European Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules

Irish Competition Authority Submission

20th April 2006

The Competition Authority
An tÚdarás Iomaíochta

1. INTRODUCTION

1.1 The Competition Authority has read with interest the Commission's Green Paper[1] on damages actions for breach of the EC antitrust rules, and the accompanying Staff Working Paper[2]. The Green Paper has as its basic premise that the promotion of private antitrust actions will assist enforcement of the antitrust rules of the Treaty. Proceeding from that point, the Green Paper identifies issues that it perceives to militate against the bringing of private actions and proposes various options for reform.

1.2 The Commission is of the view that the rules on access to evidence in different member states pose a considerable obstacle to plaintiffs in private antitrust actions. The Green Paper asks whether there should be special rules on disclosure of documentary evidence, and if so, what form it should take**. The Competition Authority believes to harmonise procedural requirements across the EU in one field of law alone seems to have great potential for confusion. With that important caveat in mind, the Competition Authority considered the options as to the form the rules (if any) on disclosure should take.**

1.3 Given the importance of EC and national competition laws, the Competition Authority support action by the Commission to ensure that the right to bring damages action for breach of EC competition laws (and national competition laws) is a reality in all Member States. Since there are great differences in national legal and court systems, the Competition Authority is concerned to ensure that any specific rules concerning antitrust damages action will not have unintended and potentially harmful effects on the conduct of other damages actions in Member States. For this reason, the Competition Authority ask the Commission to adopt a minimalist approach, namely, to adopt only the rules that are deemed necessary to ensure that the right of damages action for EC competition laws (and national competition laws) is viable in all Member States.

1.4 The Competition Authority strongly support the initiative of the Commission to promote public debate about the conditions for bringing damages claims for infringement of EC antitrust law and the important work done by the Commission Staff on the Green Paper and the Commission Staff Working Paper annexed to the Green Paper.

1.5 The Competition Authority agree that there are too few damages claim for breach of the EC antitrust law and competition laws of Member States. The Competition Authority believes the major reason for this in Ireland is the cost of litigation. The other impediments to damages action identified in the Green Paper are in the Competition Authority's view, less relevant or less significant in the Irish context although the Authority appreciate the difficulties they cause in certain other Member States.

[1] Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, Brussels 19.12.2005 {COM (2005) 672 final}

[2] Commission Staff Working Paper. Brussels 19.12.2005

1.6 The Competition Authority is grateful for the opportunity to make submissions on the Green Paper in general, and on the options for reform in particular. In doing so, this submission will follow the order and logical sequence of the Green Paper itself, firstly by outlining the question posed by the Commission and secondly the Competition Authority's position on each issue. For ease of reference a summary of the options which are in the Competition Authority's view the most desirable is attached as Appendix A to this submission.

2. ACCESS TO EVIDENCE

Question A

Should there be special rules on disclosure of documentary evidence in civil proceedings for damages under Articles 81 and 82 of the EC Treaty? If so, which form should such disclosure take?

2.1 The Competition Authority believes Option 3, with the addition of judicial oversight, will give the best opportunity to a plaintiff to access the necessary evidence. In Ireland, the discovery rules are very wide, but are under court control. Any party may, without filing any affidavit, apply to the court for an order directing any other party to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of the application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage;, or make such order on such terms as to security for the costs of discovery or otherwise and either generally or limited to certain classes of documents as may be thought fit. An extract from Order 12 of the Rules of the Superior Courts, in which the discovery rules are set out, is attached as Appendix B to this submission.

2.2 The Competition Authority also agrees with the adoptions of an obligation to preserve evidence, as set out in Option 5, and sanctions for destruction of evidence, as set out in Option 4. In Ireland, a defendant is obliged to preserve evidence once litigation has commenced. Any failure to do so is treated as a contempt of court, and could result in imprisonment.

2.3 In summary, the Competition Authority suggest the adoption of Option 3, expanded to include judicial control, Option 4 and Option 5

Question B

Are special rules regarding access to documents held by a competition authority helpful for antitrust damages claims? How could such access be organised?

