I certify that this document, the Appellant's Submissions (by Christian Vindin, Telephone: 02 9232 5180, Email: cvindin@twowentworth.com.au) are suitable for publication in accordance with paragraph 27 of the Practice Note SC CA 01.

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Tihomir Novakovic of Novakovic Lawyers, solicitors for the Appellant.

SUPREME COURT OF NEW SOUTH WALES

Filed: 14 October 2025 5:36 PM

D00028QQ9Y

Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00153997

TITLE OF PROCEEDINGS

First Appellant	Branka JAKSIC-REPAC
First Respondent	Dusko Dundjerski

FILING DETAILS

Filed for	Branka JAKSIC-REPAC,Appellant 1
Legal representative	Tihomir Novakovic
Legal representative reference	
Telephone	02 9826 5029
Your reference	TN: Jaksic-Appeal

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 (2025.09.25 - Appellant's Submissions.pdf)

[attach.]

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Appellant's Submissions –

Appellant: Branka Jaksic-Repac

Respondent: Dusko Dundjerski

I. Introduction

1. This appeal concerns whether the presumption of revocation applied to the will of the deceased, Mimi Milka Jaksic-Berger ("**Mimi**"), dated 22 May 2015 ("**the May 2015 Will**") and, if so, whether it was rebutted.
2. The Appellant contends that the trial judge erred in law and in fact by not finding, on balance of probabilities, that the original of the May 2015 Will was in Mimi's possession after execution, and by failing to correctly apply the presumption. The Appellant contends that the weight of the evidence established Mimi's possession and thus enlivened operation of the presumption and that the Respondent (plaintiff below) failed to demonstrate, as was his onus, that the presumption was rebutted. The evidence, considered as a whole, established that:
    a. Solicitor Bradley Campbell, who prepared the May 2015 Will when practicing at Nicole Leggat and Associates, although uncertain as to whether he retained or handed over the original will, admitted in conversation with the Appellant's solicitor that:
        i. the office kept very few originals;
        ii. his practice at the time was to give originals to the client;
        iii. he could not rule out having given the original to Mimi; and
        iv. the "*likely*" scenario was that the original will was handed over to Mimi upon execution.
    b. No other solicitor confirmed they saw or held possession of the original of the May 2015 Will after its execution.
        i. Solicitor Marc O'Brien of Redmond Hale Simpson ("**O'Brien**"), who first acted for Mimi in 2018, confirmed his office held only a copy.
        ii. Solicitor Nicole Leggat of Nicole Leggat and Associates and then NL Legal ("**Leggat**") confirmed she had "*never seen a will*" of Mimi's before these proceedings, does not remember having ever seen an original will of Mimi's and never confirmed ever having possession of it, despite having retained Campbell's files and having always operated a safe custody system for important original documents. Leggat was never asked by Mimi if she had it, although Mimi stated she would inquire "*to see where it is*" when told by O'Brien that he held only a copy.
        iii. Contrary to the plaintiff's written submission that, "*by 18 July 2022, Mimi considered that her will was held by Marc O'Brien (and subsequently by Mr*

Bryant when the will file was transferred)," Solicitor Gordon Bryant ("**Bryant**"), who Mimi first consulted and met in July 2022, confirmed during cross examination, that Mimi brought no testamentary documents to their meeting and that he did not ever see (or have in his file) an original (or copy) will executed by Mimi.

c. Mimi's statements as to who she believed held the original of the May 2015 Will (being Leggat in September 2018 and O'Brien between August 2018 and July 2022) were equivocal and unsupported by any evidence of inquiries by Mimi as to the location of the original of the May 2015 Will once made aware that it was not with O'Brien in 2018. Nor was there any evidence of accidental loss or destruction that could explain the will's absence.

d. For reasons set out at paragraph 2(a) above and under the next heading, the original May 2015 Will was more likely than not handed over upon execution to and retained by Mimi.

e. At the time of her death in November 2022, the original was not found despite exhaustive searches; and

f. Mimi's conduct after 2015 supports the inference of revocation. In particular:

   i. In 2018, despite being expressly warned by O'Brien that without the original of the May 2015 Will an intestacy could result, she failed to inquire about or retrieve the original. Despite O'Brien providing Mimi a copy of her May 2015 Will and telling her to think about making a new will, she did not do so in the next four years, to June 2022.

   ii. On 14 June 2022 Mimi signed an informal codicil referring to the May 2015 "my will held by Mark O'Brien" but without annexing a copy of that will. She was in hospital, receiving treatment for inflammation in her lungs and with a broken arm, the result of a fall.

   iii. In July 2022 Mimi instructed Bryant to prepare a new will that departed from the dispositions of the May 2015 Will (in relation to the gift of her artwork and appointing a sole executor). This demonstrated a cessation of reliance on the May 2015 will — which, on the Appellant's case, occurred much earlier, after the 2018 warning by O'Brien that he did not hold the original and her failure to follow up with Leggat.

   iv. Mimi did not tell anyone of the existence of the codicil after execution.

   v. She did not execute the August 2022 draft will, which had been delivered to her in August, three months before her death.

vi. At death there were no testamentary documents at all — no original, copy, or draft will last known/thought to have been in her possession.

3. The trial judge concluded at [55] that the presumption had "*well and truly been rebutted.*" In forming this conclusion, His Honour initially had regard to the following evidence of Mimi's conduct between March 2017 and July 2022.

    a. His Honour said that "*it would have made no sense for the deceased to have*" done the following things if she had previously destroyed her will:

        i. In March 2017 Mimi sent a copy of her May 2015 Will to her niece Bozica in Switzerland and then told Dusko to make copies (at [30]);

        ii. at various times including August 2018, May 2022 and July 2022 Mimi said her will was with O'Brien (at [30]); and

        iii. on 14 June 2022 Mimi signed an informal codicil referring to the will (at [41]);

        iv. in July 2022 gave authority for O'Brien to release his file to Bryant (at [30]).

    b. His Honour expressed the following views in relation to the effect of the Codicil's existence as a factor in favour of rebuttal of the presumption of revocation:

        i. "*the reference in the Codicil to her Will is irrational*" if Mimi knew that destruction of a will amounted to revocation, which His Honour considered to be inconsistent with Mimi's "*full control of her mental processes*" (at [59(2)]);

        ii. the reference in the codicil is "*manifestly one to the Will*" (at [59(3)]);

        iii. Mimi acknowledged that the May 2015 Will was "*her will*" by saying that she believes Leggat has her original will, and that O'Brien has her will, supporting the conclusion that the codicil referred to that document specifically (at [59(3)]);

        iv. "*the Codicil, read together with the Will reflect the deceased's intentions stated on a number of occasions that the Jankovics would get the Surry Hills property and Bozica and Dusko the rest*" (at [59(4)]).

