CA 6370/00

Appellant: **Kal Binyan Ltd.**

v.

Respondent: **A.R.M. Raanana Building and Leasing Ltd**.

The Supreme Court as Court of Civil Appeals

[Feb. 17, 2002]

Before: President A. Barak and Justices T. Orr and I. Englard

Judgment

President A. Barak

A company issues a tender soliciting offers for the performance of some poject. It conducts negotiations with the bidders. It settles all of the conditions with one of the offerors. All that remains is ratification by the company's board of directors. The board of directors decides not to ratify the transaction. It enters into a contract with an offeror that did not participate in the tender. By its conduct, the company breached its duty to act in good faith. All agree that the bidder that the company did not treat in good faith is entitled to compensation for the harm caused by the negotiations ("reliance damages"). The scope of doubt is whether it is entitled to damages for lost profits due to the contract not being fulfilled ("expectation damages").

The Facts and Proceedings

1. The Respondent is a company that was involved in building a residential community in Raanana. The Appellant is a company that carries out development and infrastructure projects throughout the country. The Respondent contacted ten contractors (in March 1992), among them the Appellant, to solicit offers for infrastructure work in the Raanana project. The contractors were given various documents, among them a letter stating the date for submitting bids, the address for submitting the bids, the guarantees that should be appended to the bids, and the timeframe for the work. A pamphlet comprising specifications, a quantity survey, a list of plans, and special conditions was appended as well. In addition, a detailed draft of the contract to be signed between the parties to the agreement was appended. A contractors' visit to the site was also conducted.

2. The Appellant submitted a bid of NIS 7,149,000. The Respondent conducted appropriate negotiations with the Appellant, as well as with other bidders. In the course of these negotiations, the Respondent insisted that the work be performed at a "target price" of NIS 6,526,000. The Respondent's representatives (the Respondent's accountant and project managers) met with the Appellant's representative in this regard. In the first meeting between the parties, the Appellant's representative was unwilling to adjust his price to the Respondent's "target price", but in a further meeting, the Appellant's representative informed the Respondent that the Appellant was willing to perform the work at the "target price". That same day, the Respondent's board of directors convened. It was apprised of the Appellant's offer. It was also apprised of the offers of other companies that had not participated in the tender, and which were cheaper than the Appellant's bid. The board of directors refused to sign the contract with the Appellant. Instead, it signed a contract for the performance of the work with one of the offerors that had not originally submitted a bid.

3. The Appellant brought suit against the Respondent in the District Court. Its claim was that the parties had signed a binding contract that was breached, or alternatively, that the Respondent's conduct constituted bad faith in negotiations, and that the respondent had breached the "supplemental contract" between the parties, concerning the norms for conducting private tenders. The District Court dismissed the suit, ruling that there had never been a binding contract between the parties, primarily in light of their knowledge that the very making of the contract

was subject to the decision of the board of directors. It further held that there was no breach of the requirement of good faith in negotiations inasmuch as the Respondent is a private company, and is therefore not under a duty to treat the various bidders equally. It was under no formal restriction that it refrain from approaching other companies (that had not participated in the tender), and contract with one of them.

4. The Appellant appealed that decision to this Court (CA 4850/96 *Kal Binyan v. A.R.M. Raanana Building and Leasing Ltd*., IsrSC 52 (5) 562). The appeal was granted (on Dec. 23, 1998) in a majority opinion (Justices Strasberg-Cohen and Goldberg). It was held that although there was no binding contract between the parties, the Respondent's conduct in the circumstances constituted an absence of good faith in negotiations. It was held that the Respondent had decided to contract by means of a "closed, private tender". The Appellants choice not to conclude the contract with the Appellant, and contract with an offeror who had not participated in the tender, was tainted by inequality and a breach of fair, proper tender procedures. In this regard, Justice Goldberg pointed out that the offeror with which the Respondent contracted had not met any of the conditions of the tender; did not submit a bid by the appointed date, and did not participate in the contractors' visit. It was granted a real advantage when it submitted its offer after the maximum was extracted from bidders in the tender, who competed against one another. Justice Goldberg added:

> By this bad-faith conduct, the Respondent proved that the tender was meaningless from its point of view, and when it was financially advantageous, it was not deterred from contracting with an entity outside of the tender proceedings. In so doing, the Respondent deviated from the norms of fairness to which it had committed itself in regard to the participants in the tender, and for that reason, it is proper that it be obligated to pay damages to the Appellant with which it had concluded final arrangements (*ibid*., p. 575).

