IN THE MATTER OF THE ROYAL COLLEGE OF VETERINARY SURGEONS COUNCIL ELECTION SCHEME 1967, as amended in 2006 (“the Scheme”), as approved by the Privy Council.


DAVIES v ROYAL COLLEGE OF VETERINARY SURGEONS (“the RCVS”)

DECISION OF THE CHALLENGE COMMITTEE

1. The RCVS Council Election 2017 (“the Election”) was held in April 2017, in accordance with the provisions of the Scheme. The Election was administered on behalf of the RCVS by Electoral Reform Services. Voting closed at 5pm on Friday 28 April 2017, and in accordance with paragraph 22 of the Scheme, the results of the Election were announced at the Annual General Meeting of the RCVS held on 7 July 2017. There were 16 candidates at the Election, and six vacancies to be filled. Mr Davies was a candidate at the Election, and polled 428 votes. The winning candidates polled between 3,073 and 1,909 votes. The total number of valid votes cast was 6,731, some 54 votes having been declared invalid.

2. (In this Decision, all references to “paragraph” numbers are references to the relevant paragraphs of the Scheme, unless the context otherwise requires.)

3. By letter dated 7 July 2017, Mr Davies challenged the validity of the Election under paragraph 24(1)(a) of the Scheme, on the grounds that the Election was not in accordance with the provisions of the Scheme. Mr Davies does not rely on the alternative ground of challenge under paragraph 24(1)(b) (allegations of corrupt practices).

4. Paragraph 3 of the Scheme provides that the Registrar of the College shall act as the Returning Officer at the Election, but in the absence or inability of the Registrar to act, the Assistant Registrar or such other employee of the College as shall be appointed by the Registrar shall act in his place. In this case, the Assistant Registrar, Ms Corrie McCann, acted as the Returning Officer, and was largely responsible for the conduct of the Election, subject to the provisions of the Veterinary Surgeons Act 1966 (“the Act”), and the Scheme.

5. In accordance with paragraph 24(3) of the Scheme, a Challenge Committee of three members of the Council, who were not elected members, was duly nominated by the President of the RCVS, comprising Professor Richard Hammond, Professor James Wood, and Ms Elaine Acaster. Professor Hammond was appointed to the Council by the University of Bristol, Professor Wood was appointed by the University of Cambridge, and Ms Acaster was appointed by the University of London.

6. In accordance with paragraph 24(4) of the Scheme, the President of the RCVS duly nominated Richard Price OBE QC, one of the Legal Assessors appointed under paragraph 6 of Schedule
7. On 12 July 2017, the Challenge Committee met with the Legal Assessor by teleconference, and agreed and directed the procedure to be followed for the hearing of the challenge, in accordance with paragraph 24(5) of the Scheme.

8. The Election may not be declared void unless the Challenge Committee is satisfied that the irregularity complained of rendered the Election substantially not in accordance with the Scheme or significantly affected the result of the Election (paragraph 24(7)).

9. A candidate at the Election was entitled to supply with his nomination an Election statement and biographical information (of a format and length as specified in the Scheme). Mr Davies’ challenge is concerned with a decision made by the Returning Officer under paragraph 11 of the Scheme to edit his statement before circulation to the electorate.

10. The Returning Officer is not required to circulate an Election statement which s/he “reasonably considers to be defamatory or otherwise unlawful, or factually misleading, and may in the absence of agreement with the candidate either edit the Election statement before circulating it or decide not to circulate it” (paragraph 11(4)). This paragraph is reflected in "Guidance notes for candidates", and "Frequently-asked questions (“FAQs”) for potential RCVS Council candidates", which were published by the RCVS at the time that the Election was announced. Candidates were also reminded of the requirements in this paragraph in an email sent to them on 9 March 2017 by the RCVS in connection with video statements, which candidates were permitted to submit in support of their candidature.

11. In this instance, Mr Davies’ Election statement was circulated albeit in an edited form. Mr Davies was given the opportunity to revise/edit the statement himself before it was circulated but chose not to do so. In those circumstances, the Returning Officer edited the statement herself, having taken legal advice.

