CA 1846/92

Naftali and Aliza Levy

v.

Mabat Building Ltd

and counter-appeal

The Supreme Court sitting as the Court of Civil Appeal

[19 August 1993]

Before President M. Shamgar and Justices D. Levin, T. Or

Appeal and counter-appeal on the judgment of the Jerusalem District Court (Justice D. Cheshin) on 27 February 1992 in Civil File 368/89.

Facts: The appellants bought an apartment from the respondent. The apartment suffered from water penetration and the respondent failed to make effective repairs. After several years the appellants sued the respondent in the District Court for rescission of the contract, restitution of the purchase price and damages. The District Court found that the appellants were entitled to rescind the contract.

The main issue in the appeal was the ruling of the District Court that the appellants must pay the respondent a sum of $16,000 for use of the apartment during the years that they lived in it. The appellants argued that the deduction of this sum undermined the contractual principle that damages should put the injured party in the position he would be in, had the contract been upheld. The respondent argued that the laws of restitution require the appellants to pay for the benefit they had from the apartment during the years that they lived in it.

Held: The appellants were indeed liable under the laws of restitution to pay for the use of the apartment. But the appellants, in claiming damages, were entitled to be put in the position they would be in, had the contract been upheld. They were therefore entitled to damages for their obligation under the laws of restitution to pay for the use of the apartment, in the sum of $16,000. Consequently, the liability to pay the sum of $16,000 for use of the apartment was cancelled.

Appeal allowed. Counter-appeal denied.

Legislation cited:

Contracts (General Part) Law, 5733-1973, s. 21.

Contracts (Remedies for Breach of Contract) Law, 5731-1970, ss. 2, 9, 9(a), 10.

Prescription Law, 5718-1958, s. 19.

Sale (Apartments) Law, 5733-1973, s. 4.

Sale (Apartments) (Amendment no. 3) Law, 5750-1990.

Israeli Supreme Court cases cited:

[1] CA 3666/90 *Tzukim Hotel Ltd v. Netanya Municipality* [1992] IsrSC 46(4) 45.

[2] CA 195/85 *Iggud Bank of Israel Ltd v. Suraki* [1988] IsrSC 42(4) 811.

[3] FH 20/82 *Adders Building Materials Ltd v. Harlow and Jones GMBH* [1988] IsrSC 42(1) 221.

[4] CA 156/82 *Lipkin v. Dor HaZahav Ltd* [1985] IsrSC 39(3) 85.

[5] CA 687/89 *Liran v. Gavriel* [1991] IsrSC 45(2) 189.

[6] CA 187/87 *Levy v. Deutsch* [1989] IsrSC 43(3) 309.

[7] CA 646/85 *Barnea Creations Ltd v. Denya Development Co Ltd* [1988] IsrSC 42(2) 793.

[8] CA 262/86 *Roth v. Deak and Co. Inc.* [1991] IsrSC 45(2) 353.

[9] CA 277/89 *Chum Food Products Ltd v. Tamico Ltd* [1992] 46(3) IsrSC 288.

[10] CA 588/87 *Cohen v. Shemesh* [1991] IsrSC 45(5) 297.

[11] CA 495/80 *Berkovitz v. Klimer* [1982] IsrSC 36(4) 57.

[12] CA 741/79 *Kalanit Hasharon Investments and Building* (1978) *Ltd v. Horowitz* [1981] IsrSC 35(3) 533.

[13] CA 42/86 *Avidov v. Israel Housing and Development Ltd* [1989] 43(2) IsrSC 513.

For the appellants — M. Netanai.

For the respondent — A. Shernekovsky-Sheren.

JUDGMENT

President M. Shamgar

1. Before us are an appeal and a counter-appeal against the judgment of the Jerusalem District Court that awarded the appellants damages for breach of contract for the sale of an apartment by the respondent.

2. The main facts, as determined by the District Court, are the following:

(a) On 23 September 1982 the parties signed a contract whereunder the appellants purchased an apartment from the respondent. The apartment was delivered to the appellants in August 1984.

