COURT: SUPREME COURT OF TASMANIA

CITATION: *Nibbs v Devonport City Council* [2015] TASSC 34

PARTIES: NIBBS, Michael Grant
v
DEVONPORT CITY COUNCIL
WEST, Paul

FILE NO: 838/2015

DELIVERED ON: 12 August 2015

HEARING DATE: 8 May 2015

JUDGMENT OF: Porter J

CATCHWORDS:

Statutes – Acts of parliament – Validity of legislation generally – Assertion that no valid Royal Assent as State Governor not properly sworn in – Governor's oath or affirmation of office – Presumption of regularity.
Aust Dig Statutes [2]

Magistrates – Generally – Appointment qualification and tenure – Assertion that magistrate not properly sworn in – Presumption of regularity – Retrospective validating legislation.
Aust Dig Magistrates [1]

Magistrates – Hearing – Procedural fairness and natural justice – Minor claim in civil division – Magistrate not bound by rules of evidence – Litigant in person not specifically given opportunity to cross-examine deponent on affidavit in support of summary judgment application – Litigant's case based solely on legal argument – No contentious facts – No denial of procedural fairness.
Aust Dig Magistrates [79]

REPRESENTATION:

***Counsel*:**
Appellant: In person
Respondent: S B McElwaine SC
Solicitors:
Appellant: In person
Respondent: Rae & Partners

Judgment Number: [2015] TASSC 34
Number of paragraphs: 47

Serial No 34/2015
File No 838/2015

MICHAEL GRANT NIBBS
v DEVONPORT CITY COUNCIL and PAUL WEST

REASONS FOR JUDGMENT **PORTER J**
12 August 2015

Introduction

1 This is an appeal from a decision of Magistrate Brett sitting in the Civil Division of the Magistrates Court. The claim was a minor civil claim within the meaning of s 3 of the *Magistrates Court (Civil Division) Act* 1992, as it involved an amount of less than $5,000.

2 In March 2014, the Devonport City Council sued Mr Nibbs for $1,132.62 for unpaid rates for a property at Spreyton in Tasmania. It seems that the amount claimed was slightly overstated by virtue of an arithmetical error, but that has no relevance. Mr Nibbs filed a defence and counterclaim. The Council sought summary judgment. After a hearing and an adjournment during which written submissions were lodged, the magistrate entered judgment for the Council against Mr Nibbs for $1,091.67, together with costs of $749.50.

3 Mr Nibbs has appealed against that judgment. As this was a minor civil claim, s 28(2) of the Act means that Mr Nibbs is limited to arguing that the magistrate lacked jurisdiction or exceeded jurisdiction, or that there was a denial of natural justice, unless I grant leave to appeal on any other ground. The second respondent to this appeal is Paul West, who was the general manager of the Council at the relevant time, and who swore an affidavit in support of the application. He was not a party to the claim and the appeal against him must be dismissed without further consideration. As to the Council, for the reasons which follow, to the extent that leave is required, it is refused, and otherwise the appeal is dismissed.

The issues before the magistrate

4 As revealed in Mr West's affidavit, the claim was for $1,091.67 being the rates for the whole of the year ended 30 June 2014, which were payable in advance. The Council relied on s 120 of the *Local Government Act* 1993, which makes an owner of land a ratepayer and liable for the payment of rates in relation to that land. Section 122 of that Act requires a general manager to send to each ratepayer a notice stating, amongst other things, the basis on which the rates are calculated, and the date by which the rates are due to be paid.

5 In his defence to the claim, Mr Nibbs stated:

> "I have requested information which the council and its representatives have refused to answer. I conditionally agreed to pay my rates fees and charges upon receipt of council proof as stated in the attached file."

6 What was attached was a series of letters between Mr Nibbs and the Council concerning the Council's status and its power to levy rates. It is unnecessary to detail the various bases on which Mr Nibbs queried those things. Suffice it to say that Mr Nibbs referred to such things as the Commonwealth Constitution, Letters Patent concerning the office of Governor-General, and the *Crimes Act* 1914 (Cth). In an affidavit sworn on 24 September 2013, Mr Nibbs said he was prepared to pay the rates excluding interest charged on late payments, once the Council had proved that it was legal and lawful for it to do so under the Constitution. A letter to Mr Nibbs from the Director of Local Government within the Department of Premier and Cabinet, which explained the position of local

government and the *Local Government Act* as they related to the Commonwealth Constitution and the Tasmanian *Constitution Act* 1934, did not seem to satisfy him.

