LCA 2281/05

Arieh Israel Insurance Company Ltd
v.
Adv. Moshe Kaplansky

The Supreme Court sitting as the Court of Civil Appeals
[12 November 2007]
Before Justices M. Naor, E. Arbel, D. Cheshin

Application for leave to appeal the judgment of the Tel-Aviv District Court (Vice-President Y. Gross and Justices E. Covo, M. Rubinstein) of 25 January 2005 in CA 2983/01.

Facts: The respondent, a lawyer, represented a company (hereinafter 'the company') that filed a claim against the appellant insurance company for fire loss. Before it received the insurance payout, the company asked the respondent to sign a document stating that he no longer represented them. It explained that the insurance company refused to make the payout for as long as the respondent represented the company. The respondent signed the document. When the company received the payout, it refused to pay the respondent the agreed fee for his services. The respondent sued the company for breach of contract, and the insurance company for inducing the company to breach the contract.

The Magistrates Court held that only the company was liable for the respondent's fees. Since the company was unable to pay the fees, the respondent appealed the finding of the Magistrates Court that the applicant was not liable. The District Court allowed the appeal and found the applicant liable for the fees. It held that the insurance broker had induced the company to terminate the representation contract with the respondent. It further held that the insurance broker is an agent of the insurer under Article 6 of Chapter 1 of the Insurance Contract Law, 5741-1981, and therefore the applicant had the burden of proving that in the circumstances the insurance broker had not acted as its agent.

The applicant applied for leave to appeal to the Supreme Court, which granted leave to appeal on the question whether the insurance company was liable, under the law of agency, for the insurance broker's having induced the company to terminate the representation contract with the respondent.

Held: Article 6 of Chapter 1 of the Insurance Contract Law lists specific situations in which the insurance broker is regarded as acting as the agent of the insurer. This case does not fall within one of those situations. In the absence of a specific provision of statute, the general law of agency applies.

(Majority opinion – Justices Arbel, Cheshin) The case should be returned to the Magistrates Court to consider whether the insurance broker was an agent of the applicant and whether the applicant is liable for the insurance broker's tort of inducing the company to breach its contract with the respondent.

(Minority opinion – Justice Naor) Because the respondent only raised the agency argument in his closing arguments in the Magistrates Court, and such an argument requires a clarification of facts, the case should not be returned to the Magistrates Court, and the original decision of the Magistrates Court should be reinstated.

(Majority opinion – Justices Naor, Cheshin) The respondent should be liable for legal fees and trial costs in a sum of NIS 20,000.

(Minority opinion – Justice Arbel) The liability for legal fees and trial costs in the appeals should be decided by the Magistrates Court, in accordance with the outcome of the case.

Appeal allowed.

Legislation cited:

Agency Law, 5725-1965, ss. 1, 3(a), 6(a), 6(b).

Insurance Contract Law, 5741-1981, Chapter 1, Article 6, ss. 33, 33-35, 35, 36.

Israeli Supreme Court cases cited:

[1] LA 103/82 *Haifa Car Park Ltd v. Spark Plug (Hadar Haifa) Ltd* [1982] IsrSC 36(3) 123.

[2] HCJ 5064/03 *Association of Insurance Brokers & Agents in Israel v. Supervisor of Insurance* [2004] IsrSC 58(3) 217.

[3] CA 702/89 *Eliyahu Insurance Co. Ltd v. Orim* [1991] IsrSC 45(2) 811.

[4] CA 25/82 *Weitzman v. Prudential Insurance Co. Ltd* [1984] IsrSC 38(1) 501.

[5] CA 1064/03 *Eliyahu Insurance Co. Ltd v. Estate of Piemonte* [2006] (1) TakSC 1806.

[6] CA 391/77 *Dadash v. Arieh Insurance Co. Ltd* [1978] IsrSC 32(3) 649.

[7] CA 102/87 *Arieh Israel Insurance Co. Ltd v. Ludjia Textile Co. Ltd* [1989] IsrSC 43(2) 804.

[8] CA 422/85 *Bank Leumi of Israel Ltd v. Israel Subinsurance Co. Ltd* [1991] IsrSC 45(5) 32.

[9] CA 793/76 *Lookman v. Schiff* [1979] IsrSC 33(2) 533.

[10] CA 3248/91 *Ben-Ari (Winiger) v. Boaron Yitzhak Ltd* [1995] IsrSC 49(1) 870.

[11] CA 166/77 *Dadon v. Avraham* [1979] IsrSC 33(3) 365.
[12] CA 294/76 *Anglo-Saxon Property Agency (Savion) v. Passerman* [1977] IsrSC 31(1) 589.
[13] CA 6799/02 *Yulzari v. United Mizrahi Bank Ltd* [2004] IsrSC 58(2) 145.
[14] CA 207/86 *Magen v. Bachar* [1988] IsrSC 42(4) 63.

American cases cited:
[15] *Ohio Farmers Insurance Co. v. Hotler*, 2006 U.S. Dist. Lexis 7210.
[16] *Mizuho Corporate Bank v. Cory & Associates, Inc*., 341 F.3d 644 (7th Cir. 2003).
[17] *Zannini v. Reliance Insurance Co. of Illinois*, 147 Ill. 2d 437, 590 N.E.2d 457 (Ill. SC 1992).

