CFH 8447/15

Applicant: **Bank Leumi le-Israel**

v.

Respondent: **Tal Trading Corp.**

In the Supreme Court

[Sept. 11, 2017]

Before: President M. Naor, Deputy President (emeritus) E. Rubinstein, Deputy President (emeritus) S. Joubran, Justices E. Hayut, N. Hendel, N. Sohlberg, U. Shoham

Further Hearing of the Supreme Court's judgment in LCA8301/13 of November 24, 2015, by Justices N. Hendel, N. Sohlberg, and U. Shoham

On behalf of Applicant: Adv. Einav Nahari-Sandler; Adv. Bruria Sharir-Harel; Adv. Gal Klausner

On behalf of Respondent: Adv. Gilad Narkis; Adv. Yossi Pepper

JUDGMENT

Justice E. Hayut:

A Further Hearing of this Court's judgment in LCA 8301/13 *Tal Trading Corp v. Bank Leumi Le-Israel Ltd*. (November 24, 2015) (hereinafter: the Appeal Judgment), which overruled the longstanding precedent in the law of bills of exchange established in CA 333/61 *Guisky v. Meir*, IsrSC 16 595 (1962) (hereinafter: the Guisky Precedent).

Background

1. In December 1958, Mr. Joseph Meir purchased phonographs, for which he paid by postdated check made in the amount of IL 2,000. The machines purchased by Meir were not delivered, whereupon he issued a stop payment order to the drawee bank. However, the check had been negotiated prior to the issuing of the stop payment order, and came into the hands of Mr. Eliezer Guisky. Because the check was negotiated to Guisky after its due date, Guisky did not qualify as "holder in due course" of the check under the meaning of this term in the Bills of Exchange Ordinance [New Version] (hereinafter: the Bills of Exchange Ordinance or the Ordinance). However Guisky, who had given value for the check, demanded its payment both from its drawer, Meir, and from the phonograph merchant as endorser. Meir refused to pay the check, invoking total failure of consideration. The District Court accepted his claim, rejecting Guisky's lawsuit. The matter was appealed to the Supreme Court, which reversed the result and ruled, *per* (then) Justice Sussman, President Olshan and Justice Cohn concurring, that:

> … If, subsequently—i.e. after having negotiated the bill—the seller breached his contract with the buyer and failed to deliver that which had been sold, or if consideration failed for some other reason, *the buyer must pay off the bill to the holder-transferee, provided that he is a holder for value, and if the transferee had given value to the seller-endorser, he qualifies as*

> *holder for value against the buyer as well, in accordance with sec. 26(b) of the Bills of Exchange Ordinance; the defense claim arising to the buyer, following failure of consideration, only after negotiation, cannot serve him in this case to counter the transferee's claim.* When he, the suing transferee, had taken the bill from the seller, and a defect came about thereafter, the defect is not attributed retroactively, since it is the time when the suing holder took the bill that is decisive, and at that time—when the contract was still "open" to fulfilment and its fulfilment date still lay ahead—there was nothing to prevent negotiating the bill and taking possession thereof [emphasis added].

The Guisky Precedent thus determined that not only a holder in due course, but a holder for value, too, could defeat a total failure of consideration claim raised by the drawer of the check, provided that the bill had been negotiated to that holder prior to the failure of consideration (SHALOM LERNER, THE LAW OF BILLS AND NOTES, 317-321 (2nd ed., 2007) (hereinafter: LERNER) (Hebrew); YOEL SUSSMAN, THE LAW OF BILLS OF EXCHANGE, 275-277 (6th ed., 1983) (hereinafter: SUSSMAN) (Hebrew)). The Court's main reason for reaching this conclusion was grounded in property law. The Court's ruling emphasized that there was no stipulation that prohibited negotiating the check, and since the delivery date had not yet arrived when the check – given as a down payment for the undertaking to supply the phonographs in the future – was negotiated and endorsed to Guisky, no defect occurred at that point in time in the title held by the check's endorser, and the endorsee consequently received flawless title, entitling him to be paid for the check once he had provided value for it. In this context, the Court added and underscored the importance of the bill as a money equivalent, as well as the law merchant, noting that taking a bill in the knowledge that it was given to the transferor on the basis of a yet-to-be-fulfilled contract does not lack good faith:

> The law merchant does not rule out negotiating a bill in view of the possibility that the value given for it might fail in the future if it did not actually fail in the present at the time of negotiation (the Guisky Precedent, p. 599).

2. Since it was rendered in 1962, the Guisky Precedent has been the object of substantial criticism, both in the rulings of this Court and in the legal literature (CA 444/82 *Israel Continental Bank Ltd. v. Shaikevitz*, IsrSC 39(3) 113, 120-121 (1985) (hereinafter: the *Shaikevitz* case); CA 1560/90 *Zitiat v. First International Bank of Israel Ltd.*, IsrSC 48(4) 498, 527 (1994) (hereinafter: the *Zitiat* case); CA 775/85 B*ank Leumi Le-Israel Ltd. v. Brosh Metal Trading (Ashdod) Ltd.*, IsrSC 42(1) 294, 296 (1988); LCA 6553/97 *Hagai v. Abudi Haim Company Ltd.*, IsrSC 52(2) 345, 353 (1998); CA 6909/00 *Israel Discount Bank Ltd. v. Aryeh Yitzhaki Group Ltd.*, IsrSC 55(4) 83, 85 (2001); LERNER, p. 321; Shalom Lerner, *Security Bill and Bank Account Crediting as a Form of Providing Value in Bills and Notes*, 17 MISHPATIM 71, 88-91 (1987) (Hebrew); Menachem Mautner, *Bill of Exchange Delivered as Security: A Contract Subject to Condition Precedent, a Mortgaged Asset and the Problem of Consideration and Value*, 12 TEL AVIV UNIVERSITY LAW REVIEW 205, 224-226 (1987) (hereinafter: Mautner) (Hebrew); Ruth Plato-Shinar, *Towards a Rational Model of Defenses in the Law of Negotiable Instruments*, 12 HAMISHPAT – A Book in Honour of the Late Judge Adi Azar, 251, 275 (2007) (hereinafter: Plato-Shinar) (Hebrew)).

That being said, because the issue decided by the Guisky Precedent has never since come up directly before this Court, the Court sufficed with attaching a "cautionary note" to this precedent without expressly overruling it (the *Zitiat* case, p. 527). In the Appeal Judgment, my colleague Justice Hendel pointed out that reservations about the Guisky Precedent brought about "a state of confusion in the rulings of the trial courts. Some of them interpreted the reservations about the Precedent to mean that it had lost some of its validity, while others continued to apply it to the letter" (see para. 3 of Justice Hendel's opinion in the Appeal Judgment). Now, for the first time in over fifty years since the Guisky Precedent was decided, an opportunity has presented itself for this Court to revisit the issue of total failure of consideration and the right to payment of the holder for value. Even though this issue has come up in a "third round", the panel hearing it rightly thought that "the time has come for this Court to address this issue and settle the matter, or more precisely clarify where the Guisky Precedent stands" (*ibid.*), which it did.

