The Labour Party, Re leadership elections

Advice

1. I am instructed to advise the Labour Party on the following question:

> Based on Counsel's understanding of the attached Rule Book and precedent, in the election of the Leader and/or Deputy Leader of the Labour Party, in a situation where there is no vacancy:
> 1. Is the incumbent Leader or Deputy Leader automatically on the ballot paper in the event of a challenge to either leading to a contested election; or
> 2. In the event of a challenge contested by the incumbent Leader or Deputy Leader, what number (percentage) of the combined members of the PLP and EPLP would be required by each contestant to obtain a place on the ballot paper.

2. In my advice, I will deal in the following order with:

   a. The relevant provisions of the 2016 Rule Book,

   b. The history, including previous rules, and any practice and precedent,

   c. The legal principles of interpretation to be applied in answering the question,

   d. The meaning and effect of the relevant provisions of the rules,

   e. The relevance of previous practice, previous rules and any material precedent,

   f. The position of additional prospective contestants,

   g. My conclusions in summary, and my answer to the question posed.

3. In the first three sections, I will set out the relevant current rules, previous rules and available information on practice and possible precedent, and the applicable of the legal principles of interpretation in some detail. This will enable these to be reviewed in full separate from my analysis if that is of use. The reader may, of course, choose to refer straight to the analysis and conclusions in the final three sections.

The current 2016 Rule Book

of the Party. Party conference shall meet regularly once in every year and also at such other times as it may be convened by the NEC.

5. Clause VII(1)(A) provides:

> (i)There shall be a leader and deputy leader of the Party who shall, ex-officio, be leader and deputy leader of the PLP.
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> (ii) The leader and deputy leader of the Party shall be elected or re-elected from among Commons members of the PLP in accordance with procedural rule Chapter 4 Clause II below, at a Party conference convened in accordance with clause VI above. In respect to the election of the leader and deputy leader, the standing orders of the PLP shall always automatically be brought into line with these rules.

6. Clause VIII(4) provides:

> The NEC shall have the power to adjudicate in disputes that may arise at any level of the Party, including between CLPs, affiliated organisations and other Party units, and between CLPs, other Party units and individuals in those units and in disputes which occur between individual members or within the Party organisation. Where the rules do not meet the particular circumstances, the NEC may have regard to national or local custom and practice as the case may require. The NEC's decisions shall be final and binding on all organisations, units and individuals concerned.

7. Clause X provides:

> 1. The general provisions of these rules shall apply to all units of the Party...
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> 2. The NEC shall have the authority to sanction, where the NEC considers local circumstances render it necessary, modifications in the rules laid down by Party conference for the various Party units. Such modifications shall comply with the spirit and intention of the rules adopted by Party conference and may not alter the Party objects, the basis or conditions of affiliated and individual membership, vary the procedure for the selection of parliamentary or local government candidates (except as provided for in the rules) or effect a change in the relationship between CLPs and the Party.
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> ...

manner provided for in the procedural rules for Party conference which are appended hereto...

> 5. For the avoidance of any doubt, any dispute as to the meaning, interpretation or general application of the constitution, standing orders and rules of the Party or any unit of the Party shall be referred to the NEC for determination, and the decision of the NEC thereupon shall be final and conclusive for all purposes. The decision of the NEC subject to any modification by Party conference as to the meaning and effect of any rule or any part of this constitution and rules shall be final.

8. Chapter 4 "*Elections of national officers of the Party and national committees*" governs, inter alia, the election of the leader and deputy leader (see Clause VII(1)(A)(ii) above) and includes the following relevant provisions. Clause I sets out "General principles" thus:

> Internal Party elections for officer posts and the membership of national committees shall be conducted in a fair, open and transparent manner, in accordance with the constitutional rules of the Party and any appropriate NEC guidelines.

9. Clause II deals with "Procedural rules for elections for national officers of the Party". Clause II(1)A provides that:

> A. The following procedures provide a rules framework which, unless varied by the consent of the NEC, shall be followed when conducting elections for Party officers. The NEC will also issue procedural guidelines on nominations, timetable, codes of conduct for candidates and other matters relating to the conduct of these elections.

10. Clause II(2) deals with the "Election of leader and deputy leader". All references to the current rules hereafter refer to Clause II(2) unless otherwise stated. Rule A provides that "The leader and deputy leader shall be elected separately in accordance

i. In the case of a vacancy for leader or deputy leader, each nomination must be supported by 15 per cent of the combined Commons members of the PLP and members of the EPLP. Nominations not attaining this threshold shall be null and void.

ii. Where there is no vacancy, nominations may be sought by potential challengers each year prior to the annual session of Party conference. In this case any nomination must be supported by 20 per cent of the combined Commons members of the PLP and members of the EPLP. Nominations not attaining this threshold shall be null and void.

iii. Affiliated organisations, the ALC, Young Labour, and CLPs may also nominate for each of the offices of leader and deputy leader. All nominees must be Commons members of the PLP.

iv. Nominees shall inform the General Secretary in writing of the acceptance or otherwise of their nomination at least two clear weeks before the commencement of the procedures for voting laid out in rule C below. Unless written consent to nomination is received, nominations shall be rendered null and void.

v. Valid nominations shall be printed in the final agenda for Party conference, together with the names of the nominating organisations and Commons members of the PLP supporting the nominations. In the case of a vacancy under E below this information shall be included with the documentation circulated with any ballot.

vi. Nominees who do not attend the relevant Party conference shall be deemed to have withdrawn their nominations, unless they send to the General Secretary – on or before the day on which the conference opens – an explanation in writing of their absence satisfactory to the CAC.

12. Rule C deals with "Voting". These provisions are clearly concerned with a contest election and include the following:

v. The procedures shall ensure that each candidate has equal access to the eligible electorate and has equal treatment in all other matters pertaining to the election.

vi. Votes shall be cast in a single section, by Labour Party members, affiliated

viii. No person shall be entitled to receive more than one vote. Votes shall be cast by each individual and counted on the basis of one person one vote.

ix. Voting shall be by preferential ballot. The votes shall be totalled and the candidate receiving more than half of the votes so apportioned shall be declared elected. If no candidate reaches this total on the count of first preference votes, a redistribution of votes shall take place according to preferences indicated on the ballot paper.

x. The votes cast for each nominee shall be recorded and published in a form to be determined by the NEC as soon as possible following any election.