2.4 The Competition Authority considers this question first in relation to documents held by a National Competition Authority ("NCA"). The Competition Authority is of the view that if the options previously suggested in relation to discovery are adopted, the plaintiff will have all relevant documents that are in the defendants' possession, **except documents which the defendant may have provided to the NCA or other third parties.** From the Competition Authority's point of view Option 6 is therefore unnecessary.

2.5 A different issue, not addressed by either of the options provided, arises in respect of any documents provided by the defendant to the NCA **(or other third parties)** and therefore no longer in the defendant's possession or under his control. The Competition Authority does not believe as a matter of

policy that a NCA should be obliged by anyone other than a court to provide any documents to a private litigant. If NCAs handed documents over to private litigants as a matter of course it would seriously undermine public enforcement of the law. Parties subject to investigation by a NCA would be much more reluctant to provide documentation sought under a letter of request during an investigation if they knew that these documents would find their way into a private litigant's hands in the future. They would also be much less willing to make voluntary discovery in civil proceedings and would look to the courts to make narrow 'conditional' discovery orders in proceedings. NCAs are responsible for protecting the competitive process and not the interests of competitors (or indeed any private litigants even if they are consumers). NCA's should not be seen as a fast track to evidence gathering for plaintiffs in private litigation.

2.6 It is possible under Irish law, however, for an order of third party discovery to be made by the court, where documents relevant to the action are held by a person other than the defendant. The Competition Authority submits that the Commission might consider the possibility of third party discovery to enable documents held by a NCA to be discovered to a plaintiff.

2.7 Option 7 asks for feedback on how national courts can guarantee confidentiality, and on the situations in which national courts would ask the Commission for information that parties could also provide. The Competition Authority is unable to address either of those issues.

2.8 In summary, the Competition Authority suggests a new option of third-party discovery.

Question C

Should the claimants burden of proving the antitrust infringement in damages actions be alleviated and, if so, how?

2.9 The Competition Authority recommends that the plaintiff's burden of proving the infringement should not be alleviated, except in the case of an action following a finding of infringement by a court or by the Commission. In those two cases, the Competition Authority believes that the finding of infringement should be binding on the court hearing the action for damages.

2.10 The Competition Authority believes in all other cases, the plaintiff should be obliged to prove the infringement to the civil standard (i.e., on the balance of probabilities). Any alternative would (a) risk the working of an injustice against the defendant; (b) give rise to a litigation culture and (c) give rise to the possibility of abuse by competitors.

2.11 Specifically, the Competition Authority is strongly opposed to the shifting or lowering of the burden of proof in cases on information asymmetry. In some cases, this could work injustice on the defendant, in other cases, it might be counter-productive and work injustice on the plaintiff, as judges might view this shift with suspicion, and the balance would be tipped in the defendant's

favour.

2.12 In summary, the Competition Authority submits that all the options should be rejected. Instead a plaintiff's burden should be alleviated only where a finding of infringement has been made by a national court or by the Commission, and that the alleviation should take the form only of making that infringement decision binding upon the court that hears the damages action.

3. FAULT REQUIREMENT

Question D

Should there be a fault requirement for antitrust-related damages actions?

3.1 The Competition Authority suggests that Option 11 should be chosen in this case. Proof of the infringement is sufficient; otherwise there would be a perverse result if a NCA or the Commission made a finding of infringement and those who suffered loss were unable to recover compensation because the defendant was not "at fault".

4. DAMAGES

Question E

How should damages be defined?

4.1 The Competition Authority is of the view that the purpose of private actions for damages should always and only be to compensate the injured party. The Competition Authority believes the raising of damages levels to include the recovery of illegal gains is inappropriate. It is true that it would have a deterrent effect, but this would be outweighed by its attendant disadvantages. These are:

a) The fact that it would give the plaintiff a windfall to which he would not be entitled, and

b) That it would increase the danger of frivolous and vexatious actions and cultivate a litigation culture.

4.2 The adoption of Option 14 would compensate the plaintiff without having the disadvantages previously mentioned. The addition of pre-judgment interest, while justly compensating the plaintiff, would have the advantage of a deterrent effect upon the defendant. In particular, post-judgment interest would encourage early payment of the damages awarded.

4.3 In summary, the Competition Authority suggests the adoption of Option 14 and Option 17, amended so as to include post-judgment interest. The Competition Authority does not feel it would be appropriate for the Commission to specify any particular method for determining pre-judgment or post-judgment interest rates to be adopted in all Member States, given the divergence of legal and court systems and the existence of other types of damages actions in Member States.