The Appeal Judgment and the proceedings that preceded it

3. The dispute at the center of the Appeal Judgment revolved around the Respondent, Tal Trading Corp. (hereinafter: the Respondent), which had concluded an agreement with Zvi Or Diamonds Company (1981) Ltd. (hereinafter: Zvi Or) for the purchase of diamonds. The Respondent paid Zvi Or for the diamonds by postdated checks, one of which, for $205,000, is at issue. The check was drawn by the Respondent to the order of "Zvi Or Diamonds Company Ltd." and dated December 27, 2008. On September 1, 2008, that is, prior to the check's due date, the payee, Zvi Or, passed the check on to the petitioning bank (hereinafter: the Petitioning Bank)—in which it held a current loan account—as security for repayment of its debts. At the time when the check was transferred to the Petitioning Bank, Zvi Or's account was overdrawn. In the meantime, Zvi Or experienced financial difficulties and failed to deliver the diamonds to the Respondent. Following this total failure of consideration, the Respondent issued the drawee bank a stop payment order. The Petitioning Bank submitted the check to the Execution Office for execution, while the Respondent filed an objection to the execution of the check. On June 18, 2012, the Magistrates Court in Tel Aviv (Judge R. Ilan) rejected the objection, but found that the check was irregular on its face since the endorsement ("Zvi Or Diamonds (1981) Ltd.") did not match the name of the payee ("Zvi Or Diamonds Company Ltd."), and the Petitioning Bank did not, therefore, acquire holder-in-due-course status with regard to the check. Nonetheless, as a "holder for value", the Petitioning Bank did have the right to be paid for the check by the Respondent under the Guisky Precedent, because the check had been negotiated to the Petitioning Bank before Zvi Or breached its underlying transaction with the Respondent, causing total failure of consideration. The Respondent's appeal to the District Court (Judges Y. Inbar, J. Shevach, and S. Shochat) was denied for the reasons given by the Magistrates Court under Regulation 460(b) of the Civil Procedure Regulations, 5744-1984. In its ruling, the District Court saw fit to note that the Guisky Precedent stands, and that the Supreme Court is the competent authority to overrule it.

In submitting its request for leave to appeal, the Respondent raised various arguments but ultimately focused its request on a single issue, namely whether the Guisky Precedent should be overruled. The request was referred for hearing by a panel of three judges (see Justice Hendel's decision of Nov. 27, 2014) and as stated at the outset, the Respondent was granted leave to appeal, the request was heard as an appeal,

the appeal was granted, and it was decided by majority opinion (my colleagues Justices Hendel and Shoham against the dissenting opinion of my colleague Justice Sohlberg) to overrule the Guisky Precedent.

4. In a comprehensive, clear opinion, my colleague Justice Hendel reviewed the purposes underlying the law of negotiable instruments and those features of bills designed to fulfil those purposes. In a beautiful, instructive metaphor, my colleague referred to the theoretical analysis of Prof. A. Barak regarding the nature of a bill, stating as follows:

> In general, this product can be viewed through three-dimensional glasses: "The bill is a complex phenomenon… It is an object, subject to property law; a bill is a contract, subject to contract law; a bill is a negotiable paper, subject to the law merchant laid down in the Bills of Exchange Ordinance"… Its nature derives from these three dimensions, but the type of holdership might affect the balance of power among these three dimensions. The type of holdership derives not only from the way in which it was acquired, but also from the nature of "object" being held.

Justice Hendel noted that when holdership in due course is denied (in the Guisky case because the payment date on the bill had expired and in our case, owing to the mismatch between the names of the payee and the endorser that affected the bill's regularity on its face), the bill holder—even if he is a holder for value—is subject to defenses under the law of obligations and property law. My colleague emphasized that as long as the bill holder does not meet the conditions for holdership in due course as per sec. 28 of the Ordinance, the linkage between the bill and the underlying transaction is maintained, alongside the independent bill-based ground for claim created when the bill is drawn. This means that even in a bill-based claim, the bill-based grounds for claim continue to be attended by the general principles taken from property law and obligation law, according to which, in transferring property or assigning a right, the transferor or assignor cannot convey more than it has to the transferee or assignee. In this context, my colleague Justice Hendel embraced the principal critique levelled at

the Guisky Precedent, as aptly articulated by (then) Deputy President A. Barak in the *Zitiat* case. In that case, let us recall, a "cautionary notice" was attached to the Guisky Precedent as one that diverges from the aforementioned general principle in property law and obligation law. The words of (then) Deputy President A. Barak in the *Zitiat* case were quoted in the opinion of my colleague Justice Hendel (*ibid*, para. 8), and are worth repeating verbatim, in view of their importance:

> Reuven made a bill to the order of Shimon, with Shimon undertaking to perform some future action (future consideration). Shimon endorsed the bill to Levi prior to maturity. When the due date arrives, Shimon breaches his undertaking. Consideration fails. If sued by Shimon, Reuven would have a good defense against Shimon. *Levi is not a holder in due course, and his right is thus no better than Shimon's*. How might Reuven be obligated toward Shimon? True, when the bill was negotiated from Shimon to Levi, failure of consideration had not yet occurred, and its occurrence does not apply retroactively. But *the right negotiated from Shimon to Levi was one embodying some future consideration and carrying within it the potential for failure of consideration. This right passed on to Levi unaltered. When failure of consideration occurred, it "prejudiced" the right that was to be* (e.g., held by Levi), as long as it was *not* in the hands of a holder in due course" [emphasis added] (the *Zitiat* case, p. 527).