13. Rule D deals with "Timing of an election" thus:

i. When the PLP is in opposition in the House of Commons, the election of the leader and deputy leader shall take place at each annual session of Party conference.

ii. When the PLP is in government and the leader and/ or deputy leader are prime minister and/ or in Cabinet, an election shall proceed only if requested by a majority of Party conference on a card vote.

iii. In any other circumstances an election shall only be held when a vacancy occurs, subject to E below.

14. Rule E deals with "Procedure in a vacancy" depending on whether the party is in government or opposition. E(iv) applies to the election of a leader in opposition:

> When the Party is in opposition and the Party leader, for whatever reason, becomes permanently unavailable, the deputy leader shall automatically become Party leader on a pro-tem basis. The NEC shall decide whether to hold an immediate ballot as provided under E above or to elect a new leader at the next annual session of Party conference.

15. It also includes provision for elections and interim measures when the deputy leader "for whatever reason, becomes permanently unavailable", and for when both the leader and deputy leader "for whatever reason, both become permanently unavailable".

and of precedent. I set out in this section the development of the rules and available information about practice under different versions of the rules, including previous challenges to an incumbent. My review of the available information in this regard serves two linked purposes, firstly to identify the relevant facts on the available information, and secondly to consider, in light of the principles set out below, the extent to which the facts required to establish any relevant practice are likely to be known or readily ascertainable to members not involved in conducting elections. I will analyse separately in later sections whether or to what extent practice and previous versions of the rules are relevant to the interpretation and effect of the current rules touching on the answer to the question posed.

17. While there have been various changes to the rules governing leadership elections since the electoral college was established by the Wembley special conference in 1981, I deal below only those relating to the question posed. In identifying and considering previous rules and previous practice, I have consulted a number of published academic and other works dealing with the contemporary history of party leadership elections, as well as reviewing sources of news and opinion online, and raising queries which I am grateful to Those Instructing for addressing. I have already indicated aspects of my understanding of the factual context to Those Instructing who have kindly confirmed that the Labour Party has no further relevant information for me to consider for the purposes of this advice.

18. Prior to the electoral college being established for leadership elections in 1981, the electorate consisted solely of MPs. There were two post-war challenges to an incumbent leader under the pre-1981 system, both to Hugh Gaitskell, and both defeated. Given the restriction of the electorate to MPs, there would have been no purpose in having a threshold of support from MPs as a precondition to standing for

stood against Denis Healy for the office of deputy leader. In 1988, Mr Benn stood against Neil Kinnock for the office of leader and Eric Heffer and John Prescott stood against Roy Hattersley for the office of deputy leader. In each case, a contested election resulted. I am aware of no example of a potential challenger to an incumbent being nominated but failing to attain the applicable threshold of support to trigger a contested election.

20. I understand from published sources that from 1981 until the 1988 annual conference, a single threshold of support from MPs was stipulated of 5% and there was no differentiation between standing for a vacancy and standing against an incumbent. Various extracts from rules applying in the 1980s are posted online. I sought and have kindly been supplied with an authoritative version of the 1987-8 rules which would have applied to the leadership elections in 1988. (I understand that materially similar rules would have applied from 1981 to 1988 so would also have applied to Mr Benn's 1981 challenge to Mr Healy).

21. "Standing Order 5 Election of officers" in the 1987-8 Rules included the following provisions:

> (2)(a) The leader and deputy leader of the party shall be elected separately at a party conference.
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> (b) Affiliated organisations, Constituency Labour Parties and Commons Members of Parliament may nominate for each of the offices of leader and deputy leader, one Commons Member of the Parliamentary Labour Party attending conference (unless excused attendances as provided in sub-section (c) below) as a delegate or *ex officio* delegate.
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> (c) Nominees who do not attend the party conference shall be deemed to have withdrawn their nominations unless they send to the secretary on or before the date on which the conference opens an explanation in writing of their absence satisfactory to the party Conference Arrangements Committee.

their support, nominations will be rendered null and void. Valid nominations shall be printed in the Agenda together with the names of the nominating organisation and Commons Members supporting the nomination.

(3)(a) Voting in the election of the leader and deputy leader of the party shall take place consecutively in three sections as follows…

(b) The votes for each nominee in a section shall be calculated as a percentage of the total votes cast in that section…

(c) The votes apportioned as provided in paragraph (b) above shall be totalled and the candidate receiving more than half of the vote so apportioned shall be declared elected…

(d)(i) Subject to sub-paragraph (iii) below [which is concerned with the timing of an election to fill a vacancy], when the Parliamentary Labour Party is in opposition in the House of Commons the election of the party leader and deputy leader shall take place at each annual party conference.

…

(e) The votes cast for each nominee by each affiliated organisation, Constituency Labour Party and Commons Members of the Parliamentary Labour Party shall be recorded and made available as soon as possible.

22. I have seen no reports or claims about whether or on what basis Mr Healy or Mr Hattersley collected nominations or other indications of support from MPs when contested elections for deputy leader were triggered in 1981 and 1988 respectively. I have seen reports or claims in news and opinion published online that Mr Kinnock collected nominations from the PLP when the 1988 election for leader was triggered and that this may have precedent value in determining what is now required of the incumbent. However, I have seen no reliable or sourced information about whether any steps to seek multiple nominations from MPs for Mr Kinnock (or Mr Healy or Mr Hattersley) reflected a perceived requirement under the rules to demonstrate the support of 5% of MPs, as opposed to demonstrating the extent of support from MPs

20%. It is evident from published histories that the primary reason for this change was to reduce the scope for challenges to an incumbent, especially in light of Mr Benn's challenge to Mr Kinnock that year. Since the only amendment was to the percentage stipulated in 2(d), the effect was that the new 20% threshold also applied to an election to fill a vacancy. This may be explained at least in part as simply making the minimum amendment required to meet the primary aim of limiting future challenges to the incumbent. There is in addition, some suggestion, that raising the threshold applying to elections to fill a vacancy was viewed as desirable in order to limit the number of candidates in such elections, although not, it appears, with the intention of discouraging contested elections altogether where there is a vacancy to fill.

