CA 2833/04

Regis Ltd.
v.
Gabriel Trabelsi CPA, Trustee for Dan Rolider

The Supreme Court sitting as the Court of Civil Appeals
[3 August 2009]
Before Justices M. Naor, E. Arbel, E. Rubinstein

Appeal from the judgment of the Haifa District Court in Bankruptcy File 66/02 of 23.2.2004 (Judge G. Ginat) of 23 February 2004.

Facts: The respondent company, Dan Rolider Ltd., purchased heavy engineering equipment from the appellant, Regis Ltd., and agreed that a charge would be placed upon the equipment in favor of the appellant. The appellant failed to register the charges with the Registrar of Companies within the statutory 21 days. The appellant defaulted on its debt to the respondent, the CEO and controlling shareholder of the appellant company died, and an application was made to liquidate the company. Following the application for liquidation of the company, the respondent filed an application with the Registrar of Companies to extend the period for the registration of the charges, pursuant to s. 191 of the Companies Ordinance. The request was granted, and the Registrar issued registration certificates to Regis pursuant to s. 185 (a) of the Companies Ordinance. The appellant therefore claimed that it was a secured creditor in regard to the charged equipment, whereas the trustee appointed to liquidate the respondent company dismissed this claim. The District Court ruled that once the Registrar had issued a registration certificate, the charge was to be regarded as having met all the requirements of s. 178(a) of the Companies Ordinance with respect to the date of registration. The court therefore rejected the trustee's claim regarding the invalidity of the charge vis-à-vis third parties. Nevertheless, the court ruled that the registration of the charge was void due to it being a fraudulent preference, within the meaning of s. 98 of the Bankruptcy Ordinance and s. 355 of the Companies Ordinance.

Held: The Court denied the appeal. Justice M. Naor (Justices E. Arbel and E. Rubinstein concurring) differed in her opinion regarding fraudulent

preference from that of the District Court , and ruled that the case did not involve "unlawful pressure or persuasion on the part of that creditor or on his behalf" under s. 98 of the Bankruptcy Ordinance. However, the Court nonetheless decided to deny the appeal, as it held that a charge that was registered late could not be validated for three reasons: First, as a rule, the registration of a charge should not be allowed after the commencement of liquidation proceedings, because once the liquidation has commenced, the parties' expectations crystallize, and a charge that harms those expectations should not be recognized. Secondly, allowing the late registration of a charge, following the commencement of liquidation proceedings, undermines the goals of registration. Finally, the late registration of a charge after liquidation proceedings have commenced should not be recognized in the case at hand for reasons of good faith at the time of registering the charge and because of the delay involved in registering the charge. .

Israeli Supreme Court cases cited:

[1] CA 2734/92 *Iskoor Steel Services Ltd. v. Liquidator of Elkol Ltd. (in liquidation*) [1992] IsrLR 46 (4) 289.

[2] CA 315/89 *Bialostotzky Ltd. v. Graph Paper (Industries) Ltd. (in liquidation)* [1991] IsrLR 45(1) 698.

[3] CA 4548/91 *Emek Hayarden Farms Central Agricultural Cooperative Society Ltd. v. Haspaka Central Company for Agriculturalists Ltd. (in liquidation)* [1999] IsrSC 53 (4) 8.

[4] C.A. 6/89 *Israel Discount Bank Ltd. v. Maof Airways Liquidators Ltd.* [1994] (not reported).

[5] LCA 1096/97 *Abu Juba v. Feiman Ltd.* [1999] IsrLR 53(1) 481.

[6] CA 4351/01 *Liquidator of C.A. Food Company Ltd. v. State of Israel, Department of Customs and V.A.T.* [2005] IsrSC 60(1) 467.

[7] CA 126/89 *Liquidator of Koppel Tours Company Ltd. v. Dan Hotels Company Ltd.* [1992] IsrSC 46(3) 441

[8] CA 558/88 *Itung Ltd. v. Levi David and Sons Ltd. (in liquidation)* [1994] IsrSC 48(2) 102.

[9] CA 1689/03 *Israel Credit Cards Ltd.. v. Official State Receiver* [2004] IsrSC. 58(6) 126.

[10] CA 5789/04 *Hamashbir Hayashan Ltd. v. Logistiker Ltd.* (2007) (not yet reported).

[11] CA 2070/06 *Equipment and Construction Infrastructures Ltd. v. Receiver* (2008) (not yet reported).

[12] CA 6400/99 *Mirage Construction and Investments Company Ltd. v. Hapoalim Bank Ltd.* [2002] IsrSC 56(4) 830.

[13] CA 4316/90 *Haspaka Central Company for Agriculturalists Ltd. (in liquidation) v. Agra-Even Yehuda Cooperative Agricultural Society Ltd.* [1995] IsrSC 49(2) 133.

[14] CA 790/85 *Israel Airports Authority v. Gruss* [1990] IsrSC 44(3) 185.

[15] CA 2641/97 *Ganz v. British and Colonial Company Ltd.* [2003] IsrSC 57(2) 385.

[16] HCJ 566/81 *Amrani v. Rabbinical Court of Appeals* (1982) (unreported).

[17] CA 610/94 *Buchbinder v. Official Receiver* [2003] IsrSC 57(4) 289.

[18] CA 6416/01 *Benbenisti v. Official Receiver* [2003] IsrSC 57(4) 197.

[19] LCA 6339/97 *Roker v. Solomon* [1999] IsrSC 55(1) 199.

[20] HCJ 164/97 *Conterm Ltd. v. Minister of Finance, Department of Customs and V.A.T.* [1998] IsrSC 52(1) 289.

[21] LPA 426/06 *Hava v. Prison Service* (2006) (not yet reported).

[22] HCJ 987/94 *Euronet Golden Lines (1992) Ltd. v. Minister of Communications* [1994] IsrSC 48(5) 412.

[23] CA 8434/00 *Delek Israel Gas Company Ltd.. v. Gazit and Shaham Construction Company* [2002] IsrSC 57(3) 693.

[24] CrApp 2236/06 *Hamami v. Ohayon* (2006) (not yet reported).

[25] CA 839/90 *Raz Building Company Ltd. v. Erenstein* [1991] IsrSC 45(5) 739.

[26] CA 603/71 *Bank Leumi LeIsrael Ltd. v. Land of Israel-Britain Bank* [1972] IsrSC 26(2) 468.

[27] CA 181/73 *Shtukman v. Spitani* [1974] IsrSC 28(2) 182.

[28] CA 248/77 *Hapoalim Bank Ltd. v. Garburg Ltd.* [1977] IsrSC 32(1) 253.

Israeli District Court cases cited:

[29] CApp (T.A.) 19875/05 (BR 1795/05) 19875/05 (BR 1795/05) *Council for Production and Marketing of Plants v. A.S. Li Growing, Selecting*

and Marketing of Agricultural Produce (in temporary receivership), (2006) (not yet reported).

[30] CApp (T.A.) 1355/03 (BR 2118/02) *Trustee of the Rubenenko Group v. Department of Customs and V.A.T.* [2003] (not reported).

[31] M (T.A.) 8663/91 (CC 1247/88) *Crates Center Ltd. v. Industrial Development Bank of Israel Ltd.* [1993] IsrDC 5754 (1) 68.

[32] M (Dis-T.A.) 14564/89 (CC 511/88) *Liquidator of Razmig – Tires Marketing Company v. Bukshpan* [1991] (not reported).

[33] AC (Dis-Jer) 43/92 *Hapoalim Bank Ltd. v. Tadmir Feed Mix Institute Cooperative Agricultural Association Ltd. (in liquidation) [1993]* IsrDC 5754 (1) 379.

Israeli laws cited:

Companies Ordinance [New Version], 5743-1983, s. 179 (a)(1)

Bankruptcy Ordinance [New Version] 5740-1980

For the Appellant — M. Azura; V. Gwilli-Zolman

For the Respondent — R. Rogin

JUDGMENT

Justice M. Naor

Should a charge registered late, after the commencement of liquidation proceedings of a company, be deemed valid? This is the question that arises in this appeal.

1. The respondent, Dan Rolider Ltd. (hereinafter: "the Company"), over whom the respondent was appointed as a trustee, purchased heavy engineering equipment from the appellant, Regis Ltd. (hereinafter: "Regis" or "the appellant"). The purchases were made on various dates: 18.6.2000; 24.8.2000; 15.4.2001. The Company gave an undertaking to charge the purchased equipment to Regis. The charge documents were deposited with Regis, but Regis did not send the documents to the Registrar of Companies

and therefore the charges were not registered at the Registry within 21 days of their creation, pursuant to s. 179(a)(1) of the Companies Ordinance [New Version], 5743-1983. Some time later, the Company encountered financial difficulties and failed to pay its debts to Regis (or to others). The Company CEO and controlling shareholder, Dan Rolider, passed away. On 27 December 2001 an application to liquidate the Company was filed. The application was published and proceedings commenced for an operating arrangement in the framework of a stay of proceedings order. At this stage, and following the publication of the application, on 2 January 2002, Regis filed an application with the Registrar of Companies to extend the period for the registration of the charges, pursuant to s. 191 of the Companies Ordinance. In the application, it explained that "due to our having received the equipment in two separate consignments, an error occurred and the charges were not registered with the Registrar of Companies, despite the fact that the form had already been prepared when the equipment arrived." The Registrar of Companies extended the period, and the charges were registered at the beginning of January 2002, between the date of filing the application for liquidation and the stay of proceedings order. The Registrar of Companies gave Regis certificates, pursuant to s. 185(a) of the Companies Ordinance. Regis claims — and this is the focus of the appeal before us — that it is a secured creditor in relation to the equipment that was charged as stated. As per the agreement between the parties, the court gave its approval for the trustee to sell the heavy engineering equipment, and the dispute over the question of whether Regis was a secured creditor was transposed from the equipment to the consideration paid.