12. The Scheme provides that any question as to format or presentation of an Election statement or biographical information is determined conclusively by the Returning Officer (paragraph 11(5)). Further, by supplying an Election statement or biographical information, Mr Davies was taken to have agreed that the decision by a Returning Officer not to issue the whole or any part of a statement was final (paragraph 11(6)(a)).

13. Mr Davies initially provided a draft Election statement for review in advance of the deadline for submission of such statement. It was explained to him in correspondence by Ms McCann, acting as Returning Officer, that his draft statement was considered to contain defamatory and factually misleading material. Ms McCann considered that a section of the statement dealing with his interaction with a joint venture practice (JVP) was defamatory. She also considered that a section of his statement describing his previous judicial review challenge against the RCVS concerning the handling of complaints made against two Registered Veterinary Nurses (RVNs), was factually misleading.

14. Ms McCann set out in e-mail correspondence of 26 January 2017 the respects in which Mr Davies’ statement was considered to be defamatory and factually misleading. She invited him to submit his CV and candidate statement in amended form.
15. Mr Davies submitted a statement in almost identical form as the draft version on 31 January 2017 (the final date for nominations). Further, he provided a biography about his training and experience but included in the biography further details about his involvement with the JVP and his judicial review challenge against the RCVS about its handling of the complaints made against two veterinary nurses. Mr Davies contended that the Returning Officer could only consider a statement defamatory if it were not true and maintained that his statements were true.

16. On 1 February 2017, Ms McCann sent Mr Davies a copy of his statement and CV with those passages highlighted in yellow, notifying him that the highlighted passages would not be published, in accordance with paragraph 11(4). The text of the Candidate Statement, and the CV, submitted by Mr Davies are set out below, with the passages highlighted in yellow shown in italics:

Candidate statement

“I’m gravely concerned about governance of the profession and seek a mandate to illuminate and address the root causes insofar as the issues are relevant to the wider profession. The concerns I allude to are best illustrated by my own story1.

A joint venture practice I opened failed to meet financial targets set by my partners. I was asked to resign, but declined. Soon afterwards I suddenly became the object of numerous bewildering, unfounded and damaging allegations and was dismissed. Despite winning and being vindicated at an employment tribunal, I wasn’t reinstated, giving my corporate partners the legal right to buy my 50% shareholding for £60. My experiences seem to be not altogether isolated ones. A professional magazine intended to publish the details, but were threatened with legal action. Although not questioning it’s veracity, the anticipated legal costs led them to withdraw the story. Meanwhile I raised concerns with the RCVS that two RVNs had made unfounded allegations against me. When I raised further detailed concerns about the adequacy of both RCVS investigations, they advised that my only recourse was a judicial review. Regarding one nurse case, I won the judicial review; the other’s case was ruled out of time so never considered. The RCVS have declined to refer the first RVN case to the PIC/DC liaison committee for review. They instead require that I pay about a quarter of the £50,000 + legal costs, with possible implications for the likelihood that other vets will be willing to raise concerns. I have therefore written several times to George Eustace MP, the Privy Counsellor who regulates the RCVS, but haven’t had a reply from him.

299 words

CV

Whilst studying chemistry I was offered a place at Liverpool. Before starting, I had fun working in mining explosives R & D in Johannesburg to save up. Since graduating in 1992 I’ve worked in SA, equine and mixed practices, mainly in the UK but also in Melbourne and Sydney then Cape Town. In 2004, I completed a degree at London

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1 The RCVS later agreed that this sentence could be published on the website.
School of Theology, and in 2010 I opened an Oxford JVP practice. This eventually led to both the successful employment tribunal and the misconduct complaints I made to the RCVS about two RVN’s described in my candidate statement. As also noted there, the main part of my ensuing judicial review of the RCVS decision was successful. Despite this they persuaded the judge that I had erred regarding procedure, so I was ordered to pay about a quarter of the RCVS’s colossal legal costs. Although discretionary, the Operational Board elected to implement this order. Until the instalments are all paid, the RCVS consider the debt a declare a bull conflict of interest. I presently work part-time for a SA practice in Oxford. I’m also studying for an MA in Christian Apologetics and enjoy various outdoor activities such as cycling, mountaineering and kayaking.”

