

SUPREME COURT OF QUEENSLAND

CITATION: *Darveniza v Deen* [2009] QSC 99
Deen v Darveniza & another [2009] QSC 99

PARTIES: **BOJAN DARVENIZA**
(plaintiff)
v
SULTAN MOHAMMED DEEN
(defendant)

and

SULTAN MOHAMMED DEEN
(plaintiff by counter-claim)
v
BOJAN DARVENIZA
(defendant by counter-claim)
LEISURE KART CITY PTY LTD
ACN 009 841 374
(defendant added by counter-claim)

FILE NO/S: 5759 of 2007

DIVISION: Trial

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court

DELIVERED ON: 7 May 2009

DELIVERED AT: Brisbane

HEARING DATE: 11-12 December 2008

JUDGE: Fryberg J

ORDER: **1. Judgment for the plaintiff on the claim for \$269,984.00.**

2. Judgment for the defendants to the counterclaim.

CATCHWORDS: Contracts – General contractual principles – General offers and their acceptance – Matters giving rise to a binding contract – Particular instances – No proof of acceptance

COUNSEL: P Hackett for the plaintiff and the second defendant to the counterclaim

R Myers for the defendant

SOLICITORS: H Drakos and Company for the plaintiff and the second
defendant to the counterclaim
John M O'Connor & Company for the defendant

- [1] **FRYBERG J:** The plaintiff sues to recover a loan. The defendant admits the loan but claims a set off to the full extent of the amount owing. The set off is said to arise from the price payable under a contract for work and services allegedly performed by the defendant for the plaintiff. The defendant counterclaims for the un-set off balance of the price. The plaintiff denies the existence of any such contract and denies that the defendant did any work or performed any services for him in accordance with the alleged contract. No technical issues about set off are raised. Despite the pleadings no issue as to parties is raised on either side. It should be simple.

Background

Undisputed facts

- [2] Mr Darveniza is a property owner. Mr Deen is or represents an earthmoving, demolition and civil engineering contractor. They have been personal friends and have dealt with each other in business for many years, Mr Deen performing earthworks for Mr Darveniza. In late September 2006 Mr Deen was in financial difficulty. He was unable to finance some new equipment which he needed. He approached Mr Darveniza for a loan. Mr Darveniza agreed to lend him \$240,000 secured on the new equipment. No interest was payable, but Mr Deen forwent payment of \$24,000 which was part of the amount owing to him for work done for Mr Darveniza at Eagle Farm. In addition it was agreed that the loan would be repaid by one payment of \$100,000 on 30 November 2006 and a second of \$150,000 on 31 December 2006.
- [3] The work at Eagle Farm was duly completed and the \$24,000 duly appropriated. However Mr Deen was unable to repay the payment due on 30 November. On 29 November he wrote to Mr Darveniza seeking an extension of time. There was no response to his letter but neither did Mr Darveniza take action to recover the loan. Mr Deen again defaulted on the payment due on 31 December 2006. On 17 January Mr Darveniza agreed to extend time for two months, making \$100,000 repayable by 30 January 2007 and \$150,000 repayable by 28 February 2007 on the basis that Mr Deen would pay interest at 10% per annum calculated on daily rests.
- [4] Mr Deen agreed to that proposal but did not make the payments required under it. On 5 February he wrote to Mr Darveniza seeking a further extension for an unspecified period. Mr Darveniza granted an indefinite extension provided interest owing to date was paid immediately and future interest was paid on a weekly basis. It appears that Mr Deen agreed to that proposal also. However by 17 April he still had paid nothing. On that day Mr Darveniza demanded payment in full of the claim and interest. It was not forthcoming.

