SUPREME COURT OF QUEENSLAND

CITATION:	*Bero v Electoral Commission Queensland & anor* [2012] QSC 222
PARTIES:	**FLORIANNA REBECCA BERO** (applicant) v **ELECTORAL COMMISSION QUEENSLAND** (first respondent) **JERRY DIXIE STEPHEN** (second respondent)
FILE NO/S:	SC 4290/12
DIVISION:	Court of Disputed Returns
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court sitting as the Court of Disputed Returns
DELIVERED ON:	2 August 2012 (ex tempore)
DELIVERED AT:	Cairns
HEARING DATE:	31 July & 1 August 2012
JUDGE:	Henry J
ORDER:	**1. Pursuant to s 142(2)(a) of the *Local Government Electoral Act* 2011, Jerry Dixie Stephen, the candidate declared by the first respondent to be elected as the councillor for Division 13 of the Torres Strait Island Regional Council, is taken not to have been elected.** **2. Pursuant to s 142(2)(b) of the *Local Government Electoral Act* 2011 a new election must be held for Division 13 of the Torres Strait Island Regional Council.**
CATCHWORDS:	ELECTIONS – where candidates must have lived in their division for the two years preceding nomination – whether the elected candidate had complied with this requirement – if not, whether he should be taken to have been elected ELECTIONS – where the candidate elected is taken not to be elected – where there was only one other candidate that contested the election – whether that other candidate should be held to have been elected or whether a new election should be ordered *Australian Electoral Commission v Wilson* [2003] FCA 434. *Beresford-Hope v. Sandhurst* (1889) 23 QBD 79. *Burnett Shire Council & Ors v Galley* [2000] QSC 490.

Free v Kelly and Anor [1996] 185 CLR 296.
In re Parliamentary Election for Bristol South East (1964) 2 QB 257.
In Re Wood [1988] 167 CLR 145.
Re Kiwat [1993] 2 QdR 531.
Tanti v Davies (No 3) [1996] 2 QdR 602.

Electoral Act 1992 (Qld) s 137.
Local Government Act 2009 (Qld) s 152.
Local Government Election Act 2011 (Qld) s 26.

COUNSEL: DP Morzone for the applicant
C Klease for the first respondent
PF Mylne for the second respondent

SOLICITORS: Preston Law for the applicant
Crown Solicitor for the first respondent
Jason A Briggs Lawyers for the second respondent

HIS HONOUR: The applicant, Ms Bero, and her natural son, the second respondent, Mr Stephen, were the only candidates for election as the councillors for Division 13 of the Torres Strait Island Regional Council in the local Government election held on Saturday, 28 April 2012. Division 13 is the Torres Strait Islands Island of Stephens Island, known traditionally as Ugar Island.

Subsequent to the election, the returning officer gave notice that Mr Stephen was duly elected. Ms Bero disputes the election of Mr Stephen before this Court of Disputed Returns. She asserts Mr Stephen was not qualified to be a candidate because he had not, for the two years preceding the election nomination day, lived on the island, a requirement of qualification contained at s 152(3)(c) of the *Local Government Act* 2009 (Qld). She seeks orders that he be taken not to have been elected and that either she be taken to have been elected or a new election be held for the division.

Jurisdiction

A preliminary point was raised as to whether the Court of Disputed Returns has jurisdiction to hear and determine the application. I ruled that it did, see *Bero v The Electoral Commission of Queensland & anor; Day v Electoral Commission Queensland & anor; Elisala v Electoral Commission Queensland & anor* [2012] QSC 201, delivered 31 July 2012.

In summary I ruled that if, as is alleged, Mr Stephen did not meet the two year qualification required of s 152(3)(c) of the *Local Government Act*, then his nomination was prohibited by s 26(1)(b) of the *Local Government Electoral Act* 2011 (Qld) from which it follows he should not have been a candidate for election and thus, not elected. I accordingly found this was an application disputing the election of a person within the meaning of s 136(1) of the *Local Government Electoral Act* which permits such an application to the Court of Disputed Returns.

The Issue

The critical factual issue in the proceeding arises out of s 152(3) of the *Local Government Act* which provides:

> "A person is qualified to be another councillor of the Torres Strait Island Regional Council only if the person:
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> (a) is an Australian citizen; and
>
> (b) is a Torres Strait Islander or an Aborigine; and
>
> (c) on the nomination day for the election has lived in the particular division for which the person is to be a candidate for the two years immediately before the nomination day; and
>
> (d) is not disqualified from being a councillor or because of a section in this division."

To attract this Court's intervention, the applicant must prove that Mr Stephen had not lived on Stephens Island, the division for which he was to be a purported candidate, for the two years immediately preceding 27 March 2012, the nomination day.

Mr Stephen's connection with and presence on the Island

Mr Stephen undoubtedly has a significant and longstanding connection with Stephens Island. Whatever the outcome of my ruling at law is here, it ought not be regarded as in any way doubting that feature of the matter.

