

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



Anthea Tronson Solicitor
on behalf of (Hickson|Hunt & Hunt, Solicitor for the Respondent



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Written Submissions

COURT DETAILS

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

TITLE OF PROCEEDINGS

First Appellant	Brad Anthony Wheatley
First Respondent	Ronald William Peek

FILING DETAILS

Filed for	Ronald William Peek, Respondent 1
Legal representative	Joseph Peter Dominello
Legal representative reference	
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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 (Respondent's Written Submissions.pdf)

[attach.]

SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
2025/00234844

BRAD ANTHONY WHEATLEY v RONALD WILLIAM PEEK

RESPONDENT'S WRITTEN SUBMISSIONS

BACKGROUND

1. The late Colin Laurence Peek (“**Colin**” or the “**deceased**”) died on 16 August 2022, aged 79. Colin’s closest living relative was his brother, Ronald Peek (“**Ron**”), with whom he shared a close and ongoing relationship (Judgment at [14] – [15]). In addition to his relationship with his brother, Colin also developed a friendship with his solicitor, Peter Dawson, and his real estate agent, Brad Wheatley (Judgment at [16] – [17]).
2. On 21 July 2022, Colin attended a meeting with Mr Dawson at his office in Dural. During that meeting, Mr Dawson emphasised to Colin the importance of making a will. Colin provided vague instructions as to what he wished to do with his estate on his death (Judgment at [25]). On two occasions during that meeting (both of which were recorded by Mr Dawson in a file note), Colin said that he would send through his instructions to Mr Dawson (Judgment at [26]).
3. During the evening of 3 August 2022 and the early morning of 4 August 2022, Colin had a medical episode, which appears to have been caused by low blood sugar levels. Paramedics were called, but by the time that they arrived Colin was feeling better and was able to converse with the paramedics (Judgment at [30]).
4. The following day, at around 4.25pm on 4 August 2022, a document was created on Colin’s mobile phone using the ‘Notes’ application (the “**Note**”) (Judgment at [34]). The Note was last accessed at 1:35am on 5 August 2022 (Judgment at [35]). The text of the Note is set out at [34] of the Judgment. Relevantly, the Note named Mr Wheatley as the executor and primary beneficiary of Colin’s estate. Mr Dawson was named as a beneficiary of 5 per cent of Colin’s bank accounts, presumably in consideration “for handling of CP will-no fuck ups.”
5. Colin never provided a copy of the Note to either Mr Wheatley or Mr Dawson, nor did he mention its location or form. Neither Mr Dawson nor Mr Wheatley had any knowledge of the document, despite Colin having continuing contact with each of them. The only evidence of Colin discussing his will after 5 August 2022 was a

passing conversation with his cleaner on 11 August 2022 in which Colin said that he had “finalised” his will (Judgment at [39]).

6. Colin died on 16 August 2022. His body was discovered by some contractors who were attending his home to do some work. They called the police, who then informed Colin’s family and friends, including Ronald, Mr Dawson and Mr Wheatley (Judgment at [43] – [44]). The Note was discovered after Colin’s death by Mr Dawson on 19 August 2022.

PROCEEDINGS BEFORE THE TRIAL JUDGE

7. By way of a Statement of Claim filed 19 May 2023, the Respondent (the Plaintiff in the proceedings below) sought an order that letters of administration of Colin’s intestate estate be granted to him. The Appellant (the Defendant and Cross-Claimant in the proceedings below) denied that Colin died intestate. By way of Cross-Claim filed 25 September 2023, the Appellant sought declarations that the Note was a valid will of the deceased and sought a grant of probate in respect of that document.
8. The trial judge dismissed the Appellant’s claim. In so doing, his Honour began by analysing the text of the Note itself, identifying elements that both supported and worked against the existence of the requisite intention for the Note to operate as a will (Judgment at [153]). In those circumstances, the trial judge considered it important to examine the wider context in which the Note was created.
9. In considering that wider context, the trial judge placed particular emphasis on the following:
 - a) The conversation that Colin had with Mr Dawson on 21 July 2022 in which Colin stated on two occasions that he would send instructions for his will to Mr Dawson. The inference to be drawn from that conversation was that the Note was intended to be a record of instructions to be sent through to Mr Dawson, in accordance with Colin’s assurance to him (Judgment at [155]).
 - b) Colin did not communicate further with Mr Dawson about his will. The trial judge observed that if Colin had changed his mind, and decided to prepare a document himself that would operate as his will, the probability was that Colin would have told Mr Dawson of that fact by phone, text or email. That he did not do so was significant because it also meant that there was a risk that Mr Wheatley and Mr Dawson might never find the Note. The fact that Colin did not inform Mr Wheatley or Mr Dawson of the