199 words

17. The RCVS maintains that the Returning Officer (Ms McCann) was entitled to edit the statements under paragraph 11(4) on the basis that she reasonably considered the edited passages to be defamatory or otherwise unlawful or factually misleading.

18. Mr Davies’ statement and CV (in amended form) were published on the RCVS website and were sent out in hard copy to the electorate with voting papers on 22 March 2017 in accordance with paragraph 16.

The Challenge

19. The ground of challenge relied upon is that the election was not in accordance with the provisions of the Scheme (paragraph 24(1)(a)). The specific grounds are set out in paragraph 6 of Mr Davies’ letter dated 7 July 2017, as follows:

   a. The Returning Officer could not reasonably have been satisfied that the contents of the election statement were factually misleading; and/or
   b. The Returning Officer could not reasonably have been satisfied that the contents of the election statement were defamatory; and/or
   c. The Returning Officer could not reasonably have been satisfied that the contents of the biography were factually misleading; and/or
   d. The Returning Officer could not reasonably have been satisfied that the contents of the biography were defamatory; and/or
   e. There was no provision permitting redaction of a biography on the grounds that it was factually misleading/defamatory; and/or
   f. The redaction was unreasonable because it was not a proportionate means of ensuring that factually misleading and/or defamatory content was not circulated by the RCVS.

20. The complete text of Mr Davies’s letter of challenge, and the particular grounds of challenge are attached as Appendix 1.

21. Mr Davies asks the Committee to declare the election void on the basis that the alleged irregularities rendered the election substantially not in accordance with the Scheme or that the alleged irregularities significantly affected the result of the election.
The RCVS's response

22. The RCVS's position is, in summary, as follows:

(i) The election was run in accordance with the provisions of the Scheme and there was no irregularity;
(ii) If, contrary to the above, there was any irregularity, it did not render the election "substantially not in accordance with the Scheme" for the purpose of paragraph 24(7);
(iii) If, contrary to the above, there was any irregularity, it did not significantly affect the result of the election;
(iv) It follows that the Challenge Committee should not declare the election void under paragraph 24(7).

23. The complete text of the RCVS’s response to the challenge, edited to remove irrelevant references or other material, is attached as Appendix 2.

24. The RCVS says that there are no valid grounds for declaring the Election void, and invites the Committee to dismiss the challenge.

Further comments and responses from Mr Davies and the RCVS

25. Mr Davies commented on the response of the RCVS to his challenge in an e-mail dated 21 August 2017, and in a further document dated 25 September 2017, which is attached as Appendix 3.

26. The RCVS responded with written submissions in response to the documents in Appendix 3, which are attached as Appendix 4.

27. Mr Davies responded to the RCVS's submission to the documents in Appendix 5.

The decision of the Challenge Committee on the challenge

28. The Committee has received, read and carefully considered all the documents set out in Appendices 1-5, including the extensive bundle of documents and correspondence between Mr Davies and the Committee attached to Appendix 2.

29. The Committee met with the Legal Assessor to consider the challenge on 18 October 2017, attended by the Clerk to the Challenge Committee. At that meeting, the Committee received written advice from the Legal Assessor in relation to relevant aspects of the law relating to defamation, and the correct approach to paragraph 24(7) of the Scheme, a copy of which is attached as Appendix 6. A copy of that advice was sent to the parties. The RCVS agreed with the advice given. Mr Davies, considered that the Legal Assessor's advice was deficient in relation to libel and his suggested definition of the word 'defamatory'. Mr Davies relied on three meanings from the Oxford dictionary. In particular, he alleged that the Legal Assessor failed to address the question as to whether a comment may properly be considered defamatory if it is true.

30. The Legal Assessor has responded to Mr Davies's criticism of his advice in the following terms:
“I do not accept Mr Davies’s criticism of the advice. The law presumes that defamatory words are false. In consequence, the claimant need do no more than prove that defamatory words have been published of him by the defendant. It is then for the defendant to prove, if he can, that the words are true, so as to enable him to rely on a defence of justification. This rule is of long standing. Accordingly, it was not for the Returning Officer to investigate whether the words which she considered to be defamatory were true. It is for the Committee to decide whether the Returning Officer, acting reasonably, could properly have considered that the relevant words were defamatory.”

