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(JUDGMENT DELIVERED,

(Delete whichever is not applicable)

IN THE SUPREME COURT

OF VICTORIA

No.O/R 235 or 1987

MELBOURNE

BEFORE THE HONOURABLE MR JUSTICE KAYE

B E T W E E N:

GLEN THOMSON

Applicant

- and -

THE PRESIDENT, COUNCILLORS AND
RATEPAYERS OF THE SHIRE OF KYNETON

Respondent

J U D G M E N T

(Delivered 11 July 1988)

HIS HONOUR: Upon the return of an Order Nisi to review, the applicant (defendant) seeks to have set aside an order made by the Magistrates Court at Bendigo, whereby he was ordered to pay the respondent (complainant) the sum of \$3708, with interest of \$222 and costs fixed at \$1354.

The respondent's claim as amended by leave was for work and labour done and materials provided between 1 October 1982 and 30 September 1984. The respondent is The President, Councillors and Ratepayers of the Shire of Kyneton, to whom I shall refer as the Council. Its claim was in fact for the balance of moneys expended in carrying out street construction works of Hill Drive in Tylden Road subdivision which is land situated within the district of

the Council.

From documents exhibited to the affidavit of the applicant sworn in support of the Order Nisi and contents of his affidavit, it appears that early in 1980 Mr K.R. Buchanan intended to subdivide the land which was then owned by him. On 12 February 1980, Mr Buchanan lodged with the Council several plans of subdivision, together with a notice in the form of the 30th schedule of the Local Government Act 1958, as he was required to do by section 569(1) of the Act.

By section 569E(1), the Council is empowered by notice to require an owner to perform specified road construction works in connection with a subdivision, or to provide payment of or security for the costs of performance of such works. By subsection (1A), the Council may require the owner to furnish it with a written statement of the appropriate statutory authority that an agreement has been made in relation to the supply of water to the land, the subject of the subdivision.

On 20 February 1980, the Council gave Mr Buchanan a notice of requirement under section 569E(1) and (1A). By its notice, the Council required Mr Buchanan to construct all new drains, channels, streets, lanes and passages shown on the plan of subdivision and to give to it a written statement from the Kyneton Shire Waterworks Trust, that an agreement had been entered into with the Trust for the provision of water supply to all the land.

By letter dated 7 March 1980, Mr Buchanan inquired of the Shire Engineer whether at its next meeting the Council

would accept bank guaranties so that the requirement on the plans of subdivision might be lifted.

By letter dated 7 May 1980, the Shire Engineer informed Mr Buchanan as follows:

"Council would be prepared to seal the plans of subdivision without a requirement placed thereon, if a bank guaranty to the value of \$25,000 is lodged to cover road construction works."

Mr Buchanan, however, did not provide a bank guaranty.

On 21 May 1980, the Council resolved that the plans of subdivision be sealed with an endorsement stating that a requirement under subsections (1) and (1A) of section 569E had been made by it. On the same day, the plans were sealed by the Council with endorsements that a requirement under subsection (1A) of section 569E had been made, no reference of the requirement under subsection (1) being made on the endorsement.

By letter of 23 October 1980, the applicant forwarded to the Council a bank guaranty in the sum of \$25,000 for the subdivision and informed the Council that:

"The subdivision is now a joint venture between ourselves and K.R. and Y.R. Buchanan. Mr Ken Buchanan is still managing the subdivision for the partnership."

On 19 November 1980, the Council resolved to lift the requirement relating to road construction and water reticulation, subject to approval of Kyneton Shire Waterworks Trust. Presumably the Trust gave its approval for on 24 November 1980, the Council gave notice to the Registrar of Titles that the subdivider had complied with the conditions of the requirement.

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The notice was given under section 569E(3)(d). On 28 November 1980 the registrar approved the plans of subdivision by making the necessary endorsements of approval in conformity with sections 569E(3)(e) and the Transfer of Land Act 1958 section 97. In December 1980 the applicant purchased 15 of the 18 allotments made by the subdivision. By letter of 12 May 1982 the Council expressed to the applicant its concern about delay in completing the works of subdivision and sought information of his intention to complete immediately the roadworks.

On or about 19 November 1982 the Council informed the applicant that it had resolved to exercise its rights under the bank guaranty and it would carry out the works. Road construction in connection with the subdivision was carried out by the Council between 17 October 1982 and 30 September 1984.

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The Magistrate held that the applicant, having purchased the land in December 1980 and sold it in 1983, was the owner of the land within the meaning of section 569E, that the Council was entitled to withdraw the requirement pursuant to section 569E(3)(a) and had done so, that the applicant and Mr Buchanan were engaged in a joint venture, that the applicant had given the guarantee, that the requirement was made pursuant to section 569E(1)(b) or (d), and that the Council was entitled to act (that is to say, by carrying out the works and seeking from the applicant payment in adjustment between the cost and the amount of the guarantee) pursuant to section 569E(4).

Of the several grounds of the Order Nisi I find it necessary only to consider questions arising under grounds

(a) and (e). By ground (a) the complaint made is that the Magistrate was in error in finding that the applicant was a person who could lawfully provide security for the cost of the work pursuant to section 569E(1) of the Local Government Act. This ground arose out of the Magistrate's finding that the applicant was the owner of the land within the meaning of section 569E.

The evidence however established that the applicant became the owner or was entitled to become the registered proprietor of 15 of the 18 allotments of the land under the plan of subdivision in December 1980. There is not to be found in the act a meaning required to be given to the expression "owner of the land," although "owner of property" is defined by sections 3(1) of the act to mean "the person for the time being entitled to receive or who would be entitled to receive the rack rent of the land."

