THE HIGH COURT

2016 No. 10690P

BETWEEN:

LENAGHAN INTERNATIONAL TRANSPORT LIMITED

PLAINTIFF

– AND –

LOMBARD IRELAND LIMITED, AB VOLVO (PUBL), VOLVO GROUP TRUCKS CENTRAL EUROPE GmBH, VOLVO LASTVAGNAR AB, FIAT CHRYSLER AUTOMOBILES NV, DAF TRUCKS DEUTSCHLAND GmbH, DAF TRUCKS NV, DAIMLER AG, CNH INDUSTRIAL NV, IVECO MAGIRUS AG, IVECO SPA, MAN SE, MAN TRUCK & BUS AG, MAN TRUCK & BUS DEUTSCHLAND GmbH AND RENAULT TRUCKS SAS

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 12th May, 2017.

I. Overview

1. This an application made under O.26, r.4 of the Rules of the Superior Courts 1986, as amended (the 'RSC'), seeking a stay on the within proceedings *vis-à-vis* the first-named defendant until such time as the plaintiff has paid the first-named defendant's costs of the proceedings previously brought and discontinued by the plaintiff.

II. Background

2. The within proceedings were issued on 30th November, 2016, and were served on the first-named defendant under cover of letter dated 8th December, 2016. The proceedings are identical to a previous set of proceedings brought by the plaintiff against the above-named defendants, save that the previously instituted proceedings (i) featured an additional defendant, and (ii) sought damages for fraudulent misrepresentation, whereas negligent misrepresentation is now contended to have occurred.

3. As of the date of hearing, no costs of the discontinued action had been paid by the plaintiff to the first-named defendant, despite these having repeatedly been sought without any reply being received from the plaintiff's lawyers, not even a courtesy letter stating, for example, that 'We are seeking our client's instructions and will respond in due course'.

III. Relief Sought

4. By notice of motion, the first-named defendant now seeks, *inter alia*, an order pursuant to O.26, r.4 of the RSC staying the within proceedings *vis-à-vis* the first-named defendant until such time as the plaintiff has paid the first-named defendant's cost of the proceedings previously brought and discontinued by the plaintiff herein bearing record number 2016 8231P.

IV. Order 26, Rule 4

5. Order 26 of the RSC is headed "*Discontinuance*". Order 26, rule 4 provides as follows:

> "*If any subsequent action shall be brought before payment of the costs of a discontinued action, for the same, or substantially the same, cause of action, the court may order a stay of such subsequent action, until such costs have been paid.*"

6. The court's power in this regard is clearly a discretionary one: thus the rule provides that "[T]*he court may order a stay*", not 'must' or 'shall'.

V: Relevant Case-Law

(i) *M'Cabe*.

7. There appear to be no modern Irish authorities concerning O.26, r.4. The sole case of relevance identified by counsel for the first-named defendant was the long-ago decision of the House of Lords in *M'Cabe (Pauper)* v. *Bank of Ireland* (1889) 14 App. Cas. 413, an appeal from the then Irish Court of Appeal.

8. *M'Cabe* was a case in which the sole question on appeal was whether an appellant could be allowed to proceed with a pauper's action in the Chancery Division against the respondents without having first paid the costs of a former action brought by him in the Exchequer Division against the respondents for the same matter and in which (unlike the position here) the previous action had not merely been discontinued but had been dismissed.

9. Relying on the then relatively recent decision of the Court of Appeal of England and Wales in *Martin* v. *Earl Beauchamp* (1883) 25 Ch.D. 12, and showing an admirable deference to the exercise of discretion by the court below, the House of Lords concluded that, in Ireland as in England, where a plaintiff, having failed in one action, brings a second action for the same cause of action, the second action must be stayed until the costs in the first have been paid. Though he does not establish it as a pre-requisite to the exercise of the court's discretion, Herschell L.C., at 416, did draw some comfort in that case from the fact that:

> "[A]*s far as I can see, if the appellant here were allowed to sue he would really gain no advantage by doing so, for from all that I have heard today I have been unable to see that he would be likely to make out any sort of case against the present respondents, or to obtain any benefit from the litigation which he has commenced against them.*"

(ii) Martin.

10. The sole case referred to by the House of Lords in *M'Cabe* was the decision of the Court of Appeal of England and Wales in *Martin*. *Martin* was among the many 19th-century claims to the 'Jennens Inheritance', a vast fortune that was left by Mr William Jennens, god-son of King William III and sometime money-lender to the aristocracy, upon his death in 1798. The facts of *Martin* are worth

recounting in a little detail because they point to a couple of factors which are of some relevance in the context of the within application.

11. In 1859, Mr Joseph Martin, acting as legal personal representative for a Ms Bunch, filed suit (a) alleging that: (i) Mr William Jennens had died intestate in 1798, except as to a will by which he directed his debts to be paid, and devised to his mother, who died in his lifetime, certain estates for her life; (ii) in July of that year, letters of administration of the personal estate of Jennens were granted to William Lygon (later the 1st Earl Beauchamp) and the Dowager Viscountess Andover, they claiming to be two of Jennens' next of kin; (iii) Lord Beauchamp and Lady Andover got in the greater part of Jennens' personal estate and divided it equally between them; (iv) on the death of Lord Beauchamp (who survived Lady Andover) his widow took out administration to Jennens and got in the rest of his personal estate, and (b) seeking an account of the personal estate of Jennens, alleging that the several persons into whose hands it had come had kept it separate for the benefit of the next-of-kin when they should be ascertained.

