CA 9311/99

1. Menorah Insurance Company Ltd.

v.

1. Jerusalem Candles Ilum (1987) Ltd.
2. Magma Industries (Ilum) Ltd.
3. The Israel Phoenix Insurance Company Ltd.

Formal Respondents:

4. Moked Amishav Ltd.
5. Clal Insurance Company Ltd.
6. A.Z. Baranowitz Real Estate and Rental Ltd.
7. Shefa Manpower Systems Ltd.
8. David Bagdadi

The Supreme Court Sitting as the Court of Civil Appeals
[January 20, 2002]
Before President A. Barak, Vice President S. Levin, and Justice M. Naor

Facts: Appellee 6 (landlord), leased an industrial building to appellee 1 (Jerusalem Candles). The building and its contents were badly damaged by fire. The landlord, who was insured by appellant (Menorah) against fire risks, was compensated by Menorah as per the insurance policy. Menorah sued the tenant and The Phoenix (the tenant's insurance company – appellee 3), in an action of subrogation. In the district court, the latter two parties requested that the suit be summarily dismissed as, so they claimed, lessor and Menorah had waived, in the lease and in Menorah's policy, their right

of subrogation against tenant. The district court accepted this argument and dismissed the suit. Appellant now appeals that decision.

Held: The Court held that the appellant, as per both the lease contract and the parties' insurance policies, had waived its right of subrogation against the tenant.

Statutes Cited:
Insurance Contract Law, 1981, §§ 62, 62(a), 62(d)

Israeli Supreme Court Cases Cited:
[1] CA 32/84 *Migdal – Insurance Company v. Kramer and Associates*, IsrSC 41(2) 603
[2] CA 5360/93, CA 5366/93 *Hasneh Israeli Insurance v. Signa Insurance*, IsrSC 50(2) 611
[3] CA 3948/97, *Migdal Insurance v. Menorah Insurance*, IsrSC 55(3) 769
[4] CA 206/99 *A. Dori Engineering Works v. Migdal Insurance*, IsrSC 55(5) 566
[5] HCJ 846/93 *Barak v. The National Labor Court*, IsrSC 51(1) 3
[6] CA 779/89 *Shalev v. Selah Insurance*, IsrSC 48(1) 221
[7] CA 2341/91 *United Mizrahi Bank v. Migdal Insurance*, IsrSC 48(1) 389
[8] FHC 577/86 *Zerad v. Shaul*, IsrSC 40(4) 113
[9] CA 3351/92 *Marshi v. Blan*, (unreported decision)

United States Cases Cited:
[10] *Sutton v. Jondahl*, 532 P.2d 478 (Okl. App. 1975)
[11] 56 *Associates ex rel. Paolino v. Frieband*, 89 F. Supp. 2d 189 (D.R.I. 2000)

British Cases Cited:
[12] Mark Rowlands v. Berni Inns [1986] 1 Q.B. 211 (C.A.)
[13] Lambert v. Keymood [1999] Lloyd's Rep. I.R. 80 (Q.B.)

Canadian Cases Cited:
[14] *Amexon Realty v. Comcheq Services* [1998] 155 D.L.R. (4th) 661
[15] *T. Eaton Co. v. Smith* [1977] 92 D.L.R. (3d) 425

Israeli Books Cited:

[16] D. Friedman, The Law of Restitution (2nd ed. 1998)
[17] A. Yadin, *The Insurance Contract Law (1981)* in Interpretation of Contract Laws (G. Tadeschi ed. 1984)
[18] A. Barak, *Damages*, *in* Tort Law – The General Doctrine of Torts (G. Tedeschi ed., 2nd ed. 1977)

Israeli Articles Cited:
[19] U. Procaccia, *The Subrogation Clause in Motor Vehicle Insurance Policies*, 11 Mishpatim 125 (1981)

Foreign Books Cited:
[20] John Lowry & Philip Rawlings, Insurance Law: Doctrines and Principles (1999)
[21] E.J. MacGillavray, Insurance Law (N. Legh-Jones ed., 9th ed. 1993)
[22] John Birds, Modern Insurance Law (3rd ed. 1993)
[23] John A. Appleman & Jean Appleman, Insurance Law and Practice (revised) (1972)
[24] K. Sutton, Insurance Law in Australia (2nd ed. 1991)

Foreign Articles Cited:
[25] James M. Fischer, *The Presence of Insurance and the Legal Allocation of Risk,* 2 Conn. Ins. L.J. 1 (1996)

Appeal from the judgment of the District Court of Tel Aviv/Jaffa on May 3, 2000 in CC 1023/95 (Judge R. Mashal (Shoham)). Appeal denied.

On behalf of appellant—M. Kaplinski
On behalf of appellees 1-3—G. Nashitz
On behalf of appellees 4-5—E. Stein
On behalf of appellee 6—M. Kaplinski
On behalf of appellee 7—G. Michlis
On behalf of appellee 8—N. Lerrer

JUDGMENT

Justice M. Naor

The tenant of a property negligently caused fire damage to the property and its contents. The landlord's insurance company

compensated the landlord for his loss, and subsequently brought a subrogation action against the tenant. The central question considered by the district court was whether the landlord and his insurance company had waived the right to maintain an action of subrogation against the tenant. The district court answered this question in the affirmative, and dismissed the subrogation action. The parties appealed the decision. I hold that the action was properly dismissed.