(b) Starting in the winter months of 1985, problems of damp appeared in the apartment, which took the form of water penetration and condensation on the walls; this caused dampness and mould in various parts of the roof and walls of the apartment.

(c) Every winter between the years 1985 and 1989, the appellants asked the respondent to repair the defects in the apartment. The request was made through the respondent's employees who were present on the site, and they even attempted to repair the defects, albeit unsuccessfully.

(d) On 13 January 1989, an action for rescission of the contract and for damages was filed in the District Court.

(e) In a pre-trial hearing held on 3 September 1990, counsel for the defendant (the respondent in this case) gave notice that the company would carry out the repairs required in the apartment — 'as a good-will gesture'. But these repairs did not help and the case was tried by the court.

(f) On 3 May 1992 the appellants vacated the apartment.

3. The parts of the judgment that are relevant to this appeal determined the following:

(a) The respondent breached the contract between the parties;

(b) The contractual provisions about prescription and limitation of liability raised by the respondent are not valid;

(c) The contract was lawfully rescinded by the appellants;

(d) In view of the aforesaid conclusions, the trial court ordered the respondent to pay damages.

The amount of the damages included various heads of damage, according to the following details:

(a) An amount of $138,750, as of 1 August 1991. According to the court's determination after hearing testimony from appraisers, this figure reflects the value — on the day of the appraisal — of the apartment purchased, had it been in good repair.

(b) The court deducted from this sum an amount of $16,000, which is a capitalization of rent payments for use of the apartment for a period of eight years. In calculating this amount, the fact that we are talking about the use of an apartment in bad condition was taken into account.

(c) Various sums were also awarded for damage to the contents of the apartment, repair expenses paid by the appellants over the years, payments to experts, moving to a new apartment, aggravation and several other heads of damages, including improvements made by the appellants to the apartment. These sums will be referred to as 'reliance damages', and they are all intended to compensate for the damage suffered by the appellants because they were living in a leaky and dripping apartment for eight years.

4. The appeal addresses the obligation to pay rent. The counter-appeal attacks the liability to pay damages at all and also the amount of damages awarded for some of the causes of action.

The obligation to pay rent

5. The dispute in this matter can be summed up as follows: the appellants argue that no payment for rent should be deducted from the sum awarded to them as damages, for if this is done, the outcome of the judgment will not place them in the position they would be in, had the contract been upheld. In other words, had the apartment been built properly, they would today be the owners of an eight-year-old apartment whose value would be the amount determined by the trial court, without any obligation to deduct payments for rent. The obligation to pay the respondent rent results in their being deprived of this amount, and the appellants claim that this result is unjust.

The respondent's argument on this point is that when the contract was rescinded, both parties had an obligation of restitution under s. 9 of the Contracts (Remedies for Breach of Contract) Law, 5731-1970 (hereafter — 'the Remedies Law'), and the obligation of restitution also includes the injured party's obligation to return to the party in breach 'what he received under the contract'. The fact that the appellants lived in the apartment for eight years means they had use of it, which is a benefit received under the contract, and

therefore non-payment of rent would mean unjust enrichment at the respondent's expense. For this reason the appellants should be held liable to pay for this use.

The appellants reply to this that when the contract was breached and the injured party chose to rescind it, he could choose between two alternatives: 'the restitution track' or the 'compensation track'. The 'restitution track' limits the injured party to claiming the restitution interest; in the framework of this track he may only demand reinstatement of the original position, whereby each party returns to the other party what he received from him under the contract. An injured party, in the appellants' position, who chooses this track is entitled to have his money returned together with interest and is obliged to return the apartment together with fair rent for the use thereof to the party in breach. The 'compensation track' allows the injured party to sue for damages that are designed to place the injured party in the position he would be in, had the contract been upheld. In the case before us, the result would be a determination of damages in a sum equal to the value of the apartment on the date of the judgment. Therefore the appellants will not be entitled to interest on their money, and the respondent will not be entitled to rent.