2. Regis filed a debt claim for failure to make the payments for the equipment as prescribed in the sale agreement, for a principal of NIS 1.5 million. As stated, Regis claimed that it was a secured creditor in relation to the charged equipment. The trustee did not deny that the Company had given an undertaking to Regis to register the charge, but claimed that the charges had no validity vis-à-vis the trustee: all the charges were registered long after the twenty-one day period prescribed for the registration of a charge in s. 179 of the Companies Ordinance; and the extension granted by the Registrar *ex parte*, without Regis having even notified him of the filing for liquidation, was invalid. Some of the charges were registered, as stated, several days after the filing for liquidation, and others were not registered *at all,* because — as claimed by the Registrar — Regis had been registered (mistakenly) in them as "the borrower" and not as "the lender". The trustee's decision to dismiss

Regis's claim that it was a secured creditor was appealed by Regis in the District Court.

3. The District Court judge (Hon. Judge Ginat) dismissed the trustee's claim regarding the significance of non-registration of the charge within twenty-one days of its creation. The trustee sought to rely on s. 178 of the Companies Ordinance, whereas the court relied on the decision in CA 2734/92 *Iskoor Steel Services Ltd. v. Liquidator of Elkol Ltd. (in liquidation)* [1], and ruled that once the Registrar had issued a registration certificate, the charge was to be regarded as having met all the requirements of s. 178(a) of the Companies Ordinance with respect to the date of registration. The court therefore rejected the trustee's claim regarding the invalidity of the charge vis-à-vis third parties. The court effectively ruled that claims pertaining to the laws of registration of the charge should not lead to non-recognition of the charge.

4. Nevertheless, the court ruled that the registration of the charge was void due to it being a fraudulent preference, within the meaning of s. 98 of the Bankruptcy Ordinance [New Version], 5740-1980 and s. 355 of the Companies Ordinance.

Section 98(a) of the Bankruptcy Ordinance states:

'Voidance of Preference	98(a) Every transfer of property or charge, however made, every obligation incurred, and every judicial proceeding taken or suffered, by a person unable to pay his debts as they become due from his own money, in favor of a creditor or of a trustee of any creditor, with a view to giving such creditor or any guarantor of the debt due to such creditor, a preference over other creditors, or in response to undue pressure or persuasion by or on behalf of such creditor if such person is adjudged bankrupt on a bankruptcy application presented within three months after the date of making, incurring, taking, or suffering as aforesaid, shall be

> deemed fraudulent and void as against the trustee.'

And s. 355(a) of the Companies Ordinance provides:

> 'Fraudulent Preference
>
> 355(a) Any transfer, mortgage, delivery of goods, payment, execution or any other act in relation to assets — which, if committed by or against a person would be deemed in his bankruptcy a fraudulent preference—, when committed by or against a company — shall be deemed in the winding up a fraudulent preference of its creditors, and shall not be valid; for the purposes of this section, the beginning of winding up shall replace the application for bankruptcy.'

5. The court gave the following reasons for its conclusion that the charges were invalid under the sections cited: the debts between Regis and the Company, in accordance with which the Company had undertaken to charge the equipment, were admittedly authentic and not fictitious, but fraudulent preference relates precisely to real debts that have become due, and which, by law, the debtor is obligated to pay and the creditor is entitled to collect. Fictitious debts are void debts, in respect of which there is no need to resort to the rules of specific voidance under s. 98 of the Bankruptcy Ordinance, or s. 355 of the Companies Ordinance. Fictitious debts may be voided under the general law, irrespective of the three month time period or the company's ability to pay its debts. Preference of creditors under the aforementioned sections may, in principle, also find expression in the upgrading of a creditor's status. The registration of a charge in a company's favor at a time of insolvency may be regarded as fraudulent preference in precisely the same way as would the payment of a sum of money where no valuable consideration was given. A debtor's intention of fraudulently preferring ("with a view to giving preference" in the words of s. 98) is just one of the alternatives that leads to a declaration of a payment as being a preference that must be voided. Section 98 also recognizes a preference grounded in "pressure or unlawful persuasion" on the creditor's part, and the

court ruled that this indeed was the case at hand. Applying pressure, or unlawful persuasion, may in and of themselves be legal. In our case, the court added, registration of the charge was a legal act. Both by virtue of its contract with the Company and by virtue of the laws of registration, Regis was legally entitled to register the charge. However, in the court's view, the execution of the registration within the "prohibited" three months called for an examination of whether the registration took place in the regular course of business, or whether the act of registration was intended to "pressure" the Company into upgrading the status of Regis at the time of insolvency. Regarding this matter the court ruled that for purposes of fraudulent preference, it is desirable and appropriate to determine that the arrangements that are applicable at the time of insolvency and in anticipation of liquidation, should also apply as of the crystallization of an application for a stay of proceedings. However, in this case the liquidation application against the Company was pending as of 27 December 2001, and therefore the court ruled that the charge was in any event executed during the "prohibited period". Note, incidentally, that it emerges from the written pleadings that the liquidation order was ultimately issued on the basis of a later application, after the efforts to rehabilitate the Company in the framework of a creditors' settlement failed, but all the insolvency proceedings took place consecutively.

6. The court concluded that it was both appropriate and desirable to determine, under the circumstances, that the *date of the transaction* would be considered as the date on which the charges were registered (at the beginning of 2002), i.e., the date on which they entered into effect regarding third parties, and *not* the date on which they were created. However, the charges were *registered* during what the court as referred to as the "prohibited period". The court relied on the decision in CA 315/89 *Bialostotzky Ltd. v. Graph Paper (Industries) Ltd. (in liquidation)* [2], and clarified that *if* the charges had been registered within 21 days of having been created, the registration would have gone into effect retroactively, in accordance with the aforementioned ruling. However, if the charge was registered *late*, as in the case at hand, it does not come into effect from the date of its creation, but only from the date of its registration. In that regard the court noted that a decision to recognize a charge registered belatedly, during the prohibited period, as being in effect from the registration date so that the date on which the transaction was executed for purposes of fraudulent preference would be the date on which the charge was perfected, prevents a situation of preferential transactions by a consensual delay in the registration, to enable

the company to present a better financial situation. The court summed this up as follows:

> '24. Regis acquired a legal right to request the extension of the registration in order to upgrade its status to that of a secured creditor, or more precisely — to upgrade its status in relation to all the creditors by way of registration, seeing as it already had status as a secured creditor of Rolider from the date of the agreement, and as such it remained. This right, when exercised within the prohibited period, after a period of almost two years during which Regis did nothing to secure the debt, its sole purpose being to create an advantage over other creditors, *does not* satisfy the condition of s. 355 of the Companies Ordinance and s. 98 of the Bankruptcy Ordinance, insofar as it constituted "unlawful pressuring" of Rolider. Nor can we accept Regis' claim that regarding the date of the execution of the charge transaction (in accordance with the date of the creation of the charges), and in circumstances in which the charge was registered late, the rule in *Bialostotzky Ltd. v. Graph Paper (Industries) Ltd.* [2] ought to be interpreted such that the date of the transaction will be the date of the perfection of the charge in relation to third parties (i.e. the date of its registration). The operative result of my decision is that the trustee's decision of 29 August 2002 remains intact, meaning that Regis is not to be regarded as a secured creditor with respect to the funds that were received from the sale of the presses.'

7. Regis has appealed this ruling before us. It claims that the ruling in *Bialostotzky Ltd. v. Graph Paper (Industries) Ltd.* [2] concerning the retroactive effect of a charge from the date of its creation and not of its registration should not be interpreted as applying only to a case in which the charge was registered within twenty-one days of its creation. The *creation* of the charge preceded the "prohibited period" thereby preventing, according to Regis, the cancellation of the charge. Once the charge has been registered, even if late, its legal standing is that of a charge duly registered on time, and no distinction should be made between a charge registered on time and a charge registered late. Regis stresses that no *other* property right was created between the date of the creation of the right and the date upon which the charge was registered, so that there was no violation of any right that was "in competition" with Regis. In any event, the regular creditors cannot presume

that no charge will be registered at a date later than the date of their creditorship.

8. Regis further claims that this is *altogether not* a case of fraudulent preference: the act of registration was effected solely by the creditor (Regis) based on real time documents in its possession, whereas the Company did not undertake any additional act. As such, Regis did not "pressure" the company into "preferring" it.

