

The Scottish Civil Courts Review

OFT's response

March 2008

OFT989

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1 INTRODUCTION

- 1.1 The Office of Fair Trading (OFT) welcomes the opportunity afforded by Lord Gill's Review to respond to the Consultation Paper. The OFT is the UK's competition and consumer authority. It is an independent body entrusted with a wide range of enforcement powers in competition and consumer law.¹ Our mission is to make markets work well for consumers. Our vision is for competitive, efficient, innovative markets, where standards of consumer care are high, consumers are empowered and confident about making choices and where businesses comply with competition and consumer laws but are not overburdened by regulation.
- 1.2 Through putting our vision into practice, we have experience of litigating in Scotland in both the competition and consumer fields. Before turning to answer particular questions posed by the Review, we describe below in summary our experience of Scottish litigation and draw the attention of the review to the OFT's recommendations in *Private actions in competition law: effective redress for consumers and business*¹²

¹ The OFT's constitution is set out in section 1 of and Schedule 1 to the Enterprise Act 2002. The OFT is a non-ministerial government department headed by a chairman, chief executive and members (see Enterprise Act 2002 Sch.1 paragraphs 1 and 5). Its statutory duties and powers are to be found in several statutes, including the Enterprise Act 2002, the Competition Act 1998, the Consumer Credit Act 1974 and the Estate Agents Act 1979, as well as several Statutory Instruments.

² www.offt.gov.uk/shared_offt/reports/comp_policy/oft916resp.pdf

2 THE OFT'S EXPERIENCE OF LITIGATION IN SCOTLAND

- 2.1 Appeals on the merits against OFT decisions on infringements of the Competition Act 1998, or of non-infringement decisions, are brought by parties to the Competition Appeal Tribunal (CAT).³ Applications for judicial review of decisions relating to merger situations or relating to market investigations are also brought to the CAT.⁴ As the Competition Act 1998 and the Enterprise Act 2002 extend to the whole of the UK, the jurisdiction of the CAT similarly extends.⁵ The CAT may treat proceedings before it as proceedings in England and Wales, Scotland or Northern Ireland. In making such a determination, it takes account of all matters which appear to it to be relevant and in particular the location of habitual residences, principal places of business and of any agreement, decision or concerted practice to which the proceedings relate.⁶ Further appeals then lie to the appropriate court, namely the Court of Appeal (England and Wales or Northern Ireland) or to the Court of Session.⁷
- 2.2 The CAT has sat in Scotland to hear two appeals, namely *Claymore Dairies Ltd and Arla Foods UK plc v OFT* and *Aberdeen Journals v OFT*.⁸ Both appeals had a clear Scottish dimension.⁹
- 2.3 In order to take forward an investigation under the Competition Act 1998, the OFT may apply to a judge for the issue of a warrant to enter business premises. Applications are made in accordance with rules of

³ Section 46 of the Competition Act 1998.

⁴ Sections 120 and 179 of the Enterprise Act 2002.

⁵ Section 76 of the Competition Act 1998 and section 280 of the Enterprise Act 2002. There are limited exceptions to the extent of the statutes to the UK.

⁶ Competition Appeal Tribunal Rules 2003, S.I. 2003/1372, rule 18.

⁷ Section 49 of the Competition Act 1998 and sections 120(6) (8) and 179(6) (8) of the Enterprise Act 2002.

⁸ *Claymore Dairies Ltd and Arla Foods UK plc v OFT* case numbers 1008/2/1/02 and subsequently for second appeal 1011/2/1/03. *Aberdeen Journals v OFT* case numbers 1005/1/1/01 and subsequently 1009/1/1/02 for the second appeal.

