

Affidavit evidence: The problems which arise where affidavits of different witnesses use identical language

29 July 2015

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Introduction

1. An affidavit should reflect the genuinely held and independent recollection of the person making the affidavit. Therefore, problems will arise where an affidavit of one witness uses identical or substantially identical language to that found in the affidavit of another witness. The credit of such witnesses will usually be attacked by counsel and the court may find that the weight accorded to such evidence should be diminished and, sometimes, substantially diminished.
2. This paper considers a number of cases which have addressed the problems which arise where there has been identical affidavit evidence.

The cases

3. In *Seamez v McLaughlin* (“**Seamez**”),¹ three witnesses for the plaintiffs had given very similar accounts of various events in their affidavits. In cross-examination, each witness nevertheless maintained that their affidavit was their own independent recollection of the events although two of the witnesses conceded that they had discussed the events with each other.
4. Sperling J of the New South Wales Supreme Court noted that there was a high degree of similarity in content, detail, terminology and sequence (particularly in relation to conversations) between the affidavits and was satisfied that the affidavits could not have come into existence without direct or indirect collaboration.² In his Honour’s view, either the affidavits were a joint collaboration or only one was a genuine recollection of the events and the other two were not.³ His Honour went on to say that:

*“acceptance of one of the three accounts of the events ... means not only that the other two are not genuinely recollected, independent accounts. It also means that the authors of those other accounts have misstated the way in which their respective accounts came into existence, and seriously so. The credit of the others would then be worthless.”*⁴

5. His Honour found that one of the accounts was an original and genuine account and selected that account as the evidentiary vehicle for the plaintiffs’ case. The evidence

¹ [1999] NSWSC 9.

² Above, n 1, at [36].

³ Above, n 1, at [38].

⁴ Above, n 1, at [40].

of the other two witnesses on any contentious matter was disregarded as being of no weight.⁵

6. Cooper J of the Federal Court of Australia addressed a similar problem in *Dialog Pty Ltd v Addease Pty Ltd* ("**Dialog**").⁶ In that case, a paragraph of an affidavit of one witness, K, was almost identical with a paragraph of an affidavit of another witness, D. D's affidavit had been prepared some 8 months before K's affidavit. In cross-examination, K admitted that the material was 'cut and pasted' into his affidavit by his legal advisers and that he had agreed that what was there was his recollection of the relevant events. In these circumstances, Cooper J was not satisfied that K had any independent recollection of the events.⁷
7. Subsequently, in *Macquarie Developments Pty Ltd v Forrester* ("**Macquarie Developments**"),⁸ Palmer J, sitting in the New South Wales Supreme Court, dealt with affidavits of two witnesses, B and G, which contained accounts of critical discussions which were in virtually identical terms. The solicitor who had prepared the affidavits gave evidence that he had interviewed each of the witnesses separately; that when he was preparing B's affidavit for swearing he had noticed that B's evidence about the critical discussions was to the same effect as G's evidence but was not identical; and that he had then decided to 'cut and paste' a portion of G's affidavit into B's affidavit.
8. After noting that the solicitor was young and relatively inexperienced and had apparently not prepared the affidavits under the direct supervision of a senior solicitor of his firm, Palmer J said:

"Clearly, the ... solicitor failed to appreciate that the evidence of each witness must be in the words of that witness and that it is totally destructive of the utility of evidence by affidavit if a solicitor or anyone else attempts to express a witness' evidence in words that are not truly and literally his or her own.

... Save in the case of proving formal or non-contentious matters, affidavit evidence of a witness which is in the same words as affidavit evidence of another witness is highly suggestive either of collusion between the witnesses or that the person drafting the affidavit has not used the actual words of one or both of the deponents. Both possibilities seriously prejudice the value of the evidence and Counsel usually attacks the credit of such witnesses, with good reason.