4. His Honour's reasoning failed to consider and attribute appropriate weight to the totality of the circumstances. In particular, His Honour did not consider:

    a. whether the May 2015 Will was subsequently revoked;

    b. the circumstances surrounding Mimi's assertions that her will was with O'Brien — including the express advice that O'Brien held only a copy and that absence of the original carried a risk of intestacy, the lack of specificity in her statements as to whether she believed the will held by O'Brien was an original or copy, the absence of any inquiry as to the whereabouts of the original and Mimi's reference to what Dragan Radovic ("**Radovic**") observes was a "*copy*" of the will as her "*last will*"; and

    c. whether the informal codicil was capable of reviving the May 2015 will if presumed to have been revoked.

5. The appeal should be allowed. The presumption of revocation arose and was not rebutted. The grant of Probate of a copy of the May 2015 Will and the informal codicil June 2022 Codicil should be set aside.

II. Failure to Apply Presumption of Revocation

6. Where a will was last known to be in the possession of the testator and cannot be found at their death, there arises a presumption that the will was destroyed by the testator with the intention of revoking it *In the Goods of Steele* (1868) 1 LR P & D 575; *Cahill v Rhodes* [2002] NSWSC 561 at [40]–[41].
7. In the present case, the original was never located after Mimi's death. The only documentary evidence of its existence was a photocopy held by O'Brien, who confirmed in both affidavit and cross-examination that he never had and thus did not retain the original and had advised Mimi of this fact in 2018.
8. The trial judge erred in failing to apply the presumption of revocation arising from these facts. The judge concluded that Mimi "*must've believed, as at 14 June [2022], that there was a will made by her which was in Mr O'Brien's possession*" implying, without explicitly finding, that Mimi considered the May 2015 Will remained operative, and did so partially in reliance on the informal codicil dated 14 June 2022 to support this inference. This reasoning effectively reversed the burden of proof: it was for the Respondent (plaintiff below) to rebut the presumption of revocation by establishing, on the balance of probabilities, that the will was not destroyed by the testator with intention to revoke, rather than for the Appellant (fifth defendant below) to prove that the testator did not consider the will to be operative, and that the will was not lost or destroyed without intention to revoke.
9. Once possession is shown, as it was (see next heading), the evidential burden shifts to the party propounding the will to rebut the presumption by clear and convincing evidence. All factual issues are determined on the balance of probabilities: s 140 *Evidence Act 1995* (NSW). The appellant is not required to remove all reasonable doubt: *Bear v Bear* NSWSC 1687 at [197]-[202] per Meek J.

III. Circumstantial Evidence of Possession

10. While there was no direct evidence that Mimi was in physical possession of the original of the May 2015 Will, the circumstantial evidence before the Court clearly supported the inference that she had received it at execution and had custody of it at that point.
11. As noted at paragraph 2(a) above, the May 2015 Will was prepared at the offices of Leggat by solicitor Bradley Campbell, who was present when it was executed by Mimi and duly witnessed. Campbell confirmed that very few original wills were held by the practice, and he could not rule out that the will had been handed to Mimi as was his ordinary practice and he accepted the most likely scenario was that the May 2015 will was given to Mimi when executed, a scenario which

was not challenged by the plaintiff. He had no recollection of ever seeing the will again after execution, nor of any safe custody record being made. Leggat's evidence confirmed she had never seen an original of Mimi's will, that her firm operated a safe custody register, and that a thorough search of her files revealed nothing. All of this points to the original never having been retained by the firm and thus more likely than not having been handed to Mimi on execution.

12. In 2018, O'Brien (who was by then Mimi's solicitor) told Mimi that he did not have the original of the May 2015 Will, only a copy, and warned her that failure to locate the original would likely result in intestacy. Mimi said she believed the will may have been with Leggat, but Mimi never followed up, and Leggat, who had appropriate systems for holding original documents in custody has never produced the will. There was no evidence before the Court from any solicitor confirming that they ever had possession of the original of the May 2015 Will beyond Campbell having obviously seen it on his desk at the time of execution**.**

13. At the time of her death, Mimi left behind no testamentary documents of any kind at her residence — no original, no copy, no codicil, no signed instructions and no draft. This prolonged inaction and absence of documents is consistent with abandonment of the May 2015 Will, which is indicative of revocation by destruction, not a continued intention to acknowledge, of the 2015 Will.

IV. Errors of the Trial judge on Issue of Possession

14. The trial judge concluded at [54] that the presumption of revocation did not arise on the basis that:

    a. "*there is no evidentiary basis to find that the original was given to the deceased by Campbell or anyone else*", expressly relying only on the equivocal evidence that "*Campbell has no recollection of handing to her any original documents or retaining any*" [57]; and

    b. "*the evidence does not establish that the original will was in the possession of the deceased when she died,*" having expressly relied only on Mimi's equivocal statements and conduct in 2018–2022 (that she authorised Leggat to release her file to O'Brien, that she told O'Brien she believed the original is with Leggat and that she told Gordana and Bryant that the will was with O'Brien).

15. The Appellant submits that there *was* an evidentiary basis to find that Mimi received the original of the May 2015 Will. Given that Campbell said he did not see it after execution, that he admitted it was "*likely*" that he handed the original to Mimi, that he would "*ordinar[il]y give the originals to the clients*", that his office "*only kept few wills*" and that "*there was a list of original documents retained in the office*" in which he did not recall making an entry. No documentary evidence was produced in relation to what happened to the original will after execution, so the evidence does

establish to the requisite standard that the original of the May 2015 Will was handed to Mimi on execution. Accordingly, the presumption was enlivened.