- [5] Shortly thereafter Mr Darveniza requested Mr Deen to perform some earthworks at a property located at Gosport Road, Hemmant, the price to be set off against Mr Deen's indebtedness. Mr Deen submitted a quotation of \$33,000 to do the work on that basis, and Mr Darveniza accepted the quotation. The work comprised the following:

- “1. Sweep out sheds with Bobcat sweeper
2. Clean up rubbish and remove.
3. Construct concrete apron around 2 x Field Gully Pits
4. Fill, with roadbase, depression in centre of yard, so falls to Field Gully
5. Grade rear yard”.

Paragraph 6 of the defence

- [6] Mr Deen pleaded:

- “6. The quotation was duly accepted by the plaintiff. The work was duly performed to the defendant's satisfaction. The work was completed on or about 20 May 2007 and the sum of \$33,000.00 was offset against the defendant's indebtedness to the plaintiff.”

Mr Darveniza admitted that paragraph.

- [7] This was one of several cases where the pleadings bore no relationship to the reality. The first error in para 6 emerged fairly early in Mr Darveniza's cross-examination. Mr Myers (for Mr Deen) put to Mr Darveniza that the work under that contract was performed “between about the 11th and the 23rd or thereabouts of May”. The latter date subsequently took on some significance. No explanation of why the defence alleged 20 May was ever advanced.
- [8] The second error was the allegation that the work in the quotation was duly performed. Notwithstanding Mr Darveniza's admission of that fact, it was not correct. It was common ground that Mr Deen did not fill the depression in the centre of the yard with road base. Instead, he used a material called profile. Profile is the detritus salvaged when a bitumen road is torn up. It consists of lumps of bitumen with gravel embedded. It is much cheaper than road base, but unlike road base, it cannot be compacted.
- [9] The third error in para 6 was the allegation that the work was performed to the *defendant's* satisfaction. It emerged at the beginning of the defendant's case that the pleader meant to say “to the *plaintiff's* satisfaction”. Mr Myers sought and was granted leave to amend the defence. Mr Hackett, for the plaintiff, did not oppose the amendment provided he had leave to amend the reply and answer in consequence. The following exchange then took place:

“MR HACKETT: Your Honour, do I have the consequential leave?

HIS HONOUR: Yes.

MR HACKETT: Thank you, your Honour.

HIS HONOUR: You do. But you will need to turn your mind to persuading me that the original admission wasn't made on the understanding that it referred to the plaintiff.

MR HACKETT: I hear your Honour.”

In the event, no amendment was made to the reply and answer. I infer that it was always the plaintiff's intention to admit the paragraph as amended.

- [10] That leads to the fourth pleading error in relation to para 6: the plaintiff's admission of the paragraph. Mr Darveniza asserted vigorously in cross-examination that the work under the contract was not duly performed in that Mr Deen used profile instead of road base. No objection was taken to the admission of that evidence notwithstanding the fact that it contradicted the pleading. Doubtless that reflected the fact that both sides accepted the profile had indeed been used. The errors in the pleadings were simply irrelevant to them.

Difficulties in assessing credibility

- [11] I have had considerable difficulty in assessing credibility of witnesses in this case. All four major witnesses, Mr Darveniza, Mr Deen, Mr Thompson and Mr Duncombe, were argumentative and prone to giving unresponsive answers. Answers about what was said in conversations were often given in the form of summaries or interpretations of what was said and these were accepted as sufficient answers by the questioner. From time to time all of them seemed to be answering in a way best calculated to serve the interests of the side which called them. English was not Mr Darveniza's first language and he had some difficulty with tenses. Mr Deen was not called first in the defence case and was allowed to remain in court to hear Mr Duncombe's evidence before he gave his own evidence. I have approached the evidence of all four witnesses with scepticism. Assessment was not helped by the fact that questions in cross-examination often enquired of more than one topic or were unhelpfully vague, particularly by failing to specify to what point in time the question related. By contrast I thought Mrs Darveniza an honest and accurate witness, although her evidence was quite short.