existence of the Note is therefore consistent with it being a draft of his testamentary intentions (Judgment at [156]).

- c) Colin had ample opportunity to inform Mr Wheatley and Mr Dawson that he had made a will, particularly on 5 August (when he communicated with both Mr Dawson and Mr Wheatley), and on 13 August (when he had a conversation with Mr Wheatley) (Judgment at [159]).
 - d) While there was no evidence one way or the other as to Colin's knowledge of will-making requirements, Colin had long intended to see Mr Dawson for the purpose of making his will (Judgment at [157]). Colin also had a practice of using lawyers to draft agreements (Judgment at [159]).
 - e) Colin's statement to his cleaner that "I have finalised my will" was equivocal. If he meant to convey that he had made an operative will, the probability was that he would also have told at least Mr Dawson and Mr Wheatley in addition to his cleaner. That he did not do so supports a conclusion that Colin was communicating that he had settled his testamentary intentions (Judgment at [159]).
10. Having identified those contextual factors, the trial judge observed that Mr Wheatley had the onus of proving that Colin intended the Note to have present operation as his will. The way in which the evidence was presented (particularly the lack of any evidence as to the text messages sent by Colin to Mr Wheatley; evidence as to the conversations that Colin had with Mr Wheatley, Mr Dawson, and Mr Dawson's office; and the deletion of emails and text messages from Colin's mobile phone) meant that the Court could not be confident that it had all the relevant communications between the deceased, Mr Dawson and Mr Wheatley. That failure to provide evidence that was within the control of the Appellant was relevant to the question of whether the Appellant had discharged his onus of proof (Judgment at [167]).
11. On that basis, the trial judge was not satisfied that Colin intended the Note to have present operation of his will. The trial judge dismissed the Appellant's cross-claim, and granted the relief sought by the Respondent in his Statement of Claim.

NOTICE OF APPEAL

12. The Notice of Appeal filed by the Appellant identifies 3 grounds of appeal, two of which (grounds 1 and 2) assert that the trial judge erred in determining the ultimate question (i.e. that the trial judge erred in finding that the deceased did

not intend the Note to operate as his last will and therefore erred in not admitting the document to probate). Reading the Notice of Appeal together with the Appellant's written submissions dated 17 September 2025, the Appellant advances the following arguments:

- a) the language of the Note was so clear as to be not susceptible of any construction other than that it was intended to operate immediately;
- b) the evidence of Judith Jones was sufficient to resolve any doubt that the trial judge may have had about Colin's intentions;
- c) the trial judge should not have given any, or any significant weight, to:
 - (i) the opportunities available to the testator to make a formal will, or to confirm the existence of the Note;
 - (ii) the conduct of Mr Dawson affecting the probative value of all of the evidence of all of the Appellant's witnesses;
 - (iii) telephone communications involving the deceased on 5 August 2022;
 - (iv) the absence of phone messages and emails; and
 - (v) the failure of the Appellant to give evidence of a text message of the deceased on 5 August 2022.