Whether this meaning is applicable to "owner of land" is not of assistance in the present circumstances because there was no evidence that the applicant at the relevant time was receiving or entitled to receive rack rent in respect of the land. It is therefore necessary to look at the provisions of Part XIX division 10 of the act to ascertain whether the applicant was the owner of the land within the meaning of section 569E.

By section 569(1) a person intending to subdivide land is required to give the Council notice of his intention in writing in the form of the 30th schedule. The 30th schedule requires the subdivider to state the name and address of the registered proprietor of land and if the subdivider is not the registered proprietor he is required

to disclose his interest in the land, particulars of any sale of the land to him and the consent of the registered proprietor. It follows that the owner of the land as used in section 569E means the registered proprietor of the land and, if the subdivider is not the registered proprietor of the land, a person having an equitable interest in the land.

The 30th schedule notice of his intention to subdivide the land given by Mr Buchanan to the Council was not in evidence before the Magistrate. Nevertheless, in both the engineer's reports to the Council dated 20 February 1980 and 21 May 1980 and the notice of requirement, Mr Buchanan is referred to as owner.

Although in his letter of 23 October 1980 the applicant described the subdivision as "now a joint venture with the Buchanans", there was no evidence before the Magistrate that at the time of service of the requirement or at any relevant time thereafter the applicant was possessed of any equitable interest in the land.

It follows that at the relevant time the applicant was not the owner of the land within the meaning of section 569E(1) and that he was not the owner from whom the Council was entitled to recover any payment under subsection (4) of section 569E.

Ground (a) having been made out is sufficient to dispose of the order to review proceedings, but counsel having addressed considerable argument in relation to ground (e) and because of the importance of the matters debated by them, it is appropriate that I should rule upon the provisions raised by the ground.

It is asserted by ground (e) of the Order Nisi that the Magistrate was in error in holding that the Council was lawfully entitled to claim the balance of the cost of the roadworks notwithstanding it had not complied with section 569E(4) of the said act as amended. Fundamental to this ground is the uncontestable fact that the requirement made of Mr Buchanan by the Council was under section 569E(1) and (1A) notwithstanding the incorrect endorsement of the requirement on the plans of subdivision made by the Council.

(Continued)

2. It is accepted by counsel for both parties that the requirement to give the Council the necessary statement of the Trust was satisfied. The requirement of Mr Buchanan under section 569E was to perform road or street construction works. By paragraphs (a) and (c) of section 569E(1), the Council is empowered to require of the owner of land performance of particular street construction works in connection with a plan of subdivision and by paragraphs (b) and (d) the Council may require payment or security for an amount equivalent to the cost of carrying out those construction works by the Council itself.

2. The requirement by its terms, served on the applicant, was made by the Council under paragraph (a) of subsection (1) in addition to subsection (1A). By section 569E(3) the Council is required to cause on the plan of subdivision an endorsement of the requirement made under subsection (1) or (1A) and to serve copies of the requirement on the owner. Service of the requirement upon the owner is mandatory; subsection (11). All actions by the owner and the Council in respect to the requirement must be recorded by the Council; subsection (3)(c).

It follows that it is performance of the requirement endorsed on the plan of subdivision and the subject of the notice served upon him which the owner is bound to discharge. By paragraph (ca) of subsection (3) of section 569A it is provided as follows:

"Where pursuant to this section the council requires the full construction or part construction of any street, road, lane or passage or any payments, security or undertaking to be made or

given in respect thereof or the provision of works of water supplies, sewage or drainage, the following provisions shall have effect, if the Council is satisfied that in all the circumstances any requirement should be withdrawn, it may withdraw the requirement. It follows that the power given to the Council is to withdraw a requirement provided that in all the circumstances it is satisfied that it ought to be withdrawn."

The significance of this provision is twofold: first the obligation of the owner is to carry out the requirement made by the notice of requirement and secondly, the form of power given to the Council is to withdraw the requirement. It is not a power to substitute a requirement.

Furthermore, there is no provision which enables the Council to substitute or amend a requirement once endorsed on a plan of subdivision. By the terms of its resolution of 19 November 1980 the Council lifted the requirement. Despite the expression used by it, the Council intended to withdraw the requirement under the provisions of subsection (3) paragraphs (ca). By its notice it informed the Registrar of Titles that the subdividers K.R. and Y.R. Buchanan had complied with the conditions of the requirement placed on the subdivision pursuant to section 569E(1) and (1)(a).

The notice was given by the Council under paragraph (a) of subsection (3) and, as I have already observed, the Registrar of Titles approved the plan under paragraph (e) of the subsection. Consequently, upon the plan of subdivision having been approved by the Registrar of Titles Mr Buchanan was released from any statutory obligation to carry out street construction or waterworks under the terms of the requirement.

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.

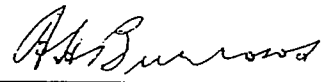
The order of the court is as follows: that the Order Nisi be made absolute, that the orders of the Magistrates' Court at Bendigo be set aside and that the applicant's costs of and incidental to the hearing in the Magistrates

Court and the costs of these proceedings including costs reserved by Master Brett be taxed and when taxed paid by the respondent.

CERTIFICATE

I certify that this and the 10 preceding pages are a true copy of the reasons for judgment of Kaye, J. of the Supreme Court of Victoria delivered on 11 July, 1988.

DATED this 14th day of July 1988


Associate