16. No mention was made of the May 2015 Will in O'Brien's first meeting with Mimi when she gave her authority O'Brien to uplift all her files, documents and any documents held in safe custody from Leggat. It contained no reference to any will and in any event, the files transferred did not contain the original of the May 2015 Will. Mimi's stated belief that Leggat has her original was ultimately demonstrably wrong. Despite Mimi saying she would "*contact [Leggat] to see where it is*" she didn't. Mimi's repeated statements after 2018 that O'Brien had her will were not explicitly to an original, and, in any event, were wrong, and known by her to be so.
17. Bryant, who first acted to prepare a new will for Mimi in July 2022 shortly after her discharge from hospital, recalled that Mimi said O'Brien had her "*current will*" whereas O'Brien has confirmed that he only had a copy. This shows Mimi's statements were at the least mistaken and unreliable. It was submitted by counsel at trial that Mimi might have intended to mislead as to the existence of the original of the May 2015 Will. There is, overall, some support for that proposition: see paragraph 83 below.
18. His Honour erred in three key respects:
    a. Effectively required proof stronger than on the balance of probabilities.
    b. Failed to give weight to evidence of the solicitors' practice, absence of custody records, Mimi's failure to follow up with Leggat about her original will after O'Brien's warning, and the absence of any testamentary documents at death.
    c. Gave weight to equivocal statements by treating Mimi's mistaken references to the location of her will as determinative, when they were equivocal at best, at times demonstrably incorrect and perhaps deliberately so.
19. His Honour mischaracterised these mistaken references. The evidence showed that Mimi often used the term "*my will*" to describe copies — to Radovic in 2017, O'Brien in 2018, Srdja in 2022, Gordana in July 2022, and Bryant shortly after. Mimi's statement to O'Brien in 2018 that she "*believe[d]*" the original was with Leggat was expressly tentative; she added "*I will contact them to see where it is*," (para 4 O'Brien Affidavit) yet never followed up. This was not referred to in the judgment at all. Properly analysed, such statements are incapable of displacing the circumstantial evidence that she held the original after execution.
20. Campbell's practice was to hand originals to clients; he admitted it was "*likely*" he gave the will to Mimi. Leggat confirmed no safe custody packet, entry, or uplift record existed, and that a thorough search located nothing. When files were transferred in 2018, other originals (leases) were included but not the original of the May 2015 Will. The only available inference is that no original of the May 2015 Will was never in Leggat's custody.

21. Taken together, the circumstantial factual matrix — Campbell's likely handover, the absence of other solicitors' custody records, the absence of the will on file transfer, and Mimi's history of uplifting and/or destroying wills (see paragraph 24 below) — is consistent with Mimi's possession of the original.

22. The plaintiff's reliance below on Mimi's references to her "*will*" as proof that she did not have possession of the original was misplaced. In 2017 she showed witness Radovic a document she described as her "*last will*" and "*the only will which is existing*"; Radovic believed it was a copy, but his belief was uncorroborated by any explicit clarification from Mimi just as there was no clarity in her subsequent references. In 2018 she told O'Brien she "*believe[d*]" the original was with Leggat but immediately added "*I will contact them to see where it is*" — a tentative assumption she never inquired about. Between 2018 and 2022 she repeatedly used the terms "*last will*," "*my will,"* and "*current will*" to describe what was plainly a copy — to O'Brien, Dusko, Srdja, Gordana, and Bryant. These statements were equivocal and at best neutral: Mimi consistently did not distinguish between originals and copies. Properly analysed, they cannot displace the circumstantial evidence that the original was handed to her at execution and remained in her possession; nor do they rebut the presumption of revocation.

23. The evidentiary gap identified by the trial judge should have been bridged by reference to ordinary practice and inference. Other original documents (leases) were transferred when O'Brien received Mimi's file from Leggat in 2018, but no original will. Neither Leggat nor O'Brien gave evidence that the original was expected or said to be missing. This is compelling circumstantial evidence that the original was never in their custody, leaving Mimi as the most probable custodian.

V. History of Revocation by Uplifting or Non-Preservation

24. Mimi had a history of uplifting or failing to preserve prior wills. None of the original wills from 2000 to 2015 were found among Mimi's possessions at death, nor were any copies or drafts:

    a. The early 2000's will was handed to Mimi but not found.
    b. The 2004 will was destroyed by Mimi and not found.
    c. The 2007 and 2009 wills were delivered to Mimi but not found.
    d. The January 2015 will was handed to Mimi, then inferred to have been destroyed by her but not found.
    e. The February 2015 will was torn up and reconstituted by sticky tape, found in solicitor's file; however, there was no evidence of who tore it up or who taped it back together or whether Mimi instructed any of this. No record of this will was found at Mimi's residence, after death and the draft of that will previously delivered to Mimi was also not found.

f. The May 2015 Will (with which these proceedings are concerned) was never found. There is no evidence that Mimi received a copy at or after execution, until Leggat's firm mailed one in March 2017. Shortly thereafter, Bozica recalls receiving a copy by mail in Switzerland, after which Radovic saw Mimi holding what he understood to be a copy. Around 2018, O'Brien gave Mimi a copy after telling her that he did not have the original, so she could consider making a new will, which she chose not to do (just as she chose not to take steps to locate or retrieve the original). Despite these copies passing through Mimi's possession, none were found at her residence, and the original remained missing.

g. The June 2022 Codicil remained in the possession of its drafter and co-beneficiary, Srdja. There is no evidence that Mimi retained a copy of the codicil, nor was any copy or other record of its existence found at Mimi's residence.

h. The August *2022* draft will prepared by Bryant was delivered to Mimi but not found at her residence.

i. None of the original wills from 2000 to 2015 were found among Mimi's papers at death, nor were any copies, nor even the draft will prepared by Bryant in August 2022.

25. This pattern of execution followed by possession and destruction, inaction, or absence, demonstrates a consistent history of Mimi's wills not being preserved, and supports the inference of revocation by deliberate destruction. The failure to preserve the original May 2015 Will, viewed against her history of past revocations, strengthens rather than weakens the presumption of revocation.

26. The trial judge did not address the probative weight of Mimi's history of conduct in relation to her testamentary documents. Instead, his Honour gave considerable weight to the 2022 informal codicil and oral statements of testamentary intent, neither of which addressed the central fact that the original of the May 2015 Will, which, on balance, had been traced to Mimi's possession, was missing. Importantly, there was no evidence that it was lost, or destroyed without revocatory intent. The plaintiff's contention that the disappearance of the original May 2015 Will was due to "*inadvertence or carelessness*" is unsupported by the evidence. Despite being directly advised by her solicitor O'Brien in September 2018 that only a copy of the Will existed and that the original was required to avoid intestacy, Mimi repeatedly asserted that her "*will*" was held by O'Brien. These assertions, made with knowledge of their inaccuracy, cannot be attributed to mere mistake or carelessness; they are more consistent with evasion or statements of convenience perhaps to deflect enquiry. Her subsequent failure to act on her promise to locate the original, even when meeting her former solicitor Leggat in 2022, demonstrates deliberate inaction inconsistent with inadvertent loss.