7 Mr Nibbs' counterclaim is in the following terms:

> "As stated in the attached file without proof they will be entering into a contract for reparation, which is paid to me until such time as evidence is provided."

8 This seems to be a reference to a statement in the affidavit of 24 September 2014 to which I have referred. That contains the following:

> "An overdue rates notice dated 10/9/13 is being taken as the Devonport city council's attempt to intimidate me into paying rates without proof.
>
> If the … council cannot rebut this within fourteen (14) days with an affidavit that proves that it is legal and lawful … to demand these charges, any further attempts to intimidate me to making payment without proof of the Devonport City Council's legal authority to enforce these infringements will incur a penalty of $200 per week until such time evidence is proven" [sic].

9 I digress to observe that because it was a minor civil claim, s 31AB of the *Magistrates Court (Civil Division) Act* applied. Relevantly that section provided as follows:

> "**31AB Procedure for minor civil claims**
>
> **(1)** The following provisions apply to a proceeding in respect of a minor civil claim:
>
> **(a)** the Court is not bound by the rules of evidence but may inform itself on any matter in any manner that it considers appropriate;
>
> **(b)** the Court may itself elicit by inquiry from the parties and the witnesses and by examination of evidentiary material produced to the Court the issues in dispute and the facts necessary to decide those issues;
>
> **(c)** the proceeding is to take the form of an inquiry by the Court into the matters in dispute between the parties rather than an adversarial contest between the parties;
>
> **(d)** the Court may itself call and examine witnesses;
>
> **(e)** …;
>
> **(f)** the proceeding is to be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act, the rules of court and a proper consideration of the issues in dispute permit."

10 It is convenient to set out part of the magistrate's reasons for granting the application:

> "The defendant has been invited to state his response to the claim. His defence states that he has requested information from the Council and that he and I quote, 'conditionally' end quote, agrees to pay the rates upon what presumably is a satisfactory response to his enquiries.
>
> The voluminous correspondence between he and Council is annexed to Mr West's affidavit. The defendant has also given to me a significant amount of written material which contains assertions which can loosely be described as legal argument. I've considered all of the material referred to above. There is nothing contained in the defendant's material which deals directly or indirectly with the defendant's liability for rates, having regard to the provisions of the Local Government Act. Rather the material asserts that the Council does not have lawful authorisation to claim rates and further that the Court, this Court, lacks jurisdiction to entertain the claim. Without going into the detail of the argument, it refers to asserted principles and concepts known to English Common Law and to English Constitutional documents including the Magna Carta. The underlying thesis seems to be that the Council has no right to levy taxes in the form of rates on the defendant.

> Even if, as a matter of reason, the conclusion contended for by the defendant could be derived from the material and sources referred to by him, and I do not for a moment accept that this is the case, there is a fundamental flaw in his argument. The argument ignores completely the sovereign authority of the Parliament of Tasmania, derived from imperial legislation and confirmed in the Australian Constitution to make laws binding within the territorial jurisdiction of Tasmania. The defendant's argument does not accept the legitimacy and authority of such law that this Court is bound by and must enforce and apply such law. The Local Government Act is such a law. It creates a liability in the defendant to pay the rates in question.
>
> It follows that there is no merit whatsoever in the defence. The claim is bound to succeed. I intend to award summary judgment against the defendant in the amount of the claim.
>
> The defence filed by the defendant asserts a counter claim. The counter claim in [sic] nonsensical, with respect, it asserts a liability on the part of the Council which arises from and I quote, entering into a contract for reparation which is to be paid by me until such time as evidence is provided, end quote. In the material provided with that document there is at least one document entitled, again I quote, Overdue Notice, asserting that there is an outstanding account due to the defendant in the sum of five thousand two hundred dollars. This material and the asserted claim is meaningless and nonsensical. It does not constitute a cause of action. The counter claim will be summarily dismissed."

