

Whether he was thereafter contractually bound for costs of any work done in connection with those matters is a question which was not relevant to the proceedings before the Magistrate and is not relevant in the present proceedings. The right of the Council to carry out street construction work and claim payment of an amount in excess of payment made or security given by the owner is provided for by subsection (4).

However, the Council's right to claim payment by way of adjustment of costs of carrying out street construction works applies only when payment or security for payment was given by the owner pursuant to a requirement under paragraphs (b) or (d) of subsection (1). The Magistrate's finding that the requirement dated 20 February 1980 was made pursuant to section 569E(1)(b) or (d) was in conflict with the express terms of the requirement.

On the other hand, if the Council amended or substituted paragraphs (b) or (d) or paragraphs (a) or (c) of the requirement which would appear to be implicit in the magistrate's finding, the Council did so without power. Nevertheless, there was no evidence before the Magistrate that the Council purported so to amend the requirement on making such substitution.

Consequently ground (e) has also been made out. In the result the Order Nisi must be made absolute.

The order of the court is as follows: that the Order Nisi be made absolute, that the orders of the Magistrates' Court at Bendigo be set aside and that the applicant's costs of and incidental to the hearing in the Magistrates