

**C.A. 817/79**

**(1) EDWARD KOSSOY**  
**(2) FILCO FINANCE AND INVESTMENT CO.**  
**v.**  
**(1) BANK Y.L. FEUCHTWANGER LTD.**  
**(2) NATHAN DRORI**  
**(3) RAANAN AMIR**  
**(4) BANQUE COMMERCIALE S.A. GENEVA**

**C.A. 818/79**

**BANQUE COMMERCIALE S.A. GENEVA**  
**v.**  
**BANK Y.L. FEUCHTWANGER LTD. ET AL.**

**C.A. 585/82**

**NATHAN DRORI**  
**v.**  
**BANQUE COMMERCIALE S.A GENEVA**

In the Supreme Court sitting as a Court of Civil Appeal

[July 9, 1984]

*Before: Barak, J., S. Levin J. and D. Levin J.*

*Definition, functions and obligations of a director - Remedies for breach of duties -  
Obligations and duties of holder of controlling shares - Liabilities for breach of duties -  
Sources of agents' knowledge and their significance.*

The appeal is centred on the question of the liability of shareholders of a bank who sold their shares knowing that the bank's funds would be used to finance the acquisition of the shares and that it would endanger the existence of the bank, and on the question of the liability of the directors of the bank, who allowed the aforesaid sale of the shares.

Held by the Supreme Court:

- A. (1) The director is the "brain" and "nerve center" of the company's activities. He acts in its name towards outsiders and manages its affairs internally.
- (2) For some purposes, the director is an organ of the company. For other purposes, he is its agent; he may sometimes be treated as an employee.
- (3) The principles of penal law, which are part of general law, specify norms of proper conduct which must be followed by directors. Thus, for example, there are "friendly relations" (within the meaning thereof in section 36 of the Penal code [New Version]) between the director and the company, and the director must take all measures that a reasonable director would take under the circumstances (in accordance with the provision of section 35 of the Penal Code [New Version]).
- (4) The general legal system is incapable of dealing directly with the problems arising from the power of control wielded by the director. The solutions of these problems are found by applying the duty of loyalty to the holder of the power.
- (5) The principle of loyalty has broad application. It is applicable to any case in which someone wields power and control over someone else. The list of situations to which the duty of loyalty is applicable is not a closed list, and it pertains in a wide range of legal relationships.
- (6) The duty of loyalty is a general duty which is incumbent upon the holder of the power. The content of the duty is that the person holding the power must act in good faith, honestly and for the good of fulfilling his function. It is a general rule inherent in our system, and its practical implementation requires concretization.
- (7) The fundamental principle of the duty of loyalty of a director has been accepted by case law and has been developed by it according to our needs, as part of the Israeli equivalent of common law.
- (8) A director must act loyally in conducting the affairs of the company. He must act honestly in his dealing with the company. Should there arise any substantive suspicion that he is not acting in good faith and for the good of the company, the burden to disprove it rests upon him.
- (9) The standards of conduct by which a director is bound are not those of the marketplace, and they are not the result of a struggle between equal forces. Therefore, a director may not be in a situation of conflict of interest between the good of the company and his or someone else's good.
- (10) The duty of loyalty is a personal duty, and it incorporates the duty to prevent other directors from breaching their duty.
- (11) The list of situations to which the duty of loyalty is applicable is not a closed list. The duty was intended as a solution to the changing problems of life with which we are constantly confronted.

With the development of commercial life, new secondary rules are created, in order to protect the intent of the fundamental principle.

- (12) In our case, the directors breached the duty of loyalty they owed the bank in that they approved the financing by the bank of the acquisition of its shares in contravention of the law and with the knowledge that it would lead to the insolvency of the bank.
- B.
- (1) In parallel to the development of the various duties of loyalty which are incumbent upon a director, the remedies available to a company for breach of those duties have also developed. The relief must suit the duty, and the remedy must suit the breach.
  - (2) A director must make available to the company all the monies that it expended as a foreseeable result of the breach of his duty towards it, even if those monies were not received by him but by a third party.
  - (3) If each of several directors breached his duty and thereby caused the company to part with sums of money, then the aforesaid obligation of indemnity rests upon the directors "jointly and severally."
- C.
- (1) The fact that a director did not act because of a personal interest and sought no benefit for himself is insufficient in itself to entitle him to the forgiveness specified in section 90(a) of the Companies Ordinance [New Version], 5743-1983; a condition for the exemption of a director in accordance with this section is that the director must have acted honestly and reasonably.
- D.
- (1) A holder of controlling shares who wishes to sell his shares owes a duty of loyalty to the company with regard to such sale, and he must act towards it in good faith and honestly. He will be in breach of his duty if he sells his shares to a purchaser who to the best of his knowledge will strip the company of its assets and lead it to insolvency.
  - (2) In this regard, if the transaction consists of several stages, which in commercial terms could be viewed as a series, then the whole may also be interpreted as a single entity in legal terms. It is therefore possible to attribute a breach of loyalty to a shareholder because of actions which are to take place in the future, provided that they are foreseeable and constitute a part of the entire entity.
  - (3) This duty is based on the fundamental principle that the holder of power over a company is under a duty to prevent the abuse of that power. From this well-known fundamental principle we may infer new secondary duties to suit our needs.
  - (4) The content of the duty of loyalty is not identical in all the legal relationships to which it is applicable. The duty of loyalty of a director is not identical to that of a shareholder.
  - (5) A shareholder is the owner of property, and according to the general law of title he is entitled to do whatever he wishes with his property. This freedom is not unrestricted, since one of the restrictions stems from the fact that ownership of the shares gives him control of the company, and this control necessitates honesty, good faith and acting for the good of the company. The content of the conduct -which belongs to the general realm of the duty of loyalty - is a product of

- an appropriate balance between the right of ownership on the one hand and control of the company on the other hand.
- (6) The term "control" means different things in different contexts. As for the applicability of the duties of loyalty relating to the sale of shares, it is sufficient that the shareholder belongs to the controlling group, and he need not necessarily be the holder of control himself.
- E. (1) A holder of controlling shares who sells his shares to a purchaser who leads to the insolvency of the company is liable to repay the company all the monies it parted with as a foreseeable result of his breach which caused the said insolvency.
- (2) This relief consists first and foremost of the monies of the company which came into the possession of the holder of the controlling shares himself, but it is not limited thereto. The liability for repayment also extends to monies received by third parties, be they the company's money which was used to finance the purchase or the company's money which it parted with as a foreseeable result of the transfer of control.
- F. (1) The knowledge of an agent is attributed to the principal, if such knowledge is related to his function as an agent.
- (2) Where an agent serves two principals, his knowledge with regard to one is not automatically attributed to the other.
- (3) Where the agent's knowledge is attributed to his agency on behalf of both principals, it is attributable to both.

**Israeli cases referred to:**

- [1] *C.A. 725/78 British Canadian Builders Ltd. et al. v. Oren et al.*, P.D. 35(4) 253.
- [2] *H. C.J. 531/79 "Likud" Faction of Petah Tikva Municipality v. Petah Tikva Municipality Council et al.*, P.D. 34(2) 566.
- [3] *C.A. 793/76 Motion 506/78 Michael Lockman v. Haim Schiff*, P.D. 33(2) 533.
- [4] *D.N. 7/81 Pneidar Investment, Development & Construction Co. Ltd. et al. v. Castro*, P.D. 37(4) 673.
- [5] *Motion 100/52, Jerusalem Industrial Co. Ltd. v. Agiun et al.*, P.D. 6 887.
- [6] *C.A. 667/76 L. Glickman Ltd. et al. v A.M. Barkai Investment Co. Ltd.* P.D. 32(2) 281.
- [7] *C.A. 247/47 "Raphael" Hospital Co. Ltd. v. N. Pailan*, P.D. 257; P.I. A 68.
- [8] *C.A. 267/55 Tokatli v. "Shimshon" Ltd. and Cross-Appeal*, P.D.11 1569.

[9] *C.A. 283/62 Hassess v. Laslo et al.*, P.D. 17 758.

[10] *Cr.M. (T.A.) 3788/75 A.M. Barkai et al. v. L. Glickman Ltd. et al.*, P.M. 5733 (1).

**English cases referred to:**

[11] *Wallersteiner v. Moir* [1974] 1 W.L.R. 991 (C.A.)

[12] *In re Carriage Co-operative Supply Association* (1884) 27 Ch. D. 322.

[13] *In re National Funds Assurance Company* (1878) 10 Ch. D. 118.

[14] *Ramskill v. Edwards* (1885) 31 Ch. D. 100.

[15] *Selangor United Rubber v. Craddock* [1968] 2 All E.R. 1073 (Ch.)

[16] *Allen v. Gold Reefs of Western Africa Limited* [1900] 1 Ch. 656 (C.A.).

[17] *Scottish Co-operative Wholesale Society Ltd. v. Meyer* [1959] A.C. 324 (H.L. Sc.).

**Australian case referred to:**

[18] *Mills v. Mills* (1937-38) 60 C.L.R. 150.

**American cases referred to:**

[19] *Securities Commission v. Chenery Corp.* 318 U.S. 80; 63 S. Ct. 454; 87 L.Ed. 626 (1942).

[20] *Litwin v. Allen* 25 N.Y. Supp. 2d 667 (1940).

[21] *Meinhard v. Salmon* 249 N.Y. 458 (1928).

[22] *Insuranshares Corporation v. Northern Fiscal Corp.* 35 F. Supp. 22 (1940).

[23] *Levy v. Feinberg* 29 N.Y. Supp. 2d 550 (1941).

[24] *Dale v. Thomas H. Temple Co.* 208 S. W. 2d 344 (1948).

[25] *Pepper v. Litton* 308 U.S. 295; 60 S. Ct. 238; 84 L. Ed. 281(1939).

[26] *Levy v. American Beverage Corporation* 38 N.Y. Supp. 2d 517 (1942).

[27] *Gerdes v. Reynolds* 28 N.Y. Supp. 2d 622 (1941).

[28] *Perlman v. Feldmann* 219 F 2d 173 (1955).

[29] *Algonac Marine Hardware Co. v. Cline* 159 N.W. 2d 150 (1968).

## C.A. 817/79

*S. Toussia-Cohen and A. Toussia-Cohen* for Appellant No. 1.

*A. Goldenberg and R. Behar* for Appellant No. 2.

*M. Kirsch. L.D. Kommissar and A. Adar* for Respondent No. 1.

*N. Amitai* for Respondent No. 2.

No defence filed for Respondent No. 3.

*A. Persky* for Respondent No. 4.

## C.A. 818/79

*A. Persky* for Appellant.

*M. Kirsch. L.D. Kommissar and A. Adar* for Respondent.

## C.A. 585/82

*N. Amitai* for Appellant.

*A. Persky* for Respondent.

## JUDGMENT

Barak J.: In January 1967 the Bank of Israel took control of Bank Y.L. Feuchtwanger Ltd. (hereinafter: "the Bank"). The board of directors of the bank resigned; the Bank of Israel was given a management share, and a director was appointed in its name. This brought to an end a period of over thirty years during which the bank had been active in Mandatory Palestine and in the State of Israel.

**The Claims**

2. Following the seizure of the Bank by the Bank of Israel, several actions were brought in the courts. Filco Finance and Investment Company S.A. of Luxemburg (hereinafter: "Filco") sued the bank (Civil File 2679/67) for the sum of \$12,840, which had stood to Filco's credit at the Bank. The Bank initially refused to pay it, but the sum was eventually paid by the agreement. Criminal charges were brought against Joseph Epstein, who was a member of

the board of directors of the Bank and held the controlling interest in it prior to its seizure, and against Raanan Amir, who was the managing director of the Bank prior to the seizure, with respect to their activities at the Bank. They were convicted of the crimes of theft through an agent, aggravated fraud and conspiracy to defraud, and were given harsh jail sentences (Cr. A. 164/69, P.D. 23(I) 825). Kimche had been the general manager of the Bank for a long period. Upon acquisition of control by Epstein and the appointment of Amir, Kimche was removed from his post (on 6 February 1966). As part of the agreement with him which assured his resignation, the shares which he held in the Bank were acquired by Ibicor Trust and Development Ltd. (hereinafter: "Ibicor") and the Bank guaranteed payment of Ibicor's debt. Part of the guarantee proceeds were paid by the Bank to Kimche, but upon seizure of the Bank by the Bank of Israel, payment of the outstanding balance was halted, for which the Bank was sued by Kimche. His claim was dismissed, in view of the provisions of section 98(1) of the Companies Ordinance, now section 139(a) of the Companies Ordinance (New Version, 5743-1983 (C.A. 486/89- P.D. 24(I), 527).