24. However, concern developed following the resignation of Mr Kinnock sa leader in 1992 that there ought to be a contested election to fill the vacancy and that the 20% threshold might prevent this (though it did not in ultimately do so). Because a contested election was considered more beneficial than a single candidate elected to a vacancy unopposed, the threshold of support where there was a vacancy was reduced in 1993 to 12.5% (subsequently amended to 15%). Clearly, no corresponding benefit was identified to lowering the threshold required to challenge an incumbent because this was kept at 20%. The change introduced in 1993 meant that the rules for the first time made provision for different thresholds of support required to stand for an election depending upon whether the prospective candidate would be standing in an election to fill a vacancy or challenging an incumbent.

25. As set out above, rule D of the 2016 rules provides that"When the PLP is in opposition in the House of Commons, the election of the leader and deputy leader shall take place at each annual session of Party conference" and this provision appears to have applied in materially the same form since 1981. It appeared in 3(d)(i) of the

words, there was no formal nomination of the incumbent for re-election and no process by which the incumbent was formally declared elected for a further year. In respect of this period, I have seen relevant extracts from the 2010 rules and 2013 rules. The 2013 version of B(ii) was in similar terms to the current B(ii). The 2010 version of the rules was worded as follows:

> (ii) Where there is no vacancy, nominations shall be sought each year prior to the annual session of party conference. In this case any nomination must be supported by 20 per cent of the Commons members of the PLP. Nominations not attaining this threshold shall be null and void.

26. The 2010 version therefore provided that "nominations *shall be sought* prior to" annual conference where there is no vacancy, which could be interpreted as providing for an invitation to nominate, whereas the 2013 Rules, like the present rules, clearly put the onus on potential challengers by providing that "nominations *may be sought by potential challengers* each year prior to" conference. I have also seen the 1993 Rules which were the first to make different provisions depending upon whether or not there was a vacancy. The 1993 version stated (similarly though not identically to 2010) that "In the case where there is no vacancy, nominations should also be sought on an annual basis". I have no information available about any process by which nominations were in practice sought each year under earlier rules.

<u>The legal principles applying to the interpretation of the rules</u>

27. The legal status of the Labour Party and its rules is well established. In the words of Stanley Burnton J in *Choudhry v Treisman* [2003] EWHC 1203 (Comm):

> 38. The Labour Party is an unincorporated association. Its constitution is contained in its rules contained in its rule book, which constitute a contract to which each member adheres when he joins the Party.

29. The most authoritative explanation of the modern approach to contractual interpretation is that supplied by Lord Hoffmann in *AG of Belize v Belize Telecom* [2009] UKPC 10, [2009] 1 WLR 1988:

> 16... The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed....
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> 17 The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
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> 18 In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen.... In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.
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> ...
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> 21 It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean... There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

30. The leading text on English contract law, Chitty on The Law of Contracts (32 ed),

> interpreting their intention, the courts look at the factual matrix of the contract: " . . . modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result."
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> 13-056 ... the principle that words must be construed in their ordinary sense is liable to be departed from where that meaning would involve an absurdity or would create some inconsistency with the rest of the instrument. It may also not be applied, as Lord Hoffmann indicates, where there has been an obvious linguistic mistake or where, if the words were construed in their ordinary sense, they would lead to a very unreasonable result...

31.

Custom or usage may in limited circumstances be admitted as evidence of what the terms were intended to mean but "No custom or usage will be considered by the court on the construction of a contract, unless it is notorious, certain and reasonable" and "The notoriety of a custom or usage is a matter to be proved in evidence" (Chitty, para 13–132).

32. The modern approach to the implication of terms (as opposed to the interpretation of the express terms) was described by Lord Hoffmann in the passage from *Belize* above. That passage reflects the caution that a court will still exercise before implying a term that could have been, but has not been expressed. Specific circumstances in which an additional term may be implied include where necessary to give efficacy to a contract, i.e. where the contract will be unworkable unless further terms are implied; where the implication is an obvious inference from the express provisions; and where the contract as set out in the express terms is incomplete (Chitty, paras 14-008 - 14-011). An implied term may be derived from "an invariable, certain and general usage or custom" but "To be binding, however, the usage must be notorious, certain and reasonable" (Chitty, para 14–021).

having regard to their purpose and audience and avoiding the technical approach to the language that may be appropriate to the interpretation of a statute. A number of authorities on the interpretation of rules were considered by Warner J in *Jaques v AUEW* [1986] ICR 683 who held that:

> There are, of course, in those dicta differences of emphasis and of formulation, but not, I think, differences of principle... The effect of the authorities may I think be summarised by saying that the rules of a trade union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court's view they must have been intended to mean, bearing in mind their authorship, their purpose, and the readership to which they are addressed. (p.692)

34. Custom and usage may be of particular significance when interpreting the rules of an unincorporated association, but the basic principle remains that someone relying on custom and practice must establish that it is "notorious, certain and reasonable" (Chitty, above). In *Lewis v Heffer* [1978] 1 WLR 1061 the Court of Appeal had "to discover what is the true relationship between the national [Labour] party and the local constituency [Labour] party, and to do this we have to look at the rules" (p.1071C). In concluding that "a constituency Labour party cannot be regarded as independent of the national party" and was subject to the disciplinary powers of the NEC (p.1071H), Lord Denning MR observed that:

> This view of the relationship is supported on the evidence adduced by Mr. Underhill as to the way the constitution has worked in the past. He refers to the reports of the party conference. The N.E.C. have exercised disciplinary powers over the local Labour parties or their members. When there have been dissensions within a local party, the N.E.C. have held inquiries and reorganised them. They have expelled members and suspended them. **All these measures have been reported to the annual party conference and no exception has been taken to them — or no serious exception as far as I can see. In a body like this, rules are constantly being added to, or supplemented by, practice or usage: and, once accepted, become as effective as if actually written.** (p.1072A-B, emphasis added)