Question F

Which method should be used for calculating the quantum of damages?

4.4 The three options suggested in the Green Paper do not really address the question; instead they pose additional questions.

4.5 Option 18 asks whether there is any added value in using complex economic models, and whether the court should have power to assess quantum on the basis of an equitable approach.

4.6 The Competition Authority believes the calculation of damages in antitrust actions does not lend itself to a rigid scientific method, as there are too many variables and unknown quantities to permit it.

4.7 As previously submitted, the Competition Authority believes damages should be defined as compensatory only. In that case, the best approach will be the

equitable or "common-sense" approach, used traditionally by the courts of Ireland, England and Wales when calculating damages, where the aim is to restore the plaintiff as far as is possible to the situation he would have been in if he had not suffered the alleged injury.

4.8 Option 19 asks whether the Commission should publish guidelines on the quantification of damages. The Competition Authority submits that it should not. Courts are accustomed to calculating damages for financial loss, and if the equitable approach is to be adopted, some flexibility must be allowed.

4.9 Finally, the Competition Authority does not see any advantage in the introduction of split proceedings between liability and calculation, except in "follow-on" actions where, as previously suggested, the court hearing the claim for damages should be bound by an earlier court finding of infringement. The Competition Authority is, however, concerned about the rigidity and formalism which it understands may be followed by the courts of some Member States. It might therefore be helpful if the Commission established the compensatory principle and urge courts to be flexible in adopting a "common-sense approach", rather than placing an undue burden on the plaintiff to exactly quantify damages,

4.10 In summary, the Competition Authority submits that an equitable or "common-sense" approach to the calculation of damages should be adopted, and that the Commission should not issue any guidelines on quantification.

5. PASSING-ON DEFENCE AND INDIRECT PURCHASER STANDING

Question G

Should there be rules on the admissibility and operation of the passing-on defence? If so, which form should such rules take? Should the indirect purchaser have standing?

5.1 If the principle underlying a damages claim for an antitrust infringement is compensatory, a defendant should be entitled to raise a passing-on defence, i.e., that any loss suffered by the purchaser was passed on to the customers of the purchaser. The Competition Authority note, however, that a passing-on defence is unlikely to be a complete answer to a damages action. The fact that an overcharge has been passed on does not necessarily mean that no damage has been suffered. To take just one example, there may have been a loss in sales by a purchaser as a result of the unlawful behaviour of the defendant even though the plaintiff may have passed on to its customers the overcharge for the goods actually purchased from the defendant.

5.2 The Competition Authority is sympathetic to the rationale for excluding the passing-on defence, namely, that if a passing-on defence is successful against an indirect purchaser claim, there is a strong possibility that indirect purchasers would not bring actions. As a result the defendant, assuming liability is established, would benefit from its unlawful conduct and victims of such conduct would not be compensated.

5.3 From the perspective of the compensatory principle for damages claims, the Competition Authority is of the opinion that there should be no specific rule on the passing-on defence and the Authority is concerned that in practice, the existence of a successful (or almost successful) passing-on defence might preclude the bringing of damages actions by either direct or indirect purchasers. For this reason, the Competition Authority supports further consideration of the implications of the passing-on defence and the issue of whether indirect purchasers may sue.

5.4 The compensatory principle also implies that an indirect purchaser should not be precluded from bringing a damages action. The Competition Authority is concerned about the fact that indirect purchasers are unlikely to bring many actions and for this reason, the Authority supports representative actions, a topic considered later in this submission.

5.5 In Ireland, the rule set out in the Competition Act 2002 as to standing in private antitrust actions is that the plaintiff must be an "aggrieved person". Although the term "aggrieved person" is not defined in the Act itself, it is a term that appears in other statutes, and some case law exists as to its meaning. It is, according to the court in The State (Lynch) v Cooney[3],

> *a term to be generously interpreted - which is generally understood to include any person who has reasonable grounds to bring the*

[3] [1982] IR 337

proceedings […]The question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case. In each case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it is only by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates.