Mr Stephen was born on 25 April 1971. His natural mother is, in fact, the applicant, Ms Bero. However, by way of tradition, his grandparents, Jerry Stephen Senior and Mrs Belphina Stephen, adopted him at birth to be their son and heir. His adoptive father is a traditional owner of Stephens Island and Mr Stephen, the second respondent, grew up on this island.

It is a small island with limited services. It is common that people from the island travel to obtain access to health care and education and employment.

The second respondent, Mr Stephen attended Stephens Island Primary School up to grade two. There was an interregnum where his family relocated to Thursday Island because of his

mother's ill health, although his father remained on Stephens Island. At a later stage, they relocated to Townsville where he did most of his year seven.

His mother passed away in 1984. Subsequent to that, Mr Stephen relocated to Stephens Island completing the rest of his primary school. He did part of his high school years at Thursday Island and would travel by helicopter and plane between Thursday and Stephens Island during school holidays. He interrupted his schooling for a time, going to work on a crayfish boat. He later returned to school for a short period of time completing year nine and year 10 at Thursday Island State High, again travelling between Thursday Island and Stephens Island.

He deposes that as the son and heir of Mr Stephen Senior he has a cultural obligation to maintain and protect their “ailan kastom”; that is, the island customs and traditions.

He deposes that since enrolling to vote at 18 years old on Stephens Island, he has never changed his electoral roll address from Stephens Island when travelling for his schooling, work or visits elsewhere. He explains this is because Stephens Island is his traditional homeland and as he puts it, "I am recognised by ailan kastom”.

There is little doubt that he is held in good regard by a number of citizens of the island, as is apparent in the outcome of the ballot with which I am here concerned; he received 71 per cent of the vote. Further, earlier this year he became a director of the island's prescribed body corporate.

Between 1989 and 2008, he deposes to having worked at various jobs at Stephens Island, Thursday Island and Cairns, but asserts that he continued to maintain his ailan kastom by travelling to and from Stephens Island to other locations to gain employment. He was employed with the Department of Immigration in 1999. In 2001 he was given enduring power of attorney in respect of his father, Jerry Stephen Senior. He has maintained responsibility for caring for his father who is apparently now 98 or 99 years old.

In October 2005, he was on duty with the Department of Immigration at Thursday Island when the tragedy of the sinking of the Malu Sara occurred. He suffered post-traumatic stress as a result and received counselling and ongoing treatment. He travelled regularly between Stephens Island and Cairns to seek such treatment and rehabilitation.

His employer's records show his address for the period 27 February 2006 to 20 June 2010 to be Dunn Street in Cairns. He acknowledges he inputted that information. Notwithstanding this, he deposes that in 2008 he moved back to Stephens Island from Cairns, moving in to live with his father at lot 19

Stephens Island. He, in 2008, deposes to having signed the lease on the property as co-tenant with his father. That agreement was signed on 2 June 2008; the tenant is named in item 2 of the agreement as his father, although both he and his father are named as tenants at the signature section at the rear of the document.

He deposes that his tenancy at that address has continued to this day, and that he is presently living at this address. It is readily apparent from the evidence to which I will come that he was not living at that address on a continuous basis prior to the election. That is, such continuity as existed may have related to his financial responsibility for the tenancy and him regarding the relevant residence as his home. He has continued to deal with the invoices and statements for rent dealing with that property. He has written letters to the landlords and had meetings with them in relation to renovations to the house.

While his affidavit was largely silent on the topic of other aspects of his private life, it emerged in his evidence that he had been in a relationship with a lady called Cynthia, living with her in Cairns and having two children together with her on 1 April 2006 and on 15 December 2007. A third child was born to them on 10 December 2010, but they separated at some earlier stage in 2010 when she was pregnant with that child. There was evidence Cynthia had visited the island with him, but no evidence he had ever lived with her and the children in the sense of setting up and maintaining a home

there as a family unit.

He deposes that in October 2009, he was required to commence a return to work program as part of his rehabilitation with the Australian Quarantine Services in Cairns, but that he only completed three months of it. He says that while staying in Cairns he resided at a motel. His employer's records show his address from 21 June 2010 to be Windarra Street, Woree in Cairns; although he gave evidence that he did not input that information.

He deposes that having taken responsibility for his father's care and acting as his attorney he has encountered conflict with Ms Bero and her sister Barbara Stephen. He deposes that in July 2010 he arrived back on the island after having been to Cairns for his medical treatment and rehabilitation and discovered that Ms Bero and Ms Stephen had removed his nephew from his house and placed Ms Stephen's daughter and her niece there. He requested the girls to leave; that provoked a serious family dispute between Barbara Stephen, Florianna Bero and him.

There was, on any view, a culminating argument. It is unnecessary for me to make findings as to the detail of that event. However, he deposes that a temporary protection order was thereafter taken out against him by Ms Bero and Ms Stephen, he says on or about 16 July 2010. He deposed that as a result he had to remove himself from Stephens Island, but that he went to Court on Thursday Island to, as he puts it,

fight for his right to return to his island and had the condition of the order overturned in about August 2011.

