1. AES Systems (appellant in appeal and respondent in counter appeal)

2. Bamberger Rosenheim Ltd. (appellant in appeal and respondent in counter appeal)

v.

1. Moshe Sa'ar (respondent in appeal and appellant in counter appeal)

2. State of Israel (respondent in appeal and appellant in counter appeal)

The Supreme Court Sitting as the Court of Civil Appeal

[August 28th, 2000]

Before President A. Barak, Justices T. Or, E. Rivlin

Appeal and counter appeal on the Judgments of the Tel-Aviv District Court (Justice A. Goren) on June18th, 1996 in CC 1331/87, 500/88, 565/89.

Facts: Appellant No.1 developed independent computer word processing systems. Appellant no. 2 was the exclusive distributer of the systems in Israel, and also provided its customers in Israel with maintenance and repair services. The respondent had been an employed by the appellant as a computer technician, and had at the time of his employment, signed both an agreement not to compete with the appellant in anything related to the marketing and repair of Linear systems, as well as an "Agreement to Protect Confidentiality," according to which he was obligated to maintain the absolute confidentiality of information that he may obtain in the framework of his employment.

The respondent was fired after twenty eight months of work, and started a business of computer systems services. He advertised his services in the newspaper as a repair and maintenance technician for computer systems, including Linear systems, he approached the customers of the appellant directly, using a customer list of the appellant's. The newspaper advertisement led to a contract with The Armament Development Authority (RAFAEL-operated by respondent number two), according to which respondent would provide Linear services to RAFAEL. These services replaced the repair and maintenance services that had been given in the past to RAFAEL by the appellant.

Against the background of these events three suits were filed in the District Court. In one suit, in the framework of which a temporary injunction was issued prohibiting the respondent from dealing directly or indirectly in the sale or provision of service to Linear word processors for a period of eighteen months from the day the respondent was fired, which did not apply to the contract with RAFAEL, the appellant sued the respondent, for violation of his obligations to it, for doing damage to its property rights and its reputation, and for appropriating its trade secrets. In the second suit the appellants claimed that the respondent made use of the magnetic disks and diskettes which store backup programs, application programs and diagnostic programs that were developed by the appellant and disks that were prepared for use by them, thereby doing damage to their property rights, and violating their copyright. In this suit it was claimed that RAFAEL is assisting the respondent in his prohibited actions. The appellants demanded damages from the respondents, and from RAFAEL. RAFAEL filed a third-party notice. The third suit, directed by the appellant against RAFAEL, sought the return of hardware equipment and software lists that were lent by the appellant to RAFAEL and for payment of fair use. RAFAEL filed a countersuit in which it sought removal of a barrier that the appellant created in its workspaces. It also demanded equipment that it purchased and did not receive, and payment in the amount of NIS 7,022 for expenses it incurred as a result of violation of the agreement that the appellant had with RAFAEL. Consideration of all these suits was joined.

The District Court (Vice-President, Justice A. Goren), in its judgment, dismissed the appellants' claims inasmuch as they related to violation of copyright or damage to reputation. It was also held that the respondent violated the agreement not to compete with the appellant's business, and that the respondent made use of the customer list of the appellant within the eighteen month period, and that a contract with RAFAEL resulted from the violation of the agreement not to compete. It was also held that it was not proven that contracts with other customers resulted in agreements between those customers and the respondent, within the eighteen month period, and therefore it was not shown that agreement of the respondent in this matter was violated. The court also held that as a result of the agreement between the respondent and RAFAEL, RAFAEL ceased receiving Linear System maintenance services from the appellants. The court determined compensation for the appellants in the amount of $25,000. Additionally, the State of Israel (under whose aegis RAFAEL was operating) was ordered by the court to pay the appellant for the value of certain hardware and software items, which were given to RAFAEL by the appellants, and which remained in their possession. The appeal and the counter-appeal were directed against the judgment of the District Court.

Held: The Court allowed the respondent's appeal voiding the award of damages to the appellant for the contract with RAFAEL. The court denied the appellants' appeal and the appeal of respondent no. 2. The Court also denied the respondent's appeal inasmuch as it related to software and hardware. The appellants were ordered to pay the respondent's costs in the sum of NIS 15,000.

For the appellant—Z Hubers

For Respondent no. 1 —A. Loit

For Respondent no. 2 –R. Zakai-Newman

Basic laws cited:

Basic Law: Human Dignity and Liberty, s. 8.

Basic Law: Freedom of Occupation, s. 4.

Legislation cited:

Contracts (General Part) Law 5733-1973, ss. 19, 25(b), 30, 31..

Restrictive Trade Practices Law 5748-1988.

Commercial Torts Law 5759-1999.

Contracts (Remedies for Breach of Contract) Law 5731-1970, ss. 3(4), 4.

Israeli Supreme Court cases cited:

[1] CA 614/76 *Jane Doe v. John Doe* IsrSC 31(3) 85.

[2] CA 294/91 *Chevra Kadisha KAHSHA "Kehillat Yerushalayim" v. Kestenbaum* IsrSC 46(2) 464.

[3] CA 239/92 *"EGGED" Israel Transport Cooperation Society v. Mashiach* IsrSC 48(2) 66.

[4] HCJ 1683/93 *Yavin Plast Ltd. v. The National Labour Court* IsrSC 47(4)702.

[5] LCA 5768/94 *A.S.I.R Import, Manufacture, and Distribution v. Accessories and Products Ltd*. IsrSC 52(4) 289.

[6] HCJ 1703/92 *C.A.L. Cargo Airlines Ltd. v. The Prime Minister*, IsrSC 52(4) 193.

[7] HCJ 28/94 *Tzarfati v. Minister of Health* IsrSC 49(3) 804.

[8] CA 2247/95 *General Director of the Antitrust Authority v. T'nuvah Center for Cooperation and Marketing of Agriculture Products in Israel Ltd.* 52(5) 213.

[9] LCA 371/89 *Leibovitz v. Eliyahu* Ltd. IsrSC 44(2) 309.

[10] HCJ 588/84 *K.S.R. Asbestos Trade Ltd. v. President of the Antitrust Tribunal* IsrSC 40(1)29.

[11] CA 312/74 *Cable and Electric Cable Company in Israel Ltd. v. Martin Christianpalour* IsrSC 29(1) 316.

[12] CA 4/74 *Berman v. Misrad Lehovalat Masaot Pardes Hana – Carcur "Amal" Ltd.* IsrSC 29 (2) 718.

[13] CA 618/85 *Ma'ayanot Hagalil Hamaravi Ltd. v. Tavori BEHAR Soft Drinks Ltd.* IsrSc 40(4)343.
[14] CA 2600/90 *Elite Israeli Company for Manufacture of Chocolate and Candies Ltd. v. Serengah* IsrSC 49(5) 796.
[15] CA 1142/92 *Vargus Ltd. v. Camax Ltd*. IsrSC 51(3) 421.
[16] CA 136/56 *Fuchs. v. Eylon and Etzioni Ltd*. IsrSC 11 358.
[17] CA 136/64 *"Francitext"Ltd. v. Utzitel Ltd*. IsrSC 18(3) 617.
[18] CA 238/73 *Sharabi v. Chamtzani*, IsrSC 28(1) 85.
[19] CA 157/88 *"EGGED" Israel Transport Cooperation Society v. Meiron* IsrSC 44(1) 522.
[20] HCJ 935/89 *Ganor v. State Attorney* IsrSC 44(2) 485 at pp. 513.
[21] CA 155/80 *Rav Bariach Ltd. v. Amgar* IsrSC 35(1) 817.
[22] CA 566/77 *Dicker v. Moch* IsrSC 32(2) 141.
[23] CA 1371/90 *Damati v. Ganor* IsrSC 44(4) 847.
[24] CA 901/90 *Nahmias v. Columbia Trade and Manufacture Ltd.* IsrSC 47(1)252.
[25] LCA 672/96 *"EGGED" Israel Transport Cooperation Society v. Rachtman* (not yet reported).
[26] CA 369/74 *"TromAsbest" Company for Assembly of Pre Structures Ltd. v. Zakai,* IsrSC 30(1) 793.
[27] CA 4628/93 *State of Israel v. Efromim Residence and Initiative* (1991) Ltd. IsrSC 49(2) 265).
[28] CA 214/89 *Avneri v. Shapira* IsrSC 43(3) 840.