In this last piece of advice, the Legal Assessor referred to “the claimant” and “the defendant” in a defamation action. In the context of the present case, if the relevant words had been published, and there was a claim for damages for defamation, the Joint Venture partners would be “the claimants” and the RCVS would be “the defendants”. The rule set out above should be understood in that context.

The Legal Assessor has supplemented his advice in relation to the meaning of the word “defamatory”, in the light of the Defamation Act 2013, which provides that a statement is not defamatory unless its publication has caused or is likely to cause significant harm to the reputation of the claimant.

31. Mr Davies made further observations about the advice of the Legal Assessor in an email dated 25 October 2017 (attached as Appendix 7). The Legal Assessor has informed the Committee that he does not agree with the Mr Davies’s observations. Mr Davies queries the neutrality of the Legal Assessor in the advice he has given to the Committee. The Legal Assessor was appointed under paragraph 6 of Schedule 2 to the Veterinary Surgeons Act 1966, and was duly nominated under paragraph 24(4) to act in an advisory capacity to the Committee, but with no vote. The Committee has no doubt that the Legal Assessor has been careful to act as a self-consciously neutral advisor to the Committee throughout.

31. The Committee has accepted the advice that it has received of the Legal Assessor.

32. The Committee has to consider:

(i) whether there was an irregularity in the conduct of the Election on the part of the Returning Officer; if so

(ii) whether the irregularity concerned rendered the Election substantially not in accordance with the Scheme; or

(iii) whether the irregularity concerned significantly affected the result of the Election.

(i) Was there an irregularity in the conduct of the Election on the part of the Returning Officer?

33. Under paragraph 11(4), the Returning Officer is not required to circulate an election statement which he/she reasonably considers to be defamatory or otherwise unlawful, or factually misleading, and may in the absence of agreement with the candidate either edit the election statement before circulating it or decide not to circulate it.
Under paragraph 11(5), any question as to the format or presentation of an election statement, biographical information or contact details shall be decided conclusively by the Returning Officer.

Under paragraph 11(6), every candidate who supplies an election statement or biographical information under paragraph (1) shall be deemed to have agreed that the decision of the Returning Officer not to issue the whole or any part of it is final.

34. It is accepted by the RCVS that the assessment by the Returning Officer as to whether material is defamatory or otherwise unlawful or factually misleading must be a reasonable one.

35. The Committee notes that the Returning Officer’s powers to edit or not circulate election statements relate solely to material published by the RCVS on its website or in its booklets. The RCVS submits and the Committee accepts that the purpose behind the rule is clear: to avoid the RCVS incurring liability to any third party arising from the publishing of election statements or biographical information. Mr Davies accepts that he published an unedited version of the statement on his own website, and his website address was set out in the information published by the RCVS. He had access to a list of addresses for the electorate, and could have sent out further election material by post if he had wished to do so. He was also at liberty to submit a video promoting his candidature, but declined to do so. The Committee notes that Mr Davies was not the only candidate whose election statements were subject to editing. Changes were made in respect of materials produced by four other candidates as set out in paragraph 4 of Appendix 2.

Defamatory material

36. The section of Mr Davies’s candidate statement which the Returning Officer considered to be defamatory appeared in the first nine lines of the second paragraph of the statement, beginning with the words ‘A joint venture practice ….’ and ending with the words ‘… The anticipated legal costs led them to withdraw the story.” (“the relevant words”)

37. In an email dated 26 January 2017, the Returning Officer explained why she considered that the relevant words were defamatory. She said:

“In your statement you set out details of your involvement with your former JVP. What you say suggests that your former partners behaved inappropriately and unlawfully towards you. That is defamatory. The JVP is easily identifiable and may well take issue with your statements. Whether or not these statements are true or not is irrelevant; they are defamatory.

You have said that the magazine declined to publish. The fact that this is so supports the view that the statements are contentious and potentially liable to challenge. The RCVS has no concerns relating to a general statement to the effect that you have personally had a negative experience in connection with a JVP structure and
have concerns about the wider structure of veterinary practices. However, we cannot permit defamatory details about an identifiable organisation."