For the appellant — Y. Shavit, Y. Charash.
The respondent was represented by himself and A. Pardal.

JUDGMENT

Justice E. Arbel

1. On 28 March 1997 a fire broke out at the premises of "Anat Trade and Holdings Ltd" (hereinafter: "the company") causing them damages. The company and its directors decided to retain the legal services of the respondent for the purpose of obtaining the insurance payout from the applicant. A fee agreement was signed between the company and the respondent, according to which the respondent was entitled to a percentage of whatever money was recovered from the applicant. On 27 August 1997 the directors of the company met with the respondent and asked him to sign a confirmation that he no longer represented the company in the matter of the insurance payout. The company directors explained to the respondent that the applicant was not prepared to make the insurance payout to them until the respondent stopped representing the company. Since the company was in a difficult economic position , it had no choice but to comply with this demand. The respondent signed a confirmation that under which he would stop representing the company, and the company received the insurance payout. The respondent then asked the directors of the company for his fees. His request was denied. He therefore filed a claim against the company and its directors for breach of

contract, and against the applicant and the manager of the applicant's claims department for inducement to breach a contract.

2. The Petah-Tikva Magistrates Court (the honourable Judge I. Schneller) held that the company had not breached the agreement with the respondent since it was entitled to sever the contractual relationship with him at any stage of the legal representation. Therefore, the court concluded that the respondent was only entitled to remuneration from the company until the date on which the representation was terminated. The court also held that the directors of the company acted as organs of the company and therefore had not breached the contract with the respondent. Insofar as the applicant was concerned, the court held that even if the insurance broker exerted pressure to terminate the representation, it had not been proved that in doing so the broker acted as an agent of the applicant or of the manager of its claims department. The court therefore held that the company owed the respondent only fair remuneration for his work in the period prior to the termination of the representation. The remaining claims were denied.

3. The respondent appealed the judgment of the Magistrates Court to the Tel-Aviv-Jaffa District Court (the honourable Vice-President Judge Y. Gross and Judges E. Covo, M. Rubinstein). The appeal was filed solely against the appellant and the manager of its claims department, since it became clear that it was not possible to collect from the company in view of its economic position, nor was it possible to determine the whereabouts of its directors in Israel. The District Court allowed the appeal against the appellant and found it severally liable for the fair amount of remuneration determined by the Magistrates Court. The court held that the company had breached the agreement with the respondent, since it had terminated his representation in bad faith at the insurance broker's request. The court also held that the appellant's insurance broker had induced a breach of the agreement between the company and the respondent by demanding the termination of the representation. Finally, the District Court held that the insurance broker was an agent of the insurer under Article 6 of Chapter 1 of the Insurance Contract Law, 5741-1981 (hereafter: 'the Law'), and therefore if the applicant wished to prove that in the circumstances of the case the insurance broker did not act as its agent, the burden of proving this claim rested with it.

4. The applicant argues that the District Court erred when it determined that the agreement between the respondent and the company was breached in bad faith by the company, and when it found that the insurance broker had induced a breach of that agreement. The applicant's main argument concerns

the finding of the court that the insurance broker is an agent of the applicant and that the applicant is therefore vicariously liable for the broker's acts. It argues that raising impermissible broadening of scope of the original claim. The applicant is of the opinion that the District Court interpreted the provisions of the Law in a manner that is contrary to their wording and that the situation in this case does not fall within any of the sections of the Law that provide for an agency between the broker and the insurance company. According to the applicant, this issue gives rise to a fundamental legal question that justifies granting leave to appeal.

5. The respondent claims that the District Court was correct in its factual findings as to the breach of contract and the insurance broker's inducement of the breach. With regard to whether the insurance broker was an agent of the applicant, the respondent claims that the finding of the District Court that the insurance broker did act as the agent of the applicant is entirely consistent with the factual findings of the Magistrates Court. The respondent claims that the case falls within the scope of s. 35 of the Law, according to which, for the purpose of notices given by the insured or the beneficiary to the insurer, the insurance broker is regarded as the agent of the insurer.

6. On 6 January 2006 we held a hearing of the application, and after we heard the arguments of the parties, we decided on 15 January 2007 to grant leave to appeal and to regard the application as the appeal. It was therefore decided that the parties would be given an opportunity to submit further arguments on the question of the applicant's liability as the insurance broker's principal. Now that we have received the further arguments of the parties, the time has come to decide the appeal.

Deliberations

7. The District Court based its judgment on three findings: first, it held that the company breached the agreement that it signed with the respondent. Second, it found that the insurance broker induced the breach of contract between the company and the respondent, by demanding that the company terminate its representation by the respondent. Third, the court held that the insurance broker acted as the agent of the applicant by virtue of Article 6 of Chapter 1 of the Law, and that the applicant bore the burden of disproving this agency relationship in the circumstances of the present case.

The first two findings of the District Court are mainly factual ones that depend on the circumstances of the specific case, and therefore there is no basis for our intervention, especially not within the scope of an application for leave to appeal to a third instance (LA 103/82 *Haifa Car Park Ltd v. Spark*

Plug (Hadar Haifa) Ltd [1]). It is, however, my opinion that the third finding of the District Court justifies a more thorough consideration of the question of the status of the insurance broker and the legal relationship between him and the insurance company, and between him and the insured.

