KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 115**

2024 SKKB 115 (CanLII)

Date: **2024 06 18**
Docket: QBG-RG-02314-2013
Judicial Centre: Regina

BETWEEN:

ŞEKERBANK T.A.Ş. and ALTERNATIFBANK A.S
RESPONDENTS (PLAINTIFFS)

- and -

HUSEYIN ARSLAN and MURAD AL-KATIB
RESPONDENTS (DEFENDANTS)

- and -

YAPI ve KREDI BANKASI ANONIM SIRKETI
APPLICANT (PROPOSED PLAINTIFF)

CORRECTED JUDGMENT: The text of the original judgment has been changed *per* the corrigendum released July 22, 2024. (A copy of the corrigendum is appended to this corrected judgment.)

Counsel:

No one appearing	for the respondents (plaintiffs)
Michael Milani, K.C., William Lane, Jonathan Milani and Stephen Barrington-Foote	for the applicant (proposed plaintiff),Yapi ve Kredi Bankasi Anonim Sirketi
Deron Kuski, K.C. and Shawna Sparrow	for the defendant, Murad Al-Katib
Kevin Mellor	for the defendant Huseyin Arslan

DECISION — LAYH J.
June 18, 2024

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BACKGROUND

Briefly Stated Background and Issues

[1] This decision arises from the application of a Turkish bank, Yapi ve Kredi Bankasi Anonim Sirketi [YK Bank], to be added or substituted as a plaintiff in a fraudulent conveyance action first initiated in 2013 [2013 Action] by another Turkish bank, Şekerbank T.A.Ş. [Şekerbank]. Alternatifbank [ABank] was added as a plaintiff in the 2013 Action in 2017. However, YK Bank has encountered certain realities in its quest to be added or substituted as plaintiff in the 2013 Action. First, without being added as a plaintiff to the existing 2013 Action, YK Bank faces a virtually certain result: its claim is barred by a limitation period. Second, both Şekerbank and ABank have settled and discontinued their claims against the defendants, Huseyin Arslan and Murad Al-Katib [Defendants] in the 2013 Action. Thus, YK Bank asks the court to set aside the notice of discontinuance executed and filed by ABank (the last of the two Turkish banks that discontinued the 2013 Action) so that it can anchor its claim against the Defendants by being substituted as the plaintiff.

[2] Briefly stated, the court must decide if it can, or should, set aside the discontinuance of the 2013 Action, before the court can consider whether YK Bank should be added or substituted as a plaintiff. Then, if the discontinuance is set aside, the question becomes whether the court should allow YK Bank to be added or substituted as a plaintiff as might be authorized by reference to either or both *The King's Bench Rules* and/or s. 20 of *The Limitations Act*, SS 2004, c L-16.1.

Facts in More Detail

A History of the 2013 Action

[3] From my count, this decision will be tenth reported decision in the 2013 Action, an action begun 11 years ago when Şekerbank alleged that Mr. Arslan, a

guarantor of certain obligations owed to it, fraudulently conveyed several million dollars worth of shares he held in Alliance Grain Traders Inc. [AGTI] to Mr. Al-Katib who became the trustee of a family trust held for the benefit of Mr. Arslan's and Mr. Al-Katib's family members [Carme Trust].

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[4] Contemporaneous with the issuance of the statement of claim in the 2013 Action, Şekerbank sought a preservation order pursuant to s. 5 of *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22, prohibiting Mr. Al-Katib, as trustee of the Carme Trust, from disposing of 850,000 shares of AGTI. With surprising speed, the parties consented to a preservation order, which the court granted. However, perhaps because of a change in counsel, this preservation order would become fuel for years of ensuing litigation when Mr. Arslan and Mr. Al-Katib brought several applications before the court to have the preservation order set aside. This litigation spawned several reported decisions:

(a) *Şekerbank T.A.Ş. v Arslan*, 2014 SKQB 215, 450 Sask R 76

(b) *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77, 400 DLR (4th) 193, leave to appeal to Supreme Court of Canada refused, 2017 CanLII 5372 (9 February 2017)