3. In January 1968, the Bank brought action against Edward Kossoy, Filco, Amir and Drori. At this time Kossoy was a member of the board of directors of the Bank and a shareholder in it. Filco was a shareholder in the Bank. Amir, as mentioned, was the managing director of the Bank and Drori was a director of the Bank. Kossoy and Drori were sued for payment of 1,755,000 Israeli Pounds to the Bank. Kossoy, Amir and Drori were sued for payment of \$427,000 to the Bank. All four defendants were sued to pay the Bank the sum of \$1,211,378 plus interest and costs. The claim was heard in the Tel Aviv-Jaffa District Court, before Judge S. Loewenberg.

4. In 1968, the Bank was sued by way of summary procedure in the Jerusalem District Court by Banque Commerciale S.A. Geneva (hereinafter: "Banque Commerciale"). The claim was for the sum of \$88,000, being a test claim and part of an over-all claim for the sum of \$352,000. The Bank petitioned for and was granted leave to defend. On its part, the Bank served third party notices on Kossoy and Filco. After a while, these claims were transferred to the Tel Aviv-Jaffa District Court, and following a procedural arrangement between the parties, the hearing of the claims was joined with that of the Bank.

5. Hearing of the claims of the Bank and Banque Commerciale in substance began in 1976. The testimony of a large number of witnesses was heard, some of whom, pursuant to the procedural arrangement, were heard outside of Israel. Hundreds of exhibits were submitted and hundreds of pages of minutes recorded. The procedural arrangement also gave rise to disputes which were also resolved by this Court (C. A. 781/77 - unpublished). Amir did not file a defence. In September 1979, judgment was given. The four defendants in the Bank's claim were ordered, jointly and severally, to pay the Bank 1,755,000 Israeli Pounds and \$1,633,378. Interest and linkage (on the sum in Pounds) and costs were also awarded. Banque Commerciale's claim was dismissed. Accordingly, there was no basis for hearing the third party notice.

6. The present appeals were filed against the decision of the District Court. Kossoy and Filco (C. A. 817/79) and Drori (C. A. 585/82) appealed against their conviction. Banque Commerciale appealed against the dismissal of its claim (C. A. 818/79). The hearing of the appeals was consolidated. During numerous sessions, we heard the pleadings of the representatives of the parties. We thank them for their commendable, practical appearance, which was of great assistance to us in understanding the complexity of activities in this difficult episode.

### **The Factual Background**

#### **The Acquisition of Control by Kossoy-Appelbaum**

7. The Bank was founded in 1934. Four years after it was established, the Bank was purchased by the "Y.L. Feuchtwanger" partnership. In 1959, Leo Feuchtwanger, a founder of the partnership, passed away, and control of the Bank passed to Wallter Feuchtwanger and the Federman group. In that year, Kimche was appointed general manager of the Bank. Arnold Appelbaum also became a shareholder and joined the Feuchtwanger group in that year. In 1960, Kossoy, acting in co-operation with Appelbaum, also acquired shares in the Bank. In 1961, the Sahar group, joined the Bank. In early 1964, the Feuchtwanger family left the Bank. Its shares were sold to the Kossoy-Appelbaum group. The consent of the Sahar and Federman groups was required for the purpose of approval of the transfer, and they made their consent conditional on the sale of their shares. Indeed, in March 1964, the



Sahar group, followed by the Federman group, left the Bank, and were replaced by the Kossoy-Appelbaum group, which also included Joseph Epstein. The distribution of the shares of the Bank, after increasing the issued capital to six million, was as follows: Kossoy personally-11,521 shares; Appelbaum and his family - 156,633 shares; Filco, which was at that time controlled and owned by Kossoy and Appelbaum's daughter-1,200,000 shares; Orico Ltd., which was owned by Kossoy and Appelbaum - 425,000 shares; Appelico Ltd., which was owned by Kossoy and Appelbaum - 1,932,145 shares; and Joseph Epstein - 1,965,598 shares. The remaining shares were divided among the directors of the Bank, Kimche (175,297), Levshinski (48,050) and Drori (85,756). Appelbaum was elected chairman of the board of directors, with Kossoy as his deputy. Other members of the board of directors were Gutkovski, Vered, Epstein and Schrem. As mentioned, Kimche was the general manager of the Bank, with Levshinski and Drori operating at his side. As part of the arrangement for his joining the Bank, Epstein granted Kossoy, Appelbaum and Appelico an option to acquire their shares, which they had acquired from the Sahar and Federman groups.

### **The "Closing of the Tap"**

8. At the time of the acquisition of control of the Bank by the Kossoy-Appelbaum group, the Epstein group's debt to the Bank stood at the sum of 1.3 million Israeli Pounds. This debt continued to mount quickly, and in August 1964 reached some 4 million Israeli Pounds. In late 1964, the Epstein group's indebtedness amounted to 6.6 million Israeli Pounds. In February 1965, the debt grew to some 7.1 million Israeli Pounds and in April 1965 it totalled a sum of over 10 million Israeli Pounds. This situation was disturbing to Kimche. In late March 1965, a check for the sum of 390,000 Israeli Pounds drawn on the Bank to the order of Appelico was due for payment. Upon Kimche's orders, the check was not honoured. On 14 April 1965, a meeting of the board of directors was held, at which Kimche's action and Epstein's request that his credit be increased to 11 million Israeli Pounds were discussed. No resolution was adopted at the meeting. In practice, no further credit of any significance was extended to the Epstein group until early 1966, when control of the Bank passed to the Epstein group, following the "Tiberias Agreements."

9. Thus in late March 1965, the period of "the closing of the tap" began. Mr. Bavli, the Bank's certified public accountant, was asked to examine the credit and collateral of the Epstein group. He reported (on 20 April 1965) that the collateral and registered charges were equal to a mere fraction of the credit, and that additional collateral and charges should be registered. The Bank began to implement this. In a report prepared by Kimche in late April 1964, he had noted that in actuality there were sufficient collateral and charges to cover the Epstein group's indebtedness to the Bank. Epstein was in a rather difficult situation at the time, because on the one hand he was heavily in debt (for a total of over 9 million Israeli Pounds and \$500,000), including a sizeable debt to Appelico for the shares in the Bank he had purchased from it, whilst on the other hand the liquidity of his real estate holdings, which, *inter alia*, consisted of plots of land and the Zirahton theatre, had fallen as a result of the "recession" in Israel at that time. Epstein asked the Bank to raise his credit limit. Kimche opposed it. Kimche was supported by members of the boards of directors, including Kossoy and Vered, Kimche's confidant. Kossoy expressed his opposition to any increase in credit to the Epstein group, in addition to his surprise that his own debt to the Bank had grown to such proportions without it having been reported to him. The common opinion, which was shared by Kossoy himself, was that the solution should be found in the sale of Epstein's shares to a wealthy foreigner. Kossoy expressed the opinion the "the good of the Bank does not allow the credit line to continue or to be increased" (Exhibit 40 of 3 May 1965). Attempts were also made at that time to sell the Bank's shares to foreign purchasers, but with no success. During the entire period, from April 1965 to February 1966, Epstein's credit was not increased. Even credit of extremely small amounts (5,000 Israeli Pounds) was extended only after approval by management. Towards late 1965, the Bank was solvent, since credit of up to 10 million Israeli Pounds, in the opinion of the Bank's certified public account, did not endanger the Bank.

### **The Tiberias Agreements**

10. In January 1966 and early February 1966, a fundamental change took place at the Bank in the form of several agreements which were entered into at that time, and of changes made in the structure of the Bank pursuant thereto. The main changes were as follows: *Firstly*,

Filco sold its shares in the Bank to Michael Rapp, David Rapp and Morris Bialchik, three South African financiers (Exhibit 8). The consideration for the shares was \$1,237,000. The consideration was to have been paid in part (the sum of \$327,000) by 7 February 1966, which was indeed the case. The balance (the sum of \$910,000) was to have been paid in nine two-monthly payments of \$100,000 each, beginning on 1 May 1966 and ending on 1 September 1967. *Secondly*, Appelico and Orico sold 725,000 shares in the Bank (420,000 shares owned by Appelico and 305,000 shares owned by Orico) to Ibicor (Exhibit 184). The consideration for the shares was 1,755,000 Israeli Pounds. This agreement also incorporated an option for the sale of the remaining shares in the Bank held by the vendors, as well as the shares held personally by Appelbaum and Kossoy, to Ibicor. Payment was to have been made partly by crediting the accounts of the vendor companies with the Bank (for the sum of 310,600 Israeli Pounds) and the balance (in the sum of 454,400 Israeli Pounds) by releasing Appelico and Orico from their liability to certain creditors and by Ibicor assuming the debt. *Thirdly*, an agreement was made between Kossoy and Epstein, according to which the two undertook to ensure that an extraordinary general meeting of the Bank would be convened, at which a decision would be taken to terminate Kimche's term as general manager and to appoint Amir in his stead (Appendix 443). This package of agreements was called "the Tiberias agreements" by all, signifying a meeting which took place on 14-16 January 1966 in Tiberias between Kossoy and Appelbaum on the one hand and Epstein on the other, at which the principles thereof were agreed upon. Pursuant to these agreements, a general meeting of the Bank's shareholders was convened on 10 February 1966, and a meeting of the board of directors was also convened. At these meetings, Kimche's resignation was submitted and the conditions of his retirement approved, which - as we saw (paragraph 2 above) - included acquisition by Ibicor of the shares he owned in the Bank for the sum of 554,000 Israeli Pounds and the Bank's guarantee for payment thereof. On that day, a new board of directors was elected, chaired by Appelbaum. Kossoy and Epstein were elected as his alternates. Amir was appointed - together with Levshinski - to the position of general manager. Drori became the deputy general manager. The sale of shares was approved. For the purpose of carrying out its acquisitions, Ibicor was granted credit in the sum of 2.3 million Israeli Pounds, in order to finance the acquisition of Kimche's shares (554,000 Israeli Pounds) and the acquisition of the shares held by Appelico and Orico (1,755,000 Israeli Pounds).

11. The meaning of the "Tiberias agreements" is the subject of bitter dispute between the parties. The Bank's approach is that Kossoy reached the conclusion that he and Filco - which is nothing but a company owned and controlled by him - must leave the Bank. To that end, he entered into an agreement with Epstein in Tiberias with regard to his total departure from the Bank, in phases, and the transfer of control of the Bank to Epstein. At the time, Kossoy was - or should have been - aware that the South African investors were nothing but Epstein's front men, and that the funds for the acquisition of shares by Epstein would not come from them, but from the Bank itself. For the purpose of implementing the over-all plan, which would enable Epstein to exact funds from the Bank and to rob it, as well as to finance the acquisition of the shares themselves, it was necessary to get rid of Kimche and place control in Epstein's hands immediately. The "Tiberias agreements" assured that this would be done. Kossoy and Appelbaum's approach is different. They argue that no decision was made in Tiberias regarding Kossoy and Filco's departure from the Bank in general and in phases, but merely for the sale of certain shares, whilst Kossoy was to remain at the Bank, both as a shareholder and as a director. The purchasers of Filco's shares were South African investors, and the financing of the transaction was to have come from external sources. Kossoy and Filco did not know - and could not have known - that in the end the finance would come in part from the Bank's resources, and that Epstein would commit illegal acts at the Bank. The reason for Kimche's removal was not the transfer of control to Epstein, but dissatisfaction with his professional conduct. Amir, a successful businessman with a recommendation from Pinchas Sapir, was appointed to replace him.

#### **From the "Tiberias Agreements" to the "July Agreements"**

12. The increase in credit extended by the Bank to Ibcor worried the accountants. On 4 March 1966, they conducted a meeting with Kossoy, Amir, Epstein and Drori, and expressed a warning to that effect. They pointed out that it contravened the previous resolution not to increase the credit granted to Epstein. The Bank's management was warned that it must make plans to reduce Epstein's debt. The accountants noted that the Bank was not permitted to lend money to Epstein for the purpose of financing the acquisition of shares in the Bank. They added that if the situation were not remedied, "we

will have to reconsider our attitude." At that time, the accountants were not advised that Filco's shares had been sold to South African investors. On 17 April 1966, a meeting of the board of directors took place. The accountants noted that they would be unable to approve the Bank's balance sheet unless far-reaching remedial action was taken. They complained about the provision of loans without sufficient collateral and stated that the management had eight months in which to remedy the situation. The accountants met Kossoy and informed him of the severity of the situation. In their opinion, the sale of the shares to Epstein endangered the solvency of the Bank. Kossoy replied that he was not leaving the Bank and that both he and Appelbaum would remain until Epstein's payments were concluded, which was to have been a considerable length of time (from eighteen months to two years). He noted that he was aware of his responsibility, and that it was most important that Epstein's credit be under supervision. On 21 April 1966, the accountant wrote to the board of directors that the loan in the sum of 1,755,000 Israeli Pounds which had been granted to Ibicor for the purpose of the acquisition of the shares of Appelico and Orico without sufficient collateral was not a loan in the ordinary course of business of the Bank, and that there was reason to believe that it violated the provisions of the Companies Ordinance. Towards the end of May, the credit provided to Epstein continued to grow, and stood at approximately 17 million Israeli Pounds. In May, Filco, pursuant to the "Tiberias agreements" received a further payment of \$100,000, so that the total of all sums received until then stood at \$427,000 (see paragraph 10 above).

