JUDGMENT : WYLIE J. HIGH COURT OF NEW ZEALAND AUCKLAND REGISTRY 26 June 2008

[1] This is an appeal and a cross appeal against a decision of Judge D G Mather in the District Court at Waitakere entering summary judgment against the appellants for $108,829 and awarding costs against them on a 2B basis.

[2] The appellants ask that the summary judgment be set aside, and that the proceedings be set down for hearing on the standard track.

[3] There is a cross appeal by the respondent. It seeks:
a) that the appellants should pay its actual and reasonable costs of recovery, including its solicitor/client costs in respect of the District Court proceeding;
b) that the appellants should pay interest to it on the judgment debt from 5 October 2007 to the date of actual payment at the rate of 19.98%; and
c) that it should receive its actual and reasonable costs of and incidental to the hearing of this appeal.

Relevant background

[4] Mr and Mrs Suaniu are the owners of a property at 102 Fonteyn Street, Avondale, Auckland. They reside at their property together with their daughter, Ms H A Ah Loe.

[5] Mr and Mrs Suaniu have limited English, and it is common ground that at all material times their daughter acted as their agent in their dealings with the respondent.

[6] Hi-Qual Builders Limited is a building construction company. It has been represented in its dealings with the appellants by a Mr F L Heard, who is its contracts manager.

[7] Mr and Mrs Suaniu wanted to make alterations to their house. In March 2007, they engaged the respondent to carry out the necessary work. A construction contract was entered into on 5 March 2007. It was executed by Mr Heard on behalf of the respondent, and by Ms Ah Loe. It was for the completion of various works at the property and the contract price was $213,527 plus GST.

[8] Construction works started on or around 5 March 2007, and proceeded for some months thereafter.

[9] The initial contract works were varied on a number of occasions and a number of variation orders were signed by Ms Ah Loe.

[10] On 2 July 2007, an amendment to the construction contract was entered into. It was again signed by Mr Heard on behalf of the respondent, and by Ms Ah Loe. The amendment listed the variation orders agreed prior to that date, and various cost over-runs on PC figures. The total price of these variations and cost over-runs was recorded as being $75,495, together with GST of $9,436.88, making a total of $84,931.88.

[11] Construction continued through until mid-August 2007. Over that period, the appellants say that they paid $209,329.64 to the respondent. The respondent says that the amounts paid totalled $207,329.64 - but nothing turns on this discrepancy. The payments were made pursuant to various payment claims made by the respondent. The majority of those payment claims included as extras the variations which had then been undertaken.

[12] On 21 September 2007, a residential building inspector employed by the Auckland City Council undertook a final inspection of the works at the property. He prepared a report which recorded, "*All in order. OK to proceed* CCC."

[13] On 28 September 2007, the Council issued a Code Compliance Certificate in respect of the building works under number BLD 20062408501. A copy of that certificate was handed to the appellants by Mr Heard on the same day.

[14] The building contract contained what is referred to as a "*payments schedule*" which provided for various percentages of the contract price to be payable on completion of various stages of the building works. The final item in that schedule was as follows:

Payment of 10% on issue of code of compliance - $21,352.278 plus GST

[15] On 30 September 2007, the respondent served a payment claim under the Construction Contracts Act 2002 (*the "Act"*) on the appellants for the sum of $108,820.29 (including GST). That claim sought:
a) the final payment due in terms of the payment schedule - $21,352.27 plus GST (a total of $24,021.30); and
b) a total of $84,798.99 on account of the variations together with accrued interest for earlier progress payments which had been paid late by the appellants.

The payment claim stated that the due date for payment of the amount claimed was 5 days after the payment claim was delivered to the appellants. It had attached to it a page detailing how the interest calculation had been made and a notice containing the information that is required to accompany a payment claim served on a residential occupier pursuant to s 20(3) of the Act.