9. The trustee endorses the decision of the District Court. According to the trustee, after the process of liquidation has begun, transactions in the property of the Company cannot be allowed without court approval. Since no such approval was forthcoming in our case, registration of the charge is not valid. The trustee adds that when Regis requested and received the extension from the Registrar, it did not disclose the fact that an application for liquidation had been filed and that the Company was collapsing. Had the Registrar known these facts he would not have granted the extension. The trustee is therefore entitled to claim in the liquidation court that the extension is void regarding him. The trustee claims that Regis registered the charges in a completely improper manner. Granting Regis the status of a secured creditor would lead to its preference even over other preferred creditors, including debts for workers' wages, debts to income tax and other debts with priority status. The trustee also endorses the decision of the court with regard to fraudulent preference.

Deliberation

10. Before addressing the substance of the matter I wish to clarify that one of the arguments raised by the parties *does not* require our resolution: Was the trustee obliged to file a separate proceeding *on his own behalf, requesting* that the liquidation court invalidate the late registration of the charge, by reason of its being (so he claimed) a fraudulent preference and because the Registrar should not have granted an extension after the beginning of the liquidation, or can this question be clarified in the course of the hearing of the creditor's request to be recognized as a secured creditor? In my view, we should take the bull by the horns and examine whose right takes preference: the right of the creditor whose charge was not registered on time, i.e., within the twenty-one days mentioned in s. 179(a)(1), and which was actually registered only after the filing of the liquidation application, or the right of the insolvent company and its creditors. In other words, our concern is with the validity of the charge, both in terms of the laws of charges and the laws of insolvency. In the matter before us nothing prevents the issue of the *validity*

of the charge being resolved by the liquidation court, and the decision of the Registrar cannot be the final word with respect to the liquidator, who was not a party to the extension proceeding, and when in any event, "s. 185 confers the status of conclusive proof of the fulfillment of all of the requirements relating to registration and not to the validity of the charge (*Iskoor v. Elkol* [1], at p. 297C; see also the comments of Judge D. Keret-Meir in CApp (T.A.) 19875/05 (BR 1795/05) *Council for Production and Marketing of Plants v. eGrowing, Selecting and Marketing of Agricultural Produce (In Temporary Assets Receivership)* [29], at para. 4(b).

11. The matter before us is located on the "seam" between the laws of charges (including the laws of the registration of charges) and the laws of insolvency. Were it not for the insolvency, there would have been nothing preventing (in this case) the registration of the charge, even if late. There were no later charges and there is no conflict of rights between competing charges. As such, in my view, the solution to the question I posed must be found on the seam between the laws of charges and those of insolvency. The dividing line between them is not always clearly demarcated, and the comments of Professor Lerner in this context are particularly apposite, as though they were written specifically in reference to our case:

> 'That the border between the laws of insolvency and the laws of charges is a difficult one to demarcate is also evident in the case-law ruling that unregistered charges are invalid at the time of the company's liquidation, and secured creditors who did not perfect their right will be regarded only as regular creditors' (Shalom Lerner, *Charging of Company Assets* (1996), p. 26).

Indeed, in our case I have reached the conclusion that validity cannot be conferred on a charge registered late, after the commencement of the liquidation proceedings, and the appeal should thus be denied. My path to that conclusion differs from that of the District Court. The District Court ruled that under the laws of charges the charge should be validated, but under the laws of insolvency which prescribe the invalidity of transactions involving fraudulent preference, Regis cannot be accorded the status of a secured creditor. In my view, our case does not involve fraudulent preference and in that respect my view differs from that of the District Court. However, my position regarding the holding that the charge should be validated differs from that of the District Court as well, and so, at the end of the day, the result is that the appeal must be dismissed. I will explain below.

12. First, I wish to explain why I believe that the District Court should not have ruled as it did regarding fraudulent preference. Section 98(a) of the Bankruptcy Ordinance prescribes four cumulative conditions for the determination that a case is one of fraudulent preference (see Shlomo Levin and Asher Grunis, *Bankruptcy* (2nd ed., 2000) at p. 329; Irit Haviv-Segal, *Corporate Law in Israel – After the New Companies Law*, vol. 2 (2004) at p. 288):

(a) The acts took place within the three-month period that preceded the filing of the bankruptcy application;

(b) The acts were executed for the benefit of a creditor or his trustee;

(c) The acts were executed for the purpose of giving preference to that particular creditor, or to the person who guaranteed his debt, over other debtors, *or by reason of unlawful pressure or persuasion on the part of that creditor or on his behalf*.

(d) At the time of the act, the debtor was unable to pay his debts from his own money upon their becoming due.

13. It seems to me that in our case there is no dispute regarding the conditions specified in items (b) and (d) above. Item (a) will be resolved in accordance with the answer to the question of whether the charge should be viewed as having come into force on the date of its creation or on the date of its registration. Without ruling on the matter, I am prepared to *assume* that the District Court was correct in ruling that the determining date was the registration date (unless the charge was registered within twenty-one days of its creation, in which case it will be viewed as having retroactive effect, in accordance with the rule in *Bialostotzky Ltd. v. Graph Paper (Industries) Ltd.* [2]). The District Court cited in this regard an explanation mentioned in the legal literature, to the effect that such recognition of the determining date (as being the registration date) will prevent dubious deals between the holder of the charge and the debtor, in which the charge would not be registered so as not to prejudice the company's ability to raise funds. As noted by Professor Lerner:

> 'In jurisprudential literature, the issue of invalidation of transactions is accorded an additional purpose — as a barrier against the conferral of concealed rights. For example, the concealment of a charge may mislead potential creditors and assist the company in presenting its financial position as being better than it is in reality. In order to prevent an agreement between the debtor and the creditor to create a charge and defer

> its registration to a later date, the law allows the liquidator of a company to petition for the cancellation of a charge that was registered just prior to the time of liquidation. It is for this reason that with respect to the laws of cancellation, the execution of the transaction is identified with its perfection regarding others, and not with the conclusion of the agreement. The secured creditor is thereby given a double incentive to register the charge in his favor without delay: the fear of the creation of an additional charge on the same asset, and the possibility of challenging the charge at the time of liquidation. The goal of preventing the concealment of charges is therefore one that is common to the two sets of laws: the laws of charges and the laws of insolvency' (Lerner, at p. 427).

As noted by the District Court, this question is one of legal policy. In our case I am not required to rule on the question, for *even if* the determining date was the date of registration of the charge, and the charge was not "immune" to cancellation in any event due to fraudulent preference, in our case it would still not be possible to cancel the charge by virtue of the laws of fraudulent preference. I will now address this issue.

14. Regarding the question of fraudulent preference, the crux of the appeal is the third condition specified above, and in greater detail in Regis's argument that the case did not involve "*unlawful pressure or persuasion on the part of that creditor or on his behalf."* It will be recalled that in this case the court did not invoke the alternative of "in order to give priority to a particular creditor" but rather the alternative of "pressure" referred to in s. 98 of the Bankruptcy Ordinance. My view is that the District Court "stretched" the expression "pressure" beyond its linguistic limits, and beyond the situation of "pressure" as in the case-law ruling in a similar case.

15. Under the present circumstances, the act of registration was executed entirely by the creditor (Regis) and not by the Company. In executing the registration Regis did not require the assistance of the debtor, as it was already in possession of all the charge documents. A matter similar to the one before us arose in CA 4548/91 *Emek Hayarden Farms Central Agricultural Cooperative Society Ltd. v. Haspaka Central Company for Agriculturalists Ltd. (in liquidation)* [3]. The Court ruled there that in terms of the sections pertaining to fraudulent preference, there was nothing unlawful about acts of assignment of the right of a creditor of the company to its debtor which resulted in the litigating societies having a right of set off against the company in liquidation. The Court explained that the assignment of a right

does not require the debtor's consent, and the act of setting off is a unilateral legal act which is perfected upon giving notice of the set off. These acts were executed by the creditors of the company in liquidation and not by the company itself. In our case, the District Court, as stated, based its decision on the alternative provided by s. 98(a) of the Bankruptcy Ordinance, under which there had been "unlawful pressure or persuasion". In this regard the court relied on the judgment of Judge Alshich in CApp (T.A) 1355/03 (BR 2118/02) *Trustee of the Rubenenko Group v. Department of Customs and V.A.T.* [30], whereby the court decided not to recognize a charge on the company assets created by the Tax Authority during the prohibited period. The Tax Authority is able, by law, to upgrade its standing from that of a regular creditor to that of a secured creditor, and it did so in the prohibited period. The District Court ruled that inasmuch as the charge was registered on the eve of the company's collapse and its entry into the stage of a stay of proceedings, the act constituted the exercise of a right with the express intention of gaining priority over the other creditors, and this constituted fraudulent preference. The test, according to the decision in *Rubenenko v. Department of Customs and V.A.T.* [30], was whether the act fitted into the regular course of business between the creditor and the debtor or whether it deviated therefrom with the aim of "upgrading" the creditor vis-à-vis all the other creditors, without value having been given in consideration. The court in *Rubenenko v. Department of Customs and V.A.T.* [30] noted that the tax authorities were obligated to make use of the tool they had been given to upgrade their status lawfully and in good faith, and that the prohibition against according preference to creditors on the eve of a company's collapse is a general principle. It also ruled that upgrading the status a few days before the collapse of the company, when the tax authorities were aware of the position of the company, might expose it to the logical presumption that this was an act of "pressure" applied by the tax authority to cause the debtor to pay his debt, and its intention was solely to gain preference for itself over the debtor's other creditors. This is the natural and necessary meaning of the registration of a charge just before the company's collapse.