5.6 In summary, for the reasons outlined above, the Competition Authority believes that **there should be no specific rule on the passing-on defence** and that both direct and indirect purchasers should have standing. The Competition Authority also urges further consideration of the policy implications of these two issues.

6. DEFENDING CONSUMER INTERESTS

Question H

Should special procedures be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed?

6.1 The Competition Authority agrees with the Commission that lack of resources will mean that a NCA cannot take action in every case that arises. The existence of a right of private action is therefore valuable not only for its compensatory, but also for its deterrent effect. Unfortunately, this effect at present is weak. The number of private actions taken in Member States has been few. A significant reason for this may be the frequent existence of a Goliath-like defendant, which individual plaintiffs may be loath to take on.

6.2 However, it is rare that a breach of competition law would affect only one or two individuals. Because breaches of competition law usually result in higher prices than would otherwise have been the case, consumers are ultimately the injured parties. While any illegal price increase would ultimately impact adversely on the end user, it is difficult to quantify that impact except where the price increase involves finished goods for which, at each stage of the distribution, there is a mark-up. Where the goods involved are production inputs, the impact on the end user of the goods that incorporate the input may be small, and difficult to quantify. Thus, there are unlikely to be many consumer antitrust damages actions.

6.3 The Competition Authority believes that certain types of collective action may address this problem, in particular, empowering bodies such as consumer associations to institute actions on behalf of consumers. In the United States, a useful example is provided by section 19(b) of the FTC Act[4], which allows the Federal Trade Commission to institute a civil action seeking redress for consumers who have been injured by violations of the antitrust rules. The court may order a wide variety of remedies, including restitution in the form of monetary refunds. Disgorgement to the US Treasury has also been held to be an appropriate remedy for preventing unjust enrichment where it is not possible to identify all the consumers entitled to restitution.

6.4 Some adaptation of another interesting US procedure might also be useful. Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976[5] authorises a state attorney general to bring an action for injuries to natural persons residing within the state. Any damages established may either be distributed in a manner authorised by the court or be awarded to the state as a civil penalty, subject in each case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the award. The Act also provides for the recovery of reasonable attorneys' fees following the successful outcome of the litigation.[6]

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[4] 15 U.S.C. § 57b(b) (2000)

[5] *5 15 U.S.C. § 15c (a) (1).*

6 A useful discussion of the parens patriae action can be found in ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002) Vol. 1 page 807 ff.

6.5 In summary, the Competition Authority submits (a) individual consumers should not be deprived of bringing an action; (b) consideration be given to the creating of a cause of action by a representative body, or (c) consideration be given to some adaptation of the US parens patriae procedure.

7. COSTS

Question I

Should special rules be introduced to reduce the cost risk for the claimant? If so, what kind of rules?

7.1 The options suggested in the Green Paper are: plaintiffs to pay costs only if they have acted in a manifestly unreasonable manner by bringing the case, or the court to have discretion to order at the beginning of the trial that the plaintiff should not be exposed to costs even if unsuccessful.

7.2 The Competition Authority believes both of these are dangerous options. Why should a defendant against whom nothing has been proved be exposed to costs? This would be particularly invidious where the private action was not a follow-on action, and no infringement had been established. The options would also go a long way towards encouraging a litigation culture.

7.3 If some form of representative action is established for consumers, the cost burden will be greatly lessened for them. They form the class of plaintiffs most at risk from cost awards in individual actions. The Competition Authority does not believe that plaintiffs other than consumers should be in any better position as regards costs in antitrust litigation than they would be in other civil actions.

7.4 The experience of other jurisdictions is informative. In the Canadian province of British Columbia, class action rules provide that no costs are payable by either party at any stage of a class proceeding including the certification stage unless a party has engaged in vexatious conduct.[7] This relieves the potentially onerous burden on the plaintiff class of having to pay costs if it is unsuccessful but, as a matter of balance, the defendant is also relieved from paying costs if it is unsuccessful. In the provinces of Ontario and Quebec, a representative plaintiff may apply to a class proceedings fund to defray the expense of litigation.

7.5 In summary, the Competition Authority submits that no special provisions should be made in respect of costs, if the option of representative actions is adopted.