Facts

1. A.Z Baranowitz Real Estate and Rental Ltd. owns many properties, including a 6,000 square meter industrial building, consisting of three floors and a basement, in Petah Tikva. Jerusalem Candles Ilum (1987) (which later changed its name to Magma Industries (Ilum)) [hereinafter – the tenant], rented the ground floor of the building (approximately 1,425 square meters) from Baranowitz on October 22, 1991 and, on October 21, 1993, rented an additional 813 square meters.

2. On Saturday October 29, 1994, at approximately 7:00, a fire broke out in the building. The building and its contents were severely damaged. It was necessary to demolish and rebuild an entire wing of the building.

3. Baranowitz was insured by Menorah Insurance Company, who is the appellant in this case. The insurance policy (policy number 03-09-0005023-94-0), including its appendix and its attachments, provided coverage against fire risks. Magma was insured against fire risks by the Israel Phoenix Insurance Company. As per the insurance policy, Menorah paid Baranowitz $1,300,000 US in New Israeli Shekels ("NIS") for damages to the building and loss of profits. Menorah and Baranowitz signed a settlement agreement. In the agreement, Baranowitz declared that it would make no further claims

against Menorah pursuant to the policy, and that "without detracting from the generality of the above, it is agreed that the said payments constitute a full and final settlement of all the claims of all those insured by the policy for the said damage and all related or deriving from it." Menorah, for its part, declared in the settlement agreement that it waived all claims against Baranowitz regarding the policy and the damage "except cooperation to the extent needed in order to realize Menorah's right to indemnification pursuant to the policy (no indemnification claim shall be brought against parties toward whom Menorah has waived its right of indemnification)."

4. In principle, while disregarding for now the specific provisions of the lease and of Menorah's policy (the interpretation of which is under contention), an insurer who compensates an insured has a right of subrogation, pursuant to section 62(a) of The Insurance Contract Law, 1981, which provides:

> If the insured, due to an insurance event, has a further compensation or indemnification right against a third party, not pursuant to an insurance contract, this right is transferred to the insurer, subsequent to his payment of the insurance benefits to the beneficiary and to the extent of the benefits he paid.

An identical provision appears in the Menorah policy (clause 13(a) of the policy's general clauses).

6. Menorah filed a subrogation action against Magma and Phoenix in the District Court of Tel-Aviv/Jaffa. Menorah claimed that Magma was responsible for the damage caused by the fire; Magma and Phoenix responded by sending third party notices (some of whom sent notices to fourth parties), in order to implead them. One of the third parties impleaded by Magma and Phoenix was

Baranowitz itself. In the third party notice that the defendants submitted against Baranowitz, they claimed that, if it is determined that Menorah has a right of indemnification against Magma, then Baranowitz is in breach of his contractual obligation toward Magma in the lease agreement. As per the agreement, Magma must ensure waiver of the right of subrogation As such, Baranowitz should indemnify Magma in any amount which Magma would be obligated to pay Menorah. Menorah and Baranowitz were represented by the same lawyer – Mr. Kaplinski. This indicates that there is no conflict of interests between the two parties.

7. Magma and Phoenix moved for summary dismissal of the claim against them. They claimed that, according to both the lease between Baranowitz and Magma, as well as according to Menorah's policy, Baranowitz and Menorah had *"waived"* their right of subrogation against Magma. They also claimed that Magma's insurance policy with Phoenix contained a similar waiver of claims for Baranowitz's benefit. The question whether there was a waiver of the right of subrogation – and if so, to what extent – was the question before the district court, and it is the question at issue before us.

8. During the pre-trial proceedings, the parties reached a procedural agreement to bifurcate the proceedings, so that it could first be determined whether claimant had a cause of action against any of the respondents pursuant to the lease or to Menorah's policy. The trial court, since it summarily dismissed the claim and held that the right of subrogation had been waived, did not discuss respondents' third party complaint against Menorah. Menorah now appeals this decision. Alternatively, Menorah argues that if there was a waiver, it pertained solely to the rented property and not to the damage to the whole building.

9. There is a close connection between the motion for summary dismissal and the third party notices that Magma and Phoenix

sent to Baranowitz. Both involve a triangular relationship between the landlord, the landlord's insurance company, and the tenant. Both involve the interpretation of the same documents. In fact, this case is circular: the landlord received compensation from its insurer. The insurer is suing the tenant and the tenant, in turn, is suing the landlord. It is possible that, due to the bifurcation of the proceedings (or to other reasons known to the parties), *prima facie*, the parties did not present all the evidence they could have and should have. Both parties refrained from calling witnesses involved in the negotiation of the rental terms, in the underwriting, and in the drafting of the settlement agreement Based on the evidence (which was, as noted, meager), and especially on the interpretation of the documents presented and on the economic objective of the lease provisions, I have, as noted, reached the conclusion that the claim was properly dismissed, and that Menorah has no cause of action against respondents. As such, the appeal should be denied.

10. Since the claim was not examined on its merits, the trial court did not determine whether the fire broke out as a result of Magma's negligence. Pursuant to the accepted rules regarding motions for summary dismissal, I will *assume*, for the remainder of the discussion, that Magma negligently caused the fire,(as Menorah claimed in its suit). This is, of course, merely an assumption.

The Provisions of the Lease and of the Policies

11. Clause 15 of the lease between Baranowitz and Magma provides:

> The *tenant* agrees, at its own expense, to insure, with an insurance company, the *contents of the rental property*,

including fixtures, accessories, equipment and all other contents, as well as third party liability insurance for property and body, with the landlord to be seen, for these purposes, as a third party. Tenant's insurance policy will include a *waiver of the insurance company's right to indemnification* from the landlord. The *landlord* agrees, at his own expense, to insure the rental *building*, the air conditioning systems and plumbing of the rental property. *The landlord's insurance policy will include a waiver of his insurance company's right to indemnification from the tenant.*

All policies will be calculated in current U.S. dollar values or indexed to the monthly consumer price index.