Israeli National Labour Court cases cited:

[29] LA 164/99 *Frumer and Checkpoint Software Technologies Ltd. – Redguard Ltd.* (not yet reported).
[30] LC 54 3-110/ *First Class Service Ltd. – Mati Kosacks* LCC 26, 451 at p. 462.
[31] LC 42 3-74/ *Vardi-City of Netanyah* LCC 14 59.

English cases cited:

[32] *Hepworth Manufacturing Co. v. Riyott,* [1920] 1 Ch 1, 12.
[33] *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1894] A.C.535.
[34] *Gledhow Autoparts Ltd v. Delaney* [1965] 3 All. E.R. 288, 291.
[35] *Esso Petroleum Co. Ltd. V. Harper's Garage (Stourport) Ltd* [1967] 1 All E.R. 699.
[36] *Kores Manufacturing Co. v. Kolok Manufacturing Co*. [1959] Ch. 108.
[37] *Lansing Linde Ltd v. Kerr* [1991] 1 W.L.R 251.

French cases cited:

[38] Cass. 5OC. 14 Mai 1992 Droit Social No. 12, 976 (1992).

Israeli books cited:

[39] D. Friedman and N. Cohen *Contracts* 15 (Vol. A, 1991).
[40] E. Zamir *Contract Interpretation and Supplementation* (1996).
[41] A. Barak *Interpretation in Law*, Vol. 2, *Statutory Construction* (1993).

Israeli articles cited:

[42] Porat 'Considerations of Justice Between Parties to a Contract and Considerations of Guiding Behaviors in Israeli Contract Law' *Iyunei Mishpat* 22.
[43] Friedman "Contracts of Adhesion, Good Faith and Public Policy" *Iyunei Mishpat* 7, 431 at p. 433 (1979).
[44] Gilo, 'Toward a New Legal Policy toward Non-Compete Terms,' *Iyunei Mishpat* 23, 63 (2000).
[45] Cohen, 'Freedom of Trade and Commercial Competition' *Iyunei Mishpat* 19, 353 (1995).
[46] Hermon, ""Public Policy" and the Limitations on Freedom of Occupation in the Perspective of Israeli and English Case Law," *The Cohen Book*, 393,403 (1989).

[47] Goldberg, 'Limiting Freedom of Occupation of the Employee by Contract' *Mechkarei Mishpat* 4, 7 (1987).

[48] Goldberg 'Freedom of Contract in Labour Law' 672, 678 (1972)

[49] Goldberg 'Good Faith in Labour Law' *Sefer Bar-Niv* 13 (1987).

Foreign books cited:

[50] I. T. Smith and G. Thomas, *Industrial Law* 86 (1996).

[51] R. Upex, *The Law of Termination of Employment* 432 (5th. Ed., 1997)).

[52] Cheshire, Fifort and Furmston's, *Law of Contract* 420 (13th. Ed., 1996);

[53] Chitty, *On Contracts* 890 (Vol. 1, 28th ed., 1999).

[54] Trertel, *The Law of Contract* 416 (9th ed., (1995).

[55] M. Weiss, *Labour Law and Industrial Relations in Germany* 105 (1995).

[56] A. Berenstein, Labour Law and Industrial Relations in Switzerland 134 (1994).

[57] R.W. Arthure et al, *Labour Law and Industrial Relations in Canada* 138 (1993).

Foreign articles cited:

[58] Hanna Bui-Eve, 'To Hire or Not to Hire: What Silicon Valley Companies Should Know About Hiring Competitor's Employees,' 48 *Hastings L. J.* 981 (1997).

[59] Gilson, 'The Legal *Infra*structure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete,' 74 *N.Y.U.L. Rev.* 575 (1999).

[60] O'Malley, 'Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for a Legislative Solution,' 79 *B.U.L.Rev.* 1215 (1999).

Other:

[61] Restatement 2d, *Contracts*, §§188, 188(1)(a).

JUDGMENT

President A. Barak

The Facts

1. Appellant No.1 developed independent computer word processing systems. It used systems called "Linear systems". Appellant no. 2 (hereinafter, "the appellant") received from appellant no. 1 the right of exclusive distribution of the systems in Israel. It provided its customers in Israel with maintenance and repair services. The respondent was an employee of the appellant. He was employed as a computer technician. At the time of his employment, he signed an agreement not to compete with the appellant in anything related to the marketing and repair of Linear systems. This is the language of the agreement:

> "The employee hereby undertakes not to compete with B/R [the appellant A.B.] either directly or indirectly, whether or not he acts in his capacity as an employee of B/R, to the extent that any loss is caused by such competition to the business of B/R as distributor, marketer and service provider for equipment made by Linear and/or any other name by which such equipment will be called in the future. So too the employee undertakes not to take any action that would undermine, eliminate, or damage B/R's relationships with its customers."

The respondent signed an "Agreement to Protect Confidentiality." According to it he was obligated to maintain the absolute confidentiality of information that he might obtain in the framework of his employment. The respondent was obligated not to make use of such

information nor utilize it for commercial purposes. Information that the respondent already possessed before beginning his employment and information that was available to the public was outside the purview of the agreement. Both agreements were not limited in time.

2. After twenty eight months of work, the respondent was fired. He started a business of computer systems services. He took out an advertisement in the newspaper offering his services as a repair or maintenance technician for computer systems, including Linear systems. In addition, he directly approached the customers of the appellant, using a customer list of the appellant's that he had. As a result of the newspaper advertisement a contract was signed between the respondent and the Armament Development Authority (RAFAEL-operated by respondent number two) according to which the respondent would provide Linear services to RAFAEL. These services came in place of the repair and maintenance services which the appellant had given in the past to RAFAEL.

3. Against the background of these events three suits were filed in the District Court. In one suit, the appellant sued the respondent for violation of his obligations toward it, for doing damage to its property rights and its reputation, and for appropriating its trade secrets. In the framework of this suit the District Court granted a temporary injunction which prohibited the respondent from dealing directly or indirectly in the sale or provision of services for word processors of the Linear type until the expiry of eighteen months from the day the respondent was fired. The injunction did not apply to the contract with RAFAEL. In the second suit the appellants claimed that the respondent made use, in the course of providing services to his customers, of the magnetic disks and diskettes which store backup programs, application programs and diagnostic programs that were developed by the appellant and disks that were prepared for use by them. In this the respondents, according to the appellants' claim, violated their property rights and infringed on their copyright. In this suit it was claimed against RAFAEL that it is aiding the respondent in his prohibited actions. The appellants demanded compensation from the respondents, and from RAFAEL, for causing by their behavior the breach of contracts between the appellant and its customers, the breach of an implied term that arose from the work relationship between the appellant and the respondent, and for unjust enrichment. RAFAEL for its part filed a third-party notice. The third suit was directed by the appellant against RAFAEL, for the return of hardware equipment and software materials that were lent by it to RAFAEL and for payment of fair use for them. RAFAEL for its part filed a countersuit in which it requested removal of a block that the appellant created in its workspaces. It also demanded the supply of equipment that it purchased and did not receive, and payment in the amount of NIS 7,022 for expenses it incurred as a result of breach of the agreement that the appellant had with RAFAEL. All of these suits have been joined for the purpose of consideration by the court.