[7] See, for example, Class Proceedings Act, RSBC 1996, Chapter 50, section 37

8 PUBLIC AND PRIVATE ENFORCEMENT

Question J

How can optimum coordination of private and public enforcement be achieved?

8.1 Three options are suggested in the Green Paper: the exclusion of discoverability of the leniency application, thus protecting the confidentiality of submissions made to the competition authority as part of the leniency application; conditional rebate on damages claims against the leniency applicant; removal of joint liability from the leniency applicant.

8.2 These options all appear to be based on the premise that if a leniency applicant is exposed to damages, it may prevent undertakings or individuals seeking leniency, thus undermining public enforcement.

8.3 First, the Competition Authority is doubtful about the merits of this premise. The Competition Authority believes that, weighing up the pros and cons of applying for leniency, it will always be to an undertaking's, or individual's advantage to come forward for leniency. If he does, and leniency is granted, then, although he may subsequently be exposed to damages, his risk will be less than if he did not apply for leniency, in which case he would risk both substantial penalties and damages. The Competition Authority submits that if the Commission wishes to promote the bringing of private actions, it should not do anything to favour a leniency applicant – provided always that damage are defined as compensatory.

8.4 Second, the Competition Authority does not believe as a matter of policy that a leniency applicant should in effect be "rewarded" for coming forward by having his exposure to damages limited or excluded. He is already benefiting from either immunity from prosecution or some other form of leniency.

8.5 Third, the Competition Authority does not believe that a plaintiff who has proved his case should be disadvantaged because one of the defendants is a leniency applicant. The Competition Authority submits that if the leniency applicant's unlawful behaviour has caused injury to the plaintiff, he should be liable to compensate him, whether singly, or jointly and severally.

8.6 Finally, if the Competition Authority's proposals on court-controlled discovery are adopted, the Authority believes that submissions attached to a leniency application will not be admitted unless they constitute relevant evidence. If they do constitute such evidence, the Competition Authority can see no reason why they should be excluded. It should be noted that an immunity applicant under the Irish Cartel Immunity Programme[8] must make full disclosure of all relevant information in his/her possession to the Director of Public Prosecution in order to qualify for the final grant of immunity. This information must then be disclosed in full to the defendants in criminal proceedings. The evidence of an immunity applicant is reduced to statement form and is tested in full in open court. It is very difficult to see in an Irish context how it would be possible to exclude discoverability of the immunity applicant's information (application). In

[8] http://www.tca.ie/immunity.html

fact, where parties are being sued in damages and discover that the immunity applicant has avoided suit, it would be very easy for those parties being sued to release, in discovery to the plaintiff, the witness statements made by the immunity applicant, as they will be in possession of this evidence from the criminal proceedings. Defendants would also be entitled to join the immunity applicant in the civil suit if the immunity applicant is not being sued. In that instance, the defendants would ensure that the party that received immunity would share in the costs (including any damages awards) that will arise from the follow on civil action.

8.7 In summary, the Competition Authority does not agree with the premise and does not believe that any of the options should be taken.

9. OTHER ISSUES

Question K

Which substantive law should be applicable to antitrust damages claims?

9.1 The four options suggested in the Green Paper are: the law of the place where the damage occurs; the laws of the states on whose market the victim is affected; the law of the forum; where more than one state is affected, the choice of the plaintiff.

9.2 Although the first two options seem at first sight to be the same, the Commission's Staff Working Paper points out that the place where the damage occurs may be interpreted as the place where the financial loss occurs rather than to the place where the market effects are felt, although these will often coincide.

9.3 The Competition Authority believes that if Member States are to encourage private actions flexibility for the plaintiff is a good thing, and that the option of leaving the choice to the plaintiff should be adopted.

Question L

Should an expert, whenever needed, be appointed by the court?

9.4 The Competition Authority recommends this should be left to the court in each case. The Competition Authority also submits that the appointment of a court-appointed expert should be without prejudice to the rights of the parties to bring in their own expert witnesses if they so wish. It is a well-known fact that experts disagree and a party should not be denied the opportunity to present its strongest case.

Question M

Should limitation periods be suspended? If so from when onwards?

9.5 The Competition Authority submits that the limitation period should only begin to run when the damage has been discovered.