Deputy President S. Levin (dissenting) pointed out that, in fact, the parties had concluded a binding contractual agreement, under which the winner would be one who had properly submitted a bid in the framework of "the closed private tender". That is what arises from the various documents that the Appellant was required to submit, from the testimony of the parties, as well as from the manner that it chose for contracting (a tender). Justice S. Levin further noted

that the Respondent conducted the negotiations with the Appellant in bad faith. On that basis, the appeal was granted. The case was remanded to the District Court to decide "the appropriate remedies for a lack of good faith in contract negotiations" in the circumstances of the case. It should further be noted that the request for a Further Hearing on the judgement was denied (CFH 140/99 *Kal Binyan v. A.R.M. Raanana Building and Leasing Ltd*. (unpublished).

5. In the District Court (in the second proceeding), the Appellant requested that it be compensated for the injury it had incurred by reason of loss of expected profits to which it would have been entitled had the contract been concluded with it ("expectation damages"). In this regard, the Appellant submitted to the court an accountant's opinion as to the expected profit, in accordance with the average profit for projects that the Appellant had completed in the past. The Respondent argued before the District Court that the law does not allow for expectation damages, and that the Appellant's remedy is limited to compensation for its negotiation expenses (reliance damages).

6. The District Court (Judge Y. Zaft) adopted the Respondent's position. It noted that the source for the remedy for breach of the duty to negotiate in good faith is sec. 12(b) of the Contracts (General Part) Law, 5733-1973 (hereinafter: the Law). That provision allows only for reliance damages (which it set at NIS 11,975). The court added that if it would be held (on appeal) that expectation damages should be paid, such had not been proven by the Appellant. It was held that in order to prove such damages, it would be necessary to submit the opinion of an economist or expert engineer, based upon an analysis of expected costs as against the negotiated amount. That was not done, and therefore the damages were not proved.

7. This brings us to the appeal before us. The Appellant argues that damages under sec. 12(b) of the Law should not be limited to reliance damages alone. There is also nothing to prevent awarding expectation damages under the provisions of sec. 12(a) of the Law. According to its approach, in special cases in which a contract was nearly concluded, the damages for breach of the good-faith requirement should constitute compensation that would place the injured party in the situation in which it would have been were it not for the breach of the good-faith requirement. This should certainly be the case in tender proceedings whose conditions constitute a "supplementary contract" the breach of which should permit expectation damages. According to the Appellant, the negotiations in this case had nearly ripened to a contract. All the conditions

were agreed. All that remained was formal ratification (by the board of directors). As far as the extent of damage was concerned, the Appellant argued that it had provided sufficient foundation for proving the profits it was denied.

8. The Respondent asked that we dismiss the appeal. The only remedy to which the Appellant is entitled is reliance damages. The case before us does not fall within the scope of exceptional cases in which expectation damages may be awarded. The Respondent's refusal to conclude a contract was legitimate, as ratification by the board of directors was required. It was further argued that no "supplementary contract" was concluded between the parties. It was also argued that sufficient evidence had not been submitted to prove damages based upon expectation damages.

The Normative Framework

9. The key provision is to be found in sec. 12 of the Law, which states:

> *Negotiation in Good Faith*
>
> 12. (a) In negotiating a contract, a person shall act in a customary manner and in good faith.
>
> (b) A party to a contract who does not act in a customary manner and in good faith shall be liable to pay compensation to the other party for the damage caused to him in consequence of the negotiations or the making of the contract, and the provisions of sections 10, 13 and 14 of the Contracts (Remedies for Breach of Contract) Law, 5731-1970 shall apply *mutatis mutandis*.

This provision, and its elder sister that requires good-faith in the performance of obligations deriving from a contract (see sec. 39 of the Law,[1] and the expansion of the obligation under sec. 61(b) of the Law[2]), constitute fundamental provisions of the Israeli legal system, in

[1] 39. An obligation or right arising out of a contract shall be fulfilled or exercised in a customary manner and in good faith.