The application of Article 6 of Chapter 1 of the Law

8. The District Court held that 'according to the provisions of Article 6 [of Chapter 1] of the Insurance Contract Law, 5741-1981, the insurance broker is an agent of the insurer.' In this I believe that the lower court made an error. Article 6 of Chapter 1 of the Law (in ss. 33-35) defines three specific situations in which the insurance broker will be regarded as the insurer's agent, and in s. 36 it provides that the Agency Law, 5725-1965 (hereinafter: 'the Agency Law') will apply, *mutatis mutandis*, to such an agency. The purpose of these sections is to protect the insured. The significance of creating a presumption of this kind is that the insurer will be liable for any failure of the broker to comply with his obligations to the insured, where the major advantage of this is that the insurer, unlike the broker, has a 'deep pocket.' In practice, the acts described in ss. 33-35 require the insurer to supervise the acts of the broker and to take responsibility for the acts of its broker (see HCJ 5064/03 *Association of Insurance Brokers & Agents in Israel v. Supervisor of Insurance* [2], at p. 232; CA 702/89 *Eliyahu Insurance Co. Ltd v. Orim* [3], at pp. 817-818; D. Schwartz & R. Schlinger, *Insurance Law* (2005), at p. 376).

During the debate that was held in the Knesset before the Law was passed, MK Mordechai Virshubski explained the idea underlying the enactment of Article 6:

> 'The last thing that I wish to discuss is that we have determined the status of the insurance broker… Emotions ran high and the arguments were heated, but finally a decision was made — which was not to the liking of the insurance companies — that for the purpose of the negotiations before making the insurance contract and for the purpose of making the contract, the insurance broker will be regarded as the agent of the insurer. There was a difference of opinion on this. The insurance companies argued that they wanted to regard the broker as the agent of the insured. But we said: a person presenting himself as an insurance broker comes to the home of an innocent person and persuades him to sign an insurance agreement. Then he leaves and the person thinks in his innocence that he is insured, with all of the conditions that the broker told him, and he is happy and contented

> until the insurance company says: that was not my broker at all, he was not authorized to do what he did and you are not insured. Alternatively, the insurance company says that the terms that were on the signed document are not the terms that govern the relationship between it and the insured. We wanted to put an end to this dispute, and we decided that the law will say that the insurance broker will be regarded as the agent of the insurer, and what he said to the insured when he persuaded him to sign, when he made him a client of the insurance company, binds the insurance company' (*Knesset Proceedings* 91, 1443 (5741)).

9. In Article 6 the legislature addressed three specific situations in which the insurance broker is presumed to be the agent of the insurer. In the *Report of the Commission for Examining the Legal Status of the Insurance Broker* (1998) (hereafter: 'the commission's report), at p. 13, it is stated that the situations in Article 6 are characterized by the concern that a consumer interest would be prejudiced as a result of the objectivity required of the insurance broker in a transaction. It should be pointed out that the members of the commission were unanimous in their opinion that there are no additional situations to those listed in Article 6 of Chapter 1 of the Law that require the broker to be classified as an agent.

Prof. Stern is of the opinion that the Law does not seek to regulate the relationship between broker and the insurer *inter se*, but it is in essence a consumer law that concerns itself solely with the interests of the insured and tries to mitigate to some degree the inequality created by the power disparity between the parties to the insurance contract. Stern therefore regards Article 6 as a kind of addendum to the Law that was added at the request of insurance brokers. He argues that what is common to the matters mentioned in Article 6 is the intention to grant additional protection to the insured in his dealing with the insurer. Even Stern is of the opinion that apart from these situations the Law does not adopt any position regarding the status of the insurance broker in relation to the insurer (Y.Z. Stern, 'On the Legal Status of the Insurance Broker: Broker-Insurer Relations,' 10 *Bar-Ilan Law Studies (Mehkarei Mishpat)* 93 (1993), at pp. 95-96).

We should therefore begin by examining whether the situation in this case falls within one of the situations that are described in the aforesaid sections.

10. Sections 33-35 of the Law provide:

'Agency for the contract

33. (a) For the purpose of the negotiations prior to the making of the insurance contract and for the purpose of making the contract, the insurance broker shall be regarded as the agent of the insurer, unless he acted as the agent of the insured in accordance with his written request.

(b) For the purpose of the duty of disclosure in making the insurance contract, the knowledge of the insurance broker with regard to the correct facts of a material matter shall be regarded as the knowledge of the insurer.

Agency for the insurance premiums

34. For the purpose of receiving the insurance premiums, the insurance broker who arranged the insurance or who was stated in the policy as the insurance broker is regarded as the agent of the insurer, unless the insurer gave written notice to the insured that they should not be paid to that broker.

Agency for giving notices

35. For the purpose of the insured and the beneficiary giving notices to the insurer, the insurance broker who arranged the insurance or who was stated in the policy as the insurance broker is regarded as the agent of the insured, unless the insurer gave written notice to the insured and the beneficiary in writing that notices should be sent to another address.'

