

**AUTO ENGINEERING SDN BHD**

... **Appellant**

AND

**SWEE SDN BHD**

... **Respondent**

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**(Court of Appeal of Brunei Darussalam)  
(Civil Appeal No. 11 of 2013)**

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Before: Mortimer P, Davies and Burrell JJ A.

**21<sup>st</sup> May, 2014**

*Application under O18 r18 – whether statement of claim discloses reasonable cause of action – effect of “pay when pay” term – implied term – fundamental term implied in all contracts – qualification of “pay when pay” term*

Mr Andrew Ong Teck Wee and Ms Lee Lian Khing (M/S CCW Partnership) for Appellant  
Mr Leney Andrew Albert and Mr Tan Chee Huie (M/S Ahmad Isa and Partners) for Respondent

**Cases referred to in the judgment:**

*Alghussein Establishment v Eton College [1991] 1 All E R 267 at 270j*  
*BP Refinery (Westernport) v Hastings Shire Council, (1994) 180 CLR 266*  
*Durabella Limited v .J Jarvis & Sons Limited ] [2001] EWHC 454*  
*Secured Income Real Estates (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596*

**Davies, J.A.:**

This is an appeal from a decision of a High Court judge in chambers on 2 December 2013 dismissing an appeal from the Deputy Senior Registrar striking out the Appellant’s writ of summons and statement of claim pursuant to an application made by the respondent pursuant to Order 18 rule 18 (1) (b) of the rules of the Supreme Court. That rule relevantly provides:

*“18. (1) The Court may at any stage of the proceedings order to be struck out...any pleading or the endorsement of any writ n the action.....on the ground that –*

- (a) It discloses no reasonable cause of action.....;or*
- (b) It is scandalous, frivolous or vexatious*

.....

*And may order the action to be ....dismissed..... ”*

The appellant and the respondent were respectively the subcontractor and the main contractor under a subcontract dated 24 September 2003 for the execution of mechanical and electrical work under a main contract between the respondent and the Government of Brunei dated 13 May 2003. Under the subcontract the appellant agreed to execute and complete the work referred to in the subcontract within a period of one year commencing from 24 September 2003 for the sum of \$19,224,697.99 less a discount of 5%.

The central question in the judgment under appeal and in this appeal concerns the application to the facts of this case of clause 16 (4) of the subcontract. That clause is in the following terms:

*“(4) For the avoidance of doubt it shall be a condition precedent to the Contractor’s obligation to pay the Subcontractor under this clause or any other clause of the Subcontract that payment is first received by the Contractor from the Employer.”*

It is common ground between the parties that the respondent has not received payment from the Government of Brunei under the main contract. The registrar and the learned judge both held that, in consequence of the application of clause 16 (4), the appellant’s claims, which were for monies due under the subcontract, and for damages for delay caused by the fault of the respondent, were premature as no cause of action for those claims had yet arisen.

By its argument the appellant accepted that if the above clause were construed literally the decision under appeal was correct so far as it applied to the monies due under the subcontract. However it submitted that clause 16(4) did not apply to the claim for damages.

As to the first of these, it contended that there were implied provisos to clause 16(4) that:

- “(i) the Respondent’s breach, default or act of prevention is not a cause or reason for the failure or refusal of the Employer to pay the Respondent under the Main Contract in respect of all sums which are due to the Appellant under the Subcontract; and/or*
- (ii) the Respondent will promptly and effectually take the necessary steps and pursue all available means and remedies to recover payment from the Employer under the Main Contract in respect of all such sums due to the Appellant.”*

In making that contention the appellant relied on the principle that *“a contracting party will not in normal circumstances be entitled to take advantage of his own breach as against the other party.”* *Alghussein Establishment v Eton College [1991] 1 All E R 267 at 270j*. Two points should be made about that case. The first is that the House of Lords recognised that the weight of authority favours the view that, in general, this principle is embodied in a rule of construction rather than in an absolute rule of law: at 274h. It would follow that it would only be implied if it were not inconsistent with the express

terms of the contract. Hence the phrase “*in normal circumstances*”. And the second is that the express provision in that case was held to be inconsistent with the other principal provisions (at 273j) and, on its literal construction, led to a bizarre result (at 274b–c).