[2] 61. (a) The provisions of this Law shall apply where no other Law contains special provisions regarding the matter in question.

general, and of private law, in particular. It reflects a "royal" doctrine (see HCJ 1683/93 *Yavin PLast Ltd. v. National Labor Court*, IsrSC 47 (4) 702, 708). It constitutes the "soul" of the legal system (CA 391/80 *Lasarson v. Shikun Ovdim Ltd.*, IsrSC 38 (2) 237, 264). It requires that the individual act justly and fairly (HCJ 59/80 *Beer Sheva Public Transportation Services v. National Labor Court*, IsrSC 35 (1) 828, 834). It does not costitute a demand for a high level of "piety"; it does not require that the parties treat one another as angels. It is intended to prevent a situation in which people act toward one another like wolves. It tries to impose a normative framework in which people treat one another as people (see A. BARAK, JUDICIAL DISCRETION (1987), 473. I addressed this in one case in stating:

> We do not aspire that the relations between the participants in a tender be like those of angels. The level of conduct of *homo homini deus* is unattainable. But we reject that the relations between participants in a tender be of *homo homini lupus*. We aspire that the principle that will guide the conduct of the participants in a tender will be that of a person to a person as a person … (CA 207/79 *Raviv Moshe & Co. Ltd. v. Beit Yules Ltd.*, IsrSC 37 (1) 533, 558; and see LCA 5768/94 *A.S.I.R. Import Manufacturing and Distribution v. Forum Accessories and Consumer Products Ltd*., 54 (4) IsrSC 289, 414).

…

Justice I. Englard

1. I concur with my colleague President Barak that a person who does not act in a customary manner and in good faith in contract negotiations may be liable to expectation damages in the framework of his obligation to compensate the other party for the damage he incurred due to the non-conclusion of the agreement. However, it cannot be denied that this rule represents an important innovation on the basis of sec. 12(b) of the Contracts (General Part) Law. My colleague the President well described this background, as well as the pertinent reasons for this desirable result in this area, as expressed in his conclusion.

(b) The provisions of the Law shall, as far as appropriate and *mutatis mutandis*, apply also to legal acts other than contracts and to obligations not arising out of a contract.

2. I asked myself whether the solution to the legal question before us represents filling in a lacuna in the sense of Foundations of Law, 5740-1980, which directs us to the principles of freedom, justice, equity and peace of Israel's heritage. It may be that the recognition of expectation damages is already inherent in the provisions of sec. 12 of the Contracts (General Part) Law, but it may be that that provisions only grant reliance damages, although without constituting a negative arrangement that would prevent expectation damages. Under these circumstances – and under the assumption that the obligation of damages should not be expanded from reliance damages to expectation damages on the basis of analogy – we must find the solution in Israel's heritage. Whatever the legal situation may be in regard to the Foundations of Law, nothing would prevent – and it would even be proper – that we seek inspiration in the principles of the rich Jewish legal tradition, to the extent that it relates to the matter before us. See the call in this spirit in I. WARHAFTIG, THE UNDERTAKING IN JEWISH LAW: ITS VALIDITY, CHARACTER AND TYPES, pp. 450-451 (2001) (Hebrew).

3. The duty to conduct negotiations faithfully is so important in Jewish tradition that observing it is the subject of one of the first questions that a person is asked upon entering the next world: "Raba said: When man is led in for Judgment he is asked, Did you deal faithfully?" (*TB SHABBAT* 31a; see *Tosafot* on *SANHEDRIN* 7a, *s.v.* "*Ela al divrei torah*"; *Tosafot* on *KIDUSHIN* 40b. *s.v.* "*Ein tehilat dino*"; and see *Maharsha* [Rabbi Shmuel Eidels (1555 – 1631)], *ad loc.* And for the halalkha, see: *TUR, Orah Hayim* 156. It was further said: (*MEKHILTA DERABI ISHMAEL* (Horowitz-Rabin ed.), *Beshallah. Masekhta deVayisa* 1: "'Doing what is upright in His sight' [Exodus 15:26], this refers to negotiation, teaching that any who negotiates faithfully and people are pleased with him, Scripture deems it as if he had observed the entire Torah"; CA 148/77 *Roth v. Yeshufeh (Construction) Ltd.*, IsrSC 33 (1) 617, 634, *per* Elon J.). These sources concern the final judgment in heaven, and the big question is whether this standard of conduct also has legal force in this world, as opposed to merely moral force. In other words, is this duty accompanied – in a case of breach – by a threat of sanction in the form physical coercion by a court, or do we suffice with some lesser sanction?

4. It should be noted that in a religious normative system, like halakha, the distinction between a moral duty and a legal duty is not as sharp as in a civil legal system. The reason for the gradual transition between the two types of obligations in religious law is that the entire

system is given by a single lawmaker, that is, the source of legitimacy of entire system of obligations – legal and moral – is one. Moreover, in the view of a religious person, even punishment at the hand of Heaven, in its various forms, is of great significance, and therefore its threat can be no less effective that the threat of a physical sanction by human beings.