In adopting this position, my colleague Justice Hendel states that the nature of the right received by the holder of the bill, if he is not a holder in due course, should not be examined at the time when the bill was negotiated to him, but at the time when he demanded its payment. Thus, the fact that the consideration had not yet failed at the time of negotiation cannot serve to invalidate the defendant's defense claim of total failure of consideration. Justice Hendel made it clear that such a case was not about defective ownership of the bill itself, but a defect in the obligation embodied in it, and in our case, he stated as follows: "Since the bank is not a holder in due course, it does

not defeat the Applicant's [the Respondent's – E.H.] claim that the undertaking to supply diamonds to it was violated. Holdership for value in itself does not fulfil a special purpose that justifies prevailing over the rights of the debtor under the usual legal rules" (*ibid.*, para. 9). Justice Hendel further addressed additional aspects expressed in criticism of the Guisky Precedent and having to do, inter alia, with "the usual property law applicable to movable property", and particularly that this precedent also enables a holder for value who did not pay actual, fulfilled consideration to demand payment for the check. Justice Hendel further addressed the distinction between forcing the party injured by total failure of consideration to honor obligations under an underlying transaction that had been cancelled, as opposed to denying the remedy of restituting an "object" that had already been transferred or money that had already been paid. Justice Hendel stated that studies in behavioral economics suggested that forcing payment in these circumstances, which is in fact the outcome reached by the Court in the Guisky case, was perceived as a harder outcome than failure to restitute payment that had already been made. He refers in this context to the view of Prof. Eyal Zamir, according to which a different legal approach to these two categories might be justified from a normative perspective in view of the severity of the loss as opposed to the denial of profit.

5. My colleague Justice Hendel then went on to discuss the Petitioning Bank's claim that the Guisky Precedent accords with the parties' expectations and that by not restricting the negotiability of the check, the Respondent assumed the risk that it might lose its money and priced this risk when drawing the check. This argument was dismissed by my colleagues for three reasons: The *first* is that even if the Respondent had assumed a risk by handing the payee a postdated check before receiving the diamonds, this does not mean that it should be made to bear all the risks involved therein, and matters should be examined "from the bill perspective, in all its aspects and shades", especially given the fact that the bank in this case did not have holder-in-due-course status that would defeat total failure of consideration; the *second* is that the argument regarding the pricing of the risk also applies to the bank for having taken as collateral an incomplete, irregular bill on its face, knowing that holding such a bill did not grant it the advantages reserved to a holder in due course; and the *third* lies in the Petitioning Bank's questionable assumption that anyone drawing a postdated check with

no limitation of negotiability is aware of the possibility that it might have to pay for merchandise that it wanted to buy even without receiving it.

The Petitioning Bank further claimed that overruling the Guisky Precedent would leave banks unable to rely on postdated checks as collateral, with possible repercussions for the credit market. The bank also raised concerns that drawers and payees might conspire against the banks by deliberately tampering with checks to make them irregular on their face in order to deprive the bank of holder-in-due-course status. In rejecting these arguments, Justice Hendel noted that the Petitioning Bank failed to present data on the number of checks endorsed to it as collateral and for how many among them it is only a holder for value and regarding which claims of failure of consideration were raised. Justice Hendel went on to dismiss the conspiracy concern, saying that if the drawer and the payee wanted to prevent the bank from collecting on the check in the event of a breach of contract, all they would have to do is add the word "payee only", and that in any case it was the bank's duty to verify that the check was complete and regular on its face.

For the above reasons, my colleague Justice Hendel proposed that the Guisky Precedent be overruled, and Justice Shoham concurred.

6. As opposed to them, my colleague Justice Sohlberg was of the opinion that while the Guisky Precedent should be narrowed and limited, it should not be overruled. While Justice Sohlberg emphasized that he agreed with Justice Hendel's arguments concerning the laws of obligation and property law, he was nevertheless of the opinion that this was not the crux of the debate, and that the key question to consider was "what is the proper balance between the risks of the obligor on the bill and the endorsee in said circumstances, considering the purpose of the law of negotiable instruments in the strict sense". In answer to this question, my colleague thought that "the proper balance dictates that we place the risk on the obligor rather than the endorsee, provided that the endorsee gave the real, fulfilled value of the bill and did not anticipate the possible failure of consideration when taking it". My colleague Justice Sohlberg mainly rests his position on the logic behind the application of market overt to a holder in due course. As he sees it, the same logic also applies to a holder for value who gave real, fulfilled consideration and did not anticipate, nor could have anticipated, the failure of

consideration that was to occur in the future after his holdership of the bill. Justice Sohlberg also noted the need to focus on the inner purposes of the law of negotiable instruments, including bills of exchange, which are meant to serve as an efficient commercial substitute for the use of cash money, rather than focus on the proprietary and contractual aspects of the bill. All these things lead, to his mind, to the need to also recognize the "immunity" of a holder for value, like the Petitioning Bank before us, against a claim of total failure of consideration formed after its holdership, provided that the additional conditions that restrict and limit the Guisky Precedent have been met, namely: the good faith of the holder for value who did not anticipate and could not have anticipated the future failure of consideration, and the provision of real, fulfilled value for the check.

As mentioned above, the majority decision was to grant the Respondent leave to appeal, to grant the appeal and overrule the Guisky Precedent. The judgments of the Magistrates and the District Courts were reversed, the Petitioning Bank's claim was denied, and it was ordered to pay a total of NIS 60,000 in costs and legal fees of the Respondent.

7. On July 17, 2016, my colleague the President granted the request of the Petitioning Bank and ordered a further hearing of the Appeal Judgment before a seven-judge panel. The parties submitted supplementary pleadings, and the petition was heard on January 31, 2017.

The parties' arguments in the further hearing

8. The Petitioning Bank reiterated its claim that overruling the Guisky Precedent would work to the detriment of the credit market by downgrading the status of postdated checks as collateral, and that endorsees—and mostly banks—would be afraid to take postdated checks as collateral since any defect, down to the slightest, would negate holdership in due course and void the liability on the bill, even if value was given for it. It was further claimed that in order to check for any such defect, banks would have to invest considerable and disproportionate efforts in screening the checks. Alternatively, the Bank is in favor of leaving the Guisky Precedent in place subject to the conditions proposed by Justice Sohlberg. Making reference to market overt in

movable property and in conflicting transactions in chattels, the Bank argues that the law of bills of exchange should also grant preference to the right of a holder who is temporally second, when said holder had given *bona fide* consideration for the bill, and all the more so in light of the principles of negotiability, certainty and stability of commerce particular to the law of bills of exchange. According to the Bank, the fact that the payee's name is not identical to the endorsement signature constitutes a technical defect in form rather than a material proprietary or contractual one. The Bank likewise subscribes to Justice Sohlberg's position regarding the appropriate division of risks and the desirable judicial policy in this context, claiming that the lowest cost and most effective damage avoider is the drawer of the check, whereas imposing upon the endorsee the duty to vet every underlying transaction for which a bill was initially given would completely void its essence and nature as a bill. The Bank further emphasizes that the present case does not involve a defective check under the Bills of Exchange Ordinance, and certainly not one defective to the point of voiding its negotiability, since the drawer of the check had issued a regular check on its face, while the payee was the one who introduced the defect with the endorsement signature. This is why, it is argued, the claim that the Guisky Precedent encourages the negotiability of defective checks is not justified. Another argument is that, under the Ordinance, the time of negotiation is the relevant point in time to examine the rights of the check's holder, and in this respect the Guisky Precedent does not deviate from the Ordinance, but is rather perfectly aligned with its principles. From this, the Bank infers that the law of negotiable instruments supports leaving the Guisky Precedent in place. The Bank further claims that the Assignment of Obligations Law, 5729-1969 (hereinafter: the Assignment of Obligations Law) is irrelevant and no analogy can be drawn from it to our case, as the law excludes bills of exchange, and the purposes underlying each of the laws—the law of obligations, on the one hand, and the law of negotiable instruments, on the other hand—are different. The Bank's view is that making the bill-based obligation analogous to a normal obligation would erode the law of negotiable instruments and do away with the unique character of a bill of exchange.