⁹ In *Claymore Dairies Ltd*, the investigation concerned the conduct of a dairy in Scotland, Robert Wiseman. In *Aberdeen Journals*, the investigation concerned a Scottish newspaper.

court.¹⁰ The OFT has similar powers to take forward investigations under EC competition law.¹¹ Pursuant to the Rules of Court, the OFT has applied for warrants to the Court of Session on several occasions. The OFT found the judges of the Court of Session to be extremely helpful in testing the application of what was then a new regime for Competition Act warrants in Scotland and establishing the appropriate procedural framework. This was subsequently instrumental in the ensuing development of the Rules of Court in relation to this area (prepared by the Lord Advocate's office). The judges were firm and robust, ensuring that the OFT's evidence was tested on a case by case basis before issuing the relevant warrants.

- 2.4 Under the Enterprise Act 2002, the OFT may apply to the court for an enforcement order if it considers that a person has engaged or is engaging in conduct which infringes either domestic or EC consumer law. In Scotland such applications lie to the Court of Session or the Sheriff Court if the person against whom the order is sought carries on business or has a place of business in Scotland. The court may also grant interim enforcement orders in circumstances where it is expedient that the conduct is prohibited or prevented immediately.¹²
- 2.5 The OFT sought an enforcement order against MB Designs in the Court of Session, lodging the petition for the interim enforcement order in September 2004. The petition for the interim enforcement order was heard in February 2005. MB Designs sought to appeal the order and the appeal was heard in the Inner House of the Court of Session in May 2006. The hearing for the enforcement order was then listed to be heard towards the end of 2007, but the parties reached a settlement shortly beforehand and therefore the hearing was not required.

¹⁰ Section 28 of the Competition Act 1998.

¹¹ Sections 62, 62A and 63 of the Competition Act 1998.

¹² Part 8 of the Enterprise Act 2002. Domestic infringements are defined in section 211 (and are specified in S.I. 2003/1593) and Community infringements in section 212 (and are specified in S.I. 2003/1374). Section 213(1) gives the OFT enforcement powers. Section 215 makes provision for applications to the court for enforcement orders. For enforcement orders see section 217, and for interim enforcement orders see section 218.

- 2.6 Most of the OFT's experience of litigation is in the CAT and the High Court of England and Wales, both of which have active case management by the court. For example, there are specific case management hearings in front of a Judge for the sole purpose of ensuring effective and expeditious case management. These case management conferences (CMC) deal with next steps, estimated trial length, fixing a date for the hearing and even the allocation of the Judge. In contrast, we found the absence of such case management in the Court of Session unfamiliar and at times frustrating.
- 2.7 The fact that the courts in Scotland do not intervene in a matter to ensure that it is listed for trial and subsequently heard within a reasonable period of time meant that the OFT found it difficult to progress the MB Designs case in order to obtain the interim enforcement order (and therefore protection for consumers) as soon as possible. For example, although the Petition was lodged in the autumn of 2004, the hearing for the interim enforcement order did not take place until February 2005, with the judgement being handed down in June 2005.
- 2.8 It became apparent that while an estimate of trial length was given, the hearing itself simply ran for as long as was required to complete it. The advantage of this was that the court was flexible enough to ensure all issues were fully heard and considered, without the case having to be part heard, because the time estimates given were not accurate. However, it would seem that it must be difficult for matters to be listed with any accuracy, as it cannot be clear when a court or judge would actually come free.
- 2.9 In addition, as criminal and family matters take precedence over civil matters, it can be difficult to get an interim application heard quickly. Our experience in MB Designs showed that we could be 'bumped' from the list if another matter took precedence, with no certainty to future listing of the hearing. This caused some difficulty for the OFT in terms of getting a quick solution for consumers and in terms of the costs associated with abandoned hearings.