5. The issue before us is a clear example of what we might speak of as the side-by-side existence of legal and moral obligations in religious law. Of course, the halakhic rule is that words alone are insufficient to create a legally valid contractual obligation, and a means of *kinyan* [a juristic act of acquisition – trans.] is required, such that the result is that in the absence of a general consensual principle, a party to a contract can withdraw from his promise until the performance of an act of *kinyan*. The negotiation stage is thus lengthened, and with it the period of the obligation to act faithfully toward the other party. Thus, the halakha establishes moral obligations of increasing severity until the transformation into a contractual obligation of legal force. I will begin with the most severe moral obligation, which operates closest to the transformation [of an agreement – trans.] into a legal obligation. The starting point is in the law that establishes that pulling the chattel (which is an act of *kinyan*) purchases the money, while the money does not purchase the chattel. The Mishna (*BAVA METZIA* 4:2) states in this regard:

> For example, if he [the buyer] pulled fruit from him [the seller] into his possession but did not give him money, he cannot renege. If he gave him money but did not pull fruit from him, he can renege. But they [the Sages] said: He who exacted payment ["*mi shepara*"] from the generation of the flood and the generation of the dispersion [the Tower of Babel – trans.] will extract payment from one who does not stand by his word.

Following the Gemara in *BAVA METZIA* 48-49, *MAIMONIDES*, *Hilkhot Mekhira* 7:1-2; *TUR*, *Hoshen Mishpat* 204, the *SHULHAN ARUKH* (*Hoshen Mishpat* 204) rules:

> Section 1:
>
> One who gives money but does not take the chattels, even though he has not purchased the chattels, [nevertheless] as explained, anyone who reneges, whether the buyer or the seller, has not acted in a Jewish manner, and must receive *mi shepara*, even if he only gave him part of the money.

Section 4:

> How does one receive *mi shepara*? He is cursed in court, and told He who exacted payment [*mi shepara*] from the generation of the flood and the generation of the dispersion, and the people of Sodom and Gomorrah, and the Egyptians who drowned in the sea, will exact payment from one who does not stand by his word.

The *Rema* [Rabbi Moses Isserles (1520-1572)] adds in his glosses (*HAGAHOT HAREMA*, *SHULHAN ARUKH*, *Hoshen Mishpat* 204):

> And some say that he is told he will exact payment from you if you do not stand by your word … and some say that he is told in public.

6. Thus, we have before us the imposition of a severe sanction – an official, public curse – upon a person who reneges on his promise immediately prior to the final act of *kinyan*. The commentators have addressed the meaning of this curse, which relates to evil people who spoke in vain and did not keep their word, contrary to the words of the Prophet Zephaniah (3:13): "The remnant of Israel shall do no wrong and speak no falsehood; a deceitful tongue shall not be in their mouths …". See *Maharsha*, *BAVA METZIA* 49b, *s.v.* "*Mi shepara*". And see the author of the *SM"A* [(Rabbi Joshua b. Alexander HaCohen Falk (1555 – 1614), *SEFER ME'IRAT ENAYIM*], on *TUR*, *Hoshen Mishpat* 204, in the *Perisha*,[3] *s.v.* "*Sheyomar lo hadayan*", And see *SHULHAN ARUKH*, *Hoshen Mishpat* 204:8, s.v. "*MeAnshei dor hamabul*". According to the *SM"A*, the punishments imposed upon these people testify to Divine providence, and further see the *TIFERET YISRAEL* commentary [Rabbi Israel Lipschitz (1782–1860)] , on *MISHNA BAVA METZIA* 4:2 *Boaz*[4] ss. 1, in which the author explains that all human sins are due to four reasons: sexual desire, as in the generation of the Flood; honor, as in the generation of the dispersion; greed, as the people of Sodom; denial of Divine providence, like Pharaoh. The author of *TIFERET YISRAEL* therefore concludes:

> All these four groups were corrupt and corrupted human society, and breached the boundaries of morality by the four above reasons, and four types of terrible punishments were rained down upon them from Heaven. Therefore, one who does

[3] Trans: *Sefer Me'irat Enayim* consists of two parts, the *Perisha* and the *Derisha*.
[4] Trans: *TIFERET YISRAEL* consists of two parts, *Yakhin* and *Boaz*.

> not stand by his word, being from one of those four stated reasons, thereby causes the cessation of people's faith, and the relationship of human society will be torn and disconnected, like wax melting before fire, and therefore he is reminded of all of the above, and he is told that He who exacted payment from those four groups by great and terrible judgment in fire and water, will also exact payment from one who does not stand by his word, for whatever reason that may be.