27. While giving too much weight to the plaintiff's theory about carelessness, His Honour failed to give proper weight to the Appellant's unchallenged evidence supporting Mimi's clear motivation to revoke the will, including Mimi's expressed dissatisfaction (including being "*clearly angry and irritated*" (at [143])) towards Bozica and statements indicating she intended her estate to pass to her broader Jaksic family rather than to Bozica alone. The Appellant (Branka) also gave evidence that, shortly after Mimi's death, Srdja (the drafter and beneficiary (with his wife) of the informal codicil) said Mimi reported having removed Bozica and Dusko from her will.
    a. Mimi said to Branka, "*I have my family [the entire Jaksic family] whom I will leave my estate*" at [98];
    b. Srdja said to Branka "at around the time immediately after Mimi's death", "*she [Mimi] told me on a number of occasion she would oust them [Bozica and Dusko] and that she did so from the inheritance*" at [126];
    c. Mimi said to Branka, "*I will not leave the estate to her [Bozica] as she demands it….I have my family Jaksic*" at [130]; and
    d. Mimi said to Branka, "*I'm not crazy to transfer everything to you [Bozica], as if you are the only member of my Jaksic Family*" at [143].
28. This circumstantial and historical evidence provides a basis for operation of the presumption of revocation. Failure to give it adequate weight, preferring to rely only on the evidence as set out at paragraph 3 above, constitutes a material error.

VI. 2017 Copy Will Sent to Bozica – Error in Inference Against Revocation

29. Factual basis:
    a. The trial judge accepted that Mimi sent a copy of her May 2015 Will to Bozica Dundjerski in Switzerland in 2017 and subsequently told Dusko to make copies, treating this evidence as a factor in finding the presumption of revocation was rebutted.
    b. There was no covering letter with the envelope in which Bozica says the copy of Mimi's May 2015 Will was contained, no explanatory note, nothing identifying the will or verifying the context of her sending it, nothing evidencing an intention that the will remained operative. Also, there was no evidence that Mimi knew Bozica's address (having failed to produce it when asked by Campbell in February 2015).
30. Error in reasoning:
        i. When placing weight on Mimi having sent a copy of the May 2015 Will to Bozica in 2017, the trial judge failed to consider that the presumption of revocation applies at the time of death. Sending the copy will to Bozica in 2017 may be consistent with the will being operative at that time, but it does not preclude subsequent revocation between 2017 and Mimi's death in 2022 —

particularly given her known pattern of revoking and destroying and/or abandoning previous wills.

31. Failure to weigh subsequent conduct (2018–2022):

The Court failed to give adequate weight to:

i. Mimi's 2018 conversation with O'Brien, where she was told the original was not held and that intestacy would result unless it was found — yet she took no steps to recover or re-execute the will.

ii. Her later execution of an informal codicil that she called a "*declaration*" in 2022, which she did not finalise through a solicitor;

iii. Her instructions to solicitor Bryant to prepare a new will to large extent replicating the May 2015 Will and informal codicil (with departure *vis-à-vis* art gift and a sole executor), and yet failing to mention to him the informal codicil she recently signed — which she ultimately did not execute;

iv. Her failure to mention the May 2015 Will, the informal codicil, or the new draft will to solicitor Leggat when she met her in late 2022.

v. The fact that no copy, draft or original will (nor codicil) was found at death, not even the copy she allegedly sent to Bozica nor any of the documents referred to at paragraph 24 above.

32. The reliance on the 2017 copy sent to Bozica as determinative proof that the 2015 Will remained operative at death involved an error of logic and inference. At most, it was capable of showing intention that it remained operative in 2017. It did not rebut the strong circumstantial evidence of abandonment, destruction, or revocation between 2018 and 2022. Accordingly, the trial judge erred in:

a. Giving weight to remote historical conduct.

b. Not according appropriate weight to later, final-period, conduct inconsistent with settled testamentary intention.

c. Failing to weigh the total absence of any testamentary documentation in Mimi's possession at death.

d. Not giving weight to the appellant's evidence supportive of revocation and intestacy.

VII. Post-2018 Inaction and Final Conduct

33. After being advised in 2018 by O'Brien that the original of the May 2015 Will was not with his office, Mimi:

a. Took no steps to retrieve, replace, or re-execute the May 2015 Will;

b. Signed the informal 2022 codicil (at the hospital), repeatedly referring to it before execution as a "*declaration*" (including after Srdja said it was "*a codicil…used to update and amend a will*"), and not referring to it at all after execution. Before execution Mimi

said she would "*amend*" her will in the future, and both before and after execution, Mimi said she would "*update*," her will and speak to a solicitor about it;

c. Shortly after, she did so. She gave solicitor Bryant instructions for a new will mostly incorporating the terms of the May 2015 Will (but with a significant departure, being an added beneficiary to the gift of her art collection and appointing only one executor) and giving the gift in the codicil. But Mimi never executed the draft given to her;
d. Made no mention to Bryant of the codicil despite it having been just recently executed;
e. Also saw Leggat (whom she previously said she believed held her will) but made no mention of the May 2015 Will, the 2022 codicil, or the August 2022 draft, nor did she ask about the whereabouts of the original May 2015 Will; and
f. Died leaving no will, no codicil, no copy of any of her wills or the codicil, and no draft.

VIII. Effect and Error

34. In these circumstances, the presumption that the May 2015 Will was destroyed *animo revocandi* clearly arose.
35. The trial judge failed to apply the presumption correctly, by failing to give sufficient weight to the cumulative evidence of:
    a. Past destruction of wills;
    b. Past uplifting and non-preservation of wills;
    c. Failure to follow up the missing original of the May 2015 Will after express legal advice;
    d. Total absence of testamentary documents at death;
    e. Final acts (inaction to remedy consequences of the original of the May 2015 Will being missing and silence after instructing Bryant) inconsistent with any settled testamentary intention; and
    f. The Appellant's unchallenged evidence of Mimi being at discord with Bozica and her intention to "*oust*" Bozica and Dusko from inheritance and her stated intention on multiple occasions to leave estate to the Family as a whole.
36. This failure constitutes an error of law, fact, and inference, warranting appellate intervention.