6. It is usual to say that the law of remedies for breach of contract is designed to protect three interests: the expectation interest — which focuses on (but is not limited to) the injured party's loss of *profit* and aims to put him in the position he would have been in, had the contract been upheld; the reliance interest — which focuses on the *damages* suffered by the injured party because he relied on the contract and which aims to place him in the situation he would have been in, had there been no contract at all; the restitution interest — which requires each party to *return* to the other whatever he received from him and which aims to prevent the enrichment of the party in breach at the expense of the injured party (when restitution is a remedy for breach). This is the classic division that appears in L.L. Fuller and W.R. Perdue, 'The Reliance Interest in Contract Damages' 46 *Yale L. J.* 52 (1936-1937); cf. the recent discussion of this in CA 3666/90 *Tzukim Hotel Ltd v. Netanya Municipality* [1].

In Israeli law, where enforcement is the principal remedy, the expectation interest is without doubt the main interest that the law of remedies aims to protect (CA 195/85 *Iggud Bank of Israel Ltd v. Suraki* [2], at p. 834). When an injured party demands damages for breach of contract, the court, in principle, must aim to place him in the position he would have been in, had the contract been performed.

Notwithstanding, the Remedies Law makes a range of remedies available to the injured party, and it gives him, in s. 2, the right to choose between them. An injured party who so chooses may demand any remedy or combination of remedies from among the remedies available to him, that represent one of the interests that the Remedies Law aims to protect, provided that two requirements are met: (a) he may not receive double compensation for the same damage; (b) there is no material conflict between any two remedies sought (for example rescission and enforcement) (see FH 20/82 *Adders Building Materials Ltd v. Harlow and Jones GMBH* [3], at pp. 268-269). Justice Ben-Porat said of this:

> '...and there are systems, such as the common law system, where the approach is flexible and allows the injured party to choose the remedy or the combination of complementary remedies that grant him the fullest protection possible for the interest that he wants to protect. As long as there is no conflict between them and as long as the injured party is not given a double remedy for the same damage, there is no obstacle to such a combination. Thus, for example, it is possible to claim partial restitution and partial damages, where these are complementary and provide full compensation, but no more than this (Treitel, *supra*, at pp. 36, 38). There is nothing, for example, to prevent the combination of the remedy of enforcement with damages for reliance. There is also nothing to prevent a combination of restitution with damages for loss of the profits anticipated from the transaction (see D.B. Dobbs, *Handbook of the Law of Remedies*, St. Paul, 1973, 786, 844). But it is not possible to combine full restitution, in kind or for value, with full expectation damages in the sum of the whole of the agreed consideration (see Treitel, "Remedies for Breach of Contract (Causes of Action to Party Aggrieved)", *International Encyclopaedia of Comparative Law,* vol. 7 — Contracts, ch. 16, at p. 38)' (CA 156/82 *Lipkin v. Dor HaZahav Ltd* [4], at p. 96).

Further on, Justice Ben-Porat adds that in view of s. 2 of the Remedies Law, this is also the approach in Israeli law.

It follows that the dichotomy that the appellants propose between the 'restitution track', on one hand, and the 'compensation track', on the other, is mistaken. 'The restitution mandated by s. 9(a) of the Remedies Law derives, as stated there, from the rescission, with which it is also possible, as aforesaid, to demand damages, provided that the nature and amount of these does not

lead, together with the restitution, to a double remedy for the same damage...' (*Lipkin v. Dor HaZahav Ltd* [4]). An injured party who rescinds a contract may choose restitution only, in which case each party must return to the other whatever he received under the contract, and no more (an example of this may be found in CA 687/89 *Liran v. Gavriel* [5]); the injured party may rescind the contract and demand expectation damages only, or reliance damages together with restitution (Justice Cheshin, in *Tzukim Hotel Ltd v. Netanya Municipality* [1]). Treitel also describes an English case where a faulty machine was supplied to an injured party, and in court he was awarded restitution of the price paid, the expenses of installing the machine (reliance damages) and loss of profits (expectation damages) because the machine was faulty (G.H. Treitel, *Remedies for Breach of Contract,* Oxford, 1988, at pp. 392, 395).