The appeal to this Court

11 The grounds in the notice of appeal are as follows:

> "1 Ruling was contradictory in nature.
>
> 2 An unserved affidavit was admitted into evidence.
>
> 3 The affidavit written by Paul West was heresay.
>
> 4 All affidavits written by me were left unrebutted.
>
> 5 Magistrate was practicing law from the bench.
>
> 6 Refusal of my judicial rights also disregarded numerous requests to be heard by a jury of my peers." [sic]

12 Effectively, Mr Nibbs' outline of facts and contentions did not address these grounds and, except to a limited extent, was of little assistance in defining and addressing the issues. In numbered headings and without much explanation, the outline refers to such things as the rule of law, all past Commonwealth referenda, "Registration of live birth", fee simple ownership, "basic" contract law, the *Trade Practices Act* 1974 (Cth), "ATO – ABN Lookup", habeas corpus, the Bill of Rights 1688, Magna Carta, and the Nuremberg Trials. In a separate section, the outline includes 94 quotations from the Bible, some of which are said to relate to contract law. As part of the appeal book, Mr Nibbs filed a large volume of material, much if not all of which I understand the magistrate to have had. Some further explanation of the outline is discernible from a reading of that material, but not easily so. As things transpired, Mr Nibbs wanted to argue a matter which he raised before the magistrate in one form or another, and wanted to argue a new issue about the magistrate's jurisdiction.

13 In the outline, Mr Nibbs asserts "that local council does not hold the constitutional or legal authority to charge rates as a tax". As I understand it, he maintains the point, as a fundamental issue, that there is no such thing as local government which is recognised in Australian law. However, in oral argument it became clear that Mr Nibbs' principal argument was that the Council had no power to levy rates because the *Local Government Act* was invalid as not having been given proper Royal Assent. Mr Nibbs further asserted that it was "critical" that the Attorney-General of Tasmania had recently stated that no magistrate had been correctly sworn in for the past 30 years. Based on that proposition, Mr Nibbs argues that that the magistrate had no power to decide the case.

14 Apart from an alleged denial of procedural fairness, those two issues became the principal points of contention. The Council agreed that I should determine them, along with the basic local government issue, notwithstanding they were not raised in the notice of appeal. The last substantive issue related to Mr West's affidavit, the principal contention being that the magistrate had denied Mr Nibbs the opportunity to cross-examine on that affidavit.

The validity of the *Local Government Act*

15 The fundamental point as to the status of local government can be quickly dealt with. The appellant fails because, as the magistrate rightly said, the argument fails to acknowledge the basic nature of a federation in the form which the Commonwealth of Australia takes. It is true that local government, as a tier of government in Australia, is not referred to in the Constitution. However, the States of Australia are sovereign states: see ss 106 and 107 of the Constitution. Section 109 renders invalid State laws to the extent that they are inconsistent with a law of the Commonwealth. There is nothing to prevent States from legislating about local government. Whilst s 51(ii) enables the Commonwealth Parliament to make laws with respect to taxation, a State government is not thereby precluded from making such laws, provided there is no inconsistency.

16 Section 45A of the *Constitution Act* 1934 (Tas) establishes in Tasmania a system of local government with municipal councils elected in such manner as Parliament may from time to time provide. Subsection (2) provides that each municipality shall have such powers as Parliament may from time to time provide, being such powers as Parliament considers necessary for the welfare and good government of the municipal area. The provisions of Pt 3 and Sch 3 of the *Local Government Act* establish the Devonport municipality and the Devonport City Council. That leads to the question of the validity of the *Local Government Act*. However, for the sake of completeness, I will mention a decision of a judge of the District Court of New South Wales to which Mr Nibbs referred in support of his argument on this point. The case is *Rumble v Liverpool Plains Shire Council* [2012] NSWDC 95.

17 Mr Nibbs was not able to explain the principle identified in that case which I should apply, or identify any part of the judgment which was relevant to the present point. There is nothing in the case which identifies anything of benefit to Mr Nibbs. It involved a claim by Mr and Mrs Rumble against a local council and others for damages for trespass. There had been a dispute between the plaintiffs and the council about what they were able to do in terms of an automotive repair business at a property which was their home. The application of planning laws was in contention. Council and police officers went to the property to serve notices.