16. The District Court's comments in *Rubenenko v. Department of Customs and V.A.T.* [30] were, as stated, endorsed by the court in the judgment forming the subject of appeal before us, which held that the registration of the charge constitutes "pressure" or "persuasion", as it is not an act performed in the regular course of business. I see no need to take a position on the question that has not arisen before us — concerning the duties incumbent upon the *tax authorities*, which are public authorities, with respect

to the other creditors. However, I am unable to concur in the conclusion that Regis' actions in our case fall into the category of "pressure". The comments of this Court in *Emek Hayarden v. Haspaka* [3] are apposite here, concerning the alternatives of pressure or persuasion:

> '*Haspaka* further argued that the case falls into the category of section 98 of the Ordinance, in the Bankruptcy Ordinance Amendment Law 5743–1983. That is to say: the act was done "or in response to undue pressure or persuasion by or on behalf of such creditor" Indeed, the aforementioned amendment broadened the laws of fraudulent preference by also enabling the invalidation of actual acts of preference carried out without intention on the debtor's part to prefer the creditor. As indicated by the Explanatory Note to the Bankruptcy Ordinance Amendment Bill, 5741-1981, which added this amendment, "It is proposed that a transfer of the bankrupt's property, which is unlawfully received by a creditor by way of collection of his debt involving coercion or temptation, should be equated to the fraudulent preference of a creditor and will likewise be invalid with respect to the the trustee (*ibid,* at pp. 155-156). Justice Bein in CA 1621/92 and Justice Strasburg-Cohen in CA 767/93 correctly stressed the existence of two foundations included in the aforementioned paragraph: one – the act was unlawful and a set off — assuming it was executed lawfully — is the legitimate way of paying debts. The other – even when there is undue pressure, *the act must be committed by the debtor himself* and not only by his creditor. *Haspaka* argues that the section refers to the act of surrendering to a legal proceeding, and that in the matter at hand, it surrendered to the legal proceedings instituted by the Associations. This situation, it was claimed, is analogous to the failure to file a statement of defense against a statement of claim. It was likewise claimed that the result of the set off was that *Haspaka* had actually paid its debt to the factories, and by doing so committed an act of fraudulent preference. These arguments *disregard the unilateral character of acts of setting off*. Not contesting a claim or actively paying a debt is not the same as a debtor passively standing by while the act of setting off is being carried out' (*ibid.*, p. 18).

Further on, the court in *Emek Hayarden v. Haspaka* [3] explained that the scope of s. 355 of the Companies Ordinance could not be extended to include

acts of a creditor in which the company played no part (see also Levin and Grunis, at pp. 329, 332 and 338). In our case Regis registered the charge based on signed documents that had long been in its possession. Therefore, and notwithstanding my *assumption* that in terms of the dates, the laws of fraudulent preference are applicable to this case, they cannot be applied in the concrete circumstances of this case, which fail to meet the conditions specified in s. 98(a) of the Bankruptcy Ordinance or the alternative relied upon by the District Court ("undue pressure or persuasion") as explained in *Emek Hayarden v. Haspaka* [3]. In other words, even in a case of "undue pressure", an act must be performed by the company itself, and in absence of such an act on its part, there can be no "fraudulent preference".

17. This concludes our comments regarding fraudulent preference. As mentioned, my view on this matter differs from that of the District Court, but the matter does not end here. We must consider whether in our case, we can validate a charge registered late, after the commencement of the liquidation proceedings. I would answer this question in the negative, for three reasons. First, for the reason that as a rule the late registration of a charge should not be allowed after the commencement of the liquidation proceedings; secondly, because allowing the late registration of a charge, following the commencement of liquidation proceedings, undermines every one of the goals of the registration; and thirdly, for reasons of good faith at the time of registering the charge and because of the delay involved.

Liquidation Proceedings

18. As stated, the District Court concluded that the charge in the case at hand was valid, despite having been registered *after* the beginning of liquidation proceedings, in reliance on *Iskoor v. Elkol* [1]. However, in *Iskoor v. Elkol* [1], the question of the status of a charge registered *after* the commencement of liquidation proceedings was explicitly left undecided. In fact, the question in *Iskoor v. Elkol* [1] was different. At the very beginning of the decision, Justice S. Levin stated that "the question that arises in these appeals is what validity a charge created by the company has — regarding the liquidator —a, when the particulars of the charge were submitted for registration after the passage of twenty-one days from the date of its creation; and which, even though no application for an extension of the registration date was submitted, was registered by the Registrar, and a certificate of registration of the charge was issued, *well before the commencement of liquidation proceedings against the company*" (*ibid,* at p. 291 para. d) [emphasis added]. Thus, the charge in *Iskoor v. Elkol* [1] was indeed registered late, but the registration was effected "*well before the*

commencement of liquidation proceedings". This is not so in the case before us, in which not only was the charge registered late, but it was registered *after* the commencement of liquidation proceedings. Consequently, the rule laid down in *Iskoor v. Elkol* [1] does not govern our case. To be precise: the *Iskoor v. Elkol* [1] ruling stresses that the registration was indeed late, but that it occurred *before the commencement of the liquidation* (this expression appears repeatedly, see paras. 10, 11, and 12) and Justice Levin even states that he is not deciding on a situation in which the charge was registered after the commencement of the liquidation (see para. 7). In *Iskoor v. Elkol* [1], therefore, no ruling was made on the validity of a charge registered late after the commencement of liquidation proceedings, but the general thrust of the judgment seems to be that validity should not be conferred on such a charge (as opposed to a situation in which the charge was indeed registered late, but "well before the commencement of liquidation proceedings, "in which case it should be deemed valid). As noted by Professor Deutch:

> 'A special question arises when the Registrar issues the certificate *after* the commencement of liquidation proceedings, whereas the charge itself was created before the commencement of those proceedings. The court [in *Iskoor v. Elkol* — M.N.] did not decide on that situation, but it is clear that it deemed it possible that the situation under those circumstances would differ from what it was in the case at hand [when the registration was executed well before the commencement of liquidation proceedings — M.N.] (Miguel Deutsch, *Property*, vol. 1, 162, n. 111 (1997) (hereinafter: Deutsch, vol. 1).

And Professor Lerner wrote:

> 'The court in *Iskoor v. Elkol* [1] refrained from expressly stating its position on the matter, but from reading the decision it emerges that the court would not have been inclined to grant the secured creditor a similar extension after the commencement of the liquidation. A similar approach finds expression in the ruling of the District Court […]. According to this approach, the status of the creditors — as regular or secured — is determined at the commencement of the liquidations, i.e. at the time of the submission of the liquidation application' (Lerner, at p. 350).

19. Indeed, if the charge was registered within the time specified in s. 179 of the Ordinance, i.e., within twenty-one days of its creation, it would be valid (in terms of the laws of charges), even if an application was filed in the

meantime to liquidate the company. In other words, if the charge was created before the application for liquidation, and its registration was executed after the application but before the passage of the twenty-one days prescribed in s. 179, the charge would be valid (CA 6/89 *Israel Discount Bank Ltd. v. Maof Airways Liquidators Ltd.* [4], at para. 5). The basis for this rule is that although the charge was registered after the submission of the liquidation application, it was within the twenty-one day period specified in s. 179. In our case, however, the registration took place after the submission of the liquidation application and considerable time after the twenty-one days. What is the law in such circumstances? In my view, it should be decided that the charge is invalid. After the liquidation has commenced, the parties' expectations crystallize, and a charge that harms those expectations should not be recognized. When the liquidation began, there was no valid charge in favor of the appellant, and therefore, after the commencement of the liquidation, the charge that was registered late should not be deemed valid. This point was elucidated by Prof. Cohen:

> 'In my view the date for registration of charges should not be extended after the beginning of the liquidation. The liquidation crystallizes the rights of the parties, as they were at the time of its commencement, and these rights should not be changed by registration at a later date' (Tzipora Cohen, *Liquidation of Companies* (2000) p. 582).

Instructive comments in this context were also made by Professor Deutch:

> 'It is clear that the commencement of bankruptcy or liquidation proceedings against the mortgagee crystallizes the picture of the conflict, such that the registration of a pledge after that stage will not usually lead to the proprietary preference of the mortgagor over other creditors (Miguel Deutch, *Property* vol. 2 (1999), p. 143 (hereinafter: Deutch, vol. 2)).

The issue was also addressed by Professor Lerner:

> 'The meaning of the retroactive application of the liquidation is that the division of the company's assets amongst the various creditors will take place in accordance with the state that existed when the liquidation application was filed. Any act done thereafter, even if the company was not partner to it, will not change the manner of allocation that existed at the beginning of the liquidation' (Lerner, at p. 446).

