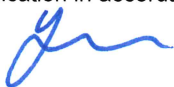


I certify that the Applicant's Reply Submissions are suitable for publication in accordance with paragraph 27 of Practice Note SC CA 01.



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



Filed: 23 October 2025 11:21 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 Reply Submissions (filed for Brad Anthony Wheatley) .pdf)

[attach.]

Form 1 (version 4)
UCPR 51.36

APPELLANT'S REPLY 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	<i>Peek v Wheatley</i> [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
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1 Please see the Appellant's Reply Submissions 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 REPLY SUBMISSIONS

1. In relation to the Respondent’s submissions in response (“**Reply**”) [1] - [2], it is emphasised that whilst there was a loving relationship, the concept of the brothers having a “close” relationship was challenged; and further the evidence of Dawson was that the deceased was “badgered” but “continued to avoid the topic” of dealing with his will.¹ Again, it was identified that Dawson’s view was the tone of the deceased’s response was one that led him to believe that the likelihood of the deceased sending through such instructions was relegated to only a “possibility.”² This wavering confidence about the likelihood of the deceased to provide instructions (and he had never done so previously despite being badgered) infects the determination relied upon at Reply [9](a).
2. In relation to Reply [5], it is precisely the case that the Appellant and (particularly) Dawson had no knowledge of the deceased having constructed the Note, which was conceded to be a document containing the deceased’s testamentary intentions. It is contended by the Appellant that the absence of the knowledge of the Note by Dawson, reflects that the deceased did not intend the Note to form mere instructions, and the absence of any knowledge of it infects the basis for the position and reliance on *Jones v Dunkel* as a factor in the judgment. This is a matter which undermines Reply [9](b).

JONES V DUNKEL

3. In J 89,³ in dealing with the unexplained absence of texts and emails of the deceased’s phone, his Honour states, “*The evidence that texts and emails have been deleted from Colin’s phone creates uncertainty as to whether the court has the full picture as to the contents of the phone at the time of Colin’s death*”. However, it has been stated that, “*The rule cannot be employed to fill gaps in the evidence, or to convert conjecture and suspicion into inference.*”⁴

¹ J 21, Red 40 R.

² J 26 Red 41 T.

³ J 89, Red 54 N.

⁴ Heydon, J.D., *Cross on Evidence*, (2021, LexisNexis Australia, 13th ed), 42.

4. At J 140(5),⁵ his Honour states,

*The failure to adduce evidence about what was or was not on the phone, or what documents were or were not retained, would ground an inference that that material, if adduced, would not have assisted the defendant (T136-137). It was within the defendant's power and control to advance evidence as to what documents were on the mobile phone at the time that it was located on 19 August and what paper documents had been retained by the deceased. The failure to do that raises squarely the kind of inferences that Handley JA adverted to in Commercial Union Assurance Co of Australia Ltd v **Ferrcom** Pty Ltd (1991) 22 NSWLR 389 at 418:*

There appears to be no Australian authority which extends the principle of Jones v Dunkel to a case where a party fails to ask questions of a witness in chief. However, I can see no reason why those principles should not apply when a party by failing to examine a witness in chief or some topic indicates as the most natural inference that the party fears to do so. This fear is then some evidence that such examination in chief would have exposed facts unfavourable to the party.

5. In *Cross on Evidence*, it was explained the Rule in *Jones v Dunkel* could be summarised in this way, “First, unexplained failure by a party to give evidence, to call witnesses, to tender documents or other evidence or to produce particular material to an expert witness may (not must) in appropriate circumstances lead to an inference that the uncalled evidence or missing material would not have assisted that party's case.”⁶
6. It was stated in *Weissensteiner v R* (1993) 117 ALR 545, per Gaudron and McHugh JJ: “... there is a **difference between mere silence or the absence of evidence, on the one hand, and, on the other, the failure to explain facts for which, it is assumed, an innocent person would offer some explanation** ...” [emphasis added]
7. The highlighting in the passage above goes to the core of an issue which undermines the judgment. The absence of information relating to the calls and message logs of the phone is a matter which his Honour observed as requiring explanation, although it is noted that the Respondent did not ask the Expert, Sobbi, to delve into an investigation of the absence of this data in his expert report. The trial judge's determination to presume that the absent phone logs and message logs were connected to the Note is in error.

⁵ J 140(5), Red 67 B.

⁶ *Cross on Evidence*, 39.