9. The Respondent, for its part, agrees with the Appeal Judgment and emphasizes that the fundamental principle in property law that a person cannot transfer to another more rights than he himself has, save for the exception established in "market overt", likewise applies to the law of negotiable instruments. Therefore, it goes on to claim,

only a holder in due course acquires full, valid title to a bill free of all defects or defense claims that parties precedent thereto may have, by virtue of the market overt established in the Ordinance with respect to bills. In the Respondent's view, this position accords with the proper judicial policy that the risk should not be imposed on the drawer of a postdated check in cases where total failure of consideration occurred, unless the holder thereof is a holder in due course, and this even if the drawer had not limited the negotiability of the check. This conclusion is all the more true, according to the Respondent, when the holder is a bank taking the bill as security for credit extended, since the bank is the best avoider of damage, capable of verifying that the conditions for holdership in due course are met before extending the credit, and of withholding credit if those do not obtain. It is further argued that this is not a case of overruling a longstanding, deep-rooted precedent, as the Bank claims, but of a precedent whose very validity remained unclear for many years. Finally, the Respondent argues that banks and check-discounting firms are the main players in the Israeli marketplace that receive postdated checks, and they price the risk of such checks being dishonored by means of interest and commissions, as well as by granting credit for less than the bill's stated value in view of the said risk. Therefore, and because these players are the most efficient risk preventers, nothing justifies relaxing the requirements for holdership in due course for their sake and allowing them to continue benefitting from the Guisky Precedent.

Discussion

Let me first say that if the hearing on overruling the Guisky Precedent had taken place before an expanded panel to begin with, my job would have been easier, for then I would have contented myself with saying that I concurred in the clear, compelling and comprehensive judgment of my colleague Justice N. Hendel and that his words should be deemed as if I myself had written them. With the proceeding first going before a panel of three (my colleagues Justices Hendel, Sohlberg and Shoham) and then ending up before an expanded panel in a further hearing, I saw fit to elaborate a little more, but as I have already noted, I see eye to eye with my colleague Justice Hendel on the issue of overruling the Guisky Precedent, and I agree with all of his reasons—including those written in response to the dissenting opinion of my colleague Justice Sohlberg.

10. Notwithstanding the development of electronic means of payment, first and foremost credit cards, checks remain a major, widespread means of payment in present-day Israel (Michal Ofer Tsfoni and Ruth Plato-Shinar, *Comment on Ruling —On Total Failure of Consideration, Holdership in Due Course and Everything in Between: An Opportunity to Fix a Legal Anachronism in the Law of Bills and Notes (Following LCA 8301/13 Tal Trading Corp v. Bank Leumi le-Israel Ltd.)*, 1 MOZNEI MISHPAT (due to be published in 2018) (hereinafter: Tsfoni & Shinar) (Hebrew)). In his studies on the law of negotiable instruments, Prof. A. Barak discusses three systems of law—proprietary, contractual and bill-based—applicable to bills and influencing the legal outcomes to be adopted in their regard. These three areas of law apply according to the balance of powers among them, which varies with the circumstances of each individual case. In this context, Prof. Barak coined the term "the law of negotiable instruments in the strict sense", which is concerned with the bill as a negotiable instrument and is mainly grounded in legislative acts relating to bills, and "the law of negotiable instruments in the broad sense", concerned with the laws applicable to bills as an obligation and as an object as opposed to the laws that directly relate to the bill as a negotiable instrument, as long as the Bills of Exchange Ordinance makes no contrary arrangement (Aharon Barak, *The Nature of the Negotiable Instrument*, SELECTED ESSAYS, vol. 2 1284 (2000) (hereinafter: Barak) (Hebrew); Shalom Lerner, *Notes and Bills in the 21st Century*, SHLOMO LEVIN BOOK 433, 434 (eds. Asher Grunis, Eliezer Rivlin and Michael Karayanni, 2013) (hereinafter: Lerner 2013) (Hebrew)).

Market Overt in bills and the holder for value

11. With a view to promoting the purpose of bills as a quick and efficient mode of payment in the commercial realm, the Bills of Exchange Ordinance established, alongside the transferability feature characterizing the bill, a "market overt" in bills that grants the "holder in due course", as per the meaning of this term in sec. 28(a)(2) of the Ordinance, rights in the bill that are free of defects and any other right of parties precedent thereto (sec. 37(2) of the Ordinance; Barak, p. 1266; the *Zitiat* case, p. 505; Plato-Shinar, p. 254). In other words, holdership in due course "purifies" the bill, granting the holder in due course "immunity" from any claim drawn from the law of negotiable instruments in the broad sense (CR 258/98 *Zemach v. Shelshevski*, IsrSC 55(4) 193, 196 (1998)). This turns the bill into a "courier without luggage", to quote

Justice Gibson in *Overton v. Tyler* (1846) 3 Pa 346, 45 Am. Dec. 645 (referred to in CA 9/79 *Carpol v. Horowicz*, IsrSC 34(1) 260, 262 (1980)). It releases it from the burden of the "law of negotiable instruments in the broad sense" and subordinates it to the law of negotiable instruments in the strict sense only, i.e. to the Bills of Exchange Ordinance.