38. The Committee considers that the natural and ordinary meaning of the relevant words taken as a whole was as follows:

a) Your refusal to resign from the Joint Venture practice led to your “suddenly” becoming the subject of numerous bewildering, unfounded (ie. false) and damaging allegations of misconduct, which resulted in your dismissal.

b) In spite of your being vindicated at an employment tribunal, your Joint Venture partners wrongfully refused to re-instate you, thereby unjustly enabling them to purchase your share of the practice at an undervalue.

c) By implication or inference, these false and damaging allegations were made by your Joint Venture partners, or others at their behest.

d) The Joint Venture partners were thereby guilty of untoward, unfair, scurrilous and unscrupulous conduct in their professional dealings with you.

The Committee accepts the advice of the Legal Assessor that the sense in which the words were intended is irrelevant.

39. The Committee considers that these allegations suggested, putting it at its lowest, that “your former partners behaved inappropriately towards you” and that the Returning Officer was reasonably entitled to reach this conclusion.

40. Further, the Committee also considers that these allegations, would be likely to cause serious harm to the reputation of the Joint Venture partners, and others, and/or affect their reputation adversely in the estimation of reasonable people generally. In the view of the Committee, they were very serious allegations to make.

41. The Committee notes that Mr Davies refers to the fact that a professional magazine declined to publish his allegations against the Joint Venture partners. The Returning Officer observed that the fact that this was so supports the view that these allegations were contentious, and potentially liable to challenge. The Committee considers that the challenge referred to meant a challenge by way of a libel action, and that the Returning Officer was reasonably entitled to take this into account when arriving at her decision that the relevant words were defamatory.

42. Mr Davies seeks to argue that Ms McCann could not possibly have considered the content of the relevant words to be defamatory, because he did not name anyone in the statement. Ms McCann carried out an internet Google search, and discovered that the Joint Venture practice, and thus the partners in it, were readily identifiable. The Committee accepts the advice of the Legal Assessor in paragraph 2(d) of Appendix 6. The Committee considers that the relevant words were such as would lead persons acquainted with the Joint Venture partners to believe that they are the persons referred to. There is nothing in this point.
43. Accordingly, the Committee concludes that the Returning Officer was reasonably entitled to conclude that the relevant words were defamatory.

**Factual misleading material**

44. The section of Mr Davies’s candidate statement which the Returning Officer considered to be factually misleading appeared in the last nine lines of the second paragraph of the statement, beginning with the words ‘Meanwhile I raised concerns with the RCVS …’ and ending with the words ‘but haven’t had a reply from him’. ("the factual material").

45. Ms McCann explained in her email dated 26 January 2017 why she considered that the candidate statement was considered to contain factually inaccurate and misleading material, as it omitted relevant information. She stated:

“For example, it is not the RCVS which ‘required’ you to pay costs; it is the High Court, through a High Court order that requires you to pay; in raising costs you do not explain that the outcome you obtained was offered at an early stage and that the costs you are required to pay need not have been incurred. The RCVS have not declined to refer to ‘the relevant Standards Committee’, there is no such process and the matter has been dealt with in accordance with College procedures and has been drawn to the attention of the PIC/DC liaison committee. The RCVS takes no issue with you making a general statement relating to challenging of matters via judicial review, but it is necessary for the statements to be accurate and not to mislead. That is not the current situation.”

46. The RCVS expanded on this explanation in its further written submissions dated 25 September 2017 (Appendix 4). In paragraph 8 of Appendix 4, the RCVS stated that the objection raised by Ms McCann (in her email of 26 January 2017) was that in raising the issue of costs, Mr Davies failed to explain that the outcome that he had obtained in the judicial review proceedings was offered at an early stage and that the costs he was required to pay could have been avoided. In respect of his judicial review challenge to the RCVS’s decision to close his complaint about the Registered Veterinary Nurse Walsh, the RCVS offered, after the grant of permission by Warby J, to process that complaint to stage 4 of the complaints process (i.e. the next stage of the complaint). In so doing, Mr Davies was offered the only remedy that the court could grant at a substantive judicial review hearing in respect of the Walsh complaint, yet he decided, nevertheless, to proceed to a substantive hearing. His other grounds of challenge were dismissed at the hearing. Mrs Justice Patterson held:

“None of the matters raised by the claimant whether in his compendious written submissions for the hearing or his submissions on costs raise any basis, in my judgement, for a finding that he was reasonable in the rejection of the offer made by the defendant. It was clearly the claimant’s right to have an oral hearing, which she did, but his conduct in so doing is a matter which the court can properly take into account in coming to its decision in costs which I have done.” (Paragraph 14 of her judgment on costs).
Furthermore, as recorded in the costs judgement, the RCVS had sought to compromise the issue of costs by proposing there be no order as to costs between the parties, yet Mr Davies refused the offer and decided to press on to the substantive hearing.