IX. Acceptance of Irreconcilable Beliefs About the Will's Location

37. The trial judge found that Mimi believed in 2018 that her May 2015 Will was with solicitor Leggat (after solicitor O'Brien said he did not have it) yet accepted the 2022 codicil's reference to her last will being held by O'Brien as evidencing that Mimi believed the May 2015 Will was still operative.
38. There was no change in circumstances (no evidence was provided that the original of the May 2015 Will was transferred between solicitor O'Brien and solicitor Leggat, or even seen by any solicitor during this period) to justify the finding that the original will was at the two different

locations at different times (in August 2018 with O'Brien, September 2018 with Leggat and in 2022 with O'Brien).

39. These beliefs, if Mimi held them, are logically incompatible, and the contradiction was not addressed. The trial judge accepted contradictory accounts without assessing the contradictions and without any evidence to explain how the two different beliefs could coexist. The beliefs are mutually exclusive.

X. Mistaken Belief About Will Location Cannot Rebut Presumption

40. Despite O'Brien's 2018 warning that in the absence of an original will, the result may be intestacy, Mimi never contacted solicitor Leggat to seek to locate the original of the May 2015 Will, though she said it might be with Leggat. Her informal 2022 codicil erroneously states the will is with O'Brien, showing continued misunderstanding or deliberate deception. A mistaken or false belief about a will's location does not evidence continuity of the will's operation. The presumption of revocation is directed to what the testator did with the original, not to later careless, equivocal, or erroneous statements about copies.

41. Mimi's inaction from 2018 to 2022 (and in the critical July–November 2022 period, after discharge from hospital where the informal codicil was signed) supports abandonment of the May 2015 Will. She was no longer treating it as operative, showing lack of intention to preserve it. This was consistent with destruction of the will *animo revocandi* which is supported by the Appellant's evidence of Mimi complaining about Dusko and Bozica and multiple expressions of intention to leave her estate to the whole of the Jaksic Family.

XII. Failure to Explain the Absence of the Original May 2015 Will Undermines the Finding of Ongoing Testamentary Intention

42. The trial judge erred by accepting that Mimi believed her May 2015 Will remained operative while simultaneously failing to require the plaintiff to offer a plausible explanation for the absence of the original of the May 2015 Will.

43. The plaintiff did not establish that the will was lost, misplaced, or removed through:

    a. Innocent error by a solicitor or a third party; or
    b. Any unintended act by Mimi herself (such as misplacement or accidental destruction) or routine or administrative mishandling of the type that might displace the common law presumption of revocation.

44. On the contrary, the plaintiff relied on equivocal statements made by Mimi over several years without addressing the fundamental inconsistency between such statements and Mimi's complete failure to secure, locate, replace, or re-execute the May 2015 Will despite knowing that its absence would likely result in intestacy as had been explained to her by O'Brien in 2018.

45. Mimi was not legally or cognitively impaired. She was a shrewd, financially independent property owner, experienced in executing multiple wills, and capable of managing her legal affairs. In

those circumstances, if she truly intended for the May 2015 Will to govern her estate, she would have:

a. Ensured it was held securely by a solicitor;
b. Taken steps to retrieve or confirm its location; and
c. Re-executed it or replaced it when informed of the original's absence after learning from solicitor O'Brien that a lack of the original may lead to intestacy; unless she intended that outcome (consistently with the Appellant's unchallenged evidence that she did).

46. Instead, over a four-year period, Mimi took no steps to recover or validate the original, and in her final months:

a. Signed the informal codicil she referred to as a "*declaration*";
b. Later instructed preparation of a new will that mostly replicated the May 2015 Will (but significantly changed the gift of her art collection and appointed a sole executor) and incorporated the gif in the 2022 codicil; but never executed it;
c. Died leaving no testamentary document (nor copy of any kind among her effects.

47. The trial judge failed to weigh this prolonged inaction and disregard for the original May 2015 Will's status against the plaintiff's assertion of continuity of the May 2015 Will's operation. The judge also failed to address the plaintiff's lack of evidence as to why the will could not be located. This is a critical omission: in the absence of a credible explanation for the missing will, the presumption of revocation applies and should have been determinative in this case.

48. Accordingly, the acceptance of the informal 2022 codicil and copy of the May 2015 Will, in the face of an unaccounted-for original, is at odds with the operation of the presumption, not a basis for rebuttal of the presumption, and amounts to an error.

XII. Failure to Consider Unchallenged Evidence Supporting Intestacy

49. The Appellant's unchallenged evidence was that Mimi was unhappy with Dusko and Bozica and especially with the pressure coming from Bozica (Dusko's mother) and that she wished to divide her estate among her extended family.

50. This matches the intestacy distribution and is inconsistent with the narrow dispositive effect of the informal 2022 codicil and the May 2015 Will.

51. The trial judge did not adequately weigh or consider this conflict either with respect to the continued operation (or not) of the May 2015 Will or the execution of the informal codicil which was inconsistent with these stated testamentary intentions.

XIII. Error of Finding that the 2015 Will Was Valid and Operative at Death

52. The trial judge erred in concluding that the May 2015 Will was valid and operative at the date of Mimi's death, despite the evidence showing:

a. The original May 2015 Will was never located.

b. Solicitor Campbell who prepared the May 2015 Will considered the original was most likely handed to Mimi when executed.
c. No solicitor (including Campbell, Leggat, O'Brien or Bryant) confirmed any custody of the original.
d. No evidence was presented that any solicitor misplaced or lost the original.
e. No credible explanation was provided by the plaintiff as to why there is no original will.
f. The admitted copy is insufficient, in law, to rebut the presumption of revocation.
g. There is no clear or consistent chain of custody or evidence establishing continued intention to rely on the document.

53. Marc O'Brien gave evidence that:
    a. He held only a copy, not the original.
    b. He informed Mimi in 2018 that the original was not in his possession.
    c. He warned her that if the original could not be located, the estate would likely fall into intestacy.