18 Part of the background set out by Mahony DCJ was that the Rumbles said that they were members of something described as the "Independent Sovereign State of Australia". They had, in their dealings with the council, claimed that they were exempt from local government rates. His Honour referred to this only in the context of examining the relationship between the plaintiffs and the council, saying at [138], that it "could be reasonably inferred that such conduct would only harden Council officers' resolve to thereafter enforce compliance of [sic] the relevant zoning laws". The plaintiffs were awarded damages for trespass and conversion, but the claimed exemption from rates had no significance at all beyond that which I have mentioned.

19 Turning to the Royal Assent issue, as it was ultimately clarified, Mr Nibbs argues that the Governor who assented to the *Local Government Act* did not take the proper oath on being appointed. The Act was given Royal Assent on 23 December 1993. The Governor at the time was General Sir Phillip Bennett. There is no evidence about what oath or affirmation His Excellency took, but Mr Nibbs relies on the Schedule to the Commonwealth Constitution. The Schedule sets out the oath and the affirmation of allegiance. The oath is in the following terms:

> "I, A B, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law. SO HELP ME GOD!"

20 The Schedule contains a note to the effect that the name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time. It is s 42 of the Constitution which makes reference to the Schedule. That section provides that every senator and every member of the House of Representatives shall, before taking his seat, make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the form set forth in the Schedule. Obviously, it has no relevance to the Governor of this State.

21 Mr Nibbs' arguments also seem to be based on what was or was not achieved by the *Australia Acts*; that is, the *Australia Act* 1986 (UK), and the *Australia Acts* of the States. Mr Nibbs asserted that the Governor at the time of giving Royal Assent to the *Local Government Act*, had sworn an oath or made an affirmation to the Queen of Australia, and not the Queen of the United Kingdom of Great Britain and Ireland. Mr Nibbs did not refer to what oath or affirmation the Governor of the State of Tasmania was required to take before or after the *Australia Acts*, nor to the operation of that legislation.

22 In this State, the requirement for the Governor to take an oath of allegiance, and the form of that oath, are dealt with in cl IV of Letters Patent issued on 29 October 1900. The clause provides that the Governor shall take the oath of allegiance "in the form provided by an Act passed in the session holden in the thirty first and thirty second years of our reign intituled an Act to amend the law relating to promissory oaths; and likewise the usual oath for the due execution of the office of Governor …".

23 The promissory oaths legislation referred to is the *Promissory Oaths Act* 1869, recently repealed by the *Promissory Oaths Act* 2015, an Act to which I will return. Section 2 of the 1869 Act prescribed the form of the oath of allegiance. The oath was "I __ do swear that I will be faithful and bear true allegiance to His Majesty the King, according to law. So help me God." Section 13 permitted the making of a solemn affirmation or declaration instead of taking an oath, and sets out the required change in wording. This was the law on 23 December 1993 when the *Local Government Act* was given Royal Assent.

24 The Queen's title in the Commonwealth of Australia was changed, firstly by the *Royal Style and Titles Act* 1953 (Cth), and again by the *Royal Style and Titles Act* 1973 (Cth). Following those changes, Her Majesty's title was Elizabeth II, by the Grace of God Queen of Australia and her other Realms and Territories, Head of the Commonwealth. For some, that left room for argument about Her Majesty's title in the States, what power the British monarch could exercise in and in relation to those States, and whether the relationship of Australian States to the Crown was truly independent of the relationship of the Commonwealth to the Crown: see for instance *Commonwealth v Queensland* (1975) 134 CLR 298 (the *'Queen of Queensland Case'*). The *Australia Act* 1986 (UK) repealed the *Imperial Colonial Laws Validity Act* 1865. Thereafter there were no residual powers or responsibilities of the United Kingdom in relation to Australian States. Generally, the provisions of the *Australia Act* (UK) left a discrete Australian monarchy.