4. In a comprehensive and thorough judgment the District Court (Vice-President, Justice A. Goren) dismissed the claims of the appellants inasmuch as they related to infringement of their copyright or damage to their reputation. On the other hand, it was held that the respondent breached the agreement not to compete with the appellant's business. So too it was held that the respondent had made use of the customer list of the appellant. Breach of the agreement not to compete yielded – within the eighteen months during which the temporary injunction was issued (this being the period to which the appellant limited its claims) – the contract with RAFAEL. As for contracts with other customers based on the customer list in the possession of the respondent, it was held that it was not proven that these yielded -- during the limitation period of eighteen months -- agreements between those customers and the respondent and therefore it is not to be said that the respondent's agreement in this matter was breached. The Court held that as a result of the agreement between the respondent and RAFAEL, RAFAEL ceased to receive maintenance services from the appellants for the Linear systems in RAFAEL's possession. For these losses the court held that the respondent was to compensate the appellants in the amount of $25,000. So too, a court ordered the State

of Israel (under whose aegis RAFAEL was operating) to pay the appellant the value of certain hardware and software items given to RAFAEL by the appellants, and which remained in their possession.

The Appeals

5. The appeal and the counter-appeal before us are directed against this judgment. The appellants' claim that it should be determined that the respondent made prohibited use of the programs that were developed by them and these actions damaged their property rights and their reputation. They also claim that the District Court erred in holding that the marketing and advertising actions undertaken by the respondent during the eighteen months are not to be seen as a breach of their agreements with the appellants, even if this breach did not result in transactions. The respondent, for his part, appeals the decision requiring him to pay damages to the appellant for his contract with RAFAEL. He also appeals (alternatively) the amounts that were awarded. The State of Israel (which operates RAFAEL) claims, in an appeal that was filed on its behalf, that it was inappropriate to require it to pay the appellants the value of the software and hardware items, either because they were not supplied to it at all or because the appellant is not entitled to payment for them.

Property Rights of the Appellant, Damage to Reputation, and Compensation for Software and Hardware Items

6. The parties' claims on these matters ask us to intervene in the factual findings of the trial court. We will not do so. The decisions of the District Court are based on findings that were determined on the basis of expert opinions and testimony. These findings are well anchored in the evidentiary material and we will not interfere in them. This also applies to the property rights of the appellant and to the damage to its reputation. We have also not found that it would be appropriate to intervene in the judgment of the District Court as to the compensation for software and hardware items that were handed over to RAFAEL. The factual findings in these matters rely on proper interpretation of the relevant documents and of the evidence that was brought before the District Court; we will not interfere in them.

Limiting Freedom of Occupation

7. There are two questions before us: The one is whether the obligation of the respondent not to compete with the appellant is lawful; the second is whether it was lawfully determined that the respondent is not liable for the use that he made of the customer list, as this usage did not result in a contract with the customers within the period of eighteen months. These two questions are related to one central issue, which relates to the validity of agreements which limit the freedom of occupation. But the fundamental starting point for examining these issues is found in the provisions of section 30 of the Contracts (General Part) Law 5733-1973 which establishes:

> "a contract whose execution, content, or purpose are illegal, immoral or against public policy -- is void."

"Public policy" reflects the fundamental approaches of Israeli society as to the appropriate level of behavior in contractual relationships. It expresses the position of Israeli law as to what is permitted and what is prohibited in contractual relationships. The content of public policy changes from society to society; it changes in any given society from one point in time to another point in time (see CA 614/76 *Jane Doe v. John Doe* [1] at p. 94). The judge learns about the core values of Israeli society and the approach of Israeli law as to what is permitted and what is prohibited from the totality of values of the legal system. Primary among these values are the constitutional values of the law and the regime. Therefore, human rights anchored in the basic laws constitute a central source – even if not the only source -- from which the judge draws the values which come together to form the Israeli "public policy". And note: human rights in the basic laws are directed toward public entities. They do not grant, on their own and directly, rights to an individual as against another individual.

However, the basic rights -- and other constitutional provisions anchored in the basic rights -- establish a system of values and core concepts in the framework of which the law (the public and the private) operates and develops (see CA 294/91 *Chevra Kadisha KAHSHA "Kehillat Yerushalayim" v. Kestenbaum* [2] at p. 531; see CA 239/92 *"EGGED" Israel Transport Cooperation Society v. Mashiach* [3]). These core values also determine the content of "public policy." They are not the only ingredients of "public policy." The approaches of Israeli society to what is permitted and prohibited in contractual relationships are not only determined by the values which express human rights. Public policy extends over further values, goals and interests, which reflect the policy of Israeli society (its public policy). Therefore, national security, public peace, the welfare and strength of the nation are also values and interests which shape its "public policy."

8. The values of a legal system, its core values, purposes and interests, are in constant conflict. When this conflict takes place in the framework of the basic laws themselves, it is resolved by the balances (vertical and horizontal) which apply to the matter (as to the vertical balance, the limitation clause in section 4 of the Basic Law: Human Dignity and Liberty and in section 8 of the Basic Law: Freedom of Occupation). When this conflict takes place in the framework of private law -- and in our case, in establishing the parameters of "public policy" -- it is resolved by the proper balance between the conflicting values and interests. This balance is determined by the relative weight of the competing interests and values in the framework of the private law. And it should be noted that these values and interests are not solely the values and interests of the individual versus another individual. These are also and primarily the values and interests of society as to the validity of contracts between individuals. Indeed, "public policy" reflects the public interest which within its purview also takes into consideration the interests of various individuals. It constitutes, by its very essence, a limitation on the parties' free will. Against this background we will focus our gaze on terms limiting the freedom of occupation.

Public Policy and Clauses Limiting Freedom of Occupation

9. What does "public policy" require as to terms between employer and employee which limit the freedom of occupation, and in our case, terms by which upon termination of employment an employee agrees not to compete with the employer and not to make use of information received during his period of employment? In order to develop "public policy" in this context it is necessary to understand the values, principles and interests competing for primacy, and the proper balance between them (see the judgment of the National Labour Court LA 164/99 *Frumer and Checkpoint Software Technologies Ltd. – Redguard Ltd.* [29] (para. 11) (hereinafter: "the *Checkpoint* case")). We will open with values, principles and interests which support granting validity to the contractual obligations the parties have taken upon themselves. A first principle that is to be taken into account is freedom of contract. From this principle the approach is derived that contracts are to be kept: *pacta sunt servanda*. The contract is the "law" that the parties have established between themselves and which they must keep. A civilized society cannot exist and develop if contracts that are made are not honored. The public interest – an interest that reflects concepts of justice, morality and social efficiency together – is that obligations that a(n adult) person takes upon himself will be honored by him (see D. Friedman and N. Cohen *Contracts* 15 (Vol. A, 1991)[39]; E. Zamir *Contract Interpretation and Supplementation* (1996)[40]; A. Porat 'Considerations of Justice Between Parties to a Contract and Considerations of Guiding Behaviors in Israeli Contract Law' [42] at 647). And note: I do not hold that it is "public policy" that contracts are to be kept. Public policy is the weighted result which results from the internal balancing of values and principles which are under consideration. However, I am of the opinion that freedom of contract and the performance of contracts are central values and interests which come together to form – in their balancing with other interests and values -- "public policy" in Israel (see Friedman "Contracts of Adhesion, Good Faith and Public Policy" [43] at p. 433). The

principle of freedom of contract is to be given substantial weight, as it reflects a constitutional right and a central public interest.

10. A second interest that is to be considered is the personal advantage (to the employer) and the public advantage (to society as a whole) in protecting the employer from competition by the employee in general, and from use of information that he acquired from the appellant, in particular (see HCJ 1683/93 *Yavin Plast Ltd. v. The National Labour Court* [4] at p. 708). In this context the investment of the employer in his business overall is to be particularly emphasized, as well as his investment in training his employees and in his trade secrets, in particular. (See Gilo "Toward a New Legal Policy toward Covenants not to Compete" [44] at 63). This would be the interest (private and public) that the employer be given protection for his investments in training his employees, and in building a client base and work methods. Certain aspects of this interest are anchored in the freedom of property itself. Other aspects stem from the public interest. Indeed, there is a concern that if the employer is not able to protect these interests, he will not invest the necessary investments, and the public interest will be damaged (compare LCA 5768/94 *A.S.I.R Import, Manufacture, and Distribution v. Accessories and Products Ltd*. [5]).