The respondent claims in his supplementary arguments that ss. 34 and 35 of the Law apply. I do not think that this argument can be accepted. Section 34 specifically addresses the insurance premiums that the insured is liable to pay to the insurer, and the status of the insurance broker who receives the premiums from the insured on behalf of the insurer. The purpose of this section is to remove any concern that the insured will be left without insurance coverage because the insurance premiums that he paid to the broker were not transferred by the broker to the insurer, because the broker either 'lost' or used that money (*Association of Insurance Brokers & Agents in Israel v. Supervisor of Insurance* [2], at pp. 233-235; S. Weller, *The Insurance Contract Law,*

5741-1981 (vol. 1, 2005), at pp. 719-721). By contrast, the situation in our case concerns the process of obtaining the insurance payout, which is not included within the framework of this section. The inclusion of activity relating to the insurance payout within the scope of s. 35 of the law, which concerns the giving of notices by the insured and the beneficiary to the insurer, is also difficult, in view of both the language and the purpose of the section. Section 35 is intended to answer the question whether an insured person, who gave the insurance broker the notice that is required by the insurance contract or by law, has discharged his duty vis-à-vis the insurer. Section 35 gives a positive answer to this question (Weller, *The Insurance Contract Law, 5741-1981*, at p. 723). It would appear that the process of obtaining the insurance payout is therefore not included within the specific sections of Article 6 of Chapter 1 of the law (see Weller, *ibid*., at p. 686).

Now that we have determined that Article 6 of Chapter 1 of the Law does not apply to our case, we should examine the significance of this finding with regards to the legal relationship between the insurer, the insured and the insurance broker.

The status of the insurance broker outside Article 6 of Chapter 1 of the law

11. In his book Weller raises five possibilities for determining the status of a broker in cases that are not governed by Article 6 of Chapter 1 of the Law (Weller, at pp. 687-689). *First*, the insurance broker may be regarded as the agent of the insured. The logic behind this is that the insurance broker should have a fiduciary duty to the insured, so that he serves the interests of the insured rather than the insurer (see support for this view in D.M. Sasson, *Insurance Law* (1988), at p. 51). *Second*, the insurance broker may be regarded as the agent of the insurer. Weller claims that had the legislature wanted to choose this possibility, it would not have legislated specific cases in which such an agency relationship applies. *Third*, the status of the insurance broker may merely be that of a broker, and not that of an agent. A broker, unlike an agent, has no power to perform legal acts on behalf of one of the parties, nor does he have a fiduciary duty to only one of the parties (see also I. Englard, 'On Brokerage and Agency,' 10 *Hebrew Univ. L. Rev. (Mishpatim)* 359 (1980)). Thus the broker will not serve the interests of only one party, but will have duties to both parties. Weller claims that this possibility is problematic in cases where the insurer authorizes the broker to carry out legal acts on its behalf, such as thecae where the insurer gives the broker authorization to conduct negotiations on its behalf with an insured with regard to the insurance payout and to reach an agreement with the insured in this

regard. *Fourth*, the broker may be regarded as the agent of both the insurer and the insured. Weller discusses the difficulty inherent in such a situation where the broker has a fiduciary duty to two parties with conflicting interests. *Fifth*, the status of the insurance broker will depend upon the circumstances. Weller supports this possibility and claims that the status of the broker should be determined as an agent of the insured, an agent of the insurer or merely a broker in accordance with the authorization given to the insurance broker by each of the parties with regard to a certain act, and in accordance with the policy considerations that are relevant to the case.

12. In his article Stern raises concerns about applying the laws of agency to the relationship between the insurer and the insurance broker. Stern believes that the insurance broker should be regarded solely as a broker between the two parties. In his opinion, there is no agency relationship between the insurance broker and the insurer because business practice in Israel shows that the insurance broker does not have any general power or authority to bind the insurer in his dealings with the insured. He also argues that even if an apparent agency is created under s. 3(a) of the Agency Law by the conduct of the principal (the insurer) vis-à-vis the third party (the client), this cannot affect the relationship between the broker and the insurer. Lastly, he argues that the insurance broker also cannot be regarded as an agent of the insurer under Article 6 of Chapter 1 of the law, since this regulates specific situations in which the insurance broker will be regarded as the agent of the insurer, and these constitute exceptions that testify to the general rule. Stern also mentions practical problems that may arise if the law of agency is applied to the relationship between the insurance broker and the insurer. Thus, for example, he argues that such an agency will result in the insurer's interests being preferred by the insurance broker and the insured's interests being neglected. He is also of the opinion that applying the laws of agency will have serious repercussions for the insurer, since it will find itself liable for a wide variety of acts of the broker without any justification and without there being any special relationship of trust that derives from the broker and the insurer being acquainted with one another.

13. I am of the opinion that in practice there is no real difference between Weller's suggestion that each case be examined according to its circumstances and Stern's suggestion that the insurance broker be regarded mainly as a broker between the parties. This approach that regards the insurance broker mainly as a broker allows the laws of agency to be applied to the insurance broker when he acts in accordance with a consensual, apparent or statutory agency (Y. Elias, *Insurance Law* (vol. 1, 2002), at p. 499). On the other hand,

even according to Weller, where neither of the parties proves anything with regard to the specific circumstances of the case, we should create a baseline rule It would appear that he too believes that that rule should be that the insurance broker acts solely as a broker, unless one of the parties proves that in the circumstances of the case there is an agency. The example raised by Weller in order to contradict the agency approach, in which the case where the insurer gives the insurance broker an authorization to carry out legal acts on its behalf, does not in my opinion rule out this approach since according to this example the brokerage approach will also recognize the existence of a consensual agency between the insurer and the insurance broker.