WEIGHT ATTRIBUTED TO INFERENCES DRAWN FROM THE NOTE ITSELF

- 13. The Appellant asserts that the Note itself is sufficient evidence of Colin's testamentary intention, such that the trial judge erred in placing any weight, or any significant weight, on any other circumstances to determine Colin's intention.
- 14. That approach is not supported by authority. In *Hatsatouris v Hatsatouris* [2001] NSWCA 408, Powell JA (with whom Priestley and Stein JJA agreed) referred at [58] to *Public Trustee v Commins; The Estate of Gwendolyn Myrtle Way* (NSWSC, 21 November 1994, unreported) in which his Honour observed that when determining the deceased's intention, it is "not only legitimate, but almost inescapable, that one should have regard to the totality of events in order to determine what was the party's intention". That observation is reflected in the approach of the Court of Appeal in *Burge v Burge* [2015] NSWCA 289 in circumstances where a document that was signed and dated was found not to

have been intended to operate as a will once consideration was given to the circumstances of its creation and retention.

15. Consideration of the broader context in which a testamentary document is created and retained is necessary because inferences drawn from the form of the document may not reflect the testator's true intentions in respect of the document. In *National Australia Trustees Ltd v Fazey* [2011] NSWSC 559 at [18], Windeyer AJ cautioned that "great care" must be taken in determining whether a person intended a document to have present operation as a will. That is because "[m]any people write out proposals for their wills on pieces of paper headed "will" but often these are no more than present thoughts not testamentary intentions and certainly not intended to be wills." In *Macey v Finch; Estate of Donald Munro* [2002] NSWSC 933, Young CJ in Eq observed at [23] that "[i]t is quite common for a person when he or she sees a draft of what has been typed up to realise that there needs to be some change in expression, or even in disposition." Those observations reflect what Mahony JA said in *The Estate of Masters (Deceased); Hill v Plummer* (1994) 33 NSWLR 446 at 455 that "... a document which is in form of a will will not operate as such if it is, for example, a draft or "a trial run", not intended to have a present operation. A person may set down in writing what are his testamentary intentions but not intend that the document be operative as a will".
16. It follows that while the Court may draw inferences from the text of an informal document itself, the surrounding circumstances will also inform the Court's conclusion as to the relevant intention of the deceased. It is therefore appropriate (and, in fact, necessary) for the Court to have regard to them.
17. In the present case, the trial judge was correct to identify elements of the Note that supported a finding of the requisite intention (primarily the heading, the date, and less significantly, the initials "CP"); and elements that operated against a finding of intention (that the Note remained in electronic form, the gift to P Dawson for the "handling" of the will, and the fact that the Note did not deal with all of the deceased's property). Even if the trial judge considered the Note without considering the wider context, as the Appellant has said he should have, the Appellant would still fail to discharge his onus – as there are factors that cut both ways from the Note on its face (as the trial judge identified). However, and contrary to the Appellant's submission, the trial judge was correct to conclude that inferences drawn only from the document itself were not determinative. As explained above, it was necessary (and important) to have regard to the wider

context in which the Note was created in order to determine whether Colin possessed the requisite intention.

18. Colin's statements as to how he intended to prepare his will, his conduct from at least 21 July 2022, and his communications with Mr Dawson and Mr Wheatley, all support the trial judge's conclusion that the Appellant had not demonstrated to the requisite standard that Colin intended the Note to have present operation as his will. Of particular relevance is the following:

- a) **Colin's intention to see Mr Dawson to prepare his will:** Colin was experienced and careful in his business dealings. He had engaged Mr Dawson in "hundreds" of matters.¹ Colin used lawyers to prepare agreements and to provide advice² and intended to see Mr Dawson to prepare his will.³ Reinforcing that, Mr Dawson reminded Colin several times each year that he needed to make a will.⁴ Colin also understood that Mr Dawson was always ready, willing and available to make a will whenever he needed it.⁵
- b) **Meeting on 21 July 2022:** Colin and Mr Dawson had a meeting on 21 July 2022 during which they discussed Colin giving instructions for a will. Colin said "I'll write it down and sent it through in the next week or so". At the end of the meeting, he stated "I told you, I'll send it through in the next week or so" (Judgment at [155]). Despite this assurance, Colin never sent anything to Mr Dawson. The most logical inference to be drawn from this conversation, and Colin's subsequent failure to follow up with Mr Dawson is: *first*, that Colin prepared the Note in response to the conversation with Mr Dawson; and *secondly*, that Colin did not send anything to Mr Dawson because he did not consider the document on his mobile phone to be in a form ready to send to his solicitor.