... Where the identity of evidence is due to collusion, the devaluation of the evidence is justified but where, as in the present case, the identity of evidence is due entirely to a mistake on the part of a legal adviser, a witness' credit and a party's case may be unjustly damaged."⁹

⁵ Above, n 1, at [43].

⁶ [2003] FCA 1359.

⁷ Above, n 6, at [99].

⁸ [2005] NSWSC 674.

⁹ Above, n 8, at [89]-[91].

9. His Honour accepted the solicitor's evidence as to how the identical affidavit evidence had come to be prepared, and that the mistake was an honest one on his part, and said that the explanation removed any suspicion that there had been collusion on the part of G and B.¹⁰
10. *Rosebanner Pty Limited v Energy Australia* ("**Rosebanner**")¹¹ was another decision of the New South Wales Supreme Court which addressed the problem of identical affidavit evidence. W, a solicitor, had drafted an affidavit for his client, L, which was almost identical to an affidavit which he had prepared for himself. The affidavits deposed to what had been said at a meeting which both had attended some two years prior to the preparation of the affidavits. What had taken place at the meeting was a significant matter in dispute in the proceedings and neither witness had taken detailed notes of the meeting at the time.
11. Ward J said that she should treat what was said in the affidavits with some degree of caution.¹² Her Honour referred to what had been said in a number of cases about identical affidavit evidence including *Macquarie Developments*, *Seamez* and *Dialog*, and noted that there were a number of differences between the circumstances of *Macquarie Developments* and those of the case before her. Whereas the solicitor in *Macquarie Developments* had been relatively inexperienced and Palmer J had accepted his explanation and found that he had made an honest mistake, her Honour noted that the solicitor in the case before her was a more senior practitioner and a witness to the very events the subject of the conversation to which his client had deposed. Moreover, her Honour noted, in certain respects, L's oral testimony had not supported the version attributed to him in the affidavit prepared by W.¹³
12. Her Honour then concluded:

"At the very least, the way in which [L's] affidavit evidence was prepared must give rise to doubts as to whether that evidence represented his own views uninfluenced by [W]. While I accept it likely that [L] expressed to [W] in no uncertain terms what he recalled of the meeting, the fact that [W] cast (or perhaps recast) it in such substantially similar terms can be consistent only with the pair having near perfect and identical recall of a particular conversation, some two years later, (which seems unlikely...) or did so in collaboration with each other to an extent which must devalue the weight of their evidence."¹⁴

13. In *Celermajer Holdings Pty Ltd v Kopas* ("**Celermajer Holdings**"),¹⁵ another decision of Ward J, affidavits and statutory declarations of various family members contained virtually identical material in relation to events which had taken place many years

¹⁰ Above, n 8, at [92].

¹¹ [2009] NSWSC 43; (2009) 223 FLR 460.

¹² Above, n 11, at [325].

¹³ Above, n 11, at [328]-[329].

¹⁴ Above, n 11, at [334].

¹⁵ [2011] NSWSC 40.

earlier. The affidavits and statutory declarations had been prepared by a family member, a non-lawyer. The family members gave evidence that they had discussed the events that had occurred and one family member had accepted that the others had looked at her draft affidavits. However, all claimed that the documents reflected each individual's actual recollection of the events.

14. Ward J observed that, according to *Macquarie Developments*:

*"even if there has not been collusion as such between the witnesses, in the sense of changing their evidence to make it fit with that of another, the fact that the affidavits may not contain the actual words of one or other of the deponents devalues their evidence."*¹⁶

15. Her Honour then said that there seemed to be a distinct possibility that at least one or more of the witnesses' evidence reflected a common recollection drawn from discussions between family members over the years as to what had happened.¹⁷ While her Honour did not consider that the communal nature of the preparation of the affidavits rendered the credit of the witnesses worthless, she said that it suggested that care had to be taken before accepting that the evidence of one or other of the family members as to his or her recollection of events provided corroboration of the evidence of another.¹⁸

16. Her Honour went on to express concern that the witnesses had maintained that the documents reflected each individual's actual recollection of events, saying that this perhaps could be of greater significance than the identical affidavit evidence itself.¹⁹