8. Absence of evidence can be evidence itself (a principle sometimes attributed to Sherlock Holmes⁷), the principle is predicated upon an assumption that some type of fact presumed (“presumption of fact”) is present as a precursor to the absence of evidence about it.
9. In the case of *Blatch v Archer* (1774) 1 Cowp 63, 65, it was stated,
But it is said, that young Fenton the son, who could have cleared up the doubt, ought to have been subpoenaed by the plaintiff. It is certainly a maxim that all evidence is to be weighted 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.
10. The statement at J 163 that,⁸ “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” fails to entertain that a *Jones v Dunkel* inference must be based on the presence of facts pertinent to the belief that those communications contained some reference to the Note, as opposed to requiring there to be evidence of absent evidence.
11. In this case, there is no presumption of fact pertinent present, in that the evidence states that the Appellant received multiple phone calls a day from the deceased but there is no indicator that any of those phone calls contained a conversation about a testamentary document. It is not plausible to expect that in circumstances where the deceased routinely called the Appellant multiple times a day, that, in the absence of any evidence that the deceased changed his habit of not exploring testamentary directions with the Appellant, and where the Appellant did not identify that he did so, unusually, that this should be used to deny the Note’s testamentary effect. This would be not only inequitable but a violation of the principle in *Jones v Dunkel* which carries a latent presumption of fact to ignite its applicability.
12. The Appellant had put to him that the deceased rang him multiple times during the time when he was very ill, during which the deceased crafted the Note, and up until the deceased died. The Appellant gave evidence that this occurred. There is no evidence that the deceased spoke of the Note with the Appellant about which the Appellant remains silent.

⁷ See Thompson, W.C. & N. Scurich, “When does absence of evidence constitute evidence of absence?” (2018) 291 *Forensic Science International* 18 <http://doi.org/j.forsciint.2018.08.040>; Taroni, F., S. Bozza, T. Hicks & P. Garbolino, “More on the question ‘When does absence of evidence constitute evidence of absence?’ How Bayesian confirmation theory can logically support the answer” (2019) 301 *Forensic Science International* 59, <http://doi.org/10.1016/j.forsciint.2019.05.044>; Doyle, A.C., *Silver Blaze*, Sherlock Holmes Collection (2017, Flame Tree Publishing, 1st ed. Collection), 336.

⁸ J 163, Red 75 U.

13. The absence of a conversation about the Note is easily explicable on the basis that the evidence about the phone calls was not recalled due to it being a mundane and routine display of the character of the relationship. If there was a necessary presumption of fact, in that the deceased was presumed to have provided an indicator of having ventilated the Note with the Appellant, only then would this presumption of fact ignite the scrutiny of *Jones v Dunkel*.
14. His Honour states at J 162,⁹ that the “*Blatch v Archer principle, 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, in circumstances where such evidence as has been called has not itself clearly discharged the onus...*”
15. The matter in dispute is whether the deceased intended the document to operate as his will, without more. It is submitted that in the circumstances where nothing was referenced by the deceased in that regard, it is difficult to see how non-evidence could cast light on the matter in dispute.¹⁰
16. The trial judge’s statement, “*the failure by a party to call or give evidence that could cast light on a matter in dispute...*”,¹¹ highlights that the conversations, if they could not shed light on the matter in dispute, rob them of the relevance with which there is claimed to be an infringement.
17. Ultimately, these ‘presumptions of fact’ pertinent, go no further than to establish that the deceased did, on multiple occasions, as he did most every day, make multiple calls to Dawson. There is no reasonable presumption that there must have been a discussion about the Note or other testamentary matters. It is likewise the same with Mr Dawson, who despite being someone whom the deceased utilised for legal matters, was also identified as a friend of the deceased. It is submitted that it was not open to the trial judge to have taken the view that the absence of evidence is evidence of absence, or in other words that the fact that calls happened around the time of the making of the will meant the deceased must have discussed the will with either party.
18. It is also stated in Cross that, “*The rule has no application if the failure is explained, for example by a reasonable explanation for not compelling attendance by subpoena, or by illness or other unavailability, or by loss of memory or by refusal to waive privilege.*”¹²

⁹ J 162, Red 75 Q.

¹⁰ Noting that it was stated at J 141(2) [Red 67 T] that “*Both Mr Dawson and Mr Wheatley accepted that they did not have a conversation with Colin about a will located on his iPhone, or the location of his will more generally, despite communicating with him during the period 5 to 16 August (T16.12-21; T76.17-23).*”

¹¹ J 162, Red 75 Q.