The Appellant seeks to neutralise the evidence of this conversation by reference to Mr Dawson's evidence in cross-examination as to the "tone" of Colin's responses. Apart from the speculative nature of that evidence, it ignores that regardless of any "tone" that he attributed to Colin, Mr

¹ Transcript 17:4-9 (Black 64)

² Paragraph [4] of the Affidavit of Peter Dawson sworn 19 June 2023 (Blue 46); Transcript 18:10-39 (Black 65)

³ Paragraph [25] of the Affidavit of Ronald William Peek affirmed 17 July 2023 (Blue 71); Paragraph [11] of the Affidavit of Andrew Peter Jones sworn 20 December 2022 (Blue 8).

⁴ Paragraph [8] of the Affidavit of Peter Dawson sworn 19 June 2023

⁵ Transcript 19:36-48 (Black 66)

Dawson still chose to record those two statements in a filenote.⁶ The Appellant must also grapple with the caution with which the Court approached the evidence of Mr Dawson more generally for the reasons explained in paragraphs 31 - 46 below.

- c) **No mention of will on 5 August 2022 to Mr Wheatley:** The Note was last edited at 1:35am on 5 August 2022. At around 8am on that day, Colin spoke with Mr Wheatley. Colin also sent an SMS message to Mr Wheatley on that date. At no point did Colin mention to Mr Wheatley that he had a will or even that he had finalized his testamentary intentions (Judgment at [36]). If Colin had prepared a will that he intended to have present operation, which was only located on his iPhone and nowhere else, his communications with Mr Wheatley on 5 August 2022 provided Colin with the perfect opportunity to tell the very person he had appointed as his executor. The fact that he did not do so is further support for the conclusion that the Note was prepared in response to the conversation with Mr Dawson on 21 July 2022, and that it was either a working document, or at least not in a form that Colin was prepared to send to Mr Dawson.
- d) **No mention of will on 5 August 2022 to Mr Dawson:** At 3:37pm on 5 August 2022, Colin called Mr Dawson's office. The call lasted approximately 4 minutes. Later that same day, Mr Dawson used his personal mobile phone to call Colin and they spoke for 21 seconds. Mr Dawson did not disclose those calls in his affidavits filed in the proceedings. No other witness was called to explain them. When asked in cross-examination about those calls, Mr Dawson professed to not recall what was discussed.⁷ All that is known about those calls is that Colin did not disclose that he had prepared a will, or that it was located on his mobile phone. That is important evidence given the conversation that Colin had earlier had with Mr Dawson on 21 July 2022. It further supports the conclusion that Colin did not intend the Note to have present operation, and that it was not in a form that Colin wanted to provide to Mr Dawson (or that he did not yet feel comfortable to do so).
- e) **No mention of will in subsequent conversation with Mr Wheatley:** Colin spoke again with Mr Wheatley on 6, 8, 9, 10, 11, 12, 13 and 15

⁶ Blue 53

⁷ Transcript 21: 9 – 22:15 (Black 68 – 69)

August 2022. In none of those conversations did Colin mention the existence of any will, that Mr Wheatley was his executor, or the location or form of the will. That may have been explicable if the will had been in the form of a tangible document held by a solicitor or retained in an obvious or secure location. However, if Colin had intended that the Note operate as his will, it would be most unusual not to inform Mr Wheatley and Mr Dawson where the document was in electronic form, and Colin must have appreciated that there was a real risk that neither Mr Dawson nor Mr Wheatley would find it. Indeed, Mr Dawson and Mr Wheatley (in fact) searched for a formal will extensively among Colin's papers before considering, effectively as an afterthought, to check his phone.⁸ The Appellant's case requires Colin to have consciously kept his will a secret from Mr Wheatley and Mr Dawson in circumstances where it was stored in an obscure location. It is far more likely that Colin's failed to inform Mr Dawson or Mr Wheatley about the Note because he did not intend it to have present operation.