17. In another decision of the New South Wales Supreme Court, *Krajovska v Krajovska*,²⁰ numerous paragraphs of the affidavits of two witnesses were in substantially identical form. Black J observed that:

*"[t]he difficulties arising from affidavits which are sworn or affirmed by different witnesses but are essentially identical have been recognised in numerous cases in this Court. The fact that portions of affidavits are identical or substantially identical may evidence collusion but in any event creates an issue as to the credibility of the witnesses and diminishes the weight to be accorded to their evidence: Macquarie Developments ...; Rosebanner ...; Celermajer Holdings... . The issues as to the form of these affidavits requires that care be taken before I accept the evidence of either [witness] as corroborating the other's version of events. This difficulty has been mitigated to some extent by oral evidence given by the witnesses and extensive cross-examination as to critical events."*²¹

¹⁶ Above, n 15, at [186].

¹⁷ Above, n 15, at [187].

¹⁸ Above, n 15, at [189].

¹⁹ Above, n 15, at [193].

²⁰ [2011] NSWSC 903.

²¹ Above, n 20, at [6].

18. A similar issue came before Black J again in *Re Green Alliance Pty Limited (receiver and manager appointed)*.²² In that case, large parts of the affidavits of two witnesses were in identical terms and had, his Honour said, clearly been copied from each other. His Honour went on to say that:

*"[i]t should not be necessary again to emphasise that this course is wholly inappropriate, as judges of this Court have repeatedly observed."*²³

19. Nevertheless Black J did find it necessary again to emphasise the inappropriateness of identical affidavit evidence in *Re Colorado Products Pty Ltd (in prov liq) ("Colorado Products")*.²⁴ Large parts of H's affidavit and K's affidavit, both witnesses for the plaintiffs, had been copied, generally word for word, from each other, and the copied parts included many critical disputed conversations. No satisfactory explanation for this was given, with H claiming that she had not seen K's affidavit and had not discussed her or K's evidence with him, and K claiming that he had not discussed his evidence with H.

20. Black J commented that an inference might be available that the plaintiffs' solicitors had copied passages from one affidavit to the other but noted that the solicitors had not sought to provide an explanation, by contrast with the position in some other cases such as *Macquarie Developments*.²⁵ His Honour then said:

*"It does not seem to me to matter whether the identical passages in [H's] and [K's] affidavit evidence was the result of collusion between the witnesses personally or was the result of [H's] adopting evidence that had been copied from [K's] affidavit, or [K's] adopting evidence that had been copied from [H's] affidavit, since each substantially devalues both witnesses' affidavit evidence where no explanation has been given of what occurred. It is not possible for the Court to be satisfied in this situation, in my view, that [H's] and [K's] evidence reflects a genuine recollection of events."*²⁶

21. His Honour accepted, referring to *Macquarie Developments*, *Rosebanner* and *Celemajer Holdings*, that in some cases the courts had taken the view that the possibility of collusion or the possibility that the affidavits did not use the actual words of the witnesses did not render the credit of a witness worthless, although they required care before accepting the evidence of one or other of the witnesses.²⁷

22. However, his Honour said that in the case before him, where the difficulties related to the most important disputed conversations and where the manner in which they arose remained unexplained by the plaintiffs, they substantially devalued the weight to be given to the affidavit evidence of each of H and K as to those matters to the

²² [2012] NSWSC 1224.

²³ Above, n 22, at [15].

²⁴ [2014] NSWSC 789; (2014) 101 ACSR 233.

²⁵ Above, n 24, at [16].

²⁶ Above, n 24, at [16].