20. In his book, Prof. Lerner presents both the English caselaw that negates the possibility of extending the date for registering the charge after the filing of the application for liquidation of the company, as well as the Australian caselaw which does not regard the application for liquidation as an exclusive consideration, but he immediately adds that "nevertheless, there would not be a significant gap between the two approaches in practice, *since only rarely would the court extend the registration date when a request to liquidate the company had already been filed* (Lerner, p. 351) (emphasis added). In Israel, the extension is at the discretion of the Registrar of Companies, and according to Prof. Lerner, "particular care" is required concerning the question of extending the date for registration of a charge after liquidation proceedings have commenced; in his view, "it is doubtful whether it is desirable to leave a quasi administrative-judicial authority such as the Registrar broad discretion after liquidation proceedings against the company have begun" (*ibid*). Prof. Deutch similarly notes that "it is doubtful whether the period can be extended, when in any case the company is going through liquidation proceedings" (Deutch, vol. 2, p. 132) and that "it is doubtful whether the Registrar of Companies is authorized to extend the date for the registration of a charge against the company, after the commencement of liquidation proceedings, when the charge was not registered on time" (Deutch, vol. 2, p. 143, n. 373). The fact that in England, "the homeland of our Companies Ordinance" (in the words of Justice Goldberg in LCA 1096/97 *Abu Juba v. Feiman Ltd.* [5], at p. 493), the court does not generally allow the late registration of a charge after the commencement of liquidation proceedings, and the reasons for this are explained by Gower:

> 'Section 404 enables the holder of a registrable charge which has not been registered within 21 days from its creation to apply to the court for an order extending the period for the registration of the charge. The jurisdiction of the court is very wide but normally the court will not make an order under section 404 once a winding up has commenced. The reason for this is that winding up is a procedure for the benefit of unsecured creditors and the registering of a charge after the commencement of winding-up would defeat their interests.' (PAUL L. DAVIES, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 380 (6th ed. 1997) (1954)).

Prof. Cohen takes a similar view:

> 'Whereas there is nothing to prevent the timely registration of a charge, that is, within twenty-one days of its creation, even if the

> company began liquidation within the period between the creation of the charge and its registration, the time for registration of the charge may not be extended after the commencement of the liquidation. As mentioned, the period for registration of a charge may not be extended when it is harmful to the creditors. Liquidation is a procedure intended to benefit regular creditors. The late registration of a charge, after the commencement of liquidation, is detrimental to the creditors' interests. The Supreme Court in the matter of *Iskoor v. Elkol* [1] did not express its view on this question of late registration, after the commencement of liquidation, of a charge that was created before the liquidation began […]. In England too, the accepted view is that as a rule the court will not exercise its authority to grant an extension after the commencement of liquidation, for the reason of harm to the regular creditors. All the same, it was held there that in exceptional cases the court was entitled to extend the period, despite the commencement of liquidation proceedings. This would be the situation, for example, in a case in which the failure to register was the result of fraud' (Cohen, at p. 581; and see Lerner, at p. 424).

21. In our case, the non-registration was not the result of fraud and that exception does not apply. Furthermore, in *Iskoor v. Elkol* [1], one of the reasons for the conclusion that a charge would be valid even if registered late but "well before the commencement of the liquidation proceedings" was that "there was nothing to prevent the company from creating a new, identical charge and from filing the registration documents pertaining thereto on time" (*ibid,* at p. 298). This reasoning has no application in the case before us, because after the beginning of the liquidation, no transaction in the company's assets can be made without the approval of the court (see s. 268 of the Companies Ordinance; regarding the purpose of this section and the conditions for its application, see CA 4351/01 *Liquidator of C.A Food Company Ltd. v. State of Israel, Department of Customs and V.A.T.* [6], at p. 478ff.). Prof. Lerner's comments in this regard are incisive:

> 'The court justified the harm by saying that in any event, the secured creditor would be able to conclude a new pledge agreement with the company and to register it on time. However, this reasoning does not apply after the filing of an application to liquidate the company, since during that period, transactions made by the company with others are not valid, unless approved

> by the court. It may reasonably be presumed that the court would not approve a transaction granting one of the company's creditors a charge regarding an old debt that the company owes to him' (Lerner, at p. 350).

22. To be precise: it might be argued that even if the charge was created before the commencement of liquidation, the fact that its registration was effected after the commencement of the liquidation should suffice for it be viewed as a "transaction in the company's assets" which is impermissible under s. 268. As ruled by Judge Levitt of the District Court:

> 'Were we to recognize the Administration's retroactive consent to the charge, after the commencement of the liquidation, we would thereby prejudice the rights of the company's other creditors and confer upon the bank the preferred status of a secured creditor, which it did not have at the beginning of the liquidation. It would not be amiss to note that under s. 268 of the Companies Ordinance no transaction may be made in the company's assets other than with the consent of the court. I see no grounds for allowing the bank to change and improve its status as a company creditor on the basis of an act done after the beginning of the liquidation, even if it is nothing more than the completion of an act taken by the company before the beginning of the liquidation (M (T.A.) 8663/91 (CC 1247/88) *Crates Center Ltd. v. Industrial Development Bank of Israel Ltd.* [31] at p. 80; see also and compare (M (T.A.) 14564/89 (CC 511/88) *Liquidator of Razmig — Tires Marketing Co. v. Bukshpan* [32], at para. 3; AC (Jer) 43/92 *Hapoalim Bank Ltd. v. Tadmir Feed Mix Institute Cooperative Agricultural Association Ltd. (in liquidation)* [33], at p. 379).

According to Judge Levitt, even the completion of an act by a creditor is tantamount to a transaction by the company, which is not allowed under s. 268, and as previously cited in the name of Prof. Lerner (emphasis added):

> 'The division of the company's assets amongst the various creditors will take place in accordance with the state that existed when the liquidation application was filed. *Any act done thereafter, even if the company was not partner to it, will not change the manner of allocation that existed at the beginning of the liquidation* (Lerner, at p. 446).

In the matter of *Crates Center Ltd. v. Industrial Development Bank of Israel Ltd.* [31] cited above, at issue was the retroactive consent of the Israel Lands Administration to a mortgaging of land, and Judge Levitt's comments there concerning the Administration's consent are also applicable, *prima facie*, to the matter at hand with respect to the Registrar's consent to the extension of the period for registration. However, my decision is not based on s. 268, and therefore I will not rule on the question of whether registration *per se* constitutes a "transaction" within the meaning of s. 268, and I will leave the matter as pending further examination (see and compare: CA 126/89 *Liquidator of Koppel Tours Co. Ltd. v. Dan Hotels Co. Ltd.* [7] at p. 451; CA 558/88 *Itung Ltd. v. Levi David and Sons Ltd. (in liquidation)* [8] at pp. 138-139, in which, *inter alia*, the question arose as to how to distinguish between the continued existence of the power of attorney and the extent to which the right secured by the power of attorney continues to exist *after* the commencement of liquidation proceedings).

23. Moreover, as stated, the rights of the parties crystallize with the commencement of the liquidation, and in addition, the principle of equality is accorded priority status. Prof. Cohen even adds that "by virtue of this principle the courts will prefer an interpretation that preserves the principle" (Cohen, at pp. 19–20). Dr. Bahat adds that "the principle of equality is the starting point in the laws of liquidation, and its application may also be of importance in those cases in which there is an exception which sets in law any kind of priority right. For example, even exceptions to the principle of equality are given a restrictive interpretation, and equality of creditors occasionally serves as a principle that often redirects the rights of the secured creditor back towards the starting point of equal division" (Yechiel Bahat, *Corporations — The New Ordinance and the Law*, vol. 3 pp. 1445-1446 (10th ed., 2008) (hereinafter: Bahat, vol. 3). It appears that there is no dispute that this principle is based on considerations of justice, and as noted by Prof. Lerner: "The classical explanation for the rule of equality in liquidation and bankruptcy is rooted in foundations of justice and fairness" (Lerner, at p. 18). This point was also made by Dr. Bahat, who noted that —

> '… the rule is based on considerations of justice. Considerations of justice play a central role in the laws of liquidation, whose English source is in the laws of equity. These considerations of justice dictate not only equal distribution of the property remaining at the end of the liquidation process, with the liquidator's examination of the creditors' proofs of debt, but also the ensuring of equality for the duration of the process. For

> example, by the invalidation of transactions and transfers executed after the beginning of the liquidation' (Bahat, vol. 3, at p. 1443)

24. In the present case the respondent claims that the parties' rights crystallized with the commencement of the liquidation, and that considerations of justice should therefore lead to the conclusion that these rights cannot be affected by validating a charge registered late, after the commencement of liquidation proceedings. The appellant claims, on the other hand, that justice is on its side, because it was the appellant that sold the heavy engineering equipment which is the subject of the appeal to the Company, and there is no reason that other creditors should be able to enjoy this property, for which no payment was made. Indeed, it is undeniable that concretizing the consideration of justice in this case is not simple. What I said in another case is appropriate in the present context:

> 'In any situation of bankruptcy or liquidation of companies, a situation of injustice is created vis-à-vis innocent parties. Justice dictates that any person who is indebted should pay his debts. In a state of insolvency, innocent bystanders gain, if anything, a dividend, and the morsel does not satiate the lion. When the blanket is short, pulling the blanket in any direction will perforce expose to the cold the party from whom it was pulled. Many are pulling the blanket in different directions: creditors with priority rights, owners of charges, parties with setting off rights, regular creditors and the like. Any solution that prefers one of them is necessarily at the expense of another […]. Either way, we must determine a uniform rule which does not take into consideration the question of whom the legal solution "will enrich" (CA 1689/03 *Israel Credit Cards Ltd. v. Official State Receiver* [9]).