(c) *Şekerbank T.A.Ş. v Arslan*, 2017 SKQB 205

(d) *Arslan v Şekerbank T.A.Ş.*, 2018 SKCA 77, 38 CPC (8th) 311

(e) *Şekerbank T.A.Ş. v Arlsan*, 2019 SKQB 119

(f) *Şekerbank T.A.Ş. v Arslan*, 2019 SKQB 283

(g) *Şekerbank T.A.Ş. v Arslan*, 2020 SKQB 286

(h) *Şekerbank T.A.Ş. v Arslan*, 2021 SKQB 256

(i) *Huseyin Arslan and Murad Al-Katib*, CACV 3941 leave to appeal denied January 25, 2022

[5] On July 7, 2017, Justice Barrington-Foote (as he then was), in *Şekerbank T.A.Ş. v Arslan,* 2017 SKQB 205, affirmed by the Court of Appeal in (*Arslan v Şekerbank T.A.Ş.*, 2018 SKCA 77, 38 CPC (8th) 311), added ABank as a plaintiff in the 2013 Action, notwithstanding the expiration of the limitation period, as Justice Barrington-Foote found was permitted under s. 20 of *The Limitations Act*.

[6] Fast forward 10 years after the initial claim to December 11, 2023. To the court's surprise, the Defendants filed a notice of application seeking an order that the action commenced by Şekerbank against them "be dismissed" and that the preservation order of January 9, 2014 be terminated. The notice of application described that Şekerbank and Mr. Arslan had settled the 2013 Action and had executed a "Debt Liquidation Protocol" [Protocol]. The Protocol provided that Şekerbank would discontinue both the claim that had originated in Turkey and the the 2013 Action in consideration of the Defendants releasing to Şekerbank the security that they had previously posted ($1,040,000.00 CDN plus interest) [Settlement Payment]. Filed on the same day was a consent order reciting the relief sought.

[7] As the case management judge for several years, this development was surprising because the parties had such a protracted history of vigorous litigation. On December 11, 2023, I granted the consent order that Şekerbank's action "be discontinued" (not "dismissed" as the notice of application requested) and that the preservation order be terminated.

[8] Although Şekerbank had consented to an order to discontinue its claim, ABank had not. Undoubtedly, that is why Mr. Arslan filed a notice of application on January 23, 2024, seeking an order that ABank's action against him should be struck on the basis that the claim was statute-barred by *The Limitations Act* and, alternatively,

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that ABank was unable to register its foreign judgment in Saskatchewan, based on the decision in *Alternatifbank A. S. v Arslan*, 2016 SKQB 106.

The Appearance of YK Bank

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[9] Another surprising situation arose after Mr. Arslan's notice of application filed on January 23, 2024. A newcomer appeared in the 2013 Action: YK Bank filed a notice of application on February 13, 2024 to be added as a plaintiff in the 2013 Action.

[10] In affidavits sworn in support of YK Bank's application, I learned that YK Bank began a lawsuit in Turkey in June 2015 and obtained judgment against Mr. Arslan, on September 15, 2017. Then began a series of appeals in Turkish courts until June 24, 2021 when all appeals were exhausted. Two years later, YK Bank commenced an originating application in QBG-RG-01686-2022 to register the Turkish judgment in Saskatchewan. The application was heard on June 8, 2023 and on June 16, 2023, Justice Robertson granted an order allowing registration of the judgment in the Judgment Registry of Saskatchewan, reported as *Yapi ve Kredi Bankasi Anonim Sirketi v Arslan*, 2023 SKKB 126. On July 6, 2023, Mr. Arslan appealed the decision and the appeal remains under reserve.