- 2.10 *MB Designs* also highlighted a potential loophole for traders by virtue of which they may be able to avoid the effect of interim enforcement orders. This is because there is uncertainty whether the effect of a reclaiming motion against the grant of an interim enforcement order is to supersede its effect pending disposal of that appeal. This procedural uncertainty is largely due to a lack of an express provision in the Scottish Court Rules. Unless an interim interdict is on the list of expressly preserved orders, interim interdicts may not subsist once an appeal has been lodged. In practice, this means that once a trader has lodged a notice of appeal (which is easy to do as no permission is needed), the interim order is in effect lifted and no contempt proceedings can be brought. As the appeal process is largely driven by the appellant, and given the difficulties outlined above, this means that consumers can be without protection for many months.
- 2.11 Two approaches were made by the Office of the Solicitor to the Advocate General on behalf of the OFT in 2005 and again in 2007 to the Scottish Court Rules Committee to request that the rules be amended, so that interim enforcement orders under the Enterprise Act 2002 are made expressly preserved under the Court Rules. On both occasions, the Committee declined to amend the Court Rules, so this is still a highly relevant issue. The OFT would find it highly beneficial to clarify the position in the Rules of Court in order to afford Scottish consumers the same level of protection as that of their counter parts in England and Wales.
- 2.12 The last case which we would like to draw to your attention in this section of our response is *Dumfries and Galloway Council v The Scottish Information Commissioner*, an appeal by the Council to the Inner House of the Court of Session.¹³ This case was about the construction of provisions in the Freedom of Information (Scotland) Act 2002. The OFT had an interest in this as it concerned provisions that were very similar to those in the Freedom of Information Act 2000, and the interaction of

¹³ [2008] CSIH 12

such provisions with Part 9 of the Enterprise Act 2002 is a matter in which the OFT has a keen interest.¹⁴ The OFT did not intervene in the appeal but instead supported Dumfries and Galloway Council and kept a watching brief. The Court of Session found in favour of the Council. The OFT's only observation on this process is that the burden on the Scottish courts system could be eased if appeals initially lay to a specialist Information Tribunal rather than immediately to the Inner House of the Court of Session.¹⁵ However, the viability of such a specialist tribunal would be dependent upon there being a sufficient critical mass of appeals.

- 2.13 In November 2007, the OFT published its recommendations to the Government in *Private actions in competition law: effective redress for consumers and business* (the OFT's recommendations).¹⁶ The OFT's Recommendations build upon a UK-wide consultation on the barriers to effective redress in competition cases.¹⁷ Paragraph 1.1 states that '*the purpose of the paper is to make recommendations to the UK Government as to the steps which, in the OFT's view, should be taken at the domestic level to improve the effectiveness of redress for those who have been harmed by breaches of competition law*'. The same paragraph added that '*although the legal systems of England and Wales, Scotland and Northern Ireland are different in various respects, such that methods of implementation would vary by jurisdiction, the purpose and spirit of the recommendations are of general application*'. Paragraph 1.2 summarises the recommendations about actions by representative bodies, the capping of parties' costs liabilities, a litigation fund, a

¹⁴ The issue is the scope of section 44 of the Freedom of Information Act 2000 (information is exempt from disclosure if its disclosure is prohibited under any enactment) in its application to Part 9 of the Enterprise Act 2002 (which concerns restrictions on disclosure of 'specified information' as defined in the Part).

¹⁵ See Part V of the Freedom of Information Act 2000.

¹⁶ www.offt.gov.uk/shared_offt/reports/comp_policy/oft916resp.pdf

¹⁷ OFT's discussion paper *Private actions in competition law: effective redress for consumers and business* available at

www.offt.gov.uk/advice_and_resources/publications/reports/competition-policy/oft916. The consultation responses are published at www.offt.gov.uk/advice_and_resources/resource_base/consultations/private.

requirement for UK courts and tribunals to 'have regard' to UK competition authorities' decisions and guidance, and powers to be conferred on the Secretary of State in respect of leniency documents and immunity recipients. Paragraph 1.3 discusses the possible need for new or additional case management powers to minimise any risk of ill-founded litigation arising from such changes.

2.14 We now turn to the questions in the Consultation Paper and offer responses to those where we consider that we can assist the Review.

3 RESPONSE TO REVIEW QUESTIONS

Chapter 1

(1) Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?