In *Durabella Limited v J Jarvis & Sons Limited* [2001] EWHC 454 Judge Humphrey Lloyd QC had to consider whether an implied term in such terms should be implied to exclude the operation of a “*pay when paid clause*”. He held that it should be, basing his conclusion on both the Unfair Contract Terms Act and on the common law. As to the latter he said:

*“It is trite law that one cannot take an advantage from one’s breach of contract.”*

The judge did not refer to *Alghussein* from which it appears that that is not an absolute rule but may yield to express terms to the contrary.

In order to consider the application of that principle to the subcontract here it is necessary first to turn to the context of clause 16 (4). Clause 16 is relevantly as follows:

*“16 (1) The Subcontractor shall submit to the Contractor, within 7 days after the end of each month...a statement, in such form as the Contractor may from time to time prescribe...showing the amounts to which the Subcontractor consider itself to be entitled up to the end of the month in respect of*

*(a) The value of the Subcontract Works executed;*

*(b) .....*

*(c) .....*

*(d) Any other sums to which the Subcontractor may be entitled under the Subcontract or otherwise.*

*.....*

*(2) Subject to the Subcontractor having submitted a Statement for any month to the Contractor, the Contractor shall include, unless inappropriate, the amounts set out therein in the Contractor’s next statement for payment under the Main Contract.*

*(3) Within the agreed period from .....the amounts included in a statement shall only be due and payable to the Subcontractor within 7 days after receipt by the Contractor of such payments from the Employer...*

*(4)*

*[Then follows subclause (4) set out above.]*

*(5) Without prejudice to subclause (4), the Contractor shall be entitled to withhold or defer payment of all or any part of any such sums otherwise due pursuant to the provisions hereof where:*

*(a).....,*

- (b) *the amounts included in any statement are not certified in full by the Engineer, providing such failure to certify is not due to the act or default of the Contractor,*
- (c) *the Contractor has included the amounts set out in the statement in its own statement in accordance with the Main Contract and the Engineer has certified but the Employer has failed to make payment in full to the Contractor in respect of such amounts, providing such failure is not due to the act or default of the Contractor, or*
- (d).....  
 .....

*Notwithstanding the terms of this Clause or any Clause of the Subcontract and without prejudice to subclause 16(4) no amount shall be due and payable to the Subcontractor until the performance security, if required under the Subcontract has been provided by the Subcontractor and approved by the Contractor.*  
 ....."

Of immediate relevance is subclause (5) which is specifically made without prejudice to subclause (4); especially subclauses (5) (b) and (c), each of which contain the proviso "*providing such failure is not due to the act or default of the Contractor*", which has the meaning and effect similar to the first proviso which the appellant seeks to imply in clause 16(4). Even if, absent those provisions, it would be appropriate to construe clause 16(4) as if it were subject to such a proviso, in the present case such implication would be inconsistent with the express provision of such a term in clause 16(5) (b) and (c), because, to imply such a proviso to subclause (4) would render each of these express provisos unnecessary; for it must be assumed that in neither of the events contemplated by those subclauses would the contractor have received payment under the main contract.

It is a fundamental requirement, under the common law, for implication of a term in a contract, that it not be inconsistent with the express terms of the contract. In *BP Refinery (Westernport) v Hastings Shire Council*, (1994) 180 CLR 266. Lord Simon of Glaisdale, speaking for the majority of the Privy Council, said that:

*"In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."*

Consequently we think that, because the implication of such a proviso to clause 16(4) would render the provisions of clause 16(5) (b) and (c) nugatory, the last of these conditions is not satisfied.

However the implication of a more fundamental term, to which we refer shortly, may nevertheless achieve what the appellant seeks.