14. In my opinion, the approach that the starting point is that the insurance broker is a broker between the parties, and in any case it can be proved that there is an agreed, apparent or statutory agency relations, is a proper approach to this issue. First, Article 6 of Chapter 1 of the Law incorporates several common situations in which the legislature decided to give the insured protection by providing that the insurance broker is the agent of the insurer, and therefore the insurer is liable for the broker's omissions and mistakes. In other situations, where the legislature did not choose to grant the insured the protection of a presumption of agency, the legal position in any situation that will arise in the future in a specific case cannot be determined categorically. Therefore, the assumption will be that the insurance broker is merely a broker between the parties, and each party will be allowed to prove the existence of an agency relationship in the circumstances of the specific case. Second, case law has laid down that the arrangement that applies to situations which occurred before the statute came into effect is that the special circumstances of each case should be examined in order to decide the question whether the person who acted as the insurance broker is an agent (CA 25/82 *Weitzman v. Prudential Insurance Co. Ltd* [4], at pp. 503-504). I see no reason to depart from this arrangement when we are speaking of cases that have not been regulated in statute. Third, this conclusion is supported by logic and proper policy. Even if we regard the purpose of the Law as the protection of insured against the greater power of the insurer (CA 1064/03 *Eliyahu Insurance Co. Ltd v. Estate of Piemonte* [5]), it is not possible to decide *ab initio* every question of which legal relationship will benefit the insured. Admittedly, recognizing the insurance broker as an agent of the insurer imposes liability on the insurer for the insurance broker's omissions and thereby protects the consumer, but it should be remembered that the significance of this agency is that it imposes a fiduciary duty on the insurance broker towards the insurer, a duty that is not always desirable for the insured. Thus, in a case where the

insured regards the insurance broker as his agent and reveals confidential information to him, he certainly does not want the insurance broker to have a duty to pass on this information to the insurer because the broker has a fiduciary duty to the insurer. On the other hand, even Sasson, who as we have mentioned supports the position that the insurance broker is an agent of the insured in all the cases which are not stipulated in the statute, points out the difficulty that will arise in certain cases. Thus he gives an example of an insurer who transfers the insurance payout to the insurance broker, but the broker does not transfer it to the insured because of embezzlement or insolvency. In such a case, a difficulty arises if it is determined that the insurance broker is the agent of the insured, since then the insured will not be able to make a claim against the insurer for not making the payment to him (Sasson, *Insurance Law*, *supra*, at pp. 52-53).

It should be noted that a similar, albeit more limited, position was adopted in the commission's report (at p. 13). According to this position, the insurance broker should be given the legal status of a broker, except where there is a concern of harm to a consumer interest as a result of the objectivity that is required of the insurance broker in a transaction, in which case the insurance broker should be defined as an agent of the insurer. But at the same time the commission restricted these cases solely to those currently set out in Article 6 of Chapter 1 of the Law. The commission also proposed that the Law should state that the provisions of the Agency Law do not apply to cases that are not included in Article 6 of Chapter 1 of the Law, unless a principal expresses consent to the agency. As I have said, my opinion is that the proper approach is to allow each case to be considered on its merits, and to allow an apparent agency to be recognized in accordance with the provisions of the Agency Law and the interpretation given to it in case law.

15. I am of the opinion that, even following the approach that the starting point is that the insurance broker is merely a broker, it is possible to find solutions to situations where the insured and his interests need to be protected, and therefore there is no concern that this approach will not allow any solution in cases where the Law should ideally protect him. On the contrary, I think that considering each case on its merits will allow the court to adopt an approach that protects the insured's interests and conform with the Law's purpose of protecting the insured.

First, it should be emphasized that the insurance broker is not of course exempt from all obligations to the parties. He is subject to the obligations of the general law. It should be recalled that being an insurance broker gives rise

to a contractual relationship that imposes various obligations on the parties, including a fiduciary duty, a prudence duty and the duty to act in a customary manner and in good faith (see Englard, 'On Brokerage and Agency,' *supra*, at pp. 363-364).

Second, in Article 6 of Chapter 1 the legislature gave the insured relatively broad protection in common situations that arise between the insurance broker and the insured, such as negotiations prior to the formation of the insurance contract and the formation of the insurance contract itself.

Third, I am in agreement with Weller that the interpretation that will be given by the court to the circumstances of the case and the answer to the question whether there is an agency in the circumstances of the case should also be influenced by the policy considerations that apply in that case. Among the policy considerations that are mentioned, it is important to emphasize the possibility of distributing the damage that is normally available to the insurer, and the more extensive information that the insurer is able to obtain with regard to his brokers in comparison to the information that the insured possesses (Weller, at pp. 678-679). These policy considerations can in appropriate cases justify a broader interpretation of the existence of an apparent agency or the application of the sections in Article 6 of Chapter 1 of the Law. In other words, the general laws of agency are what will determine the agency's existence, scope, etc., but their application and implementation in each case will depend upon the special policy considerations in an insurance scenario.