All the insurance policies will be for the benefit of both the landlord and tenant. Any negotiations with insurance companies over incurred losses will be held by the tenant in coordination with the landlord.

The landlord will have veto power over the negotiation procedure and over the outcome of negotiations regarding damage to the rental property, including fixtures and installations of the property.

All payments received from the insurance companies or in any other way for damages to the landlord will be paid first and foremost to the landlord, for reparation of the damages owed to him, only after which can the tenant receive the remainder of the sum in compensation for his damages, if such were in fact incurred. The tenant agrees to submit the abovementioned policy to the landlord no later than ten days after the close of the agreement.

(emphases added).

12. I shall foreshadow my conclusions, by hinting that Magma and Phoenix argue – and their argument was accepted by the trial court - that the purpose of the lease was to distribute the risk between the landlord and the tenant, such that the landlord would insure the the building and the tenant would insure the contents of the property, while each would waive their claims of subrogation against the other in their insurance policies. The trial court also held that this is an accepted practice in buildings with many tenants. Magma and Phoenix claim that the lease should be used as an aid for the interpretation of Menorah's insurance policy, since it is presumed that the parties ensured that their insurance policies would realize their contractual obligations.

13. Clause 13 of Menorah's insurance policy is a verbatim copy of Clause 62 of The Insurance Contract Law, which provides:

> *Subrogation*
>
> a) If the insured, due to an insurance event, has a further compensation or indemnification right against a third party, not pursuant to an insurance contract, this right is transferred to the insurer, subsequent to his payment of the insurance benefits to the beneficiary, and to the extent that those benefits were paid.
>
> b) The insurer is not permitted to use the right transferred to him pursuant to this clause in a manner that would infringe

upon the insured's right to collect indemnification or compensation from a third party above and beyond the benefits he received from the insurer.

c) If the insured received compensation or indemnification from the third party, which is due to the insurer pursuant to this clause, he shall transfer it to the insurer. If the insured enters into a settlement agreement, waives a right or takes other action which infringes upon the right that was transferred to the insurer, he must compensate the insurer for it.

d) The provisions of this clause will not be applicable if the insurance event was unintentionally caused by a person from whom an insured reasonable person would not claim compensation or indemnification due to familial relations or employer-employee relations.

14. Our discussion regarding Menorah's policy will focus on clause (m) in the specifications regarding comprehensive fire insurance coverage [hereinafter – the Waiver Clause]:

Waiver of Subrogation

It is hereby agreed that in addition to clause 13(d) of the general terms of the policy, the provisions of the subrogation clause will not be applicable if the insurance event was caused by agents of the insured, stockholders of the insured, members of the board of directors of the insured; against Insurance Companies Ltd., Bar Beton Ltd., *those renting or leasing* space from the insured, as well as against Bezeq the Israel Telecommunication Corp., Ltd. and The Israel Electric Company.

(emphasis added)

15. The "Extensions and Special Conditions" section of Magma's insurance policy with Phoenix (clause 20) also includes a subrogation waiver:

> *Waiver of Subrogation Rights*
>
> 20. The insurer hereby waives any claims of subrogation against the owners, managers, employees, parent company, or subsidiary companies of the insured; against companies whose owner is the same as that of the insured party; and against any other party to which the insured waived his claims in writing or to which he guaranteed, in writing, indemnification, or production of a waiver of the right of subrogation against said party.

Denial of the Insurer's Right of Subrogation as an Exception to Accepted Legal Rules

16. It is a general principle that a negligent person who caused damage must compensate the damaged party for the damage caused by his fault. Sometimes the damaged party has an insurance policy that covers the incurred damage. The fact that the damaged party is insured, and that the insurer paid him, does not usually exempt the party who caused the damage from bearing the consequences of his actions. Clause 62 of The Insurance Contract Law grants the right of subrogation to the insurer who paid the insured, and he is entitled to sue the party who caused the damage. The right of subrogation is an accepted right in the law of other countries as well. *See* U. Procaccia, *Subrogation in Motor Vehicle Insurance* Policies, *11 Mishpatim* 128-29 (1980) [19]. For a comparison between the rights of subrogation, assignment, and restitution see D. Friedman, The Law of Restitution 260 (2nd ed. 1998) [16]. It is accepted to say that in a subrogation situation, the new creditor "stands in the shoes of his predecessor." *See, e.g.* CA 32/84 *Migdal – Insurance Company v. Kramer and Associates* [1]. Sometimes it is said that the insurer and the insured "are one." John Lowry & Philip Rawlings, Insurance Law: Doctrines

and Principles 203 (1999) [20]. In the situation where the insured cannot sue the party who caused the damage, due to an agreement between them, the insurer cannot sue the him either: *nemo dat quod non habet*.

A negation of the insurer's right of subrogation may be anchored in the law or it may be anchored in a contract. When the right of subrogation is denied we have an exception to the following two principles: the principle that the party who negligently caused damage should bear the consequences of his actions, and the principle that the existence of insurance in the hands of the damaged party does not exempt the party who caused the damage.

17. The right of subrogation may also be negated pursuant to statute or common law. Section 62(d) of The Insurance Contract Law provides that the provisions relating to subrogation will not apply in a case where the insurance event was caused by a person from whom, due to familial relations or employer-employee relations, a reasonable person would not claim compensation or indemnification. In the opinion of Professor Yadin, clause 62(d) is not a *numerus clausus*. Rather, the two relationships specified in it – familial relation or employer-employee relation – are examples of a more general category, and do not bar application of the provision to other relations in that category *See* A. Yadin, The Insurance Contract Law 157 (1981) [17]. I will return to this issue below.