²⁷ Above, n 24, at [18].

point that neither's affidavit evidence could be treated as genuinely reflecting their own recollection of the events as distinct from a collective reconstruction of them.²⁸

23. The issue of identical affidavit evidence came before Black J again in *Chidiac v Bhatt Vaidya and Rosybarb Pty Ltd*.²⁹ The defendants, B and V, were husband and wife and represented themselves in the proceedings. They were assisted for part of the hearing by their daughter, a non-lawyer. In cross-examination, V accepted that she had read B's affidavit before preparing her own affidavit, but claimed that she did not use B's affidavit in preparing her affidavit. Black J, however, was satisfied that significant parts of V's affidavit had been copied from B's affidavit, and had been copied by V or possibly V's daughter.³⁰
24. After noting once again that the courts had taken the view that the difficulties arising from identical affidavit evidence at least required care before accepting the evidence of one or other of the witnesses, his Honour indicated that he had not accepted B's evidence as to significant matters and that V's adopting it did not assist B and V, quite apart from any issues arising from the process by which their affidavits had come to be prepared.³¹
25. In *Zagame v Zagame*,³² a decision of Hallen J of the New South Wales Supreme Court, the affidavits of two of the defendants, Roseanne and Robert, recounted parts of conversations in identical form and terms. Roseanne denied any "collaboration" between her and Robert in the preparation of the affidavits, saying that they were both together at the time the words were said to them and that they were just repeating what was said.
26. Hallen J was prepared to believe Roseanne's evidence relating to "collaboration", but said it was clear that the affidavits bore the hallmarks of a 'cut and paste' from one affidavit to another and that "[t]here may have been clarity of recollection by each but it is hard to conclude that the recollection was identical."³³
27. In the particular circumstances of that case (which included that the plaintiff had not disputed the contents of the conversations that were recounted in identical terms), his Honour generally accepted the evidence of the two witnesses.³⁴
28. In *The State of Queensland (Queensland Corrective Services) v Together Queensland, Industrial Union of Employees*,³⁵ Deputy President O'Connor, sitting in the Queensland Industrial Relations Commission, dealt with 5 affidavits where a 'cut and paste' appeared to have been used. Evidence was given by one of the witnesses that there had been a meeting attended by a number of witnesses during which the

²⁸ Above, n 24, at [18].

²⁹ [2014] NSWSC 1253.

³⁰ Above, n 29, at [4].

³¹ Above, n 29, at [5].

³² [2014] NSWSC 1302.

³³ Above, n 32, at [68].

³⁴ Above, n 32, at [69]; [71].

³⁵ [2015] QIRC 69.

evidence had been gone through and put up on a whiteboard; that a photograph had been taken of the whiteboard; and that this had then been used to draft an affidavit.

29. After referring to what the Courts had said in *Colorado Products, Seamez, Celermajer Holdings* and *Macquarie Developments*, the Deputy President concluded that the evidence of the five witnesses was a product of collaboration to an extent which devalued the weight to be given to their evidence.³⁶
30. Black J of the Supreme Court of New South Wales, once again dealt with the issue of identical affidavit evidence in the recent case of *Re Imperium Projects Pty Limited*.³⁷ Two of the defendants, directors of a company, had given affidavit evidence in identical terms in respect of certain matters. Black J observed that:

*"[t]he Courts have repeatedly referred to the difficulties which arise where witnesses, or their solicitors, copy their evidence ..."*³⁸

31. His Honour, however, said nothing further about this because the case was an interlocutory hearing dealing with an application by a shareholder of the company for leave to bring proceedings on behalf of the company against those directors and leave was granted for the bringing of the derivative action in respect of a number of matters.

Final note

32. In light of the above, when preparing a case where evidence is to be given by affidavit, it would be wise to bear in mind the following observations of Allsop J in *Byrnes v Jokona Pty Ltd*:³⁹

"The preparation of written evidence that reflects the honestly held recollection of individuals, assisted by sensibly ordered and presented documentary and other background material, is a difficult task and one requiring experience and skill."

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29 July 2015

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³⁶ Above, n 35, at [63].

³⁷ [2015] NSWSC 16.

³⁸ Above, n 37, at [20].

³⁹ [2002] FCA 41 at [14].