

Statement of Claim - Glen Eira

Form 5F

Rule 5.02

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

SCI 2013

BETWEEN

01796

GLEN EIRA CITY COUNCIL  
(ABN 65 952 882 314)

Plaintiff

and

HANSEN YUNCKEN PTY LTD  
(ABN 38 063 384 056)

Defendant

ORIGINATING PROCESS [SCV-CMS]

Date of document: 10 April 2013

Filed on behalf of: The Plaintiff

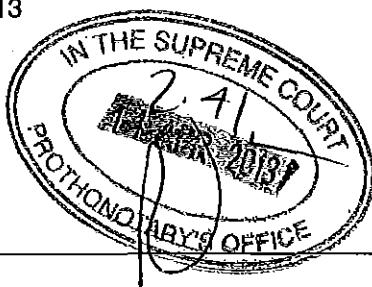
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Ref: JGM 03 2029 1249

Attention: Mr J Mulcahy

Email: [jos.mulcahy@ashurst.com](mailto:jos.mulcahy@ashurst.com)

TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this originating process. This originating process has been filed electronically in the Supreme Court of Victoria Case Management System (SCV-CMS).

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearances stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by following the procedure set out in Schedule 1 (attached) and filing a Notice of Appearance in the form of Schedule 2 (attached).

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

THE PROPER TIME TO FILE AN APPEARANCE is as follows—

(a) where you are served with the originating process in Victoria, within 10 days after service;

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**GLEN EIRA CITY COUNCIL**  
(ABN 65 952 882 314)

Plaintiff

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**STATEMENT OF CLAIM**

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NOTE: A copy of all documents referred to in this Statement of Claim may be inspected at the offices of the Plaintiff's solicitors by prior appointment.

**The Parties**

1. The Plaintiff (**Council**) is and was at all material times a council constituted under the *Local Government Act 1989* and capable of suing.
2. The Defendant (**HY**) is and was at all material times:
  - (a) incorporated according to law and ~~capable of being sued~~; and
  - (b) carrying on business as a ~~building contractor~~

December 2009      3 years + 4 months  
April                    2013

### The Contract

3. The Council (as Principal) and HY (as Contractor) entered into a construction contract dated 9 December 2009 for the construction of the Glen Elra Sports and Aquatic Centre (Contract).

### Particulars

The Contract is in writing and is comprised of the following documents:

- (a) Formal Instrument of Contract;
- (b) General Conditions of Contract (Amended AS2124-1992); and
- (c) Annexures Part A to Part R.

4. There were express terms of the Contract including those set out in Schedule 1.

### ~~liquidated damages~~

5. During the course of the Works, the Superintendent granted the following extensions of time to the Dates for Practical Completion:

- (a) one (1) day for the Southern Carpark (Zone 2); and
- (b) three (3) days for the Balance of the Works.

6. In the premises, the Dates for Practical Completion were extended as follows.

Separable Portion	Date for Practical Completion (original)	Date for Practical Completion (as extended)
Southern Car Park (Zone 2)	14 May 2010	17 May 2010
Central Car Park (Zone 3)	2 May 2011	2 May 2011
East Boundary Road (including signalisation of entry) (Zone 6)	3 March 2011	3 March 2011
Balance of the Works	22 July 2011	27 July 2011

7. In breach of the Contract, HY failed to bring the Separable Portions to Practical Completion by the relevant Dates for Practical Completion.

#### PARTICULARS

Practical Completion for each Separable Portion was achieved on the following dates, being the Dates of Practical Completion:

- (i) Southern Car Park (Zone 2) – 27 May 2010;
- (ii) Central Car Park (Zone 3) – 21 March 2012;
- (iii) East Boundary Road (including signalisation of entry) (Zone 6) – 21 May 2011; and
- (iv) Balance of the Works – 2 May 2012.

8. As a result, HY is indebted to the Council in the sum of \$1,589,000.00 by way of liquidated damages, as follows:

Separable Portion	Date for Practical Completion	Date of Practical Completion	No. of days later	Rate of liquidated damages	Liquidated damages payable
Southern Car Park (Zone 2)	17 May 2010	27 May 2010	10	\$1,000	\$10,000
Central Car Park (Zone 3)	2 May 2011	21 March 2012	324	\$1,000	\$324,000
East Boundary Road (Including signalisation of entry) (Zone 6)	3 March 2011	21 May 2011	79	\$1,000	\$79,000
Balance of the Works	27 July 2011	2 May 2012	280	\$4,200	\$1,176,000
<b>TOTAL</b>					<b>\$1,589,000</b>

9. During the course of the Works, the Superintendent granted the following extensions of time to the Dates for Handover Access:

- (a) two (2) days for the Main Entry Foyer;
- (b) 17 days for the Aquatic Administration and Retail;
- (c) 17 days for the Café;
- (d) two (2) days for the Consulting Suites;
- (e) two days (2) for the Wellness Centre;
- (f) two (2) days for the Crèche; and
- (g) two (2) days for the Gymnasium.

