RESPONSE TO THE LAW COMMISSION'S CONSULTATION PAPER ON CONTEMPT OF COURT (Law Com Consultation Paper 262)

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A. INTRODUCTION

1. The Constitutional and Administrative Law Bar Association ("ALBA") is the professional association for barristers in England and Wales practising in public law, which includes administrative law, constitutional law, judicial review, and other areas of practice concerned with regulating the exercise of public powers.

2. ALBA's members are predominantly self-employed barristers in England and Wales, but also include employed barristers working in the UK Government Legal Department, local authorities, solicitors' firms, companies, and campaigning organisations and other NGOs. ALBA's wider membership includes (as associate members) judges, solicitors, legal academics, law students, and lawyers in other jurisdictions.

3. One of ALBA's principal objectives is to provide a forum for exchanges, between practising lawyers, judges and academic lawyers, of knowledge and ideas about the development of public law, including developments in public law jurisprudence and practice across the common law world. ALBA frequently responds to a number of consultations by the Ministry of Justice and other organisations about matters affecting public law.

4. The members of ALBA who have contributed to this consultation response are barristers (including King's Counsel) who are experts in the field of public law.

5. ALBA is submitting this response to draw attention to particular issues that may arise out of the Law Commission's proposals as they would apply in the context of public law cases, in particular claims for judicial review. In brief, ALBA wishes to encourage the Commission – if it has not already done so – to consider how its proposals in relation to contempt by breach of court orders or undertakings would work in the context of claims for judicial review. In this respect, ALBA's comments relate primarily to the topics addressed by consultation questions 18, 20, 21, 23 and 27.

B. BACKGROUND: COERCIVE COURT ORDERS AND CONTEMPT IN CLAIMS FOR JUDICIAL REVIEW

6. In the context of a claim for judicial review, the Administrative Court may grant a range of coercive orders, both interim and final: an interim injunction, a mandatory order, a prohibiting order, or a final injunction. As in any other type of proceedings, the breach of such an order (or of an undertaking given in lieu of such an order) may constitute a contempt of court, including where the breach is committed by a Minister of the Crown.[1]

7. In a claim for judicial review, the subject of a coercive order is usually the public body that is named as the defendant to the claim, such as a local authority or a Minister of the Crown. For example, an interim injunction might be drafted in terms which require a particular local authority to take a specified step, or which prohibit a particular Secretary of State from taking a particular step. In most cases, the defendant to claim for judicial review is a body corporate (whether a corporation sole or a corporation aggregate).[2]

8. Where the defendant to a claim for judicial review is a body corporate, it usually acts through its individual officers, officials or employees. Generally, such individuals act pursuant to authority that has been delegated to them by the defendant; in the case of Ministers of the Crown, civil servants in effect act as the Minister's *alter ego*, pursuant to the *Carltona* principle.[3] Nevertheless, in ALBA's experience there is no general practice in the Administrative Court of drafting coercive orders more widely to include, for example, the "officers and agents" of the defendant.

9. In ALBA's experience, the Administrative Court generally proceeds on the basis that the defaults of such individuals are attributable to the public body on whose behalf they act, and that the public body may be found in contempt on the basis of the acts or omissions of such individuals. In this respect, although the Court requires a public body to give a full account of how a breach of a coercive order

[1] *Re M* [1994] 1 AC 377, HL, 424 *per* Lord Woolf; *R (Mohammad) v Secretary of State for the Home Department* [2021] EWHC 240 (Admin), para 26 *per* Chamberlain J.
[2] *R (JM) v Croydon LBC* [2009] EWHC 2474 (Admin), [2010] 1 WLR 1658, para 4 *per* Collins J.
[3] *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, CA, 563 *per* Lord Greene MR.

came to occur, it rarely inquires into the precise mechanism by which the public body is to be fixed with liability for the breach.[4]