Rules of association of this kind ultimately derive their legal effect from the acceptance, by the members, of the terms and conditions of the association when they join the group. **Where there is an established and well known and unquestioned practice in use in the association it is some evidence, and indeed it may be strong evidence, that this practice too is part of the terms and conditions which are accepted by persons joining the association. Consequently there are sound reasons for including such a practice as suspension by the N.E.C. in the rules by a process of implication.** If one adopted the contrary view, it must require an extraordinarily strong and clear case to justify the court in holding a well-established practice like this to be unconstitutional or ultra vires, more particularly where the organisation concerned is a voluntary, unincorporated and essentially informal body. (p.1076E-G, emphasis added)

36. Such practice need not actually be known to all members. The test was considered in *Re RMT, AB v CD* [2001] IRLR 808, in which Sir Andrew Morritt VC held that:

> 25. **It was common ground that an implication on the basis of custom and practice could only be made in cases where the custom was both reasonable and certain. But there was much debate as to the extent to which the custom must be known.** Counsel for the claimants contended that it must be notorious amongst all those engaged in the trade. Counsel for the defendants submitted that it was enough if the custom or practice was known to those responsible for operating the procedures. The materiality of the distinction is plain from the evidence. The claimants point to a substantial body of direct and indirect evidence to the effect that the alleged custom and practice was unknown to them. This is unsurprising because most of them would not have had any experience of balloting procedures or how to break a tie.
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> 28. I agree with counsel for the claimants. If it is asserted that custom or practice warrants the implication of a term into a contract then, in principle, it must be known to or readily ascertainable by all the parties to the contract. *Sagar v Ridehalgh* [1931] 1 Ch.310 is an example of the extent of the knowledge or notoriety required. **A custom or practice alleged to justify an implication into the contract between all the members of the union and the union itself must, therefore, be known to or readily ascertainable by all the members not only those concerned with the conduct of elections**

provide for a tie-breaker), being justified on each of the other recognised reasons for implying a term which he listed by reference to a previous edition of Chitty, "where individual reasons for implying a term are described as to give efficacy to the contract, to be an obvious inference from the express terms or to complete the contract the parties made" (judgement, paras 30-31).

38. In *Choudhry* (above), Stanley Burnton J sounded a need for caution in relying upon practice as an aid to the interpretation of the provisions of the rule book:

> 64. I have reached this conclusion without reference to the principle contended for by Mr Giffin that the rules are to be interpreted in accordance with the practice of the Party. He referred me to the judgment of Lord Denning, the Master of the Rolls, in *Lewis v Heffer* [1978] 1 WLR, 1061 at page 1076 D and to the judgment of Lord Woolf, the Lord Chief Justice, in *Dunlop Tyres v Blows* [2001] EWCA, Civ, 1032 at paragraphs 21 and 22.
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> 65. In my judgment, the principle applied in those cases must be applied with caution, particularly in view of the principle established by the House of Lords in *James Miller and Partners v Woodworth Street Estates* [1970] AC 583, that it is illegitimate to use the conduct of the parties to a contract after its conclusion as an aid to construction. Where there is no equivalent of paragraph 5 at clause 10, it cannot be right for a member of a party to be bound by the interpretation of rules of which he has no notice. Just as a custom relied upon in support of an allegation of implied term must be certain, well established and notorious, so must any practice relied upon as establishing a particular meaning to contractual rules of the kind presently under consideration.

39. His reference in para 65 to "paragraph 5 at clause 10" is to what is now, in materially identical form, Clause X(5) of chapter 1 of the 2016 Rule Book. It should be noted that Stanley Burnton J was here referring to this rule in the context of whether conduct following the conclusion of the contract could determine the "*interpretation of rules of which [a member] has no notice*". This refers to the interpretation of the written (express) rules. He was not suggesting that Clause X could affect the well established principle by which "*a custom relied upon in support of an allegation of implied term*

40. Stanley Burnton J's reference to the principle established in *James Miller* is to the principle described by Lord Reid as follows:

> I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later. (p.603)

41. That principle was expressly considered in *Dunlop Tyres*, the other case mentioned by Stanley Burnton J at para 64 as having been cited to him on this point. The Lord Chief Justice, with whom the other members of the Court of Appeal agreed, stated that:

> 22. it is important, in my judgment, to note that in looking at the practice before the contract was entered into and noting that it did not change after the contract was made, that does not offend what Lord Reid said. This is not to suggest that the contract meant one thing on one day and another thing on a different day. The approach I have adopted recognises that it is not wrong to look at that practice beforehand because something different happens subsequent to the contract... [W]here there is a clearly established practice which continues before and after a contract is made, the evidence of what happened before becomes relevant in determining whether any change in the position has been made. If there is (as I believe there was here) real ambiguity as to the meaning of the contract, the absence of any change of practice would be a clear indication that the parties by their conduct which as part of the background circumstances against which the contract should be interpreted, intended no change in the contractual terms.

42. Therefore, where there is a "real ambiguity" in the rules *and* "where there is a clearly established practice which continues before and after a contract is made", then "the absence of any change of practice would be a clear indication that the parties by their conduct ... intended no change in the contractual terms".

43. A particularly restrictive approach should be adopted when considering alleged implied terms limiting eligibility for election beyond those that are expressed in the

> to make any such implication? **In my judgment the answer is "No," because it is not necessary to give to the contract contained in the rules business efficacy, although it may make it more efficient. ...Implication should not be made of additional requirements of eligibility over and above those expressed unless one is really driven to it, and in my judgment one is not.** In my view the inability of the candidate at the moment of nomination, if elected, to perform his duties under rule 4 (4) is a matter for the electors, not of his right to stand. (Emphasis added)

44. A restrictive approach was also applied to the ambit of a discretion to review eligibility (although it was easy to conclude that the particular discretion was limited).