11. I have explained two considerations which support the validity of clauses limiting freedom of occupation. What are the values, principles, and interests which are found at the core of the approach which desires to invalidate these clauses? A first principle that is to be considered is freedom of occupation. This is a constitutional principle, and is anchored in the Basic Law: Freedom of Occupation. It is derived from human dignity, and from freedom of thought and action. The significance of freedom of occupation is, *inter alia*, the freedom of an employee who concluded an employment relationship with his employer to contract with any employer with whom he desires as well as the freedom of the employee to start a business of his own, without being bound by agreements limiting trade. Freedom of occupation is derived from freedom of competition. (See HCJ 1703/92 *C.A.L. Cargo Airlines Ltd. v. The Prime Minister* [6]; HCJ 28/94 *Tzarfati v. Minister of Health* [7]). However, freedom of competition is a public interest that stands on its own (see CA 2247/95 *General Director of the Anti-Trust Authority v. T'nuvah Center for Cooperation and Marketing of Agriculture Products in Israel Ltd.* [8] at p. 229). It was justly noted that "free competition is likely to bring about reduced prices, improved quality of the product and improvement of the service which is given with its sale" (President Shamgar in LCA 371/89 *Leibovitz v. Eliyahu Ltd.* [9] at p. 327; HCJ 588/84 *K.S.R. Asbestos Trade Ltd. v. President of the Antitrust Tribunal* [10] at p. 37; Cohen "Commercial Competition and Freedom of *Occupation* [45] at p. 354 (1995)). Expression for this public interest has been given in Israeli law *inter alia* in anti-trust legislation (See the Restrictive Trade Practices Act 5748- 1988) At the foundation of this law is competition, which was intended to ensure efficient allocation of resources and increased efficiency (see 2247/95 *supra*, at 229) Judge Adler rightly emphasized in the *Checkpoint* case that:

> "The modern market is based on the existence of free competition in the open market and a free economy, inter alia, as to capital, and particularly human capital.... Free competition advances the marketplace and brings about, inter alia, reduction in prices for the consumer. A competitive market encourages establishment of new companies, including companies started by employees who compete with their previous employers. The employees offer their talents to various employers and compete with each other for places of work. The employers on their part, offer improved working conditions with the goal of attracting skilled labor. . . Society is interested in rapid and free transfer of information in the marketplace." (**Ibid**. para. 14).

This principle of freedom of occupation -- and the freedom of competition derived from it -- is to be given heavy weight, as it reflects a constitutional right and important public interest.

12. A second interest which is to be considered is the employee himself. His labor is his property, spiritual and physical. It is the basis for his self-realization and fulfillment. His freedom of choice is his life. His capacity to choose an occupation for himself is the source of his existence and his property. His training is the means by which he will be able to compete in the workplace. Keeping him from his work for a specified period of time may remove him entirely from the workforce and bring about the destruction of many years of training. "A person's place of work, where he spends at least a third of his day, is not merely a means of support, but a place from which he hopes to achieve self-realization and fulfillment. Limiting the mobility of the employee will damage his right to personal fulfillment" (The *Checkpoint* case, paragraph 14). This is primarily so in the context of employment in the field of high-tech. These interests are first and foremost the interests of the employee. But they also constitute the interest of the public. "The good of the public demands that generally, knowledge, rules and professional skills acquired by an employee in his work will be used without limitation, as such use is a blessing to the individual and the public as one" (Justice Berinson in CA 312/74 *Cable and Electric Cable Company in Israel Ltd. v. Martin Christianpalour* [11] at p. 320; Hermon, ""Public Policy" and the Limitations on Freedom of Occupation in the Perspective of Israeli and English Case Law," [46] 403). This is primarily so in the fields of high-tech, in which the public as a whole has an interest in their development for the good of society. Indeed, the public good justifies recognizing the freedom of the employee to choose for himself employment at his will. This was justly noted by Judge Astbury in the Hepworth case (*Hepworth Manufacturing Co. v. Riyott* [1920] [32]) when he said:

> "A man's aptitude, his skill, his dexterity and his manual and mental ability may not, nor ought to be, relinquished by an employer. They are not his masters [sic] property, they are his own, they are himself." Moreover, in a contractual relationship, the employer and the employee are not of equal status. The employer generally is in a stronger bargaining position. Justice Berinson discussed the "weakness of the employee versus the employer, who may dictate the terms of the employment contract." (CA 4/74 *Berman v. Misrad Lehovalat Masaot Pardes Hana – Carcur "Amal" Ltd.* [12] at p. 722).

The National Labour Court emphasized that "labour law is guided by a basic principle, which is based on the presumption of the fundamental inequality between the power of the employee and the power of the employer". (*Checkpoint* case, paragraph 14). Of course, this inequality changes over time. The matter is conditioned on the structure of the labour market and the strength of the professional association. However, in principle it may be said that the employee's interest and the public interest is to protect the work capacity and creative capacity of the employee.

Balance between Conflicting Considerations

13. The various considerations which come together to form "public policy" do not all lead in one direction. We have before us "competing" considerations (Vice-President Ben-Porat in CA 618/85 *Ma'ayanot Hagalil Hamaravi Ltd. v. Tavori BEHAR Soft Drinks Ltd.* [13] at p. 348; see also CA 2600/90 *Elite Israeli Company for Manufacture of Chocolate and Candies Ltd. v. Serengah* [14] at p. 808). The one pair of considerations leads in most cases to the recognition of the validity of contractual clauses limiting the freedom of occupation of the employee. The second pair of considerations also leads in most cases to invalidating such contractual terms. The normative content that will be given to the concept of "public policy" constitutes, therefore, the result of the balance between the conflicting values, principles, and interests. I have explained this in one of the cases, when I noted:

> "As against the freedom of occupation stand other values, which the law also seeks to protect. The protection given to freedom of occupation is a result of the balance that stems from the confrontation between freedom of occupation on the one hand and other individual liberties (such as freedom of property, freedom of contract (as part of human dignity and liberty) on the other, and the confrontation between the freedom of occupation and the public interest (such as the public interest in the protection of professional secrets). . . . as against the freedom of occupation of the employee and the new employer stand the interests of the original employer that are worthy of protection, including his property (section 3 of the Basic Law: Human Dignity and Liberty) and perhaps also his privacy (section 7). The freedom of contract of the original employer and the public interest are also to be considered." (HCJ 1683/83 [4] *supra* at p. 708; see also CA 239/92 *supra*, at p. 72; CA 1142/92 *Vargus Ltd. v. Carmax Ltd.* [15]; see also LC 54 3-110/ *First Class Service Ltd. – Mati Kosacks* [30] at p. 462).

14. Israeli case law, in the footsteps of English case law, has determined that the criterion for balance between the competing interests is reasonableness. A contractual limitation on the freedom of occupation of the employee will not damage "public policy" if the limitation is reasonable in terms of the interests of the parties and in terms of the public interest. Lord MacNaghten's words are well known:

> "It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable -- reasonable, that is, in reference to the interest of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public" (*Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1894] [33]).

These words and similar ones have been quoted at length in Israeli case law (see CA 136/56 *Fuchs. v. Eylon and Etzioni Ltd*. (hereinafter: "the *Fuchs* case") [16] at p. 361; CA 136/64 *"Francitext"Ltd. v. Utzitel Ltd.* [17] at p. 626; CA 238/73 *Sharabi v. Chamtzani* [18]; CA 4/74 [12] *supra*; CA 157/88 *"EGGED" Israel Transport Cooperation Society v. Meiron* [19] at p. 526). Of course the reasonableness test is an appropriate and good test. However, it does not advance us very much, as the key question is what are the tests for determining the reasonableness of the contractual limitation. Reasonableness means proper balance between competing values, interests and principles. (See HCJ 935/89 *Ganor v. State Attorney* [20] at p. 514; A. Barak *Interpretation in Law*, 663 (volume two, 1993) [41]). The balance is appropriate if we give the correct weight to the various considerations that are to be taken into account. What is the proper weight -- and what, therefore, is the proper balance -- among the various considerations that are to be taken into account in providing an answer to the question whether the employee's agreement not to compete is reasonable?