[16] The payment claim was delivered to Ms Ah Loe's brother at the property on 30 September 2007. He in turn advised that he would pass it on to Ms Ah Loe.

[17] The appellants and Ms Ah Loe did not respond to the payment claim by providing a payment schedule as provided for by s 21(1) of the Act. Ms Ah Loe did prepare a letter dated 3 October 2007. That letter is some five pages long, and it raises a large number of issues in relation to the respondent's performance under the building contract. Curiously, Ms Ah Loe does not say in her affidavit that she sent the letter to the respondent although that can be inferred. Mr Heard in his affidavit in reply asserts that neither the respondent, nor he, ever received the letter. Judge Mather found that the letter did not constitute a payment schedule in terms of s 21 of

the Construction Contracts Act, and that therefore the issue as to whether or not the letter was received by the respondent within the specified timeframe did not need to be resolved. Whether or not the letter was a payment schedule was raised in the notice of appeal filed by the appellants at para 4.1(a), but this argument was not advanced by Mr Perese appearing on their behalf at the hearing of the appeal. The Court was advised that the argument was no longer being taken. I have accordingly proceeded on the basis that the appellants did not provide a payment schedule in response to the payment claim made against them.

[18] The appellants did not pay either in whole or in part the amount claimed by the respondent in the payment claim.

[19] On 15 October 2007, a Mr Kinraid from the Auckland City Council contacted Mr Heard, and asked him to attend a meeting at the Council's office on 17 October 2007.

[20] Mr Heard attended the meeting. It became apparent that Ms Ah Loe had contacted Mr Kinraid directly, and raised concerns about some of the work that had been carried out by the respondent. The purpose of the meeting was to discuss those issues. Mr Heard stood by the work that had been done, but said that if the Council was satisfied that particular items needed repair, that the respondent was happy to go back to the property and do the necessary work. In a record of the meeting kept by Mr Kinraid, it is noted as follows:

"*All parties present at this meeting have agreed that the passed final inspection of 21/09/2007 will be rescinded along with the code of compliance certificate issued to Frank Heard on 28/09/2007*."

[21] Ms Ah Loe did not attend the meeting. Nor did the appellants.

[22] A site instruction was prepared addressed to Ms Ah Loe. It was to be copied to Mr Heard. It listed eleven items which needed to be rectified to ensure compliance with the building code. It required those items to be completed by 17 November 2007.

[23] On 18 October 2007, Mr Larkin and Mr Heard visited the property and undertook a brief exterior inspection to estimate the extent of the remedial works to be undertaken.

[24] Mr Heard then made various attempts to contact Ms Ah Loe by telephone to arrange a time to undertake the remedial works. He was unable to make contact with her. On 2 November 2007, he sent a letter to Ms Ah Loe requesting access to the property to complete the remedial works. On 7 November 2007 he visited the property and hand delivered a further letter to Mr Suaniu. The appellants advised him that the respondent no longer had permission to go onto the property. As a consequence, Mr Heard delivered a further letter requesting access to attend to the remedial works required on 22 November 2007. On the same day, Mr Heard spoke to Mr Suaniu. Mr Suaniu advised that he did not want the respondent or its workmen on his property at all. This was confirmed in a letter which the respondent received from Ms Ah Loe dated 23 November 2007. Mr Heard responded by letter dated 23 November 2007, advising that the respondent was prepared to engage an independent contractor to undertake the remedial works at its expense so that the situation could be resolved. That offer was not taken up.

[25] The respondent has obtained a quote from another building company - Franix Construction Limited - for $6,300 to attend to the remedial work.

[26] It seems that remedial works have still not been completed. The appellants, and Ms Ah Loe, have not allowed the respondent or an independent builder access to the property.