47. In paragraph 9 of Appendix 4, the RCVS said that the statements made about the judicial review were factually misleading because Mr Davies suggested that he had been unfairly and badly treated by the RCVS in respect of the costs order in circumstances where a High Court judge had found that he had acted unreasonably in refusing to accept the RCVS’s offer, and it was therefore appropriate that he pay costs to the RCVS. Further in respect of Mr Davies’s concerns about the handling of his RVN complaint, the RCVS made the PIC/DC liaison committee aware of his concerns and Mr Davies was notified by letter of 17 October 2016 that this had been done. Mr Davies’s statement suggested a refusal to involve the PIC/DC liaison committee and the Returning Officer was entitled to consider it factually misleading.

48. The Committee has considered the RCVS submissions on this point with care, and has read the judgement of Mrs Justice Patterson dated 12 November 2015 and her supplementary judgement on costs dated 17 December 2015. The Committee concludes that to the Returning Officer was reasonably entitled to conclude that the factual material set out in lines 9 to 18 of the candidate statement of Mr Davies was factually misleading for the reasons referred to in the RCVS submissions set out above.

**Power to edit the CV**

49. Mr Davies argues that the Returning Officer had no power to edit his CV. He argues that the Returning Officer’s powers of editing are restricted to those in paragraph 11(4), which only refers to the election statement, and does not include the CV. The section which the Returning Officer removed from Mr Davies’s CV is set out in paragraph 16 above. The RCVS contends that this passage in the CV also contained factually misleading material relating to the judicial review claim, in similar terms to the factually misleading material in the candidate statement.

50. Paragraph 11(5) provides that any question as to the format or presentation of an election statement, biographical information or contact details shall be decided conclusively by the Returning Officer. Paragraph 11(6) provides that every candidate who supplies an election statement or biographical information shall be deemed to have agreed that the decision of the Returning Officer not to issue the whole or any part of it is final.

51. The RCVS submits that the offending section in the CV was in truth “an election statement” for the purpose of the Scheme. It was not straightforward biographical information that would be expected to be included in a biography. The scheme would be undermined if candidates were permitted to insert collection statements into their biographical information so as to prevent the returning officer exercising powers under paragraph 11(4).

52. The Committee accepts the submission of the RCVS set out in the preceding paragraph. However, the Committee considers that paragraph 11(3)-(6) read as a whole makes it clear that the Returning Officer is empowered to decide any question as to the format or
presentation of an election statement, biographical information or contact details relating to candidates at the Election. The Committee concludes that the relevant provisions of Paragraph 11 gave the Returning Officer power to edit Mr Davies’s CV on the basis that the offending section was in reality an election statement, and was factually misleading for the reasons set out above.

Other matters

53. The Committee notes that Mr Davies was given an explanation of the key reasons why the Returning Officer considered the election statement to be defamatory or factually misleading in her email dated 26 January 2017. Suggestions were made to Mr Davies in that email as to how the statement could be redrafted in a way that would not contravene the relevant paragraphs of the Scheme. Mr Davies did not avail himself of the opportunity to edit his election statement and CV in accordance with the Returning Officer’s suggestions. Mr Davies was entitled to submit a video in support of his candidature, but chose not to do so. He was also entitled to obtain a list of addresses of electors, and could have contacted them by post, but did not do so. The RCVS submits that Mr Davies was the author of his own misfortune by failing to edit his election statement and CV in such a way as to meet the Returning Officer’s objections. The Committee agrees.