18. At times, the right of subrogation may be denied pursuant to the terms of the *contract* between the damaged party and the party who caused the damage, and sometimes it is denied due to a contract between the insured and the insurer. Our consideration of the negation of the right of recourse will focus on a situation where the injured party and the party that caused the damage agreed, *before* the damage occurred, to exempt the latter from responsibility. Once this agreement is made, the damaged party has no claims against the party

who caused the damage. Thus, neither does the insurer have claims against the party who caused the damage: the insurer "stands in the shoes of the damaged party." If the damaged party conceals the existence of his agreement with the party who caused the damage from his insurer, it may release the insurance company from its obligation toward the damaged party. *See* A. Barak, *Damages*, *in* Tort Law – The General Doctrine of Torts 404 (G. Tedsky ed., 2nd ed. 1967) [18].

19. The trial court based its ruling primarily on the meaning of the "waiver clause" in Menorah's policy, as according to its approach, the lease serves as the contextual background for the interpretation of that policy. I intend to demonstrate that the lease, Menorah's policy, and Phoenix's policy all create a complete and harmonious arrangement. The interpretation of the documents, each on its own, and certainly when they are read together, leads to the conclusion that the damaged party and the party that caused the damage agreed, previous to the occurrence of the damage, to distribute the risk between them, such that the landlord would insure the building on the rental property and the tenant would insure the contents of the rental property, with a reciprocal waiver of the right of subrogation. Both insurance policies contain provisions relating to the waiver of subrogation. Their language is different, but the policies reflect (in respect to fire damages) the agreement between the parties in the lease. The evidence indicates that the lease was sent to Menorah before it was underwritten. The two sides should be presumed to be acting in good faith, and thus the insurance policies reflect the agreement in the lease. *Compare* CA 5360/93, CA5366/93 *Hasneh Insurance v. Signa Insurance*, [2] at 611 (Strasberg-Cohen J.).

20. Let us put aside the interpretation of the documents for now. Let us turn to comparative law, so that it may assist us in our understanding of the economic objective of the system of contracts. It is the meager evidence regarding the subjective

intentions of the parties which makes it important to demonstrate that the agreements are standard ones. Subsequently, we will return to the agreements and their interpretation.

Comparative Law

21. Often, the party who causes the damage and the injured party meet for the first time at the event in which the damage is caused. The damaged party has insurance, and the insurer compensates him for the damages. The general principle is, as we have said, that the insurer is entitled to recourse against the party who caused the damage, pursuant to the right of subrogation.

In some cases, the damaged party and the party who caused the damage are not strangers. A landlord and his tenant, for example, or a contractor and sub-contractors, or a buyer and seller, may have had contractual relations *prior* to the tort. Due to their contractual relations they each have an interest in the same asset. Once the insurance event occurs, the damaged party is compensated by his insurer. Comparative law reveals many cases, in the context of such contractual relationships, of the damaged party having insurance, and these cases examine the consequences of such insurance for the damaging party's liability. A common issue in these cases is, if the damage was caused by one of the parties to the contract, whether the parties intended to waive the right of subrogation. Let us review a few of these examples. In light of the issues raised by this appeal, we shall focus especially on landlord-tenant relations.

22. The case law we will cite sometimes describes complex or multiparty situations. In our case there are *four* parties: the tenant, the landlord, and the two insurance companies. In order to simplify and

to prevent unnecessary repetition, we will first describe a simple model which involves only three parties. This model, including the names of its participants and its systems of contracts will accompany us hereinafter.

23. Let us assume that Reuven and Shimon, sign a contract, which is intended to realize a shared economic objective. The contract pertains to certain property (such as a rental agreement). Let us call this agreement "the basic contract." Reuven approaches an insurance company (hereinafter – the insurance company) and insures the property. From this point forward, we shall no longer call Reuven by his name, but rather we shall call him "the insured." One day, Shimon negligently causes damage to the property of the insured (from this point forward, we shall no longer call him Shimon, but rather "the party who caused the damage"). The damage constitutes an "insurance event" according to the policy. The insured turns to the insurer, the insurer compensates the insured, and the insurer subsequently sues the party who caused the damage, pursuant to the right of subrogation. The party who caused the damage wishes to defend against the insurer's suit and asserts that the basic contract protects him from such a suit. It seems, from a review of case law of other countries, that the question of whether it is correct to interpret the basic contract as a denial of the right to maintain an action of subrogation has greatly engaged the courts of various legal systems.

Canadian Law

24. An instance similar to our own appears in Canadian Law, in the judgment of the Court of Appeal for Ontario in *Amexon Realty v. Comcheq Services* [1998] 155 D.L.R. (4th) 661 [14]. In this case, a fire broke out in a rental property; the insurer fully indemnified the landlord and sued the damage causing tenant, pursuant to the right of subrogation. In the basic contract, the landlord agreed to insure the property against fire damages, and the tenant agreed to pay a pro rata part of the insurance premium. The tenant further agreed to make necessary repairs to the rental property, with the exception of fire

damages. The insurer's subrogation suit was summarily dismissed. The court reviewed some of the decisions of the Supreme Court of Canada, the most recent of which was *T. Eaton Co. v. Smith* [1977] 92 D.L.R. (3d) 425 [15]. Many of the cited cases concerned claims made by insurers who, pursuant to their right of subrogation, sued tenants whose negligence caused fire damages. The Supreme Court of Canada made it clear that, under such circumstances, the outcome of the suit depends on the provisions of the basic contract and not on the provisions of the insurance policy, since the insurer stands "in place" of the insured, and does not have more rights than the insured toward the tortfeasor. In that case, the Supreme Court of Canada held that the terms of the lease freed the tenant from the risk that his future negligence would cause damage to the insured. As such, in *Amexon* [14], the Court of Appeals held that the basic contract there provided that the insured should turn to the insurer – and not to the damaging party – for compensation.