- 3.1 The OFT is in favour of court systems which encourage early resolution of disputes, as this not only enables parties to reach resolution more quickly but in many cases will be more cost effective and reduce the number of cases in the court system, allowing other cases that require judicial attention to be heard more quickly.
- 3.2 A key feature of any early resolution procedure is that it should be voluntary, as parties are unlikely to reach a compromise if they are forced into the process. The OFT has found that some consumer cases have been resolved in this manner, because it has given the party an opportunity to speak to the OFT face to face about issues and convey issues and concerns in a manner that can be more effective than through either a legal representative or in writing. It also provided the OFT an opportunity to equally convey that it is serious about its concerns and will take action if a resolution is not found.
- 3.3 The OFT also considers that pre-action protocols are most helpful as their purpose is to facilitate early resolution and commends such protocols to the Review (see also our comments on pre-action protocols at paragraphs 44 to 46 below.)

(3) Are there any matters within the Review's remit about which you have concerns but which are not dealt with in this paper?

- 3.4 We draw attention to our observations in paragraph 12 above on interim enforcement orders made under the Enterprise Act 2002. In addition, we have concerns about the lack of rights of audience in civil matters for appropriately qualified and authorised Trading Standards Officers (TSO) from local authorities trading standards services (LATSS) in all Scottish

courts, but in particular the Sheriff Court. LATSS share with the OFT responsibility for enforcing consumer law.¹⁸

- 3.5 Based on experience in England and Wales, we consider that it would be beneficial for TSOs to have rights of audience, as the court then benefits from hearing from those closest to the facts and evidence of the case. It is also more cost effective for TSOs to bring legal actions, as lawyers do not have to be instructed. In turn, savings in costs means that more actions can be brought and therefore a greater number of consumers will benefit from additional protection. Fewer cases would fall to the OFT if the LATSS were able to pursue them, allowing a more efficient use of OFT resources.

Chapter 2

(3) To what extent is it (a) desirable, or (b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?

- 3.6 The OFT has experience of cases in the CAT where the appellant is a litigant in person.¹⁹ In most cases a litigant in person requires additional and often more detailed assistance and responses by the court and the OFT's counsel, but in the main these have proved to be manageable. Sensitivity to the position of the litigant in person by both court and represented party is called for, including clear explanation of process and more leeway in terms of technical requirements. However, by allowing litigants in person to be able to bring their own cases, it provides access to justice to those who could not otherwise have brought their case because they either cannot afford legal representation, or do not qualify for legal aid.

¹⁸ See the Enterprise Act 2002 section 213(1)(b)

¹⁹ Rule 51(2) of The Competition Appeal Tribunal Rules 2003 S.I.2003/1372 provides that the CAT shall so far as it appears to be appropriate seek to avoid formality in its proceedings.

(5) Are there any other issues which impact on access to justice in Scotland which the Review should consider?

3.7 The OFT's recommendations identified the current limited availability of representative actions in competition cases as a significant barrier to effective redress for businesses and consumers.²⁰

(6) Is there a case for a new method of dealing with low value cases? If so, should this be within the existing structure or separate from it? What kind of cases would be suitable for such treatment?

3.8 We suggest that there would be significant benefit in a form of low level resolution service for matters such as consumer issues. This would allow low value claims to be dealt with quickly and relatively cheaply (possibly unrepresented), thus freeing up court and LATSS/OFT time to focus upon more complex and higher value claims. We draw the attention of the Review to the existence of redress schemes such as the Consumer Code Approval Scheme.²¹ Consumer codes are rules businesses agree to follow, usually operated by a trade association or similar body, that are approved by the OFT. The aim being to promote and safeguard consumers' interests by helping consumers identify better businesses and to encourage businesses to raise their standards of customer service.

Chapter 3

(2) To what extent does the cost of litigating deter people from pursuing or defending cases in court?

3.9 The costs of litigation act as a considerable barrier to litigation for the LATSS. The OFT is aware of many cases that it would have been perfectly proper to have been put before the court, but the relevant

²⁰ See Chapters 5 – 7 of *Private actions in competition law: effective redress for consumers and business*.

²¹ See www.offt.gov.uk/oft_at_work/consumer_initiatives/codes/ for further information about the OFT's Consumer Codes Approval Scheme.