54. When Mr Davies’s Candidate Biography and Candidate Manifesto were published, his address, telephone numbers, email address and his website address were provided to electors. Mr Davies accepts that an unedited version of his election statement and CV appeared on his personal website. These provided ways in which electors could have contacted Mr Davies if they wished to find out more about his candidature. It appears from his submissions that he was contacted by e-mail by 3 electors, and about 10 electors visited his website.

55. The RCVS has stated that, before the Returning Officer came to a conclusion as to whether the offending material in the election statement and the CV was defamatory or factually misleading, she obtained independent legal advice. Mr Davies has expressed scepticism about the truthfulness of this assertion, and he has suggested that the RCVS has supplied misleading information to the Committee in this regard. The Committee is unimpressed with this suggestion, which has no evidence to support it. The Committee does not consider that this allegation has any merit.

56. There is a considerable body of material contained in the Appendices and accompanying documents, which have not been expressly referred to in this Decision on irregularity. All of that material has been considered by the Committee, and all the allegations, comments and submissions of the parties are contained in the Appendices. The Committee does not consider it necessary to refer to every point raised and responded to in the Appendices. The material points which relate to the specific issues that the Committee has to decide on irregularity have been dealt with above. In relation to other issues raised and responded to in the Appendices, the Committee does not accept the comments and submissions made by Mr Davies, and accepts the comments and submissions of the RCVS. So far as Mr Davies’s
comments in Appendix 5 are concerned, the Committee considers that they do not materially affect its Decision on irregularity.

Conclusion on irregularity

57. The Committee concludes that the Returning Officer has acted reasonably in the conduct of the Election. In particular, the Committee has decided that the Returning Officer was reasonably entitled to conclude that the relevant words in Mr Davies's election statement were defamatory, and that the factual material referred to in the election statement and the CV were factually misleading, for the reasons set out above. It follows that the Committee has decided that the Returning Officer was entitled to edit out the offending sections of the election statement and the CV, in accordance with her powers under Paragraph 11 of the Scheme. The Committee notes that, in any event, paragraph 11(6) provides that every candidate who supplies an election statement or biographical information shall be deemed to have agree that the decision of the Returning Officer not to issue the whole or any part of it is final.

58. Accordingly, the Committee has decided that there was no irregularity in the conduct of the Election on the part of the Returning Officer, and considers that there is no valid basis for challenging the validity of the Election. However, for the sake of completeness, the Committee will go on to consider whether, if it is wrong in its conclusion that there was no irregularity, there would be any grounds for declaring the Election void under paragraph 24(7) of the Scheme.

(ii) If the Committee had found that there was an irregularity in the conduct of the Election:

(a) would the irregularity concerned have rendered the Election substantially not in accordance with the Scheme, or

(b) would the irregularity concerned have significantly affected the result of the Election?

59. Pursuant to paragraph 24(7), the Election may not be declared void unless the Challenge Committee is satisfied that the irregularity complained of rendered the Election substantially not in accordance with the Scheme or significantly affected the result of the Election.

60. The Legal Assessor gave the Committee advice as to the correct approach to paragraph 24(7) in the following terms:

“Paragraph 24(7) of the Scheme

(a) Paragraph 24 of the Scheme applies principles which are derived from or similar to the principles which govern challenges to the validity of elections regulated by the Representation of the People Act 1983 (see paragraphs 24(1) and 24(7)).

(b) Paragraph 24(7) provides that:
“The Challenge Committee shall not declare an election void under sub-paragraph (5) unless it is satisfied –

(a) that the irregularity concerned rendered the election substantially not in accordance with this Scheme; or

(b) that the irregularity concerned significantly affected the result of the election.”

(c) This paragraph is similar to the provisions of section 48 of the Representation of the People Act 1983, which provides:

“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 section 36 or section 42 above 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 the result”.

(d) Section 48 was definitively considered by the Court of Appeal in Morgan v. Simpson [1975] QB 151 (a case dealing with section 37(1) of the Representation of the People Act 1949, which was in the same terms as section 48). The Court held that:

(i) on the proper construction of [section 48] if an election is not conducted substantially in accordance with the law as to elections, then although such breaches of the Act or Rules cannot be shown to have had any effect on the outcome of the election, the court must declare the election to be invalid;

(ii) for it to be said that there has been a failure to conduct the election substantially in accordance with the law as to elections there must be shown to have been a fundamental departure from the basic principles of a true and fair election in English law:

“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 a travesty of an election by ballot” – Stephenson LJ.