7. In this respect we should clarify that there is no conflict between the remedy of rescission with the ensuing restitution and awarding expectation damages. At first glance there appears to be a conceptual difficulty in awarding these two remedies cumulatively, since *prima facie* the rescission looks back to the pre-contractual position, whereas the expectation interest looks forward to what would be, had the contract been upheld. As a result, certain continental legal systems do not allow these two remedies to be awarded in the same action, and this approach was upheld in the United States for many years (Treitel, *ibid.*, at pp. 392-396).

It seems that this *prima facie* conflict is unfounded. The contract is indeed rescinded together with its 'primary' obligations, but the duty to pay expectation damages falls into the category of the 'secondary' obligations that arise upon rescission of the contract.

Treitel says of this:

> 'These arguments are far from compelling. The principle of retrospective operation does not necessarily apply for all purposes; nor do such statements as that a contract has 'ceased to exist' carry any necessary connotations as to the *extent* to which damages are recoverable for a breach committed before termination. They refer only to the primary obligations under the contract, so far as these have not been performed' (Treitel, *ibid.*, at p. 392; emphasis added).

Elsewhere the following was said in this regard:

> 'If an obligation of this type is not honoured, the injured party is entitled to remedies for breach of contract, including enforcement

> of the obligation or damages for *that* breach...' (CA 187/87 *Levy v. Deutsch* [6], at p. 320).

The *Levy v. Deutsch* case refers to secondary obligations that the parties had stipulated in the contract between them, but this is true, *a fortiori*, also for secondary obligations arising from statute.

As Treitel notes, this is not the case in every legal system. Apparently most continental systems of law do not allow rescission and restitution together with expectation damages; American law also faced this problem until recently (see Treitel's discussion of this, *ibid.*, at pp. 105-108, 392-396). Yet even these legal systems are not worried about a material conflict between the remedies, but about awarding double compensation. In discussing the *prima facie* conflict between restitution and damages, Corbin says:

> 'As was said above, there is no necessary inconsistency between these two remedies; and the real purpose served by not granting both at once is to avoid double compensation for one injury' (A.L. Corbin, *On Contracts*, St. Paul, vol. 5A, 1964, at p. 485).

Clearly he is referring specifically to expectation damages, since with regard to reliance damages there is not even a *prima facie* inconsistency.

This court has already ruled accordingly: in CA 646/85 *Barnea Creations Ltd v. Denya Development Co. Ltd* [7], the court held that when the injured party rescinds a contract because of a breach (which took the form of late performance), he is entitled to recover from the other party the profit that was anticipated from performance of the contract. It was stated, *ibid.,* at p. 798:

> 'Damages are intended to place the injured party, from a financial viewpoint, in the position he would be in, were it not for the breach... the trial court held that the respondent's damage amounts to a loss of anticipated profits, and this damage was suffered as a probable result of the breach. I accept this basic conclusion...'

We reached a similar result also in CA 262/86 *Roth v. Deak and Co. Inc.* [8], at p. 353:

> 'Now that I have held that there was a fundamental breach of the agreement and that it was lawfully rescinded, I cannot accept the argument that a certain damage resulted from rescission of the agreement, since rescission of the contract is a *result* of its breach. If this argument of the appellants were accepted, it would deny injured parties damages whenever they chose the possibility,

> that the *law* affords them, of rescinding the contract that was breached. From the moment that the appellants breached their obligations under the contract, they should have anticipated its rescission, including the loss of profits deriving therefrom.'

