[2022] EWHC 937 (QB)

Case No: M372/21

IN THE ELECTION COURT
HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE ACT 1983
IN THE MATTER OF THE PARISH COUNCIL BY-ELECTION FOR CHURCH FENTON ON 6 MAY 2021

Before :

His Honour Judge Saffman sitting as an Election Commissioner

- -

Between :

Susan Babington (1)
Martin Blakey (2)
Sarah Chester (3)
Lesley Wright (4)

Petitioners

- and -

Jessica Cooper (1)
Stewart Ferris (2)
Joanna Mason (3)
Janet Waggott (4) (the Returning Officer)

Respondents

- -
- -

The petitioners in person
Respondents 1 to 3 neither attending nor represented
Mr Timothy Straker QC instructed by Sharpe Pritchard for the 4th Respondent

Hearing date: 7 and 8 March 2022
Date draft circulated to the Parties: 16 March 2022
Date of hand down: 27 April 2022
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I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

JUDGMENT

Introduction

1. This election petition, issued on 26 May 2021, questions the parish council by-election for Church Fenton, North Yorkshire held on 6 May 2021.

2. Section 127 *Representation of the People Act 1983* sets out the grounds upon which an election such as this parish council by-election can be questioned. It states:

> *An election under the local government Act may be questioned on the ground that the person whose election is questioned –*
>
> *a. was at the time of the election disqualified, or*
>
> b. *was not duly elected,*
>
> *or on the ground that the election was avoided by corrupt and illegal practices or on the grounds provided by section 164 or section 165, and shall not be questioned on any of those grounds except by an election petition.*

3. The election was one under "a local government Act". That is so by virtue of the provisions of s203 of the 1983 Act which defines that as the *Local Government Act 1972*. That in turn, by s16, provides for the election of parish councillors and (by subsequent amendment) the incorporation of the 1983 Act

4. By this petition the petitioners' question the election of the successful candidates on the basis that they were not duly elected. The petition therefore focuses exclusively on s127b above. It was indicated in *Ali v Bashir* (2013) EWHC 2572 at para 59 that in practice this provision is largely confined to cases where, on re-examining the votes after removing any defective votes, the candidate ceases to have a preponderance of votes.

5. Section 128 of the 1983 Act provides that a petition giving rise to a challenge under s127 can be presented by, amongst others, not less than 4 people who voted as electors at the relevant election or had the right to do so. This petition is presented by Ms Susan Babington, Mr Martin Blakey, Ms Sarah Chester and Ms Lesley Wright, all of whom were entitled to vote, and did vote, in the by-election.

6. The by-election was to fill 3 places on the Church Fenton Parish Council. There were 4 candidates. They consisted of the first 3 respondents to this petition namely Ms Jessica Cooper, Mr Stuart Ferris and Ms Joanna Mason all of whom were the successful candidates and Mr Stuart Spensley, the unsuccessful candidate.

7. Mr Ferris polled 267 votes, Ms Cooper 259 and Mrs Mason 241. Mr Spensley polled 226 votes – some 15 fewer than Ms Mason.

8. The Returning Officer was Mrs Janet Waggott. She is the 4th respondent. She is the chief executive of Selby District Council and has a long and clearly distinguished career in local government. Her role as returning officer, however, is an independent one but her evidence is that she is also experienced in this role on the basis that she has been involved in the supervision of elections over a significant period and has been Selby's Returning Officer since 2017.

9. All the petitioners are represented by one of their number, Ms Sarah Chester. The Returning Officer is represented by Mr Timothy Straker QC. I am grateful for the skill with which the advocates have gone about advancing their respective cases both orally and in writing. The elected candidates, namely respondents 1 to 3 and Mr Spensley, have not taken part in this petition and do not appear. In fact, as I understand it, Ms Cooper is no longer a parish councillor having resigned since this by-election. Mr Ferris gave word that he did not intend to attend while Ms Mason gave word that she might "*pop along for a while depending on how busy I am and how long it goes on for".*

Election Rules

10. It is right to note that there are strict rules as to how any election, including a parish by-election, is to be conducted. These rules are essentially designed to maintain the integrity of the electoral, and thus the democratic, process. I think it is fair to observe that there may be some differing views as to how effective the current system is in actually achieving that laudable objective but, of course, the importance of trying to maintain the integrity of the democratic process and peoples' confidence in it is critical. This is an observation that I would venture to suggest has added poignancy when people are, even now, fighting and dying to maintain democratic principles, as have many very brave people over many years.

11. The rules which are relevant to this particular election are the *Local Elections (Parishes and Communities) (England and Wales) Rules 2006* (SI 2006/3305). I shall call them "the Rules". S36 of the 1983 Act provides the basis by which the Rules are applicable to this election.

12. Those Rules make it clear an election does not just consist of polling day. As Mr Straker puts it in paragraph 7 of his skeleton argument *"The election, as is demonstrated by the rules for elections, is conducted according to a particular timetable with election rules covering every step required to be taken for the election*". These steps, and thus the election, include matters such as notices of elections, nominations, statements of nominations, forms of ballot paper, actions necessary before the poll, setting up of the polling station, the appointment of polling officers and the provision of the relevant paraphernalia to be used at the polling station, events on polling day, steps to be taken at the close of the poll, the count and the ultimate declaration. In her witness statement the Returning Officer goes into some detail as to the steps required to be undertaken over and above the steps focusing on polling day itself.