In this case too, a uniform rule should be established that does not take into consideration the question of whom the rule will "enrich". In formulating such a rule we must tread, as I stated in another case, "the path which will benefit the party looked upon favorably by the legislator" (CA 5789/04 *Hamashbir Hayashan Ltd. v. Logistiker Ltd.* [10]). In the circumstances of this case, where the charge was registered late, and only after the liquidation proceedings had commenced, the legislature has taken the side of the liquidator (and the other creditors). This is evinced by s. 178(a) of the Ordinance:

Charges requiring registration	178.(a) Any charge of the types listed below, which was created by a company registered in Israel, shall be void in respect of the liquidator and any creditor of the company, to the extent that it places a guarantee on its assets or plant, unless the prescribed details of the charge and the document that creates or attests to it — if there was such a document — were delivered to the Registrar or received by him by the time and in the manner specified in s. 179, , for the purpose of registration as required under this Ordinance.

25. In the legal literature, explicit reference is to be found regarding the purpose of s. 178 as being to protect the liquidator and any other creditor:

> 'The purpose of s. 178 is to grant full assurance that any charge on the company's assets which was not registered with the Registrar of Companies within the period prescribed by law, or within the extended period [...] will be void toward the liquidator and any other creditor of the company in the event that it places a guarantee on the company's assets or its plant. In other words, the lender in whose interest the charge was created will not enjoy any preferential right in relation to other creditors, or toward the company liquidator, since they were entitled to assume that the company was free of any charges and it was on that basis that they provided credit, and the law therefore protects them from being harmed. (A. Felman, *Company Law in Israel – In Theory and in Practice*, vol. 2 (4th ed, expanded and updated by Hadara Bar-Mor, 1994), at p. 956).

Indeed, s. 178 instructs that when the charge was not registered on time, the legislator preferred the liquidator and the creditors of the company. In view of s. 178, Zaltzman and Grosskopf argue that no validity should be ascribed to a charge registered late, after the beginning of the liquidation, and "from this the importance of the act of perfection is derived. Only a pledge or charge that were perfected before the bankruptcy or liquidation proceedings were initiated, will be valid toward the trustee or the liquidator"

(Nina Zaltzman and Ofer Grosskopf, *Pledging of Rights* (2005), p. 303. In this context they stress that:

> 'Where the liquidation of a company is concerned, the determining date for purposes of examining the validity of the charge against the liquidator must in our opinion be the date of the commencement of the liquidation proceedings, which is the day on which the application for liquidation is filed (*ibid.*, n. 168).

Therefore, the rule that ought to be established in our case is that no validity should be granted to a charge that was registered late, after the commencement of the liquidation proceedings, when the rights of the parties had already crystallized. I believe that this ruling also adheres to the path that gives preference to the party favored by the legislator under these circumstances, and is consistent with the purposes of registration with the Registrar of Companies. I will now address this.

Objectives of Registration with the Registrar of Companies

27. The objectives of the register of charges maintained by the Registrar of Companies has been addressed in both caselaw and the legal literature. Some writers have stressed the traditional-historical role, which was to attest to the authenticity of the charge transaction, whereas others have stressed its publicity role. Here we are not required to decide which of these objectives takes precedence, because allowing registration after the commencement of liquidation undermines both objectives (see and compare CA 2070/06 *Equipment and Construction Infrastructures Ltd. v. Receiver* [11]; it bears note that in that case, an application for a further hearing was denied (FHC 9048/08)).

28. There is a tendency to view the judgment in *Iskoor Steel Facilities Ltd. v. Elkol Ltd.* [1] as one that focuses on the historical-traditional role (Lerner, at pp. 357-358). Indeed, the historical-traditional role was to view the register as proof of the charge. This point was made by Prof. Lerner:

> 'In order to prevent collusions between the debtor and one of his creditors, the court only recognized charge transactions that were registered in the public register of charges. The register attested to the authenticity of the transaction, and to its not being first conceived of at the time of liquidation for the purposes of detracting from the portions of the regular creditors of the company' (Lerner, p. 364).

In this sense, the register is evidentiary — it attests to the transaction and obviates the need for factual clarification. The evidential aspect is of particular importance after the liquidation proceedings have commenced. As noted by Prof. Lerner:

> 'The additional purpose of the register is evidentiary — to attest to the existence of a right in favor of a particular transferee. This evidence is of particular importance when the company is insolvent and its assets do not suffice for the payment of all of its debts. In that situation the company may wish to benefit a particular person and to claim that specific assets are charged to him. To prevent this claim being raised for the first time during insolvency, the law negates the validity of an unregistered charge toward the liquidator of the company. In that sense, registration plays a key role in the conflict between a secured creditor and regular creditors (Lerner, at p. 368).

Thus, the historical-traditional role is intended to protect the secured creditor who registered the charge, but on the other hand, as noted by Prof. Lerner, the registration according to this objective is also intended "to protect the general creditors of the company" (Lerner, at p. 382); and therefore, he says, "the law prescribes that an unregistered charge is invalid with respect to the liquidator of the company and its regular creditors" (Lerner, at p. 362). Justice Englard ruled that "the historical-traditional role of the register was to attest to the authenticity of the charge transactions so as to prevent collusions between the debtor and his creditors. An unregistered charge was invalid because it was viewed as fraudulent" (CA 6400/99 *Mirage Construction and Investments Co. Ltd. v. Hapoalim Bank Ltd.* [12], at p. 853a). In the case before us, it was only after the beginning of the liquidation proceedings that the appellant sought to register the charge. If we say that a charge registered late, after the beginning of the liquidation proceedings, is similarly valid, it would undermine the historical role of the register, which is, *inter alia*, to protect the regular creditors of the company. Moreover, it would also detract from commercial certainty and stability (see Lerner, at p. 336). In addition, it would render the register irrelevant as a means of attesting to the absence of any collusion, and each case would require complex factual clarification and litigation, contrary to the historical-traditional objective. As stated, according to the historical-traditional objective, a charge that was not registered "*was viewed* as fraudulent" (in the words of Justice Englard), and granting it validity even after the beginning of the liquidation would undermine that objective and create a dangerous outlet for collusions (see and compare CA

4316/90 *Haspaka Central Company for Agriculturalists Ltd. (in liquidation) v. Agra — Even Yehuda Cooperative Agricultural Society Ltd.* [13], at 182.

29. So it is regarding the historical-traditional objective of the registration. At a later stage of its development, the "publicity" role of the register was also recognized, i.e., "as a source of information for someone considering doing business with the company […] [and] providing information to third parties regarding the nature of the rights in the company's assets" (see *Mirage v. Hapoalim Bank* [12], at p. 853. The question is often asked whether the objective of publicity is relevant for all the creditors, or only for those creditors interested in being secured. Prof. Cohen notes that indeed, "the regular creditors do not normally rely on the register of charges, but rather on the economic strength of the company and its state of liquidity. Still, it does not follow from this that the register of charges is absolutely irrelevant for the purposes of the regular creditors. For example, […] regular creditors may examine the register of charges after granting credit in order to assess the degree of danger to which they are exposed and to request repayment of the loan they made to the company, as well as refuse to grant additional credit to the company" (Cohen, at p. 580). Prof. Deutch also takes the view that "the regular creditors have a reasonable protected interest that an examination of the position of the debtor's charges will provide them with a reliable picture regarding the claims to the debtor's assets which may serve for future payment. This picture also enhances their ability to evaluate and plan the degree of danger in which they may be (Deutch, vol. 1, at p. 195, and see Haviv-Segal, at p. 156). According to Prof. Lerner, the purpose of publicity may be relevant primarily to the creditors seeking to take securities and not to regular creditors, "since the register reflects the position of the charges at a given point in time and [the regular creditor] is exposed to charges that may be created at a later point" (Lerner, p, 360). He notes, however:

> 'Some are of the opinion that regular creditors too have an interest in examining the register of charges. These creditors are likely to examine the register periodically, and if they notice a significant change in the scale of the company's charged assets, they can, if necessary, demand the repayment of existing loans and refrain from giving additional loans. The list of charged assets provides the creditors with a general, non-binding indication of the company's activities, and they may demand that it avoid creating further charges in the future (*ibid,* p. 381)

Either way, in matters of property and charges, publicity is important *per se* and "in the law of securities and in the law of property in general, the rule is that to create a right that is effective vis-à-vis third parties, the right must have some element of publicity (CA 790/85 *Israel Airports Authority v. Gruss* [14], at p. 212e . In this context Justice Procaccia ruled that the aspect of publicity is the "principal determinant of the power of the property right and its immunity when confronted by third party claims" (CA 2641/97 *Ganz v. British and Colonial Company Ltd.* [15], at p. 422). As noted by Professor Deutch:

> 'Given that property affects the entire world, the manner in which it is created mandates, in principle, the existence of a component of publicity' (Deutch, vol. 1 p. 127).