British Law

25. In Britain, the guiding case is Mark Rowlands v. Berni Inns [1986] 1 Q.B. 211 (C.A.) [12]. In Rowlands, the basic contract (which was also a rental agreement) contained a clause which provided that the landlord would insure the rental property for fire damages and use the insurance benefits to repair the property. The tenant agreed, in the basic contract, to share the costs of paying the insurance premiums. The contract further provided that the tenant would not be under an obligation to repair the rental property even if his negligence caused the insurance event (the fire). The court held that the insurer, who paid the insured, would not be able to receive compensation from the damage causing tenant, despite the fact that the latter was not mentioned in the insurance policy. According to the court, it was clear from the rental agreement that the insurance policy *was issued for the benefit of the tenant as well*. The party who caused the damage participated in payment of the insurance premium, and the rental contract released him from responsibility for the fire damages. For an analysis of the judgment, see J. Lowry & P. Rawlings, Insurance Law: Doctrines and Principles 402 (1999) [20];

E.J. MacGillavray, On Insurance Law (N. Legh-Jones ed., 9th ed. 1993) [21]; John Birds, Modern Insurance Law 290 (3rd ed. 1993) [22].

26. Rowlands [12] was later analyzed in the decision of Lambert v. Keymood.[1999] Lloyd's Rep. I.R. 80 (Q.B.) [13]. In Lambert, the court determined that the question whether a waiver of the right of recourse existed in the basic contract would be answered, first and foremost, by the intentions of the parties as reflected in the basic contract. In distinguishing the facts of that case from the facts in *Rowlands*, the court ruled that the lease *before it* did not suggest that the owner's insurance was also for benefit of the tenant, and thus did not negate the insurer's right of subrogation. In the first supplement to the 9th edition of MacGillavray, On Insurance Law (N. Legh-Jones ed,. 9th ed., 1997), it is noted that the court in *Lambert* correctly distinguished the *Rowlands* judgment. The question whether the parties intended to release the party who caused the damage depends on the basic contract, and the landlord's insurance policy in the Lambert case was *not* made to the benefit of the tenant.

The United States

27. American Law is also characterized by similar differences of opinion regarding whether provisions in the basic contract should be interpreted as negating the insurer's right of recourse.

I do not intend to review the many decisions handed down in situations where the basic contract was a rental agreement and the policy insured against fire damages. I will note two primary trends. The Oklahoma Court of Appeals, in *Sutton v. Jondahl*, 532 P.2d 478 (Okl. App. 1975) [10], held that, in the absence of an express stipulation otherwise, the tenant will be considered a "co-insured" in the landlord's insurance policy. Therefore, the insurer cannot exercise the right of subrogation toward the damage causing tenant responsible for the fire. *Sutton* [10] was based on two rationales: that

the rent payments reflect participation by the tenant in the landlord's insurance premium, and that the tenant has an interest in insuring the building itself.

Many United States courts have adopted *Sutton* [10]. Many other courts, however, have rejected *Sutton*'s holding. *See* 6A John A. Appleman & Jean Appleman, Insurance Law and Practice (revised) §§ 4051-55 (1972) [23]. Recently, a federal court rejected the *Sutton* approach. *See* 56 *Associates ex rel. Paolino v. Frieband*, 89 F. Supp. 2d 189 (D.R.I. 2000) [11]. This latter court emphasized that no prior assumptions should be made regarding the intentions of the parties in the rental agreement. Tenants, like other people, will usually be responsible for the consequences of their negligence, and the landlord is entitled to recover from them. The specific terms of the rental agreement should be examined on a case by case basis to determine whether the insurer, stepping into the shoes of the insured, has the right to sue the negligent tenant in a claim of subrogation.

28. For a critical view of courts which grant tenants a "quasi-insured" status in landlords' insurance policies, see James M. Fischer, *The Presence of Insurance and the Legal Allocation of Risk*, 2 Conn. Ins. L.J. 1 (1996) [25]. Fischer argues that granting such a status sometimes constitutes a windfall to the negligent tenant.

29. An examination of the various decisions shows that, when the parties intended that the landlord's insurance would also be for the benefit of the damage causing tenant, courts do not permit the insurer to institute an action of subrogation against the negligent tenant. The trend in both in England and the United States is that courts examine, without making prior assumptions regarding the parties' intentions, the contract in question in order to determine whether the insurer waived his right of subrogation. The key question, in both case law and legal scholarship, is whether the intention of the parties in the basic contract was for the insurance to be made for the benefit of both parties. As John Birds notes, in reference to *Rowlands* [12]:

> It was *clearly crucial* to the result of the *Mark Rowlands*

> case that *the terms of the lease made it clear that the insurance was for the benefit of both parties*. Not all leases will be so worded. It may be that the reasoning can be extended to other relationships between persons interested in the same property, for example vendor and purchaser of land where the vendor's policy expressly ensures for the purchaser's benefit between contract and completion, and owner and hirer of goods where the owner has insured pursuant to a condition of the contract of hire.