- f) **Failure to publish the Note:** Related to the matters above is that Colin took no steps to make the Note public or to bring it to the knowledge of the executor named in the document, or the solicitor charged with "handling" the will. The document remained located privately on Colin's mobile phone and he provided nobody with any guidance as to how to find it. The Appellant attempts to dismiss this factor by suggesting that "publication" of a document is not part of the test in s. 8 of the *Succesison Act 2006*. With respect, that argument misses the point. If a person intends for a document to have present operation, that person would be expected to take steps (time permitting) that allow that document to be given operative effect. That might be (and often is) done informally by simply placing the document in an obvious place, telling a relevant person about the document or its location, or in the case of an electronic document, emailing it to a relevant person (see *Kemp v Findlay* [2025] NSWCA 46). Colin did none of those things such that the document remained a secret. For Colin to engineer such a situation requires an acceptance that Colin did not tell the very people he was trusting to put his wishes into effect. That would be curious in the extreme and highly unlikely. The failure to disclose the document in any way is a powerful

⁸ Transcript 27: 10 – 25 (Black 74); Transcript 28: 8-19 (Black 75)

indicator that Colin did not intend for the document to have present operation.

19. It follows that any inferences that might be drawn from the Note itself, when considered in context, do not displace the weight of evidence that supports the trial judge's finding that Colin did not intend for the Note to have present operation as his will.

EVIDENCE OF JUDITH JONES

20. The Appellant seeks to support the inferences drawn from the Note with the evidence of Colin's cleaner, Judith Jones. The Appellant's case is that even if Colin did not intend the Note to operate as a will at the time that he drafted it, he certainly intended it to so operate on 11 August 2022.
21. The evidence of Ms Jones was that Colin said to her, "I have finalised my will". The trial judge observed at [158] of the Judgment that the statement she attributes to Colin is equivocal in that it is susceptible of multiple meanings. That was an uncontroversial conclusion. In *Rodny v Weisbord* [2020] NSWCA 22 at [20], Meagher JA referred to with approval the observations of Sir John Nicoll in *Beatty v Beatty* (1822) 1 Add 154 that "... the mere vague declarations of testators that "they have made" their wills, are not always to be implicitly relied on; and can never, standing singly, supply proof of due execution, or, consequently, of what is to be taken in lieu of it. In common parlance a man may well say, and possibly often does, that "he has made" a will, when he has written a testamentary paper, however incomplete or unfinished that paper may be."
22. Ms Jones provides no background to the conversation or any other context that would assist the Court in ascertaining the deceased's true meaning. The Appellant asserts that this was a definitive statement by Colin that he intended the Note to have present operation, at least at the time that he made the statement. However, that would be a very curious statement for Colin to make to his cleaner, and only his cleaner, without making a similar disclosure to Mr Wheatley or Mr Dawson. Considered in this way, the evidence of Ms Jones may equally support the opposite construction – that Colin considered at the time of the statement that he had settled upon the contents of his will, but nothing more. That construction is supported by the factors identified in paragraph 18 above, most specifically:
 - a) On 21 July 2022, Colin stated on two occasions that he would send through his instructions to Mr Dawson. If Colin truly intended the Note to

have present operation, there is no sensible reason why he would have informed Ms Jones and not Mr Dawson.

- b) Colin met with Mr Wheatley in person on 13 August 2022. If he intended the Note to have present operation, and felt comfortable enough to tell Ms Jones, it is inconceivable that he would not tell his purported executor (or his solicitor) in circumstances where he had every opportunity to do so.
23. Put another way, it would be unusual in the extreme, and contrary to logic and experience, for Colin to tell his cleaner that he had prepared a final form of his will, which he intended to have present operation, but to keep that secret from his intended executor (Mr Wheatley) or the person with whom he charged with “handling” the will (Mr Dawson). Far more likely is that, at the time that Colin had the conversation with Ms Jones, he considered that he had settled upon the contents of his will, and no more. The trial judge was correct to treat this as a neutral piece of evidence.