¹² Cross on Evidence, 40.

19. The failure to adduce evidence (if such evidence exists) of the content of the calls is readily explained in the prism of the Appellant's evidence in circumstances where:

- (a) the deceased rang the Appellant many times a day,
- (b) the Appellant did not know at that time that there had been the making of the Note, and
- (c) where he did not recall the deceased having made any testamentary reference.

It was not open to his Honour to take an inference against the Appellant in absence of some other prescient indicator that led to a belief that something of a testamentary nature was discussed (rather than that there might have been something testamentary in nature discussed).

20. There was no evidence tendered that indicated that the deceased referenced in any way during his phone calls to the Appellant and Dawson which were regular and not infrequent respectively, a testamentary intention or the Note. Without that suggestion, *Jones v Dunkel* cannot be a device to 'fill the gap' where the Respondent propounded no evidence that this was a subject discussed.

21. In *Insurance Commissioner v Joyce* (1948) 77 CLR 39, 61 per Dixon CJ, it was stated, *It is proper that a court should regard the failure of the plaintiff to give evidence as a matter calling for close scrutiny of the facts upon which he relies and as confirmatory of any inferences which may be drawn against him. But it does not authorize the court to substitute suspicion for inference or to reverse the burden of proof or to use intuition instead of ratiocination. After all it is better that the due application of the law relating to evidence and burden of proof should produce an automatic result ... than that the court should hazard an attempt at divination in getting at the facts.*

22. As submitted previously,¹³ where his Honour had accepted the evidence of Judith Jones the deceased on 11 August 2022, "I have finalised my will",¹⁴ and where there was no dispute that the Note had not been amended between its creation on 5 August 2022 and the deceased's death (five days later), it is unclear why critical importance was placed 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 which was the absence of evidence regarding the communications on 5 August 2022.

23. It is submitted that a proper application of the principle in *Blatch v Archer* could not have led to a finding that the Appellant had not discharged his onus of proof in propounding the Note as the deceased's last will. The contents of the Note itself and the context in which it

¹³ Appellant's prior Submissions at [47].

¹⁴ J 94, Red 55 E.

was created, and never amended, combined with the fact (as accepted by his Honour) that the deceased told Ms Jones that he had “finalised” his will, overwhelmingly support the Appellant’s case that the deceased intended the Note form his will either at the time of creating the Note or upon telling Ms Jones that his will was “finalised”.

24. This is not a case in which there was substantial evidence tending to undermine the Appellant’s case, such that the absence of evidence as to certain communications between the deceased and the Appellant and Dawson, between 5 August 2022 and the deceased’s death, could have led to a determination that the Appellant had not discharged his onus. The speculation was double – first, there was a conversation about a will/Note, and secondly, it canvassed the deceased’s intentions.
25. Nothing in s 8, as understood in *Hatsatouris* and subsequently, suggests that a person propounding an informal testamentary document must demonstrate that the deceased told others about the document. It is respectfully submitted that his Honour imposed an auxiliary limb to the test to be applied in s 8 which does not exist. In imposing that auxiliary limb, his Honour fell into error by focusing on the absence of evidence as to certain communications between the deceased and the Appellant and Dawson, between 5 August 2022 and the deceased’s death, then purported to apply *Blatch v Archer* in order to more confidently find that the deceased had not told the Appellant or Dawson about the Note.
26. In any case, the deceased did tell another person – he told Judith Jones. The principle in *Blatch v Archer* ought to have had no bearing in his Honour’s determination.
27. His Honour stated,¹⁵ that if the deceased, “*really meant that he had made his will, it would be expected that he would have told Mr Dawson and Mr Wheatley, as well as Ms Jones, given his previous discussions with both about the will (including that he said to Mr Dawson at the meeting on 21 July that he would send through his instructions on the will ‘in the next week or so’) and that each is to benefit under it.*” This is impermissible speculation and serves only to apply a fetter that is not present in the consideration of the third arm of *Hatsatouris*.
28. In relation to Reply [5], Judith Jones was the deceased’s cleaner, but she was also his friend and her evidence was that he used to open up to her and talk about things like the concern over finalising his will.¹⁶
29. In Reply [9](b) the assertion is that there was a risk that the Appellant or Dawson might not find the Note. This is not reasonable in the modern world where phones are also computers

¹⁵ J 159, Red 74 K.