"Legitimate Interests"

15. The fundamental starting point should be to avoid the approach of "all or nothing". It is not to be said that all clauses limiting the freedom occupation of the employee who departs his workplace are consistent with "public policy." So too, it is not to be said that all such clauses go against "public policy." The validity of clauses which limit freedom of occupation should be determined by the legitimate interests which they protect. Indeed, this was the approach taken by the Supreme Court when it placed the "legitimate interests of the parties and the public" in the center of its analysis. Justice Berinson explained this, noting:

> "the limitation must meet the double condition that it is necessary for the protection of the legitimate interests of the employer from whose workplace the

employee has departed and that it is for the good of the public" (CA 312/74 [11] *supra* at 319).

Justice Bechor reiterated this approach noting:

"the general law is that there exists the right to freedom of occupation in the field of the employee who has left a place of work with an employer. And if there is an agreement which limits him in this freedom of occupation after the conclusion of his work with the employer, two conditions must be met, in order for this limitation to be valid. The first condition is that it is necessary to protect the legitimate interests of the employer from which the employee has left, and the second condition is that this is also necessary for the good of the public in terms of the interests of the two parties" (CA 155/80 *Rav Bariach Ltd. v. Amgar* [21] at p. 825).

M. Goldberger wrote in a similar vein:

"there is nothing wrong with limiting the right of a person to choose their occupation and employment up to the boundaries of the 'limited right' of his former employer in protecting his legitimate interests" (Goldberg, 'Limiting Freedom of Occupation of the Employee by Contract' [47] at 27 (1987)).

Professor Cohen takes a similar approach:

"a valid limitation of freedom of occupation is one that protects a legitimate interest of one in whose favor it is applied, and it must be reasonable both in terms of the parties and in terms of the public (Cohen, 'Freedom of Trade and Commercial Competition' [45]).

Comparative law undertakes a similar approach (as to the appropriate use of comparative law in the matter of limitation of freedom of occupation see CA 566/77 *Dicker v. Moch* [22] at p. 146). The American Restatement 2d (Contracts) [61] establishes that a non-competition clause between an employer and employee is not reasonable if (section 188(1) (a)):

"The restraint is greater than is needed to protect a promisee's legitimate interests."

English law takes a similar approach (see I. T. Smith and G. Thomas, *Industrial Law* 86 (1996) [50] as well as *Gledhow Autoparts Ltd v. Delaney* [1965] [34]). This approach is also common in French law (see Cass. 5OC. 14 Mai 1992 Droit Social No. 12, 976 (1992) [38]. Indeed, the relevant question is what are the interests considered legitimate -- in terms of the parties and the public --by the legal system, which clauses limiting freedom of occupation lawfully protect.

16. In connection with "legitimate interest" it has occasionally been emphasized in the case law that both the legitimate interests of the parties and the legitimate interests of the public are to be considered, and that the public interest is secondary to the legitimate interests of the parties. The following words of Justice Berinson which relate to the consideration of "the public good" are typical:

"the public good remains important; however, it has always been of secondary importance compared with the first reason which relates to the interest of the parties themselves" (CA 4/74 [12] *supra*, at p.722; see also CA 1371/90 [23] *supra*; CA 238/73 [18] *supra* at p. 91).

However, it has been emphasized "there exist extraordinary cases, as in the example of the creation of a harmful monopoly, in which the public interest would be sufficient to justify invalidating a clause of that type" (CA 901/90 *Nahmias v. Columbia Trade and Manufacture Ltd*. [24] at p. 264). Personally, I do not believe it is appropriate to distinguish between the legitimate interests of the parties and the legitimate interests of the public. This is a matter of invalidating a contractual clause on the grounds of "public policy." It appears that the

perspective is that of the public. The legitimacy of the parties' interest is determined, therefore, from the perspective of public policy. Moreover: the various human rights -- such as freedom of contract, freedom of occupation, property rights and other human rights -- express both the private interest and the public interest. Indeed, we must not separate between the legitimate interests of the parties (as opposed to an undefined interest) and the public interest. This is a matter of the public interest, which takes account of the totality of the facts, including the legitimate interests of the parties. Lord Pierce discussed this in a key case on this issue:

> "Although the decided cases are almost invariably based on unreasonableness between the parties, it is ultimately on the ground of public policy that the court will decline to enforce a restraint as being unreasonable between the parties... There is not, as some cases seem to suggest, a separation between what is reasonable on the ground of public policy and what is reasonable as between the parties. There is one broad question: is it in the interest of the community that this restraint should, as between the parties, be held to be reasonable and enforceable?"(*Esso Petroleum Co. Ltd. V. Harper's Garage (Stourport) Ltd* [1967] [35] 724).

Indeed, the employer has his own interest and the employee his own interest. Those interests may be different from the public interest. But we are not interested in the parties' interest. We are interested in the legitimate interests of the parties. And the legitimacy of the interest is determined by general considerations of the legal system, its principles and approaches. The public interest and the legitimate interests of the parties are one and the same. Therefore, whilst I will continue to discuss the legitimate interests of the parties and the legitimate interests of the public, I do not see them as separate concepts, but a uniform concept of the legitimate interests of the public ("public policy") which takes into account for its part, *inter alia*, the parties' interests, whereby some of them will be protected (the "legitimate" ones) and the others will not be protected.

17. From the perspective of the legitimacy of the interests the following conclusion is warranted: as a rule, the employer does not have "a legitimate interest" that a non-competition agreement will be given validity, without any other connection to the other interests of the employer; similarly, as a rule the employee does not have a "legitimate interest" that a non-competition agreement will be invalidated, without any connection to the other interests of the employer. Indeed, as a rule, the employer's interest in preventing a former employee from competing with him, without this coming to protect additional interests (beyond the non-competition), such as trade secrets or customer lists, is not a legitimate (nor a "protected") interest.

Non-Competition for its Own Sake

18. I will open with the employer's interest that a former employee not compete with him. In this matter we must presume that the employer does not have trade secrets or customer lists or another "legitimate interest" which he seeks to protect. The single interest claimed by the employer is his wish – a wish that is expressed in a non-competition clause– that his employer not compete with him. Is this "bare" interest – non-competition "on its own" – a "legitimate" interest to be protected, in such a manner that a non-competition clause will not be considered against "public policy"? This problem came before the court in the *Fuchs* case, in which Justice Landau distinguished between an employee's agreement with his employer not to compete with him and a contract in which the seller of goodwill undertakes an obligation vis-à-vis the buyer not to deal in a competing business. In relating to the first type of case – the type we are dealing with in this appeal – Justice Landau writes:

> "The tendency to invalidate the agreement is much greater in the first type. The reason for this is that in such cases the employer is not protecting an existing

> interest but is trying to obtain an advantage he is not entitled to, as the rules of commerce require him to resign himself to the competition of any person dealing in similar trade, and this includes the competition of his employee, after he has left his employment, with the condition that the employee is not utilizing to his advantage the trade secrets of his employer or the special ties which he made with the clients of his employer during the period of his employment with the employer. Therefore, the court provides a remedy for the employee on whom the employer has imposed, due to his superior bargaining position, an agreement which limits his freedom of occupation – and permits the prohibited." (*Fuchs* case, p. 361)

In a similar vein Justice Bechor held:

> "The general law is that there exists a right to freedom of occupation in the profession of the employee who has left his employer's workplace. If there is an agreement which limits him in this freedom of occupation after the conclusion of his work with the employer, two conditions must be met so that this limitation will be valid. The first condition is that it is necessary for the protection of the legitimate interests of the employer which the employee has left, and the second condition is that the matter also is necessary for the good of the public in terms of the interest of both parties. The good of the public requires that the departing employee will generally be able to make use, without limitation, of the general knowledge and skill that he acquired in his work. The legitimate interest of the employer is to protect his trade secret, and that is the first condition necessary to justify the conditioning of the limitation of freedom of occupation" (CA 155/80 [21] *supra*, at p. 825).