12. Some consider the "market overt" in bills to be the very essence of the law of negotiable instruments, without which the law of negotiable instruments cannot justifiably exist as a separate branch of law (Lerner 2013, p. 436). Like its counterparts in property law and obligations law, the "market overt" in bills is an exception to the fundamental principle we have addressed above, by which a person cannot transfer to another more rights than he himself possesses (for the "market overt" in movables, see sec. 34 of the Sale Law, 5728-1968; for the "market overt" in real property, see sec. 10 of the Land Law, 5729-1969; and for the "market overt" in pledges, see sec. 5 of the Pledge Law, 5727-1967). The holdership in due course on which the "market overt" in bills is based depends on the fulfilment of the following main conditions: The holder has taken the bill complete and regular on the face of it; he became its holder before it was overdue; and he took the bill in good faith and for value (sec. 28(a) of the Ordinance; Lerner, pp. 240-243). When these conditions are met, the holder in due course acquires, as noted, the right to receive payment of the bill "free from any defect of title of prior parties, as well as from mere personal defenses available to prior parties among themselves, and may enforce payment against all parties liable on the bill" (sec. 37(2) of the Ordinance). The holder in due course will also be able to transfer his purchase to another party substituting it (Lerner, 248). The market overt in bills is more lenient than its Sale Law and Land Law counterparts. Thus, holdership in due course makes no requirement as to the identity of the bill's assignor, contrary to market overt in the Sale Law, which applies only when the seller of the asset carries on the sale of property of the kind of the object sold (sec. 34 of the Sale Law, 5728-1968; Lerner 2013, p. 438; Barak, p. 1384; CA 230/73 *Israel Discount Bank Ltd. v. Bank Halva'ah Vekhisachon le-Israel Ltd.*, IsrSC 28(1) 113, 119 (1973)). Moreover, in order to benefit from market overt in real estate, the buyer of a right must run a check at the Land Registry (sec. 10 of the Land Law, 5729-1969), whereas the holder of a bill will be considered a "holder in due course" even without having performed any check regarding the bill. One of the important rationales on which "market overt" in bills rests

is that holdership in due course encourages the use of bills as a means of payment, and thus contributes to the increase of transactions and to developing commerce. This was explained by Lerner, who added that this explanation is all the more true in the Israeli realty where a large proportion of checks carry a future date and are used by the payee as security by endorsing them to a bank in order to obtain credit (Lerner 2013, p. 439). The rationale underlying "market overt" in bills based on holdership in due course was also addressed by Plato-Shinar, who noted that it constitutes "a key instrument in the service of the 'certainty of payment principle', which is one of the fundamentals of the law of negotiable instruments. The certainty of payment principle is meant to ensure, to the extent possible, that the bill will indeed be paid to the bill creditor, thus encouraging the taking of the bill and contributing to its negotiability (Plato-Shinar, p. 254, 255).

13. Like my colleague Justice N. Hendel, I too see this market overt arrangement in bills per sec. 37(2) of the Bills Ordinance as expressing a negative implication. It makes the "purity" of the bill conditional on its holder being a holder in due course, stating: "Where he is a holder in due course, he holds the bill free…" etc. As a result, when the conditions for holding in due course do not obtain, the bill is not "purified" and we do not have before us a "courier without luggage", but a bill that continues to carry, alongside "the law of negotiable instruments in the strict sense", a dimension of "the law of negotiable instruments in the broad sense" as well, and as such it is subject to the well-known fundamental principle of obligations and property laws whereby a person cannot assign to another more rights than he himself has.

One of the most prevalent defense claims raised by defendants sued on bill-related grounds, as in our case, is total failure of consideration. In one of the cases, (then) Justice A. Barak addressed this claim and drew, with respect thereto, the line separating a holder in due course—who overcomes this defect in the title of the person assigning the right—and other holders, among them holder for value, who do not meet the conditions for holdership in due course and cannot overcome it (the *Shaikevitz* case, p. 116). In his academic writing, President Barak criticized the arrangement established in the Bills of Exchange Ordinance with regard to holdership in due course, noting that it "is far from satisfactory", inter alia because "the conditions required for a holdership in due course are unjustifiably numerous and complicated" (Barak, p. 1339). According

to President Barak's approach in that article, it is fitting to predicate holdership in due course on purchase for consideration and in good faith, whereas the other conditions established by the Ordinance for a holding in due course—including: the bill being complete and regular on its face, and the requirement that its negotiation to the holder in due course be done prior to its stated due date—are unjustified if the idea is to promote dynamic commercial activity (*ibid*.). This critique is shared by Lerner, who also thinks that the time has come to update the law of negotiable instruments, saying, inter alia, that the law of holdership in due course is often in conflict with the interest of consumer protection (Lerner 2013, pp. 441-450). Yet, despite this critique by Prof. Barak in his academic writing of the "unjustifiably numerous and complicated" conditions established by the Ordinance for holdership in due course, President Barak, wearing his judicial "hat", adhered to these conditions and saw fit to set down a "cautionary notice" against the Guisky Precedent, even though it might be construed as a precedent that mitigates those "numerous and complicated" conditions, inconsistent as it is with the provisions of the Ordinance (the *Zitiat* Case, p. 527; the *Shaikevitch* Case, pp. 120-121). In other words, in his article, Prof. Barak criticized the conditions for holdership in due course as prescribed in the Ordinance as well as its delineation, and called to amend these conditions, noting that provision of consideration in good faith should suffice for the purpose of the "market overt" in bills. However, his rulings on the issue indicate President Barak's clear position that as long as no change has been made to the market overt conditions and the related requirements for holdership in due course by amending the Ordinance, they were impossible to bypass, and a holder who did not meet the conditions for holdership in due course, even if he was a holder for value, could not defeat defense claims presented by the defendant on bill-related grounds, including the claim of total failure of consideration.

14. In this context, I wholly agree with Justice Hendel, who thought that Justice Sohlberg's approach created "a middle class of holder, entitled in some circumstances to defeat certain defense claims" (para. 22 of his opinion) and also created "a middle-class bill, located between a defect-free bill that can be held in due course and a bill whose restriction appears on its face. The exact status of the bill cannot be clearly ascertained by examining the bill itself without referring to external circumstances" (*ibid*., para. 24). Justice Hendel emphasizes that an arrangement of this kind has no foundation in the Ordinance, and he believes that "establishing a new arrangement in

the law of negotiable instruments, one that overcomes the law of negotiable instruments in the broad sense and is not derived from the law of negotiable instruments in the strict sense, should properly be undertaken by the legislature" (*ibid*,, para. 25). In their article, Tsfoni & Shinar also address the difficulties inherent in Justice Sohlberg's position, noting that the critique levelled at the Guisky Precedent "likewise applies to Justice Sohlberg's dissenting opinion", as it "deviates from the basic paradigm of defense claims in the law of negotiable instruments, instead of converging on it and creating a clear, certain, uniform law in keeping with the narrow and broad principles of the law of negotiable instruments" (Tsfoni & Shinar, p. 27). They support the reservations made in this context by Justice Hendel, and are also of the opinion that there is no call for creating a new type of holder in the law of negotiable instruments—one who had provided real value against the bill without anticipating and having had to anticipate a possible failure of consideration. This kind of holder, they say, finds no mention in the Ordinance, and considering the substantial change in the law of negotiable instruments involved in creating such a holder, they believe that this requires "holistic thinking and a review of the law of negotiable instruments in both the strict and broad senses" and that, to the extent that change is warranted, it should be effected by legislative amendment of the Bills of Exchange Ordinance itself (*ibid*.).