This was clearly stated in CA 277/89 *Chum Food Products Ltd v. Tamico Ltd* [9], at p. 298:

> 'I do not see any conflict between the remedy of rescission, which puts an end to the agreement and releases the parties from their future obligations, and protecting the injured party's anticipated interest by compensating him accordingly.'

It follows that it is possible in one action to combine rescission and restitution deriving therefrom with expectation damages, provided that double compensation is not awarded (also cf. D. Friedman, *Unjust Enrichment*, Boursi – H.S. Peretz, 2nd edition, 1982, at p. 445).

Let us turn from the general to the particular case: an injured party who rescinds a contract and claims restitution together with expectation damages is interested in being placed in the position he would have been in, had the contract been upheld. He is interested in protecting his expectation interest, and within the framework of our legal system he is entitled to this. In the present case, comparing the position of the appellants to what would have been the case if the contract has been upheld necessitates an award of damages to the injured party (the appellants) in an amount equal to the value of the apartment, were it in good repair.

8. The statement of claim filed by the appellants in the trial court contains the following paragraphs that are relevant to the matter:

> '20. As a result of the above chain of events, the Plaintiffs ask the honourable court to grant the relief of rescission of the contract, restitution of the value of the investment and damages.
>
> …
>
> 22. The defendant is liable to the plaintiffs or either of them for breach of the agreement and for fundamental breaches as described above, and it is liable to compensate the plaintiffs or either of them for all the damages, losses and expenses that they suffered and which they will suffer as a result of breach and in consequence thereof, as set out below:

(a) ... restitution of all the money that they invested in the apartment, together with linkage differentials according to the consumer price index and lawful interest.

(b) ...

(c) The defendant is liable to pay and reimburse the plaintiffs for the expenses that they incurred and the amounts that they paid as a result of the terms of the agreement and in consequence thereof, and as a result of its breach by the defendant, and in consequence of its breach as described above, as follows:

1. Payment of the value of the apartment if it were in good repair and habitable...'

The dispute between the parties concerns both procedural and substantive issues. On the *procedural level*, the respondent contends that the appellants chose the 'restitution path', and did not even claim damages. Inspection of paragraphs 20 and 22(c)(1) of the statement of claim shows this contention to be unfounded. Moreover, the appellants even brought an appraiser to appraise the value of the apartment were it in good repair. Is it conceivable that they troubled themselves to bring an appraiser merely in order to obtain restitution? The remedy of restitution is indeed claimed in the statement of claim, but the overall picture arising from the whole range of remedies that the appellants claimed is that they are applying to the court so that the amount of compensation will put them in the position they would have been in, if the contract had been upheld by the respondent.

On the *substantive level*, the parties disagree about the amount of damages that should be awarded for breach of the sale contract that was rescinded; *prima facie*, now that we have established the purpose of damages when the injured party claims expectation damages, we must translate this into practical terms and grant the appellants damages that will put them where they would have been if the contract was upheld.

9. When we come to apply this result on a practical level, we encounter the following problem: the rule that there is no obstacle to awarding different remedies, so long as this does not involve granting double compensation for the same damage (*Lipkin v. Dor HaZahav Ltd* [4]), is at odds with the rule, stated in section 9 of the Remedies Law, that each party must return to the other whatever it received under the contract. What each party received also includes the use made of the property transferred between the parties (Friedman, *ibid*., at pp. 462-464, and the supplement to these pages).

Therefore, the appellants must *prima facie* pay the respondent rent for the period when they lived in the apartment, as the District Court held; but this payment will frustrate the outcome of putting the injured party in the position he would be in, had the contract been upheld, and the protection of his expectation interest.

Similar circumstances arose in the aforesaid *Liran v. Gavriel* [5]. In that case, as in this one, contractors delivered a defective apartment to the residents. There too the contract was rescinded after several years, during which the residents lived in the apartment. In that case, Justice Goldberg held that, in principle, the contractors must restore to the residents their money together with interest, whereas the residents were liable to restore to the contractors the apartment and also rent for the use thereof. In the circumstances of that case the residents were not required to pay the rent, because this was not claimed by the contractors.