John Birds, [22] at 292 (emphases added).

30. We have stated that at times, as a result of the provisions of the basic contract, the insurer will have no recourse to the party who caused the damage – in other words, the basic contract negates the right of subrogation. A provision regarding the negation of the right of subrogation may be included in the basic contract, in the insurance policy or, as in this case, in both the contract and the insurance policy. The insured has an obligation to notify the insurer that he has waived the right of subrogation. If the insured does not do so, he risks a charge of nondisclosure. A waiver of the right of subrogation, which increases the insurer's risk since he will have no recourse for compensation in case of an insurance event, naturally has an effect on the premium.

31. There are many advantages to an educated and deliberate waiver of the right of recourse. One of them is avoiding double insurance. *See* K. Sutton, Insurance Law in Australia 205 (2nd ed. 1991) [24]. There are also other ways of avoiding double insurance, such as coinsurance. In many cases double insurance occurs due to inattentiveness on the part of the insured parties. Double insurance usually occurs unintentionally *See* CA 5360/93, 5366/93 *Hasneh Insurance v. Signa Insurance*, [2] at 611. At times, parties to a joint venture (such as a construction project involving many parties) insure themselves separately for identical risks. If an insurance event does not occur, the parties may never find out that they are each paying

insurance premium separately for the same coverage. With proper planning this situation can be avoided.

32. The issues of double insurance may raise complex legal issues once the insurance event occurs. *See* CA 3948/97, CA5449/97 *Migdal Insurance* [3]; CA 206/99 *A. Dori Engineering Company v. Migdal Insurance* [4]. In CA 3948/97 Justice Or gave an example of double insurance: a landlord insures his property for fire damages and the tenant renting or guarding that property insures it with an insurance policy that covers fire, and which also covers damages to the landlord's interest in the property. This is an example of double insurance, which can result in the insurance premium being paid twice without the knowledge of the parties. Double insurance, aside from raising complicated legal issues, also has monetary consequences.

33. The proper planning of risk management, such that one party involved in a complicated deal insures the property while the right of recourse toward others is waived, may prevent double insurance. Up to this point we focused on examples in which the basic contract was a lease. A waiver of the right of recourse is also common in the case of primary contractors and sub-contractors. The American Institute of Architects recommended that its members use a standard formula for a waiver of the right of subrogation in situations where architects, contractors, sub-contractors and others work together on a complicated project. *See* Michael R. Bosse, *Understanding the Scope of Waiver-of-Subrogation Clauses*, *in* 21 The Risk Management Letter Issue 7 (2000). As explained there, waiver-of-subrogation agreements will likely prevent unnecessary litigation and encourage cooperation between the parties taking part in the project. A waiver of the right of subrogation is also common in buyer-seller relationships, *see* Fisher, [25] at 96, and in other situations where two or more parties have an interest in a joint property or project.

The Contracts at Issue in this Appeal

34. Let us return to our interpretation of section 15 of the rental

agreement, which is the basic contract in our case. Let us once again quote it in part:

> The *tenant* agrees, at its own expense, to insure, with an insurance company, the *contents of the rental property*, including fixtures, accessories, equipment and all other contents, as well as third party liability insurance for property and body, with the landlord to be seen, for these purposes, as a third party. Tenant's insurance policy will include a *waiver of the insurance company's right to indemnification* from the landlord. The *landlord* agrees, at his own expense, to insure the rental *building*, the air conditioning systems and plumbing of the rental property. *The landlord's insurance policy will include a waiver of his insurance company's right to indemnification from the tenant*.
>
> **All policies will be calculated in current U.S. dollar values or indexed to the monthly consumer price index.**
>
> All the insurance policies will be for the benefit of both the landlord and tenant . . .

(emphases added).

As noted, clause 15 reflects a typical deal between landlords and tenants, which is common in many countries. Magma brought Moshe Katalanik, who has been operating in the insurance business in Israel since 1978, as an expert witness. According to Katalanik's opinion it is an common practice, when a property has many users – as in a building, an office building, or an industrial building – to divide the insurance premium between landlord and tenants. The prevailing custom is that the landlord insures the entire building and its main

systems, and each of the tenants insures the contents of the property in their separate possession. It is accepted to include, in rental agreements, a clause which expressly provides that the tenant and the owner will include, in the insurance policies, a clause by which the insurers waive the right of subrogation. According to the expert opinion, this practice – that every tenant takes out insurance for his property in the framework of a mutual system of waivers of subrogation – is one of the main principles of the management of properties with multiple users.

35. Menorah and Baranowitz found fault with the trial court's decision to accept the opinion of Katalanik, who was never present on the property, and who took no part in the drafting of the leases or the underwriting process. In my opinion, the trial court had the authority to rely on the opinion of Katalanik, who testified regarding an accepted commercial practice. I mentioned previously that there was no testimony presented by those involved in the negotiations toward the signing of the rental agreement or in the underwriting. Thus, we have no evidence regarding the "subjective intent" of the parties. *See* HCJ 846/93 *Barak v. The National Labor Court*, [5] at 3 (Barak, V.P.). In the absence of evidence regarding the parties' subjective intent, we have no choice but to seek "the objective purpose of the agreements as fair parties protecting *typical interests* form it." CA 779/89 *Shalev v. Selah Insurance*, [6] at 221. In interpreting the insurance contract we must pay due attention to the "objective of the specific insurance contract according to the insurance objective it is meant to provide." CA 2341/91 *United Mizrahi Bank v. Migdal Insurance*, [7] at 389 (Levine J.). Katalanik's testimony regarding the typical accepted commercial practice can cast light upon the interpretation of the rental agreement and the insurance policy. Furthermore, the practice we observed in the law of other countries accords with Katalanik's opinion.