54. Despite this warning:
    a. Mimi did not seek to recover the original from any solicitor.
    b. She never instructed any solicitor to reconstruct, confirm, or re-execute the May 2015 Will.
    c. She (much) later instructed solicitor Bryant to draft a new will to an extent replicating the 2015 Will contents (but with a significant departure with respect to her art collection and appointing a sole executor) but which she never executed.
    d. Her only intervening act was signing an unexplained, unwitnessed (at her insistence) informal codicil in 2022, a "*Declaration*" as she called it, to give Srdja "*peace of mind*" coupled with an intention to consult a solicitor to prepare a new will, all in the context of her causing it to be not witnessed.

55. A will cannot be validly admitted to Probate in copy form unless the propounder can displace the presumption of revocation by proving:
    a. That the will was not destroyed by the testator.
    b. That the testator continued to regard it as operative.
    c. That the contents of the will are proven to the Court's satisfaction.

56. The evidence before the Court included evidence of Mimi's post-informal codicil conduct including instructing preparation of a new will does not support the May 2015 Will being operative or otherwise rebutting the presumption but rather supports that Mimi ceased to regard the May 2015 Will as operative and could well have destroyed it.

57. In such circumstances, the copy of the May 2015 Will and informal 2022 codicil should not have been admitted to Probate.

XIV. Incorrect Acceptance That the Presumption of Revocation Was Rebutted

58. The trial judge relied on oral assertions and the phrasing of the informal codicil, prepared by its beneficiary Srdja (whose wife also benefited), to infer by implication that the May 2015 Will remained operative. The burden remained on the plaintiff (now, the Respondent) to establish non-revocation, which was not discharged.

59. The trial judge erred by finding that the presumption of revocation had been rebutted in circumstances where:

    a. The May 2015 Will was not located at death.
    b. There was no conclusive evidence that the original was ever in the possession of a solicitor or third party after its execution.
    c. Mimi was told in 2018 by solicitor O'Brien that he did not hold the original and that failure to locate it might result in intestacy.
    d. Mimi took no steps to recover and preserve the original or investigate its location from 2018 until her death in 2022.

60. Mimi's own statements as to the May 2015 Will's location were equivocal, inconsistent (first referencing solicitor Leggat, then solicitor O'Brien), and never acted upon her. Her conduct demonstrated at highest indifference, not a settled intention to preserve the May 2015 Will.

61. The evidence relied on to rebut the presumption — including the informal codicil, oral statements, and testimony of interested parties — lacked corroboration, was factually contradictory, and did not address the core requirement: to displace the presumption by proving the original was not destroyed *animo revocandi*.

62. No independent or contemporaneous evidence confirmed that Mimi continued to regard the May 2015 Will as valid past 2018, particularly following her July 2022 instruction to prepare a new will (which she never executed), and her silence about the informal codicil to her solicitor, advisors, friends and family.

63. The Court misdirected itself by:

    a. Treating the informal codicil and oral statements as sufficient in themselves to rebut the presumption, without establishing the continued existence or chain of custody of the original; and
    b. Effectively shifting the burden to the appellant to prove revocation, contrary to the authorities in *Cahill v Rhodes* [2002] NSWSC 561 at [40]–[41].

64. Accordingly, the finding that the presumption of revocation had been rebutted was against the weight of the evidence.

XV. Failure to Find That Mimi Did Not Know and Approve Contents of the Codicil

65. The trial judge concluded at [60] that "*the codicil has testamentary effect*"

66. The trial judge erred in failing to consider or find that Mimi did not know and approve of the contents of informal 2022 codicil, which had been pleaded.

67. Mimi was elderly (86 years old), hospitalised, physically compromised (with a broken arm, the consequence of a fall, and inflammation in her lungs).

68. Radovic provided evidence that Mimi complained that Srdja and his family were exerting "*pressure*" on Mimi to sign a document giving them a property. He also gave evidence that Srdja was accompanied by his son at the hospital when visiting Mimi in 2022 (not admitted by Srdja who insists he visited her alone). Radovic was a witness with no financial interest in the outcome of the case and whose evidence was unchallenged. Notwithstanding, the conflicting evidence from Radovic, was not reconciled by the trial judge before concluding at [62] that Mimi "*intended the terms of the Codicil to have testamentary effect*".

69. This pressure by Srdja occurred in the historical context of Mimi having revoked each previous will which gave any gift to Srdja and Gordana and where, contrary to Srdja's evidence that he "*never accepted payment for the help [he] gave Mimi*", Dusko gave evidence that "*Mimi always told me that she paid Srdja for all the services and help he provided her.*"

70. During this extended period of hospitalisation Mimi was mentally isolated from support networks. Mimi's accountant, Maria Lazaros gave evidence that "*Mimi never mentioned to [her] about giving something to Srdja*", that Mimi told her, she and Srdja "*were always having arguments and not talking for periods of time*" that Mimi said "*people always want my money*" evidencing a history of conflict (corroborated by Bozica's evidence that Mimi and Srdja had a "*very disjointed relationship*"). and that Mimi and Srdja "*were in an argument and not speaking*" until about 9 October 2022."

XVI. Departure from Testamentary Practice – Suspicious Circumstances

71. Mimi executed nine previous wills, all in the context of legal advice. The informal 2022 codicil was an anomaly: no solicitor, no witnesses, no explanation of its content or time to consider it. Such a break from pattern, under suspicious circumstances, should have warranted close scrutiny that was not applied.

72. The Informal codicil was unwitnessed (at Mimi's insistence), prepared by Srdja Jankovic, its co-beneficiary (with his wife) and executed in a hospital setting, without legal advice or any explanation of legal effect, all in the context of having received pressure from Srdja to gift property to him.

73. The document was never discussed by Mimi with:

    a. Her solicitors (O'Brien, Leggat, or Bryant);

    b. Any neutral or disinterested party;

c. Any family member or friend unconnected with the primary beneficiaries, not even with Gordana (Srdja's wife and co-beneficiary)

74. The trial judge failed to apply the correct legal test, which requires the propounder of a suspicious document to affirmatively prove knowledge and approval, particularly where the document:

a. benefits its preparer.

b. is unsigned or unwitnessed by legal professionals; and

c. is not consistent with prior testamentary behaviour.

75. The failure to make a finding of lack of knowledge and approval in these circumstances constitutes a material error of fact and law and independently justifies the exclusion of the informal 2022 codicil and thus rejection of its use to revive or republish the May 2015 Will.

XVII. Failure to Recognise Legal Misapprehension and Lack of Legal Advice

76. Mimi had no legal assistance when signing the informal codicil. Accordingly, no one explained to her the impact of the word "republish" where the original May 2015 Will was not held by solicitor O'Brien (as Mimi knew).