The trial court relied on the judgment in *Liran v. Gavriel* [5] and saw itself bound to award the respondent rent for the period when the appellants lived in the apartment. But the trial court did not properly consider the details of the case in *Liran v. Gavriel* [5], for the aforesaid judgment is limited to cases where the resident, the injured party, claimed restitution, *and nothing else*. It does not apply to cases, such as the one before us, where the plaintiffs sued not only for restitution but also for *damages* — which are intended to put them in the position in which they would have been, had the contract not been breached. In this respect, Justice Goldberg says the following about this in the judgment in *Liran v. Gavriel* [5], at p. 192:

> 'Since they sought restitution, there was no need to consider whether the appellants should be found liable to return the money at its real value together with interest, or to pay the respondents the value of an "identical apartment, in good repair, at its value on the date of the repayment". This is because the second alternative, which is designed to return the respondents to the position they would be in had the contract not been breached, is not a form of restitution, but is a compensatory remedy.'

The case before us is a claim for damages, and therefore the ruling laid down in *Liran v. Gavriel* [5] is irrelevant to it. Notwithstanding, the duty of restitution as a result of the rescission of the contract still applies by virtue of s. 9 of the Remedies Law. In this respect, counsel for the appellants argues that the restitution of rent by the purchaser is *contingent* on restitution of interest by the contractors on the money that they held, and when the

contractors are not held liable to pay interest on the money, the residents should also not be held liable to pay rent, as if these were mutually dependent obligations. This reasoning cannot succeed. The reason for this is that restitution derives from the laws of enrichment. Therefore the obligation of restitution is not mutual, and each party is liable to return the benefits that he received from the property of the other party, irrespective of the other party's obligation to him. Justice Mazza said about this:

> '… even restitution, which is mandated by s. 9 of the Contracts (Remedies for Breach of Contract) Law, is, in its own way, designed to prevent unjust enrichment. Unlike the basis for receiving a "contractual" remedy, which is available only to a party injured by a breach of the contract and which is designed to remedy the harm done by the breach to his "expectation interest" that the contract would be upheld, a claim for restitution may be made by *each of the parties to the contract* for what he gave to the other party under the contract. The "reliance interest", that one person should not unlawfully enrich himself at the expense of another, is an interest shared by both parties, and justice requires that it is made available by returning them to their pre-contractual position' (CA 588/87 *Cohen v. Shemesh* [10], at 317; emphasis added).

This result is supported by the fact that with restitution, each party is liable to return 'what he received' and not its value, and so, even if there are changes in the relative value of what the parties gave to each other, each party is still liable to return 'what he received', even if the relative value of the assets has changed (see D. Katzir, *Remedies for Breach of Contract,* Tamar, 1991, at 778). One of the advantages that s. 9 of the Remedies Law confers on an injured party over the party in breach is the ability to choose between restitution in kind and restitution for value, an advantage which does not exist in a case of restitution under s. 21 of the Contracts (General Part) Law, 5733-1973 (see Friedman, *ibid*., at 450-451). This possibility, which gives the injured party the power to 'impose' on the party in breach a different contract from the agreed one (see Friedman, *ibid.*) also supports the view that these obligations are not mutually dependent.

The aforesaid does not conflict with the rulings made by this court. In CA 495/80 *Berkovitz v. Klimer* [11], it was stated:

> 'Just as the appellant "pays" for the lawful use he made of the money, so must the respondent "pay" for the lawful use she made

> of the apartment. Just as the respondent gave the appellant money, which he must now return, so the appellant gave the respondent the use of an apartment, the value of which the respondent must return' (Justice Barak, at p. 68).