S48 of the 1983 Act

13. Parliament in its consideration of the 1983 Act clearly recognised, as had been the case in preceding similar legislation, that the strictures of the Rules, their extent and detail mean that inevitably from time to time there will be an accidental breach of them. The Act therefore contains the saving provision which graced earlier iterations of this legislation. It is to be found in section 48(1) which provides that:

> *No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of rules under s36 if it appears to the tribunal having cognizance of the question that –*
>
> *(a) the election was so conducted as to be substantially in accordance with the law as to elections; and*
> (b) *the act or omission did not affect its result.*

The Election at Church Fenton

14. In this case it is appropriate to note that the complicated life of a Returning Officer, his/her Presiding Officer and polling clerks was made more complicated by a number of features applicable specifically to this election:

    a. The Covid-19 pandemic and the steps that needed to be taken to protect the safety of voters and electoral staff.

    b. The election was a combined election in the sense that, not only was Church Fenton Village Hall on 6 May 2021 the polling station for the Church Fenton parish by-election, it was also the polling station for the election of a Police, Fire and Crime Commissioner. This was accordingly a combined election to which the provisions of schedule 3 of the Rules applied.

    c. Electors in respect of the Police, Fire and Crime Commissioner election were entitled to vote for up to 2 candidates. Electors for the parish councillors, however, could vote for up to 3 candidates.

    d. The pool of electors in respect of each election was different. The electors for the by-election were confined to residents of Church Fenton. The electorate for the Police, Fire and Crime Commissioner was wider. In other words, a resident of Church Fenton parish was eligible to vote in both elections but a voter who resided elsewhere but whose polling station was still Church Fenton Village Hall was only entitled to vote in the election for the Police, Fire and Crime Commissioner.

    e. Finally, and with reference to the wording of s48 above, it is admitted by the Returning Officer that there have been acts or omissions in breach of official duty in connection with the by-election. One such breach became apparent on polling day before the polls had actually closed, others have become apparent or, indeed, occurred since.

Breach number 1

15. The first such admitted breach arose by virtue of the fact that some of the voters who attended at the polling station who were only eligible to vote for the Police, Fire and Crime Commissioner were given ballot papers for the parish by-election and casted votes using those papers. No one is suggesting that was anything other than an innocent error but the reality is that it meant that votes were cast by people who were not entitled to cast those votes.

16. The petitioners therefore assert in their petition that the first, second and third respondents, albeit they were elected, were not “duly” elected because a candidate is only “duly” elected if his/her election is in accordance with electoral law. It is suggested that a candidate whose votes include ineligible votes is not, by definition, elected in accordance with electoral law. They therefore seek a declaration that the election is void and an order that it be rerun.

17. As I have said, the Returning Officer does not dispute that the offending act/omission occurred. She argues that the election is nonetheless saved by the section 48 saving provision on the basis that the election was conducted in substantial compliance with electoral law and the error did not affect the result.

Effect on the result (part 1)

18. Let me deal briefly with the effect that this error had on the result. By an application issued on behalf of the Returning Officer dated 24 February 2022 an order was sought for the inspection and recount. The objective was to identify the votes cast by those not entitled to vote, exclude them and recount the remainder.

19. The average person in the street who has been brought up in the belief that our elections operate on a secret ballot basis may be surprised to know that it is even possible to identify by whom a vote is cast. However, in order to detect and prove any possible abuses or fraud, the Rules require that there is maintained a Corresponding Number List.

20. Each voter has his/her own unique electoral number which contains a code by which can be identified the voter and his/her place of residence. When a voter attends at the polling station his/her number is entered on the Corresponding Number List, as is the serial number of the ballot paper with which that voter is issued.

21. In this case, if the voter number on the Corresponding Number List contained the prefixes ABG or ALF then that meant that the voter is not a resident of Church Fenton but rather of a different parish. If an interrogation of the ballot papers cast in the parish by-election reveals that one bears a serial number which coincides with the serial number entered against a voter number bearing either of those prefixes on the Corresponding Numbers List then it is clear that that ballot paper has been cast by an ineligible voter.

22. This of course makes the Corresponding Number List a sensitive document because, when it, the voter reference code, the register of electors, and the ballot paper are consulted together, it is a means by which the identity of the voter and his/her vote can be revealed and, if that were to occur, it would undermine the whole concept of a secret vote.

23. The Rules seek to eliminate this risk. Rule 43 requires that the Corresponding Number List is sealed away in a packet at the close of the polls. The Rules also provide that the packet is not to be unsealed except by court order and that it is physically destroyed after 12 months.

Breach Number 2

24. I pause here to recount breach number 2. It arises because it has been accepted that the Corresponding Number List in this case, albeit initially sealed in a packet, did not remain in a sealed packet.

25. It is not entirely clear how long the relevant packet was unsealed. The evidence of Mrs Waggott suggests that it could have been unsealed for up to 3 weeks in an off site storage facility owned by the council before the fact that it was unsealed came to the attention of Mrs Waggott and she consigned it to a locked drawer in her office.

26. This breach is not one which figures in the petition as a ground for invalidating the election because, at the time the petition was issued, the petitioners were unaware of it, as indeed was

the Returning Officer until it was discovered by her some time after the election when the packets were retrieved as a result of the petition.

Effect on the result (part 2)

27. Putting that to one side, however, and returning to the application for a recount, initially the petitioners were not wholly amenable to a recount, particularly one at the outset of the hearing. Ultimately, however, their objections to a recount fell away. Accordingly, I was able to make that order on an unchallenged basis.

28. The recount took place on the first morning of the hearing in the presence of the petitioners, myself, the Returning Officer and, of course, her legal team. The ineligible votes were identified and excluded. There were about 20 of them. The process did not just involve the exclusion of votes cast by ineligible voters but also the exclusion of ballot papers which fell to be excluded for other reasons identified in the Rules.