### **The "July Agreements"**

13. Two further agreements, which expedited the departure of Kossoy and Appelbaum from the Bank, were made on 5 July 1966. One agreement (Exhibit 9) was made between Filco of the first part - and Michael and David Rapp and Morris Bialchik - the parties to the original Filco agreement (Exhibit 8) - of the second part, whereby the price of the original transaction (which stood at \$1,237,000) was reduced by \$70,000, in consideration for early payment of the instalments which had not yet been effected (in a total sum of \$740,000, after \$427,000 had already been paid) and for transfer thereof to Kossoy and Filco. Once

the payments were made, all of Filco's shares were to be transferred to the ownership of Feda Finance and Investments S.A. (hereinafter: "Feda"). Feda was established in May 1966 in Luxemburg by Epstein, Amir and Drori, and it was to have purchased Filco's shares and to have paid for them. A short time after this agreement was signed the transactions prescribed therein were carried out. The shares were transferred to Feda, which on its part transferred the sum of \$740,000 to Kossoy (\$416,000) and (\$324,000) to Filco during the month of July. Feda did not obtain the funds from the South African investors, but from the Bank itself, this by means of a Vaduz company called IERA, which acted as the Bank's agent for trade in foreign securities, and all the transactions were carried out by the Bank. The second agreement (Exhibit 225), which was made on 5 July 1966, was between Appelico and Orico of the first part and Ibicor, "Hadarim Holdings and Development Ltd." (hereinafter: "Hadarim") and Epstein. According to this agreement, Hadarim - which is a company controlled by Epstein - undertook to purchase all of the shares in the Bank held by Appelico, Orico, Appelbaum or Kossoy, provided that the option was exercised not later than 2 July 1967. If the option would be exercised, the consideration would be paid in six quarterly instalments commencing on 15 February 1968. Epstein guaranteed this obligation.

14. The meaning of the July agreements is the subject of dispute between the parties. The Bank argues that it is one more phase of the performance of the agreement in principle reached in Tiberias. It contends that Kossoy wished to expedite his departure from the Bank, since in view of the accountants' warning, he understood that the Bank was about to collapse and once it did there would no longer be any funds with which to pay for Filco's shares. The Bank argues that Kossoy and Filco knew that no South African investors existed, and that the entire balance of the price (the sum of \$740,000) would come from the Bank's funds, and that Feda and IERA were nothing but vehicles of the Bank itself. As regards the second agreement, its objective was to ensure that there would be an option to sell the balance of Kossoy's shares to Epstein (both his personal shares and the balance of his shares in Orico and Appelico). As aforesaid, this option was incorporated in the original agreement with Ibicor (Exhibit 184), but it was important to Kossoy to obtain an undertaking by Hadarim and by Epstein personally. On the other hand, Kossoy and Filco argue that nothing changed between the "Tiberias agreements" and the "July agreements," and that the objective of effecting payment earlier was to satisfy the requirements of Filco,

which was in need of funds for its affairs in Switzerland. They contend that even at that stage they believed that the South African group was the purchaser of the shares and that it would be providing the finance. According to this approach, Kossoy and Filco believed that Feda was a consortium of those investors, and that their funds were being paid by Feda.

### **The Elran Affair**

15. In mid-July 1966, Kossoy discovered, by chance, that since March 1966, Appelbaum, Epstein, Amir and Drori had been conducting negotiations to purchase Bank Elran. This was done without informing Kossoy and with deliberate intent to conceal it from him. When Kossoy discovered that the transaction had been carried out, he was incensed. His pride had been injured.

### **The "September Agreements" and Kossoy's Final Departure**

16. Two further agreements leading to the sale of Kossoy's shares in the Bank were made in September 1966. In *one* agreement (Exhibit 95), Kossoy sold Feda his privately held shares in the Bank (12,673 shares) for the sum of \$10,983. He received this sum on 20 September 1966. In the *second* agreement (Exhibit 60), Kossoy sold Feda the balance of his shares in Appelico, which in turn held shares in the Bank. The consideration for this transaction was \$812,000. Of this sum, Kossoy received \$100,000 directly from Feda on 11 September 1966. The balance of the consideration (the sum of \$712,000) was transferred by Feda to Filco's account at the Bank. From this account, Filco purchased securities and assets for the sum of \$200,000, thus leaving \$512,000 in its account at the Bank. This sum was to have remained in the Bank, in the form of a foreign resident's deposit in dollars (Exhibit 200). The aforesaid deposit was to have matured as follows: \$160,000 was to have matured on 20 January 1967, and \$88,000 was to have matured on each of the following dates: 15 February 1968, 15 May 1968, 15 August 1968 and 15 November 1968. This agreement was also carried out. On 28 September 1966, Filco notified the Bank (Exhibit 202) that it had transferred the sum of \$512,000 to the sole possession of the Union Bank of Switzerland (hereinafter: "UBS"). The Bank replied (Exhibit 203) that it was unable to modify the ownership of the deposit prior to the agreed maturity dates. On 1 November 1966, Filco

replied thereto (Exhibit 204) that it had not requested the Bank to modify the ownership of the deposit, and that all that had been requested was the Bank's approval to transfer the deposit to UBS ("to transfer those deposits to the Swiss Bank"), since the Bank lacked the legal capacity to object to the transfer. After negotiation, the Bank decided on 27 November 1966 (Exhibit 207) to approve the arrangement, as follows:

"to transfer your N/R deposits with us in the name of Union Bank of Switzerland Geneva, special deposit account, on the same condition as we hold the deposits in your name."

UBS was asked to approve this transfer, and it so approved it on 25 November 1966 (Exhibit 208), whilst noting that:

"We confirm to you that the deposits are to remain with you at the terms as originally agreed between you and Filco S.A."

In view of the above, the Bank notified UBS on 5 December 1966 (Exhibit 261) that pursuant to Filco's instructions:

"We shall transfer value 20.12.66 all the deposits in a new special account opened in your name with us."

UBS was also asked to return to the Bank the deposit certificates for these sums, which had been held by Filco and had been transferred to UBS. Further thereto, the Bank notified UBS on 20 December 1966 (Exhibit 212) that the sum of \$512,000 had been transferred to a new special account in UBS' name, with the account comprising five deposits with various maturity dates. The Bank again requested in its letter that the deposit certificates, which were in Filco's name, be returned to it.

17. Whilst these transactions between Filco, the Bank and UBS were taking place, Kossoy's involvement in the Bank came to an end. On 28 October 1966, Kossoy's letter of resignation as a director of the Bank was accepted by the board of directors. At that



meeting, the share transfers in accordance with the "July agreements" and the "September agreements" were approved.

18. On 16 January 1967, UBS sent Filco's certificates of deposit which it had held (Exhibit 210). On 20 January 1967 - the date of maturity regarding \$160,000 from the deposit of \$512,000 in UBS' name - the Bank was also asked to pay the aforesaid sum to the beneficiary it would name. This was done, and the money was withdrawn from the Bank. The next sum, in the amount of \$88,000, was to mature on 15 February 1968 (see paragraph 16 above), but the Bank refused to release it, as it was seized by the Bank of Israel on 24 January 1967. On 17 April 1968, UBS assigned its rights in the deposit - which at that time stood at \$352,000 - to Banque Commerciale, which in the District Court claimed the release of the sum of \$88,000, which was to have matured as aforesaid on 15 February 1968.

19. The meaning of the "September agreements" is also disputed. The Bank contends that it is the final phase in the abandonment of the Bank, whereby Kossoy would exercise the option available to him pursuant to the "July agreements." The Bank argued further that Kossoy and Filco knew that Fedá, the buyer of the shares, was nothing but Epstein himself, and that the funding would come from the Bank's resources. The Bank agrees that knowledge of the Elran affair gave Kossoy "added impetus" to leave the Bank, since it was evident to Kossoy that the purchase of Elran was an adventure which was likely not only to dilute the Bank's resources, from which he was to have been paid for his shares, but also to expedite the collapse of the Bank. On the other hand, Kossoy and the Bank argue that the only reason for Kossoy's final departure from the Bank (Filco had already left by virtue of the "July agreements") was the Elran affair, and that at that stage Kossoy did not know, and could not have known, that the payment would be made with the Bank's funds.

20. As regards the claim of Banque Commerciale, the Bank's attitude is that Banque Commerciale has no more rights than does Filco, and the latter is entitled to nothing from the Bank, since the funds derived from the breach of the obligations of Kossoy and Filco. On the other hand, Banque Commerciale contends that it has an independent right which is not subject to the claims by the Bank against Filco.

**The District Court's Decision.**

21. A complex series of documents describing the agreements and actions performed pursuant thereto was brought before the lower court. The central character, who could have shed some light on the events, did not appear in Court, since none of the parties called Epstein as a witness. At the time, Epstein had been declared bankrupt and was serving a prison sentence for a criminal charge. Amir did not defend himself against the claim brought against him, nor was he called as a witness. Appelbaum had passed away. Kimche, who had suffered a heart attack, did not testify. On the other hand, extensive testimony was heard from Kossoy, Drori, Vered and Schrem. Michael and David Rapp and Morris Bialchik also testified. On the basis of all of the aforesaid, the lower court found that in Tiberias "agreement had been reached whereby Epstein gained control of the bank." "Kossoy, in entering into the over-all agreement to sell his shares in the bank... must have been aware that Epstein was buying control, by acquiring shares, or control of the shares by means of powers of attorney and other such means." In any event, "if I am found to have erred in reaching this my conclusion (which I believe is logical), then since Kossoy remained a member of the board of directors until July, how could he have been unaware that Epstein controlled the bank as a result of the sales of shares?" In the opinion of the lower court, control by Epstein meant the financing of Epstein's affairs - including the purchase of the shares from Kossoy and Filco - with the Bank's resources. Epstein himself had no money, and all the payments were to have come from - and indeed came from - the Bank's resources. The objective of this over-all agreement was, in the lower court's opinion, "to eject Kossoy from the bank" by means of selling all his shares, and Kossoy was aware of the objective for which Epstein was purchasing the shares. In doing so, Kossoy abandoned the company "to a villain who was robbing it." The lower court found that "Kossoy was aware of Epstein's aspirations in acquiring control of the bank without having the money to pay for the shares. Epstein's unconcealed intention was to receive money, not to pay money." In summarizing its approach, the court said:

"Since Kosoy was evidently aware that Epstein was the true purchaser of the shares, since control of the bank passed to him thereby, Kosoy is responsible for what happened by virtue of two things: because of he sales, which resulted in the largest debtor of the bank acquiring control of the bank; and because he remained on the board of directors until July and failed to prevent new loans from being made to Epstein, which formed the beginnings of Epstein's plot to strip the bank so as to fill his coffers and save his property; he failed to prevent this. He abandoned the bank when he sold control of it as long as he remained there."

22. In the opinion of the lower court, Filco was owned and controlled by Kosoy. "He remained the owner of Filco and controlled it, and Filco was "Kosoy's company." Since Kosoy's actions were carried out within the scope of his authority at Filco, the fact that he knew means that Filco knew. His knowledge of the bank's situation and its largest creditor's plan to gain control of it means that the company he represented, which was a formal party to the agreements, also knew it."

23. Drori is an honest man who, in the opinion of the lower court, became Epstein's "helpless"... "lackey," was "carried away" with him and "was as pliable as putty." He knew "what was going on." He knew already in July that the designation of Michael and David Rapp and Bialchik as purchasers was untrue, and that the Bank was paying for the purchase of the shares with its own funds.

24. On the basis of its findings, the District Court, ruled that Kosoy had breached his obligations towards the Bank. He violated the obligation of trust incumbent upon him as the manager of the Bank. A director owes loyalty to his company, and one who allows the theft of the company's money by fraud is liable towards it. Furthermore, Kosoy breached the obligation of carefulness towards the Bank incumbent upon him. To the Bank, he committed a "crime of negligence in abandoning the bank" to Epstein. The court saw Kosoy's main liability in breaching his obligations as a holder of controlling shares. The court said:

"Liability lies at Kossov's feet mainly because he is a shareholder in the company. A shareholder and a holder or joint holder of a controlling interest, who sells shares and thus abandons the company to a villain who robs it, is held liable for the outcome."