25 Assuming that General Sir Phillip Bennett took an oath of allegiance in accordance with the *Promissory Oaths Act* 1869, and there is nothing to suggest he did not, he was properly sworn. As to this point, the Council relies on the presumption of regularity. It also put an argument based on the provisions of s 10 of the *Acts Interpretation Act* 1931 (Tas) and s 6(10) of the *Legislation Publication Act* 1993 (Tas), although that happened before Mr Nibbs' contentions became a little clearer in his reply. I will first discuss the presumption.

26 The principle commonly known as the 'presumption of regularity' is that where the exercise of a power or the performance of an act by a public officer or public authority is proved, it will be presumed that the preconditions to the lawful exercise of that power or performance of that act have been met: *McLean Bros & Rigg Ltd v Grice* (1906) 4 CLR 835 at 560. Relevant to this case, in

Minister for Natural Resources v New South Wales Aboriginal Land Council (1987) 9 NSWLR 154, McHugh JA at 164 said:

> "Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled. Thus a person who acts in a public office is presumed to have been validly appointed to that office: *M'Gahey v Alston* (1836) 2 M & W 206 at 211; 150 ER 731 at 733; *R v Brewer* (1942) 66 CLR 535 at 548; *Hardess v Beaumont* [1953] VLR 315 at 318-319."

27 In this case, Mr Nibbs did not claim or suggest that in fact assent to the *Local Government Act* was not given; his argument was about the authority of the Governor to give that assent. For the reasons I have set out, this argument fails. It is unnecessary to consider the Council's arguments as to the effect of s 10 of the *Acts Interpretation Act* and s 6(10) of the *Legislation Publication Act*, but I will explain the provisions. The former provides that the date appearing on the copy of an Act produced under s 6(10) of the *Legislation Publication Act* and purporting to be the date on which the Governor assented thereto, shall be evidence that such date was the date on which the Governor so assented and shall be judicially noticed.

28 Section 5 of the *Legislation Publication Act* requires the Chief Parliamentary Counsel to establish a database in electronic form of legislation of this State. Section 6(10) of that Act provides:

> "**(1)** The Chief Parliamentary Counsel may approve the production of copies of authorised versions of Acts or statutory rules and copies of reprints of Acts or statutory rules in electronic or printed form by a person approved in writing by the Chief Parliamentary Counsel for the purposes of production or distribution."

29 I do not understand this argument to have put on the basis that the provisions foreclosed any issue about the Governor's authority. Were there to have an issue about the fact of assent, an argument based on these provisions may well have merit. There may be questions of proof as to whether the database referred to in s 5 is the 'Tasmanian Legislation' website maintained by the Office of Parliamentary Counsel, and as to whether it is safe to assume that the electronic copy of any Act on that website is one specifically approved by the Chief Parliamentary Counsel under s 6(10). In any event, as I have said, it is unnecessary to consider these things in order to resolve this aspect of the appeal.

The appointment of the magistrate

30 There is no evidence or material before me to show when or by what means Magistrate Brett was sworn in as a magistrate. Before the *Promissory Oaths Act* 2015, magistrates and justices were required to take and subscribe the judicial oath prescribed by the *Promissory Oaths Act* 1869. Section 7 required the oath to be tendered by the Clerk of the Executive Council and taken in the presence of the Governor or such specified person as the Governor directed. Mr Nibbs produced a copy of a media report of a statement made by the Attorney-General on or around 3 April 2015. The Attorney is reported to have said that the requirement for the judicial oath under the 1869 Act was out-dated, "and it was reasonably established that it had not been followed for the past three decades". Assuming that the proper practice had not been followed in Mr Brett's case, there are two immediate answers to Mr Nibbs' assertion that Mr Brett had no power to decide the case.

31 The first is that s 21 of the *Promissory Oaths Act* 2015, retrospectively validates judicial oaths or affirmations, oaths or affirmations of allegiance and oaths or affirmations of office. It further provides that the validation takes effect before the person took an action or performed or exercised a function, duty or power in relation to the office, and states:

> "… no action taken or omitted to be taken by the person after the taking, or purported taking of the oath or the making, or purported making, of the affirmation is invalid by reason only that, at the time at which the action was taken or omitted to be taken, this section was not in force."