10. As a result the Dates for Handover Access for each Handover Access Area were extended as follows:

Handover Access Area	Date for Handover Access (original)	Date for Handover Access (as extended)
Main Entry Foyer	22 March 2011	24 March 2011
Aquatic Administration and Retail	17 December 2010	11 January 2011
Café	17 December 2010	11 January 2011
Consulting Suites	4 February 2011	8 February 2011
Wellness Centre	23 February 2011	25 February 2011
Crèche	4 February 2011	8 February 2011
Gymnasium	20 June 2011	22 June 2011

11. **If** breach of the Contract HY failed to bring the Handover Access Areas to Handover Access Stage by the relevant Dates for Handover Access.

#### PARTICULARS

Handover Access Stage in respect of each Handover Access Area was achieved on the following dates, being the Dates of Handover Access:

- (i) Main Entry Foyer – 15 February 2012;
- (ii) Aquatic Administration and Retail – 16 February 2012;
- (iii) Café – 2 April 2011;
- (iv) Consulting Suites – 19 May 2011;
- (v) Wellness Centre – 20 June 2011;
- (vi) Crèche – 11 November 2011; and
- (vii) Gymnasium – 8 February 2012.

12. As a result HY is indebted to the Council in the further sum of \$766,000.00 by way of liquidated damages.

Handover Access Area	Date for Handover Access	Date of Handover Access	No of days late	Rate of liquidated damages	Liquidated damages payable
Main Entry Foyer	24 March 2011	15 February 2012	328	\$500	\$164,000
Aquatic Administration and Retail	11 January 2011	16 February 2012	401	\$500	\$200,500
Café	11 January 2011	2 April 2011	81	\$500	\$40,500
Consulting Suites	8 February 2011	19 May 2011	100	\$500	\$50,000
Wellness Centre	25 February 2011	20 June 2011	115	\$500	\$57,500
Crèche	8 February 2011	11 November 2011	276	\$500	\$138,000

Handover Access Area	Date for Handover Access	Date of Handover Access	No of days late	Rate of liquidated damages	Liquidated damages payable
Gymnasium	22 June 2011	8 February 2012	231	\$500	\$115,500
<b>TOTAL</b>					<b>\$766,000</b>

### **Backcharges**

13. Further, in or about November 2009 HY requested ~~access to Council's electricity and water utilities~~ in the proximity of the softball pavilion on the basis that HY would be responsible for the cost of those utilities rather than having to supply its own utilities as required by clause 29.1. Council agreed to provide HY with access to these utilities on the basis that check meters would be installed by HY and payment made for the costs incurred by Council in connecting, supplying and disconnecting the utilities required by HY.

### **PARTICULARS**

~~The agreement was verbal and made in November 2009 between Raj Gopalakrishnan on behalf of the Council and Paul Bolton (Site Manager) on behalf of HY, the substance of which is as alleged.~~

14. In or about November 2009, HY installed a check meter in the proximity of the softball pavilion.

15. In or about November 2010 HY requested access to Council's electricity utilities in the proximity of the cricket pavilion on the basis that HY would be responsible for the cost of the electricity rather than having to supply its own electricity utilities as required by clause 29.1. Council agreed to provide HY with access to the electricity utilities on the basis that check meters would be installed by HY and payment made for the costs incurred by Council in connecting, supplying and disconnecting the utilities required by HY.

## PARTICULARS

The agreement was verbal and made in November 2010 by Raj Gopalakrishnan on behalf of the Council and Jason Dean (Site Foreman) on behalf of HY, the substance of which is as alleged.

16. In or about November 2010, HY installed a check meter in the proximity of the cricket pavilion.
17. As a result of HY's utility usage, Council incurred and has paid for utility charges in the amount of \$137,218.92.

## PARTICULARS

Details of these charges are set out in Schedule 2.

18. In breach of the agreements referred to in paragraphs 13 and 15, HY has failed to pay the utility charges.
19. Further and/or in the alternative, HY is liable to the Council for the cost of the utilities used in the performance of HY's obligations under the Contract, being the execution of the work under the Contract, in accordance with clauses 3.1A and 29.1.

## Variations

20. Further, during the course of the Works, HY reduced the scope of and/or omitted certain parts of the work under the Contract for its convenience.

## PARTICULARS

Details of the work under the Contract which was reduced in scope or omitted and particulars of the Variation Price Submissions submitted by HY in respect of the work which was omitted or reduced in scope are set out in Schedule 3.

21. In accordance with clause 40.5, the Superintendent valued those parts of the work under the Contract which were reduced in scope or omitted.

## **PARTICULARS**

Details of the valuations of each part of the work under the Contract which were either reduced in scope or omitted are set out in Schedule 3.