36. As we have seen in the law of other countries, the question whether the proper interpretation of the basic contract is waiver of the right of subrogation has been raised repeatedly. As noted, the key question is whether the parties' intention in the basic contract was

that the policy taken out by the landlord would also be made "for the benefit of the tenant," who would later cause damage to property. In our case, it was *expressly* stated in clause 15 of the rental agreement that the landlord must insure the building on the rented property such that the insurance policy would include a condition providing insurer's waiver-of-subrogation toward the tenant, and that the insurance be "*for the benefit of ... the tenant*." It seems that whoever drafted the lease before us made sure to make the parties' intentions unquestionably clear. If I may hazard a guess, this was done with full knowledge of the issues raised by the case law and the scholarly literature, and with an awareness of the key question: is the insurance policy made for the benefit of both the landlord and tenant? In the rental agreement before us, the parties left no room for doubt or interpretation. The rental agreement *explicitly* provides that the landlord's insurance will also be made for the benefit of the tenant (and *vice versa*).

37. Thus, my conclusion is that the basic contract between the two parties – the rental agreement – barred the possibility of the landlord's insurance company's recourse to the damage causing tenant pursuant to the right of subrogation. *Prima facie*, the discussion could have ended here, since the insured cannot transfer to his insurer more than he has. However, as I noted, we have before us a harmonious web of agreements. I will now proceed to analyze the waiver clause in Menorah's policy.

I have not forgotten that Menorah claims, alternatively, that the waiver applies to the rental property alone, and not to the entire building. This plea will be more comfortably discussed after we contend with the waiver clause.

Menorah's Policy – The Meaning of the Waiver Clause

38. Let us once more quote the waiver clause in Menorah's insurance

policy (clause (m) of the specifications for extended fire insurance):

> Waiver of Subrogation
>
> It is hereby agreed that in addition to clause 13(d) of the general terms of the policy, the provisions of the subrogation clause will not be applicable if the insurance event was caused by agents of the insured, stockholders of the insured, members of the board of directors of the insured; against Insurance Companies Ltd., Bar Beton Ltd., *those renting or leasing* space from the insured, as well as against Bezeq the Israel Telecommunication Corp., Ltd. and The Israel Electric Company.

39. Unfortunately, as is often the case in insurance policies, this clause is not notable for its clarity. Its language made it possible for Menorah to argue that the connection to the subrogation clause is merely coincidental, an interpretation whose internal logic is dubious. According to its argument, the provision deals with the situation of "joint tortfeasors."

40. In order to understand Menorah's argument, we will use the term "people connected to the insured" for those mentioned in the clause as "agents of the insured, stockholders of the insured, members of the board of directors of the insured." We will also use the shorthand term "parties appearing at the end of the clause" in place of "Insurance Companies Ltd., Bar Beton Ltd. and those renting or leasing space from the insured, Bezeq the Israel Telecommunication Corp., Ltd. and The Israel Electric Company." Menorah's interpretation of the waiver clause is that the right of subrogation is waived when one of the people who are connected to the insured and one of the parties appearing at the end of the clause are joint tortfeasors.

This interpretation first came up – as a surprise – in the testimony

of Menorah's witness Mr. Caftori:

> Q. I return once more to clause 13 of the policy [the waiver clause], in your opinion, does the wording of the clause leave no room for doubt, or is a different opinion possible?
>
> A. As I see it, it leaves no room for doubt. The clause expressly states that the waiver is only for a very limited matter – when *there are joint tortfeasors*.
>
> Q. Where do the words "joint tortfeasor" appear?
>
> A. True, *the words do not appear*, yet the meaning is clear that indeed the reference is to joint tortfeasors, and that is the meaning of the waiver of subrogation.
>
> Q. Who has to commit the tort jointly with whom?
>
> A. Agents of the insured, as well as those renting space from the insured.
>
> Q. Do you not think that your interpretation requires the wording of the clause to be "agents of the insured, together with …?"
>
> A. One can always phrase a sentence differently. We have the right to institute a claim of subrogation against a tenant if he was negligent. Had an employee of Baranowitz, however, dropped a cigarette butt and there was a gas leak in Jerusalem Candles, and as a result a fire broke out – in that situation there is a waiver.
>
> Q. Do you agree that someone reading the clause, who does not know the intention, cannot see your interpretation as the correct one?

A. I can only state my opinion.

See pp. 10-11 of the transcript.

The example given by Caftori in his testimony for the application of the waiver clause – that there is no right of subrogation if one of Baranowitz's shareholders was smoking a cigarette and there was a gas leak caused by Magma, and thus the damage was caused – bears witness against itself, that it is an incorrect interpretation of the waiver clause. The example would be most rare. Moreover, the words "joint tortfeasors" do not appear in the clause, and this interpretation of the waiver clause "hangs by a thread."

41. In my opinion, despite its cumbersome language, the interpretation of the clause is simple. It has two parts; each one enumerates a group of exceptions to the waiver clause. The clause should be read in the following manner:

a) The provisions of the waiver clause will not apply if the insurance event was caused by people who are connected to the insured.

b) The provisions of the insurance clause will also not apply *against*:

1) Insurance Companies Ltd.
2) Bar Beton Ltd.
3) People renting or leasing property from the insured.
4) Bezeq the Israel Telecommunication Corp., Ltd.
5) The Israel Electric Company.