Both parties are liable for restitution, but each is liable for restitution of the use he made of the other party's property. The obligation of restitution is usually mutual, but the obligations are not mutually dependent, and certainly there is no necessary dependence between one party and the other with regard to the *amount* of the required restitution and its various *components*. One cannot break the duty of restitution down into various components and hold that the right of one party to restitution of a certain component depends upon him returning another component to the other party. One of the advantages of restitution over other remedies is that the party claiming restitution does not have to prove damage, but only the benefit to the other party that led to the use to which he was not entitled by law (see Justice Mazza in *Cohen v. Shemesh* [10], at pp. 317-318). For our purposes, the use of the apartment after rescission of the contract is use that requires restitution.

The duty to return money for use of an apartment has been recognized in a line of cases (*Berkovitz v. Klimer* [11]; *Liran v. Gavriel* [5]; CA 741/79 *Kalanit Hasharon Investments and Building (1978) Ltd v. Horowitz* [12], and also Friedman, *ibid.*, at pp. 462-464 and the supplements thereto). Notwithstanding, as I have shown, holding the appellants liable for this amount will not allow realization of the injured party's expectation interest that must be protected.

10. The trial court considered this problem in its judgment. Referring to the sum of $16,000 that it held the appellants liable to pay to the respondent, it stated —

> 'With regard to this sum also the plaintiffs could *prima facie* have argued that the defendant is liable to compensate them for their obligation to return this sum to the defendant. In other words, they could *prima facie* argue that they could set off via the compensation track what they were held liable to pay via the restitution track, but what can be done when they did not argue this nor did they ask for it' (p. 29 of the judgment).

It seems to me that the trial court should have gone a step further and examined carefully whether the statement of claim really does not contain a claim as stated for damages for the amount that the appellants would be liable

to pay because of the duty of restitution. Injured parties who claim expectation damages, as stated in clause 22(c)(1) of the statement of claim in this case, need not make a separate claim for damages for an obligation to return money that may be imposed on them as a result of rescission of the contract with the party in breach. The claim for expectation damages incorporates a liability of this sort, since it is a claim to put the injured party in the position he would be in, had the contract not been breached. The parties do not need to claim this separately, and the court should not set off these amounts against a plaintiff who claimed expectation damages. If so, the final outcome will be to hold the respondent liable to pay damages in the amount of the value of an apartment in good repair that is identical (in respect of age, size and location) to the one with regard to which the breached contract was made.

The solution I have reached is not only just, but also efficient. It is *just* because it realizes the injured party's expectation interest and does not harm the respondent unnecessarily. It should be remembered that for a period of eight years the latter benefited from use of the money paid to it by the appellants as consideration for the apartment. It is *efficient* because it provides a clear criterion for the result that should be reached in cases of this kind — realizing the overall interest underlying the remedies claimed by the injured party. For this reason this solution is capable of providing proper guidance for future cases, thereby promoting business certainty and commercial confidence, which are so important in the contractual sphere.

11. *The counter-appeal*

The arguments of the respondent in the counter-appeal may be summarized under three headings:

(a) Prescription and expiry of the warranty period;

(b) Severance of the causal link between the respondent's omissions and the damage caused to the appellants by the appellants' behaviour;

(c) An appeal against various expenses awarded in favour of the appellants.

12. The prescription claim is based on the contract signed by the appellants, which contains the following provisions:

> '10.1 — Mabat (the respondent) shall be liable to the purchaser (the appellants):
>
> 10.1.1 — for three years from the date of completing the building of the property for damp penetrating the walls of the apartment due to rain.

> 10.1.2 — for two years from the date of completing the building of the property for… rainfall penetrating through the roof of the house.
>
> 10.1.3 — …
>
> 10.1.4 — for one year from the date of building the property for anything not specified in paragraphs 10.1.1 to 10.1.3 above.'

The appellants were also asked to sign a separate contract under which they could *not* sue after the warranty periods stated in the contract. The respondent claims that this complies with the requirements of s. 19 of the Prescription Law, 5718-1958, and therefore the terms of the contract that specify a shorter prescription period than that provided in the law should be upheld.