[11] At some point well before obtaining Justice Robertson's order, YK Bank learned of the claims of Şekerbank and ABank against Mr. Arslan and of a potential settlement of their claim. In correspondence of July 12, 2022, Michael Milani, K.C., counsel for YK Bank, sent separate but similar letters to Kevin Mellor, counsel for Mr. Arslan; to Peter Bergbusch, counsel for Şekerbank and Abank; and to Deron Kuski, K.C., counsel for Mr. Al-Katib. In the correspondence to Mr. Mellor, Mr. Milani wrote:

> We act as solicitors for Yapi ve Kredi Bankasi Anonim Sirketi ("YK Bank"). We write to you in your capacity as solicitors for Mr. Huseyin Arslan ("Mr. Arslan"), in respect of Mr. Arslan's litigation with Sekerbank T.A.S. and Alternatifbank A.S. and any other creditors of Mr. Arslan, Sekerbank T.A.S. and Alternatifbank A.S. and such other creditors are collectively referred to as the "Other Creditors".

[12] Mr. Milani described the debt obligations Mr. Arslan owed to YK Bank. Mr. Milani's concluding paragraphs to Mr. Mellor are identically repeated in his correspondence to counsel for Mr. Al-Katib and to counsel for Şekerbank and Alternatifbank:

> YK Bank understands that one or more transactions is contemplated whereby Mr. Arslan may pay an amount or amounts to one or more of the Other Creditors on accommodate or, or in settlement of, their respective claims.
>
> YK Bank takes the position that any such transaction or transactions will be improper and void. Among other matters:
>
> a) any such transaction or transactions would be made at a time when Mr. Arslan is in insolvent circumstances, is unable to pay his debts in full, and knows that he is on the eve of insolvency;
>
> b) any such transaction or transactions would be made with the intent of defeating, hindering, delaying or prejudicing his creditors, including YK Bank, and would have that effect;
>
> c) the recipient of any payment would have the intent of defeating, hindering, delaying or prejudicing Mr. Arslan's creditors, including YK Bank, and the receipt of any payment would have that effect;
>
> d) such payment or payments would result in the recipient receiving amounts that are greater, proportionately, than could be realized by unsecured creditors generally;
>
> e) such a transaction or transactions would be a transaction in favour of an arm's length creditor with a view to giving that creditor a preference over another creditor; and
>
> f) such payment or payments would not have been made in good faith.
>
> If such a transaction or transactions occur, YK Bank will take all steps available to it in law and equity against those who participated in or facilitate the transaction, or transactions.

[13] Clearly, in these items of correspondence, Mr. Milani forewarned the parties in the 2013 Action that any settlement of debts owed by Mr. Arslan to the banks

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would be viewed as a fraudulent preference. To the time of the immediate application before me, YK Bank seemingly has not taken any legal action to claim a fraudulent preference respecting the Settlement Payment.

Post-February 2024 Developments

[14] In the weeks following the two applications filed on the court's file – one by the Defendants dated January 23, 2024 to have the ABank action dismissed and one by YK Bank dated February 13, 2024 to be added as plaintiff in the 2013 Action – further developments were underway. By notice of withdrawal as counsel filed March 12, 2024, Miller Thomson LLP withdrew as ABank's long-standing legal counsel. Three days later, on March 15, 2024, by notice of change of representation, Lucke Law became counsel for ABank.

[15] The same day, March 15, 2024, a case management conference was held before me. By then, a consent order had been filed in which the Defendants and ABank consented to the discontinuance of the 2013 Action. YK Bank opposed the granting of the consent order, stating that the parties in the 2013 Action were attempting an end run to YK Bank's application to be added as a party in the 2013 Action. Given this impasse and the prior scheduled hearing date of April 25, 2024, I reserved a decision respecting the granting of the consent order.

[16] However, yet more unusual developments were to arise. Three days later, on March 18, 2014, legal counsel for both parties remaining in the 2013 Action (ABank and the Defendants) filed a consent discontinuance of claim, which stated:

> The plaintiff, ALTERNATIFBANK A.S., discontinues the action against the defendant, HUSEYIN ARSLAN an MURAD AL-KATIB, with each party bearing its own costs.