Finally, in addition to the basic approach set out here, it is possible to argue that the supporters of the approach that considers cases on their merits will be prepared to recognize the existence of an agency relationship even when no consensual, apparent or statutory agency has been proved, solely on the basis of policy considerations that justify a recognition of an agency relationship. Admittedly, it would appear that Weller did not intend this, but I am of the opinion that a certain opening should be left for exceptional cases that will justify recognition of an agency between the insurance broker and the insurer for consumer policy considerations of protecting the insured, and therefore it cannot be said that the list in Article 6 is a closed list of cases. Admittedly great caution should be exercised when determining cases of these kinds, but the consumer should not be left unprotected in a situation where policy considerations justify protecting him by creating an agency between the insurance broker and the insurer. Naturally, within the scope of the policy

considerations we should also consider those that justify refraining from extending the scope of the insurer's liability.

16. The result is therefore that outside Article 6 of Chapter 1 of the Law the three-way relationship between the insured, the insurance broker and the insurer should be examined as an particular case of the general laws of agency, in which the laws in specific context will be given an interpretation that seeks to protect the insured. Therefore the usual method of creating an agency will be by giving an explicit authorization to an agent to act on behalf of a principal. Such an agency will more easily describe the relationship between the insurance broker and the insurer in certain cases. Nonetheless, there are situations in which there will be no explicit authorization for an agency but an agency will still be recognized between two parties. This, for example, is what happens in the case of an apparent agency, in which the agency is created by the conduct of the principal vis-à-vis the third party. Therefore, any representation of the principal, in an act or an omission, from which the third party may deduce the existence of an authority given by him to the acts of the agent, is capable of rendering the principal liable in his relationship with the third party, unless the third party knew, or should have known as a reasonable person, that the agent did not have authority (Elias, *Insurance Law*, *supra*, at pp. 502-503). The institution of the apparent agency is particularly important when we are seeking to protect the insured, since in cases where the insurance company makes a representation to the insured that the insurance broker is acting with authority, the insurance company will be liable to the insured for the acts of the broker. When examining whether there exists an apparent agency between the insurance broker and the insurer and whether the aforesaid exception thereto applies, it will be necessary to take into account the disparity in information and strength between the insurance company and the insured. Possible indications of the existence of an apparent agency can be the fact that the broker works in the insurer's office; the receipts given by the broker bear the name and symbols of the insurance company, the broker works mainly for the insurer, and only in rare cases for other insurers; there is no distinction between the insurance broker and other workers of the insurance company (see CA 391/77 *Dadash v. Arieh Insurance Co. Ltd* [6], at p. 653). An additional doctrine that creates an agency is found in s. 6(a) of the Agency Law, which concerns the ratification of an action that was done by someone as the agent of another when he had no authority to do it or exceeded his authority. The section provides that ratification is equivalent to authority *ab initio*, provided that a right that someone registered in good faith and for consideration before the ratification is not prejudiced. I will merely point out that this doctrine has

also been applied in Israeli case law with regard to the relationship between an insurer and an insurance broker (CA 102/87 *Arieh Israel Insurance Co. Ltd v. Ludjia Textile Co. Ltd* [7]).

17. It should also be mentioned that under the law of agency it is insufficient to find that there is an agency between the insurer and the insurance broker. In every case it is necessary to examine whether the insurance broker acted within the scope of his authority or whether he exceeded the authority given to him. Where there is a departure from the authority given, the insurance company will not be liable for that act and the insured will be given the choice of regarding the insurance broker as the other party to the contract, or rescinding it and suing the insurance broker for his damage (s. 6(b) of the Agency Law). The difficulty that may arise in cases of this kind is that the insured may be left with damage that in many cases he cannot recover from the insurance broker because of the latter's limited financial resources. Therefore, the tendency should be to give a broad interpretation to the limits of the authority granted to the insurance broker by the insurer, and to give a narrow interpretation to a departure from authority, in order to protect the insured. The justification for this derives from the fact that the insurer is the strong party in the transaction, the party that has the tools to supervise and monitor the actions of the insurance broker, and the party that has the ability to protect itself and pay for the consequences of the acts of the insurance broker that exceed his authority. In other words, the insurer can prevent the damage in the most economic way (see Elias, *Insurance Law*, *supra*, at p. 519). This Court has said in this regard:

> 'The insurer should ascertain that his agent is acting in accordance with the authority given him, and he should ascertain that he chooses a reliable insurance broker who will act to his satisfaction. Naturally, when the broker departs from his authority as an agent, the insurer will be entitled to the remedies listed in the Agency Law, 5725-1965. In my opinion, there is nothing to prevent the insurance broker telling the insured that the arrangement between them is subject to the approval of the insurance company and until then the insured does not have any insurance cover, provided that he does so expressly. But in a case like the case before us, where the insurance broker does not make the acceptance conditional but guarantees that there is insurance cover starting from a certain date, the insurer will be bound' (CA 702/89 *Eliyahu Insurance Co. Ltd v. Orim* [3], at p. 818).