Kossov was also found liable by virtue of the fact that he allowed the Bank to pay for the purchase of his shares with its own funds, this in violation of section 98 of the Companies Ordinance (now section 139 of the New Version). In so doing, Kossov acted "contrary to the trust" which had been placed in him.

25. The lower court also found Filco liable towards the Bank: "Filco lent its name to the agreement for the sale of shares... All liability stemming from the agreement falls upon it as well." "Although Filco held no position in the Bank, it nevertheless took part in the injustice perpetrated by Kossov against the Bank." "Filco bears liability to the Bank by virtue of its participation in Kossov's actions."

26. Drori was found liable because of breach of his duties as a director of the Bank. In the opinion of the lower court, the power available to the court pursuant to the provision of section 78(1) of the Companies Ordinance (Section 90(a) of the New Version), which enables a director acting honestly and reasonably to avoid liability, in whole or in part, should not be exercised. In this regard, the court said:

"I originally thought that I would impose no liability on Drori... Drori knew what was happening there, but was unable to prevent it. He may have lacked the courage to resign, but he should have had the courage. However, I doubt that he acted reasonably, although he may have acted honestly. The result is that according to the law I cannot absolve him of liability."

27. After all the defendants were found liable - as mentioned, Amir did not defend himself - and it was ruled that "whatever judgment should be given should apply to Amir," the relief was also determined. The lower court ruled that Kossov, Filco, Amir and Drori should

"jointly and severally" pay the Bank 1,755,000 Israeli Pounds (linked to the Cost of Living Index and bearing interest at the rate of 3% from 21 January 1968 until payment) and \$1,633,378 (bearing interest at the rate of 7% from 21 January 1968 until payment). Costs of the hearing and fees were also awarded, in the sum of 1 million Israeli Pounds, together with Value Added Tax.

28. The court rejected the claim of Banque Commerciale. It was determined that, by virtue of the agreement between the Bank, Filco and UBS, Filco's right to receive payment had been transferred from the Bank to UBS. This transfer is not a novation: "The previous terms of the deposit and the maturity thereof remained unchanged. According to those terms, Filco is subject to the original transaction whence the debt originated." Accordingly, "Banque Commerciale Geneva did not purchase a new debt, but an old debt subject to conditions and right of retroactivity. Its claim for payment of the debt regardless of its source and terms must fail." Banque Commerciale was ordered to pay the costs of the hearing, and also fees in the sum of 75,000 Israeli Pounds.

### **The Appeal to the Supreme Court**

29. Kossoy and Filco - each represented by his own counsel - challenged the District Court's decision on a broad front. On the factual level, it was argued that the factual findings of the lower court were erroneous and defective. The representatives of these Appellants have called on us to set aside the judgment because of lack of sufficient findings upon which to base the decision. Nevertheless, we were asked in particular to examine the entire body of evidence and determine new findings in accordance therewith. In the view of the Appellants, these findings must be that Kossoy was not interested in leaving the Bank, neither in the Tiberias agreements nor in subsequent agreements. The Tiberias transaction was an honourable transaction, and did not harm the Bank, which was in a good position at the time. The sale of some of the shares, and not all the shares, was to South African investors, who were paying for the shares with their own money. This, in any case, was the opinion of Kossoy. Accordingly, there is no basis for ruling that the objective of the Tiberias agreements was to enable Epstein to withdraw funds from the Bank for his own purposes. The purpose of the "July agreements" was not to expedite Kossoy's departure, but to

provide Filco with the capital it required for its activities in Switzerland. The funding was actually provided by Feda, but - as Kossoy was aware - Feda was acting on behalf of the investments of the South African investors, and it was their funds which were used to pay for the sale. The "September agreements" indeed caused Kossoy's final departure from the Bank, and the only reason for this was his anger over the Elran affair, which had been concealed from him. In that case, Kossoy also believed that the funds came from sources other than the Bank. Both Filco and Kossoy emphasized that Filco is an independent company, which at the relevant times was neither owned nor controlled by Kossoy. On the legal level, Kossoy argued that his conduct did not involve the breach of any obligation towards the Bank. Filco argued that as a shareholder only it owned no duty of trust towards the Bank, either because a shareholder owes no duty of trust whatsoever, or because even if such a duty does exist, it is incumbent upon a controlling shareholder and Filco was not a controlling shareholder, or because Filco did not actually know what Epstein was apt to do. In that regard, it was argued that Kossoy's knowledge should not be attributed to Filco. Filco further argued that even if responsibility rests with it, it should not be exercised in the matter before us, since the funds which were to be repaid to the Bank were likely to come into Epstein's possession, and under such circumstances no ruling for repayment should be given. Finally, Filco argues that it was wrong to be found liable for the entire sum of the claim, since its liability should be limited to the sale of its shares. Kossoy and Filco both argued that it was wrong to oblige them to repay the sum of \$427,000, since this sum was obtained from sources other than the Bank. They further argued that they should not be obliged to repay the sum of \$352,000 (see paragraph 16 above), which was the subject of the claim of Banque Commerciale, since this remained in the Bank's coffers.

30. Drori joined the pleadings of Kossoy and Filco regarding everything related to the "Tiberias agreements." He contended that he believed in the existence of South African investors. In any case, he was not a party to the "Tiberias agreements" and did not take part in the preparation thereof. Drori's pleading was directed mainly towards exemption of liability pursuant to the provision of section 78 of the Companies Ordinance (section 90 of the New Version). His counsel pleaded before us that Drori acted honestly and reasonably, with no personal motive and with the objective of preventing the collapse of the Bank. He argued that if he had resigned from the Bank after the Tiberias agreements, it would have

wreaked havoc on the Bank and its clients. Regarding the relief, Drori argues that he is not obliged to make any repayment, since he never received anything.

31. Counsel for Banque Commerciale argued before us that the lower court was wrong in holding that an assignment, as distinct from a novation, was involved. Moreover, even within the framework of the assignment, the Bank was not permitted to air to UBS suspicions it had against Filco, since it was not proven that UBS acted in good faith and for value, and in any event the Bank's defences are valid against Filco alone.

### **The Factual Basis**

32. The starting point of counsels for the Appellants (Filco and Kossoy) was that the judgment of the lower court was defective, and that it lacked sufficient data for making a decision. In their opinion, the judgment was defective to such an extent that the few factual data arrived at therein were not to be relied upon, and it should therefore be set aside; the matter should be referred for re-hearing or new findings should be determined by the court of appeal. Verily, a first reading of the judgment raises difficulties. It contains inaccuracies. Errors were made in it. The chronological sequence of events was confused. It lacks express reference to a great deal of evidence submitted during the course of the hearing, and it lacks any clear ruling as to which witnesses were believed by the judges and which not. Nevertheless, after re-reading the judgment, it became evident that the inaccuracies and errors were in marginal matters, and the judgment of the lower court determined findings - and thus also determined an attitude towards the credibility of the evidence - relevant to all the main factual questions required to be decided in the appeal. Accordingly, we will not deviate from our custom, and we will not act as a lower court. We will not re-hear the case and we will not open a new page. The lower court arrived at a series of findings which served as the foundation for its decision, and we will examine whether those findings were established on the evidence before it. Should we find that the findings of the lower court are warranted by the evidence, we will uphold those findings. Should we find that the findings of the lower court were not warranted by the evidence, we will set aside the findings determined by the lower court and determine in their stead new findings - either positive or negative - as arise from the evidence, and as required by the burden of proof.

33. The lower court ruled that at all relevant times Epstein acted, in everything related to the acquisition of the shares, without having been granted any authority whatsoever (whether *ab initio* or retroactively) by the South African investors, and that the financing of the acquisition of the shares (including the sum of \$427,000) was entirely from the funds of the Bank itself. These findings were attacked by counsels for Kossoy and Filco. In their opinion, the evidence supports the view that at the time the "Tiberias agreements" were made, South African investors actually existed, and that Epstein acted with their authorization. In their opinion, there is nothing to support the finding that all of the funds came from the Bank's resources, since the sum of \$427,000, which at about the time of the Tiberias agreements was paid for Filco's shares, did not come from the Bank. Kossoy and Filco's representatives drew attention to the testimony of the Feuchtwanger couple, which was not mentioned at all in the lower court's judgment. They testified that in November 1966 they met Michael Rapp and Bedah-Bir, who told them that they were partners in the Bank. In actual fact, the two, as well as David Rapp and Morris Bialchik, denied it, but no importance should be attributed to those denials, since they stem from their fears of criminal liability in South Africa with regard to their investment in Israel. The Appellants argued that there was no reason not to give full credibility to the Feuchtwanger couple, whose testimony was the truth.

34. The lower court's findings that Epstein acted without authorization of the South African investors is based on the evidence, and we will not interfere therewith. David Rapp and Michael Bialchik testified that Epstein acted on the basis of a previous Power of attorney, which he had been given for a different matter, and that authority to invest in the Bank had neither been requested nor received. They became aware of the entire affair after the act. The lower court was entitled to prefer this testimony over the testimony of Kossoy and the Feuchtwanger couple, and to determine its findings on the basis thereof. It is also noted that this finding conformed to the other evidence, which showed that no inquiry or request had been made at any stage by investors from South Africa, neither directly nor indirectly, for repayment of their funds. There is also no evidence that any inquiries were made on behalf of the investors by any economists, accountants or lawyers with regard to possible investment in the Bank. It is difficult to imagine that a financier would invest considerable



sums of money without making any independent examination - simply by trusting Epstein - and this on the basis of a previous Power of attorney, which was devoid of any mention that the purchase of a bank was involved.

35. The lower court's findings to the effect that "the bank was paying for the shares, from the first to the last, and that includes the sum of \$427,000" were corroborated by the evidence with regard to all the payments, with the exception of the sum of \$427,000. It is obvious from the evidence - nor was it ever disputed - that the funding of the transaction between Orico and Appelico of the first part and Ibicor of the second part (Exhibit 184, which constitutes a part of the Tiberias agreements), came from the increase ("opening of the tap") in Ibicor's credit at the Bank, without any financial contribution from outside the Bank. It is equally evident - and neither was this ever disputed - that the financing of the "July agreements" (Exhibit 9) and the "September agreements" (Exhibits 94 and 60) was provided by Fedra from funds it obtained from IERA, which were the Bank's funds. On the other hand, there is no basis for the ruling that the sum of \$427,000 also came from the Bank's funds. Indeed, the lower court itself noted that "The bank's representative argued in his Statement of Claim that he has no knowledge of the source of the consideration of Exhibit 8, which was attributed to the period preceding 30th January 1966, and he repeated this in his final Summation. In so far as this involves an admission, the sum claimed with respect to Exhibit 8 and Exhibit 9 is reduced by \$427,000." This notwithstanding, in the relief granted by the lower court, the Defendants were ordered to pay this sum as well.

36. The District Court ruled that in the "Tiberias agreements" control was transferred to Epstein, and that Kossoy was aware of it. This finding is established upon and is rooted in the evidence. According to the Tiberias agreements, Ibicor purchased 15% of the shares of the Bank, and Rapp and Bialchik purchased 20% of the shares of the Bank. By adding these shares to Epstein's personal shares (32.7%), the formation of a "control package" was made possible. The lower court had before it ample evidence of the fact that all of the purchasers were in fact a single "package," under Epstein's control. Ibicor belonged to the "Epstein conglomerate," and was its major shareholder. Kossoy knew of this. Even if Epstein did not purchase Filco's shares, and the purchasers were Rapp and Bialchik, Epstein in effect had control, and Kossoy knew it.

37. The lower court did not satisfy itself with the ruling that control passed to Epstein in the "Tiberias agreements." According to the approach adopted by the lower court, in Tiberias an "over-all and general" arrangement was made "to eject Kossoy from the bank and to put Epstein in control." This approach is supported by the findings of the lower court that Kossoy knew that the funding of the acquisition of the shares would come only from the Bank's resources, and that Epstein's objective in effecting the acquisition was to use the Bank as a source of funds for all his affairs, including acquisition of the shares in the Bank, and that this would cause the Bank to collapse. This is also the reason for the lower court's conclusion that Kossoy "abandoned" the Bank to someone who was plotting to strip it bare. My first impression was that the lower court had further ruled that agreement had been reached in Tiberias for the sale of all of Kossoy's shares, but after re-reading it I concluded that there was no such ruling in the judgment, and that the general and over-all agreement entered into was to transfer control, and not necessarily to sell all the shares. As for Kossoy's desire to "flee" from the bank, my first impression was that the lower court ruled that this desire took shape within the framework of the "July agreements." This is doubtless what was meant by the passage in the judgment to the effect that: "I have no doubt that in July 1966, when Kossoy saw what was happening at the bank after he had sold the majority shares thereof, under control by Epstein and to the favour of Epstein, he decided to run for his life from the bank." Further perusal of the judgment indicates that the lower court was of the view that the "Tiberias agreements" themselves were intended to eject Kossoy from the Bank.