[17] Mr. Arslan and Mr. Al-Katib then withdrew their January 23, 2024 application to strike ABank's claim, which essentially rendered the previously filed

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draft consent order redundant.

[18] More legal sparring was to unfold. When YK Bank learned that the Defendants and ABank filed a consent notice of discontinuance on March 18, 2024, YK Bank reacted quickly and filed an application the next day, March 19, 2024, invoking the inherent jurisdiction of the court to strike the notice of discontinuance. YK Bank said that if the discontinuance of ABank's action were allowed to stand, the court would be deprived of its jurisdiction to decide YK Bank's application to be substituted or added as a plaintiff to the 2013 Action, and, as a consequence, YK Bank's ability to continue the prosecution of the action for the benefit of all of Mr. Arslan's creditors would be impossible.

[19] At a case conference meeting on March 20, 2024, newly engaged legal counsel for ABank, Mr. Lucke, advised the court that ABank had consented to the discontinuance of its claim and did not wish or intend to have further participation in the 2013 Action.

[20] Given the above-described developments, certain observations are obvious. Neither Şekerbank nor ABank, as plaintiffs in the 2013 Action, takes any position respecting YK Bank's quest to be added as a plaintiff. Clearly, the Defendants do not want YK Bank to be added as a plaintiff in the 2013 Action. Finally, implicit in YK Bank's application to be added as a plaintiff in the 2013 Action, is its concern that if it issued its own statement of claim alleging fraudulent conveyance of the AGTI shares, it would face the same result as was held in *Fibabanka A.S. v Arslan*, 2019 SKQB 94, [2020] 2 WWR 131 [*Arslan 2019*] where Justice Kalmakoff (as he then was) found that claims of other Turkish banks (Fibabanka and Sardes) were barred by *The Limitations Act,* writing as follows:

> [104] Accordingly, I am satisfied that the claims against the defendants in the three actions to which this application relates ought to have been discovered, with reasonable diligence on the part of the

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> plaintiffs, on a timeline similar to when Sekerbank discovered its claim, namely the summer of 2013. In any event, in my view, the plaintiffs ought, with reasonable diligence, to have discovered their claim long before December 21, 2014, which is two years before Fibabanka filed its claim.
>
> [105] As such, I find that the claims of Fibabanka, Sardes, and Alternatifbank in actions QBG 3263 of 2016, QBG 427 of 2017, and QBG 430 of 2017, respectively are statute barred, and must all be struck.

[21] Faced with the almost assuredly likelihood that an independent action alleging fraudulent conveyance against the Defendants would be hamstrung by the expiry of the limitation period, YK Bank now forcefully argues that the discontinuance of the 2013 Action should be set aside, and that it can and should be added as a plaintiff in the 2013 Action.

THE ISSUES

[22] The court must address the following issues:

1. Should the court, using its inherent powers, set aside the consent notice of discontinuance of the 2013 Action? (If the answer is "No," YK Bank's application immediately fails.)

2. If the court sets aside the consent notice of discontinuance, can YK Bank be added as a plaintiff, whether by reference to the joinder Rules of *The King's Bench Rules* or by reference to s. 20 of *The Limitations Act*?

ANALYSIS

Should the Court Strike the Consent Notice of Discontinuance?

[23] I have decided that the court should not set aside the notice of discontinuance that ABank and the Defendants have filed. Following are my reasons.

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First Things First: Setting Aside the Notice of Discontinuance

[24] Implicit in the way the parties have advanced their respective positions, they accept that, as a preliminary matter, the court must decide whether to set aside the notice of discontinuance before deciding whether YK Bank can be added as a plaintiff. I agree with the following summary at pages 273-274 of *Saskatchewan King's Bench Rules Annotated, 2023*:

> The court will not add a person as a defendant so long as discontinuance remains in place: *McCredie v Kilbach Estate* (1987), 59 Sask R 14 (QB). Where the action has previously been discontinued against the party now sought to be added, the first question is whether the discontinuance should be withdrawn; the question of adding the party can arise only after that issue has been resolved; *Sing v Street,* [1990] 5 WWR 518, 84 Sask R 161 (CA). See also *Gilbert v Debray* (1990), 85 Sask R 204 (QB). See *Clarke v Saskatoon* (City), [1994] 6 WWR 450, 118 Sask R 128 (QB), where a statement of claim was amended to omit allegations against a party later sought to be added, but a notice of discontinuance was never filed; the party was allowed to be added.
>
> [Emphasis added]

[25] *McCredie v Kilbach Estate* (1987), 59 Sask R 14 (QB) [*McCredie*] makes clear what both YK Bank and the Defendants accept: without setting aside the notice of discontinuance, YK Bank cannot be added to a discontinued action.

YK Bank's Position – Case Law Shows Discontinuances Can Be Set Aside

[26] In its quest to set aside the notice of discontinuance, YK Bank cites Rule 1-5 of *The King's Bench Rules* as an overarching principle that the court should set aside any proceedings that are an abuse of process. YK Bank states that the consent notice of discontinuance was such an abuse. The Defendants, of course, disagree.

[27] More specifically, Rule 4-49 provides the framework for a party to discontinue or withdraw a claim:

> 4-49(1) At any time before the receipt of the statement of defence of

> any defendant, or after the receipt of the statement of defence and before taking any other proceedings in the action other than an interlocutory application, the plaintiff may wholly discontinue the plaintiff's action against the defendant or withdraw any part of the action by serving and filing a notice in Form 4-49.
>
> …
>
> (8) Except as provided in this rule, a plaintiff shall not discontinue in whole or in part, unless:
>
> > (a) it is with the consent of the party or parties against whom discontinuance is sought; or
> >
> > (b) it is with the leave of the Court.
>
> (9) For the purposes of clause (8)(b), the Court may grant leave on those terms as to costs and as to any other action against all or any of the defendants and otherwise that the Court considers just.

[28] YK Bank accepts that Rule 4-49(1) permits a plaintiff to discontinue an action as a right before receipt of a statement of defence or after a statement of defence but before any other proceedings in the action or by the consent of the parties. However, YK Bank states that a discontinuance filed as a right may nonetheless be reviewed under the court's inherent jurisdiction and may be struck or set aside.

[29] YK Banks argues that the notice of discontinuance is an abuse of process because: 1) it is an improper attempt to usurp the court's jurisdiction; 2) ABank is no longer the *dominus litis* in the 2013 Action; and 3) it attempts to override substantive rights and obligations conferred by statute. To advance these arguments, YK Bank cites several decisions where the court has set aside a notice of discontinuance: *Poffenroth Agri Ltd. v Brown*, 2020 SKQB 31, 53 CPC (8th) 174 [*Poffenroth*]; *Kawaguchi v Kawa Investments Inc,* 2021 ONCA 770, 73 CPC (8th) 17 [*Kawaguchi*]; *DLC Holdings Corp. v Payne*, 2021 BCCA 31, 456 DLR (4th) 337; *Smith v Dueck,* 1997 CanLII 2759 (BC SC); *Moon v Atherton,* [1972] 3 All ER 145 (Eng CA); *James v British Columbia,* 2007 BCCA 547, 288 DLR (4th) 380; *Walker v Mitchell,* 2020 SKCA 127, [2021] 4 WWR 555; *Arnston v Arnston,* 2023 ABKB 328; *Richardson v Richardson,* 2018 ABCA 327,

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75 Alta LR (6th) 1 [*Richardson*]; *De Shazo v Nations Energy Company Ltd.,* 2006 ABCA 400, 276 DLR (4th) 559; *Glasjam v Freedman*, 2014 ONSC 3878 [*Glasjam*]; *Angelopoulos v Angelopoulos*, (1986), 55 OR (2d) 101 (WL) (Ont H Ct J) [*Angelopoulos*]; *HMTQ v Chief Ronnie Jules,* 2005 BCSC 492, 18 CPC (6th) 383; *Arcand v Wright,* 2019 SKQB 139, 48 ETR (4th) 318; *Medernach v Nutrien Ltd.,* 2021 SKQB 31.