LATSS legal team held back because of uncertainty and a degree of fear regarding costs, as they only have limited resources derived from public funds. The OFT's Recommendations also identified the cost of litigating competition disputes as a significant barrier to effective redress.²²

(4) Are the current rules for recovery of judicial expenses satisfactory?

3.10 We refer above in paragraph 25 to the LATSS holding back from bringing civil cases due to the uncertainties surrounding costs and therefore this would suggest that the system is not operating in a satisfactory manner. We also refer above in paragraph 23 to the OFT's recommendations which identifies the cost of litigating competition disputes as a significant barrier to effective redress.²³

3.11 The OFT's recommendations also highlight the problems relating to the funding and costs of competition cases.²⁴

Chapter 4

(1) Do you agree that the conduct of the civil business of the courts is adversely affected by the pressures of criminal business?

3.12 We refer above in paragraph 7 to our recent experience of the MB Designs case in the Court of Session and the general experience of the LATSS in the Sheriff Court. It is understood why criminal business takes precedence over civil business in the present system and the flexibility offered in having all judges able to hear all matters has certain advantages. Nevertheless the OFT, as a national enforcer of significant consumer protection provisions sometimes found the delays frustrating because (in our view) consumers were continuing to suffer detriment. The delays also added significantly to the costs OFT incurred, which is important because the OFT is of course publicly funded.

²² See Chapter 8 of *Private actions in competition law: effective redress for consumers and business*.

²³ Ibid.

²⁴ Ibid.

(2) Should (a) some judges of the Supreme Courts and (b) some sheriffs be designated to deal with civil business?

3.13 This is certainly an issue that should warrant further consideration, as it should enable civil cases to be listed quicker and may assist with implementation of more active case management by the court, should this be taken forwards as well. Specialisation may also make it easier for judges to develop more specialist knowledge in areas such as consumer protection and competition law, which would assist the OFT and other users of the courts in future matters. However, these considerations would have to be balanced against the flexibility offered by the current system.

(4) Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of case and in which courts?

3.14 We draw attention to our comments on the Scottish Information Commissioner case and to our suggestion that there might be a specialist Freedom of Information Tribunal in Scotland (paragraph 14 above). This would depend on there being a critical mass of cases to warrant the establishment of such a tribunal.

3.15 The same consideration would apply to other possible specialist courts, which could cover the areas of law which fall within the OFT's remit, consumer and competition law (and in respect of the latter, there is already in existence of course the UK wide CAT).

(5) What are the key factors which influence the decision to raise an action in either the Court of Session or the sheriff court where jurisdiction is concurrent?

3.16 The OFT chose to make its application in MB Designs (see paragraph 7 above) in the Court of Session as the case involved a matter that was high profile, complex and required statutory interpretation. In addition, it was the first time that an application under Part 8 of the Enterprise Act 2002 had been contested anywhere in the UK. Accordingly the OFT concluded that the Court of Session was the more appropriate court than the Sheriff Court.

3.17 In relation to actions by LATSS in Scotland, it is often the case that costs are the overriding factor and so while it would be helpful to have the more authoritative decision of a higher court, funding constraints mean that actions are generally raised in the Sheriff Court as this is perceived as being a more cost effective route.

(13) Does the current division of the sheriff court into distinct geographical jurisdictions present difficulties or does it have advantages?

3.18 We are aware of some concerns within the TSS that the geographical jurisdictions of Scottish courts can sometimes lead to a narrowing of considerations and applicability. For example, despite the UK wide scope of enforcement orders, there are instances where a Sheriff has specifically granted an enforcement order that is only effective in their own Sherifffdom. This therefore means that should the trader concerned move to another jurisdiction, the enforcement procedure would have to be started all over again.

Chapter 5

(1) Should the rules of civil procedure have an overriding objective or statement of philosophy and, if so, what should the main elements of that overriding objective or statement of philosophy be?