38. As we have seen, the evidence serves as the basis for and provides the roots of the lower court's ruling that control of the Bank passed to Epstein in the "Tiberias agreements." However, is there support for the lower court's ruling that in the "Tiberias agreements" Kossoy attempted to run for his life from the Bank, and in so doing abandoned it? I believe that this difficult ruling can stand only if there is a basis in the evidence to show that Kossoy knew prior to the "Tiberias agreements" that the funding of the purchase of the shares would come from the Bank itself. Indeed, if Kossoy knew prior to the Tiberias agreements that the funding for the acquisition of the shares would come from the Bank itself, then it involves "abandoning" the Bank and a desire to "flee," since - as we will see - finance on

such a large scale, with no collateral, led to the collapse of the Bank. However, if Kossoy did not know prior to the Tiberias agreements that the funding would come from the Bank's resources, and if he believed that the funding would come from sources outside the Bank, then there is no basis for the ruling that he "fled" the Bank and "abandoned" it to someone who planned to strip it. It must be remembered that prior to the Tiberias agreement the Bank was not in a state of collapse, and the collateral was more than sufficient to cover the debts. Epstein's personality and Amir's personality, as far as the parties were aware, were of themselves insufficient to indicate that Epstein wanted to strip the Bank of its assets, and that Amir would assist him. Dr. Goldenberg rightly pointed out that we must assess the facts as the parties knew them prior to the "Tiberias agreements," not as we now know them.

39. When the Tiberias agreements were made, did Kossoy know that the funding of the acquisition of the Bank's shares would come from the Bank's own resources? It appears to me that discussion of the question requires that proper distinction be made between the various transactions made in Tiberias. As mentioned (see paragraph 10 above), two transactions of sale were made in Tiberias, one a transaction in Israeli Pounds whereby shares in the Bank held by Appelico and Orico were sold to Ibicor for 1,755,000 Israeli Pounds (Exhibit 184), and the other a transaction in dollars, whereby shares in the Bank held by Filco were sold to Rapp and Bialchik in consideration for \$1,237,000 (Exhibit 8).

40. The transaction in Israeli Pounds (Exhibit 184) was funded entirely from the Bank's resources. Part of the price (300,000 Israeli Pounds) was transferred to the vendors by way of crediting their account with the Bank and at the same time debiting Ibicor's account. The balance (1,455,000 Israeli Pounds) was transferred by releasing Appelico and Orico from their liabilities to certain creditors and transferring the obligation in respect thereof to Ibicor, whilst debiting Ibicor's account. For the purpose of financing Ibicor's liabilities as aforesaid in the sum of 1,755,000 Israeli Pounds - as well as for the purpose of financing the bank guarantee relating to Ibicor's purchase of Kimche's shares - Ibicor's credit at the Bank was increased by the sum of 2.3 million Israeli Pounds. This was effected on 10 February 1966, at a meeting of the board of directors of the Bank. On this matter, the lower court ruled that "Ibicor had no money, merely real estate, such as the Zirahtron theatre in Tel

Aviv. Who then paid for these shares? Once again, it was the Bank, from the Bank's own funds. Everyone knew that Epstein himself had no money at that time." This finding is properly established in the evidence, both in regard to the fact that the financing of Ibicor's acquisition was made entirely with the Bank's funds, and in regard to the fact that Kossoy was aware of it. Kossoy himself testified that he knew that Ibicor's indebtedness to the Bank would increase by the sum required to cover the purchase price.

41. What of the dollar transaction (Exhibit 8)? Kossoy testified that he believed that Filco's shares had been purchased by South African investors and that they were paying for them. From the lower court's findings it seems that this testimony was not accepted by the judge. Nevertheless, rejection of Kossoy's testimony is insufficient to result in a positive finding to the effect that Kossoy knew that no South African investors existed. The lower court heard a large number of other witnesses, who testified that they also believed that foreign investors had joined the Bank. Drori, whose testimony was accepted by the judge ("his testimony has convinced me"), related that he himself had believed prior to the "Tiberias agreements" that the South African investors existed, and that they were financing the purchase of Filco's shares. As for the circumstances in general, they can be interpreted in several ways. In support of the lower court's conclusion, we may point out the following: *Firstly*, in the first draft of the Filco transaction, a company called "Efi" is named as the purchaser (Exhibit 400), and the transaction with it is a cash transaction. "Efi" no longer appears in the second draft, instead of which David and Michael Rapp, Morris Bialchik and Selfins Guzel were to purchase the shares in a credit transaction (Exhibit 401). In the final agreement (Exhibit 8), the names of Rapp and Bialchik appear, whilst Selfins' name was omitted. None of this indicates the serious existence of foreign purchasers, but rather manipulation by Epstein who was replacing the "purchasers," who were merely front men. This is also supported by the fact that it was not Epstein who signed the contracts, but Schrem, by transfer of Powers of attorney from Epstein, as if he were trying to conceal something or to hide himself. *Secondly*, in discussions held at the Bank soon after the "Tiberias agreements" (e.g., on 20 January 1966), there is no mention whatsoever of the existence of the foreign investors. Accountant Bavli pressed his demand that Epstein's shares be sold, but nobody mentioned to him that there had been a change at the Bank and that the South African investors had joined it. On 1 February 1966, Drori wrote a letter to a

friend, in which he mentioned that a "revolution" had taken place at the Bank, and that Epstein had joined, but he made no mention of the existence of the foreign investors. When Bavli met Kossoy (on the 17th or 18th of April) and expressed his concern over the increase in Epstein's debt, Kossoy did not inform him that a change had taken place at the Bank, in that South African investors had joined it.

On the other hand, we may point out several considerations which rule out the lower court's approach: *Firstly*, most witnesses testified, as we saw, that following the "Tiberias agreements" they believed that South African investors had actually joined the Bank. In actual fact, \$427,000 had been paid by parties from outside the Bank, which reinforced the belief that foreign investors had joined the Bank. *Secondly*, according to the terms of sale, the payments for Filco's shares were to have continued until September 1967, which indicates trust and confidence that the purchasers were able to shoulder the financial burden. Both Kossoy and Appelbaum continued to operate at the Bank, both as shareholders and as directors, which indicates their confidence in the Bank's situation.

42. On the basis of this body of evidence did the Bank satisfy its burden of proof that according to the "Tiberias agreements" Kossoy "fled" from the Bank? Did he know when he made the agreement with Epstein in Tiberias that Epstein's aim was to strip the Bank and finance all his affairs, including the acquisition of the shares in the Bank, with the Bank's funds? I believe that the Bank has satisfied this burden of proof and has shown that Epstein did acquire control of the Bank. The Bank has also proven that in actual fact the funds for the purchase - with the exception of the sum of \$427,000 - came from the Bank itself. The Bank has also proven that Kossoy knew that Ibicor's purchase would be made with the Bank's money. On the other hand, the Bank has failed to satisfy the burden of proof, has nor it shown with sufficient certainty- as required in civil law-that Kossoy and Filco knew that the funding of the sale of Filco's shares would also be made with the Bank's shares. It should be borne in mind that the burden resting on the Bank in this case is not light, since proof of breach of trust is involved here. The Bank has failed in this respect. In my opinion, the scales are evenly balanced, and there is nothing at all to show that in selling Filco's shares Kossoy knew that the Bank was providing the funds. It is difficult to ignore the fact

that the sum of \$427,000 was in actual fact paid by sources outside the Bank, and that not only Kossoy but many others (mainly Drori) thought that foreign investors actually existed. Since this is so, I believe that there is insufficient basis for the lower court's ruling that in the "Tiberias transaction" Kossoy knew that Epstein would strip the Bank and cause its collapse, and that in selling the shares in Tiberias he "abandoned" the Bank. As long as there was any belief in the participation of investors, no finding of abandonment can be established. I therefore believe that the hypothesis that Kossoy "fled for his life" in Tiberias, is not sufficiently established. Indeed, it is difficult to reconcile flight from the Bank with the extended terms of payment (until September 1967) and with the fact that neither Kossoy nor Appelbaum sold all of their shares in Tiberias.

43. In analyzing matters thus far, we have presumed that Kossoy controls Filco's activities. Counsel for Filco attacked this presumption. Filco was founded in 1964 in Luxemburg, and at the time of establishment it was controlled by Kossoy. In time, the number of Filco shares owned by Kossoy dwindled, and the company was registered on the stock exchange. Kossoy was not a director, and it was administered formally by directors, who carried out the formal acts as required by Luxemburg corporate law. Kossoy had a general Power of attorney from Filco to act in its name. The lower court ruled that Kossoy was the "owner and controller of Filco." The question of ownership has not been made sufficiently clear, and no finding can be determined on this matter. On the other hand, Kossoy's control was made fully clear to the lower court, and its finding on this matter is based on the evidence. Kossoy acted with Filco as if it were his own. This was testified to by Drori and Bavli. The formal directors did as he bid them. He made all the decisions as he saw fit.

44. Thus far we have examined the findings of the lower court regarding everything related to the "Tiberias agreements." We will now move to the findings of the lower court regarding everything related to the "July agreements" (see paragraph 13 above). On this matter, the District Court ruled that "to my mind, there is no doubt that in July 1966, when Kossoy saw what was happening at the Bank after he sold the majority shareholding to Epstein, placing it under his control, he decided to flee for his life from the bank." In the course of the hearing on this ruling, the lower court cited Kossoy's contention that he wished to expedite his departure because of the Elran affair. The lower court erred in so

doing, since Kossoy found out about the Elran affair only after the "July agreements" had been concluded, and it was not enough to affect him regarding these agreements. This error notwithstanding, I have no doubt whatsoever that the lower court's findings that in the "July agreements" Kossoy wished to flee for his life from the Bank are firmly established in the evidence. The meaning of "flight" is total departure from the Bank, both by Filco and by Kossoy. Kossoy testified that he wished to make early payment to Filco because the latter needed the money. It is evident that this explanation by Kossoy was not accepted by the court. On the other hand, the accountants testified that they were concerned over the growth in credit extended to Ibicor. The accountants stated that consequently they would have to reconsider their attitude, and that they would be unable to approve the Bank's balance sheet unless far-reaching changes were made. They gave the Bank's management eight months to rectify the situation. Kossoy was apprised of all this personally. They advised him that the solvency of the Bank was in jeopardy and that the existence of the Bank, which was in a severe crisis (see paragraph 11 above), was threatened. This information was sufficiently convincing for Kossoy to take steps for Filco's immediate departure and to obtain a renewed option for Appelico's complete departure and for his own. Of course, if the Bank had had its own sources of funds, by means of which the necessary remedial action could have been taken quickly, the situation would have been likely to change. However, the Bank had no such funds, and Kossoy knew it. At the time he entered into the "July agreements," Kossoy knew that the payments for the shares would come from the Bank's funds, not from South African investors. Thus testified Drori, and the court accepted his testimony. Corroboration thereof can be found in Schrem's testimony - which was cited by the lower court and found to be credible in part-that he himself had doubts, at the time he signed the "July agreements" in the name of the purchasers as to whether Rapp and Bialchik were the true purchasers of the Filco shares. Moreover, Filco's balance sheet of that year states that the reason for making early payment was because the performance of the original payment could not be assured. In their arguments before us, counsels for Kossoy and Filco attempted to convince us that the evidence taken as a whole shows that at that stage Kossoy still believed that South African investors actually existed, and that the funds for the "July agreements" would be provided by them. The advocates were aware that Drori's testimony, which was believed by the lower court, stood in their way. In their desire to overcome it, they asked us to rule that Drori should not have been

believed, because he had an interest in assisting the Bank, in order to save his skin. We cannot accept this line of argument. The court believed Drori and the finding determined on the basis of this belief is fully reconcilable with all external circumstances. We have seen that the lower court's main theory was that the intention of the sale of the shares was to enable Kossoy and Filco to flee from the Bank, since they knew that the funds for the purchase of the shares would come from the Bank's own resources, and this was likely to lead to the Bank's insolvency. As mentioned, we have determined that this theory is not based on the evidence in, so far as the Tiberias agreements are concerned. But in our opinion, this theory is firmly established on the evidence in so far as the "July agreements" are concerned. The ruling by the lower court that Kossoy "abandoned the Bank when he sold control thereof," is firmly established on the evidence, in so far as it concerns abandonment with regard to the financing of the purchase of shares in the Bank, those sold previously as well as those to be sold subsequently from its own resources.