18. For our purposes, the key issue is the law of agency relating to the liability of the insurance company for a tort committed by the insurance broker. The principle is that the agency does not apply to prohibited acts that were done by the agent, and in a case of this kind the agent will be personally liable for his damage (see A. Barak, *The Agency Law* (vol. 1, 1996), at pp. 84-85) and Elias, *Insurance Law*, *supra*, at p. 520-521). Nonetheless, there are cases in which the principal will also be liable for the tort done by the agent. The insurer's liability in cases of this kind may derive either from the law of agency, when the agent's act falls within the scope of the external appearance of his authority, or from the law of torts itself, by virtue of the insurer's direct or vicarious liability. In the latter case, the principal will be liable in every case where the agent commits a tort within the scope of his duties as agent, subject to certain reservations (see Barak, *The Agency Law*, *supra*, at pp. 84-87; A. Barak, *Vicarious Liability in Tort Law* (1964), at pp. 93-111; CA 422/85 *Bank Leumi of Israel Ltd v. Israel Subinsurance Co. Ltd* [8]).

19. In American law there is a distinction between an insurance agent and an insurance broker, who is a kind of middle man. Whereas the former will usually be regarded as an agent of the insurer, the latter will usually be regarded as an agent of the insured. However, the decision as to whether a person is an agent or a broker depends upon the circumstances and should be made on a case by case basis, so that the same broker may be considered for some acts the agent of the insurer, and for others the agent of the insured (see 43 Am. Jur. 2d. §123). Whether there is an agency is determined in accordance with the general rules of agency, and in insurance matters indications that are relevant to situations of these kinds are examined. An agency may be established upon the basis of an express agency, an implied agency (which is determined in accordance with what a reasonable broker would think and believe) and an apparent agency (which is determined in accordance with a representation made by the insurer to the insured (see 3 Am. Jur. 2d §72, 73). There is extensive case law in the United States on the question of when insurance brokers should be regarded as the insurer's agent and when they should be regarded as the insured's agent, but no comprehensive tests have been laid down in this regard. It is, however, possible to find various indications as to how the matter should be examined. One of the states that has laid down clear tests in this regard is the State of Illinois, which has laid down a four-stage test for examining the status of the insurance broker: (1) which party induced the insurance agent to start working); (2) who controlled the insurance agent's actions; (3) who paid the insurance agent; and (4) whose interests the insurance agent was protecting

(*Ohio Farmers Insurance Co. v. Hotler* [15]; *Mizuho Corporate Bank v. Cory & Associates, Inc.* [16], at p. 654; *Zannini v. Reliance Insurance Co. of Illinois* [17]).

In English law the legal position on this question is similar to that of American law. While an insurance agent will be regarded as the agent of the insurer, an insurance broker will be the agent of the insured. Here too the determination as to the kind of broker concerned is made in accordance with the circumstances of the case and the conduct of the insurance broker in the specific case (R.M. Merkin, *Colinvaux's Law of Insurance* (seventh edition, 1998), at pp. 324-325). Naturally, English law (like American law) also needs to determine the scope of the agency in each case, and if an insurance broker exceeds his authority, he will be liable personally, and the insurer for whom he acted will not be liable.

20. In conclusion, it should be noted that I am leaving another significant question undecided, , namely the definition of the term 'legal act' in the Agency Law. The agency is defined in s. 1 of the Agency Law as 'authorizing an agent to do, on behalf of or instead of a principal, a legal act vis-à-vis a third party.' No one denies that an insurance broker whose role is limited to locating the parties to the transaction and bringing them together without taking an active role in the negotiations does not carry out a 'legal act,' and therefore he will not be recognized as an agent of one of the parties (Elias, *Insurance Law*, *supra*, at p. 499). The difference of opinion arises in cases where, for example, the insurance broker takes an active part in the negotiations. The question in such cases is whether the term 'legal act' should be given a broad interpretation that also includes a situation of this kind. This question has been considered in case law and professional literature, but has not yet been decided (those who think that conducting active negotiations does not constitute agency: Barak, *The Agency Law*, *supra*, at pp. 391-393; Englard, 'On Brokerage and Agency,' *supra*, at p. 361; G. Procaccia, *Agency Law In Israel* (1986), at p. 84; Justice Y. Kahan in CA 793/76 *Lookman v. Schiff* [9]; Justices Mazza and Bach in CA 3248/91 *Ben-Ari (Winiger) v. Buaron Yitzhak Ltd* [10]; those that think that conducting active negotiations should be considered an agency: Justice M. Elon in CA 166/77 *Dadon v. Avraham* [11]; Justice Ben-Porat in CA 294/76 *Anglo-Saxon Property Agency (Savion) v. Passerman* [12]). In any case, the ramifications of this question on the relationship between an insurer, insurance broker and insured are relatively limited, since with regard to holding negotiations for the purpose of making an insurance contract, s. 33 of the Law provides a presumption that there is an agency between the insurance broker and the insurer. The question will arise

when the negotiations that take place between the insurer and the insured through the insurance broker are not for the purpose of making an insurance contract, but, for example, for the purpose of receiving an insurance payout. These cases, and the special nature of the issue in so far as it concerns the relationship between the insurer, insurance broker and insured, will be considered when the appropriate case comes before us.