CONSIDERATION OF SURROUNDING CIRCUMSTANCES

24. The Appellant asserts that the trial judge allowed extraneous or irrelevant matters to guide or affect his decision making process. Specifically:
- a) the opportunities available to the testator to make a formal will, or to confirm the existence of the Note;
 - b) that the conduct of Mr Dawson affected the probative value of all of the evidence of all of the Appellant’s witnesses;
 - c) telephone communications involving the deceased on 5 August 2022;
 - d) the absence of phone messages and emails; and
 - e) the failure of the Appellant to give evidence of a text message of the deceased on 5 August 2022.
25. The relevance of the matters identified in (a) and (c) is explained at paragraph 18 above. For the reasons already explained, the trial judge was correct to take those matters into account.

Absence of evidence of phone calls, text messages, and emails

26. The Appellant asserts that the trial judge engaged in impermissible “shadow boxing” by speculating about the importance of evidence that was not before the Court and did not exist (Appellant’s submissions at [64]) and further that by

referring to the absence of evidence, the trial judge allowed “circumstances outside of the deceased’s control to interfere with their testamentary directions” (Appellant’s submissions at [66]).

27. With respect, this submission misunderstands the approach that the trial judge took in relation to the absence of material evidence. It is a matter of objective fact that Colin communicated with Mr Dawson and Mr Wheatley prior to and after 5 August 2022. Those communications occurred by, at least, telephone and text message. There is no evidence as to the content of those communications, and in the case of Mr Dawson, no reference at all in his affidavit to those communications having occurred.
28. The trial judge did not rely upon the absence of evidence to provide the matters asserted by the Respondent. Rather, his Honour considered those matters as part of the whether the Appellant had discharged his onus of proof. His Honour referred to the observations of Hodgson JA in *Ho v Powell* (2001) 51 NSWLR 572; [2001] NSWCA 168 at [15] that “... it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so ... All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted”. The trial judge concluded at [162] of the Judgment that “the failure by a party to call or give evidence that could cast light on a matter in dispute can be taken into account in determining whether that party has discharged its onus”.
29. It was in this context that the trial judge observed that the Appellant had the onus of proof, and that an important question was, self evidently, what communication the deceased had with Mr Wheatley and Mr Dawson about the Note. In that respect:
 - a) there was no evidence about a text message sent by Colin to Mr Wheatley on 5 August 2022;
 - b) there was no evidence about telephone calls to Mr Dawson’s office on 5 August 2022; and
 - c) text messages and emails were deleted from Colin’s iPhone while it was in the custody of Mr Wheatley and Mr Dawson, meaning that there was no evidence as to any electronic communications from Colin to anyone, and now evidence as to how he otherwise used his mobile phone.

30. The failure to adduce important evidence that was in the control of Mr Wheatley and Mr Dawson is directly relevant to whether the Appellant discharged its onus in circumstances where the evidence that was otherwise called by the Appellant did not itself clearly discharge that onus.

Conduct of Mr Dawson

31. The Appellant asserts that the trial judge erred in concluding that the conduct of Mr Dawson affected the probative value of the evidence of the Appellant's witnesses.
32. It is a matter of objective fact that Mr Dawson had multiple and conflicting interests and duties. He was the solicitor on the record. He prepared all of the affidavits read at the hearing. He was himself a material witness. He was also financially interested in the outcome of the proceedings.
33. There is nothing surprising in the trial judge's conclusion that Mr Dawson's conflict of interest and duty affected the probative value of the evidence of the witnesses whose affidavits he prepared (particularly when Mr Dawson accepted that the language included in those affidavits included some of his phraseology). Ultimately, however, nothing turns upon that general conclusion.
34. More specifically (and critically), the trial judge referred to the fact that Mr Dawson discussed with Mr Wheatley the evidence that he would give. His Honour concluded that such a discussion was "improper" and "seriously undermines the probative value of the evidence of both of them". That is also an uncontroversial proposition.
35. The trial judge found that the Court had difficulty in accepting the reliability of the evidence of Mr Dawson when he acted as a solicitor in the proceedings and prepared all the evidence for the Appellant, despite his conflict of interest and duty to the Court. With respect, that finding flows naturally from Mr Dawson's conduct in the proceedings.
36. Further, and although not specifically identified by the trial judge, the following two matters further support that finding.
37. *First*, the trial judge found that text messages and emails were deleted from Colin's iPhone since his death and while that iPhone was in the custody of Mr Dawson and Mr Wheatley (Judgment at [89]). Even on the most generous analysis, the fact that text messages and emails were no longer on the iPhone

must have been obvious to Mr Dawson, and he was not forthcoming about that fact.