In this Court, the preponderance of evidence is that in point of fact he was prohibited from being on the island by virtue of a condition of his bail undertaking, a document which was tendered in evidence, Exhibit 2. That undertaking as to bail refers to five offences charged against him; enter premises and commit indictable offence by break, three counts of assault occasioning bodily harm and one count of common assault. All are alleged to have occurred on 15 July 2010 at Stephens Island.

The conditions of his bail included:

> "4. The defendant must not contact or approach, nor have someone else contact or approach, Florianna Rebecca Bero, Barbara Gael Stephen, Seba Aretha Stephen and Shanna Maree Stephen...
>
> 6. Not to return to Stephens Island until these charges are heard and determined, except with prior consent of officer-in-charge of Thursday Island Police."

That bail undertaking was printed on 10 August 2010 and I infer, consistent with the usual practice of the Magistrates Court, that that is likely to have been the date on which he signed the undertaking. That date may well coincide with an appearance entered by him in relation to the matters, although it does not follow it was the first time on which the issue of his bail was addressed. It may be that either the police or

the Court had to deal in some interim way with the question of his bail very soon after the events of 15 July 2010.

He deposes to a delay in the scheduled renovations to the house at lot 19 as a result of the dispute he had had. He also deposes to Barbara Stephen allegedly stopping him from accessing fares to which he was otherwise entitled to travel by helicopter to the island by virtue of what he describes as his recognised tenancy at lot 19. In any event, that decision was apparently overridden by the Chief Executive Officer of the council.

He deposes to recollecting that he had the bail condition overturned on or about August 2011 and further deposes that in November 2011 he was advised lot 19 had to be vacated for the renovations to be completed. He then made arrangements to have his father relocated to Cairns, travelling with him to assist him to move into an aged care facility at Redlynch in Cairns.

He appears to have stayed in Cairns thereafter until 6 May 2012 when he deposes to flying to Thursday Island and being sworn in as a councillor, subsequent to the election, and, in turn, on 12 May, flying to Stephens Island where he has continued to reside.

Mr Stephen relied, beyond his own evidence, upon the affidavits of three other witnesses who, generally, confirmed his background and strong family and cultural connection with

the island. They emphasised his home has always been the island, but acknowledged that since 2008 he has had to travel away for health reasons and training and in 2011 to arrange for his father's care in a nursing home. They do not provide specific detail about his residential arrangements and do not materially assist in an assessment of the question of whether Mr Stephen was living on the island during the relevant period.

The applicant's witnesses generally seem to concede a knowledge of Mr Stephen's residence from time to time on the island to an extent not alluded to in their affidavits. That is disappointing, although in fairness to them it seems likely their affidavits may have lacked detail because of the sort of logistical difficulties that often occur in obtaining statements from Torres Strait Islanders. In that regard, I note the affidavits of the final six witnesses were of almost proforma content and bereft of any real factual detail.

While it is likely that some of the concessions made by some of the applicant's witnesses were a product of confusion or gratuitous concurrence, nothing of significance turns upon that. Ultimately, there is little material dispute about the main aspects of the evidence.

Pre-2010

The key period with which I am concerned is 27 March 2010 through to 27 March 2012. Prior to the commencement of that period, as a general proposition, there was no real

disagreement by the witnesses that Mr Stephen had a strong background of connection with the island and that he had come and gone from time to time in the past.

Ms Bero and Mr Bucknell confirmed that Mr Stephen had received some of his primary schooling at the island. Ms Barbara Stephen acknowledged that he had come and gone from the island on a variety of occasions; indeed, she recalls seeing him in November 2009 packing a shipping container apparently in preparation for departure again.

Louisa Bucknell also supported the education link of Mr Stephen with the island and also confirmed that he apparently returned to the island in around May of 2008 and stayed through to about October 2009. She recalled that after that he would sometimes come and stay at the island and leave again after two or three weeks.

Charlotte Stephen spoke of him as being in and out of the island from time to time and, as Timothy Ghee put it, "He used to come up and stay with his father for a month or two and return to Cairns to his missus and kids."

Daniel Bero spoke similarly of him coming and going, perhaps staying three weeks, then not being back for a while.

2010

Turning to 2010, Ms Bero conceded Mr Stephen returned in about June of 2010 and left about a month later. Ms Bero's sister

agreed similarly, although she was uncertain about when he had arrived. Mr Bucknell was similarly uncertain on this topic, Louisa Bucknell said he was at the island in mid 2010 for a short period, Timothy Ghee could recall no real detail and really repeated his evidence of a fairly vague pattern of coming and going. Daniel Bero's evidence was in a similar vein. Annie Bucknell recalled Mr Stephen was at the island in mid 2010, but had to leave because of his bail conditions.

As mentioned, Mr Stephen's affidavit said he arrived back on the island in July 2010. His affidavit is vague as to whether he was at the island at any earlier part of that year, it says nothing specific on the topic.

On the whole of the evidence I find that before he returned in mid 2010, he had not been on the island for any material period of time since about October 2009 when he apparently left after attending to the packing of a shipping container. I find he returned in mid 2009; exactly when and for exactly how long is unclear.