77. The trial judge erred in treating the informal codicil as if it were the product of an informed and deliberate testamentary act, despite clear evidence that Mimi's understanding of the codicil and the will's legal status was mistaken, uninformed or perhaps, as stated at paragraph 82 below, sabotaging the execution. Mimi's insistence that the document not be witnessed deliberately rendered the codicil informal, which, given her testamentary history, Mimi would have known. She may well have assumed this would preclude it being valid both as to the gift it made and as to any republishing or revival of the May 2015 Will.

XVIII. Reliance on Language in a Layperson's Document

78. The trial judge attributed weight to the word "*republish*" in the informal codicil. It's author Srdja, a co-beneficiary (with his wife) admitted the form was sourced online. He did not explain it to Mimi when he presented it to her in hospital and is not a lawyer.

79. Mimi (with assistance of lawyers) executed at least nine earlier wills but had never executed a codicil. There is no evidence Mimi understood what a codicil was, let alone its legal effect. She called it a "*declaration"* and expressed an intention when signing to shortly thereafter see a solicitor, which she did, soon after discharge from hospital.

IXX. Failure to Require Explanation for Unwitnessed Codicil and to Address Independent Evidence of Pressure

80. The trial judge erred in law and fact in admitting the informal 2022 codicil without any or sufficient regard to (a) its unwitnessed execution; (b) the absence of any credible explanation from its beneficiary (Srdja Jankovic), as to why Mimi, in a rational exercise of her testamentary capacity, did not engage independent witnesses to execution; (c) Radovic's unchallenged

evidence that Mimi was subjected to pressure by Srdja; and (d) Radovic's evidence that Srdja's son accompanied Srdja when a document purporting to give them a property was placed before Mimi to sign.

81. Srdja's explanation that Mimi declined to have hospital staff witness the codicil for fear of being charged for services or losing her properties is inherently implausible and was not subjected to any meaningful scrutiny by His Honour.

82. The codicil was unwitnessed and thus informal and was prepared by its beneficiary. Having regard to evidence referred to at paragraph 24 above, having executed at least nine earlier wills, one thing Mimi must have known was that two witnesses present at execution are required. Yet, according to Srdja, it was Mimi who said hospital staff could not be asked to perform this function, the reason given (that they might charge her or cause her to lose her property) was so unlikely to have been what she really thought, and was irrational in the context of her undisputed testamentary capacity, as to raise a question as to whether she was sabotaging the execution of the codicil by deliberately rendering the document non-compliant with the requirement of two witnesses.

83. The plaintiff led no credible evidence to explain why the codicil was not witnessed, only evidence that Mimi was (inexplicably, even irrationally) distrustful of staff. This was not consistent with Mimi's high level of astuteness and sophistication. It leaves open as stated in the preceding paragraph that Mimi might have intended to render the document non-compliant with the requirement of two witnesses. Confronted with Mimi's refusal to have her execution of the codicil witnessed by hospital staff, Srdja could have dealt with this by himself arranging, or having Mimi arrange, witnesses who weren't hospital staff, particularly in circumstances where he gave evidence that it "*did not surprise [him*]" that Mimi did not want hospital staff involved.

84. The trial judge failed to draw any adverse inference from this omission, despite the requirement that suspicious circumstances attract close scrutiny (*Nicholson v Knaggs [2009] VSC 64)*. These circumstances – particularly the contradiction between Radovic's credible evidence and the self-serving denials of the beneficiary and author of the informal codicil – warranted that close scrutiny. Instead, the trial judge accepted the informal codicil without adequately addressing the discrepancy.

XX. Lack of Final Testamentary Intention Regarding Codicil

85. Section 8 Succession Act enables informal testamentary documents to be admitted to Probate if they represent a testator's intention.

86. The trial judge concluded at [61] that Mimi "*intended the Codicil to form her Will or an alteration to her Will within s 8(2)*" on the basis that "*The only reason she did not comply with the formalities for the Codicil [failing to satisfy the witnessing requirement] was a concern that the hospital staff would come to know of her properties and that she would be charged for staying in*

the hospital and might lose her properties. She told Srdja that she would sign the document for his peace of mind" at [62] In forming this conclusion, His Honour apparently had regard to Srdja's evidence of Mimi's remarks, "*That [declaration form] is the best solution for yours and my peace of mind*" and "*I will sign it for you so that you have proof of my decision*" which were accompanied by the plaintiff's submission that "*a document that wasn't intended to have operative effect could hardly provide peace of mind or be proof her decision.*"

87. Srdja's evidence and the plaintiff's submissions ought to have been considered in light of the contradictory evidence, being:

    a. Radovic on the one hand, and Srdja on the other, as to whether Mimi's decision to make the gift to Srdja and Gordana in the informal codicil was a voluntary act of gratitude or the result of pressure from the Jankovic family;
    b. Bozica and Dusko on the one hand, and Srdja on the other, about their knowledge of Mimi's expressed testamentary intentions;
    c. Branka on the one hand, and Srdja on the other, about Srdja's knowledge of the existence of Mimi's will and the identity of her solicitor;
    d. Srdja's internally inconsistent evidence that he held the codicil in safe custody on the one hand, and the evidence that he did not think he would need it anymore on the other.

88. Bozica and Dusko gave evidence that Mimi told each of them in May 2022 that, "*I have decided to give [Srdja] one property.*" Srdja gave evidence that Mimi said, "*I already told Bozica and Dusko about my decision*" and that Mimi reported Bozica and Dusko each having said, "*[Srdja] deserves it, and we [Bozica and Dusko] will honour your decision*" Contrary to Srdja's account, their evidence does not disclose that Mimi identified the property, the nature of the gift (be it testamentary or *inter vivos*) or that Gordana would be a co-recipient. This is consistent with the lack of evidence as to whether Bozica was aware of the codicil prior to Mimi's death, and Dusko's evidence that he was not. This contradiction was not resolved.

89. The codicil's reference to Mimi's last will being "*kept by Marc O'Brien*" rests solely on Srdja's evidence. Srdja's evidence of the circumstances surrounding the execution of the informal codicil including Mimi's reference to her "*last will*" being with O'Brien, is irreconcilable with Branka's unchallenged evidence that he told her, *"I do not know if Milka has a will ... I do not know if she had one and who is her lawyer."* This direct inconsistency was not considered, resolved or accorded adequate weight, and undermines Srdja's credibility and with it the reliability of the codicil as proof that Mimi intended it to operate as a testamentary act.