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[30] In noticing one apparent difference between these cited cases and the instant notice of discontinuance – that is, the absence of a consent discontinuance in any of the cited cases – I queried counsel and asked if any of the cited decisions had set aside a discontinuance in the face of the parties' consent to discontinue. Counsel suggested that *Glasjam* was a such a decision. In rebuttal argument, counsel for Mr. Al-Katib disagreed that *Glasjam* stood for such a proposition and stated that, indeed, *Glasjam* squarely stood in its favour. The latter interpretation is clearly correct.

[31] The court's reasoning in *Galsjam* is apposite to YK Bank's application. *Glasjam* is authority that a court may set aside a unilaterally filed discontinuance if the discontinuing party is seeking an apparent advantage over another party. Master MacLeod's reasoning in *Glasjam* is succinct and clear:

> [62] I accept the premise that a notice of discontinuance filed merely as a procedural device to thwart a court process would be an abuse of process. This will entitle the court to ignore the notice or to set it aside. In fact under the current Ontario rule, a plaintiff loses the right to discontinue unilaterally once issue has been joined and pleadings are closed. Thereafter the action may only be discontinued with leave of the court or with the consent of all parties [Rule 23.01(b)]. In the case at bar, of course, the parties did consent. It is Ms. Prizant who is not a party to that action who seeks to set the notice of discontinuance aside.
>
> [Footnote omitted]
> [Emphasis added]

[32] The last sentence of this statement can be transposed to the current application: "It is YK Bank who is not a party to [the 2013 Action] who seeks to set the

notice of discontinuance aside."

[33] Master MacLeod continued, describing the applicant, Ms. Prizant, as a "stranger to the action" who did not have the right to "force other parties to litigate." He wrote:

> [63] This is the principal problem with the relief sought by Ms. Prizant. As a stranger to the action, has she any standing to interfere in the action and in effect to force the parties to continue with that litigation notwithstanding their agreement to put it on hold? Mr. Radnoff could not point to any decision in which such a remedy had been granted. …
>
> [64] … The prejudice to her rights would have to be extreme before she could possibly be given the right to force other parties to litigate. Generally speaking one party may not be forced to sue another and each party is free to determine what rights it seeks to assert against whom.
>
> [Footnote omitted]

[34] These statements do not assist YK Bank. Indeed, they are consistent with all the other cases cited by YK Bank. None is helpful to YK Bank's claim that it, as a stranger to the 2013 Action, has standing to set aside a consent discontinuance of an action. All the cases YK Bank has cited are completely of the same sentiment as Master MacLeod expressed in *Glasjam.*

[35] For example, in *Poffenroth* the court set aside the plaintiff's unilaterally filed notice of discontinuance because it was a thinly veiled attempt to change the forum from the Court of Queen's Bench for Saskatchewan. Similarly in *Richardson* the court did not countenance a respondent unilaterally discontinuing his family property claim in an attempt to preclude a division of remaining family property, nor in *Angelopoulous* where a wife unilaterally served a discontinuance of her action after a Master had issued an order restraining her from disrupting her husband's business because she only wanted to rid herself of the Master's restraining, nor in *Kawaguchi* where the court set aside a unilaterally filed discontinuance because the plaintiff was attempting to "escape

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by a side door and avoid the contest" so that it could later bring another action for the same subject matter.

[36] Just as in in *Glasjam,* counsel for YK Bank has been unable to provide any case law where a non-party to an action has successfully set aside a notice of discontinuance that has been filed with the consent of the litigants. Accordingly, YK Bank's reliance on case law to set aside a consent discontinuance is not persuasive.