With this I cannot but agree. In my opinion, as well, there is no call to create a new kind of bill holder who has no trace in the Bills Ordinance, and actually contradicts the letter of the Ordinance, which establishes a "negative arrangement" in this regard. Moreover, the good-faith requirement under the restrictions proposed by my colleague Justice Sohlberg establishes objective and subjective criteria for testing good faith, thus deviating from the good-faith requirement established in sec. 91 of the Ordinance, which has heretofore been interpreted as subjective good faith (Lerner, p. 234; Tsfoni & Shinar, p. 20). It also deviates from the purpose of the law of negotiable instruments that we have shown above, because it requires that the holder carry out checks and inquiries before agreeing to accept a check.

15. The Anglo-American law from which the Israeli Ordinance draws its provisions likewise takes the approach that the right of any holder not in due course is subject to the failure-of-consideration defense. The American legal system sets down this rule in the UCC (in effect in some 49 U.S. States) (UCC § 3-305(a)-(b)). In English law,

opinions diverge. In making its arguments in this context, the Bank relies on the book by Prof. Guest, CHALMERS AND GUEST ON BILLS OF EXCHANGE AND CHEQUES (16th ed., 2005), claiming that, in English law, a holder for value is granted immunity against a failure-of-consideration defense. However, a close examination of the ruling by the House of Lords to which the learned Prof. Guest refers in this context (*Misa v. Currie* (1876) 1 App. Cas. 554) suggests that it does not address this question directly. Furthermore, this ruling was rendered before the status of holder in due course was established in the Bills of Exchange Act 1882, which is the forerunner of the Israeli Ordinance. Another ruling on which Guest relies in this context was rendered by one of the lower instances in England, and some scholars believe that this ruling involved a holder in due course rather than a holder for value (ELLIOTT ODGERS AND PHILLIPS BYLES ON BILLS OF EXCHANGE AND CHEQUES, pp. 270-271 (28th ed. 2007), whence they conclude that immunity from a failure-of-consideration claim in English law is exclusively granted to a holder in due course (*ibid*., p. 270) (for a review of other positions, see Tsfoni & Shinar, p. 28). It should be noted, in passing, that it is quite hard to find judgments pertaining to our subject in Anglo-American law, since the use of postdated checks in England and the United States is extremely rare, unlike the commercial practice in Israel, in which the use of postdated checks is quite widespread (Lerner 2013, p. 439).

Conclusion

16. For all the reasons specified above, I propose that my colleagues deny the petition for a further hearing and charge the Petitioning Bank with the Respondent's costs and legal fees in the amount of NIS 75,000.

President M. Naor:

I concur in the opinion of my colleague Justice E. Hayut.

Justice N. Sohlberg:

1. My colleague Justice E. Hayut notes in her opinion that had she sat on the original panel debating the overruling of the Guisky Precedent, she would have concurred in the judgment of my colleague Justice N. Hendel and left things at that. If so says my colleague, then surely I can say, for my part, that I agree with my own opinion in that judgment, and see no need to add to it. Indeed, the disagreement between my colleagues and me in the ruling, and the reasoning provided by the different sides, are sufficiently detailed in that judgment. The words of my colleague Justice N. Hendel there are clear and comprehensive, and I believe that I, too, expounded my opinion in sufficient elaboration. The further hearing held before us did not turn up a new perspective, and did not turn any previously unturned stone there. Therefore, essentially, I could content myself with saying that I have studied the ruling once again and do not deem it necessary to change my opinion as expressed there.

2. With that said, I wish to touch on one point that preoccupied my colleague, namely the institutional question regarding the relationship between the provisions of the Bills of Exchange Ordinance [New Version] and the Guisky Precedent, and the division of labor between the legislature and the court in this context.

3. As my colleague [Justice Hayut] has noted, the main novelty in the law of negotiable instruments regulated in the Ordinance is the market overt in bills, which is accorded to anyone defined as a holder in due course. This is the core of the law of negotiable instruments. Market overt entitles the holder of a bill who meets certain conditions under which he is considered a holder in due course to a bill purified of defects found therein. The border line, in this context, is binary: On one side of the line stands the holder in due course, whose bill is purified of defects, and on the other side are the other holders, whose bill is not purified. As such, it is subject to the usual law of obligations, by which a person cannot assign to another a right he does not have. This is the "basic paradigm" of the law of negotiable instruments, which I do not contest.

4. The matter before us is much more modest: It concerns a certain defect in a bill (failure of consideration) occurring at a specific time (after endorsement of the bill), and according to my approach—under certain conditions (the endorsee paid actual consideration and did not anticipate the failure of consideration). As such, our case is not about the purity of the bill. The holder in due course of a bill holds a bill purified of defects that occurred even *prior* to being assigned to him. This is the metaphoric meaning of the bill's purification: When a person holds it in due course, he is like a person who immerses in a *mikveh*, going in impure and emerging pure. This is not the situation in question. This is not a "market overt" meant to protect innocent buyers who have bought an essentially defective right. Ours is a different situation in which an essentially regular bill was endorsed (but became subject to a technical defect as a result of which its holder is not a holder in due course), except that subsequently a failure-of-consideration event occurred. Failure of consideration, in simple terms, means that one of the parties to the transaction (in our case, the endorser) found itself unable to fulfil its obligation. In this state of affairs, as in many situations of insolvency, someone must absorb the loss, and the question becomes upon whom should it justly be imposed.

5. The starting point for this question is indeed the "basic paradigm" of the law of negotiable instruments, whereby once a holder of a negotiable instrument is not a holder in due course, he no longer possesses more than he has been assigned. But to my mind, this is not the end point. True, the legislature is silent on this matter, but its silence is not the final word. I do not accept the argument that the very distinction between a holder in due course and one who is not creates a "negative arrangement" that prevents us from examining the specifics of the issue. I also disagree that my position implies "creating a new type of bill holder" (as my colleague says in para. 14 of her opinion). The question before us is much more focused than my colleagues make it out to be. It is about a well-defined, distinct dilemma: Upon whom are we to impose the loss in a situation where the endorser cannot fulfil his obligation in the specific circumstances before us?

6. Add to this another point, which I also addressed in the judgment: We are not treading on virgin soil. This is not about some novel judicial legislation, but about reviewing a longstanding, established precedent. This point, too, is significant when we look at the balance of power between the branches of government. Indeed, this is about

"judicial legislation", but it was done more than fifty years ago, and we are now treading a furrow long ago plowed. If the outcome of this "judicial legislation" is justified on the merits—as I believe it is (within the limits I have defined)—then to my mind, this not a compelling consideration against preserving it.