District Court's decision

[27] In his reserved decision, Judge Mather essentially decided two issues:

a) that the appellants had failed to provide a payment schedule as required by the Act;

b) that the issue and then subsequent withdrawal of the Code Compliance Certificate, and the listing of the remedial work to be undertaken, by the Auckland City Council, did not invalidate the payment claim submitted by the respondent. They simply provided a basis on which the appellants were able, within the time allowed to them, to provide a payment schedule which took into account those developments. Had they done so the merits of their claim could then have been determined at an adjudication under the Act.

[28] Accordingly, he held that the appellants had no arguable defence to the claim, and that the respondent was entitled to summary judgment in the amount sought.

Submissions

[29] As noted above, the appellants do not challenge the District Court's finding that they did not provide a payment schedule to the respondent in response to its payment claim.

[30] Rather the appellants concentrate on the fact that the Code Compliance Certificate was rescinded by the Auckland City Council. Mr Perese on behalf of the appellants focused on s 19 of the Act, and in particular upon the definition of the word "payee" as meaning a party to construction contract who is entitled to a progress payment. He argued that the basis for the payment claim had "collapsed", because the works undertaken by the respondent were not capable of being certified as building code compliant. He argued that the final progress claim only became payable when a Code Compliance Certificate was issued, and that what was agreed in the building contract as being necessary to trigger the final progress payment claim had not actually occurred.

[31] Mr Murray for the respondent argued that there was a valid payment claim, because there was a Code Compliance Certificate in existence at the time the claim was made, that the appellants did not provide a payment schedule nor make payment of the amount claimed, and as a consequence the amount sought in the

payment claim became due and owing, and recoverable as a debt, by operation of ss 22 and 23 of the Act. He argued that the purported rescission of the Code Compliance Certificate did not affect the respondent's rights.

The Construction Contracts Act

[32] Both parties accept that the contract they entered into is a residential construction contract as defined by the Construction Contracts Act, and that the Act applies to that contract.

[33] The purpose of the Act was to reform the law relating to construction contracts. Section 3 records that the Act seeks:

a) to facilitate regular and timely payments between the parties to a construction contract; and
b) to provide for the speedy resolution of disputes arising under a construction contract; and
c) to provide remedies for the recovery of payments under a construction contract.

[34] The overall scheme of the Act, the payment claim and the response process has been considered by the Courts on a number of occasions. In ***George Developments Limited v Canam Construction Limited*** [2006] 1 NZLR 177, the Court of Appeal, in the context of a dispute between parties to a construction contract about the validity of a payment claim issued under the Act noted, as follows:

*[41] We are satisfied that the necessary analysis must be undertaken with the purpose of the Act in mind. The purpose provision of the Act includes the fact that the Act was "to facilitate regular and timely payments between the parties to a construction contract". The importance of such regular and timely payments is well recognised. Lord Denning MR (quoted in **GilbertAsh (Northern) Ltd v Modern Engineering (Bristol) Ltd** [1973] 3 All ER 195 (HL) at p 214 per Lord Diplock) said: "There must be a `cash flow' in the building trade. It is the very life blood of the enterprise."*

[55] ... As long as the construction contract provides for the payee to be paid the claimed amount in consideration for its performance of construction work (whether or not the entitlement is contingent on a factor such as an extension of time being granted), the payee is entitled to make a claim for payment in a payment claim. If the payer's stance is vindicated, the particular amount will not have to be paid, but that will not prejudice the entitlement of the payee to be paid the other amounts claimed in the payment claim or invalidate the payment claim as a whole. It is not necessary that every amount claimed in the payment claim can be directly linked to a physical task involved in the construction of the building or structure. The Act was specifically intended to avoid artificial distinctions. Cash flow was intended to be protected by the Act and it is to be interpreted so as to achieve its object of speeding up payments.