10. It is rare that a public body deliberately flouts a coercive order of the court; in practice, where a breach of a coercive order occurs, it is typically the consequence of an administrative failure.[5] As a result, in the general run of cases the Court usually concludes that a finding of contempt accompanied by an appropriate adverse costs order (and, possibly, a further coercive order which may be endorsed with a penal notice) constitutes a sufficient sanction; there is little evidence that the Court imposes additional punitive measures on public bodies that breach court orders.[6]

11. For the same reason, the Administrative Court generally does not endorse coercive orders with a penal notice, at least on the first occasion that such an order is made in a case (although ALBA is aware of some examples of such endorsements on interim injunctions).[7] It appears that, under the former RSC Ord 45, a penal notice was a prerequisite to the imposition of punitive sanctions for contempt (apart from in the case of Ministers of the Crown), but it was not a prerequisite for a finding of contempt or the imposition of an adverse costs order.[8] Accordingly, because the expectation was that it should not be necessary to impose punitive sanctions on a public body, it was not considered necessary to include a penal notice in a coercive order. This practice has continued since the replacement of RSC Ord 45 by CPR Part 81.

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[4] *Cf Rivers v Chief Constable of Surrey* [2023] EWHC 1417 (Admin), para 42 *per* Sir Ross Cranston.
[5] *R (JM) v Croydon LBC* [2009] EWHC 2474 (Admin), [2010] 1 WLR 1658, para 5 *per* Collins J; *Craig v Her Majesty's Advocate* [2022] UKSC 6, [2022] 1 WLR 1270, para 46 *per* Lord Reed PSC; *JS v Cardiff City Council* [2022] EWHC 707 (Admin), [2022] CCLR 359, paras 90–92 *per* Steyn J. For an example of a case in which there appears to have been a deliberate decision not to inform responsible officers of the existence of a court order, see *Beggs v Scottish Ministers* [2007] UKHL 3, [2007] 1 WLR 455.
[6] *Re M* [1994] 1 AC 377, HL, 424–425 *per* Lord Woolf; *R (JM) v Croydon LBC* [2009] EWHC 2474 (Admin), [2010] 1 WLR 1658, paras 9–12 *per* Collins J. See also *Beggs v Scottish Ministers* [2007] UKHL 3, [2007] 1 WLR 455, in which the Inner House found the Scottish Ministers to be in contempt of court, but made no further order.
[7] *R (Mohammad) v Secretary of State for the Home Department* [2021] EWHC 240 (Admin), para 23 *per* Chamberlain J; *JS v Cardiff City Council* [2022] EWHC 707 (Admin), [2022] CCLR 359, para 56 *per* Steyn J.
[8] *R (JM) v Croydon LBC* [2009] EWHC 2474 (Admin), [2010] 1 WLR 1658, paras 5-12 *per* Collins J.

C. THE COMMISSION'S PROPOSALS

12. ALBA's comments relate to the Commission's proposals on contempt by breach of court orders or undertakings (chapter 4 of the consultation paper). ALBA wishes to be clear that it is not making or endorsing any specific proposals; it is merely drawing matters to the Commission's attention for its consideration.

(1) The fault element (questions 20 and 21)

13. The Commission has proposed that liability for contempt by breach of a court order or an undertaking would arise where three elements are proved, one of which is the "fault element". The Commission has proposed that three requirements must be satisfied in order to establish the fault element: (1) the action or inaction that breached the relevant court order or undertaking was deliberate (not accidental), (2) the person in question knew that there was a court order or undertaking with which he or she was bound to comply, and (3) the person knew of the circumstances or facts that meant that his or her conduct was contrary to the order or undertaking.

14. ALBA observes that these proposals appear to be predicated on an assumption that either the relevant order is directed at a real person or, in the case of a body corporate, the order extends to the officers and agents of the body who would take the actions that constitute the breach. However, in the context of claims for judicial review, neither may be the case, at least on the basis of the current practice of the Administrative Court.

15. As explained above, generally coercive orders are directed at the defendant public body alone; typically they are not directed at the "officers and agents" (or similar) of the public body. Accordingly, the officers or officials who are likely to have knowledge of a coercive order, and who would in practice be the individuals who would need to act on such an order, are themselves unlikely to be the subject of the order.