45. In September, as we have seen, further and final agreements were made, which led to Kossoy's complete departure from the Bank. As mentioned, these agreements related to Kossoy's shares in the Bank (Exhibit 94) and to Kossoy's shares in Appelico, which in turn held shares in the Bank (Exhibit 60). The lower court did not deal with these agreements separately, and it seems to have confused them to some degree with the "July agreements." Nevertheless, the lower court's general theory is considerably reinforced by the circumstances of the preparation of these agreements. In both agreements, Fedá was the purchaser. It was obvious to Kossoy that Epstein was the real purchaser. It was obvious to Kossoy that Fedá's funding was being provided by the Bank, and - according to the accountants' warning - this constituted a threat to the Bank's existence, made it insolvent and overdrew its reserves. Counsels for Kossoy and Filco argued that the Elran affair was the motive for the September agreements. The lower court mentioned this incident, noting that the expediting of the departure preceded the abandonment of the management of the Bank.

## **Liability**

### **Kossoy and Drori: Directors' Liability**



46. Kossoy and Drori were directors of the Bank, one as a "director" and the other as "manager" at all the relevant times. In these capacities they approved the sale of shares in the Bank and carried out all the actions required to finance the purchase with the Bank's funds. Are they under any liability towards the Bank by virtue of those actions, and if so, to what relief is the Bank entitled?

47. There is a comprehensive, complex network of legal relationships between a director and his company. The director is the "brain" and "nerve center" of the company's activities. He acts in its name with outsiders and manages its internal affairs. A lengthy series of provisions - some embodied in the Companies Ordinance [New Version], others in the memorandum and articles - grant him powers with regard to the management of the company's affairs. For certain purposes, he is an organ of the company; for other purposes, he is its agent; at times he can be considered to be an employee. In all his activities at the company, whether day to day management or formulation of policy and supervision of acting management, he wields extensive power. This power is vested in him on behalf of the company. However, there is some fear - and experience shows that this fear is well founded - that the person wielding the power will abuse it. The temptation to do so is great. That is why it is necessary to enact a series of laws to restrain the powers, since "power without liability resembles lawlessness" (A. Procaccia, "Dissolution of Companies at the Request of Minority Shareholders," *Mishpatim* VIII (5738) 13, 17). The problem is not limited to the relationship between directors and companies. Similar power-subservience relationships exist in other situations, both in the area of private law (such as principal-agent, guardian-legally incompetent; trustee-beneficiary; promoter-company) and in the field of public law (public servant - public authority). The general principles of law can certainly help us solve the problem. Thus, for example, criminal law lays down a series of prohibitions to deter a director from abusing his power. Special provisions were enacted in regard to violations by directors (*e.g.*, see sections 423, 424 and 425 of the Penal Code, 5737-1977). Similarly, the law of torts lays down rules for proper conduct which must be followed by the director. Thus, for example, there are "friendly relations" between the director and the company (within the meaning thereof in Section 36 of the Civil Wrongs Ordinance [New Version]: C. A. 725/78 [1]), and the director must take all steps that a reasonable director would take

under the circumstances (according to Section 35 of the Civil Wrongs Ordinance [New Version]: see T. Cohen, "Duty of Care of Director of Registered Company," *Mechkerei Mishpat* 1 (5740) 133). These areas of the law are themselves insufficient to deal directly with the problematic aspects created by the power of control vested in the director. The solution to this problem lies in the concept of loyalty. The law imposes a sense of trust on a person who holds power, thus helping to "create supervision and impose restraint on the holder of power in exercising his power" (Supreme Court of Justice 531/79 [2]), at 570.

48. The principle of trust has wide application. It is applicable to every situation where someone has power and control over another (see L.S. Sealy, "The Director as Trustee" [1967] *Camb. L.J.* 83). Accordingly, it is applicable to principal-agent relationships, since the agent exerts control over the power to contract in the name of the principal. The principle of trust is similarly applicable to guardian-legally incompetent relationships, since the former controls the actions and assets of the latter. Thus also the applicability of this principle to relationships between a promoter and the company which is to be established, since the promoter controls it. The list of situations to which trust relationships pertain is not a closed list, and they pertain "to a wide range of legal relationships" (C. A. 793/76, Motion 506/78 [3], at 557-Judge Y. Cohen). One of those legal relationships is that between a director and his company. The director controls the company. He manages its affairs externally and internally. All this requires that the power be accompanied by responsibility, since power without liability will result in chaos.

49. The obligation of trust is a general obligation, and is incumbent upon the holder of power. The meaning of this obligation is that the holder of the power must act in good faith, honestly, and for the purpose of doing his job well. It is a general principle which is inherent in our system, and putting it into practice requires concretization (see T. Frankel, "Fiduciary Law," 71, *Calif. L. Rev.* 795 [1983]). Judge Frankfurter rightly stated in *Securities Commission v. Chenery Corp.* (1942) [19], at 85-86:

"...to say that a man is a fiduciary only begins analysis. It gives direction of further inquiry: To whom is he a fiduciary? What obligations does he

owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"

These words apply particularly to the matter of the obligation of trust incumbent upon the director. This obligation raises many questions: To whom is the director obligated? Does the obligation apply towards the company only, or does the director also owe loyalty to the shareholders, employees and perhaps even to others connected to the company (see F.H. 7/81 [4], at 695)? What does the obligation of trust entail? What relief is given against a director who violates his obligations, and other such questions. However, we will not, of course, answer all these questions in this opinion. Within the present framework, we need examine only two questions: *Firstly*, what does the obligation of trust entail with respect to the sale of shares in the company, and was it violated in the present case? *Secondly*, is the company entitled to compensation for the damages it suffered as the result of the violation of trust?

50. The obligation of a director makes him act in good faith, honestly and for the purpose of fulfilling his function as a director, as Judge Sheintag said in the case of *Litwin v. Allen* (1940) [20], at 677-78. In reference to a director, the Judge said that he :

"... owes loyalty and allegiance to the company - a loyalty that is undivided and an allegiance that is influenced in action by no consideration other than the welfare of the corporation. Any adverse interest of a director will be subject to the scrutiny rigid and uncompromising. He may not profit at the expense of his corporation and in conflict with its rights; he may not for personal gain divert unto himself the opportunities which in equity and fairness belong to his corporation. He is required to use his independent judgment. In the discharge of his duties a director must, of course, act honestly and in good faith..."

The words of Justice Cardozo in this context are well known:

"Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behaviour." (*Meinhard v. Salmon* (1928) 119], at 463).

These fundamental principles are also applicable under our legal system. In truth, they were not formally expressed in the Companies Ordinance [New Version], since the legislature left the development of this subject to the courts. The Ordinance is at times merely a skeleton, taking on flesh and blood in the form of case law. Indeed, the courts perceived this fundamental principle at the very beginning of case law, and has since been developing it according to our needs, as part of the Israeli version of common law. Over thirty years ago, Justice Chesin already determined:

"Company directors act as agents and servants of the company. To a certain extent, they are trustees of the company, and as directors the intent of their actions must be for the good of the company, and for its good only. No other personal, extraneous interest may influence them or distract them from the company and its good" (Motion 100/52 [5], at 889).

There have since been many rulings with the principal requirement that the director act loyally in serving the interests of the company. A director knowingly acting to the detriment of the company is in breach of his obligation towards it. A director acting without commercial logic, knowing that his acts will harm the company, is in breach of his obligation towards it. A director must act honestly in his relations with the company (see O.M. (T.A.) 3788/75 [10], following *Mills v. Mills* (1937-38) [18]), and when substantive suspicion arises that he is not acting in good faith and for the good of the company, the burden to refute it rests on him (C. A. 667/76 [6], at 287). The standards of behaviour, as Justice Cardozo said, are not those of the marketplace and are not the result of a struggle between equal forces. Therefore, the director may not be in a situation of conflict of interest

between the good of the company and his own or someone else's good (C. A. 247/47 [7]; C. A. 267/55 [8]; C. A. 667/76 [6]). The duty of loyalty is a personal duty, and incorporates the duty to prevent other directors from breaching their obligations. These rules reflect the various aspects of the fiduciary, but are not exhaustive, since the list of situations to which the duty is applicable is not a closed list. The intention of the trustee is to provide a solution for commonly occurring problems in real life. It does not rest on its laurels. The general principle gives rise to secondary rules, and as commercial life develops, new secondary rules are created, to protect the intent of the fundamental principle.

51. What remedy is available to a company against its director who breached the obligation of loyalty towards it? This question should not be answered restrictively, since along with the development of the various duties of loyalty, there is a parallel development of remedies, for the "punishment must fit the crime." It would be unfortunate if the law were to recognize the various obligations but fail to provide suitable solutions for the breaches thereof. The relief must suit the duty, and the remedy must suit the breach. In this matter also, we have no need to examine all aspects of the subject, since the question arising in this appeal is merely thus: Is the company entitled to receive from the director all the monies it expended as a foreseeable result of the director's breach of trust? The answer to this question is *in the affirmative* (see *Wallersteiner v. Moir* (1974) [11]), at 1015). The director must make available to the company all the funds it lost as the foreseeable result of the breach of his obligation towards it (see L.C.B. Gower, "Principles of Modern Law," London, 4th ed., by L.C.B. Gower and others, 1979 at 607). The term "repayment" may be adopted in this regard, although the director does not repay what he received from the company, since the company's funds may sometimes be transferred directly to a third party, without the director receiving a penny. The term "restitution" may also be adopted in this regard, although the director is not compensating the company for the damaging act he committed towards it, but ensuring the return of the money it expended as a result of the breach of his duty of loyalty towards it. This can be interpreted as a form of special compensation (that is, compensation which is not damages: see Gower, *ibid.*). In effect, the semantic rubric is not decisive. It is the principle that is decisive, and its meaning is that the company be given effective remedy, with the aim of redressing the civil balance. Accordingly, a director who breached the duty of trust he owes the company, must "repay"

the company or "compensate" it or "indemnify" it for the money it expended as a foreseeable result thereof, even if the money was not received by him, but by a third party (see R.R. Pennington, *Company Law* (London, 4th ed., 1979) 549). If several directors all breached their individual duties, thus causing the company to lose money, the aforesaid liability for indemnity rests on the directors "jointly and severally" (see *In re Carriage Co-operative Supply Association* (1884) [12]; *In re National Funds Assurance Company* (1878) [13]; *Ramskill v. Edwards* (1885) [14]).

52. In applying these tests to the circumstances of the matter before us, did Kossoy and Drori act with the degree of loyalty required of them as directors of the Bank? As we have seen, no breach of trust can be attributed to them regarding the sale of Filco's shares in the Tiberias agreement. Kossoy and Drori believed that the purchasers of the shares were South African investors, and there is no breach of trust in the transaction with them. On the other hand, the two breached the duty of trust they owed the Bank regarding everything related to the Appelico and Orico transaction in the "Tiberias agreement," and everything related to the July and September agreements. As mentioned, commencing in March 1965, extensive discussions were held at the Bank regarding the provision of credit to Epstein and his group. The approach which was acceptable to the board of directors and active management was that the good of the company required the "closing of the tap" and refusal of additional credit to Epstein. Kossoy himself expressed this view by stating that "The good of the Bank does not permit the credit line to be expanded or continued" (Exhibit 40 of 3 May 1965). But here, in spite of this clearly stated attitude, "the tap was opened" following the "Tiberias agreements" and the Epstein group received credit from the Bank for the sale of the shares in the Bank held by Appelico and Orico, in the sum of 1,755,000 Israeli Pounds. This act was not made in good faith and for the good of the Bank. There was no commercial justification, in terms of the Bank, for extending this credit to Epstein. Not only was this extension of credit tainted with illegality - since the company was financing the purchase of its own shares, in violation of the prohibition specified by section 139 of the Companies Ordinance [New Version] - but in commercial terms the transaction endangered the solvency of the Bank. It was made without any further collateral. Therefore, even if Drori and Kossoy believed at the time that South African investors would join the Epstein group, they should not have assisted in the extension of further credit without

appropriate collateral. No such collateral was provided. In performing this transaction, Kossoy placed himself in a position of conflict of interest; placing his own interest - as a shareholder in Appelico and Orico - before the Bank's interest. This breach of loyalty increased in severity when the July and September agreements were made, in which the Bank also financed - illegally - the purchase of its own shares, and the directors knowingly assisted it, thus breaching the obligation of loyalty they owed the Bank. Drori, who gave the actual instruction to transfer the funds, was aware that the July and September agreements were being financed by the Bank, and that the Bank was parting with its money without sufficient collateral. He caused injury to the Bank with his own hands. Within the framework of the July and September agreements, Kossoy acted in his own interests, not in good faith and for the good of the company. He knew that with the approval of the sale of the shares, Epstein and his group were acquiring control of the Bank. He knew that they would finance the purchase with the Bank's resources. He knew that this would make the Bank insolvent. In spite of everything, he assisted in the performance of the transaction as a director, this so as to flee from the Bank as a shareholder. Kossoy was aware - following the accountant's findings - that the solvency of the Bank was in danger, and that it was undergoing a severe crisis, which Epstein would cause to worsen. By all this, Kossoy breached the fiduciary duty he owed as a director of the Bank.