38. *Secondly*, there was a distinct lack of candour in Mr Dawson's correspondence. On 4 November 2022, the Respondent's solicitor wrote to Mr Dawson, stating:

...

We are instructed that your client has taken possession of certain items from the home including the deceased's paperwork, files and mobile telephone ...

To the extent your client has taken steps regarding the estate, such as taking custody of papers and the mobile telephone of the deceased from the house, please outline what those steps that have been taken are.

...⁹

39. The Respondent also put Mr Dawson on notice of the need to inspect the mobile phone.
40. It must have been obvious to Mr Dawson that the Respondent was concerned about: a) the location, security and custody of the mobile phone, and b) that Mr Wheatley had possession of it.
41. Mr Dawson responded on 10 November 2022, at a time when he knew that the iPhone was in the possession of Mr Wheatley, stating:

I also took possession of Mr Peek's mobile phone ...

Your client's allegation that anything that has been removed by Mr Wheatley is ill-founded and totally incorrect ... he has NOT removed any documents or papers from the property.

42. At best, Mr Dawson's response was misleading and disingenuous. At the time of writing the response, Mr Dawson did not have the mobile phone. Mr Dawson also knew that Mr Wheatley was in possession of the mobile phone, and that it was no longer at Colin's property.
43. When questioned, Mr Dawson attempted to deflect any criticism by stating that in his response he referred only to "documents and paper" being removed (not a mobile phone) and that Mr Wheatley had not removed "anything" (Mr Dawson explained that this was technically correct because it was Mr Dawson who removed the mobile phone, which he then gave to Mr Wheatley).¹⁰

⁹ Blue 285

¹⁰ Transcript 31: 41 – 34:1 (Black 78 – 81)

44. That response, particularly having regard to the force and conviction with which Mr Dawson conveyed his sentiments, did Mr Dawson no credit. It was clearly misleading and deliberately evasive.
45. As matters transpired, the Respondent's solicitors were right to be concerned about the location of the mobile phone and its contents, given the deletions made by the Respondent, and also the state of the phone generally (inexplicably containing almost no contents other than the Note).
46. In the circumstances, the trial judge was correct to record the Court's difficulty with the reliability of Mr Dawson's evidence.

NOTICE OF MOTION

47. By Notice of Motion filed on 26 August 2025, Mr Wheatley seeks leave to rely on further evidence in these (appeal) proceedings. The affidavit in support of that motion (sworn 26 August 2025) is also the evidence sought to be relied on.
48. Mr Wheatley wishes to rely on evidence of his SMS contact with the deceased between 2 and 6 August 2022.
49. Pursuant to section 75 of the *Supreme Court Act 1970* (NSW), the Court may receive further evidence (ss 7), but should not receive further evidence except on special grounds (ss 8).
50. Relevant considerations as to whether there are special grounds have been held to include whether the evidence is highly or relevantly probative (*Akins v National Australia Bank* 34 NSWLR 155), whether the evidence could have been obtainable by reasonable diligence (*Orr v Holmes* (1948) 76 CLR 632), and whether it is credible (*Akins v National Australia Bank* 34 NSWLR 155).
51. The motion should be dismissed for the following three reasons:

Not probative

52. First, the evidence is not probative.
53. The relevance attributed to Mr Wheatley's failure to adduce the SMS message by the trial judge was that if the deceased had intended the document to operate as his will, he would have told Mr Dawson and Mr Wheatley about it, and that he did

not do so by telephone, email or text after 5 August (Judgment [159]). His Honour said, at paragraph [163] of the judgment:

“In the circumstances of the present case, an important question to be considered in determining whether the onus has been discharged is whether there were any communications by Colin with either Mr Wheatley or Mr Dawson regarding the contents of the Note in the period from 5 August to his death.”