It would therefore seem that recognition of the validity of a charge registered late, after the beginning of the liquidation proceedings, would undermine the objective of publicity. Prior to the liquidation there was no public charge, and after the beginning of the liquidation the other creditors are powerless to do anything. Allowing the late registration of a charge after the beginning of liquidation proceedings would also detract from the reliability of the picture that the register is intended to provide in real time, and from the expectations of the creditors. As noted by Justice Or, "The idea is that all those who do business with the company, as in the case before us, will be able to clarify the situation relating to charges and collaterals that the company has given, by means of an inquiry at the Registry of Companies" (*Haspaka v. Agra* [13], at p. 175). Late registration after liquidation would also be detrimental to commercial and legal certainty. In fact, it would seem that it was the objective of publicity that constituted the basis of Prof. Deutch's conclusion that validity should not be given to a charge registered after the beginning of liquidation proceedings. In his words:

> 'The regular creditor's reliance on the dimension of publicity is a legitimate, protected interest, and cannot be negated on the spur of the moment […]. The regular creditor also has an interest in being able to rely on the public presentation of charges regarding past transactions, both in order to receive reliable information regarding the financial position of the debtor and because, in view of this [presentation], he relies on various evaluations relating to anticipated developments in the future […]. This ability of the regular creditor to rely on the register, according to our approach, may — in view of the element of publicity — mean that no retrospective recognition should be

> granted to the charge of a competing creditor in circumstances in which liquidation proceedings have begun in the meantime, for in such a case the regular creditor — whose status as a creditor materialized during the interim period — would *prima facie* be entitled to claim that he did not assume the risk of the creation of a property pledge *after the beginning of the liquidation.* The creation of a pledge under these conditions is a future development which from a legal perspective could not have occurred originally at the time of the extension; this development relies on the *past*; and in relation to the past, as noted, protection should also be given to the reliance of creditors whose creditorship materialized during the interim period' (Deutch, vol. 1, pp.164-165; see also Cohen, p.581).

30. Furthermore, particular importance attaches to the absence of publicity in the current case of liquidation proceedings in which the principle of equality has prime status. Dr. Bahat maintains that under these circumstances, "any request directly related to the relations between the secured creditor and other creditors, and especially any property request based on the rules of publicity set forth in the law, concerning requirements for registration or deposit, will be meticulously examined (Bahat, *Corporations — The New Ordinance and the Law* vol. 1 (10th ed. 2008), at pp. 614-615 (hereinafter: Bahat, vol. 1). He adds that "the property format recognized by the law and the fulfillment of the requirements of publicity are the minimum necessary conditions, before we allow the creditors as a group to be deprived of equal treatment in bankruptcy and liquidation, and create a preference for the secured creditor […]. As a rule we explain this by the need to create a warning for creditors or the need to prevent creditors from relying on a particular factual representation" (*ibid,* at p. 620). Finally, he argues:

> 'As a matter of principle, any deviation from the equality of creditors in bankruptcy and liquidation proceedings, in my view, mandates particular stringency in the fulfillment of the property-based requirements, including publicity […]. This is " the end of the game", and these proceedings leave no further outlets for the creditors. As I stressed above, a person uncomfortable with the seemingly "formalistic" stringency can view it as the result of distributive justice, which does not look kindly on the obtaining of preference over other creditors, and which therefore induces the courts to be meticulous about fulfillment of the conditions that confer priority" (*ibid,* at p. 622).

Another reason for being meticulous about the publicity requirements, according to Dr. Bahat, is that there must be "some kind of formal act by a person seeking priority status, in a manner that stresses his reliance on the collateral" (*ibid,* at p. 621).

31. Thus, it is immaterial whether the principal objective of the register is the historical-traditional one of verifying the authenticity of the charge transaction, or whether the objective is publicity, since ascribing validity to a charge that was registered late, after liquidation proceedings had begun, undermines both of these objectives. Support for the conclusion that in the case before us a charge that was registered late, after liquidation proceedings had begun, should not be considered valid, may also be found in aspects of good faith, which I will discuss below.

Good Faith

32. The principle of good faith is, as we know, a foundational principle of our legal system. It functions as "a binding principle guiding conduct and legal policy with respect to legal actions and obligations throughout the entire Israeli legal system" (HCJ 566/81 *Amrani v. Rabbinical Court of Appeals* [16]. "The principle of good faith also applies in the framework of the laws of property" (*Ganz v. British and Colonial Company* [15], at p. 401c). The obligation of good faith "is imposed upon every person in Israel in his execution of legal acts"(CA 610/94 *Buchbinder v. Official Receiver* [17] at p. 332). These comments are also applicable, of course, to creditors seeking to secure their right, and as this Court has already ruled:

> 'The protection of the creditors' interest in securing their right, and the debtor's interest in his rehabilitation do not stand alone, but rather are subject to the principle of good faith (CA 6416/01 *Benbenisti v. Official Receiver* [18], at p. 205 d–e).

The requirement of good faith applies to all relationships. It determines what constitutes fair conduct in the particular circumstances. The scope for fairness differs from case to case, and is influenced by the balancing of a number of considerations. Indeed, the good faith requirement is not detached from personal interests but it also compels consideration for the other and his interests. As noted by President Barak:

> 'The principle of good faith determines the manner of conduct of people brought together by reality. It demands that people conduct themselves with integrity and fairness as dictated by the sense of justice of Israeli society […]. Good faith does not assume a "quality of piety" […]. Good faith does not require a

> person to disregard his own self-interest. […] The principle of good faith establishes a standard of conduct for people, each of whom is concerned about his own self interest. The principle of good faith determines that a person's preservation of his own self interest must be fair, taking into consideration the justified expectations and appropriate reliance of the other party. Man is to man — not a wolf and not an angel; man is to man — a man. […]. The quality of fairness is influenced by a broad spectrum of considerations […]. The scope of fairness required is the product of a balance struck between these considerations and others. The judge must weigh up the various considerations and determine which of them has the upper hand (LCA 6339/97 *Roker v Solomon* [19], at p. 279).

In another case President Barak stated:

> 'Good faith starts with the assumption that the individual takes care of his own interests. Good faith seeks to guarantee that he does so appropriately, taking into consideration the justified expectations of the other party'(HCJ 164/97 *Conterm Ltd. v. Minister of Finance, Department of Customs and V.A.T.* [20], at p. 348 f–g).

33. In our case, as specified, the expectations and reliance crystallized on the date on which the liquidation began, and the appellant should have taken that into consideration. The respondent claimed that the knowledge of Rolider's financial collapse had spread to the Company's creditors. News of the application for liquidation, which as stated was filed on 27 December 2001, appeared immediately in the financial press and in the commercial data bases, and Regis never claimed otherwise. According to the respondent (and the claim was not denied), Regis tried to seize the equipment but then realized that it had never registered the charge and so, it "frantically" (in the words of the respondent) applied to the Registrar of Companies on 2 January 2002, almost two years after the date on which the equipment was first transferred, and just a few days after the liquidation application. However, despite all this, all that was said in the extension application was that "due to the arrival of the equipment in two separate consignments, an error occurred by us and the charges were not registered with the Registrar of Companies." Such an application does not contain all the information that should have been included. Fairness and honesty demand that in an application for extension, the Registrar should be presented with the complete picture, fully disclosing the entirety of the important information. The existence of an application for liquidation is an important fact that ought to have been

mentioned, and its non-inclusion in Regis' application demands an explanation. What Felman wrote in his book on English law is apposite here:

> 'In an application to the court to issue an order [for an extension of the period for registration of a charge – M.N.] the words "incidentally" or "accidentally" will not suffice. The applicants must provide a detailed account of all the circumstances that led to the non-registration of the charge […]. The affidavit in support of the application to the court must include: a declaration stating that no application has been filed for the liquidation of the company and that no notice of voluntary liquidation has been given by the company to its shareholders, or that a judgment for payment issued against the company was not paid, and that the non-registration is not liable to prejudice the position of the creditors or the shareholders of the company' (Felman, at pp. 967-968; see also and compare: *Council for Production and Marketing of Plants v. A.S. Li* [29]).

In our case too, Regis could have been expected to present the complete picture to the Registrar, including the fact of the filing of the liquidation application. Above and beyond the issue of Regis' conduct, this is also significant in terms of the Registrar's decision. As is well known, the exercise of authority "necessitates first and foremost the existence of a factual foundation upon which the administrative authority bases its discretion when making a decision" (LPA 426/06 *Hava v. Prison Service* [21], para. 14). Likewise, it was held that "the law does not tolerate an unfounded decision. The law is that an administrative decision must be based on a factual foundation" (HCJ 987/94 *Euronet Golden Lines (1992) Ltd. v. Minister of Communications* [22], at p. 423 b–c). The absence of a full picture is detrimental to the Registrar's ability to "reach a well considered, balanced decision which takes into account all of the relevant interests" (CA 8434/00 *Delek Israeli Gas Co. Ltd. v. Gazit and Shaham Construction Company* [23], at p. 703 d–e). It may also prevent the Registrar from providing all those liable to be harmed by the decision with the opportunity of stating their claims (see and compare: Eliad Shraga and Roi Shachar, *Administrative Law – Grounds for Intervention* 130 (Tova Elstein ed., 2008); CrApp 2236/06 *Hamami v. Ohayon* [24]). In the absence of a full picture the Registrar is liable to fail to exercise his discretion correctly and desirably, and this failure is attributable to Regis, which in its application did not provide the full factual picture as required. Since the matter ultimately came before the liquidation court, as it should have done, I will not base my decision on this.