In his arguments before us - as in his arguments before the lower court - Mr. Amitai, pleading for Drori, depended mainly on section 90(a) of the Companies Ordinance [New Version], which states:

"The court is permitted, under such conditions as it sees fit, to exempt an officer from liability as aforesaid in section 89, in whole or in part, if it found that he acted honestly and reasonably and that he should lawfully be forgiven therefor."

Mr. Amitai argues that Drori acted honestly and reasonably and that accordingly "he should lawfully be forgiven" for the breach of the obligation of trust. The provision of Section 90(a) of the Companies Ordinance [New Version] is difficult, and study of the literature and English case law does not make it any easier to understand. If the director

acted honestly and reasonably, what obligation did he breach, and according to what criteria should he be "forgiven," and what does this forgiveness involve? These questions are evidently not simple at all, but we have no need to resolve them, since in our opinion Drori acted dishonestly and unreasonably. For Drori knew that the financing of the purchase of the shares was being made with the Bank's money. He assisted in it, in spite of the damage it was likely to cause the company. Drori clearly saw how the Bank's interests were being harmed by the illegal activities of the board of directors and the other managers, but did nothing to prevent it. Thus, for example, it is natural under such circumstances to bring all the facts, without any exception whatsoever, to the notice of the accountants and the Bank of Israel. He failed to do so. It is true that Drori acted neither in his own interest nor sought any benefit for himself. In this respect, his situation differs from that of Kossoy. However, that fact alone is insufficient to entitle him to the "forgiveness" specified in Section 90(a) of the Ordinance, a condition of which is that the director acted honestly and reasonably. Drori failed to satisfy these conditions (see *Selangor United Rubber v. Craddock* (1968) [15]).

54. To what relief is the Bank entitled from Drori and Kossoy? As we have seen, the two violated their functions, each violating his own function by his own actions. Their actions caused a single damage to the Bank, for which they are liable jointly and severally. The damage they caused the Bank is as follows: *Firstly*, the extension of credit in the sum of 1,755,000 Israeli Pounds for the purchase of shares in the Bank from Appelico and Orico; *secondly*, the extension of credit for the purchase of Filco's shares (in the July agreement), the purchase of the balance of Appelico's shares (in the September agreement), and the purchase of Kossoy's personal shares (in the July agreement). For the purchase of Filco's shares, the Bank provided credit in the sum of \$740,000. Kossoy and Drori must repay this sum in entirety, regardless of the question of whether or not the funds were received by them. For the purchase of Kossoy's personal shares, the Bank provided credit in the sum of \$10,983, and Drori and Kossoy must repay these sums to the Bank. For the purchase of Appelico's shares, the Bank paid \$812,000. Of this sum, \$352,000 remained in the possession of the Bank, and forms the basis for the claim of Banque Commerciale. Since Banque Commerciale's appeal should be dismissed, this sum is available to the Bank directly, and no ruling is made in favour of the Bank in respect thereof against Drori and Kossoy. Accordingly, Kossoy and Drori must compensate the Bank for the sale of



Appelico's shares in the sum of \$460,000. Thus Kossoy and Drori's total liability, jointly and severally, is for the sum of 1,755,000 Israeli Pounds and \$1,210,983.

### **Filco: Shareholder's Liability.**

55. Filco and Kossoy are not one and the same. The latter was a director of the Bank, who by his actions breached the fiduciary duty he owed the Bank as one of its directors. Filco was not a director of the Bank, nor was it bound by any duty of a director. Filco was, however, a shareholder in the Bank. It belongs to the Appelbaum-Kossoy group, which controlled the Bank. As a shareholder, and a member of the controlling group, is it bound by any duty towards the Bank? Is a shareholder in general, and a controlling shareholder in particular, bound by any duty towards the company? The starting point of the principle of English common law is that a shareholder is entitled to do whatever he wishes with his shares, and is not bound by any duty, neither to the company nor to the other shareholders. A share is property, and the shareholder is entitled to do whatever he wishes with his property (see Gower, *supra*, at 615). This approach has never been absolute, since English common law recognized the duty of a shareholder not to commit a fraud on the minority. Within this framework, the duty of the shareholder to act in good faith and for the good of the company has been recognized (see *Allen v. Gold Reefs of West Africa Limited* (1900) [16], at 671) as has the duty to act honestly towards it (see *Scottish Co-operative Wholesale Society Ltd. v. Meyer* (1959) [17]). Unlike the narrow English approach, a different approach has been developed in the United States, where a controlling shareholder is under a duty of loyalty both in wielding control within the company and in the sale of his shares, and this duty is incumbent upon him towards the company and towards the minority shareholders (see H.G. Henn and J.R. Alexander, *Laws of Corporations* (St. Paul, 3rd ed., 1983) at 653). Israeli case law has yet to deal with this matter at length, although it has been ruled that in a private company, which is similar to a partnership in this regard, a shareholder may owe a duty of trust towards the other shareholders (C A. 283/ 62 [9]), this in parallel to the recognition by Israeli case law that shareholders owe a duty not to act in a manner resulting in a "fraud on the minority" (see A. Felman, *Applied Israeli Corporate Law* (Karni, 3rd ed., 1981) vol. II, at 594).

56. Within the scope of this appeal, we have no need to discuss at length whether a shareholder is under any general duty of loyalty towards the company and towards the other shareholders. We are dealing with a new matter, with extensive practical and theoretical implications, and we will therefore do well if we act cautiously in developing this matter, answering any concrete questions arising and aiming to formulate an over-all approach on the basis of past experience. For the purpose of the appeal before us, the following proposition will suffice: a controlling shareholder who wishes to sell his shares owes a duty of loyalty to the company with respect to the sale, and must act in good faith and honesty toward it, and he will be in breach of his duty if he sells his shares to a buyer who to the best of his knowledge will strip the company of its assets and lead to its insolvency. This duty has been recognized in the United States for many years (see *Insuranshares Corporation v. Northern Fiscal Finance Corp.* (1940) [22]; *Levy v. Feinberg* (1941) [23]; *Dale v. Thomas H. Temple Co.* (1948) [24]). In this regard, where the transaction takes place in a number of stages, which in commercial terms could be viewed as a series, its entirety can also be viewed as a single entity in legal terms. Accordingly, a breach of loyalty can also be attributed to a shareholder with regard to actions which are to take place in the future, provided that they are foreseeable and constitute a part of the entire scheme, or series of actions (see *Pepper v. Litton* (1939) [25]). The basis of this duty rests on the fundamental principle discussed earlier: the controlling shareholder wields power in the company. He controls the property of others. The source of this power is the controlling shares, which entitle him to vote at the shareholders' general meeting and to appoint directors. Upon transferring this power to the purchaser, these rights are accorded to the latter. This power is likely to be abused. Accordingly, the law imposes a duty of trust upon the shareholder, so as to prevent him from abusing the power (see F.H. Easterbrook and D.R. Fischel, "Corporate Control Transactions" 91 *Yale L.J.* 698; A.A. Berle, "Corporate Powers as Powers in Trust" 44 *Harv. L. Rev.* 1049 (1930-31); D.C. Bayne, "A Philosophy of Corporate Control" 112 *U. Pa. L. Rev.* (1963-64) 22). It is true that a share is property, which its owner may treat in any way he desires. These options, however, are not unlimited. Shares may not be used to create a disposition which will, to the vendor's knowledge, lead to the company being stripped. The shareholder may not act with the attitude of "*apres moi le deluge*." He must consider the company he controls. He may not sell his shares to a

purchaser with the knowledge that by the sale the purchaser will gain control of the company, exploit it, and cause its demise.

57. One may well ask what is the source in our law of this duty of loyalty of shareholders? We have already provided the answer. It is a known, recognized principle in our law that a holder of the controlling interest is subject to a series of duties of loyalty, which are designed to limit the one in control from abusing his power. This principle is expressed in many branches of the law, and is also expressed in corporate law. Accordingly, the duty of loyalty is incumbent upon the promoter and upon the director. By virtue of the self-same principle, the duty of loyalty also rests upon the holder of the controlling shares with regard to their sale. The promoter, director and controlling shareholder wield power, which they hold in trust, as Professor Berle said more than fifty years ago, "corporate powers as powers in trust" (see Berle, *supra*, and *Pepper v. Litton* (1939) [25], at 306). Indeed no formal specific recognition of this duty of loyalty on the part of a shareholder has yet been made in our legal system, but the fundamental principle upon which it is based has been part of our system for years. On the basis of this well-known, recognized fundamental principle, we are fully entitled to deduce new secondary duties, to suit our needs. An example of another field in which there has been a similar development is the field of negligence in torts, in which from time to time this court recognizes new duties of care in regard to negligence - this on the basis of the general principle of negligence as recognized by our system. This being so, we are no longer required to examine whether the very same result could be arrived at on the basis of the application of the principle of good faith specified in Section 39 of the Contracts Law (General Part), 5733-1973.

58. I have already stated that the duty of loyalty requires concretization, within which the unique legal relationship upon which the duty of loyalty is based must be expressed. The content of this duty of loyalty is not identical in all legal relationships in which it lies. The duty of loyalty of a director is not the same as the duty of loyalty of a shareholder. It must not be forgotten that a shareholder is an owner of property, and according to the general law of title, he is entitled to do whatever he pleases with his property. This freedom is not unrestricted, since one of the restrictions derives from the fact that the holding of the share gives him control of the company and this control requires him to act honestly, in good faith

and for the good of the company. This conduct - which is part of the general regime of the duty of loyalty - is the result of a suitable balance of the right of ownership on the one hand, and control of the company on the other. The need for this balance is unique to a shareholder, and is not present in other relationships. A director is not permitted to sell his position, and there is no need to balance any such "freedom of sale" with his status as a director. Therefore, one cannot say that the duty of loyalty of a controlling shareholder is the same as the duty of loyalty of a director. Each duty of loyalty has its own content, since every power has its own extent. What balance is appropriate in the case of a controlling shareholder? This question has many facets, and we are interested in the balance appropriate to the sale of shares. In the matter at hand, it may be said that the controlling shareholder is free to sell his shares to any purchaser. unless he knows that the purchaser is about to acquire control of the company and strip it of its assets. This provides the appropriate balance between the prerogative of ownership on the one hand, and the protection of the good of the company on the other. This law is similar to another principle present in our system, whereby ownership does not justify the carrying out of an act which harms someone else (which is equivalent to section 14 of the Lands Law, 5729-1969). This principle protects the freedom of property and the shareholder's right to do whatever he pleases with his shares on the one hand, and assures protection of the interests of the company on the other. This principle is common in the United States both in the literature (see A. Hill, "The Sale of Controlling Shares," 70 Harv. L. Rev. 986 (1956-57); A.A. Berle, " 'Control' in Corporate Law," 58 Colum. L. Rev. (1958) 1212; Comment, "Sales of Corporate Control and the Theory of Overkill," 31 U. Chi. L. Rev. (1963-64) 725) and in case law (see *Insuranshares* [22]; *Levy v. American Beverage Corporation* (1942) [26]; *Gerdes v. Reynolds* (1941) [27]; Dale [24]). Note: I do not mean to say that we must adopt the balance extant in the United States between the ownership of a share and the power of control granted by the share, or that we must follow their approach in everything related to controlling shares. The matter before us raises a specific question, involving the breach of loyalty in the sale of controlling shares and liability to indemnify the company for the loss it suffered. Here we can learn from the balance present in the United States. Should other problems arise in the future - such as the "price" of control; whether the consideration for the sale of control belongs to the company itself, and whether a basis for the formation of the duty is the vendor's actual knowledge of the purchaser's intentions, or whether it suffices

that he did not know in a case where a reasonable shareholder should have known; and other similar questions which have been raised in the United States - we will deal with them when, as and if they arise.

59. Is Filco a controlling shareholder? As is known, Filco itself held approximately 20% of the shares of the Bank. It belonged to the Kossoy-Appelbaum group, which prior to the "Tiberias agreements" was the controlling shareholder of the Bank, and which upon the sale of its shares to the Epstein group transferred control to it. Under these circumstances, I believe that the duties of loyalty which are incumbent upon controlling shareholders are incumbent upon Filco, since in this regard whoever belongs to the controlling group is subject to the duties of loyalty that control entails (see the Gardes case [27] and *Perlman v. Feldmann* (1955) [28]). It is membership of the controlling group that gives the power and imposes the duty of loyalty, since otherwise control is likely to "crumble," thus defeating the purpose of the fundamental principle underlying it. Since this is so, we are not required to examine whether Filco in itself, without regard to the Kossoy-Appelbaum control group, is in a position of control. Indeed, the concept of control is complex (see Berle, "Control" in *Corporate Law*", *supra*; W.N. Snell, *Reflections on the Practical Aspects of "The Sale of Corporate Control"* [1972] *Duke L.J.* 1193; Bayne, *supra*; A. A. Berle, "The Price of Power: Sale of Corporate Control," 50 *Cornell L.Q.* (1964-65) 628). The concept means different things in different contexts. Regarding the applicability of the duties of loyalty with regard to the sale of shares, it is sufficient that the shareholder is part of the controlling group, and he need not be the controlling shareholder himself.