32 That Act received Royal Assent on 15 May 2015. To the extent that Mr Nibbs may wish to argue that the *Promissory Oaths Act* 2015 is invalid because the present Governor took the wrong oath or made the wrong affirmation, I would repeat my earlier statements about that.

33 The second answer is that in any event, the doctrine known as the 'de facto officer doctrine' would undoubtedly apply. "The acts of a de facto public officer done in apparent execution of his office cannot be challenged on the ground that he has no title to the office. It matters not that his appointment to the office was defective or has expired or in some cases even that he is a usurper": *G J Coles v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 per McHugh JA at 515. As his Honour demonstrated in his analysis in that case, and as demonstrated in the discussion by Crawford J (as he then was) in *Official Trustee v Byrne* [1989] Tas SR 1 at 13-15, the principle applies to judicial officers.

34 The three conditions necessary for the operation of the doctrine apply in this case. The office of a magistrate is one which existed in law. The acts of the magistrate in hearing and determining the application for summary judgment were within the scope and authority of the office of a magistrate. Lastly, the doctrine should properly be applied in the public interest: see generally *Jamieson v McKenna* [2002] WASCA 325 at [13]-[14]. This argument also fails.

Lack of procedural fairness?

35 There are references to this affidavit in the actual grounds of appeal, but the nub of the complaint, that of a denial of an opportunity to cross-examine Mr West, emerged in oral argument. It is necessary to trace the course of the proceedings. The application for summary judgment and that affidavit were filed on 17 June 2014. The magistrate held a general directions hearing on 18 June at which time those documents had not been served. A legal practitioner sought leave to appear for the Council. When asked by the magistrate about his attitude to this, Mr Nibbs said that the Council should be there "in person" and if not, things could not be "discussed and disputed there and then on the spot". It is not clear from the transcript whether or not Mr West was there. Counsel referred to the application which had been filed.

36 The discussion between the magistrate and Mr Nibbs revolved around Mr Nibbs' documents and his requests of the Council to justify its legal authority. When asked to clarify his defence, Mr Nibbs said, "show me its legal and lawful and I'll pay it". He went on to reiterate that his position was that there was no lawful basis for the Council's claim. At the end of the directions hearing the magistrate told Mr Nibbs he would have to come back on 11 July, as there would be a legal argument and he would then be able to present all his legal submissions. The matter was adjourned to 11 July 2014 for the hearing of the foreshadowed application for summary judgment and otherwise for further directions.

37 At the hearing of the application on 11 July, Mr Nibbs stated that all he wanted was "proof that it is legal and lawful". Whether he was referring to the Council itself or the power to levy rates was not clear. He referred to the *Rumble* case (above), the *Trade Practices Act* 1974 (Cth), and generally to the volume of documents he had filed. The magistrate reserved his decision on the application, and adjourned the matter generally for directions on 5 September. In the meantime the Council asked for the matter to be relisted. The matter was back before his Honour on 5 August 2014 when he was told that, due to an oversight, the supporting affidavit of Mr West had not formally been read into evidence. Counsel then sought to do so in support of the application.

38 The magistrate asked Mr Nibbs whether he wanted to say anything. In the course of an exchange Mr Nibbs:

- Said he wanted to proceed "under the strict understanding" that the magistrate was bound by his oath of office as of that day, and simply said nothing when he was asked what that point was;
- asserted that the Council and the councillors were attempting to pervert the course of justice under s 34 of the *Crimes Act* (Cth) as they had failed to prove that they were "acting within the laws of the Commonwealth";
- said that the Council had "not stood up once" so that he could ask them any questions. "I'd like this to happen as soon as possible, otherwise I do not give the court consent to proceed".

39 The following exchange then occurred:

> "HIS HONOUR: All right, okay, well I don't really need your consent to proceed, but in any event I've heard what you've had to say, I'm not entirely sure you needed to read that affidavit into evidence, this is a minor civil case, I'm entitled to inform myself as I would and I think I was well aware that affidavit had been filed. In any event it's still my intention to consider the arguments both sides presented on the last occasion and give a decision on or before the next listing date, which I think is 5 September. All right. Yes, Mr Nibbs?
>
> MR NIBBS: Your Honour, that affidavit was never actually formally served on me. It was dumped on Council land outside my property.
>
> HIS HONOUR: Do you have a copy of it?
>
> MR NIBBS: I beg your pardon?
>
> HIS HONOUR: Do you have a copy of it?
>
> MR NIBBS: I have a copy of parts of it. I don't know if it's the full affidavit.
>
> HIS HONOUR: Oh well you're certainly entitled to have a copy of it. I'll have the Court copy the original affidavit that we have on our file and give it to you today before we leave Court."