Justice Bejski repeated the same principal:

> "Inasmuch as it is a matter of general knowledge and even professional skill that was acquired during the course of employment, the public interest requires that the employee will be able to used them with another employer or as an independent. If you say otherwise, this may sentence the employee to abandoning the immediate profession for which he has qualified and he may become a burden on the public. Not so as to special trade secrets which typify a specific business, the use of which by the employee may cause a loss to the employer. As to the latter, and this includes ties with suppliers and customers, the employer is entitled to protection" (CA 1371/91 [23] *supra*, at p. 854).

This is also the approach of the National Labour Court. In the *Checkpoint* Case the National Labour Court emphasized that "absent 'trade secrets' the principal of freedom of occupation prevails over the principal of freedom of contract" (**Ibid**, para. 14).

President Adler noted that "a legal system protects the property of the employer, even during consideration of suits whose purpose is to limit an employee who worked with an employer from handing over trade secrets which belong to him." We find that as a rule a "bare" agreement not to compete, which does not protect the interests of the employer beyond the interest of non-competition "for its own sake" (such as his interests in protecting trade secrets and customer lists) does not shape a "legitimate interest" of the employer, and is subject to be invalidated as being against "public policy" (but see LCA 672/96 *"EGGED" Israel Transport Cooperation Society v. Rachtman* [25]).

19. This is also the law in England. In discussing non-competition agreements by an employee Professor Upex writes:

> "To be enforceable, such covenants must protect the employer's legitimate business interests, either trade secrets or goodwill and trade connections. It is not possible to prevent competition as such" (R. Upex, *The Law of Termination of*

Employment 432 (5th. Ed., 1997)) [51]. Cheshire, Fifort and Furmston's, *Law of Contract* 420 (13th. Ed., 1996) [52]; see also Chitty, *On Contracts* 890 (Vol. 1, 28th ed., 1999) [53]; Trertel, *The Law of Contract* 416 (9th ed., (1995) [54]).

Jenkins, L.J. discussed this, noting:

> "An employer has no legitimate interest in preventing an employee, after leaving his service, from entering the service of a competitor merely on the ground that the new employer is a competitor" (*Kores Manufacturing Co. v. Kolok Manufacturing Co.* [1959] [36] 125).

Similar law applies in the United States. The employer does not have a legitimate interest in preventing competition for its own sake. He must point to an additional interest beyond the non-competition itself, such as trade secrets or customer lists (see Restatement [61] **ibid**, par. 188). The German, Swiss, and Canadian, law take a similar approach. (see M. Weiss, *Labour Law and Industrial Relations in Germany* 105 (1995) [55]; A. Berenstein, Labour Law and Industrial Relations in Switzerland 134 (1994) [56]; R.W. Arthure et al, *Labour Law and Industrial Relations in Canada* 138 (1993) [57]).

20. We will now turn to the employee's interest in competing with the employer. Our premise here is that the employee undertook not to compete with his employer after the conclusion of his employment. The employee seeks to be released from this obligation. His claim is that this obligation damages his ability to compete with his employer. Is this "bare" interest -- the competition "for its own sake" -- a "legitimate" interest that is to be protected, in a manner that a contractual obligation which limits it will be against "public policy"? Similar to the matter of the employer, here too the answer is that only a legitimate interest of the employee will be sufficient to justify invalidating clauses limiting freedom of occupation. The employee does not have a "legitimate interest" in competing with his employer under all circumstances. There exist employer interests (such as his interest in protecting trade secrets and customer lists) which are worthy of protection. In the framework of these interests, the employee's interest in competing retreats, and the employee's obligation not to compete with his employer is validated (see the *Fuchs* case, p. 361; CA 155/80 [21] *supra*, at p. 825). Justice Berinson explained this, noting:

> "The big difference between the employee's duty to protect the employer's professional secrets and secret information and the limitation of freedom of occupation of the employee after his departure from employment with the employer must be pointed out. Trade secrets and secret information are property rights of their owners and the employee is prohibited from using them for his own purposes or from revealing them to others at any point in time" (CA 312/74 [11] *supra* at 319).

In a similar vein Justice Bejski noted, when relating to a term between an employer and employee limiting the freedom of occupation of the employee:

> "The tendency to invalidate a restrictive clause in an agreement of the first type is stronger -- because in that case the employer attempts to achieve an advantage that he is not entitled to, and this is as long as the employee does not take advantage of trade secrets or commercial ties that he established during his work with the employer." (CA 369/74 [26] *supra* at 796)

21. What are the reasons that lie at the base of the approach that freedom of competition is not absolute, and that it does not always exist (as the employee claims) and is not always to be prevented (as the employer claims relying on a contractual obligation)? My answer is that at the base of this approach there are three reasons: **First** there is the proper balance between the constitutional rights of freedom of contract on the one hand and freedom of occupation on the other. This balance requires mutual concessions. Freedom of contract is recognized. The obligation of the employee not to compete with his employer is fulfilled. However, it holds

only where it protects a legitimate interest of the employer. Similarly, freedom of occupation and the right to compete which derives from it -- are recognized. The right of an employee to find himself an occupation, even if he is competing with his employer, is fulfilled. However, it does not apply where it damages a legitimate interest of the employer. Thereby, a proper balance between human rights which are competing for supremacy is found; **second** is the proper balance between the employer's interest in protecting his business and the employee's interest in fulfilling his employment potential. This balance is achieved according to considerations of the public good. As a rule, the public good demands that the trade secrets and customer lists of the employer are protected from use by an employee after his departure. The same public good generally demands that the employee be enabled to compete with his employer and develop his employment potential, without being bound by an obligation that he undertook under conditions of what are largely unequal bargaining conditions. Goldberg explained this, noting:

> "The public, as such, has an interest in developing the potential of the employee, and an employer is not entitled to prevent competition by his former employee even if said employee obtained all his knowledge from the employer. However, if the employer has "a pure property interest" in preventing competition of this type, it is possible... to enforce a clause limiting freedom of occupation." (Goldberg 'Freedom of Contract in Labour Law' [48] at 678 (1972); 1371/90 [23] at 854).

Third, this balance reflects the relationship of trust that exists between an employee and employer. This relationship of trust justifies obliging the employee not to do damage to the employer by means of use of secret information that has come into his possession during his employment (see LC 42 3-74/ *Vardi-City of Netanyah* [31] 59; Goldberg 'Good Faith in Labour Law' [49]). I explained this in one of the cases when I noted:

> "The employee has an obligation, derived from the relationship of trust between him and his employer and anchored in the contract with the employer and in the need to implement a contract in good faith, to protect the employer's trade secrets, not to use them for his own purposes or for the purposes of others and not to reveal them other than with the employer's permission" (HCJ 1683/93 [4] *supra* at 707).

So too this balance reflects the proper laws of commerce (see Commercial Torts Law 5759-1999), the principle of good faith and the fair conduct between employer and employee in our society (compare LCA 5768/94 [5] *supra*). Justice Strasberg-Cohen explained this in one of the cases:

> "One must consider the public interest in establishing a behavioral norm characterized by fairness and good faith. In principal, such a balance requires that an employee who has left a workplace protect the trade secrets of his previous employer, live up to his duty of trust in him and not be unjustly enriched at his expense" (CA 1142/92 [15] *supra* at 429).

22. Thus, the reasons I have explained justify a middle ground, according to which in the overall balance freedom of occupation prevails when all that stands against it is the employer's interest in non-competition, while freedom of contract prevails when alongside it stands a legitimate interest of the employer such as a "proprietary" or "quasi-proprietary" interest of the employer. It is then the case that limiting competition "for its own sake" – a "bare" limitation which does not protect the employer's interest beyond the interest in non-competition – does not protect any "legitimate interest" of the employer at all. It goes against the public good and it will be invalidated in the framework of "public policy".