60. As we have seen, a director who is in breach of the fiduciary duty he owes the company must repay the company any money it lost as a foreseeable result of the breach of his duty, whether such sums were received by the director himself or by a third party. A similar rule should rightly apply to a shareholder who is in breach of the duty of loyalty he owes the company. Accordingly, a controlling shareholder who sells his shares to a purchaser who makes the company insolvent must repay the company all sums the company lost as a foreseeable result of his breach which caused the insolvency. This relief includes, first and foremost, the company's money which came into the possession of the controlling shareholder himself, but it is not limited thereto. The liability for repayment also extends to

sums received by third parties, whether such sums are the company's money, which it used to finance the purchase, or whether such sums are the company's money, which it lost as a foreseeable result of the transfer of control (see *Algonac Marine Hardware Co. v. Cline*; *Insuranshares* [22], and *Dale* [24] (1968) [29]; *Henn, supra*, at 659).

61. Filco belonged to the controlling group. It sold its shares to the Epstein group, thereby transferring control of the Bank to Epstein. Was Filco in breach of its duty towards the Bank as a shareholder? As we have seen, Filco owes a duty of loyalty towards the Bank. It must act towards it in good faith and honesty. It may not sell its shares to a purchaser with the knowledge that it will cause the destruction of the Bank. These duties of loyalty were breached by Filco. This did not take place in the "Tiberias agreements," but took place in the July agreements. In selling its shares in July, Filco knew that the purchasers of the shares were not South African investors, but the Israeli Epstein group. Filco knew that the financing would be provided by the Bank itself and that it would bring about the insolvency of the Bank. Filco knew that Epstein would purchase with the Bank's money not only its own shares, but also the other shares of the controlling group (in regard to which the option was renewed in July), as actually took place in the September agreement. At the time Filco agreed under those circumstances to sell its shares to the Epstein group, it was in breach of its duty to the Bank and it is liable to repay the Bank all the money that the purchaser took from the Bank to finance the purchase of those shares and other shares of the controlling group.

62. As we have seen, the shares in the Bank held by Filco were first sold in the "Tiberias agreement." We have ruled that this sale involves no breach of trust by Filco to the Bank. The July agreement replaced the "Tiberias agreement," and by virtue thereof a new sale took place, at a reduced price, and the shares were transferred to Fedra. We have ruled that in this agreement Filco was in breach of the duty of loyalty it owed the Bank. Under these circumstances, the question is likely to arise whether one should deem the main transaction to be the one made in Tiberias. in regard to which there is no breach of trust, with the July agreement being merely a secondary agreement. for the purpose of carrying out that which had already been agreed upon. I believe that the answer is that each agreement must stand on its own merits. According to the Tiberias agreement, Filco undertook to transfer the

shares in the Bank to the purchaser only upon full payment of the price of the shares. Failure to effect any of the payments entitled Filco to cancel the transfer of the shares. When it was discovered that no South African investors existed, and that the only source of the financing of the purchase was the Bank itself, Filco - as a shareholder in the Bank - should have objected to the financing of the acquisition by the Bank, which would have had the effect of rescinding the "Tiberias agreement." Filco did not do so. On the contrary: instead of rescinding the "Tiberias agreement," by virtue of the contractual power given to it, Filco entered into a new agreement, which worsened the Bank's financial situation. Under those circumstances, it is but natural that the July agreement stands on its own merits, and it suffices to establish the breach of trust by Filco.

63. It was argued before us that Kossov's knowledge should not be attributed to Filco, since Kossov's knowledge was acquired as a director of the Bank, and it should only be attributed to the Bank, not to Filco. Indeed, an agent's knowledge is attributed to the principal, if the knowledge is related to his function as an agent. Accordingly, in the case of an agent acting on behalf of two principals, knowledge regarding one principal is not attributed to the other. Nevertheless, where the agent's knowledge concerns his agency on behalf of both principals, it can be attributed to both. Such is the case before us. Kossov's knowledge that the shares were being acquired by the Epstein group and that the funding was being provided by the Bank, and that no group of South African investors existed, was acquired both as a director of the Bank and as an agent - holding Filco's Power of attorney - and this knowledge should therefore be attributed to Filco itself.

64. To what relief is the Bank entitled against Filco? As we have seen, the Bank is entitled to indemnity for the damages it suffered as a result of the breach of trust by the controlling shareholders. In this regard, the question of whether or not the Bank's money, which was taken from it as a result of the breach of loyalty, came into the possession of the controlling shareholder or the possession of a third party is irrelevant. The controlling shareholder is liable for the Bank's damages, not only for its enrichment. Accordingly, Filco must indemnify the Bank both for the money that was taken from the Bank for the purchase of its shares and Kossov's shares (in the July transaction), and for the money taken from the Bank for the purchase of Appelico's shares (in the September transaction), since the latter was a

foreseeable result of the breach of loyalty. As we have seen, the total of these sums is \$1,210,983.

65. We have discussed the joint and several liability of Drori and Kossoy. We have discussed Filco's liability. We believe that the liability of all three for payment of the sum of \$1,210,983 is joint and several, since in spite of the fact that the duties differ - Kossoy and Drori breached director's duties, whilst Filco breached a controlling shareholder's duty - and the breaching acts differ, the damage is the same.

66. The lower court found Filco liable "jointly and severally" to compensate the Bank for the sum of 1,755,000 Israeli Pounds. It erred in so doing. This sum involves the sale of shares of the Bank held by Appelico and Orico in the "Tiberias agreements," and at the time they were entered into Flico was not in breach of any duty of loyalty towards the Bank, since it was entitled to assume, as Kossoy assumed, that the purchase would be made by South African purchasers.

67. The lower court found all the defendants liable to repay the Bank the sum of \$427,000. As mentioned, this sum was received following the "Tiberias agreement" on account of the sale of Flico's shares. The lower court erred in so doing. This sum did not come from the Bank's resources, and there is no reason why the Bank should receive it. In their arguments before us, the Bank's representatives attempted to defend the conclusion reached by the lower court with the argument - which had already been discussed by the lower court - that by their conduct all the defendants caused heavy damages to the Bank, amounting to some 50 million Israeli Pounds, and that they were therefore entitled, within the framework of this general damage, to repayment of the sum of \$427,000. We do not accept this argument. The scope of the hearing was fixed; it involved the breach of loyalty and repayment of sums related to the sale of the shares. On this matter, the plaintiffs brought evidence and a defence was deployed. A change to a completely different track should be avoided. We do not know what the other losses are, nor whether they resulted from the breach of loyalty by Drori, Kossoy and Filco.



68. Dr. Goldenberg, who pleaded for Filco, raised a general argument for the defence - in which Mr. Toussia-Cohen (pleading for Kossoy) and Mr. Amitai (pleading for Drori) joined - that no liability for compensation should be imposed upon Filco, Kossoy and Drori because the money which would be repaid to the Bank is likely to find its way into Epstein's account. According to Dr. Goldenberg, the law is that money involved in a breach of trust should not be repaid to the company if the money is destined to be returned to those who breached the trust (see *Pennington, supra*, at 549). We cannot address ourselves to this argument. It was not raised before the lower court, and it is presented here for the first time. In order to examine it, the factual basis concerning the matter trust be established, for example, a finding that the money which the Bank will receive will be transferred to Epstein's account. No such factual basis was established by the lower court, and we will not establish it in the court of appeal. For this reason only, without entering into an examination of the correctness of the argument itself, we cannot address ourselves to it.

69. The lower court based Filco's liability on the fact that it participated in Kossoy's activity. On the other hand, we based Filco's liability on the breach of its own duty. Since this is so, we have no need to adopt any position regarding the question as to whether we would have reached our conclusion on the basis of the lower court's approach. Within the framework of Filco's liability, we acted on the factual assumption that Filco knew - by virtue of Kossoy's own knowledge - that the Epstein group was gaining control of the Bank and financing the acquisition of the shares with the Bank's money, which was making it insolvent. Since this is so, we have no need to adopt any position with respect to the question as to whether liability should be imposed upon Filco, had we established as a factual finding that Filco did not know these facts, but that as a reasonable person, it should, under the circumstances, have known them. The question of "constructive knowledge" does not arise here and we wish to leave it unanswered. As to Kossoy's liability, the lower court based its ruling mainly on his liability as a shareholder in the Bank. On the other hand, we based Kossoy's liability on the basis of his status as a director of the Bank, and we therefore find it unnecessary to examine further the question of whether a corresponding liability should be imposed because of the few shares he held in the Bank. Moreover, Kossoy's liability was based on the breach of the duty of trust, which he owed the Bank as a director thereof. Accordingly, it was unnecessary to examine whether to impose liability upon Kossoy as a director for the

breach of the duty of care he owed the Bank. Indeed, this appeal raises a great many questions in the area of corporate law, and we on our part have made every effort to decide only questions whose resolution are essential to the appeal.

### **Banque Commerciale's Claim**

70. As we have seen (see paragraph 16 above), Banque Commerciale obtained its right by way of assignment from UBS, and accordingly Banque Commerciale has no more than does UBS. Does UBS have any right against the Bank? We have seen that UBS received the deposit by transfer from Filco. Filco itself is liable to repay the deposit to the Bank, since its receipt by Filco involves a breach of trust by Filco towards the Bank. The question is therefore whether the Bank's right of repayment against Filco stands against UBS as well, or is it the law that UBS's right is not affected by Filco's breach of trust? I believe that UBS has no more rights than does Filco, and just as Filco is liable to repay the deposit to the Bank - or more precisely, is not entitled to withdraw it from the Bank - UBS is equally liable to repay the deposit to the Bank. The reason for this is that in the tripartite agreement between the Bank, Filco and UBS, which serves as the basis for the transfer of the deposit from Filco to UBS, it was expressly specified that UBS was holding the deposit "on the same conditions" as Filco was holding it. I believe that this means that any claims the Bank has against Filco also pertain to UBS, both whether we deem the agreement between Filco and UBS to be an "assignment" or whether we deem it to be a novation. For this reason the appeal of Banque Commerciale is dismissed.

71. The result is thus as follows:

- a. We reject the appeal of Banque Commerciale (C A. 818/79). Banque Commerciale shall pay Bank Feuchtwanger the costs of the hearing, including advocates' fees, in a total sum of 500,000 Shekels. This sum is linked and shall bear interest until actual payment is made.

- b. We allow Kossoy's appeal (C. A. 817/79) in part and reject it in part, in such manner that Kossoy's liability towards Bank Feuchtwanger shall be set at the following sums: 1,755,000 Israeli Pounds and \$1,210,983. These sums are to bear interest and linkage, as stated in the lower court's judgment. In view of the result, Kossoy shall bear the Bank's costs, including advocates' fees, in a total sum of 10 (ten) million Shekels. This sum is linked and shall bear interest at the rate of 4% until actual payment is made.
- c. We allow Drori's appeal (C. A. 585/82) in part and reject it in part, in such manner that Drori's liability towards Bank Feuchtwanger shall be set at the following sums: 1,755,000 Israeli Pounds and \$1,210,983. These sums shall bear interest and linkage, as stated in the lower court's judgment. In view of the result, Drori shall bear the Bank's costs, including advocates' fees, in a total sum of 10 (ten) million Shekels. This sum is linked and shall bear interest at the rate of 4% Until actual payment is made.
- d. We allow Filco's appeal (C. A. 817/77) in part and reject it in part, in such manner that Filco's liability towards the Bank shall be set at \$1,210,983. The sum is to bear interest and linkage, as stated in the lower court's judgment. In view of the result, Filco shall bear the Bank's costs, including advocates' fees, in a total sum of 5 (five) million Shekels. This sum is linked and shall bear interest at the rate of 4% until actual payment thereof.
- e. Kossoy and Drori shall bear the liability for the sum of 1,755,000 Israeli Pounds jointly and severally. Kossoy, Drori and Filco shall bear the liability for the sum of \$1,210,983 jointly and severally. Kossoy and Drori shall bear the liability for the payment of costs jointly and severally.

Judgment given on 9th Tammuz 5744 (9 July 1984).