22. ~~The value of the omissions and the reduction in the scope of the work under the Contract is \$453,418.44 in favour of the Council.~~
23. ~~Further, during the course of the Works HY changed the character, materials or quality of certain parts of the work under the Contract.~~

## **PARTICULARS**

Details of the character, materials or quality of the work under the Contract which were changed and particulars of the Variation Price Submissions submitted by HY in respect of the changes are set out in Schedule 4.

24. In accordance with clause 40.5, the Superintendent valued the changes to the character, materials or quality of the work under the Contract.

## **PARTICULARS**

Details of the Superintendent's valuations of the parts of the work under the Contract which were changed are set out in Schedule 4.

25. ~~The value of the changes to the character, materials or quality of the work under the Contract is \$321,057.00 in favour of the Council.~~

## **Defective Works**

26. Further, in breach of clause 3A.1(f)(i), HY failed to ensure that certain Works, when delivered, were fit and adequate for the purpose for which they were intended.

## **PARTICULARS**

Particulars of the defective Works are set out in Schedule 5.

27. Pursuant to clause 37 and/or 30.3, the Superintendent directed HY to reconstruct, replace and/or correct certain material or work and/or omission or defects in the work under the Contract (Rectification Work) which were not in accordance with the Contract, and gave notices to HY that if it failed to do so within the time specified in the relevant direction, the Council would have the work carried out by other persons.

#### PARTICULARS

Particulars of the directions are set out in Schedule 5.

28. HY failed to undertake the Rectification Work as directed by the Superintendent, within the time set out in the notices.

29. ~~As a consequence of the matters set out in paragraphs 26 to 28, the Council has suffered loss and damage.~~

#### PARTICULARS

Particulars of the costs of rectification will be provided prior to trial.

#### ~~Additional consultants fees~~

30. ~~Further, in accordance with clause 31.1, between June 2010 and March 2012 the Superintendent directed that the 25 metre pool, being part of the work under the Contract, be tested by Ancon Beton Ply Ltd and Mantic Architecture.~~

31. ~~The tests:~~

(a) ~~showed that the material or work was not in accordance with the Contract; and/or~~

(b) ~~were consequent upon failures of HY to comply with a requirement of the Contract.~~

#### PARTICULARS

 A significant cold joint at mid-height in the pool wall.

 Honeycombing of concrete at numerous locations with steel reinforcement being exposed in places.

- (iii) Concrete lacking proper compaction in several areas and over compaction in other areas resulting in a loss of fines from the base of the external wall forms.
- (iv) The Concrete in an area of the wall on the water face of the shallow end wall was soft and sandy to the extent that it could be scratched away by hand.
- (v) The Hydrotite waterstop at the eastern end of the north wall was at an angle of 45 degrees and was elevated off the pool floor slab rendering it inoperable for its intended purpose.
- (vi) Hair line cracks running around the pool walls.
- (vii) The wall faces were not constructed to a Class 2 finish.

32. ~~The Council incurred fees in the amount of \$91,319.00 in respect of the testing undertaken and advice provided by the consultants in relation to the defective work associated with the 25metre pool.~~

#### **PARTICULARS**

Particulars of this sum are set out in Schedule 6.

33. ~~It is payable to the Council for the cost of testing undertaken by the consultants in accordance with clause 31.7(a).~~

#### **Damages**

34. ~~By reason of the matters set out at paragraphs 5 to 25 (inclusive) and 30 to 33 (inclusive), the Council has suffered loss and damage in the sum of \$3,084,846.00.~~

**PARTICULARS**

<b>Works Done</b>	
<b>Contract Sum</b>	\$38,076,011.77
Variations	\$1,182,151.25
<b>Total</b>	\$40,250,162.36
<b>Deductions</b>	
Liquidated damages	\$2,355,000.00
Backcharges	\$137,218.92
Variations (omissions and reduced scope)	\$453,413.44
Variations (change in character/quality)	\$321,057.00
Damages for consultants' fees	\$91,319.00
<b>Total</b>	\$36,902,154.00
<b>Final Contract Amount (value of works done)</b>	\$36,902,154.00
<b>Subtotal (Amount Paid to HY)</b>	\$39,987,000.18
<b>Balance owed to the Council</b>	\$3,084,846

35. By reason of the matters set out at paragraphs 26 to 29 (inclusive), the Council has suffered loss and damage.

**PARTICULARS**

Particulars of the costs of rectification will be provided prior to trial.

**AND THE PLAINTIFF CLAIMS:**

- A. Payment in the sum of \$3,084,846.00 pursuant to paragraph 34.
- B. Damages pursuant to paragraph 35.
- C. Interest pursuant to statute.
- D. Costs.

Dated 10 April 2013

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/s J.G. Mulcahy  
Ashurst Australia  
Solicitor for the Plaintiff