The trial court rejected the arguments of the respondent, both on the grounds that this is an unfairly prejudicial term in a standard contract and also on the grounds that this is a term that is contrary to s. 4 of the Sale (Apartments) Law, 5733-1973, (according to its wording before the Sale (Apartments) (Amendment no. 3) Law, 5750-1990). It would appear that this conclusion is justified, bearing in mind that this is a relationship between a construction company and a customer, where the former restricts its liability for leaks from rain to two or three years, and if we take into account that sometimes one or two winters are not sufficient to reveal defects of this kind (see CA 42/86 *Avidov v. Israel Housing and Development Ltd* [13], at p. 516), it appears that the purpose of these laws is to protect the purchaser of apartments precisely from terms of this kind.

13. The District Court examined and rejected the argument that the appellants' actions severed the causal connection between the respondent's breaches and the damage suffered (pp. 21-24 of the District Court's judgment). The trial court gives several convincing reasons for this, and it will suffice to mention the fact that the damp appeared before the rain which the respondent claimed caused the damp, and that in other apartments where the changes made in the appellants' apartment were made — those changes which the respondent claims severed the causal connection — no damp appeared.

Moreover, it seems that when purchasers receive a new apartment, and starting from the first winter it leaks and is filled with damp on the walls and in the roof in several places — it is questionable whether a better proof that this is needed of the liability of the contractors who built the apartment, and

the rule in such a case should be that the liability rests with the contractors, and the exception to the rule that it does not.

14. With regard to the heating and painting expenses, I see no reason to intervene in the conclusion of the District Court judge regarding the amount of the damage suffered by the appellants.

In conclusion, I would allow the appeal, deny the counter-appeal and uphold the District Court's decision, apart from cancelling the obligation of the appellants to pay the respondent $16,000.

Justice D. Levin

I agree with the opinion of the President.

Justice T. Or

I agree that the counter-appeal should be denied, for the reasons set out in the opinion of my colleague the President, and I also agree that the appeal should be allowed as he proposes.

The respondent breached the contract between it and the appellants by supplying them with a defective apartment, a fact that gave the appellants the right to rescind the contract. Under s. 2 of the Contracts (Remedies for Breach of Contract) Law (hereafter — 'the Remedies Law'), the appellants had a claim for damages for the harm suffered by them as a result of the breach, in addition to their right to rescind the contract. Rescission of the contract required each party to make restitution, as provided by s. 9(a) of the Remedies Law. Within the framework of the duty of restitution, the appellants were obliged to return to the respondent the benefit that they had in possessing and using the apartment for years until it was returned, a sum which the court assessed, in view of all the circumstances, at $16,000; and the respondent was liable to pay the appellants the value of the apartment, which the appellants were liable to return to the respondent in consequence of rescission of the contract.

The question remains: what are the damages that the appellants are entitled to receive from the respondent? These damages must correspond to the damage suffered by the appellants as a result of breach of the contract by the respondent, the same damage that the respondent foresaw or should have foreseen at the time of making the contract as a probable result of the breach (s. 10 of the Remedies Law). Like my colleague the President, I too am of the

opinion that in this case the sum of $16,000 constitutes the damage suffered by the appellants as defined above. Had the respondent upheld the terms of the contract with the appellants, they would be entitled to keep the apartment and to benefit from living in it during the period since they received possession of it, in addition to having the rights in the property registered in their names. It follows that the sum of $16,000 that the appellants must return to the respondent for living in the apartment until its return to the respondent (within the framework of the duty of restitution under s. 9(a) of the Remedies Law), is an expense that they could have expected not to have to pay, had the respondent upheld the contractual obligations. In other words, this is damage within the meaning of s. 10 of the Remedies Law, for which the appellants are entitled to compensation from the respondent.

Decided as stated in the opinion of the President. The respondent shall pay the costs of the appellants in a sum of NIS 6,000.

Appeal allowed. Counter-appeal denied.

19 August 1993.