The alleged incident attracting the bail conditions occurred on 15 July at the island. His bail form, as I have mentioned, was printed on 10 August, but he may have left earlier. There is no evidence as to when he was actually charged or whether any interim bail conditions were imposed.

The records of financial activity of an account of his father, which Mr Stephen used shows a transaction in Earlville, Cairns

on 6 July 2010 and a transaction in Cairns North on 16 July 2010. This strongly supports an inference he was only at the island for a fortnight. It is possible he went to the island earlier, say in June, and either slipped briefly back to Cairns in early July or someone else was using the account of his father's, for which he was responsible, back in Cairns, but he did not suggest such things.

On balance then, I find he was on in the island in 2010 for about a fortnight in early July.

He was, as has been explained, thereafter absent from the island for the balance of the year because of his bail conditions and through much of 2011 for the same reason.

2011

As to 2011 Ms Bero said he returned soon after his bail was lifted, but she would not concede that he stayed through to November. Ms Mylne said he returned after his bail was lifted and she seemed to concede he was on the island from August to November although whether or not that was a genuine recollection or simply an overly gratuitous agreement with what was being put to her is less clear. Mr Bucknell was uncertain. Louisa Bucknell agreed he was on the island from August to November 2011 although, again, I had the sense in respect of her evidence that there was a flavour of agreement for the sake of it rather than a true recollection of that

precise time period. Charlotte Stephen agreed he was back on the island from August but was less sure when he left. Timothy Ghee, again as with Daniel Bero, could recall nothing relevant other than a vague general pattern of attendances from time to time over the history of Mr Stephen's connection with the island. Annie Bucknell could not recall when the change of bail occurred, but did not agree that he stayed until November.

The effect of Mr Stephen's own affidavit and his oral evidence was that he in fact returned to the island in October 2011 and left again in November 2011. Given the applicant's witnesses were asked in cross-examination whether he returned in August and left in November, I had anticipated he may well give oral evidence to that effect, albeit that it may have been inconsistent with his affidavit, but that did not transpire.

Acting then on his evidence, and counting inclusively, that would be a presence on the island of, at best, two months. The acceptance by some witnesses of the period of August to November, potentially more in the order of four months or so, needs to be considered in light of Mr Stephen’s own recollection. He is likely to have a more reliable recollection of his own movements. On balance I find he was on the island for about two months in 2011.

2012

As to the balance of the period with which I am concerned, during the first three months or so of 2012, there appears to be an acceptance by Louisa Bucknell and Charlotte Stephen that he was back on the island from May 2012. That seems to be consistent with Mr Stephen's own evidence that he was not on the island during any relevant period of that approximate three month period at the start of the year, and did not move back to the island until after it.

Total period of presence on the island

The upshot then is that during the two year period from 27 March 2010 to 27 March 2012 Mr Stephen was on the island for about two weeks in 2010 and about two months in 2011, a grand total of two and a-half months in two years.

It may be there were some other visits by him during that time. That prospect is consistent with the evidence of witnesses that he did come and go from time to time, albeit that the flavour of their evidence was that he was gone for much longer periods than he was present for. The witnesses may, of course, have formed their impression of a degree of repetition of coming and going based on a much longer period than the two year period that is relevant here. If there were other visits during the relevant period, then Mr Stephen would appear to have forgotten them, which suggests they could not

have been lengthy visits.

Allowing for errors in the evidence, it is, I suppose, conceivable that the total period during the two year period may have been as high as perhaps five months, but even if that were so, and I have not found it to be so, it would make no material difference to any of my ultimate conclusions in this case. On any view he was not physically present on the island for anything approaching a substantial majority of the period with which I am concerned.

His period of absence during the residential prohibition of his bail was seemingly from mid-July 2010 to October 2011, about 14 and a-half months away. He purports to explain that absence as inflicted upon him against his will by virtue of the bail conditions. However, he gave no evidence of the existence of tangible arrangements demonstrating otherwise how long he would have remained on the island in that period. Quite apart from that absence, he was absent from the island for the several months prior to July from the start of the period with which we are concerned on the 27th of March 2010. Further, in the following year, his return late in 2011 was short-lived and he did not return in 2012 prior to the end of the relevant period. This absence is explained on the basis he moved his father to a nursing home in Cairns and was supporting him there.

For Mr Stephen to be regarded as living in the Stephen Island division for the two years preceding his nomination when, as a matter of fact, he was only on the island during that time for a total of about two and a-half months, it would be necessary to construe s 152(3) very broadly indeed.

Purpose of s 152(3)

The essence of the submission in support of Mr Stephen is that one does not have to reside at a place continuously to live there, and one may reside at other than that place even for much of a period of time, yet nonetheless be regarded as living at the place during that time.

What then is meant in s 152(3) by "lived" in the particular division for the two years immediately before? The word "lived" is not defined by the Act. The requirement of living in an area for a two year period is repeated in s 152(2) in respect of the mayor of the Torres Strait Island Regional Council although the requirement relating to it is unsurprisingly the geographic local Government area rather than a specific division within it.

There is no similar requirement in s 152(1) which relates to councillors of local Governments other than the Torres Strait Island Regional Council. Why was such a qualification

introduced in respect of local Government representatives of the Torres Strait Islands but not elsewhere in Queensland?