45. Clause I in chapter 4 says that "Internal Party elections for officer posts ... shall be conducted ... in accordance with the constitutional rules of the Party and any appropriate NEC guidelines" and Clause II states that "The following procedures provide a rules framework which, unless varied by the consent of the NEC, shall be followed... The NEC will also issue procedural guidelines on nominations, timetable, codes of conduct for candidates and other matters relating to the conduct of these elections." I understand that there are no NEC guidelines currently in existence that are relevant to whether the incumbent may participate in an election triggered by a challenger, and that there is no known precedent for the NEC issuing guidelines dealing with a specific election that would be relevant to answering the question posed by my instructions. Given the restrictive approach to the interpretation of eligibility criteria for election illustrated by *Leigh*, and that we are here concerned with eligibility conditions applying to an incumbent leader or deputy leader, I would anticipate that only the interpretation of the rules themselves would determine substantive eligibility criteria. Any guidelines, like the interpretation of the rules, should also accord with the "General principles" in Clause I: elections "shall be conducted in a fair, open, and transparent manner".

is a principle of contract law that the correct interpretation of a contract is a matter to be determined by the court and its jurisdiction to do so cannot be ousted by a term of the contract. The statement most usually cited for this principle in the context of the interpretation of rules is that of Denning LJ in *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329:

> Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy...
>
> Another limitation arises out of the well-known principle that parties cannot by contract oust the ordinary courts from their jurisdiction... They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void. (p.342)
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> ...
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> I desire to emphasise that the true construction of the contract is to be decided by the courts and by no one else.
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> ... The rules are the contract between the members, the committee cannot extend their jurisdiction by giving a wrong interpretation of the contract, no matter how honest they may be. They have only such jurisdiction as the contract and its true interpretation confers on them, not what they think it confers. The scope for their jurisdiction is a matter for the court and not for the parties, let alone for one of them. (p.344)

47. Stanley Burnton J pointed to Denning LJ's reference to the court deciding "the true construction of the contract" as supporting his observation at para 68 that:

> This case differs from *Lee* in an important respect. The members of the Party have agreed by clause 10.5 that it is the NEC who shall determine disputes as

restrict itself to whether the NEC's interpretation was honest and reasonable and decline to determine, and proceed on the basis of, the correct interpretation. It would be fair also to point out that the other members of the Court of Appeal in *Lee* were less emphatic than Denning LJ and the point did not need to be decided. However, his dicta have subsequently been adopted and relied upon in a number of cases such as *Leigh* (at p.333E-H), including cases in which there was a clause similar to 10.5, e.g. *Baker v Jones* [1954] 1 WLR 1005. In that case, Lynskey J indicated agreement with Denning LJ's dicta in the course of holding that:

> The interpretation of the rules is a question of law which the courts will examine. In my view, therefore, the provision in the BAWLA rules, making the central council the sole interpreter of the rules and their decision in all cases final, is contrary to public policy and void. (p.1010)

49. In light of Stanley Burnton J's apparently differing view, I have arrived at conclusions on the correct interpretation of the rules, and have in addition considered whether a contrary interpretation could reasonably be adopted.

<u>The interpretation of the relevant rules</u>

50. I will consider firstly the application, if any, of B(i) and B(ii) to the incumbent. I shall do so on the hypothesis that an incumbent is formally nominated for re-election by an MP, MEP, or an organisation or unit listed in B(iii) and the question is whether either threshold of support must be attained for that nomination. I will also address whether a requirement on the incumbent to attain any threshold of support can be derived any other way. I shall then address the distinct issue of whether there is any requirement that the incumbent is formally nominated or whether s/he is automatically on the ballot paper when a leadership challenge is triggered under B(ii) unless s/he resigns before the vote. I will then consider whether any evidence of past practice under

The threshold of support

51. B(i) is expressly directed to the threshold of support that each candidate must attain "**in the case of a vacancy**", that threshold being that "each nomination must be supported by 15 per cent of the combined Commons members of the PLP and members of the EPLP". Rule E illustrates what is meant by a "vacancy", namely where the incumbent "for whatever reason, becomes permanently unavailable".

52. B(ii) deals expressly with the position "**where there is no vacancy**". That is the situation with which I am concerned. It is clear that an incumbent can be "challenge[d]". For this purpose, "nominations may be sought by potential challengers each year prior to the annual session of Party conference". However, "In this case any nomination must be supported by 20 per cent of the combined Commons members of the PLP and members of the EPLP."

53. The "potential challengers" that B(ii) envisages are, of course, seeking to challenge the incumbent in circumstances where the incumbent continues in office and is not resigning. A higher threshold of support - 20% - is required when seeking to stand against an incumbent than the 15% threshold of support that is required to stand in an election to fill a vacancy. The purpose of the rules on their face is to make it more difficult for someone to challenge an incumbent in a contested election than to stand for election to fill a vacancy. That makes it unsurprising that there is no reference to a threshold of support that the incumbent must satisfy in order to contest the election against his or her challenger. The purpose of the higher threshold of reducing the scope to challenge an incumbent would not be served by applying a higher threshold to the incumbent than applies in the case of a vacancy.

55. To contend that the incumbent had to satisfy the 15% threshold would be contrary to the express provision that the 15% threshold applies in the case of a vacancy. On no view can there be said to be a vacancy when the incumbent is willing and able to continue. It is not properly arguable, in the face of express wording of the rule, that the 15% threshold in B(i) extends to an election where there is no vacancy and in particular that it must be met by the incumbent.

56. I turn therefore to whether the 20% threshold in B(ii) could reasonably be construed as applying to the incumbent. In my view, the 20% threshold in B(ii) can only reasonably be construed as applying to a "potential challenger". The second sentence which applies the threshold starts "*In this case* any nomination must be supported by 20 per cent" so "*in this case*" refers back to the first sentence. The first sentence is solely providing for "potential challengers" to seek nominations "where there is no vacancy". Therefore, where there is no vacancy, a potential challenger must be supported by this higher 20% threshold. The first sentence to which "*in this case*" refers does not deal in any respect with nomination of the incumbent.