54. Mr Wheatley, in his affidavit of 26 August 2025, says that he did not receive an SMS or imessage from the deceased on 5 August 2022. However, Mr Wheatley’s affidavit reveals that he and the deceased in fact exchanged SMS messages on 6 August 2022. None of those messages (annexed to the affidavit) mention a will or anything related to willmaking.
55. The trial judge found that the SMS on 5 August would not have assisted Mr Wheatley’s case and inferred that it did not contain any communication from the deceased informing Mr Wheatley that he had made a will. The affidavit of 26 August 2025, if accepted into evidence, would barely change that finding. With or without the additional evidence, the Court would have found (or will find on a rehearing) that the deceased did not tell Mr Wheatley that he had made a will after 5 August 2022.
56. To the extent that Mr Wheatley’s credibility as a witness is affected one way or another, the Court should not permit further evidence that goes only to credit: *Orr v Holmes* (1948) 76 CLR 632.

Could have been obtained or led by reasonable diligence

57. Second, the evidence was previously obtainable by reasonable diligence of the plaintiff.
58. Mr Wheatley bore the onus of proving that the deceased intended the Note to operate as his will. Contact between himself and the deceased (from the deceased’s iphone) in the final days of the deceased’s life was clearly relevant. There is no reason why Mr Wheatley could not have adduced evidence in chief of his contact with the deceased, by SMS, in his own case (and, evidently, he has devised a means to do so).

59. General access was granted by the Court to the parties of the Telstra records (packets S-1 and S-4) (a summary of which was exhibit F) on 25 October 2023, more than a year before the final hearing. Those records show that an SMS message was sent to Mr Wheatley by the deceased on 5 August 2025. That Mr Wheatley was taken by surprise in cross examination (when asked about it by Mr Chapple) is not a good reason to permit him to, on appeal, effectively give a different answer or provide an explanation for the answer he gave.
60. Another way the same evidence could have been made available to the Court would have been by viewing the deceased's iphone (to see what SMS messages he had sent and received). However, that was not possible because the iphone was presented to the Court divorced of its other contents, with his honour finding that messages had been deleted from the iphone while in the custody of Mr Dawson and Mr Wheatley (judgment paragraphs [89], [165]). In the circumstances, leave should not be granted to adduce evidence that would otherwise have been readily available but for those deletions.

Not credible

61. Third, the evidence is not credible.
62. Were evidence along the lines of what is proposed to be relied upon adduced at the hearing in chief, it is likely that Mr Wheatley would have been cross examined about it.
63. Mr Wheatley's dealings with the deceased's iphone (including deleting material from that iphone) was the subject of cross examination and findings by the trial judge. As above, his Honour found that material had been deleted from the iphone whilst in the custody of Mr Wheatley and Mr Dawson.
64. It is likely that Mr Wheatley would have been cross examined about:
- a. The nature and extent of his SMS messages between himself and the deceased;
 - b. How he came to lose his SMS and phone messages; and
 - c. The process he applied to reconstruct his SMS and phone messages.
65. Mr Wheatley only seeks leave to adduce SMS messages between 2 August 2022 and 6 August 2022. It is also likely that a call for production would be made,

questions asked, or submissions made, about Mr Wheatley's failure to adduce other SMS messages (for a larger period), including up to the deceased's death.

66. That evidence, if adduced by affidavit, may also have been the subject of an additional report from, or questions to, Mr Sobbi, the Court appointed metadata expert.

CONCLUSION

67. For the reasons set out above, the appeal should be dismissed with costs.

A handwritten signature in black ink, appearing to read 'Simon Chapple'.

Simon Chapple SC
13th Floor St James Hall

A handwritten signature in black ink, appearing to read 'Hugh Morrison'.

Hugh Morrison
13th Floor St James Hall

15 October 2025