29. Of the reasons for rejecting ballot papers to which I refer above, 2 were rejected as being unmarked or void for uncertainty but none were rejected for want of an official mark, for voting for more candidates than the voter was entitled to or for writing or marking the ballot paper in a way by which the voter could be identified. As I understand it, at the original count following polling day, no ballot papers were rejected for this last reason. That in itself gives rise to the third issue with which this hearing became concerned. I shall come back to that shortly.

30. The recount resulted in Mr Ferris securing 261 votes against his original 267, Ms Cooper securing 246 votes against her original 259 and Mrs Mason 232 as against her original 241. Mr Spensley still came last with 221 against his original 226. It is clear that the recount established that the original decision to include the votes of those who ought not to have voted did not affect its result. The Declaration of Result of Poll recorded that the electorate was 1048, that 422 ballot papers had been issued and that the turnout was 40.26%.

31. The recount provided an opportunity to inspect the Corresponding Number List. There was no obvious evidence that that had been altered or tampered with in the period when it was in an unsealed packet.

32. Of course, even though the error of permitting ineligible people to vote did not affect the result, the election is still susceptible to a declaration of invalidity if it appears that it was not conducted substantially in accordance with electoral law. That therefore requires a consideration of what is meant by “substantially in accordance with electoral law”.

Breach number 3

33. Before, however, I embark upon that exercise let me deal with the other breaches accepted and alleged. I begin by adding flesh to the third issue which I identify above. The following factual matrix is essentially agreed by the Returning Officer. What is not agreed, however, is that that matrix constitutes a breach of electoral law or that, if it did, it was a substantial breach.

34. On polling day an eligible voter, whose initials are EG, when in the polling booth at Church Fenton Village Hall, inadvertently placed one of her votes against the name of a candidate for whom she did not intend to vote. She had intended to vote say for candidates A, B and C but mistakenly instead placed her cross intended for candidate C in the box referable to candidate D.

35. She realised her error and sought advice from Mr Neil Scargill, the Presiding Officer. It is not in dispute that he told her to amend her ballot paper. I have a statement from EG to the effect that Mr Scargill told her to amend and sign her ballot paper. Mr Scargill says that he merely suggested that she initial the amendment. In fact, whether advised to or not, she both signed and initialled her amendment. The initials are clearly "EG" but her signature is simply a squiggle from which it is impossible to decipher a name. In that respect of course it is no different to very many signatures. That, as a general rule, does not a stop a signatory from being identified because the identity of the signatory is gleaned from the style and look of the signature rather than how it actually reads.

36. The 1983 Act, Schedule 1 paragraph 47 states so far as is relevant:

Any ballot paper—
(a) which does not bear the official mark, or
(b) on which votes are given for more than one candidate, or
(c) on which anything is written or marked by which the voter can be identified except the printed number [and other unique identifying mark] on the back, or
(d) which is unmarked or void for uncertainty,
shall, subject to the provisions of the next following paragraph, be void and not counted.

37. The question arises as to whether, under those circumstances, it was erroneous to allow this vote to be counted. I should add that the decision to count it was not referred to Mrs Waggott but was taken, without consultation, by one of her deputies.

38. Mr Straker suggested that there was no error. He points out that the decision of the Returning Officer is final subject to review on a petition and that the signature on this ballot paper is so stylised as to provide an insufficient basis for concluding that the voter can be identified.

39. It is right to observe that in the *West Bromwich Case* (1911) OM and H 256 a ballot paper was rejected merely because it bore initials. Rhetorically one might ask therefore how much more likely is it that a ballot paper will be rejected where it bears initials and a signature?

40. The response from Mr Straker is that the world in 1911 was entirely different. The pool of voters was smaller and voter identification may therefore have been less unlikely. In addition, he argues, there is a much greater bias now than there was in 1911 in favour of allowing votes to stand.

41. As to his first point, the pool of voters in this case was very small. It amounted to no more than 1048 and all emanated from the same small part of the world namely Church Fenton parish. Ms Chester herself says that she recognised EG's signature. Add to that the fact that there are no rules that prevent the vote counters from hailing from the same locality as the voter and it seems to me that there is sufficient material to enable this voter to be identified.

42. I remind myself that the Returning Officer's decision that the markings could not identify the voter is a final decision unless challenged by a petition. Of course this petition does not launch that particular challenge. Furthermore, the point made by Mr Straker is that even if this vote ought not to have been counted the fact that it was counted did not affect the result and it cannot be said that counting it resulted in the election being conducted other than substantially in accordance with the law. He is clearly right in his assertion that it did not affect the result. The recount clearly establishes that.

43. Nevertheless, it seems to me that the Returning Officer or her deputy in this case made an error in not rejecting this vote even though there is a bias in favour of allowing a vote. The point is that if initials and a signature are not enough to identify the voter in a small by-election such as this then it is difficult to see what would be.

Breach number 4

44. In common with the first and second breach, this is one that the Returning Officer recognises as a breach.

45. Once again it is not of itself a ground of challenge in the petition because it was not something about which the petitioners were aware until the witness statement of the Returning Officer drew it to their attention.

46. Rule 35 of the Rules requires each voter to receive "*a ballot paper in respect of the relevant election*". One voter appears to have been issued with 2 ballot papers because one was inadvertently stuck to another.