57. That the rule is not intended to exclude the incumbent from the ballot paper is reflected by it setting conditions for a *challenge* to the incumbent. A "potential challenger" must attain a threshold to be permitted to make that *challenge* to the incumbent by way of a contested election. The leader is otherwise protected from challenge by the enhanced threshold that potential challengers must meet. Were the leader required to pass some threshold in order to contest the election, then the "challenger" could be elected unchallenged because the incumbent that s/he is challenging is excluded from the ballot by that higher threshold. The exclusion of the incumbent from the ballot in this way would be a grave step requiring a clear term.

expressly applied "in this case", being the case described in the first sentence. That provides simply that nominations may be sought by potential challengers in advance of annual conference. "In this case" refers to a potential challenger seeking nomination as provided by the first sentence. If "any nomination" in the second sentence were intended to encompass nomination of the incumbent then it would be triggered simply in the case of a potential challenger *seeking* nomination, not in the case of that nomination attaining 20% support. The wording cannot be construed so that the requirement to achieve 20% support imposed by the second sentence is only activated if the potential challenger has already achieved 20% support.

59. If "any nomination" is interpreted to encompass nomination of the incumbent for re-election, then the rule would therefore contemplate a process by which a potential challenger seeks nomination pursuant to the first sentence of B(ii), so activating the requirement that any nomination achieve 20% support, but neither the potential challenger nor the incumbent then achieves that threshold. The consequence, given that "Nominations not attaining this threshold shall be null and void", would be that neither the potential challenger nor the incumbent would be on the ballot paper, leaving the party potentially without a leader. Given the principles of interpretation set out above, I do not consider that there is any prospect that a court would uphold an interpretation with this implausible effect.

60. If a uniform percentage was stipulated in each case in which a threshold of support is required under the rules, then it might be a little less obviously unarguable that the threshold should be applied to an incumbent. However, the fact that the threshold of support stipulated in B(ii) in a case where there is no vacancy is higher than the threshold which the incumbent had to meet when s/he was elected to office creates an insurmountable hurdle in the way of construing the threshold in B(ii) as applying to

of MPs and MEPs. Let us suppose that a candidate whose nomination is supported by 15% of MPs and MEPs is chosen by the electorate in preference to a candidate supported by 20% or more of MPs and MEPs. That is a result clearly contemplated by the rules. The losing candidate, utilising the same 20% support from MPs and MEPs, could stand the following year against the candidate who had defeated him. That again is in line with the rules. But the effect of applying the 20% threshold in B(ii) to the incumbent (even if it could be construed as applying only if a challenger has already attained that threshold) would be that the incumbent with the 15% support of MPs and MEPs that entitled the electorate to choose him or her would now be removed from the ballot paper by application of a higher 20% threshold. The candidate that had been rejected the previous year is then elected unopposed on the basis of 20% support of MPs and MEPs. Such an interpretation is not one that I consider a court could accept, applying the principles set out above, unless driven to do so by the clearest of wording. It will be apparent from the discussion above that this is not such a case.

62. There is no basis in the rules for applying any other threshold to the incumbent that those that the rules identify in B(i) and B(ii). The absence of any basis for applying to the incumbent either of these thresholds leaves a binary choice. Either the challenge is intended to proceed by way of a contested election against the incumbent as a matter of course or it is intended that the incumbent be excluded from the ballot as a matter of course. The latter alternative would be viewed by a court as absurd.

Whether the rules require that the incumbent be nominated

63. Both B(i) and B(ii) require that a "nomination must be supported by" a percentage of MPs and MEPs and that "Nominations not attaining this threshold shall be null and void". It is clearly implicit that an MP or MEP may make the nomination to which

offices of leader and deputy leader" and the requirement that a percentage of MPs must indicate support for the nomination was imposed by a different sub-section (see the quotation from the 1987-8 Rules set out above). For the avoidance of doubt, I do not think it arguable that nomination made by an organisation or unit under B(iii) for an election to fill a vacancy or to challenge an incumbent would avoid the threshold of support required respectively by B(i) or B(ii).

64. There is no reference in the rules to the incumbent being *nominated* for re-election, whether in the case of a challenge triggering a contested election under B(ii) or in years in which no potential challenger seeks nomination or a potential challenger's nomination fails to attain 20% support.

65. D(i) provides that "When the PLP is in opposition in the House of Commons, the election of the leader and deputy leader shall take place at each annual session of Party conference." The reference to *each* annual session rather than *the* or *an* annual session suggests that there was to be an election to these offices annually, on which basis, one would expect an incumbent facing no challenge to be deemed re-elected unopposed. As I have already indicated, I understand that no formal process of any sort takes place at annual conference or otherwise leading to the incumbent being declared re-elected unopposed in a year in which there is no challenge under B(ii). This means that in practice, the incumbent is not required to seek or be nominated for re-election each year in order to continue in office and, obviously, that no threshold of support is required to enable him or her to continue in office. If s/he is deemed to be re-elected unopposed for the purposes of D(i), then this would appear to be happen implicitly given that there is no practice of making a formal declaration to that effect, and re-election is deemed to occur without the need for any nomination.

nominated in time. In the absence of a challenger having been nominated and having satisfied the threshold in B(ii), this would again create the prospect of the office becoming empty. It might be said that this will create a vacancy and therefore call for an election governed by B(i). However, the "Procedure in a vacancy" in Rule E is provided to apply if the incumbent "for whatever reason, becomes permanently unavailable" which is not wording that is apt to cover this scenario. I do not think that a court would imply a requirement that the incumbent be re-nominated, a requirement that could leave the party without a leader, particularly given the consequential provisions that the court would then have to identify by implication.

67. B(iv-vi) also address nominations so I have considered whether any requirement that the incumbent be nominated can be inferred from these provisions. B(iv) provides that "Nominees shall inform the General Secretary in writing of the acceptance or otherwise of their nomination" and "Unless written consent to nomination is received, nominations shall be rendered null and void." This does not read as if it were intended to apply to an incumbent, whether under challenge or not. There is no apparent need to require written evidence of his or her consent to inclusion on the ballot. The drastic consequence of failure to supply such unnecessary consent in the case of an incumbent is a further indication that it was not intended to encompass the incumbent. Given that I understand that the practice is not to nominate the incumbent each year, it will also be the practice that the incumbent supplies no written consent to nomination each year. The absence of any consequence supports my interpretation of B(iv).