The use of profile

- [12] Mr Darveniza asserted vigorously that he did not approve the use of profile. It was put to him that he had a conversation with Mr Deen about profile before it was laid. Mr Darveniza agreed. It was suggested that in the course of that discussion he was told that profile could not be compacted. Mr Darveniza denied that and said that he was told it was just as good as road base. It was suggested that Mr Duncombe drove a truckload of profile to the site for his approval as material to be used on the site, that he looked at it and that there was a discussion with Mr Deen about its qualities. Mr Darveniza was asked if he understood the question and he replied in the affirmative; but he was not asked to answer it. It was suggested that he was told that to use road base as opposed to profile would substantially increase the cost of the job. He denied that. It was again suggested that profile was brought to the site on a truck driven by Mr Duncombe for his approval as a material to be used and he denied the suggestion. It was suggested that he quite consciously and deliberately approved the use of profile because of the lesser cost involved. Mr Darveniza replied:

“I didn't approve of the profile being put there when I found out it can't be compacted, even though at the time I had no intentions of putting bitumen there, but I still wanted the land to be compacted so hard that it wouldn't create any dust or for the land to get holes in it or tracks.”

- [13] At that point, objection was taken to the line of questioning. Mr Myers took instructions and then announced that he was “instructed to withdraw that in any event, the cost saving aspect”.
- [14] Mr Darveniza said that he did not find out about the un-compactability of profile until after it had been laid. Its use was unacceptable to him because it could not be compacted, a process which was necessary for the proposed use of the premises by transport vehicles. Shortly afterwards he decided to have the whole area bitumened to comply with the requirements of a tenant or of the Council. Profile was unacceptable as a material beneath bitumen, but his decision to use bitumen was not the reason he found profile unacceptable.
- [15] When he realised that the profile could not be compacted, Mr Darveniza said, he told Mr Deen to remove it from the area where it had been laid. He said that it could be pushed to a back paddock and did not have to be removed from the site. He asked Mr Deen what the latter was going to do to earn his \$30,000 and Mr Deen offered to excavate some soft spots which were in a different part of the premises, fill them and compact them. He did not require Mr Deen to acquire and lay road base in the original area, even though that was a requirement of the contract. Mr Deen subsequently removed the profile but did not do the soft spots (although elsewhere Mr Darveniza said Mr Deen did work on the soft spots). Nonetheless Mr Darveniza was content to allow him credit for the \$33,000 contract price.
- [16] Mr Deen's evidence was that three or four days after the contract was signed and before any profile was brought on site, he told Mr Darveniza that profile would be a better material for the job. That was because there would remain several low-lying areas where road base would simply turn to mud if it became wet. He did not testify unequivocally that he told Mr Darveniza that road base could not be compacted. He said that in addition to placing profile in the depression in the centre of the yard, he excavated three low lying spots elsewhere and filled them with road base, notwithstanding that the contract did not require that work to be done. He thought the work was virtually completed by 24 May.
- [17] In cross-examination Mr Deen recognized that the contract required filling with road base so that the fall was to the two drains, which would necessarily be elevated somewhat from their existing position. He could not explain how porous profile would achieve this. There was, he testified, no necessary cost saving in using profile as opposed to road base and he had not instructed his counsel to suggest that there was. He organised a truckload of profile to be brought to the site and tipped, and Mr Darveniza then approved its use. Mr Duncombe drove the truck and was standing next to him during the conversation.
- [18] Mr Duncombe described the work which Mr Deen told him to do in relation to the first contract as including digging out the soft spots. He said that Mr Deen told him to do this on about 14 or 15 May. At about the same time Mr Deen told him to use profile for the filling. He was not aware of what the contract provided for the filling and had not been instructed prior to this to use road base. Mr Deen (not Mr Duncombe) brought a load of profile in and Mr Deen and Mr Darveniza looked at it and decided it would do. Subsequently, after 26 May, Mr Duncombe went back and dug out the profile because, as far as he knew, it was not going to be heavy enough to run trucks on; there was insufficient depth. Stabilised road base, a mix of concrete and road base, was then introduced.