40 As to the service of the affidavit, and the allegation in ground 2, Mr McElwaine SC pointed out to me that on 14 August 2014 Mr Nibbs filed and served an affidavit described as "in right of reply to the late Affidavit lodged by Paul West", and that Mr Nibbs did not complain after 11 July that he did not have a full copy of the affidavit. Ground 2 fails.

41 As to the right to cross-examine Mr West, it is true that Mr Nibbs was not asked whether he objected to any parts of the affidavit or whether he wished to cross-examine Mr West. However, as the magistrate rightly pointed out, he was not bound by the rules of evidence and could inform himself in any manner that he considered appropriate. That disposes of ground 3. The affidavit of Mr West simply exhibited the rates notice, asserted the failure to pay, and exhibited the course of correspondence between Mr Nibbs and the Council. At no stage did Mr Nibbs raise any question of fact which was referred to in, or raised by, Mr West's affidavit. In those circumstances I am not satisfied that there was any material denial of procedural fairness.

Other issues

42 There is another matter which was mentioned in the written materials before the magistrate, but not referred to in argument before his Honour. There is a brief reference to it in the outline filed in this Court and was raised, almost as an afterthought, in Mr Nibbs' reply in the appeal. I should dispose of it. In the documents the point is referred to as "the Kable principle". I take this as a reference to the High Court's decision in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The detail given in each document is different and inconsistent.

43 As it was asserted in the appeal outline, the argument amounted to the proposition that where there was a constitutional argument, federal jurisdiction applied, and that the Constitution was the only source of judicial power. Mr Nibbs did not expand on this. I take it that what he meant was that as, on his argument, a constitutional issue arose, s 78B of the *Judiciary Act* 1903 (Cth) should have been complied with, and notices given to Attorneys-General. However, this was not a cause pending in a State court exercising federal jurisdiction, nor does any matter arise under the Constitution or involving its interpretation.

44 A matter will not arise under the Constitution if it does not really and substantially, or genuinely, arise: see *ACCC v CG Berbatis Holdings* (1999) 95 FCR 292 at 297; *Danielsen v Onesteel Manufacturing Pty Ltd* [2009] SASC 56 at [25]–[30]; *Pham v Secretary, Department of Employment and Workplace Relations* [2007] FCAFC 179 at [12]. A constitutional point must not be trivial or vexatious, or frivolous in the sense of being patently unarguable or completely devoid of merit. It was proper for the magistrate to proceed, and proper for this Court to determine the appeal.

45 Lastly, it appeared to me that while not dealt with in argument, at least in any meaningful way, there was a lingering maintenance of ground 6; the asserted right to have the claim heard and determined by a jury. At the directions hearing on 18 June, Mr Nibbs asked whether there would be a jury of his peers. The magistrate said that there would not be a jury, but that it would be heard by him. Mr Nibbs said, "It will be you?", to which the magistrate said, "Yes". The point was not pursued.

46 In Mr Nibbs' written material put before the magistrate, he referred to trial by jury and to s 80 of the Constitution "trial by jury". He set out the text of the section, the relevant part of which provides that trial on indictment of any offence against any law of the Commonwealth shall be by a jury. Mr Nibbs did not otherwise mention it in oral argument before the magistrate, and although it is a ground of appeal, did not addressed it in this court. That it is inapplicable is abundantly plain from the very clear words of the section. Mr Nibbs did not say why he was entitled to a trial by jury in a minor civil claim in the Magistrates Court in the State of Tasmania. There is nothing to suggest that the process to which Mr Nibbs was made the subject, was unlawful.

Outcome

47 For reasons which appear from their terms, I do not need to deal with any of the remaining grounds. As indicated, my orders are that to the extent that leave to appeal is required, it is refused, and the appeal is dismissed.