And see *SHULHAN ARUKH, Hoshen Mishpat* 204:2:

> And moreover, there is no reward for a mitzvah or punishment for a sin in this world, and many people do not fear punishment in the next world, and all they desire is the vanities of this world. Therefore, he is told that He who exacted payment from those in this world, will similarly exact payment from you in this world, and that may cause him to regret and keep his promise.

7. When the breach of faith in negotiations occurs prior to the act of payment, the halakha imposes a less severe moral sanction, declaring the person who reneged on his promise as lacking in faith, rather than imposing a curse upon him. Thus the halakhic rule (*SHULHAN ARUKH, Hoshen Mishpat* 204:7) is:

> One who negotiates in words alone should stand by his word, even if he took no money, and did not write or give a bailment, and anyone who reneges, whether the purchaser or the seller, although not required to receive *mi shepara*, is one who is lacking in faith, and the sages are not pleased with him.

And see the glosses of the *Rema, ibid*., at the end of sec. 204:

8. There are many halakhic disagreements on the boundary between a legal obligation and a moral obligation in regard to promises, as well as on the various institutions that suffice solely with a moral sanction, such as the borderline between "*mi shepara*", "lacking in faith", and "grievance", as opposed to "piety". For a detailed discussion, see WARHAFTIG, *ibid*., pp. 409-445, and the references there, as well as B. LIFSHITZ, PROMISE - OBLIGATION AND ACQUISITION IN JEWISH LAW, 387-389 (1988) (Hebrew), and also compare M. SILBERG, THE WAY OF THE TALMUD, 2nd ed., 118*ff*. (1984) (Hebrew).

9. It should be noted that moral sanctions, as defined by Hans Kelsen – as opposed to legal sanctions – can be divided into negative sanctions and positive sanctions. A negative sanction is, in substance, a punishment intended to deprive some advantage or other benefit from the person who breached a moral obligation. Thus, the receiver is threatened with "*mi shepara*" because he can be expected to be subjected to Divine penalties that will harm him, that is, a threat of a transcendental punishment. As opposed to this, a positive sanction is a reward that will grant some benefit to the person who fulfils his moral obligation, such as, on the worldly plane, social recognition of his status and virtues. Thus, for example, the idea expressed in *MISHNAH SHEVI'IT* 10:9: "But if he did keep his word, the sages are pleased with him", is a positive sanction. And compare MAIMONIDES, COMMENTARY TO THE MISHNAH, *Shevi'it* 10:9: "His lot is that the Sages love him for this, and what he did is proper in their eyes …" (on the distinction between sanctions as reward and sanctions as punishment, see: H. KELSEN, *REINE RECHTSLERE* (Wien, 2nd Aufl., 1960) at p. 26.

10. Notwithstanding the formal requirement of *kinyan*, we find a tendency among halakhic decisors to obligate a person solely on the basis of his promise, if that promise caused another person to rely upon it (WARHAFTIG, *ibid*.). One salient example of this tendency can be found in regard to copyright, particularly in the case of publishers of the Talmud who sought to obligate subscribers to purchase the entire set without performing an act of *kinyan*, see N. RAKOVER, COPYRIGHT IN JEWISH LAW, 414-415 (1991) (Hebrew), and see *ibid*., particularly the responsum of R. Elazar Moshe Halevi Horowitz, *OHEL MOSHE*, II:138; [Rabbi Abraham Yeshayahu Karelitz, (1878-1953)] *HAZON ISH, Hoshen Mishpat, Bava Kama* 22; the aforementioned responsum in WARHAFTIG, *ibid*., p. 418, and in A. SAGI, JUDAISM: BETWEEN RELIGION AND MORALITY, pp. 128-130 (1998) (Hebrew), according to whom one may learn from this responsum about the view that there is a natural law system parallel to Torah law.

11. Nevertheless, it would appear that the basic principle that the breach of a promise made without *kinyan* will not be subject to legal sanction – as opposed to moral sanction – continues to be accepted by halakhic decisors. See, e.g., File 1/2/705 (COLLECTED JUDGMENTS OF THE CHIEF RABBINATE OF THE LAND OF ISRAEL, Z. Warhaftig, ed., 64 (Hebrew)), in which the halakhic conclusion is summarized as follows:

1. The lacking-in-faith rule is appropriate only when the matter is conclusive from both sides, and both parties expressed their resolve, that is, that the taker expressed a conclusive decision to buy, and the seller decisively promised to sell to him. "One who negotiates in words alone is deemed lacking in faith". The wording of this principle shows that it refers specifically to a case in which there were conclusive negotiations, and nothing was lacking other than *kinyan* alone.