The contract for bitumen

- [19] It is common ground that on or about 24 May Mr Darveniza told Mr Deen that he now wanted to bitumen the whole area and asked for a quote. The whole area was two to three times the area involved in the first contract. The work necessarily involved digging out the three low-lying spots referred to above and filling them with non-porous material, importing road base and compacting, before applying bitumen. Mr Deen responded the same day with a oral quote for \$360,000. Mr Darveniza testified that he immediately rejected that quote because it was too high. Mr Deen testified that Mr Darveniza accepted the quote.
- [20] Mr Deen claimed that over the next three weeks his men performed work pursuant to that contract. Mr Darveniza said that Mr Deen's men did little work over the next three weeks apart from filling in and compacting three or four holes, and that the work they did was simply excavating and filling and compacting the soft (low-lying) spots, as Mr Deen had agreed to do in lieu of placing the road base required under the first contract. Mr Deen claimed his men did a substantial amount of work directed toward the bitumening of the whole area. However after about three weeks, he said, Mr Darveniza approached him and asked his permission to allocate the bitumening to another contractor. Because of their friendship, he agreed to this. At this time Mr Darveniza agreed, according to Mr Deen, that \$240,000 worth of work had been done to date. Mr Darveniza denied all of these allegations.
- [21] Mr Deen was conspicuously unable to produce any documentation to support his claim regarding the work which was done. He said he did not have to purchase road base because his firm kept a large supply of it at its depot. He said he had no records of where his men worked or who worked on this job. His firm's records of fuel usage likewise did not identify the job concerned. In fact there was nothing which his firm had purchased specifically for this job. He did however have a handwritten quotation to do the bitumening work for \$360,000 which would have been sent to Mr Darveniza about 24 May. Generally quotes were faxed to Mr Darveniza by a member of the staff. However the firm did not keep a record of faxes sent. Indeed he could not be certain whether the fax was sent from his home machine or his office machine.
- [22] Mrs Darveniza, who was responsible for the administration of her husband's companies, testified that the fax had never been received.
- [23] Mr Darveniza claimed that having rejected Mr Deen's tender, he contacted Mr Thompson of Ace Bitumen. Mr Thompson testified that he went to the site on 28 May with a view to giving a quote for the bitumening work. He returned a few more times before providing his quotation to do the work for \$209,000 on 12 June. He insisted that Mr Deen's men and equipment be off the site before he began work. He was extremely scornful of the quantity and quality of any work which they had done.

Findings

- [24] It was common ground between the parties that only two questions were to be resolved in this case. The first was whether the oral quotation for \$360,000 was accepted by Mr Darveniza and the second was whether Mr Deen performed work to the value of \$240,000 pursuant to it.