47. It is recognised by the Returning Officer that this might be considered a technical breach of rule 35. In fact, the second ballot paper was unmarked so it was not used for the purpose of voting. On any view it is a glitch in the administration of the election but it is difficult to see it as more than that.

Breach number 5

48. This final alleged breach differs from the others in that the Returning Officer does not accept the factual matrix asserted by the petitioners. There is, in short, a dispute of fact which I must resolve. If resolved in favour of the respondent Returning Officer then this allegation can have no relevance. If it is resolved in favour of the petitioners then it constitutes a breach which gives rise to a consideration of whether it is a breach which, by itself or combined with others, is amenable to the saving provision of section 48.

49. The allegation is that incorrect advice was given to voters about the number of candidates for whom they could vote. This is an allegation set out in the petition and the complaint is that, while voters were entitled to vote for 3 candidates in the by-election, the election staff at the village hall advised some voters that they could vote for no more than 2.

50. The evidence adduced by the petitioners in support of this allegation is however very scant indeed. Miss Babington in neither her written nor oral evidence suggested that she personally was told that she could only vote for 2 candidates in the parish by-election.

51. Her evidence was simply that she herself was quite confused (although not sufficiently confused so as to prevent her from casting all the votes that she was entitled to cast) and she thought that others may be more confused. Her evidence is that she pointed this out to Mr Scargill, the Presiding Officer. He initially agreed that it might be wise to ensure that voters were made specifically aware of the number of votes that could be cast but was then dissuaded from doing so by one of his clerks who thought that the written instructions in the polling booth was sufficiently clear.

52. An issue arose as to the extent of signage in the polling station instructing electors as to procedure and the number of votes they were permitted to be cast. It appears not to be in dispute

that there were such instructions in the polling booths but Ms Babington cannot recall seeing any in the polling station other than in the booth. She does not categorically assert that such posters were not displayed in the wider polling station. She simply cannot recall.

53. Her co-petitioner, Mr Martin Blakey does not suggest that he was misled by the electoral staff as to the number of votes he could cast. He too can recall notices in the polling booth giving directions for voting but cannot recall any notices elsewhere. He too however does not specifically assert that no such notices existed, he simply cannot recall.

54. Ms Georgina Ashton gave evidence. The thrust of her evidence related to the fact that she was given a ballot paper for the parish election even though her understanding was that she was not eligible to vote and made that clear to the Presiding Officer. It was in fact Ms Ashton's involvement that brought this issue to the attention of the Returning Officer. She reports that, in her conversation with the Returning Officer, Mrs Waggott suggested that the problem was going to be resolved by removing the ineligible ballot papers before the count. Mrs Waggott does not dispute that she proposed that solution to Ms Ashton and that, in fact, such a solution would have been unlawful.

55. Ms Ashton did not appear to suggest that she was told by staff, who were under the mistaken impression that she was entitled to vote at all, that she was only permitted to vote for 2 candidates in the by-election. She did not notice anything unusual about the polling station. She makes no complaint of an absence of written instructions and specifically recalls a poster in the polling booth. She cannot recall whether posters were located elsewhere in the polling station.

56. Mr Scargill's evidence as the Presiding Officer was that he was perfectly aware that electors had up to 3 votes to cast in favour of candidates for the by-election and no elector was told that they had less than 3. His oral evidence was that he was actually told this at a face-to-face meeting when he collected the ballot boxes and associated electoral paraphernalia from the offices of the Returning Officer prior to the election. I should say that this is not made clear in his witness statement but nonetheless that was his oral evidence.

57. He is also adamant that there was comprehensive signage explaining the procedure, not only in the booths but in the wider polling station, as well as instructions on the polling card and ballot paper. In this regard he is supported by the oral and written evidence of Ms Lisa Midgley, a polling clerk and her colleague, Ms Pamela Andrews. Ms Andrews has not attended and makes no written comment on whether there were signs other than in the booths but she is as clear as Mr Scargill and Ms Midgely that voting instructions were clear.

58. It is appropriate to note that the polling staff seemed to recall that many people asked how many votes they could cast. The point made by the petitioners is this is itself evidence that written instructions were not perhaps as clear or as plentiful as they could have been. If they had then it would have been unnecessary to enquire in the numbers that made that enquiry.

59. The point was made, however, is that often people seek confirmation of things that they already know if there is an official there who is able to give that confirmation. That is simply human nature. I accept that, but even if that was not the case there is simply no evidence that people received any instructions which precluded them from voting for 3 candidates if they wished to do so.

60. None of the electors who have been called suggested that Mr Scargill or his clerks misled them in any way nor indeed are there any witness statements from any such electors to that effect.

Such an instruction would have been clearly contrary to such instructions as it is accepted were available. That in itself makes it less likely that the polling staff would have been minded to give information which might mislead.

61. I referred earlier to the evidence in support of this particular breach as being scant. In fact there is no evidence of misdirection. In so far as the focus was in connection with the existence or otherwise of posters on the polling station walls, in fact, whether they existed or not is something of a red herring. It would only be relevant if there was evidence that the purportedly absent posters somehow constituted a breach of the Rules and that electors were misled by virtue of the absence of required posters. There is no evidence of that.

62. In short there is nothing in the evidence presented to me upon which it would be appropriate to reach the conclusion that breach 5 is actually made out.

63. I should be clear that in coming to this conclusion I do not overlook that Ms Chester mentioned that she had spoken to an elderly lady who claimed to have been given to understand that she could only vote for 2 candidates. There is however no evidence from this lady. Indeed there is no evidence from her even of a hearsay nature. The only reason that I know of it is because Ms Chester made reference to it in her submissions but Ms Chester did not give evidence. Even if she had, and even if I accepted that Ms Chester was accurately reporting what she had been told, it would have been difficult to attach much weight to this hearsay evidence. There is simply not a valid basis for making a finding in favour of the petitioners on breach number 5.