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YK Bank's Position – A Fraudulent Conveyance Action Benefits all Creditors

[37] YK Bank also argues that a fraudulent conveyance action attracts a different analytical lens because ss. 12(1) of *The Fraudulent Preferences Act*, RSS 1978, c F-21 states that such an action may be brought for either (i) "the benefit of creditors generally," or (ii) "for the benefit of such creditors as have been injured, delayed, prejudiced or postponed by the impeached transaction." Seemingly, YK Bank wishes to make two points. First, ABank cannot discontinue an action that has been launched for the benefit of all Mr. Arslan's creditors. Second, YK Bank states that it must be allowed to continue the claim because if it is denied, then all Mr. Arslan's creditors will be deprived of the ability to beneift from a declaration of a fraudulent conveyance of the AGTI shares.

[38] If the first contention were accurate, once a fraudulent conveyance action was begun, it could not be discontinued without the approval of all creditors affected by the impugned fraudulent transaction. On its face, such a principle would thwart any creditor-plaintiff from initiating a fraudulent conveyance action because the plaintiff would no longer be in control of the action. The decision in *Driffill v Ough*, [1906] OJ No 101 (QL) (Ont H Ct J) – a decision cited by both parties – states that until a plaintiff in a fraudulent conveyance action actually obtains a judgment declaring that the impugned transaction was fraudulent, a plaintiff can discontinue the action:

> [7] According to the well settled practice in creditors' class suits, the creditor names as plaintiff is up to judgment, master of the proceedings as dominus litis, and other creditors have before judgment the right to begin actions each for himself, because they cannot prevent the original creditor plaintiff from stopping or settling his action before judgment. …

[39] Put in the context of the instant application, the last sentence of the above statement might read as follows:

> The creditor named as plaintiff [ABank] is up to judgment, master of the proceedings as dominus litis, and other creditors [YK Bank] have before judgment the right to begin actions each for himself, because they cannot prevent the original creditor, plaintiff [ABank] from stopping or settling his action before judgment.

[40] This principle was earlier stated in *Canadian Bank of Commerce v Tinning*, [1893] OJ No 242 (QL) (Ont H Ct J):

> [14] Nothing is better settled than that such a judgment was the present one is for the benefit of all creditors, and not merely for the benefit of the actual plaintiff. Before the judgment I obtained, the actual plaintiff may settle the action on any terms he thinks proper. He may discontinue it, he may dismiss it, and no other creditor can complain, but after judgment it enures to the beneift of all. …
>
> [15] The law on that subject is very clearly stated by Sir John Leach, V.C., in Handford with Storie, 2 Sim & Student. 196, to which my attention was very properly called by counsel on the motion. He says, p. 198, "A plaintiff who sues on behalf of himself and all other persons of the same class, as he acts upon his own mere motion and at his own expense, retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure." …

[41] I am unable to find any evidence that supports a finding that ABank was abusive of the court's process by deciding that it no longer wanted to prosecute the claim against the Defendants in the 2013 Action. Although perhaps more forcefully stated that I would have stated, I essentially agree with the characterization offered by the Defendants at para. 62 of their brief of law:

> 62. These are the risks that parties take when they miss limitations, sit on their hands while the proceeding they want to be party of is progressing, and then leave their fate in the hand of parties to an action

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> they are not party to. YK Bank has no ability nor right to complain about ABank and the Defendants agreeing to end the proceeding and all the cost that goes with that simply to protect itself from its own failure to protect its own interests. If YK Bank does not protect its rights by acting diligently, it ought not come to the court as a victim and cast accusations towards the Plaintiff and Defendants in an action that they all agree has run its course and that none of them want to waste another red penning litigation. To force the Defendants to litigate this now settled matter with a new, delinquent party would be unconscionable and extremely prejudicial. For YK Bank to seek this extraordinary relief and to ask the Court to exercise its discretion in its favour at this late stage is to entirely misstate and misconstrue the equities, the facts and the prejudice to the Defendants.

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[42] I also see little merit in YK Bank's assertion that it should be added as a plaintiff so that it can protect the interests of other creditors of Mr. Arslan, that it will be a representative of these creditors. No evidence was provided that other creditors see YK Bank as representing their interests.