16. Conversely, it is unlikely that the defendant public body will itself have any knowledge that a court order has been granted or of its effect. For example, apart from in politically sensitive matters, it is in practice unlikely that a local

authority[9] or a Secretary of State would be informed that an interim injunction has been granted. It has been held that (at least in the context of decision-making) the knowledge of a public body's officers or officials cannot be attributed to the public body on whose behalf they act.[10]

17. In light of the above, it seems to ALBA that there is a possibility that the Commission's proposals might result in a lacuna in the context of claims for judicial review: in short, the body which is the subject of a coercive order would not have knowledge of the order (or the fact of breach), whereas the individual who does have such knowledge would not be the subject of the order.

18. ALBA recognises that this lacuna might be addressed by an analysis based on principles of delegation and/or the *Carltona* principle (as the case may be). For example, it might be said that an officer of a local authority exercising delegated powers in effect acts as the local authority and, in that capacity, he or she has the necessary knowledge. However, insofar as ALBA is aware there is no case law on the point in the context of contempt, and it appears to ALBA that such an analysis might not necessarily be straightforward, particularly in circumstances in which it would be outwith the scope of an officer's delegated authority to act contrary to a court order. Less difficulty might arise in the context of the *Carltona* principle, as pursuant to that principle civil servants act as the *alter ego* of the relevant Minister, but again insofar as ALBA is aware there is no case law on the point in the context of contempt. Accordingly, it seems to ALBA that at the very least there is a risk of uncertainty, which would be undesirable and contrary to the Commission's general objectives in reforming this area of the law.

19. Further, ALBA recognises that the lacuna might be addressed by the adoption of a practice of including an "officers and agents"-type clause in any coercive order. However, not only would that require a change in the practice of the Administrative Court, it would also raise the prospect of individual public

[9] Which, as a matter of law, comprises all the elected members of the authority.
[10] *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, paras 23-38 *per* Sedley LJ.

officials (such as local authority officers) potentially facing personal liability for contempt in the context of claims for judicial review, which would constitute a significant change in approach as a matter of substance and may raise difficult issues of principle.

20. ALBA observes that similar issues may arise in the context of coercive orders directed at other large organisations (including commercial companies) in a non-public law context. However, it may be that a different approach to "officers and agents"-type clauses is adopted in those contexts, with the result that the potential difficulty does not arise in quite the same way. Further, paragraphs 4.38 and 4.39 of the consultation paper imply that, where such a large organisation is the subject of a coercive order, the mere fact that the order was sent to the office of that organisation does not itself demonstrate that a particular individual within that organisation had knowledge of the order. It is not obvious to ALBA that the Administrative Court adopts a similar approach in the case of coercive orders that are sent to public bodies; in accordance with the point made in paragraph 9 above, the Administrative Court tends to proceed on the basis that it is sufficient that one part of a public body's organisation is informed of the relevant coercive order, even if the part that does the act that constitutes the breach is not.[11]

(2) The requirement for a penal notice (question 18)

21. As explained above, it is not the general practice of the Administrative Court to endorse coercive orders with a penal notice, and ALBA is not aware of such a notice ever having been attached to a final mandatory or prohibiting order. Accordingly, if the Commission's proposals were intended to bite on coercive orders granted in claims for judicial review, a change in the long-standing practice of the Administrative Court may be necessary.

[11] Such an approach is reflected in the *Administrative Court Judicial Review Guide 2024*, para 17.7.4, which states that a public body is expected to have in place proper arrangements for ensuring that it promptly identifies and acts upon a court order.

(3) Interim coercive remedies (questions 23 and 27)

22. ALBA observes that none of the interim remedies proposed by the Commission are likely to be relevant in the context of a contempt by a public body.

D. SUMMARY

23. For the reasons set out above, ALBA considers that the particular context of claims for judicial review, and the practice of the Administrative Court, may give rise to particular issues that merit consideration by the Commission.

ALBA
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