90. Srdja gave evidence that after Mimi signed the informal codicil, she gave it to him "*for safekeeping.*" However, Srdja also gave inconsistent evidence that he "*put that document somewhere [inconsistent with someone entrusted to retain a binding testamentary document in*

safe keeping], and…didn't think that…will need it anymore." The available inference is that Srdja himself, who did not discuss the codicil with anybody including his wife, did not consider the codicil to have immediate testamentary effect.

91. Mimi made no mention of the informal codicil to solicitor Leggat on 13 September 2022, a meeting at which the plaintiff was also present. Although Mimi attended this meeting in the context of lease matters, it was held during a period in which she had received the draft August will that she had not signed, and on Srdja's evidence, was waiting to see a solicitor to sign. At no point in that meeting did she refer to the codicil or her May 2015 Will (or any will).
92. Mimi's conduct, viewed cumulatively, is inconsistent with any view that the informal 2022 codicil was final or operative, similarly the May 2015 Will. The weight of the evidence is consistent with deliberate intestacy and inconsistent with the codicil's attempt to resuscitate the May 2015 Will or favour select beneficiaries.

XXI. Mischaracterisation of Codicil as Republication

93. The codicil said. "*I confirm my Last Will kept by Marc O'Brien*." His Honour did not make any finding in relation to whether the Codicil "*republishes*" the May 2015 Will by reference to the copy but only as to revival, despite the references to the two distinct doctrines at trial. Republication only operates where there is a subsisting, operative will at the time of the codicil. Here, no original was found at death, and Mimi took no steps to locate or re-execute the May 2015 Will. it is an error to treat the codicil as being capable of republishing the May 2015 Will.

XXII. Error in Admitting informal 2022 Codicil and Finding It Revived the May 2015 Will

94. The trial judge concluded that the informal codicil "*revives*" the May 2015 Will "*even if it had been revoked*" (at [60]). The plaintiff's case was confined to the May 2015 Will being republished by the codicil; revival was neither pleaded nor argued. The trial judge's finding that the codicil revived the May 2015 Will went beyond the plaintiff's case. The trial judge erred in law by concluding that the informal 2022 codicil had the effect of reviving the May 2015 Will, despite the codicil lacking the express and operative language required to do so under section 15 of the *Succession Act* and at common law. The informal codicil relied on in this case contained no such revival language. The sole relevant statement is *"I hereby confirm and republish my Last Will kept by Marc O'Brien."*

95. This language is: (a) ambiguous in legal effect; (b) factually incorrect (Marc O'Brien did not hold the original and Mimi was informed of this in 2018); and (c) insufficient at law to establish conscious intent to revive an instrument presumed revoked.
96. The applicable principles require that revival language must:
    a. Acknowledge the will has been revoked or is no longer valid;
    b. Express a clear and informed desire to restore its legal effect;

c. Be supported by evidence that the testator understood and adopted that effect. (*In the Goods of Steele* (1868) 1 LR P & D 575.

97. The court had regard to Mimi's references to the copy of the May 2015 Will held by O'Brien, as "my will." But only the original can be admitted to Probate, and revival of a revoked will requires re-execution or a codicil showing a clear and conscious intention to revive (s15 *Succession Act*.) Referring to a copy as "my will" is at best equivocal and factually wrong, as Mimi was informed by O'Brien in 2018 that he held no original. Moreover, as confirmed in *In the Goods of Steele* (1868) LR 1 P & D 575 at 576, even an express codicil cannot revive a will destroyed *animo revocandi*. Mimi's informal references to a copy cannot therefore amount to revival of the missing 2015 Will, nor can they displace the presumption of revocation.

98. Rather than satisfying these criteria, the fact is there was no evidence that Mimi:

a. Understood the May 2015 Will was inoperative or presumed revoked, which is precondition for it to be revived if physically extant, since the Court found that Mimi regarded the 2015 Will as operative at all relevant times;
b. Intended the informal codicil to revive the May 2015 Will formally (if it is operative then it doesn't need to be revived); and
c. Was advised that revival required compliance with legal standards.

99. Further:

a. The codicil was unwitnessed and prepared by its beneficiary (Srdja Jankovic);
b. It was never shown to any solicitor;
c. Mimi, within weeks after discharge, instructed Mr Bryant to prepare a new will in essence replicating (although with the change in respect of her art collection and appointing a sole executor) both the May 2015 Will and the informal 2022 codicil, an act inconsistent with belief by her in their continued validity; but
d. She never executed that draft will.

100. The trial judge therefore erred in:

a. Treating the ambiguous informal codicil language as satisfying the statutory requirements for revival;
b. Inferring revival in the absence of formal or evidentiary support; and
c. Misapplying s 15 and failing to distinguish revival from mere reference.

101. This error materially affected the outcome. In the absence of revival, the May 2015 Will is incapable of being given effect.

XXV. Failure to Consider Evidentiary Inferences Available

102, The trial judge erred in failing to evaluate and draw proper inferences from material evidence that was before the Court, which was not contradicted or challenged by the plaintiff and was

central to the legal issues on which the Court was required to make findings. Despite the weight of the evidence:

a. The Court failed to draw the inference that Mimi did not know and approve the contents of the informal codicil, despite the lack of legal advice, witnessing, or corroborative conduct;
b. The Court did not assess the implications of Mimi's failure to retrieve or replace the original 2015 Will (which was continuously missing since at least September 2018 unless in Mimi's possession or destroyed), despite clear evidence that she knew of its absence from O'Brien's possession and the legal significance of that absence; and
c. The suspicious circumstances surrounding the preparation and presentation of the informal codicil by its beneficiary were not adequately scrutinised or weight.

103. These failures constituted legal error because they resulted in a judgment that overlooked probative evidence, some uncontested, and failed to apply settled principles requiring heightened scrutiny, such as where there are unwitnessed documents or suspicious circumstances.

104. The trial judge's omission to draw available inferences from the evidence materially affected the outcome and supports appellate intervention.

Dated 25 September 2025

Christian Vindin, Counsel for the Appellant
Two Wentworth Chambers
Phone: (02) 9232 5180
Email: cvindin@twowentworth.com.au