On one view the high mobility of those who live in the Torres Strait as between other islands and the mainland would arguably make this qualification more difficult to meet for the Torres Strait Island Regional Council than many other Queensland councils. However, the Torres Strait Islands are remote compared to many other Queensland council areas and it is unsurprising that it is regarded as important that its councillors actually live in those remote islands in order to maintain a properly informed connection with the islands and islanders they represent and maintain a properly informed understanding of the cultural circumstances which have evolved in those remote islands.

Reflecting that special aspect of the Torres Strait Islands local Government area, the explanatory notes in respect of the Local Government Bill 2009 said of this newly introduced qualification:

> "These additional qualifications reflect the cultural and other circumstances of this council and the representation by councillors who understand this."

It may, of course, be accepted that many people who come from the Torres Strait consider it their home but live elsewhere.

They may well refer to the Torres Strait as their home in the sense they were born and bred there, yet they are not living there. They may well maintain a close connection with their home island and have a good understanding of its cultural and other local circumstances, but they are not living there. Such persons are not qualified by law to represent their home island on the local council because they do not live there. There will be those who come and go from their home island, who reside there sometimes, but not all the time and not even for most of the time. In the two years preceding his nomination, Mr Stephen was such a person. Was he living at Stephens Island for that two year period?

The meaning of "lived" in s 152(3) does not fall to be considered in isolation. Context is important. The words "lived in a particular division for the two years immediately before the nomination day" are all important. They require the person to have actually lived in a geographic sense in the division and done so for the two year period. This underscores the need to have regard to the reality of where the person lived and not merely their subjective view of where their place of residence was or where it was they called home.

Importance of considering the objective reality

On the aspect of the objective reality being important, I was referred in particular to *Tanti v Davies (No.3)* [1996] 2 QdR

602, a decision of Ambrose J. The provision under consideration there was s 105(3) of the *Electoral Act* 1992 (Qld) which provided:

> "(3) The following electors are special postal voters for the provisions of this Act –
>
> (a) an elector whose real place of living is not within 15 kilometres, by the nearest practicable route, of a polling booth."

His Honour found that in that section "real place of living" meant "actual place of living" in contra-distinction to place of residence.

His Honour contrasted the meaning of place of residence to place of living. He was not persuaded that place of living connotes a greater degree of permanence than place of residence and considered the contrary to be true. He identified place of living by reference to where a person as a matter of objective fact lives rather than the place which the person regards as their residence. This distinction recognises that persons may, in a nominal sense, have a residence and regard it as the place they reside at, typically even nominating it as their residence or address for official purposes, yet they may, as a matter of objective fact, live elsewhere, indeed live elsewhere against their will.

His Honour observed at 636-637:

"In my view, the most natural meaning to be given to the words is "actual place of living" in contradistinction to "place of residence" or "residential address" recorded on the electoral rolls under s. 58 of the Act which connotes a subjective element of intention to habitually live at and to regard as "home" or the expectation of continuity of living in the same place, even if absent temporarily or involuntarily from time to time.

I reject the respondents' contentions that for reasons unexplained, the legislature used the term "real place of living" in s. 105(3)(a) of the Act instead of and as synonymous with place of residence - which presumably is to be found recorded on the electoral roll. It has been settled law for a very long time that a person "resides" at the place where he habitually and voluntarily sleeps and lives intending that he will permanently, or for an indefinite period of time continue to do so. It has never been the case that a man has been said to reside at any place at which he may be forced to live against his will or at any place where he lives only temporarily albeit voluntarily, with an intention eventually to live in some other place on a permanent or at least indefinite basis and which place only he will regard as "home".
… reference to the dictionary meanings of "to live" or "living" makes it clear that both words within the

> context of s. 105(3) of the *Electoral Act* may be construed to connote "to have life" or "to continue in life", "to dwell and to reside" or "to cohabit". In some contexts 'to live' includes to "reside". In most contexts "to reside" includes "to live" - but only with the necessary intention, expectation and attitude to which I have referred; in other contexts "to reside" includes "to regard as the usual place of living or as home" even when not actually living there at the time."

The point there made by his Honour is relevant here in the sense Mr Stephen had no choice but to live away from Stephen Island for over a year during the period because of his bail condition.

A more extreme example might be a person who usually lives at Stephens Island but is charged and denied bail and has thus been in gaol at Lotus Glen on the Atherton Tablelands for the last two years. He may subjectively regard his place of residence during that two years as still being Stephens Island, but as a matter of objective fact, he has been living at Lotus Glen for the last two years.

Thus, in the present case, the fact that such a long time period of Mr Stephen's absence was against his will, rather than voluntary, is not a material consideration. The question

must surely be where, as a matter of objective fact, was he living, not where did he want to live.

The approach of considering where, as a matter of objective fact, a person was living during the period in question is plainly consistent with the words and the purpose of the section under consideration here. That purpose is obviously to ensure candidates are not merely nominally connected with the island in the sense they might regard it as their home or even have a place of residence there, but that they actually live there and thereby acquire and maintain a proper and current understanding of the island's cultural and other circumstances.