On the other hand, limitation of competition which is intended to protect the interests of the employer in trade secrets, customer lists, reputation and the like the "legitimate interests"

of the employer, and as a rule does not go against public policy. This overall balance is achieved entirely in the framework of "public policy" and is shaped by "public policy" considerations... ,There may therefore in a special case be a public interest that will justify deviation from this overall balance (see Gilo, 'Toward a New Legal Policy toward Non-Compete Terms' [44] at p. 75 (2000)).

Protection of the "Legitimate Interests" of the Employer

23. Thus, limitation of freedom of occupation operates, as a rule, in the framework of the "legitimate interests" of the employer. Examining these interests raises three questions: the first, what are these interests, and how are they characterized; the second, what is the extent of the protection given to "legitimate interests" and what are the limitations which apply to a contractual obligation not to compete in the framework of the "legitimate interests"; the third, what are the remedies that the employer is entitled to when the employee breaches his obligation not to compete in the framework of the "legitimate interests." We will discuss these questions separately. We will do so only to the extent that the appeal before us raises those questions.

The Essence of the "Legitimate Interests"

24. The case law recognizes trade secrets and customer lists as legitimate interests of the employer worthy of protection. Occasionally these interests are described as "proprietary rights" of the employer (see for example CA 312/74 [11] *supra*, at 319). In English literature the "proprietary interests" of the employer are referenced (see Upex [51] **Ibid**. at 433). This list is not comprehensive and is not closed. The "proprietary" language in this context raises difficult questions. In my opinion, it is appropriate to move away from these characterizations. The reasons found at the basis of the law, and not the label given to them, should determine the scope of the "legitimate interests" of the employer. In the framework of this appeal it is not necessary to examine these questions in depth. Thus, for example, I accept that the appellant's customer list, in the circumstances of the matter before us, constitutes a "legitimate interest" for the appellant which enables limitation of the freedom of occupation of the respondent.

The Scope of the Protection Given to the Protected Interests

25. Identifying the "protected interests" – such as trade secrets and customer lists – is only the beginning of the road in establishing the legality of limitation on freedom of occupation. After it was determined that the contractual clause limiting freedom of occupation relates to the employer's "legitimate interests", the question arises whether the extent of the limitation is lawful. Smith and Thomas discussed this, noting:

> "Once there is a legally protected interest, the question which then arises concerns the extent to which the employer can bind the employee's future conduct in order to protect that interest" (**Ibid**. [50] p. 88).

In a similar vein Chestire, Fifoot and Furmston note:

> "The existence of some proprietary or other legitimate interest... must first be proved, and then it must be shown to the satisfaction of the court that the restraint as regards its area, its period of operation and the activities against which it is directed is not excessive" (Chestire, Fifoot and Furmston's, *Law of Contract* 420 (13th. Ed., 1996)).

Even if an employer is entitled to the protection of his "legitimate interests" such protection is not absolute. This is relative protection which must take into account the public interest (including the "legitimate interests" of the employee). Justice Strasberg-Cohen explained this when she noted:

> "Hand in hand with the recognition of the right to protect trade secrets, barriers and brakes have been created and relevant considerations have been established

> for bounding the limits of the protection that is afforded . . . the confidentiality is relative and is not viewed as absolute. It changes in accordance with the circumstances" (CA 2600/90 [14] *supra* at 807).

The test is one of reasonableness or proportionality. The employer is entitled to protection of his "legitimate interests" to the appropriate proportion. Beyond this proportion, the interest ceases to be legitimate. What is this reasonableness or proportionality and how does it operate?

26. The reasonableness or proportionality test seeks to ensure that the protection of the "legitimate interests" of the employer do not deviate beyond that which is necessary. In this context the extent of the limitation is to be examined in terms of time, place, and type of activity. The question in every case is whether the timeframe, limits, and type of limitation do not deviate beyond that which is reasonable and necessary in order to protect the legitimate interests of the employer. President Adler explained this in the *Checkpoint* case, noting

> "In the framework of the judicial balance, the courts must apply the proportionality and reasonableness test; –that is, they must examine whether the limitation on freedom of occupation passes the reasonableness test under the circumstances. In this context, one must consider the reasonableness of the period of limitation, including the need to safeguard the trade secrets which belong to the prior employer, its scope, and its geographic range... So too the measure of damage to the employee is to be examined as well as the measure of damage to the prior employer... It is to be noted that the reasonableness test is a broad test, which includes the protection of many and varied interests of the employer. However, the protected interest, generally, is the trade secrets which belong to him" (**Ibid**. paragraph 12).

The restrictive means must be adapted to the "legitimate interest" entitled to protection, and must not deviate from it (the test of time, place and type). In this context the "legitimate interests" of the employee are also to be considered. A limitation which denies to the employee the capacity to work in his field of expertise should not be recognized. A limitation that denies to the employee his ability to make a living is not to be justified. The restatement explains this, noting:

> "The harm caused to the employee may be excessive if the restraint inhibits his personal freedom by preventing him from earning his livelihood if he quits" (Restatement, Second, Contracts [61] par. 188, comment c. p. 43).

It is in this context that one may consider, *inter alia*, the question whether an employment contract guarantees the employee a (full or partial) salary during the period of limitation. This practice (known as "Garden leave") is common in England (See I.T. Smith and G.H. Thomas, *Industrial Law* 306 (3th. Ed., 1996) [50]). In Germany the law itself establishes that a contractual clause limiting freedom of occupation is legal only if the principal promises the agent a salary payment equal to at least half of his salary during the period of limitation (section 74(a) of the Commercial Code). The case law has broadened this approach to include all employer-employee relations (See. M. Weiss, *Labor Law and Industrial Relations in Germany* 105 (1995) [55]).

27. Alongside the employee interest one must also consider the public interest. The public interest may demand invalidation of the limitation on freedom of occupation, which from other perspectives appears proportional. The public interest is expressed, *inter alia*, in the needs of the marketplace, the development of industries and encouragement of competition. Such is generally the case (see Gilo [44] **Ibid**.). This is so in particular in high-tech industries (see Hanna Bui-Eve, 'To Hire or Not to Hire: What Silicon Valley Companies Should Know About Hiring Competitor's Employees'[58];Gilson, 'The Legal *Infra*structure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to

Compete' [59]; O'Malley, 'Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for a Legislative Solution' [60]).

28. One may ask: if the validity of clauses limiting freedom of occupation is limited only to situations in which the employer has a "legitimate interest," what need is there for such clauses, as generally the "proprietary" interest or the "quasi-proprietary" interest of the employer is protected without the need for an explicit clause (see HCJ1683/93 [4] *supra*) The answer is that with the development of duties in the law which protect the "legitimate interests" of the employer, indeed the importance of clauses limiting freedom of occupation has diminished. However, they are not superfluous, and this is so for **two** primary reasons: **First**, there is not complete overlap between the protection given by the general law to the "legitimate interests" of the employer and the protection given them in the framework of clauses limiting freedom of occupation; this is primarily so in all that relates to considerations of trust, fairness, good faith and fair dealing. In these matters the general law is still in its early stages of development (compare LCA 5768/94 [5] *supra*) and therefore there is importance to the explicit contractual clause; **second**, the contractual clause has "evidentiary" importance. On can see by it what is regarded by the parties as a trade secret or customer list or other "legitimate interest," the importance attributed to it, the degree of knowledge that they had as to it, and the proportionality of the limitation (see Chitty [53] at 891).