Further developments post the election and declaration

64. There is a further matter which it is appropriate to record. It relates to the reaction of the Returning Officer when it became clear that ballot papers had been given to people who were not entitled to them.

65. By an email sent to Ms Babington on 11 May 2021, admittedly not by Mrs Waggott but accepted by her as having been sent with her knowledge and authority, it was conceded that "*The issues at the polling station do call into question the administration of the election*".

66. It is right that, although phrased as issues (plural) rather than an issue calling into question the administration of the election what Mrs Waggott had in mind related solely to the accidental enfranchisement of ineligible voters.

67. The email goes on to say;

> *"Unfortunately the Returning Officer does not have the power to rerun the election. The result can only be challenged by an election petition which can be brought by any of the candidates or 4 persons who are entitled to vote in the election.*
>
> *I have provided this information to the Chair and the Clerk to the Parish Council and confirmed that the Council would be minded to consent to the petition if it is submitted"*

The email scans to me like a concession that the Council would consent to a petition demanding a rerun. Why else appear to bemoan the lack of a power reposing in the Returning Officer to order a rerun?

68. In fact, it transpires from her oral evidence that Mrs Waggott's agreement was confined merely to no opposition to a recount. This is a surprisingly narrow interpretation of the words in the email, but that was her evidence.

69. Mrs Waggott seemed to take the view that the additional breaches identified subsequent to this first breach fortify her view that only a recount is necessary. I found it puzzling as to how she could possibly take the view that the identification of additional errors somehow reduced the appropriateness of a rerun rather than the opposite.

70. She was, however, eventually and after some pressing, prepared to concede that the confidence of the electorate in the outcome of an election is likely to be affected if the electors include some who were not entitled to vote. Nonetheless, her position is that in this case, despite the identified breaches, the election was substantially in accordance with electoral law.

S48 Substantial accordance

71. I now turn to what is meant by substantial accordance. I think one need go no further back than *Morgan v Simpson* (1975)1QB 151. This was a case where 44 ballot papers did not bear the official imprint which was a requirement for a valid ballot paper. It was held that this was not a substantial departure from election law. In that case the election was vitiated but that was only because of the effect that the defect may have had on the result which was decided by less than 44 votes.

72. At 164 F Lord Denning MR, having analysed earlier cases, concluded that the law could be stated in 3 propositions:

- *If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated irrespective whether the result was affected or not.*
- *If the election was so conducted that it was substantially in accordance with the law as to elections it is not vitiated by a breach of the rules or mistake at the polls – provided that it did not affect the result of the election.*
- *But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or mistake at the polls – and it did affect the result then the election is vitiated.*

That case fell therefore within category 3 above. The result in this case was not affected. The question therefore is whether the Church Fenton by election was so badly conducted that it falls into category 1.

73. Stephenson LJ stated in Morgan v Simpson at 168 E:

> "*For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or travesty of an election by ballot. Instances of such a substantial departure would be allowing voters to vote for a person who was not in fact a candidate or refusing to accept a qualified candidate on some illegal ground or disenfranchising a substantial proportion of qualified voters"*

74. He went on to observe that:

> "*What is substantial is a question of degree and I find it easier to give instances of what is and is not substantial than to define precisely in other words what the section means*."

Submissions

The petitioners' submissions

75. Ms Chester has been good enough to furnish me with a copy of her final submissions and I have considered it carefully. The fact that this brief summary of submissions does not address every point is not an indication that they have not been considered.

76. Ms Chester argues that there has been wholesale maladministration of this by-election and the consequence is that it cannot be said to have been conducted substantially in accordance with electoral law.

77. She argues that the breaches, both individually and cumulatively, lead to that conclusion and she prays in aid the first proposition of Lord Denning MR to which I refer in paragraph 72 above in support of her contention that it matters not that the recount has indicated that the result was not affected.

78. She raises issues about the quality of training undertaken by the electoral officers. She points out that such training as was undertaken was only of a generic nature. It cannot, she argues, assist the Returning Officer in the context of her assertion that voters were not misled by erroneous instructions as to the number of votes that could be cast because the training never covered this. I have, of course, already determined that this alleged breach (which I have characterised as breach number 5) is simply not made out on the evidence, irrespective of alleged shortcomings in training.

79. She points out that even the Returning Officer appears not to have formal qualifications as to the running of an election and was prepared to make the fundamental error of removing votes from the ballot box before the declaration.

80. She also complains of Mrs Waggott having something of a laissez-faire attitude to the election process evidenced, Ms Chester suggests, by, for example:

    a. The lack of follow-up of an investigation that was undertaken to consider this election and the lessons to be learnt.

    b. The fact that she left a consideration of whether EGs vote should be rejected to a subordinate.

    c. The fact that no drilling down has been done to establish who actually unsealed the Corresponding Number List and what happened to it during the period when it was unsealed.

81. Ms Chester refers me to *Edgell v Glover* (2003) EWHC 2566 (QB). She argues that the multiplicity of breaches here makes it more likely than not that there were other breaches of the Rules about which she and the court and possibly even the Returning Officer are ignorant.

82. She cites *Edgell* as authority for the proposition that the court is entitled to draw inferences that there are other errors which inform a conclusion there has been a substantial departure from electoral law.