3.19 The OFT's experience in England and Wales is that the overriding objective in the Civil Procedure Rules (CPR)²⁵ is most helpful as it can sometimes afford assistance in cases of doubt over the interpretation of the detailed rules in the CPR. In the OFT's view, the factors that should be considered if there were to be an overriding objective are: dealing with matters fairly (particularly given the size and resources of the parties), proportionately (given the issues, the complexity, the amounts in dispute), and as efficiently as possible.

²⁵ Rule 1.1 CPR - www.justice.gov.uk/civil/procrules_fin/contents/parts/part01.htm.

(2) Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?

3.20 As we state above (paragraph 18), the OFT does not believe that parties should be required to use some form of Alternative Dispute Resolution (ADR) before a claim can be issued. ADR should be a voluntary process, because the parties have to be willing at least to listen to each other's view and consider compromising the matter. In our experience, a face to face meeting can help to cut through tensions and misunderstandings that can build up. Additionally, even if the matter is not resolved, it can help facilitate a narrowing of issues or at least improve relations between the parties, which benefit any subsequent litigation.

3.21 Other factors could be built into the system so that the parties are in no doubt that they should give serious consideration to ADR, not only at the outset but also throughout the matter at key milestones (such as following disclosure). Equally, it should also be recognised that in some matters it is not possible for ADR to produce the remedy being sought, for example, in some cases a remedy such as an interdict has to be ordered by the court or as in the case of a Competition Act warrant, it is done without the knowledge of the other party.

(3) If so, how should this be done and at what point or points in the progress of a dispute?

3.22 In England and Wales, the court requires parties to complete an allocation questionnaire when the defence has been filed, but before the case is allocated to a 'track'. The questionnaire asks questions about the case, the witnesses and experts involved, general availability and requires the provision of an estimate of costs. The first question however asks whether the parties wish to have a stay of one month in order to pursue resolution via ADR. This therefore creates a natural stage to ensure that ADR is considered.

3.23 At any point in the process, the claimant and defendant can make a 'Part 36' offer to resolve the matter. The claimant therefore offers to accept a certain amount of money or the defendant pays into court an

amount of money to resolve the matter. Should the offer not be accepted by the other party and the party refusing the offer does not obtain a higher sum at trial (either because they lose or win but are awarded a lower amount of damages), there can be significant cost consequences for that party. In most matters, costs are an important factor. Accordingly such a possible consequence of refusing an offer makes the parties consider seriously an offer of settlement made by way of a payment into court.²⁶

(4) Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify?

3.24 We have referred above to OFT applications for warrants to enter premises (paragraphs 5 and 37). We would not characterise our applications for such warrants as 'disputes' but in any event they are not at all appropriate for dispute resolution given that they are pursuant to an ongoing investigation and are obtained without the subject of the warrant being informed or involved.

(6) In what respects can modern communications and information technology be harnessed to improve access to the civil courts?

3.25 The OFT is in favour of maximum ease of communication between parties and courts – such as email, fax, telephone conferences and video conferences – for speedy progress of matters. It would also provide a costs saving to the OFT for example in respect of reducing the need to travel to court as often.

(7) To what extent should the court control the conduct and pace of litigation?

3.26 In our experience, the pace of litigation in Scotland is controlled by the parties to the litigation and in particular by the party who has brought the action or a particular application. As we explain above (paragraph

²⁶ See Part 36 CPR - www.justice.gov.uk/civil/procrules_fin/contents/parts/part36.htm.

12) if an interim enforcement order made under Part 8 of the Enterprise Act 2002 is appealed, it cannot take effect until the appeal is determined. However, as it is the defendant who has made this application, it is the defendant who controls the pace of the appeal and therefore it is in their interests to delay the hearing of the appeal for as long as possible, because in the meantime they can continue their activities. If changes are made to the system, possibly allocating a judge to cases at the outset who could have active case management powers, this would lead to an overall saving of time, as different judges would not have to read into the matter each time that there was a hearing.

3.27 The potential downside is that it would reduce the flexibility of the court to allocate any judge to any hearing, so matters would have to wait for a particular judge to come free. It also means that the court would need to be more actively involved in the cases, which will inevitably create more work for the courts, thus needing greater resources. The OFT's recommendations also emphasises the importance of active case management by the court in competition cases, especially representative actions.²⁷

Chapter 6

(1) What are the advantages and disadvantages of pre-action protocols?