[35] There are also helpful analyses by Gendall AJ in ***10 Gilmer Limited v Tracer Interiors and Construction Ltd*** HC WGN CIV 2005-485-2009, 6 December 2005 at [22] to [35] and by Asher J in ***Marsden Villas Limited v Wooding Construction Limited*** [2007] 1 NZLR 807 at [92]. I particularly note [16] and [17] in the latter case:

[16] The Act sets up a procedure whereby requests for payment are to be provided by contractors in a certain form. They must be responded to by the principal within a certain time frame and in a certain form, failing which the amount claimed by the contractor will become due for payment and can be enforced in the Courts as a debt. At that point, if the principal has failed to provide the response within the necessary time frame, the payment claimed must be made. The substantive issues relating to the payment can still be argued at a later point and adjustments made later if it is shown that there was a set-off or other basis for reducing the contractor's claim. When there is a failure to pay the Act gives the contractor the right to give notice of intention to suspend work, and then if no payment is made, to suspend work. There is also a procedure set up for the adjudication of disputes.

[17] The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of that procedure, and the quick resolution of disputes. The processes that it sets up are designed to sidestep immediate engagement on the substantive issues such as set-off for poor workmanship which were in the past so often used as tools for unscrupulous principals and head contractors to delay payments. As far as the principal is concerned, the regime set up is "sudden death". Should the principal not follow the correct procedure, it can be obliged to pay in the interim what is claimed, whatever the merits. In that way if a principal does not act in accordance with the quick procedures of the Act, that principal, rather than the contractor and sub-contractors, will have to bear the consequences of delay in terms of cash flow.

[36] I agree with these comments. The contract entered into between the parties and their respective rights arising out of the same fall to be determined in the context of the legislation, and in particular, ss 19 to 23, as explained in the relevant case law.

The Contract

[37] In the present case the parties provided for progress claims in their contract. They were entitled to do so - s 14. Indeed they were wise to do so because the default provisions that relate to progress claims to not apply to residential construction contracts - s 10. There are some default provisions - ss 20(1)(b) and 22(b) - but they are limited in their ambit.

[38] There was a "*payment schedule*" in the contract, which provided for a deposit of 10% of the contract price on commencement of the work, for the payment of 20% on completion of the floor, 20% on completion of the roof, 20% on completion of cladding and insulation, 20% on completion of linings, and the final 10% on issue of the code of compliance. In addition, c17.1 of the contract provided as follows:

Where work is undertaken over a period exceeding on [sic] week payment claims/invoices maybe issued for progress payment covering work done and costs incurred including variations up to the end of each week.

[39] The payment schedule in the contract was based on the contract price, and it provided when progress claims could be made in respect of the original works and fixed the percentage of the contract price that could then be claimed. Variations (as defined in the contract - cl 11) were not covered by the payment schedule. They could be claimed on a weekly basis in accordance with c17.1.

[40] As noted above, here the payment claim made by the respondent on 30 September 2007 sought payment of the final 10% of the contract price, of the amounts claimed for variations, and of interest in accordance with the contract on earlier payments paid late by the appellants.

[41] Section 20(1)(a) provides as follows:

(1) A payee may serve a payment claim on the payer for each progress payment,

(a) if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; ...

[42] At the time the payment claim was made, a Code Compliance Certificate had been issued by the Auckland City Council. It follows that the payment claim for 10% of the contract price could properly be made in accordance with s 20(1)(a) of the Act. So could the payment claim insofar as it sought payment for the agreed variations. It was made in accordance with c17.1 of the contract.

[43] As required by cl 20(2), the payment claim was in writing. It made express reference to the contract between the parties dated 5 March 2007. It identified the construction work undertaken and the relevant period to which it related. It indicated a claimed amount, and it gave a due date for payment. It also detailed how the claimed amount had been calculated, and stated that it was made under the Construction Contracts Act. It was accompanied by an outline of the process for responding to the claim, and an explanation of the consequences of not doing so, or of not paying the claimed amount (or the scheduled amount) in full. On its face, the payment claim complied with the provisions of s 20(2) and (3) of the Act. The appellants have not suggested otherwise.

Date for payment

[44] There is a difficulty with the due date for payment detailed in the payment claim. It stated that the due date for payment was 5 days after the payment claim was delivered to the appellants.