Occasional absences

There may be circumstances during a two year period where a person who lives at one place may be occasionally absent from it, staying elsewhere from time to time during that two year period. Would that mean the person has not lived at the place for two years?

The question is one of degree as was observed by Holmes J in *Burnett Shire Council & Ors v Galley* [2000] QSC 490. The provision there considered was s 221 of the *Local Government Act* to the effect:

"A person is qualified to become a councillor of a local

> Government if a person is an Australian citizen who … lives in the local Government area."

The dispute in that case was whether, as at the date of the election, the respondent, Ms Galley, lived in the local Government area. It was different from this case in the sense that here we are concerned with the assessment of a more prolonged period of time. Her Honour observed at paragraph 41:

> "While I accept that the word "lives" may not connote the same degree of permanence as "resides", I consider that there must be some element of continuity in a person's occupation of premises for the purpose of eating, sleeping, bathing and carrying on the other activities of everyday life to warrant a conclusion that he or she lives there. It is a question of degree whether a use of premises short of daily occupation is of sufficient proportions to amount to living there."

Duration of absences

An important aspect of that question of degree is the duration of a person's absence from the place they are allegedly living at. That aspect was considered by Dowsett J in *Re Kiwat* [1993] 2 QdR 531. That matter was concerned with residing rather than living at a place, although it was dealing, as here, with a two year requirement.

That requirement was in the *Community Services Torres Strait Regulations* 1985 (Qld):

> "(1) every islander who –
>
> (a) has resided continuously in the area for not less than 24 months prior to their nomination date for an election;...shall be qualified to be nominated as a candidate and to be elected as a member of the island council for that area."

During two periods, which occurred less than 24 months prior to the nomination day, namely between 12 February 1990 and 16 March 1990 and 22 March 1990 and 19 June 1990, the applicant in that matter was absent from the island diving for trochus, during those periods he maintained a home on the island with his wife and child and left the island to live at a place near where he was diving and his mail was directed to that place.

In the course of his decision, Dowsett J referring to the approach of Williams J in a matter of *Re O'Brien* No 6 of 1985, Cairns Registry, judgment delivered 20 March 1985, observed:

> "His Honour there adopted what I perceive to be the usual approach to questions of residence for electoral purposes reflecting the approach taken in numerous cases, including *Fox v. Stirk* [1970] 3 WLR 147, where Lord Denning said at 153:
>
> 'The first principle is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second

principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not a resident. A short-stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence. If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account.'

His Lordship was speaking in the context of university students who had sought to be registered as voters in the university cities. His Lordship observed that such persons were resident both at their usual homes and in the university cities. This perhaps gives some indication of the length of time during which one might be absent from a place of residence without losing one's qualification as a resident...

Williams J., in the case to which I have referred, took a somewhat different view. Because of his Honour's view of the wording used in reg. 11...and also the requirement in reg. 8 that a candidate be on the voters' role, his Honour concluded that reg. 8(1)(a) must be read as requiring something more than a mere intention to reside in a particular area and that although there may be short breaks in the continuity of residence for incidents such as medical treatment, nonetheless, there must be a substantial continuity of residence in order to satisfy the regulation. His Honour felt that an absence for the whole of a six month period (which is the period under the Aboriginal Regulations, though differing in this

respect from the current regulations), was such an absence as to deprive the potential candidate of residence. Different factual considerations may apply where the qualifying period is two years and the absence is of six months duration.

Factually, there is a substantial difference between that case and the present one. The present applicant has in effect lived on the island all his life and there would be, I would think, little doubt that if anybody had been asked prior to his departure for the trochus fields whether he was a resident, the answer would have been clearly "yes". Had anybody asked after his return, one would think that the answer would again have been clearly "yes". The absence was for a lengthy period, it is true, but it was in the pursuit of a business which is common in the area and one may, I think to some extent, accept that these regulations were designed specifically to deal with the problems of this area. It is difficult to believe that if a person resided on a boat which is plying through the Torres Strait for the purpose of supporting trochus diving, such person would be said to have lost his residency on Darnley Island simply because he went where the trochus were in pursuit of his calling."

The differences between this matter and *Kiwat* are obvious, and are not only that this matter is concerned with living rather than residing somewhere. *Kiwat* was not away from his island

for such a prolonged period as the period of absence we are concerned with here. Further, there was evidence in Kiwat that the absences were temporary and involved no material change to where he was living. Moreover, there were abundant evidentiary indicia of the fact that he was living at the island.

Lack of evidentiary indicia

In the present case little evidentiary detail was advanced by Mr Stephen of a kind which tends to indicate he was living at Stephen Island. Such indicia might potentially have included the location of his important personal possessions, evidence about the conduct of his finances and the nature and location of his day to day activities and interactions with others, both on a personal and professional level. There was really very little to support the inference that he was living on the island by way of evidentiary detail of the nature or quality of his presence at the island.

Mr Stephen was not living on the island long enough

The absence of much evidentiary indicia of him living on the island, however, is unsurprising given his own evidence about the brief periods he was actually on the island for during the two years in question.