¹⁶ Blue 21 H, Black 105 T.

and the repository of documents. Regardless, and again, the publication of the Note by making it available generally is different to the ‘suicide cases’ where the informal will often also constitutes the final farewell of the informal testator.

30. In Reply [9](d) there is some evidence of the deceased’s will-making history. The deceased did not make any other will. Further, the deceased knew about the requirements to appoint an executor, a fact that he regularly spoke of (that being the extent of his public pronouncements (but for Judith Jones)). It is the case also that the deceased regularly made vague assertions that he would see Dawson in relation to his will, the fact that Dawson had to badger the deceased is indicative that the deceased routinely failed to do so.
31. In relation to Reply [14], the Respondent places reliance upon *Burge v Burge* [2015] NSWCA 289 in relation to lack of operative determination. The circumstances in *Burge* were, as his Honour there observed, “highly unusual.”¹⁷ The conclusion reached in *Burge* turned not upon any general principle diminishing the evidentiary significance of a signed and dated document, but upon the deceased’s idiosyncratic and sustained practice of executing and retaining documents of no legal effect. His Honour’s reasoning was largely confined to those exceptional facts. In the present case, the circumstances are materially distinct. The deceased was, by all accounts, hesitant to construct a will, there is no evidence of any comparable practice of drafting or preserving documents of no legal consequence. It may properly be observed that the Note in question was the first and only instance in which the deceased sought to record his testamentary wishes. That act, in its singularity, assumes greater weight in the assessment of intention. The absence of any pattern of non-operative writings or correspondence strengthens, rather than weakens, the inference that the Note was intended to have operative effect. While it is, of course, accepted that *Hatsatouris v Hatsatouris* instructs that the Court must have regard to the totality of the circumstances, those circumstances, when considered here, point in a different direction from those in *Burge*. That is, that they reinforce rather than undermine the Appellant’s contention that the Note was intended to operate as the deceased’s will. The observations in *Burge* are of limited application, representing an exceptional factual departure, not a general diminution of the presumption that a signed and dated instrument was intended to operate as a will.
32. In relation to Reply [15], in *National Australia Trustees Ltd v Fazey* [2011] NSWSC 559, the question was whether draft notes, intended to be handed to a solicitor when the deceased saw him, had been “by his oral statement” converted to an informal will when the testator subsequently became immobile. In *Macey v Finch; Estate of Donald Munro* [2002] NSWSC

¹⁷ [2015] NSWCA 289, [46] per Leeming JA.

933, this involved instructions given to a solicitor and in this case lacks applicability. In relation to Reply [17], it is observed that none of the three contrary items detract from an informal will.

33. In Reply [18], the proposition that the deceased was “experienced and careful in his business dealings” rose no higher than a submission, and there was no evidence that this extended to testamentary matters of any kind, other than his statements which identified he was aware of the requirement for an executor, and his professed intentions for the allocation of his estate. The proposition ignores the legislative intention. In Reply [18](b), the purported logical inference is challenged in circumstances where the evidence of Dawson identified no confidence in the deceased keeping such a commitment. At that point the logical inference founders.
34. With respect to the *operative* element, the Appellant says this case has the following facts and circumstances which allows the document to stand for itself: the language of the Note; the initials of the deceased; the allocation of tasks in first person language, it was dated, it appointed an executor, it apportioned the deceased’s estate, it contemplated the probate process and appointed Dawson to take charge of it, and finally, if the above was not sufficient, then the Note was adopted or authorised at the time when the deceased declared to Judith Jones that he had “finalised” his will.
35. There is no evidence that the deceased sought an appointment with Dawson. Whilst the trial judge attributed significance to the absence of evidence related to the content of any communications between the deceased and Dawson, the Respondent did not: seek to analyse the deceased’s computer; review the deceased’s papers in his study; subpoena Dawson’s diary; subpoena Dawson’s telephone; subpoena the Appellant’s phone; all of which could have been done if one propounded a case theory that Dawson had presided over evidence that was relevant or was concealed, in relation to the Note in order to propound that it was not an operative document, but was instead instructional.
36. In Reply [15], it is rejected that the Note could be considered a “trial run”. There is no evidence of this in the document, and the concession at Reply [16] that the Court may draw inferences from the document itself, and it is accepted that the Court can assess the surrounding circumstances, there remains the issue where, in order to assign a more sinister motive to the absence of the data related to the telephone and message logs (which might have had a more feasible explanation if the Respondent had have asked the Expert to consider this aspect in his report (or supplemental report)) there must be a fact precedent

which triggers a presumption that there is evidence that must have been present in order for the applicability of *Jones v Dunkel* to be engaged.