The appellant meets the same difficulty, we think, in seeking to imply the second term sought by it to be implied in Clause 16(4). Clause 11(2) of the subcontract under the heading “NOTICES AND CLAIMS” relevantly provides:

*“(2) Subject to the Sub-Contractor’s complying with this sub-clause, the Contractor shall take all reasonable steps to secure from the Employer such contractual benefits, if any, as may be claimable in accordance with the Main Contract on account of any adverse physical conditions or artificial obstructions or any other circumstances that may affect the execution of the Sub-Contract Works..... On receiving any such contractual benefits from the Employer (including any extension of time) the Contractor shall in turn pass on to the Sub-Contractor such proportion thereof as may in all the circumstances be fair and reasonable.....”*

This clause is, unlike clause 16(5), not expressly made subject to clause 16(4). However, like clause 16(5), it is a “*clause of the Subcontract*” within the meaning of those words in clause 16(4) and must be read subject to it. We do not think that a proviso as wide as the second term sought to be implied can be implied in clause 16(4) consistently with clause 11(2). To do so would render clause 11(2) unnecessary. But, again, it does not follow that a more fundamental term cannot be implied to the appellant’s benefit.

Indeed we think that the terms sought to be implied here and a term as wide as that stated by Lord Jauncey may be wider than is necessary for the appellant to succeed. And we think that there is a fundamental term implied in all contracts which may be sufficient for the purpose sought to be achieved by the first of the implied terms. It was stated in the following way by Mason J., with whose judgment Gibbs, Stephen and Aickin JJ. agreed in *Secured Income Real Estates (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596:

“25. *But it is common ground that the contract imposed an implied obligation on each party to do all that was reasonably necessary to secure performance of the contract. As Lord Blackburn said in Mackay v Dick (1881)6 App Cas 251 at 263:*

*‘as a general rule.....where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.’*

26. *It is not to be thought that this rule of construction is confined to the imposition of an obligation on one contraction party to co-operate in doing all that is necessary to be done for the performance by the other of his obligations under the contract. As Griffith CJ said in Butt v McDonald (1896) 7 Q LJ 68 at 70-71:*

*‘It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.’*

27. *It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication where the acts in question are necessary to entitle the other contracting party to the benefit under the contract but are not essential to the performance of the party's obligation and are not fundamental to the contract"*

In other words, if the term is so fundamental that, without it, the parties, or one of them, would be deprived entirely of the benefit of the contract, it must be implied, for otherwise there would be no contract.

Here it seems to us, substantial performance by the contractor under the main contract was necessary for the subcontractor to have the benefit of the subcontract.

We therefore think that the appellant was entitled to allege that there was an implied proviso to section 16(4), to the effect that the respondent has substantially performed the main contract. The implication of such a proviso would, we think, enable the appellant to recover monies under the subcontract, notwithstanding non receipt by the respondent, if the respondents have failed, substantially, to perform the head contract.

The appellant also argued that clause 16(4) would not affect the appellant's damages claim. That would depend on whether it can properly be characterised as an "*obligation to pay.....under any other clause of the Subcontract*". We think that a claim for damages for breach of contract is not a claim for payment under a clause of that contract. We think, therefore, that clause 16(4) does not apply to the damages claim.

It follows from what we have said that:

1. the appellant, on the basis of the implied proviso to clause 16(4) which we have identified, and the facts which it alleges in its statement of claim, would be entitled to claim for moneys under the subcontract notwithstanding that the contractor has not received payment from the employer: and
2. the appellant's claim for damages is unaffected by clause 16(4).

The respondent did not in this appeal, address argument on these questions because, it submitted, there was no evidence to support the contentions alleged in the Statement of Claim relied on for this argument. That is to miss the point that applications under Order 18 rule 18 must be determined on the assumption of the truth of the allegations in the pleading.

The respondent also filed a notice under Order 57 rule 7 making a contention that the rights sought to be enforced in this action had been compromised by an agreement consisting principally of an exchange of letters in 2011. The effect of these involves an assessment of evidence and is not relevant to the validity of the pleading.

The appellant should be given leave to amend its statement of claim in accordance with these reasons

***Orders***

1. Appeal allowed.
2. set aside the judgment of the High Court
3. In lieu, allow the appeal and dismiss the application
4. That the appellant have leave to amend its statement of claim within 21 days from the date of this judgment
5. That the respondent pay the appellant's costs here and below.

**Mortimer, P.**

**Davies, J.A.**

**Burrell, J.A.**