[45] There is nothing in the contract between the parties which expressly provided for payment 5 days after the date a payment claim was delivered. Rather cl 7.7 of the contract provided as follows:

Payment of the claimed amount plus Goods and Services Tax and without any retention, is due and payable upon receipt. If you disagree for any reason with the claimed amount, you will respond to Hi-Qual Builders Limited in writing with a payment schedule before payment is due, detailing a scheduled amount (the amount that you propose to pay) and your reasons and basis for calculation for any item in the payment claim that you do not propose to pay in full. You will pay the scheduled payment by the due date. If Hi-Qual Builders Limited disagree with your payment schedule, we may refer the matter to adjudication (refer disputes and differences). Contra charges will not be accepted.

[46] In its terms, cl 7.7 is a nonsense. It requires payment of the amount claimed upon receipt of a progress payment claim, but goes on to provide that the appellants had a right to respond with a payment schedule before payment was due.

[47] As the District Court Judge observed, that regime is unworkable.

[48] Mr Murray submitted that to give cl 7.7 practical meaning and business efficacy, it has to be interpreted to mean that the payment was due and payable within a reasonable time of receipt. As a consequence, he submitted that the requirement to respond in writing with a payment schedule before payment was due required that a response be submitted before expiry of a reasonable time after receipt.

[49] Here the payment claim asserted that payment was due 5 days after delivery - i.e. by 5 October 2007. Mr Murray submitted that that was the relevant reasonable time. He said that the appellants were therefore required to submit a payment schedule prior to 5 October 2007, and that they did not do so.

[50] The significance of this date was that it predated the purported rescission of the Code Compliance Certificate by the Auckland City Council on 17 October 2007.

[51] I cannot accept Mr Murray's argument.

[52] There is nothing in the contract stipulating that the due date for payment of an amount claimed in a payment claim is 5 days after receipt of the payment claim. The contract provisions are unworkable. I accept that a date when payment is due has to be implied. In my view it is not however 5 days simply because that is the date detailed in the payment claim dated 30 September 2007. There is nothing in the course of dealings between the parties to suggest that the parties had agreed to payment claims becoming due 5 days after receipt. The previous progress claims were before the Court, and they did not contain any due date for payment. To allow the respondent to impose a due date 5 days after delivery of the progress claim in the final progress claim would be to allow the respondent to unilaterally impose a variation to the contract. That is not appropriate. I agree with the District Court Judge in that regard.

[53] I also agree with the Judge that the Act assists. It provides in s 22(b) that a payer becomes liable to pay the amount claimed in a payment claim if the payer does not provide a payment schedule to the payee within the

time required by the construction contract, or if the contract does not provide for the matter, within 20 working days after the payment claim is served.

[54] Here the construction contract between the parties did not stipulate a workable time with which a claim became payable or a payment schedule had to be provided. It follows in my view that the appellants had 20 working days from the date of service of the payment claim by the respondent to respond by way of a payment schedule, or to pay. Here that 20 working day period expired on 29 October 2007.

[55] This minor difficulty with the payment claim does not invalidate it - ***George Developments Limited v Canam Construction Limited*** at [42], [43], [46], [47], [56] and [68].

Effect of the "rescission" of the Code Compliance Certificate

[56] The Auckland City Council purported to rescind the Code Compliance Certificate as from 17 October 2007, before payment of the payment claim was due. The appellants argue that this undermines the validity of the progress claim. They say that "*the state of affairs which is contemplated by the contractual condition that the final payment is made on the issue of a Code Compliance Certificate has not been satisfied, and has with the respondent's concurrence never been satisfied*". They argue that no debt arises under the contract as a consequence.