These were no mere temporary or minor absences. The length of his absence, or more particularly, the brief duration of his presence on the island is a very significant consideration.

In the absence of any significant countervailing evidentiary indicia that he was living at the island for a more prolonged period than he was physically present for, it is determinative.

On no reasonable view could it be said that Mr Stephen was living at Stephens Island in the two years preceding nomination in circumstances where he was not living there for most of that time.

Mr Stephen taken not to have been elected

Mr Stephen had not lived in the division for which he was to be a candidate for the two years immediately before the nomination day. It follows he was not qualified under s 152 of the *Local Government Act*. Since s 26 of the *Local Government Electoral Act* required that he could be nominated as a candidate only if so qualified he was thus not lawfully a candidate and thus not lawfully elected.

In the circumstances, the appropriate course is to order under s 144(2)(a) that he be taken not to have been elected.

Additional argument irrelevant

It emerged in argument that the application had been intended to seek the exercise of the Court of Disputed Returns' jurisdiction to make that order on a basis additional to the basis of failure to comply with the two year qualification. As I apprehend it, it was also intended that an allegation Mr Stephen does not live in the local Government area, that is,

that he did not live in the area after his election, was a basis, if proved, for this Court to intervene as the Court of Disputed Returns as distinct from the Supreme Court considering the issue by way of judicial review, as is expressly contemplated by s 157 of the *Local Government Act.*

I did not understand that basis to have been advanced for the purposes of my decision on jurisdiction and, as is readily apparent from the reasons I gave, I did not find the Court of Disputed Returns had jurisdiction to hear and determine the application on that additional basis. There was flagged during the jurisdictional argument an application to simultaneously pursue a judicial review by the Supreme Court at the Court of Disputed Returns hearing, however it was, in effect, postponed pending my jurisdictional ruling since its utility apparently depended upon my ruling. It was not pursued after my ruling.

In any event, this second basis which the applicant had apparently hoped to advance became irrelevant. The factual basis relied on for it was not made out or pursued and the applicant formally withdrew that purported basis of the application.

Take Ms Bero to be elected or order new election?

Having determined Mr Stephen is taken not have been elected, it is necessary to decide whether to order under s 144 that Ms Bero is taken to have been elected or that a new election must be held. Ms Bero was the only other candidate. She had been the incumbent. Ninety-four per cent of the division voted. She

received 13 votes, whereas Mr Stephen received 32 votes. That is, in a field of two candidates, she only received around 29 per cent of the vote.

New election not an automatic outcome

Ms Bero, who fairly contested this election, understandably asserts she ought be taken to be elected as the only remaining candidate regardless of how few votes she attracted. There is certainly no basis to automatically approach Mr Stephen's lack of qualification as meaning there was at law no election. *In Re Wood* [1988] 167 CLR 145 at 167 the High Court observed:

> "The problem of want of qualification arises under the Act if an unqualified candidate is elected, but an election is not avoided if an unqualified candidate stands. If it were otherwise, the nomination of unqualified candidates would play havoc with the electoral process, for the ministerial officer who accepts nominations has no general power to refuse a nomination in due form: see s 172 of the Act."

Further, this is not a case involving a real difficulty in discerning an alternative outcome from a large field of candidates, a problem discussed by the High Court in *Free v Kelly and Anor* [1996] 185 CLR 296. Brennan CJ there observed, at 303:

"The principle … is that an election in which a person who is incapable of being chosen is purportedly returned as a member of the Senate or as a member of the House of Representatives will not warrant an order for a special count unless a special count would reflect the voters' true legal intent or, conversely, would not result in a distortion of the voters' real intentions. In *In re Wood* the Court was satisfied that a special count would reflect the voters' true intentions but in *Sykes v Cleary,* no special count could be ordered "because the voters' preferences were expressed within the framework of a larger field of candidates presented to the voters by reason of the inclusion of the first respondent". In other words, if the name of the disqualified Mr Cleary had not appeared on the ballot paper the voters' preferences might have been differently expressed."

Brennan CJ went on to reason at 304:

"Indeed, there is much to be said for the view submitted by counsel for the Australian Electoral Commission, that, if the candidate who is returned as an elected member proves to have been incapable of being chosen, the election is necessarily void and a new election must be held. That may be too broad a proposition, at least where there are only two candidates standing and the facts which establish the incapacity of the one chosen

are known to the electors at the time of the poll."

Requisite approach to a "two horse race"

That later observation is plainly of potential relevance in the case at hand. The issue it raises was analysed at some length in *In re Parliamentary Election for Bristol South East* (1964) 2 QB 257. In that matter AB, a member of Parliament and male heir to a peer of the United Kingdom sought, on his father's death, to renounce the peerage and to petition the House of Commons to appoint a select committee to examine and report on his submission that he was and should remain a member of the House of Commons. His argument was not supported. Nonetheless, he persisted and nominated at an election in respect of the House of Commons. It appears his only opposition was one SC. Before the votes were cast, steps were taken by and on behalf of SC to bring to the notice of all persons entitled to vote that his opponent was a peer of the United Kingdom so found by the Committee of Privileges and the resolution of the House of Commons and was thereby disqualified from membership of the Commons and that accordingly all votes given for AB at the election would be thrown away. The outcome was AB was elected but that the Electoral Court found by reason of his status as a peer he was disqualified from being a candidate and not duly elected.