- [25] The first question depends to begin with on word against word, the word of Mr Darveniza against the word of Mr Deen. I have already referred to the unsatisfactory nature of the evidence given by both men. I do not feel confident in relying on either of them except where their evidence is uncontradicted or corroborated in some respect or consistent with plain common sense. Mr Deen submitted there was corroboration of his version in the fact that his men were (albeit only from time to time due to wet weather) working on site for up to three weeks after 24 May, and performed a substantial amounts of work; and that they did so not only following the oral agreement but also following the dispatch of the written quotation by facsimile.
- [26] As I have said, I accept Mrs Darveniza's evidence that no fax was ever received. I found Mr Deen's evidence regarding the written quotation singularly unconvincing. If the document were genuine one would have expected there to be working documents used in the preparation of the quotation. None was produced or referred to it. No attempt was made to establish the provenance of the document: where and by whom it had been filed or what was filed near it; and Mr Deen's explanation of why it was not typed (as were his other quotations and his correspondence) was limp. He claimed that when he did quotations himself he wrote them and when he did them from the office they were typed. He claimed he would be able to produce many handwritten quotes sent to Mr Darveniza. In the event, no attempt was made to do so. Nor was there any attempt to produce records from his telephony provider to show that a call was made to Mr Darveniza at the relevant time. I think it is more probable than not that the handwritten quotation was spurious and was never faxed to Mr Darveniza.
- [27] Nor am I prepared to accept Mr Deen's evidence regarding the amount of work done after 24 May. Its quality is insufficient to convince me of its accuracy, unsupported as it is by any documentation. No doubt it would not have been possible to produce evidence at the standard of that of a quantity surveyor; but I find it difficult to accept that Mr Deen's office would be so devoid of records that he would be required to do the calculations from memory. The quantity of work alleged is challenged by both Mr Darveniza and Mr Thompson. While their evidence has its own problems, it is enough to challenge Mr Deen to produce something more convincing than he has done. Mr Duncombe provided some support for Mr Deen's evidence, but it did not stand up in detail. The number of man hours able to be calculated from his diary bore no relationship to the alleged value of the work. Significantly, none of Mr Deen's calculations was put to Mr Thompson. Mr Thompson had no interest beyond an emotional involvement apparently founded on indignation. I accept his evidence, given repeatedly with vehemence, that there was no road base on the site when he visited it, except perhaps in the soft spots.
- [28] Mr Darveniza's explanation for why the Mr Deen's men were on site from time to time over a period of three weeks or so after 24 May is suspiciously convenient. That explanation -- that he was performing work on the soft spots pursuant to his oral agreement to vary the first contract -- is inconsistent with his admission of para 6 of the defence. It emerged for the first time in cross-examination. That could be explained by the fact that the evidence in chief was extremely short, having regard to the fact that the onus of proof lay on Mr Deen, were it not for the pleading inconsistency. But the weight to be attributed to it is diminished by Mr Deen's own errors on the same point.

- [29] I find that Mr Darveniza's evidence regarding the placement of profile is more likely to be accurate than that of Mr Deen. I infer that Mr Deen's initial instructions to counsel were that Mr Darveniza agreed to use profile in order to save money. When it emerged in the midst of cross-examination that the conversation regarding profile must have occurred after the formation of the first contract, so that any money saved would be for the benefit of Mr Deen, he withdrew those instructions and when he gave evidence claimed he had never given such instructions. He then said that there was no necessary price difference between road base and profile. I do not accept that evidence. I infer that had Mr Deen's claim that he never gave such instructions been correct, his lawyers would have done as any honourable lawyers would do in that situation: they would have provided evidence corroborating his claim. That did not happen.
- [30] It may be that when he was first told of the intention to use profile Mr Darveniza raised no objection. I am however satisfied that he was not then told that it could not be compacted, and that he objected as soon as he found out that fact. I disbelieve Mr Deen's evidence that he not only obtained approval in advance of the use of profile but also explained in advance that it could not be compacted.
- [31] Mr Darveniza found out about the impossibility of compacting profile only shortly before he decided to bitumen the whole area. There was some confusion regarding the sequence of conversations, but I find that Mr Darveniza's version is more likely than that of Mr Deen.
- [32] It follows that the fact that Mr Deen had men on the site from time to time for up to three weeks after about 24 May does not corroborate his evidence about Mr Darveniza's acceptance of his quote.

Conclusion

- [33] I am unable to accept the evidence of either side as representing an accurate and reliable version of what Mr Darveniza said in response to Mr Deen's oral quote of \$360,000. Mr Darveniza's version is more probable than that of Mr Deen. The onus of proving the pleaded set off lies on the latter. He has not proved that the contract upon which the set off is founded was made, nor has he proved that the work in it (save perhaps for excavating and filling the soft spots with road base) was performed. The plea of set off fails. So does the counterclaim.
- [34] The plaintiff's calculation of his claim including interest to 11 December 2008 is \$261,244.64 and that amount was undisputed. Further interest has accrued since that time. The final amount for judgment must include that further interest. I shall hear the parties on that question and on costs.