[43] In conclusion I have found no reason to set aside ABank's discontinuance of its action against the Defendants. Accordingly, YK Bank's application to be added as a plaintiff in the 2013 Action cannot succeed because, as was stated in *McCredie,* a party cannot be added to a discontinued action unless the discontinuance is withdrawn or set aside. No case law supports YK Bank's position. To the contrary, case law states that until judgment, a plaintiff in a fraudulent conveyance action is the master of its own litigation.

[44] Furthermore, to accept that YK Bank should be added as a plaintiff in the 2013 Action because it will represent other creditors ignores the reality that two other Turkish banks, Fibabanka and Sardes, have been denied such a claim because they were outside the limitation period: *Arslan 2019*. To allow YK Bank to succeed in prosecuting a fraudulent conveyance through the circuitous route of first setting aside the consent discontinuance in the 2013 Action and then being joined as a party under *The King's Bench Rules* or added as a plaintiff under s. 20 of *The Limitations Act,* when Fibabanka and Sardes were unable to commence an action seeking the same relief, would augur

for an inconsistent and illogical result. One might ask how could YK Bank represent the interests of Fibabanka and Sardes when their interests have been determined and foreclosed by an earlier decision.

[45] Finally, *The King's Bench Rules* specifically contemplate the finality of two parties agreeing to discontinue an action. As quoted previously, Rule 4-49(8) states:

> **Discontinuance or withdrawal of claim**
>
> 4-49(8) Except as provided in this rule, a plaintiff shall not discontinue in whole or in part, unless:
>
> (a) it is with the consent of the party or parties against whom discontinuance is sought; or
>
> (b) it is with the leave of the Court.

CONCLUSION

[46] Because I have decided that the consent notice of discontinuance shall not be set aside, there exists no action to which YK Bank can be joined whether by reference to the Rules or to s. 20 of *The Limitations Act.*

[47] Costs in the usual manner are awarded in favour of the Defendants.

J.

D.H. LAYH

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Date: **2024 07 22**
Docket: QBG-RG-02314-2013
Judicial Centre: Regina

BETWEEN:

ŞEKERBANK T.A.Ş. and ALTERNATIFBANK A.S
RESPONDENTS (PLAINTIFFS)

- and -

HUSEYIN ARSLAN and MURAD AL-KATIB
RESPONDENTS (DEFENDANTS)

- and -

YAPI ve KREDI BANKASI ANONIM SIRKETI
APPLICANT (PROPOSED PLAINTIFF)

Counsel:

No one appearing	for the respondents (plaintiffs)
Michael Milani, K.C., William Lane, Jonathan Milani and Stephen Barrington-Foote	for the applicant (proposed plaintiff),Yapi ve Kredi Bankasi Anonim Sirketi
Deron Kuski, K.C. and Shawna Sparrow	for the defendant, Murad Al-Katib
Kevin Mellor	for the defendant Huseyin Arslan

CORRIGENDUM to JUDGMENT
DATED June 18, 2024 LAYH J.
July 22, 2024

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[48] The style of cause is corrected to read as follows:

ŞEKERBANK T.A.Ş. and ALTERNATIFBANK A.S.

RESPONDENTS (PLAINTIFFS)

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- and –

HUSEYIN ARSLAN and MURAD AL-KATIB

RESPONDENTS (DEFENDANTS)

- and –

YAPI ve KREDI BANKASI ANONIM SIRKETI

APPLICANT (PROPOSED PLAINTIFF)

[49] The counsel for Şekerbank T.A.Ş. and Yapi ve Kredi Bankasi Anonim Sirketi are corrected as follows:

No one appearing	for the respondents (plaintiffs)
Michael Milani, K.C., William Lane, Jonathan Milani and Stephen Barrington-Foote	for the applicant (proposed plaintiff), Yapi ve Kredi Bankasi Anonim Sirketi

________________________________ J.
D.H. LAYH

2024 SKKB 115 (CanLII)