68. B(v) provides that "Valid nominations shall be printed in the final agenda for Party conference, together with the names of the nominating organisations and Commons members of the PLP supporting the nominations." (I assume that the failure to add here members of the EPLP when the rules were amended in 2015 is inadvertent.) This

withdrawn their nominations" would, if it applied to the incumbent, provide for his or her eviction from office without a vote simply on the basis of non-attendance and is similarly indicative of provision for those seeking office rather than an incumbent.

69. Given that D(i) provides for the leader and deputy leader to be re-elected each year, then if the incumbent does not require nomination each year, then there is no obvious basis upon which s/he can be required to seek nomination only in a year in which a challenger satisfies the 20% threshold and certainly no express term having that effect.

70. While I do not consider that rule B offers support for a requirement that an incumbent be nominated for re-election where there is a contested election, there is at least a point that could be made by reference to rule C on Voting to argue for an implicit requirement that an incumbent be nominated if a challenger triggers a contested election. I do not, however, think it is a good one.

71. C(i-ix) makes provision for the conduct of the election (set out above) and uses the term "candidates" in the election, terminology that does not support any requirement that the incumbent be nominated. However, C(x) provides that "The votes cast for each **nominee** shall be recorded and published in a form to be determined by the NEC as soon as possible following any election." (Emphasis added) Although it is possible to construe C(x) as excluding the incumbent, I would infer that this provision was intended to encompass the votes cast for the incumbent in addition to those cast for the challenger(s) in an election triggered under B(ii). It could therefore be argued merely from the use of this term that it implies a requirement that the incumbent must be nominated in order to be on the ballot paper. I think such an argument is difficult in the extreme. The provisions dealing with the conduct of the election refer to "candidates" rather than to "nominees". The different term used in C(x), for which there is no clear explanation, may have resulted from C(x), unlike the preceding

interpreted like a statute. Nothing suggests that the different term was deliberate or intended to do anything other than refer to those who had been on the ballot paper.

72. I consider that practice under previous versions of the rules support my interpretation that the incumbent need not be nominated. As indicated above, the first sentence of the 2010 version (similarly to the 1993 version) of B(ii) provided that "Where there is no vacancy, nominations for leader shall be sought each year prior to the annual session of party conference". The remainder of that rule was identical to the present rule (other than not referring to the EPLP). If the incumbent required nomination then it would follow that s/he should be nominated when nominations are sought. If so, then the second sentence of that rule applying the 20% threshold of support would have applied to the nomination of the incumbent each year. It would have meant that each year, the incumbent was required to attain a higher threshold of support than was required of a candidate for a vacancy, regardless of whether anyone else was nominated. The failure of the incumbent's nomination to attain 20% support would render it null and void which would again leave the party without a leader. That did not reflect practice under previous versions of the rule or the current one. In line with the principles of interpretation set out above, that supports the view that at least following 1993 when the rules were given their current structure making separate provision if there is no vacancy, they have not required nomination of an incumbent.

73. I therefore conclude that an incumbent does not require formal nomination in order to be deemed re-elected (to the extent that occurs) in a year in which there is no challenge, and in a year where a contested election is triggered by a challenger under B(ii), the incumbent does not require to be nominated in order to appear on the ballot paper. The incumbent is therefore automatically on the ballot paper unless s/he resigns (or otherwise becomes permanently unavailable) in the period between a challenger

achieve under B(ii) cannot be applied to an incumbent. However, my conclusion that this threshold of support does not apply to the incumbent as a precondition of inclusion on the ballot paper (and that it could not reasonably be concluded otherwise) is not dependent upon my conclusion that the incumbent need not be formally nominated. Even if the view were taken that s/he should be nominated, the incumbent's nomination is clearly not covered by B(i) or B(ii) as explained above.

Relevance of previous practice and rules and any material precedent

75. It is unnecessary to refer to the factual matrix in order to recognise that a purpose of the rules is to make it more difficulty to stand for election against an incumbent than to stand for election to fill a vacancy. That is apparent from the face of the rules. The development of the rules detailed above in any event supports that conclusion. The original 5% threshold of support was raised to 20% primarily in order to reduce the scope for challenges to an incumbent following Mr Benn's challenge to Mr Kinnock. The structure of the rules was not altered at that point so the new 20% threshold also applied to elections to fill a vacancy. It was subsequently decided to apply a separate, lower threshold in the case of a vacancy. That was done in view of the value identified in ensuring that an election for a vacancy was contested. It is apparent that no corresponding value was identified in making it easier to stand against an incumbent because the higher 20% threshold was retained for such challenges.

76. I understand that nobody has been nominated to challenge an incumbent since 1993, the year in which the rules were changed to make different provision depending upon whether or not there is a vacancy to fill. There is therefore no precedent or established practice in respect of the separate provision for challenges to an incumbent.

"Unless consent to nomination is received and five percent of Commons Members have indicated their support, nominations will be rendered null and void."

78. The incumbents in 1981 and 1988 would have been expected, given the results, to have attracted indications of support from more than 5% of MPs regardless of whether this was perceived as required. I will assume, as has been reported, that Mr Kinnock in particular was nominated by more than 5% of MPs and that his campaign encouraged multiple nominations. That, however, does not establish a precedent for *requiring* indications of support for an incumbent from more than 5% of MPs in order to be on the ballot paper, even in respect of the rules that then applied. I have seen no evidence of any general understanding that this was required. That some were of that view (which is unclear) is not sufficient. The number of views and beliefs that have been reported about current eligibility requirements for incumbents reflects the sense of the principles of interpretation set out above by which custom and practice may be legally relevant if it is certain and notorious or "established, well known, and unquestioned".

79. In any event, even were there clear and readily ascertainable information that Mr Kinnock or another incumbent sought the support of 5% of MPs in the context of a belief that it was required to be on the ballot paper, the different structure of the rules and absence of provision for challenges to an incumbent would deprive this precedent of significant value in interpreting the current rules. The established principles of interpretation set out above would in any event afford no significant weight to a precedent almost two decades old in the context of an absence of relevant practice since. That is not a basis upon which to establish legally relevant custom and practice.