2. As for the lacking-in-faith rule when there is a change in price, there is disagreement among the decisors, and one who acts strictly will be blessed, but the court is not empowered to decide strictly in a case of doubt, inasmuch as the matter is not actually *d'oraita* [derived from the Torah].

3. The court does not attach property solely due to lack of faith in the absence of *kinyan*. The court is only required to inform the defendant that he is deemed lacking in faith, and admonish him that he should agree to pay damages, but he cannot be ordered to pay damages in a judgment that can be enforced coercively.

4. We do not compel to act "beyond the letter of the law" when we have not found this expressly in the Sages. (*Ibid*., at p. 66).

12. A separate halakhic issue is that of the responsibility of one who reneges on his word for reliance damages. The assumption is that the other party incurred costs or other damage as a result of his reliance on the promise that was not kept. See WARHAFTIG, *ibid*., pp. 426-438, and in particular, see *HATAM SOFER* [Rabbi Moses Schreiber (1762–1839)], *Yoreh Deah* 246 (Hebrew), and compare RESPONSA *MINHAT YITZHAK* [Rabbi Yitzchak Yaakov Weiss (1902–1989)], IV:104 (Hebrew). It should be noted that there is disagreement among halakhic decisors on this issue, as well.

13. I will now return to the problem before me – the obligation to pay damages imposed upon a person who breached his duty to negotiate in good faith by failing to conclude the contract at the end of the negotiations, and making a contract with another person. The question concerns imposing expectation damages, as opposed to reliance damages. If we examine the case from the perspective of halakha, we can say that the party is lacking-in-faith. There is support for the view

that he halakhically owes reliance damages to the innocent party for the costs he incurred in the course of the negotiations. The big question is whether it is possible, in the framework of applying Jewish law to the civil system, to impose expectation damages, which are an expression of a legal duty to perform the contract even though it was not finally signed.

14. This question points to the dilemmas faced by the civil court when it seeks to apply Jewish law. Clearly, this Court is not an institution that decides halakha in matters of religious law. M. ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES, vol. 1, 117-118 (1973) (Hebrew) [English: M. ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES (Jewish Publication Society, 2003)]) and see FH 23/69 *Yosef v. Yosef*, IsrSC 24 (1) 792, 811-812, *per* I. Kahan J. Similarly, the civil court is not empowered to impose moral sanctions on a party, and needless to say, it is not empowered to express extreme imprecations (and there is some doubt as to whether "*mi shepara*" applies to a corporation; 717/3301/כ"ה (T.A.*) A. v. Shikun uPituach, Finance and Development Company of Histatrut Agudat Yisrael*, Rabbinical Courts Judgments 6 315). And it is not the role of a court to officially declare him lacking in faith. The declaration that the sages are not pleased with him is also inappropriate to a civil court. The result is that the various types of norms of substantive Jewish law cannot comprehensively be applied to this issue.

15. Against this background, the question arises as to whether, in the framework of adopting Jewish law, it would be appropriate for the civil court to "develop" the solution presented by Jewish law, and impose a legal sanction in place of the moral sanction established in religious law. In other words, at the first stage, the civil court would adopt the Jewish law concept that it is improper for a party to renege on a promise or act in bad faith in the course of negotiations, but in the absence of a possibility of imposing moral sanction, at the second stage, the court would, on its own initiative, impose a sanction of compelling the party to keep his promise or pay expectation damages to the other party, although that remedy is not to be found in the existing religious law.

16. On the assumption of a positive response to this fundamental question, this "development" of Jewish law by the civil court might produce an interesting result. It is possible that the rule established by the civil court would be recognized in Jewish law as a custom or as *dina demalkhuta* [the law of the land], which carries obligatory force in the framework of Jewish

law itself. See 717/3301/כ"ה (T.A.*), ibid*., at p. 322. But, as noted, it is not my place to make halakhic rulings.

My colleague the President is of the opinion that awarding expectation damages can be derived from the provisions of sec. 12 of the Contracts (General Part) Law by interpretation. Inasmuch as I approve of that possibility, I see no need to decide the aforementioned fundamental questions in regard to the application of Jewish law.

Decided in accordance with the opinion of President Barak

Given this day, 5 Adar 5762 (Feb. 17, 2002).