7. On the other hand, the legislation before us—the Bills of Exchange Ordinance—has its origin in the English version of 1882, which has undergone only minute changes since its translation into Hebrew (Shalom Lerner, *Bills in the 21st Century*, SHLOMO LEVIN BOOK 433, 434 (2013) (Hebrew)). As my colleague Justice E. Hayut notes in para. 13 of her opinion, the arrangement in the Ordinance—as regards the requisite conditions for holding in due course—is not necessarily satisfactory, and my position in the judgment does some justice in that respect. True, the question of updating the Bills of Exchange Ordinance falls to the legislature, not the Court. I would not lend a hand to creating a legal rule that runs counter to the language of the Ordinance, deviates from what it implies, and aims at circumventing its arrangements. But we are not there: We are not creating a legal rule, but debating the boundaries of an existing one. The Ordinance does not, in my opinion, create a negative arrangement with respect to the matter before us, and in any event, we are not looking to bypass its arrangements.

8. As I see it, all of the above means that it is not these considerations that should make or break the Guisky Precedent, but rather the material considerations pertaining to the specifics of the case. I detailed and explained my position in the judgment, namely that when the endorsee has given actual consideration for the bill and could not have anticipated the failure of consideration, then justice and judicial policy dictate that the loss be imposed on the obligor, even if such a decision comes to some extent at the expense of certainty considerations. Indeed, my colleague Justice N. Hendel and myself agreed that as regards considerations on the merits of the case, in terms of who should be made to bear the loss incurred, the arguments cut both ways. In my opinion then, as now, when the considerations are weighed, given that real consideration was provided and the endorsee acted in good faith, the scales are tipped in favor of preferring the endorsee over the obligor. Had my opinion been heard, this is what we would now instruct.

Deputy President (emeritus) E. Rubinstein:

A. It is not without hesitation that I have decided to join in the opinion of Justice Hayut—and Justice Hendel originally—which changes the Guisky Precedent (CA 33/61 *Guisky v. N. Meir*, IsrSC 16(1) 595 (1962)). I carefully perused the appeal judgment and the opinions in the further hearing, and although they are all are deserving, it seems to me that, in the interest of future legal and practical clarity, presenting a framework that offers "decisiveness" and specificity is warranted. Indeed, in principle, there is some appeal to the Guisky Precedent and the view held by my colleague Justice N. Sohlberg that it should not be overruled but rather modified. After all, if the bank is assumed to have acted in good faith, given no real indications of future complications attending the transaction, why should it be deprived and lose the money it had given? But we are concerned with cases that do not involve an immaculately good bill, or at least the bill in question had been "seriously demoted" such that its holder does not have the status of a "holder in due course". By analogy to the approach that has taken root in the law of tenders, it seems that when it comes to the law of negotiable instruments, it is proper to adopt an approach focused upon "the need for utmost strictness upon meeting the conditions" of the bill (and in that case—the tender; AAA 6823/10 *Matan Health Services Ltd. v. Ministry of Health* (2011), para. 22 of Justice Vogelman's opinion; see also para. D of my opinion in the same case (2011)); and as I have noted in another case, "the lesson to be learned is the strictness and accuracy" (from my opinion in AAA 2628/11 *Epcon Control and Automation Ltd. v. the State of Israel – the Government Authority for Water and Sewage* (2012)). This is also true, both legally and morally, for the law of negotiable instruments, where "more often than not, the endorsee will be a bank and the drawer a consumer" (CA 1560/90 *Moshe Zitiat v. the First International Bank of Israel Ltd.*, IsrSC 48(4), 498, 519 (1994), *per* President Shamgar), and the bank, the most effective damage avoider, has at its disposal the most effective tools to verify the regularity of the bill (CA 8068/01 *Ayalon Insurance Com Ltd. v. Executor Opplager*, IsrSC 59(2) 349, 369 (2004); CA 7370/06 *Shani v. Berdichevsky*, para. 9 (2009); I. GILEAD, TORT LAW – THE LIMITS OF LIABILITY, 856-858 (2012) (Hebrew)). And at the end of the day, I doubt that changing the Precedent would make that much actual difference in the conduct of commerce in this day and age, or at any rate not to the extent claimed by the Petitioning Bank in our case,

considering that bills are losing ground to credit cards as a form of consumer payment (See Plato-Shinar, *Towards a Rational Model of Defenses in the Law of Negotiable Instruments*, 12 HAMISHPAT (In memory of the late Adi Azar), 251, 257 (2007); S. LERNER, THE LAW OF BILLS AND NOTES 29 (2nd edition, 2007) (Hebrew)).

B. I therefore concur in the opinion of Justice E. Hayut. In signing and taking my leave from this Court, I would like to wish my colleague Justice Hayut my heartfelt congratulations on her being chosen to serve as President of the Court. I have had the privilege of serving alongside her in good friendship throughout my term, and I wish her satisfaction and success, with God's help.

Justice U. Shoham:

I concur in the judgment of my colleague Justice E. Hayut, and likewise believe that the petition for a further hearing should be denied, as proposed by my colleague. As may be recalled, I concurred in the opinion of my colleague Justice N. Hendel in the proceeding that is the subject of this further hearing (LCA 8301/13 *Tal Trading Corp v. Bank Leumi le-Israel Ltd.* (Nov. 24, 2015)), according to which the Guisky Precedent should be overruled, and I see no cause to depart from my view there.

Deputy President (emeritus) S. Joubran:

1. I concur fully with the lucid opinion of my colleague Justice E. Hayut. Like her, I believe that this extended panel should adopt the comprehensive, instructive opinion my colleague Justice N. Hendel in LCA 8301/13 *Tal Trading Corp v. Bank Leumi le-Israel Ltd.* (Nov. 24, 2015) ((hereinafter: the Judgment), which overruled the precedent laid down in CA 333/61 *Guisky v. N. Meir*, IsrSC 16(1) 595 (1962) (hereinafter: the Guisky Precedent)). Since the opinion of my colleague Justice N. Hendel in the Judgment left no stone unturned and aptly presented the reasons for overruling the Guisky Precedent, I shall content myself with a brief comment only.