80. Whatever the facts and the contemporary understanding of them in 1981 and 1988, I

that the incumbent attain a threshold of support by a process of implication. To become an implied rule, custom and practice must be certain, notorious, and reasonable or, drawing upon authorities in the context of party and trade union rules, "established, well know, and unquestioned" and capable of being readily ascertained if not already known by all members. My review of publicly available information indicates, at least, that any relevant practice is not readily ascertainable by ordinary members.

81. Nor could a requirement that the incumbent attain any threshold of support be implied by any other route recognised by the authorities on interpretation. I have already considered whether there is any scope to construe from the express provisions any implicit requirement that an incumbent attain some threshold of support as a precondition to inclusion on the ballot paper. I have concluded that no reasonable argument could be advanced in respect of the 15% threshold, the 20% threshold, or for any other implicit threshold. Nor can it be reasonably be argued that it is necessary to require the incumbent to attain any threshold of support in order to make the rules work. As set out above, they are plainly workable on the basis that no threshold applies to the incumbent. As confirmed by the judgment in *Leigh* (above), "Implication should not be made of additional requirements of eligibility [for election] over and above those expressed unless one is really driven to it". That test could hardly be further from being met in the case of a suggested implication of a precondition to the incumbent's inclusion on the ballot paper in a contested election.

<u>The position of additional prospective contestants</u>

82. I am instructed that "in the event of a challenge contested by the incumbent Leader or Deputy Leader", I am to advise on "what number (percentage) of the combined

83. There is no provision in the rules for inviting additional nominations when a contested election is triggered by a challenge under B(ii). The fact that the current rules place the onus on a potential challenger to seek nomination rather than inviting nominations prior to annual conference indicates that it would be wrong to imply that further nominations should be invited once a contested election is triggered.

84. Whether or not any invitation should or could be issued, there would be no possible basis under the rules not to apply the 20% threshold to other prospective contestants. In particular, and for the same reason that it could not apply to the incumbent, there would be no basis for applying the 15% threshold in B(i) which expressly applies in "the case of a vacancy". The incumbent would remain in office unless or until evicted by the election result. There is no vacancy.

85. Although there is no basis in the rules for inviting additional nominations, there is also nothing in B(ii) that expressly limits the number of challengers to an incumbent at a single election. Where there is no vacancy, the rules permit only one election per year. They do not provide for a challenge by way of contested election against the incumbent whenever a potential challenger attains the 20% threshold of support.

86. It could be argued that the effect of a potential challenger attaining that 20% threshold is to trigger an election contested only by that challenger and the incumbent. The effect, however, would be that other potential challengers who attained the 20% threshold in good time before the election could not stand in that year's election and had to wait, at least, until the following year. I do not think, in the absence of express provision, that the rules should be interpreted as permitting only one challenger to stand against the leader at one time, given that an election can take place only once a

need not, of course, be included on the ballot paper if s/he attains the 20% threshold too late for inclusion to be practical. This would turn on procedural decisions with which I am not concerned as such procedural matters do not affect the answer to the question of who should be included on the ballot paper and what, if any, threshold of support contestants require for inclusion on the ballot paper.

Summary of conclusions and the answer to the question posed

87. It is of course possible to make the rules clearer and more comprehensive. The courts have repeatedly noted that this is to be expected of such rules and that their imperfection is no obstacle to their interpretation (see *Jacques* above and the cases discussed therein). It is apparent from the authorities that imperfect drafting or incomplete terms do not equate to ambiguity and that a robust and common sense approach is to be taken to their meaning having regard to their purpose and context. It would be possible to add a provision to the current rules, for the avoidance of doubt, that the incumbent will be entitled to contest the election against any challenger who emerges pursuant to rule B(ii), i.e. that s/he will automatically be included on the ballot paper. That may facilitate the widest understanding of the effect of the rules. However, I do not consider that the rules as they stand are ambiguous in this regard or open to serious or reasonable doubt, or that a court would find that they were.

88. I summarise my conclusions as follows. The 15% threshold of support applied in B(i) has no relevance to any contestant in an election triggered by a challenge to an incumbent because on no view can this involve "the case of a vacancy". B(ii) permits *potential challengers* to seek nomination in order to challenge the incumbent, and provides that in this case, their nomination must attain a higher 20% threshold of support to enable them to stand against the incumbent. There is no possible basis for

clearest wording. There is in reality no wording pointing to such an interpretation.

89. It is not reasonably arguable that a requirement that the incumbent attain any threshold of support in order to appear on the ballot paper can be inferred by any process of interpretation of the provisions of the current rules, individually or as a whole. There is no evidence capable of establishing a custom and practice that could point to the contrary and in any event, no ambiguity that could be resolved by custom and practice. On the basis of the available information taken at its highest, previous challenges are incapable of establishing any legally relevant custom, practice, or precedent applying any threshold of support to an incumbent. It is in particular clear that no precedent supports any custom or practice that is "certain and notorious", "established, well know, and unquestioned" or is readily ascertainable by ordinary members.

90. In the absence of express provision or any basis for implying one, I also do not consider that an incumbent requires nomination in order to appear on the ballot against a challenger, or to be deemed re-elected (to the extent required) in a year in which no challenger emerges. Any available argument that the rules require nomination of the incumbent in the case of a contested election is weak. In any event, at most, what could be required of the incumbent is formal nomination: the incumbent's nomination is not one covered by either B(i) or B(ii). This would not alter my conclusion that the correct interpretation of the rules is that the incumbent need attain no threshold of support to be on the ballot paper, nor my conclusion that the contrary is not reasonably arguable on the basis of any process of interpretation permitted by the authorities.

91. I therefore answer the question posed by my instructions as follows. In the case of an

of the PLP and members of the EPLP. Any challenger (i.e. any other contestant) must have the support of 20% of the combined Commons members of the PLP and members of the EPLP in order to obtain a place on the ballot paper.

92. If Those Instructing have any queries or wish to discuss any aspect of this advice, they should, of course, not hesitate to contact me.

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13 April 2016