9.6 Although the Competition Authority recognises the usefulness to a prospective plaintiff of suspending a limitation period while public enforcement proceedings are in being, on balance the Authority does not think that this option should be adopted, as it could result in extensive limitation periods where a NCA or the Commission is carrying out a protracted cartel investigation and does not deal with all members of the cartel at the same time.

10. CONCLUDING COMMENTS

The Competition Authority is grateful for the opportunity to make submissions on the Green Paper and strongly support the initiative of the Commission to promote public debate about the conditions for bringing damages claims for infringement of EC antitrust law.

The Competition Authority looks forward to further discussion and debate on the topic.

Should you have any queries on the Competition Authority's submission please do not hesitate to contact:

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APPENDIX A

2. Access to evidence

Question A: Options 3 (expanded to include judicial control), Option 4 and Option 5

Question B: New option of third party discovery

Question C: A plaintiff's burden should be alleviated only where a finding of infringement has been made by a national court or by the Commission, and that the alleviation should take the form only of making that infringement decision binding upon the court that hears the damages action.

3. Fault requirement

Question D: Option 11

4. Damages

Question E: Option 14 and Option 17

Question F: An equitable or "common-sense" approach to the calculation of damages should be adopted, and the Commission should not issue any guidelines on quantification.

5. The passing-on defence and indirect purchasers

Question G: There should be no specific rule as to the passing-on defence. Both direct and indirect purchasers should be allowed to sue although the Competition Authority welcome further consideration of the implication of the passing-on defence and the issue of whether indirect purchasers may sue.

6. Defending consumer interests

Question H: (a) Individual consumers should not be deprived of bringing an action; (b) consideration be given to the creating of a cause of action by a representative body, or (c) consideration be given to some adaptation of the US parens patriae procedure.

7. Costs of actions

Question I: No special provisions should be made in respect of costs, if the option of representative actions is adopted.

8. Coordination of public and private enforcement

Question J: No option should be chosen.

9. Other issues

Question K: Flexibility for plaintiff is a good thing and jurisdiction should be the choice of the plaintiff.

Question L: The appointment of any court-appointed expert should be without prejudice to the rights of the parties to bring in their own expert witnesses if they

so wish.

Question M: The limitation period should only begin to run when the damage has been discovered. Although the Competition Authority recognises the usefulness to a prospective plaintiff of suspending a limitation period while public enforcement proceedings are in being, on balance the Authority does not think that this option should be adopted.

APPENDIX B

Extract from Order 12 of the Rules of the Superior Courts

12. (1) Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order on such terms as to security for the costs of discovery or otherwise and either generally or limited to certain classes of documents as may be thought fit.

(2) On any such application the Court, in lieu of ordering an affidavit of documents to be filed, may order that the party from whom discovery is sought shall deliver to the opposite party a list of the documents which are or have been in his possession, custody, or power, relating to the matters in question. Such list shall, as nearly as may be, follow the form of the affidavit prescribed in rule 13. The ordering of the delivery of such list shall not preclude the Court from afterwards ordering the making and filing of an affidavit of documents.

(3) An order shall not be made under this rule if and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

13. The affidavit, to be made by a party against whom such order as is mentioned in rule 12 (1), has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it shall be in the Form No. 10 in Appendix C.

14. The Court may at any time during the pendency of any cause or matter, order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

15. Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings, or affidavit or list of documents reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit copies thereof to be taken; and any party not complying with such notice shall not afterwards be at liberty to put any such documents in evidence on his behalf in such cause or matter, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice; in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

16. Notice to any party to produce any documents referred to in his pleadings or affidavit or list of documents shall be in the Form No. 11 in Appendix C.

17. The party to whom such notice is given, shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit or list as is mentioned in rule 13, or if any of the documents referred to in such notice have been set forth by him in any such affidavit or list, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof, at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in the Form No. 12 in Appendix C.

18. (1) If the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his

solicitor, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit or list of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party.

(2) An order shall not be made under this rule if and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

19. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

20. (1) Where inspection of any business books is applied for, the Court may, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, the Court may inspect the document for the purpose of deciding as to the validity of the claim for privilege.

(3) The Court may, on the application of any party to a cause or matter at any time, and whether an affidavit or list of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power; and, if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them.

21. If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court for an order to that effect, and an order may be made accordingly.

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