It was successfully submitted SC should be declared duly

elected because SC was the candidate with the next highest number of votes, and in fact the only other candidate entitled to be declared to have been duly elected. In that sense that case parallels the present.

The Court had regard, in particular, to the decision of the Court of Appeal in *Beresford-Hope v Sandhurst* (1889) 23 QBD 79, a case in which the lack of qualification of a candidate, Lady Sandhurst, was well known, since in that era, as a woman she was not eligible for election. In that case the Divisional Court observed:

> "In the first place it was admitted that all those who voted for Lady Sandhurst knew that she was a woman. In the second place it was shown to our satisfaction that the question whether as a woman she was incapacitated from election was a subject of common public discussion at the time and place of her election."

The matter ultimately went before the Court of Appeal where Lord Coleridge, Chief Justice, observed:

> "The fact from which the incapacity arose must have been known to every one who voted for Lady Sandhurst; therefore every one voted at his peril because there existed that fact to which the law annexed the incapacity of being elected."

His Honour referred to a number of cases as authority for this

proposition:

> "… it has been laid down over and over again, that if the fact exists which create an incapacity, and it is known, and must be known, to those persons who voted for a candidate who was so incapacitated, votes given under those circumstances are thrown away. As it is put in one of the judgments, such votes are fairly enough thrown away because the persons would not do the only thing they ought do to give effect to their votes, namely, to vote for a properly qualified candidate."

In *re Parliamentary Election for Bristol South East* the Court applied that reasoning.

While the authorities discussed in that matter emphasise the relevant knowledge is of the facts which give rise to legal incapacity, they tend in those cases to be facts which give rise to an obvious legal incapacity, or which involve a public dispute prior to the election as to whether they constitute incapacity. The present case does not have such characteristics. True it is that it is a small electorate, but there is no evidence of what the electorate knew. In the present matter not only is there no evidence the electorate voted with knowledge that Mr Stephen could not be elected, there is no evidence to inform me of whether with that knowledge others would have nominated against Ms Bero.

Lack of certainty

This absence of knowledge, or lack of certainty, as to the will of the electorate is a significant factor, as was explained by Mansfield J in *Australian Electoral Commission v Wilson* [2003] FCA 434. His Honour observed at paragraphs 18 and 19:

> "The present circumstances are, in one respect at least, different from those being addressed in Free v Kelly. There are here only three candidates. If Mr Wilson was ineligible to be a candidate so his preferences were distributed, there would not be the risk discerned in Free v Kelly by Brennan CJ that the distribution of Mr Wilson's preferences might affect the order of exclusion of the less favoured candidates in a way which might have affected the proper determination of the will of the electorate.
>
> However, the election as prescribed by Sch 2A under the Act was for a single member of a regional council ward. It requires an absolute majority system akin to the House of Representatives electoral system. There is no evidence that Mr Wilson represented a particular constituency or set of views; nor indeed is there evidence to the contrary. It may be that, had his ineligibility been discerned, those who voted for him may have expressed preferences for one or other of Ms Daly or Mr Parry in a different way from that which they expressed their preferences on the votes which they cast for Mr Wilson. It may be that the preferences were expressed with some indifference through a belief that Mr

> Wilson would be elected. It is presently unknown how many of the former votes cast in favour of Mr Wilson contain preferences. It may be that the communications to the electorate by Ms Daly or Mr Parry may have been different. At a more remote level, it may be that if Mr Wilson had not stood for election some other person reflecting the views for which he stood may have been a candidate. I simply do not know. I am therefore not satisfied that a special count by the distribution of the preferences of Mr Wilson's votes would probably represent the will of the electorate, had he not been an candidate at all."

In the present case it cannot be inferred the electorate voted with knowledge that there was an issue which might mean Mr Stephen could not lawfully be elected. Nor can it be inferred whether with that knowledge another candidate would have nominated to oppose Ms Bero. Perhaps no-one would have nominated, but it is not a fanciful prospect that someone may have, particularly bearing in mind the low proportion of votes Ms Bero attracted on the island.

New election

In all of the circumstances, the true will of the electorate being impossible to divine from what transpired, the best means of giving effect to the will of the people is to allow them to express it at a new election.

I decline to order that Ms Bero be taken to be elected and,

rather, will order a new election must be held.

The parties have indicated they seek no order as to costs.

Orders

My orders are:

(1) Pursuant to s 142(2)(a) of the *Local Government Electoral Act* 2011, Jerry Dixie Stephen, the candidate declared by the first respondent to be elected as the councillor for Division 13 of the Torres Strait Island Regional Council, is taken not to have been elected.

(2) Pursuant to s 142(2)(b) of the *Local Government Electoral Act* 2011 a new election must be held for Division 13 of the Torres Strait Island Regional Council.