2. The legal question at hand requires deciding between conflicting interests. On one side stands the drawer of the bill, who has passed it on to the payee in expectation of some future consideration in return. Opposite him stands the endorsee, who received the bill from the payee and gave consideration in return, expecting to be able to receive payment for the bill when the time came. This state of affairs is disrupted when the payee fails to provide the drawer with consideration for the bill. Once this happens, it is no longer possible for both parties, the drawer and the endorsee, to have their expectations fulfilled. Which side will be forced to bear the cost of this failure is a complex question, in view of the bill's multi-layered character as an amalgam of property law, obligation law and the law of negotiable instruments (see: Aharon Barak, *The Nature of a Negotiable Instrument*, SELECTED WRITINGS, vol. II 1253, 1282 (2000) (Hebrew)). The explicit wording of the Bills of Exchange Ordinance does provide an answer to this question, but one that is restricted to particular circumstances. As long as the endorsee acquired "holder-in-due-course" status (as defined in sec. 28 of the Bills of Exchange Ordinance [New Version] ((hereinafter: the Ordinance)), the legislature instructs that the endorsee be accorded precedence and that the burden of failure be placed on the drawer. As my colleague Justice N. Hendel explained, this precedence stems from the commercial purposes of the bill and the desire to facilitate and streamline its use (see para. 6 of his opinion in the Judgment). On the other hand, the strict wording of the Ordinance does not grant similar precedence to an endorsee of lesser standing relative to the bill, including a "holder for value" (as defined in sec. 26 of the Ordinance). Despite this lacuna in the scope of application, the Supreme Court saw fit to determine at the time, in the Guisky Precedent, that even he would be immune to a failure-of-consideration defense and be able to demand execution of the bill.

3. For the reasons specified and elaborated by my colleague Justice N. Hendel in the Judgment, it is also my view that the said lacuna should be deemed a negative arrangement, which does not allow an endorsee with merely holder-for-value status—including the Applicant in this proceeding—to have the bill executed. Consequently, I did not see fit to subscribe to the intermediary approach suggested by my colleague Justice N. Sohlberg, which seeks to limit the Precedent and establish, *de facto*, a new status in the law of negotiable instruments (see para. 14 of the opinion of my colleague Justice E. Hayut).

4. Hence, I believe, like my colleague Justice E. Hayut, that the petition for a further hearing should be denied.

Justice N. Hendel:

1. I concur in the clear opinion and edifying comments of my colleague Justice E. Hayut.

I believe that in the previous hearing, my colleague Justice N. Sohlberg and I were given ample opportunity to set forth our disagreement. I thus considered leaving it at that and concurring in the majority opinion in the current proceeding. However, my colleague Justice Sohlberg—for understandable reasons—added specific reference to his way of perceiving our disagreement. To avoid any misunderstanding, I wish to clarify why I do not share that perception.

2. My colleague believes that the crux of the disagreement is the following question: A "contest of rights" arises between Party A and Party C. Both have acted in good faith, and both have paid or will pay consideration that will be lost. Who should "take the hit"? In other words, the legislature did not settle this question, and my colleague believes that there is nothing to prevent the Court from developing criteria to decide the issue. I, on the other hand, believe that this is not at all the question at issue here. The question, to my mind, is whether it is fitting to subject the parties to that contest of rights to start with, in a situation where such contest is not inevitable and can be fully prevented. The legislature did not initiate that contest, and there is no place, in my view, for the Court to do so itself.

As I have noted in my judgment, and as my colleague Justice Hayut noted, the law of negotiable instruments institutes a market overt of sorts, in the form of the holder in due course. This arrangement differs, however, in one respect from the rest of the "classic" market overts, such as in relation to the sale of land or movable property. These instances of market overt address what is commonly referred to as a "legal accident". Why accident? Because these situations come about as a result of an involuntary encounter between Party A and Party C who compete over the right – a

tort-like rather than contractual-like encounter, if you will. Typical situations in which the need to use the market overt rule arises are cases of fraud or forgery, or—quite differently—human error. This is not so when it comes to the negotiable-instrument context now before us. When a person holds a bill in due course, such holding arises from the voluntary choice of the person drawing the bill not to restrict it to begin with. What this choice means is a wish to create such holdership of the bill as would allow payment thereof even if its drawer has a good defense claim from the realm of contract law. Unlike other contests, the focus here is the bill's existence as a means of payment. This involves independent considerations pertaining to the flow of commerce. This distinction suggests that underlying the contest of rights is a voluntary arrangement—the relationships between the bank and other players. The contest of rights results from the choice made by the drawer of the bill not to restrict its negotiability in any way. It is this choice that leads, in cases of holdership in due course, to the contest of rights between Party A and Party C – a contractual-like rather than tort-like encounter, if you will.

The contest of rights between Party C, who holds the bill in due course, and Party A, the person drawing the bill, is made possible as a result of the legislature's choice to allow this encounter. It is not a situation dictated by reality. Had it been prescribed that a bill holder cannot at all overcome good defense claims grounded in contract and property law, Party C would not have taken the bill to begin with. Alternatively, it would have taken it while knowing, however, that it is assuming the risk of a good defense claim being raised by the drawer of the bill, and pricing the consideration for the bill accordingly. As previously explained, however, holdership in due course is a mechanism offering significant economic advantages. It is conducive to developing commercial activity and making it more efficient. This is why the legislature has chosen to allow the parties to enter a contest of rights to begin with, while laying down appropriate decision rules.

3. Similarly, in the proceeding before us as well, the question that arises is whether to allow the parties to enter a contest of rights to begin with. This is the general facet of the legal question discussed in the further hearing, from a forward-looking (*ex ante*) perspective—which is the primary perspective in such proceedings. To rule as per my colleague's view would allow various players, and banks in particular, to accept

defective checks as collateral, knowing that in some circumstances the defect in the check would not prevent them from collecting on it, even from a person who has a good defense claim in terms of contract law. In other words, to rule like this would mean to allow a contest of rights between the bank and the person who drew the check but did not receive the contractual consideration they were looking to acquire using the check. On the other hand, the majority decision produces an outcome where the bank, which can easily spot the flaws in a check, would initially avoid taking a defective check as collateral, or else choose to take it by way of a known and calculated risk. In other words, this approach prevents the contest of rights from the outset. Thus, I believe that what we have here is not a contest of rights wherein my colleague prefers Party C and I prefer Party A. The question before us is whether to initiate the contest of rights to start with where the legislature did not do so. In this sense, my colleague does, indeed, seek to establish a "market overt", that is, a device meant to fix, streamline and develop the market mechanism. This is the sense in which the arrangement of holdership in due course is a market overt, and this is the sense in which the proposal to develop the law made by my colleague is market overt.

4. To conclude, I still believe that the Guisky Precedent should be overruled, as it was in the judgment subject of this further hearing. My reasons have been presented and elaborated in the previous proceeding. I therefore concur in the decision of my colleague Justice Hayut, denying the petition for a further hearing.

Decided by majority opinion (against the dissenting opinion of Justice N. Sohlberg) to deny the petition for a further hearing as stated in the opinion of Justice E. Hayut.

Given this day, 20 Elul 5777 (Sept. 11, 2017).