3.28 In our experience the advantages of pre-action protocols are that they set out the required steps that have to be taken by the parties so that everyone is clear what the process has to be,²⁸ particularly in relation to applications for judicial review. It also means that it is far easier for the court to issue guidance to explain the process to litigants in person and increases access to justice for those unable to afford legal representation. By the parties being more open at the outset it can often

²⁷ See paragraphs 4.2 – 4.4 and 7.30 of *Private actions in competition law: effective redress for consumers and business*.

²⁸ See the CPR Pre-action Protocols at www.justice.gov.uk/civil/procrules_fin/menus/protocol.htm.

also encourage early settlement of s disputes, thus reducing the overall burden placed on the court system and on the parties in costs.

3.29 The disadvantages are that the protocols may be too prescriptive and do not always give sufficient leeway for cases that are different from the norm, which can mean that in some cases the steps taken are artificial and do not benefit the individual case.

3.30 In general the OFT is in favour of such protocols. The OFT's Recommendations stated that there may be benefits in introducing pre-action procedure for representative actions in relation to competition claims.²⁹

(3) Should compliance with pre-action protocols be voluntary or compulsory?

3.31 In our experience it is unlikely that many, if any parties, will comply with pre-action protocols unless they are required to do so, as the protocols tend to require the work to be front loaded in the case and therefore so are the costs. In addition to the requirements in the protocols being compulsory, there should also be a consequence for non-compliance, for example in relation to costs to reinforce the fact that compliance should be taken seriously.³⁰

(13) In the conduct of substantive hearings should there be greater use of written rather than oral arguments?

3.32 In proceedings before the High Court and the CAT, the OFT finds the use of skeleton arguments very useful. It allows the parties to be clear about the position being taken, the arguments being put forward and prevents surprises happening during actual hearings. It also means that the judge can review them beforehand and start the process of consideration of the issues prior to the hearing.

²⁹ See paragraphs 11.7 – 11.11 of *Private actions in competition law: effective redress for consumers and business*.

³⁰ See Rules 2 and 3 of the CPR Pre-Action Protocol Practice Direction at www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm#IDACLHGG

3.33 The OFT often has input into the preparation of its counsel's skeleton arguments. This ensures that there is consensus between the OFT and its counsel on policy issues (particularly as there could be ramifications on other cases or use of powers generally) and the presentation of the argument generally.

(19) Should the courts have greater powers to impose sanctions for non-compliance with court rules or where a party or his representative has behaved unreasonably? If so, what should these be?

3.34 Our view is that a wide ranging case management role would give the court powers to impose sanctions for non-compliance with orders and/or in respect of other factors such as breaches of pre-action protocols, delays or unreasonable conduct. Sanctions could include costs awarded against the party being sanctioned generally or in relation to specific aspects of the case and the striking out of pleadings.

(20) What measures should be available to the court to identify and manage unmeritorious causes or appeals brought by party litigants?

3.35 From our experience of the MB Designs case, the OFT would find it helpful if the party had to apply for permission to appeal, as it would prevent parties filing an appeal to delay the effects of an interim enforcement order and delay the hearing of the final enforcement order. By having this additional stage, unmeritorious appeals would be stopped without significant costs and time being incurred by the other party. In addition, the time spent considering applications by the court would be outweighed by the time saved from not hearing unmeritorious appeals.

(22) Should a person without a right of audience be entitled to address the court on behalf of a party litigant and, if so, in what circumstances?

3.36 We have referred above (paragraph 20) to our view that TSOs should have rights of audience in the Sheriff Court for which we give our reasons.

(23) Would it be desirable to introduce separate procedures for multi-party litigation?

3.37 The OFT's Recommendations recommended that the scope of representative actions, currently only available under section 47B of the Competition Act 1998, should be expanded. We also draw attention to chapters 5 – 7 of *Private actions in competition law: effective redress for consumers and business*.

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