83. She refers me to paragraph 35 to 37 of that judgement which the judge states:

> *35 "I reject the submission that the court is not entitled to draw inferences in connection with the character of the errors which it is established have been made. The Returning Officer has done so by suggesting likely explanations for the errors. I fail to see, in a situation where it is generally accepted that any election process is likely to give rise to error, and where errors have been established as having occurred, why one should proceed upon the assumption that the next inspection will not throw up any more errors. Due regard to the range of causes which could have given rise to the weight which should be attached to the pursuit of the one circumstance in which the result could turn out not to be affected after all.*
>
> *36 It is one thing to carry out an inspection where there has been an appearance of error alleged in a petition and to find on the inspection, which will commonly be ordered, that there was no error. It is quite another to order an inspection to see whether an error proved to have affected the result could nevertheless be counteracted by the result of further errors.*
>
> *37 …… Obviously, it is relevant to consider whether further investigations can be carried out, but the court is not bound to order them simply because the investigations are possible. The potential value of such investigations will depend upon what they might show. If they are only likely to affect the evidence presently before the court in a limited and remote circumstance then to order the investigation is simply delaying the time at which the court will, at a later* date*, have to declare the election invalid. The inherent uncertainty attendant upon the only relevant result which could affect the matter is, in my judgement sufficient and substantial and points the resolution of this petition by an order of the court now rather than later……*"

84. Finally, Ms Chester reminds me that even though Mrs Waggott may have retreated from her position that she would not defend the election, she eventually conceded that this election may, in the end, have been conducted in a way which may cause an elector to conclude that he/she cannot have confidence in the result. As she put it at the conclusion of her submissions:

> *"As petitioners who rely on the democratic services provision in the district to be compliant and meet the high level of accuracy that it deserves, the petitioners feel it is important to restore the public's confidence in the democratic process by providing for disclosure and transparency of the errors that occurred, details of the lessons learned with improvements implemented and a rerun of this election.*
>
> *This is not about the results or any individual counsellor, it is about standing up for democracy and the fact that the parishioners of Church Fenton have been let down and failed badly by the local authority who it now seems, are trying to back out of their responsibility as earlier promises of another election seem to have disappeared*."

Submissions on behalf of the Returning Officer

85. Let me deal first with Mr Straker's submissions in relation to the effect of *Edgell*. He does not accept that it assists the petitioners in the way suggested. He argues that it most certainly does not suggest that an election court can proceed on the footing that there may be other material errors lurking in the background but currently unascertained.

86. *Edgell* was a case concerning postal votes in which one vote separated the parties. There was an issue as to whether a Declaration of Identity had been properly completed. There was an inspection, just as there was in this case, and that revealed other arguably irregular declarations.

87. In other words, the inspection actually identified defects in much the same way as our inspection identified a defect in the admission of EGs vote. However, in *Edgell* the inspection was brought to a premature end, unlike in the case with which we are concerned.

88. Mr Straker suggests that the critical point about *Edgell* was that any defect may have affected the result bearing in mind that the difference between two 2 most successful candidates was only one vote. The point that was being made by the court was that it was not appropriate to conclude that there may be other errors in favour of the unsuccessful candidate which offset the error in favour of the successful candidate. That, argues Mr Straker, is the nub of *Edgell*.

89. Indeed, he argues the decision to order a rerun of that election was dependent not on a finding that there had not been substantial compliance but simply on the basis that "*the court should not strain to uphold an election which contained known errors and which produced a bare majority of one vote for a successful candidate.*" Per Clarke J at para 51.

90. As to his more general points, Mr Straker reminded me that s48 has a preservative effect. The default position ought to be that an election is valid. He points out that there are sound policy reasons which include the expense and administrative burden of reruns and the benefit of avoiding a surfeit of elections. There is also the fact that a rerun would seek the views of the electorate at a different time. An election should ideally reflect the views of the electorate at the time that the election was held rather than the views of the electorate at a subsequent time.

91. He also reminded me of the fact that compliance with electoral law does not just involve what happens on polling day. As I record in paragraph 12 above, an election is much bigger than simply polling day. It involves all the steps prior to polling day and those subsequent to polling day up to and including the declaration. There are a myriad of steps involved in an election. A consideration of whether there has been a substantial departure from electoral law needs to be considered in that context and not in the context of whether there has been a departure in just one part of the process. There has been no complaint about steps taken up to election day.

92. There is a complaint of course in relation to an unsealed package but Mr Straker's position on that is that that is not part of the election. It is subsequent to the election. He prays in aid the Rules themselves. Part 4 of schedule 3 is headed "*Final Proceedings in Contested and uncontested elections*". Issues relating to the sealing of packets is dealt with in Part 5 and is thus after the final proceedings. Mr Straker argues that there is no breach therefore of official duty in connection with the election.

93. In any event he argues, there is no evidence that the Corresponding Number List was tampered with in any way. Indeed, its appearance at the recount strongly suggested that it had not been tampered with. He argues that it cannot be said that unsealing this list affected the result or that the fact that it was unsealed precluded the recount from being an accurate one. Furthermore, the evidence is that it was properly dealt with at the polling station, at and after the count and was initially stored in a sealed packet and has been under lock and key for the vast majority of its existence since it was unsealed.

94. In the end, he simply argues that the breaches that I have been identified, even cumulatively, are insufficient to characterise this election as one that was so badly conducted as to fall within the first of Lord Denning's propositions and nor are they sufficient to cause a reasonable person to believe that the election was a sham or travesty.