12. In 1875, a Mr Isaac Martin became the legal personal representative of Ms Bunch. In 1877 he, in that representative capacity, revived the suit against Hon. Mary Howard (as representative of Lady Andover) and the 6th Earl Beauchamp (as representative of the 1st Earl and his widow). The Honourable Mary Howard having died, the suit was revived against Hon. Arthur Upton and Mr F.A. Coe as her executors. Finally, in 1879, the action stood as one by Mr Isaac Martin against the 6th Earl Beauchamp and Messrs Upton and Coe. In 1880, the proceedings were dismissed with costs, on the ground that the title of Ms Bunch as next-of-kin had not been established. In 1882, Mr Isaac Martin obtained a grant of letters of administration with the will annexed of the personal estate of Jennens left un-administered by the 1st Earl, his widow and Lady Andover. In 1883, Mr Isaac Martin, acting as administrator aforesaid, commenced the action that ultimately came before the Court of Appeal against the 6th Earl, as legal personal representative of the 1st Earl and his widow, to have an account taken of all personal estate of Jennens come to the hands of the 1st Earl and his wife. In the same year, Pearson J. made an order staying all proceedings in the suit until the costs ordered in 1880 (as taxed thereafter) had been paid. It was against this order that an appeal was brought to the Court of Appeal.

13. Again, *Martin* was a case where an action had been dismissed rather than discontinued. However, it seems to the court that the principles identified in *Martin*, and indeed in *M'Cabe*, can be applied by analogy in the context of an application brought under O.26, r.4. What makes *Martin* perhaps of especial interest in the context of the within application is that, it will be recalled from the court's account of the background facts to the within application, the within proceedings are not between precisely the same parties and not brought on precisely the same grounds as the previous proceedings. Something of a like difficulty presented in *Martin* in that (i) the two proceedings brought by Mr Isaac Martin related to the same estate but their objects were different in that the proceedings dismissed in 1880 had claimed the property for the estate of Ms Bunch whereas the proceedings commenced in 1883 had sought to have the fund distributed among the next-of-kin, whoever they were, (ii) the plaintiff in the 1883 proceedings sued under a different title from that set up in the failed 1880 proceedings, and (iii) it followed that the two actions were different, being between different parties and for different purposes.

14. The two-man Court of Appeal who heard the appeal in *Martin* not only (a) recognised what it considered to be the already-by-then established principle that where a plaintiff, having failed in one action commences a second action for the same matter, the second action must be stayed until the costs of the first action have been paid, but (b) was prepared to apply this rule where there was a very substantial overlap, albeit not a precise overlap, between the substance of the two sets of proceedings, regardless of form. Thus, per Cotton L.J., at 15:

> "*The rule is established that where a plaintiff having failed in one action commences a second action for the same matter, the second action must be stayed until the costs of the first action have been paid. Here the Defendant is only one of the Defendants in the old suit, but he is sued in the same character as before. The Plaintiff in the former suit sued as personal representative of Elizabeth Bunch , he now sues as administrator* de bonis non *of William Jennens. But though he is not suing in the same character as that in which he formerly sued, he is suing substantially by virtue of the same alleged title. If he recovers any part of this estate from the Defendant he will recover it as a trustee for the estate of Elizabeth Bunch , and I am of opinion that he is to be treated as bringing a second suit for the same matter as the former*",

and, per Lindley L.J., also at 15:

> "*I am of the same opinion. There is some technical difficulty in the case, for the Plaintiff formerly sued as personal representative of Elizabeth Bunch, but now he sues as personal representative of William Jennens. I think, however, that the technical difficulty is not insuperable, and that we are not prevented by it from saying that this is really and substantially a second action for the same matter.*"

15. These observations find partial echo in the wording of O.26, r. 4. However, the Court of Appeal in *Martin* goes further and, it seems to this Court, properly so, in recognising that a difference in the capacity in which proceedings are brought, as opposed to a difference in the precise cause of action, likewise need not, in and of itself, yield the consequence that a stay cannot or ought not to issue.

VI. Applicable Principles

16. What principles fall to be derived from the foregoing analysis? It appears to the court that the following propositions may be asserted, notwithstanding that the above-considered case-law was concerned with proceedings that followed dismissed, as opposed to discontinued, proceedings:

(1) the power of the court to grant the stay referred to in O.26, r.4 of the Rules of the Superior Courts 1986, as amended, is a discretionary power;
(2) notwithstanding that such discretion falls to be exercised as appropriate in any one case, as a general (though not unyielding) rule where a plaintiff, having failed in one action, commences a second action for the same matter, the second action should be stayed until the costs of the first action have been paid;
(3) a like discretion arises to be exercised in the context of any subsequent action for the same, or substantially the same, cause of action as the discontinued action;
(4) the discretion may be exercised despite a technical difference in the capacity in which the subsequent action is brought; and

(5) the prospects of success in the subsequent action ought generally to be a factor of no relevance; however, a plaintiff's prospects of success in the subsequent action might become relevant if, for example, it were pleaded that a plaintiff's reduced circumstances meant that s/he could not afford the initial costs sought but, absent a requirement to discharge those initial costs, possessed sufficient funds to continue the impugned proceedings.

VII. Conclusion

17. No good reason has been advanced in the within application as to why the court ought not to exercise its discretion in favour of the first-named defendant. The subsequent proceedings are between substantially the same parties and concern substantially the same cause of action as the discontinued proceedings. No proper explanation has been offered as to why the previous costs have not been paid: this appears simply to be a case of 'can pay, won't pay'. The costs of the previous proceedings, though not insubstantial are far from oppressive in the context of what are proceedings of a commercial nature, being in the amount of about €4k. That those costs might be reduced following any taxation that could yet occur is a potential future boon to the plaintiff but not something that falls now to blight the within application. The first-named defendant cannot, in the circumstances presenting, reasonably be expected to incur the costs of defending a second set of proceedings that are substantially the same as the discontinued proceedings, without there being prior payment of the costs of those discontinued proceedings. The court will therefore make the order sought.