37. In relation to Reply [17], the Appellant submits that the Note's electronic form has no bearing in the current technological age of reliance upon handheld devices. Telephone and computer wills are now unexceptional. Further, prior submissions address that the gift to Dawson should be considered for the handling of the Probate/administration of the deceased's will; and that the dealing with the entirety of the estate, does lack appropriate form, but in the context of the deceased's references to his holdings.
38. In relation to Reply [18](f), again, this is not the test that authorises an informal will. Further, one implication of the reasoning in *Re Yu* [2013] QSC 322, in the absence of the argument that a similar electronic informal will on a phone, was that the Court was able to find that the document constituted the deceased's will without considering the circumstances of how someone might have found the document. In *Yazbek v Yazbek* [2012] NSWSC 594, [119], Slattery J, in a case with similar underpinnings, in contemplation of the deceased not leaving a printed copy of his informal will with his important papers, determined that this aspect did not rise to being obstructive.
39. It is difficult to accept the trial judge's reasoning, which the Respondent states is "uncontroversial" in Reply [21] that the word "finalised" is susceptible to multiple meanings. This would not be the understanding on a plain word interpretation of the word. Reference has been made to the case of *Rodny v Weisbord* [2020] NSWCA 22, [20], but this lacks authority in the context where that case related to a will which Mrs Rodney had never seen, and the remarks of Meagher JA referred specifically to nuncupative wills and oral declarations.
40. Reply [22](b) refers to "logic and experience". It is contended that the logic fails when the history of the deceased when "badgered" had **never** made an appointment or delivered his instructions to Dawson. In relation to experience, it is unclear what experience is being referred to, but the lived experience of Dawson is that the statement of the deceased referred to was only, at its highest, a 'possible' and there is no evidence when regularly badgered that the deceased ever made a draft before and certainly never made a formal will.
41. With respect to Reply [28], again, the Respondent relies upon matters that carry a presumption that the evidence not put before the Court "could cast light on a matter in dispute". This carries a presumption that there is reason to believe that the deceased did, in fact, engage in some sort of testamentary discussion with Dawson (primarily) or with the Appellant (secondarily). The absence of this presumption denies the application of an

inference that the facts presumed must have existed, in order to establish that there is any relevance or application that would warrant an adverse inference that would impact the operative effect of the Note. Whilst adverse comment of the preparation of the evidence may have been appropriate, the inference against the Note must be grounded in the presence of a fact precedent that alerts to the presence of evidence that would/could have impacted the operative effect of the Note. There is none.

42. At Reply [29], with respect to the query as to “what communication the deceased had with Mr Wheatley and Mr Dawson about the Note”, if there was no communication about the Note, and the Appellant asserts that there was not, then the Appellant is being asked to prepare evidence to negate a negative. In Reply [33], it is agreed that “nothing turns upon that general conclusion.”
43. In Reply [39], it is noted that correspondence between the Respondent and Dawson of 16 December 2022,¹⁸ identified that it would be necessary to inspect the phone and the deceased’s papers, files and documents. It is not known whether this was ever followed up or pressed. The Respondent could have taken actions to inspect key material such as the mobile phone and the deceased’s papers and computer, but took many of these issues no further, leaving them to be matters that “must have been obvious” but which would have perhaps been addressed by diligent but otherwise unmade enquiry.

NOTICE OF MOTION

44. The evidence at the heart of the Motion is relied upon in the judgment, and the subject matter relates to a line of enquiry that was raised at the trial in cross-examination of the Appellant, and was not obtainable in the context of that cross-examination. In Reply [56], it is not a question of credit, but with regard to the discovery of facts not otherwise known – i.e. not receiving the text. Further, cross-examination on this point could not have taken the matter any further. Further, in Reply [16], the Expert’s Report, at [19.13] & [19.18],¹⁹ contains the statement that the Expert had the ability to examine the logs to determine data accessed even over a number of years. The Respondent did not seek that data, despite the fact that ancillary questions were asked of the Expert and a supplemental report prepared.

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¹⁸ Blue 291 W.

¹⁹ Blue 197 R & 199 L.

23 Oct 2025