95. In reaching his characterisation of what is meant by a substantial departure from electoral law it will be remembered that Stephenson LJ gave some examples. One was an error which disenfranchised a substantial proportion of qualified voters. In this case there has been enfranchising of unqualified voters. The question arose as to whether what happened in this case was a mirror image.

96. Mr Straker made a powerful point that, in fact, one is not the mirror image of the other. Where voters are disenfranchised it is simply impossible to know how they would have voted. If this has happened in sufficient numbers there is no way of knowing what effect that may have had on the outcome of the election. However, where people have been given a vote which they ought not to have been given then it is possible to establish how they voted and disregard those votes- as indeed has happened here following the recount. In this case, everybody who was entitled to cast a vote and who wanted to vote was able to do so and their votes counted.

97. In any event, he makes the point that the breach here which erroneously gave a vote to about 2% of the actual voters was not a substantial proportion. True it is that in some contexts 2% can be substantial but, he argues that it cannot realistically be argued that this context is one of them. That, he argues, is demonstrably so where the recount shows that their votes were nowhere near substantial enough to make any difference.

98. Clearly the petitioners and the people who have contributed towards the funding of the petition may feel that the election was a travesty but, he argues, that is by no means determinative. I, as the commissioner, have the benefit of the recount which shows that these breaches had no effect.

99. He argues that, against this background and taking account of the nature of the breaches, even their cumulative effect, these errors would not, in the context of the election procedure as a whole, give the ordinary, reasonable person grounds to regard the election as a travesty or a sham. Because, in the end, nobody who was entitled to the franchise was denied it. Every legitimate vote counted and the illegitimate ones have been discounted and the result was not affected.

100. Mr Straker concedes that a reasonable person may take the view that this election was not perfectly conducted but that is a long way from a travesty. These are errors which, argues Mr Straker, to quote Lawton LJ in *Morgan v Simpson* at 170C are "*nothing more than what is always likely to happen in the conduct of any human activity"*.

101. In addition, he makes the supplementary point that, officially, EGs vote did fall to be counted because the final decision to count it is that of the Returning Officer challengeable only by petition. That decision is not so challenged.

102. Further, Mr Straker argues that the fact that the Returning Officer may concede that the confidence of voters in the outcome of the election might be affected is not to the point. It is not the same thing as whether the election is a sham or a travesty.

103. He argues that many people may not have confidence in the outcome of elections even where the rules have been scrupulously followed. They may, for example, feel that postal votes provide scope for fraud or that a candidate has lied on the hustings but that does not make the electoral process a sham or a travesty in law so long as it is conducted substantially in accordance with the law.

104. He refers me to *James v Davies* 76 LGR 189. In that case a notice did mislead electors yet the court concluded that "*we do not think for a moment that this could be regarded by anyone as a travesty, or a sham, and indeed we are satisfied that the election was so conducted as to be substantially in accordance with the law*." Per Neild J at 193. This, Mr Straker argues, demonstrates the difficulties in successfully alleging substantial non-compliance.

Conclusion

105. I shall deal first with training issues. I understand the points made by Ms Chester in relation to training but, in fact, they are not of relevance in the context of the determination that I have to make.

106. A lack of training per se does not provide a basis for vitiating the election. What provides a basis for vitiating the election is the conduct of an election other than substantially in accordance with the law. Even if it has been conducted substantially in accordance with the law by luck rather than judgment then there is no basis for vitiating the election in circumstances where, as here, the errors do not affect the result unless that lack of training has, as a fact, resulted in substantial non-compliance.

107. The same applies in respect of the allegation that Mrs Waggott's approach was laissez-faire. It only matters that it was laissez-faire (if indeed it was) if it resulted in the election being so badly conducted that it cannot be saved by section 48.

108. I now turn to *Edgell*. I think that I am bound to accept that that was a case decided against a wholly different factual background relating to postal votes and a difference between the candidates of one vote. It is not authority for the court to conclude that an election can be vitiated on the basis that, in addition to known errors, there may be other unknown errors.

109. An election court is no different to any other civil court in the sense that it can only form its conclusions based upon the evidence before it. It cannot base its conclusions on suspicions. This is particularly so where errors will be made in elections because of the strictures of the rules governing them yet specifically Parliament has decided that in itself is not sufficient to vitiate an election. A position specifically acknowledged in *Edgell.*

110. I am satisfied therefore that I must confine myself to a consideration of whether the breaches that I have found are sufficiently substantial, individually or cumulatively, so as to make the election so badly conducted that it was not substantially in accordance with electoral law and was conducted in such a way as to make an ordinary member of the public believe that the outcome was a sham or travesty.

111. On that basis, I am persuaded that, despite the breaches, this election was conducted substantially in accordance with the law.

112. I accept that whether or not there has been substantial compliance requires consideration of compliance with electoral law as a whole and not just the electoral law applicable to polling day. Breaches have to be considered in the context of the big picture and not in the context of a discrete aspect of the electoral process. There is no criticism of the manner in which the election was conducted up to polling day.

113. As far breach number 1, it was highly regrettable that this error was made and it ought not to have been. A little more care and forethought would have prevented it. However, for the

reasons set out in paragraph 96 above, I accept Mr Straker's proposition that wrongfully enfranchising voters is different to wrongfully disenfranchising voters.

114. Even if I am wrong in that, I accept that, in any event, the number of voters who were wrongly enfranchised was not a substantial proportion of the electorate. That is best demonstrated by the fact that their votes were not sufficient to have any effect on the election.

115. I am not satisfied that the ordinary person would consider that the election was a sham or a travesty when the error did not stop those voting who were entitled to vote and had no effect on the outcome. This error seems to me to be no worse than the error in *James v Davies* where even the petitioner's counsel was somewhat unenthusiastic in pressing the argument that what happened there was a substantial non compliance.