(e) Accordingly, my advice to the Committee is that paragraph 24(7)(a) is to be construed to mean that, if any irregularity is found, the Committee shall not declare the election void unless it is satisfied that such irregularity rendered the whole Election process (not solely that part relating to Mr Davies as a candidate) substantially not in accordance with the Scheme.

(f) As to paragraph 24(7)(b), the “result of the election”, means the success of one candidate over another and not the particular number of votes recorded for a candidate.”

61. The Committee will proceed in accordance with that advice.
62. The Committee must be positively satisfied that one or the other of the grounds set out in paragraph 24(7). Mr Davies relies on both grounds. Mr Davies has not challenged the advice set out above.

63. The RCVS submits that the complaints made by Mr Davies about the editing of his election statement and CV are not matters which can reasonably be treated as rendering the election “substantially” not in accordance with the Scheme. It submits that the Returning Officer was exercising wide powers under the Scheme to control and edit election statements published by the RCVS. The Returning Officer exercised those powers in respect of election statements/videos that three other candidates had submitted and that illustrates that the Paragraph was operated in a fair and even-handed manner by the Returning Officer. Mr Davies was given the opportunity to amend his election statement and to publish an alternative version but chose not to do so. Further, it was at all material times open to Mr Davies to publish other material on his website (the address of which was published by the RCVS) and to post campaign material to candidates. It was also open to Mr Davies to publish a video statement but he chose not to do so.

64. There were 16 candidates at the Election. There were 6 vacancies to be filled. The total number of votes cast online and by post was 6785. 54 votes were found to be invalid. The total number of valid votes to be counted was 6731. The 6 candidates who were elected polled between 3073 and 1909 votes. Mr Davies polled 428 votes and came bottom of the poll.

65. Applying the construction of paragraph 24(7)(a) set out above, the Committee may not declare the Election void unless it is satisfied that there was a fundamental departure from the basic principles of a true and fair election under the Scheme. For the Election to be conducted substantially in accordance with the Scheme, there must be a real election by ballot, and no substantial departure from the procedure laid down by the Scheme, such that the whole election could properly be described as a sham or travesty of an election by ballot. If an irregularity had been found, the Committee could not declare the Election void unless it was satisfied that such irregularity rendered the whole Election process (not solely that part relating to Mr Davies as a candidate) substantially not in accordance with the Scheme.

66. There is no evidence before the Committee from which it can reasonably be inferred that the whole process of the Election was substantially not in accordance with the Scheme, or could be reasonably described as a travesty or a sham. The Committee accepts the submissions of the RCVS set out in paragraph 63 above. The Committee considers that the complaints advanced by Mr Davies in relation to the editing of his election documents by the Returning Officer had no significant impact on the conduct of the election as a whole by the Returning Officer or her staff, or in any way affected the integrity of the electoral process.

67. Accordingly, the Committee is unable to be satisfied that the Irregularity concerned, if established, would have rendered the Election substantially not in accordance with the Scheme.
68. As to paragraph 24 (7)(b), the Committee must consider whether it would have been satisfied that the irregularity significantly affected the result of the Election. The Committee notes and accepts the advice of the Legal Assessor that the “result of the Election” means the success of one candidate over another, and not the particular number of votes recorded for a candidate.

69. Mr Davies came last in the election, polling 428 votes. The candidate in 6th place received 1909 votes. Thus, there was a gap of 1,481 votes between Mr Davies, and the 6th elected candidate. The Committee accepts the submission of the RCVS that Mr Davies was not in the running at this Election and there is no evidential basis for mounting a case that there was a significant impact, in that the outcome would have been different absent the editing of his statement. On his own account, some three electors contacted him by email, and about 10 visited his website. The Committee considers that it is inconceivable that Mr Davies could have polled enough votes to have achieved election to the Council. This was not a close-run election so far as Mr Davies was concerned.

70. Accordingly, the Committee is unable to be satisfied that the irregularity concerned, if established, would have significantly affected the result of the Election.

71. For all the above reasons, the Committee has decided that this challenge is misconceived, and must be dismissed.

By the Challenge Committee