[57] In my view this argument is unsound. The Act puts in place detailed provisions for the issue of a payment claim, and for a response by way of a payment schedule - ss 20 and 21. It details what happens if the procedure is not followed and payment is not made - ss 22 and 23. It then contains provisions whereby disputes can be referred to adjudication. Subpart 3 of the Act dealing with the procedure for making and responding to payment claims applies to all construction contracts. It is in effect a mandatory code which governs how a progress claim may be made, what a payee may do on receipt of a progress claim, and what happens if they do not do so. Section 12 provides that parties cannot contract out of these provisions although they can to a limited extent agree between themselves on certain matters relevant to progress claims - s 14.

[58] Here the appellants were clearly dissatisfied with the respondent's workmanship and performance under the construction contract. They itemised various matters of concern in their letter of 3 October 2007. They did not however respond to the payment claim by providing a payment schedule to the respondent under s 21. That was the avenue they should have adopted.

[59] The purported rescission of the Code Compliance Certificate on 17 October 2007 does not affect the position. The Auckland City Council issued a list of works required to be undertaken to ensure compliance with the building code as at 17 October 2007. These matters could readily have been listed in a payment schedule issued by the appellants in response to the payment claim as required by s 21. The appellants had been put on notice, as required by the Act, of the consequences of not responding to the payment claim. They had instigated a review of the Code Compliance Certificate by the Auckland City Council. They were aware of the Council's response. They had ample time after 17 October 2007 and before the due date for payment to respond to the payment claim by issuing a payment schedule, disputing the respondent's entitlement to make a progress claim, listing the work which required rectification, and indicating what they were prepared to pay. This is what they should have done under s 21(3).

[60] In addition to the provisions contained in the Act, there was an express contractual provision indicating what the appellants were to do if they disagreed for any reason with the claimed amount - cl 7.1. There was also a warranty provision, cl 18, requiring the appellants to notify the respondent promptly of any defects in the workmanship or materials, and obliging the respondent to remedy any defective workmanship within 90 days of completion of the work.

[61] The appellants took none of these steps.

[62] Where a party to a construction contract does not respond to a payment claim by providing a payment schedule, that party becomes liable to pay the claimed amount to the payee - s 22.

[63] The non provision of a payment schedule is one of the "***crucial hinges***" of the Act which has significant consequences - ***Marsden Villas Limited v Wooding Construction Limited*** at [111] and ***Auckland Waterproofing Limited v TPS Consulting Limited*** (2007) 18 PRNZ 797 at [44] to [45].

[64] Once a payer becomes liable to pay the claimed amount to the payee as a consequence of failing to provide a payment schedule, the payee may recover from the payer, as a debt due to the payee, in any Court, the unpaid portion of the claimed amount, and the actual and reasonable costs of recovery awarded against the payer by that Court - s 23.

[65] It follows that the respondent was entitled to summary judgment on its claim, and the appellants' appeal cannot succeed.

[66] There are two additional matters I should add in this context:

a) First, such rights as the appellants may have under the contract are not irrevocably lost. They can invoke the disputes procedure contained in the contract - cl 9. They can take advantage of the adjudication procedures contained in the Act - s 25. They can seek redress in the Courts. It is simply that they have to pay now, and argue later.

b) Secondly, I have noted above that the Auckland City Council purported to rescind the Code Compliance Certificate. The legal basis on which it did so is unclear. There is no provision in the Building Act 2004 permitting

the rescission of a Code Compliance Certificate. Normally, once an administrative decision in the exercise of a statutory power has been made, and communicated to the persons to whom it relates in a way that makes it clear that the decision is not of a preliminary or provisional kind, it is final and irrevocable – see ***Goulding v Chief Executive, Ministry of Fisheries*** [2004] 3 NZLR 173 at [43]. It may be that the Council was acting in reliance on s 13 of the Interpretation Act 1999. That section is similar but not identical to s 25(j) of the now repealed Acts Interpretation Act 1924. It was generally held that the power conferred by s 25(j) was of limited scope, and that it could not be exercised simply because the decision maker had changed his or her mind. Various commentaries on the Building Act raise the possibility that s 13 may permit a territorial authority to "*correct*" an erroneous Code Compliance Certificate. I am not convinced that that is necessarily the case. The point was not fully argued before me. It is unnecessary for the purposes of this judgment to determine it, and I do not do so.