Remedies

29. Clauses limiting freedom of occupation beyond the legitimate interests of the parties go against "public policy," and are therefore void (section 30 of the Contracts (General Part) Law, also taking into consideration section 31 of the Contracts Law). A clause which limits freedom of occupation in the framework of the legitimate interests of the parties is valid, and the party in breach is entitled to all the remedies given for breach of contract. These remedies raise complex questions inasmuch as they relate to fulfilling the "legitimate interest" of the employer and to his protection. These questions do not arise before us and I will not express an opinion on them. I will only note that occasionally the question arises as to whether the court may limit the scope of a limitation on freedom of occupation in order to bring it within the requirements of reasonableness and proportionality. Such was the action of the court in the case before us in limiting a limitation which had no timeframe to the timeframe of eighteen months. The court will do so first and foremost through the use of the rules of construction. "Where a contract is open to various interpretations, an interpretation which validates it is preferable to an interpretation according to which it is void" (section 25(b) of the Contracts (General Part) Law). Indeed the presumption is that the purpose of a contract is that the freedom of occupation of the employee is limited as far as the legitimate interests of the employer. If this presumption can be realized – taking into consideration other presumptions and the parties' perspective, as it emerges from the contract and from the circumstances (see CA 4628/93 *State of Israel v. Efromim Residence and Initiative (1991) Ltd*. [27]) – via the language of the contract, the court will do so. In this context, it is possible, in a suitable case, to limit general language by the purpose at its core, in such a manner that it will be constructed as applying only to the "legitimate interests" of the employer. But what if the general rules of construction are not sufficient to save the clause from being voided? In such a case the court may bring the limitation on freedom of occupation within the boundaries of the proportional or reasonable, and this by way of "severance" between the void portion and the valid portion (section 19 and section 31 of the Contracts (General Part) Law), but even in the absence of the option of severance -- and as a condition of enforcement (section 3(4) and section 4 of the Contracts (Remedies for Breach of Contract) Law 5731-1971) -- the court may limit the scope of the limitation to its proper proportion (see CA 1371/90 [23] *supra* at 856). "If a person has undertaken an obligation as to the protection of a trade secret of another and it is too broad an obligation, there is no bar to

limiting it and adjusting it to the proportionality of the secret within the information" (Justice Strasberg-Cohen in CA 2600/90 [14] *supra* at 808).

30. Frequently in the type of case before us an interlocutory order is sought. Generally the granting of an interlocutory order is sufficient to determine the entire conflict as the final order may be granted after the period of limitation has passed. From this derives the importance of taking great care in this area. An interlocutory order should not be general, and should be adapted to the legitimate interests of the employer. Thus, for example, the order would not prevent employment of the employee by a new employer, but would prohibit him from handing over trade secrets and customer lists (see *Lansing Linde Ltd v. Kerr* [1991] [37]). Such a careful approach is necessary partially due to the nature of freedom of occupation as a constitutional right (compare CA 214/89 *Avneri v. Shapira* IsrSC [28]). The remedy of the employer will be in the proportion of damages he will be awarded, if it turns out at the end of the day that limiting the employment protected his "legitimate interests".

Interim Conclusion

31. Before I move on to the special circumstances of the appeal before us, it would be proper to summarize the main points. My position can be summarized by the following four propositions: first, a clause between employer and employee limiting the freedom of occupation of the employee after the conclusion of his employment without protecting the "legitimate interests" of the employer is void as going against "public policy"; second, a "legitimate interest" of the employer -- that gives validity to a clause limiting the freedom of occupation of the employee -- is a "proprietary" or "quasi-proprietary" interest of the employer in his trade secrets and customer lists (to the extent they are confidential). This is not a closed list, and in determining the list of "legitimate interests" the relationship of trust between the employer and the employee, proper trade laws, and the duty of good faith and fairness between the employer and employee are to be considered; third, the protection given to the "legitimate interests" of the employer are not absolute. Its extent is determined by tests of reasonableness and proportionality, which take into account its timeframe, scope and the type of the limitation; fourth, as a rule, an employer does not have a "legitimate interest" in his employee not competing with him after conclusion of his employment. Therefore, limitation of the freedom of occupation of the employee which only realizes the employer's interest that the employee not compete with him ("non-competition for its own sake") is against public policy. The voidness of this limitation stems from the lack of a "legitimate interest" at its core, and therefore, as a rule, it is not appropriate to examine the reasonableness or proportionality of such a limitation.

From the General to the Specific

32. The factual basis in the framework of which the legal problems in this appeal are examined is the one established by the District Court. According to it the one legal question before us is whether the respondent breached a duty to the appellant by contracting with RAFAEL? In my opinion, the answer to this question is in the negative.

33. What is the duty that was breached by the respondent in the RAFAEL case? The respondent did not breach his duty not to make use of the customer list of the appellant. The reason for this is that it has not been proven that the respondent approached RAFAEL on his own initiative and in any case his business ties with them are not to be seen as a result of use of the appellant's customer list. Indeed, the duty that was breached by the respondent is the duty not to compete with the appellant. This agreement of the respondent not to compete with the appellant is a "bare" agreement (see paragraph 18 *supra*). This is an agreement of "non-competition for its own sake". Let us re-examine (see paragraph 1 *supra*) this agreement:

> "The employee hereby undertakes not to compete with B/R [the appellant] either directly or indirectly, whether in his capacity as an employee of B/R or not, to the extent that there shall be in such competition any loss caused to the business

> of B/R as a distributor, marketer and service provider for equipment made by Linear and/or any other name by which such equipment will be called in the future. So too the employee undertakes not to take any action that would undermine, eliminate, or damage B/R's relationships with its customers."

This agreement-- in accordance with its construction, language and purpose – was intended to protect the appellant from competition "for its own sake". When the appellant wanted to protect itself from damage to its property, it did so in the framework of an additional agreement signed by the respondent, which included an "Agreement to Protect Confidentiality," according to which the respondent undertook to keep in confidence information that he might obtain in the framework of his employment. Indeed, the obligation of the respondent not to compete with the appellant – and this is the only obligation that was breached by the respondent – does not protect the "proprietary" or "quasi proprietary" interest of the appellant. It does not protect a "legitimate interest" of the appellant. It goes against "public policy," and therefore is to be declared void. All the appellant sought was to ensure for itself immunity from competition. It is not entitled to do this, as such immunity goes against "the public interest." As to this, there is no significance to the reasonableness or proportionality of the obligation that the respondent took upon himself. It is not proper to examine whether the limitation to eighteen months is reasonable or proportional. The obligation in its entirety is void and voided.

34. Until now I dealt with the obligation of the respondent not to compete with the appellant. What about the additional obligation that he undertook to keep in confidence any information that he may obtain in the framework of his employment? As to this matter, the appellant's appeal is to be denied, if only for the reason that no causal connection has been shown between the breach of the obligation and the appellant's losses. Indeed, even if in the use of the respondent's customer list the respondent breached his obligation, this breach did not cause the appellant any loss, as it has not been proven that within the eighteen months to which the obligation was limited, relationships between the respondent and those customers were developed. This is sufficient to deny the appellant's appeal on this matter. Therefore, there is no need for me to deal with the question as to whether limiting the extent of the obligation not to make use of the information that he obtained in the framework of his employment, is reasonable and proportional. As to this it is acceptable to me that this information is, under the circumstances, confidential information, entitled to protection in the framework of the "legitimate interests" of the employer. But is the scope of the protection proportional and reasonable? This question is not simple in the least. It is sufficient for me to note, without making a determination on the matter, that there is room for the argument that the scope of this obligation under the circumstances is not reasonable and is not proportional. We are dealing with the field of computers, this is a dynamic arena. The scientific developments in this area are many. Within a matter of months the reality changes unrecognizably. Against this background there is room for the argument that a period of eighteen months is too long. Indeed, I would be ready to examine whether in this evolving arena – in which not taking advantage of expertise for such a long period of time may do significant damage to work capacity– a stricter approach is not necessary. However, as said, this is not to be determined in this appeal and I will leave it as open for future discussion.

In conclusion, we allow the respondent's appeal and cancel the award of damages to the appellant for the contract with RAFAEL. We deny the appellants' appeal and the appeal of respondent no. 2. So too, we deny the respondent's appeal in all that relates to software and hardware. Under the circumstances, the appellants shall pay the respondent's costs in the sum of NIS 15,000.

Justice T. Or

I agree.

Justice E. Rivlin

I agree.

Decided as per the judgment of President Barak.

27 Av 5760

August 28, 2000