34. However, concerning the aspect of good faith beyond that which was (and which was not) included in the application for an extension, the time that elapsed until the filing of the application for an extension cannot be ignored. In this context it must be recalled that it was possible for Regis to register the charge on time, and in so doing to prevent this entire litigation — but it failed to do so. Here, an analogy may be drawn from *Ganz v. British and Colonial Company* [15], in which President Barak ruled that the extent of application of the duty of good faith takes into consideration the entire range of variable factors, and that in principle, good faith requires that a person executing a transaction in land make every effort to register a caution in order to avoid a "legal accident"; and if indeed he could have avoided the "accident" but did not do so, he will be regarded as having breached his duty of good faith. President Barak added that the caution must be registered within a reasonable period. Our case indeed differs from *Ganz British and Colonial Company*[15], but there also points of similarity, and as President Barak stated there: "The general doctrines of law apply to all parts of the law" (*Ganz v. British Colonial Company* [15], at p. 400 b–c; see and compare *Equipment and Construction Infrastructures Ltd. v. Receiver* [11], para. 30). It seems to me that from an overall perspective, the fact that Regis had the opportunity to register the charge over a long period of time, and failed to do so until after the filing of the application for the Company's liquidation, erodes its good faith. It also demonstrates that Regis did not take any measures to demonstrate "its reliance" on the collateral, and this too operates to its detriment. The comments of Justice Goldberg are apposite in this context:

> 'A person who leaves his contractual right exposed without protection, when the effort involved in acquiring the protection is minimal and insignificant, must be prepared for a situation in which he is saddled with the consequences of the risk stemming from his omission. A legal system which imposes the duty of preventing damage (and as result — the risk of the damage materializing) on the party for whom the effort expected of him in preventing the damage is minimal is an efficient legal system' (CA 839/90 *Raz Building Company Ltd. v. Erenstein* [25], at p. 743).

35. In *Ganz v. British Colonial Company* [15], it was held that "good faith assumes that the holder of the right will ensure the security of his right. *At the same time, good faith seeks to prevent the exercise of a right in a manner that disregards the existence of the other party and that disregards the social interest* (*ibid,* at p. 400 f–g). It seems to me that not registering the charge

over a protracted period, even though all of the documents were in Regis' possession, is not consistent with the requirement not to disregard the existence of other parties and social interests. In my remarks above I already discussed the interest of publicity and certainty and its influence on other creditors, and I will not repeat what I said. I will only add that as regards the period of time that passed, it must not be forgotten that the legislator allotted a period of twenty-one days for the registration. In our case the equipment was transferred during the second half of the year 2000 and at the beginning of the year 2001, but the application for an extension of the filing period was only submitted at the beginning of the year 2002, i.e. a long time after the statutorily prescribed period. The deviation is a significant one, especially as we are dealing with a serious, professional creditor, and this too cannot be ignored when examining the entirety of factors and the duty of good faith.

Additional Claims

36. The appellant argues (in its responding summations) that because the liquidation order was issued by virtue of another liquidation application (which was filed on 14 April 2003), one cannot return to the date on which the first liquidation application was filed (27 December 2001), after it had been cancelled. I cannot accept this argument. First, the argument was not raised in the appeal; it was raised for the first time in the responding summations, even though the lower court also relied, *inter alia,* on the submission date of the first liquidation application (see paras. 14 and 15 of its judgment). It will be recalled that the court ruled that registration of the charge on 2 January 2002 took place during the "prohibited period", and that this constituted fraudulent preference. If indeed there was justification for considering (as claimed in the responding summations) *only* the liquidation application filed in 2003, then in any event there would have been no reason to speak of fraudulent preference, because the registration was carried out long before 2003. In other words, if indeed the appellant's claim was that the only relevant liquidation application was the one filed in 2003, then this claim should already have been raised within the framework of the appeal, because this would have refuted the lower court's finding that the case involved an event that took place during the "prohibited period", insofar as the liquidation application was concerned. It will be recalled that the appellant argued against the ruling of the lower court that the date of the transaction for purposes of fraudulent preference was the date of perfection (2 January 2002) and not the date of creation (during the years 2000 and 2001). The appellant attempted to persuade us that the court erred in this holding. However, if the only relevant liquidation application is the one filed in 2003, the question of the perfection date or the creation date is of no

significance whatsoever. The appellant, as specified, did not make this claim in the appeal, and hence it is clear that it agreed that the determining date regarding the liquidation application was 27 December 2001. Furthermore, as I mentioned at the outset, all of the insolvency proceedings took place in succession, and the cancellation of the first liquidation application (by consent) and the filing of the new liquidation application (by the trustee himself) were part of the sequence of insolvency proceedings. In fact, this can be regarded as akin to a "substitution" as provided in reg. 10 of the Companies (Liquidation) Regulations, 5747-1987, in accordance with which the court may, at any stage of the proceedings, order that the applicants be substituted and that the hearing of the application be continued even after the cancellation of the first liquidation application (see Cohen, at pp. 224-225).

37. An additional claim made by the appellant in its appeal is related to contractual stipulations that prohibited the Company from transferring the equipment to others without the appellant's consent, its claim being that the court erred in its failure to decide on the claim, on the grounds that it was raised belatedly. I cannot accept this claim. Having examined the various documents that were submitted to the court, I accept the court's ruling on the matter. Moreover, the respondent is correct in claiming that not only was the claim raised belatedly, but it also assumed varying forms. Thus, what began (belatedly) as a claim concerning the conservation of ownership subsequently became a claim on the contractual plane. However, the hearing as a whole, as determined by the court, focused on the plane of property law, and there is no place to allow for belatedly raising claims on the contractual plane. Furthermore, the respondent argues, with reason, that claims on the contractual plane, as distinct from claims on the plane of property law such as ownership and charges, would in any event be of no avail to the appellant, and what is more, in all matters pertaining to the relations with the Company, there is no dispute regarding the rights of the appellant (see para. 24 of the lower court's judgment, cited above). It bears note that no claims of "equitable rights" were made before us and therefore I will not express any opinion on the matter (see in this context CA 603/71 *Bank Leumi LeIsrael Ltd. v. Land of Israel-Britain Bank* [26], at pp. 477–478; CA 181/73 *Shtukman v. Spitani* [27], at pp. 187; CA 248/77 *Hapoalim Bank Ltd. v. Garburg Ltd.* [28], at pp. 261–262).

Epilogue

38. The late registration of the charge after the commencement of liquidation proceedings does not, in this case, constitute fraudulent

preference as ruled by the District Court; nonetheless, in my view the charge cannot be deemed valid. As a rule, the late registration of a charge should not be permitted after the commencement of liquidation proceedings thus violating of the principle of equality among creditors. Enabling the late registration of a charge after the commencement of liquidation proceedings would also undermine each of the goals of the register. Our case also involves aspects of good faith with respect to the period of time during which the appellant waited before filing the application for an extension, and with respect to the contents of the application, and certain weight must also be attached to these factors. I would therefore propose to my colleagues to deny the appeal. Under the circumstances, I would not make an order for costs.

Justice E. Arbel

I concur.

Justice E. Rubinstein

1. I concur in the result reached by my colleague Justice Naor and the main points of her informative analysis. There are only two matters that I would like to address.

First, I will add another reason in support of my colleague's decision on the matter of fraudulent preference (s. 98(a) of the Bankruptcy Ordinance). The term "fraudulent" carries the connotation of "malicious"; therefore, exceptional caution is required in the attribution of fraud, even in the framework of a civil rather than a criminal proceeding, because it implies the performance of a highly negative act, and its result is a stain of sorts. In my view, the courts must give this matter consideration. In the case at hand, I, like my colleague, believe that it is difficult to apply the word "pressure " as per s. 98(a) to a situation in which there was no act on the part of the Company itself, as opposed to its creditor, as explained by my colleague. I too see no need to take a position on the tax authorities as a "pressuring" factor, even though it is clear that their powers as public bodies are greater than those of individual actors, and hence their "pressure" or "constraints" are more significant.

2. Secondly, regarding good faith, I agree with my colleague that "fairness and honesty demand that in an application for extension, the Registrar should be presented with the complete picture, fully exposing the entirety of the relevant information," including an application for liquidation.

In this context there is certainly a problem with the good faith of the appellant. On the other hand, in my view, caution is required when ascribing bad faith with respect to the period of time that elapsed, since human experience shows quite often that a person does not do that which is required of him purely due to negligence, and in such a case, he may lose in court and be harmed, but this would not taint him with a lack of good faith.

3. Subject to the above, I concur in the opinion of my colleague, Justice Naor.

Held as per the opinion of Justice M. Naor.

13 Av 5769.

3 August 2009.