116. The same is true of breach number 3, the EG vote, even if that vote should not have been counted, the fact is that it was made no difference.

117. As for breach number 4, as I observed at paragraph 47 above, it is difficult to see this as anything other than an insignificant glitch.

118. Breach number 2 is in a different category. It is not a breach that occurred on polling day but rather it occurred thereafter. As I have said, Mr Straker makes the point that technically it occurred after the election had been completed. I refer to paragraph 92 above. I have to say that I am not sure how a finding that this breach was outside the purview of s48 would assist the Returning Officer since s48 is the provision upon which she specifically relies in her defence of the petition.

119. However, it is important to observe that s48 is a saving provision in respect of breaches, not just of official duty in connection with the election, but also breaches of duty in connection with the rules. It seems to me therefore that it applies - even for steps that post date the election.

120. Whether, however, that is right or wrong, I am not satisfied that this error was of the nature to cause the ordinary and reasonable person to conclude that the election was a sham or a travesty.

121. There is no evidence that the Corresponding Number List was tampered with, indeed its appearance at the recount suggests that it had not. There is no evidence that it has been used to identify the voting intentions of voters and it is worth remarking that it could not do so by itself in any event. It could only do so if combined with the voting papers and a list of names corresponding to voter numbers (i.e. the register of electors).

122. Furthermore, the error did not affect the right of people to vote. Nobody was disenfranchised by this error. It did not affect the result.

123. That is not to say it is not a highly regrettable error because no error ought to occur that may assist, even ever so slightly, in a person being able to identify a voter's intention except where the court has sanctioned that. But, as I have said, in my view, it cannot be said to make the conduct of the election a sham or a travesty.

Cumulative effect

124. Do these breaches cumulatively make the conduct of the election so bad that it falls within the first of Lord Denning's propositions such that, if a reasonable person knew of them, all he/she would conclude that the election was a sham?

125. I think not. There is a presumption that an election result should be allowed to stand. As Mr Straker observed that is the "*bias*". The reasons for that are touched on in paragraph 90 above.

126. In addition the fact is that there are very many steps that the Rules require to be taken. There is no suggestion, other than unsubstantiated suspicion, that there have been any breaches other than the 4 that I have found of which breach number 4 is trivial.

127. True it is that even one breach, if significant enough, may be enough to vitiate an election but it would have to be of the scale envisaged by Stephenson LJ in the examples he gave to which I refer in paragraph 73 above. They are all concerned with inhibitions on the ability to cast a meaningful vote or issues affecting the eligibility of the candidate. None of the errors in this case fall into those categories.

128. I accept that the petitioners' confidence in this election, and indeed those who contributed to the crowd funding, has been shaken. I accept that that is also a view to which Mrs Waggott reluctantly found herself subscribing. But I also accept that that is not the test. The test is that set out in *Morgan v Simpson*.

Outcome

129. As a result of my conclusions the inevitable order is that the petition is dismissed.

130. I should however make it clear that I completely accept Ms Chester's point, which I reproduce at paragraph 84 above, where she says that she and her co-petitioners brought this petition to restore confidence in the democratic process and in an effort to stand up for democracy. It is telling that the Returning Officer essentially invited the presentation of a petition when made aware of the dissatisfaction of a number of voters as to how this election was conducted.

131. Breaches 1 and 2 ought not to have occurred. These are not errors caused by oversight or inadvertent failure to comply with some rule. The actions which constitute these breaches were deliberate actions. I do not suggest that there was an intention to breach the Rules or the electoral process generally. I merely observe that permitting ineligible people to vote and unsealing the packet containing the Corresponding Number List were steps that were actively undertaken.

132. In my view breach 3 ought not to have occurred but I accept that whether a vote is accepted is a matter of judgement in which there may be differing views.

133. I should also add that I too am puzzled that an investigation appears to have been undertaken into what went wrong with this election and what lessons can be learnt but that has not been entirely conclusive and apparently has not been put into the public domain. I do not know if there are good reasons for that.

Costs

134. The usual order on dismissal of the petition would be an order that the petitioners pay the respondent's costs. However, in this case the petitioners seek their costs notwithstanding that the petition has been unsuccessful.

135. The point made by Ms Chester in her final submissions was that the petitioners acted in good faith in submitting the petition and it was following an indication on behalf of the Returning Officer that, if a petition was issued, the council would consent to it and reimburse the costs of the petition.

136. Mr Straker has made it clear that, albeit that in the end the petition was contested, the Returning Officer does not intend to oppose an application by the petitioners for their costs.

137. It seems to me that that is manifestly an appropriate position to take and recognises what I too recognise namely that this petition has been brought for good and proper motives and has succeeded in highlighting errors which hopefully will not be allowed to recur.

The order

138. Subject to any representations in favour of a different order, the order that I propose to make on the handing down of judgement therefore will be as follows:

1 The petition is dismissed

2 The fourth respondent do pay the petitioners' costs to be subject to detailed assessment if not agreed.

3 The security paid into court by the petitioners shall be repaid to the petitioners.

Final remarks

139. For completeness, I note that this judgment makes no specific reference to the evidence of Mr Steve Wright or Ms Sarah Thompson. I mean them no disrespect. It did not seem to me that their evidence took matters any further than existing evidence save, in the case of Mr Wright, to issues of training which I have found not to be of direct relevance.

140. Finally, once again I express my gratitude to the advocates for the manner in which this hearing has been conducted.