Cross Appeal

[67] I now turn to the cross appeal.

[68] The respondent seeks its actual and reasonable costs of recovery in both the District Court proceeding, and on this appeal.

[69] Relevantly, s 23(2) of the Act dealing with the consequences of not paying a claimed amount where no payment schedule is provided, states as follows:

(2) The consequences are that the payee

(a) may recover from the payer, as a debt due to the payee, in any court,

(i) the unpaid portion of the claimed amount; and

(ii) the actual and reasonable costs of recovery awarded against the payer by that court; ...

[70] This provision was considered by Duffy J in Auckland Waterproofing Limited v TPS Consulting Limited. Her Honour undertook a detailed analysis of the statutory provisions, and concluded that Parliament intended that payees should be able to pursue recovery of s 23 debts through Court process, and provided the quantum of the costs incurred as a consequence was reasonable and not excessively high, to obtain the actual costs of doing so. I agree with this analysis.

[71] I also note the discussion by the Court of Appeal in ***Salem Limited v Top End Homes Limited*** CAI 69/05, 12 December 2005 at [5] and [9].

[72] Here the District Court Judge ordered costs on a 2B basis. In my view, he erred in so doing. He should have awarded the respondent its actual and reasonable costs. Equally, the respondent is entitled to its actual and reasonable costs in this Court.

[73] The respondent also seeks interest on the amount awarded to it from 5 October 2007 to the date of payment. It seeks interest at the rate of 19.98%.

[74] The contract between the parties provided in c17.3 as follows:

You will pay interest on overdue payments at the annual rate of 19.98% simple calculated daily from the due date.

[75] The respondent in its statement of claim claimed interest at this rate - paragraph (b) in the prayer for relief. This claim was resisted in the notice of opposition filed to the summary judgment application.

[76] The District Court Judge did not award interest. Nor did he deal with the issue in his judgment.

[77] The provision relating to payment of interest is a term of the construction contract. It is clear and unequivocal. It entitles the respondent to recover interest at the rate of 19.98%. That sum can properly be claimed from the due date for payment - 20 working days after the payment claim was served on the appellants - until the date of judgment. In my view however it cannot be claimed thereafter. There is nothing in the contractual provision providing that the debt does not merge on judgment, or that interest at the contract rate will continue to accrue after judgment. I refer to ***ASB Bank Limited v Michael Lin-Yun Teng*** HC AK CIV 2006-404-5849, and the authorities there cited. The contractual right to interest merges once judgment is given, and the statutory rate of interest applies post judgment - r 538 of the High Court Rules and s 87 of the Judicature Act 1908.

[78] It follows that this aspect of the cross appeal is allowed in part.

Summary

[79] For the reasons given above, the appellants' appeal is dismissed.

[80] The cross appeal is allowed to the following extent:

a) the respondent is entitled to its actual and reasonable costs incurred on the proceeding in the District Court, and on the appeal to this Court. If the parties are unable to agree on the costs payable pursuant to this judgment, then the respondent is to file a memorandum in this regard within 20 working days of the date of this judgment. The appellants are to reply within a further 10 working days, and the respondent is to have a right of reply to the appellants' submissions within a further period of 5 working days;

b) the appellants is entitled to interest at the rate of 19.98% from the date that the amount claimed in the payment claim became due and payable, 29 October 2007, until the date of judgment in the District Court. Thereafter, and until the date of payment, it is entitled to interest at the statutory rate, currently 7.5% per annum.

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Mr P C Murray and Ms C L Clayton for the Respondent instructed by DLA Phillips Fox, P O Box 160, Shortland Street, Auckland