From general principles to the specific case

21. As stated above, I am of the opinion that Article 6 of Chapter 1 does not apply to the situation in this case, and therefore the legal status of the insurance broker in this case should be examined in accordance with the circumstances of the case. I think that the matter should be returned to the trial court (the Magistrates Court), which should consider the matter in accordance with the guidelines set out in this judgment, and decide mainly the following two questions: first, whetherthe insurance broker was an agent for the applicant; and second, if the answer to the first question is yes, whether the applicant liable for the tort that was committed by the insurance broker against the respondent. In this sense the appeal is allowed. The costs of this proceeding should be taken into account by the Magistrates Court to which the matter is returned, subject to the outcome of its new judgment.

Justice M. Naor

1. I too am of the opinion that the appeal should be allowed. Notwithstanding, there is no reason, in my opinion, to return the case to the Magistrates Court.

2. As my colleague Justice Arbel held, the justification for granting leave to appeal in this case is the determination of the District Court that the insurance broker acted as the agent of the applicant by virtue of article 6 of the Insurance Contract Law, 5741-1981 (hereafter: the Law). I agree with the detailed legal analysis of my colleague, according to which article 6 of the Law does not apply to this case. For this reason the appeal should be allowed and the determination of the District Court should be set aside. My colleague Justice Arbel examined whether it is possible to find a basis for the determination of the District Court *outside* the scope of article 6, and determined guidelines on that subject. While I agree with my colleague's legal analysis in my opinion, I see no justification in this instance for returning the case to the trial court. This is because the respondent's argument, which was accepted in the District Court, that the insurance broker acted as the applicant's agent (hereafter: "the agency claim"), was constituted an improper

change of front, being raised at a late stage of the case and there is therefore, in my opinion, no reason to return the hearing of the case to the Magistrates Court.

3. It should be noted that the agency claim — whether or not by virtue of article 6 of the Law — is not mentioned in the amended statement of claim that was filed in the Magistrates Court. The agency claim was raised for the first time, and in brief, in the respondent's closing arguments in the Magistrates Court (p. 8 of the respondent's closing arguments in the Magistrates Court). But raising the claim in closing arguments is insufficient. The Magistrates Court itself did not regard it as an argument that had been legally raised, and it held that it had not been argued or proved:

> 'It should be emphasized that even if the broker is indeed the one who, for some reason or other, pushed to sever the relationship, and I do not say that this was the case, *it was neither claimed nor proved that* in such an act, if it indeed occurred, *the broker acted as an agent [of the applicant] or at its request* .'

Because of the way in which the written pleadings were worded, the factual issue regarding agency was not adjudicated in the Magistrates court, neither in the examination of the witnesses nor in the other evidence. The insurance broker was not summoned to testify by either of the parties in the Magistrates Court. Incidentally, even in the District Court the agency claim was not raised as a main argument. The issue of the broker was mentioned incidentally in the section of arguments concerning witnesses that ought to have been summoned to the trial (para. 40 of the respondent's skeleton arguments in the District Court).

4. My colleague and myself do not dispute that the agency claim in this case requires a clarification of the facts. But in my opinion there is no justification for ordering such a clarification of the facts at this stage and returning the case to the trial court, since, as I have said, the agency argument was not originally raised in the trial court in the proper manner. In this regard, it is insufficient to raise the argument for the first time in closing arguments in the trial court, unless the other party agrees to the change of front , or if permission is given to amend the written pleadings (CA 6799/02 *Yulzari v. United Mizrahi Bank Ltd* [13], at para. 6 of the opinion of Justice E. Hayut). In our case the applicant did not agree to the change of front, and the permission of the court to amend the written pleadings in this regard was neither requested nor granted. This also has an effect at the appeal stage, since the court of appeal will not consider a ground of appeal that was not raised in the

trial court, especially where it is a factual argument that is raised for the first time in the appeal (CA 207/86 *Magen v. Bachar* [14], at para. 8 of the opinion of President M. Shamgar). Such is the argument in this case.

5. It would appear that in the Magistrates Court the respondent, Advocate Kaplansky, had a 'late start.' It was only in his closing arguments that he raised the agency claim. In my eyes, the timing of that claim, which obviously requires factual clarification - - being raised at the closing arguments stage - is also an indication that the claim was not a serious one even from respondent's standpoint, and in my opinion he should not be allowed to retry his case in accordance with an improved version.

6. Therefore, were my opinion accepted, we would set aside the judgment of the District Court, as my colleague proposes, and we would reinstate the judgment of the Magistrates Court without returning the case to it. The respondent shall pay legal fees totalling NIS 20,000, as well as trial costs.

Justice D. Cheshin

I agree with the opinion of my colleague Justice Arbel. But since the respondent only raised the agency claim for the first time in his closing arguments in the Magistrates' Court, which constituted a departure from his written pleadings and the raising of a new factual dispute between the parties, as described in the opinion of my colleague Justice Naor, I would find him liable to pay the applicant's cost in the litigation before the District Court and before us.

I therefore propose that the respondent shall pay legal fees in the sum of NIS 20,000, as well as the trial costs.

Appeal allowed.
2 Kislev 5768.
12 November 2007.