42. Regarding people connected to the insured, we refer back to clause 13(d) of the policy (which is a verbatim copy of clause 62(d) of the Insurance Contract Law). The clause provides that the provisions of this clause (the subrogation clause) will not apply if the insurance event was unintentionally caused by a person from whom

an insured reasonable person would not claim compensation or indemnification, due to *familial relations or employer-employee relations between them*. We mentioned the interpretation of Professor Yadin, according to which this list is not a *numerus clausus*. The case law has not yet settled the question whether this is a *numerus clausus* or not. If Professor Yadin's interpretation is correct – it may be that this clarification is superfluous. It seems that the drafter did not rely on what might be determined by the case law, and took caution to clarify that which needed clarification,. The first part of the waiver clause tells us that there will be no right of subrogation if the insurance event was caused by people connected to the insured. Compare the language of the waiver-of-subrogation clause in Phoenix's insurance policy, as quoted above in para. 15.

43. In the second part of the waiver clause (beginning with the word "against") the clause specifies a number of further parties toward whom the right of subrogation is waived. Among them are parties renting space from Baranowitz. Magma rents space from Baranowitz and, as such, the the provision of the subrogation clause does not apply to it.

44. Thus, we find a good fit between the interpretation of the rental agreement, discussed above, and the insurance policy. Menorah witness Caftori confirmed that the policy was the fruit of negotiations between Baranowitz and Menorah, and that Baranowitz had an insurance consultant "who tailored the policy and fit it to the specific requirements." *See* p. 6 of the transcript. Caftori also confirmed that, to the best of his knowledge, there is no contradiction between the policy and Baranowitz's obligations. *See* p. 7 of the protocol.

45. In the settlement agreement, Baranowitz agreed to help realize Menorah's subrogation right pursuant to the insurance policy. However, after this obligation appears a parenthetical note that a

subrogation suit *shall not* be brought against parties toward which Menorah waived the right of indemnity. Thus, I have reached the conclusion, as mentioned, that Menorah waived the right of subrogation against Magma.

46. I quoted Phoenix's policy above. The waiver-of-subrogation clause in that policy is worded simply and not in the complicated way that Menorah's waiver clause is worded. In this clause, the insurer (Phoenix) waives the right of subrogation against any party against which the insured (Magma) waived its right to action in writing. Magma waived the right of subrogation against Baranowitz, in writing, in the rental contract. In the rental contract, the tenant and the landlord each separately took it upon themselves to have insurance policies that distribute the risk between them, while including a reciprocal waiver of the right of subrogation. The fit between the provisions of the rental agreement and the provisions of the insurance policy is required by Baranowitz's obligation of good faith. Baranowitz, as noted, was assisted by an insurance consultant. It agreed to ensure a waiver of the right of subrogation, and it fulfilled its obligation: Menorah waived its right of subrogation against those renting space from Baranowitz. Despite this, Menorah tried its luck in the present suit, while providing an interpretation of the waiver clause of the policy which is, to put it lightly, artificial and forced. This attempt was properly dismissed.

The Alternative Claim: Menorah's Waiver of its Right of Subrogation Was Given Regarding the Rental Property Only and Not Concerning the Entire Building

47. Menorah claims, apparently in the alternative, that the *scope* of the waiver of the right of the right of subrogation is limited – the waiver only refers to the rental property and not to the entire

building. According to its argument, the decision of the trial court creates an "absurd" result, by which Menorah's waiver applies to the entirety of the property insured in Menorah's policy, property whose worth is estimated at $12,900,000. It would be difficult to refrain from noting that this amount is deceptive. The amount refers to *many* properties under Baranowitz's ownership, and not only to the property under consideration in this case.

48. Menorah refers to definitions of "the building" and "the rental property" in the preface to the lease contract, in order to support its alternative argument:

> Whereas a 6,000 square meter, four (4) story industrial building is built on the property (hereinafter – the building)
>
> …
>
> Whereas it is the tenant's desire to rent, from the landlord, the entire 1,425 square meter ground floor of the building, as well as parking spaces in the perimeter of the building, all as marked in the attached scheme, marked as "Annex A" and constituting an inseparable part of this contract (hereinafter – the rental property) under conditions and for consideration detailed hereinafter in this agreement, and the landlord agrees to this….

Subsequently, Magma rented an additional space of 813 square meters.

As noted, in section 15 of the rental agreement, Baranowitz agreed to insure the "*the rental building*" at his own expense (emphasis added).

Menorah claims that the language of clause 15 of the rental agreement unequivocally indicates that the waiver by the landlord

was given only regarding the structure of the rental property, and not regarding the entire building. In other words, the argument is that the waiver refers only to the outer walls, ceiling and floor of the two spaces which Magma rented. It *does not* refer to *other* parts of the building (whose total area is 6,000 square meters), which were not rented to Magma.

As this discussion commences, it should be noted that Menorah does not rest this alternative plea on any provision of its insurance policy. It relies solely on the provisions of the rental agreement. There are no grounds, in the waiver clause of the insurance policy, for the distinction which Menorah is trying to make between the "building" and the "rental property".. Menorah's interpretation creates disharmony between the rental agreement and the insurance policy. As has been clarified, the policy was intended, *inter alia*, to realize the provisions of the rental agreement, and it is correct to interpret the two documents as fitting one another. There is no logic to the claim that Menorah's policy includes a subrogation right waiver which is more encompassing than necessary according to the lease. There is no economic sense in the argument that Menorah waived more in the insurance policy than what Baranowitz bound himself to waive in the rental agreement.

49. Furthermore, on the merits, as we turn to interpret the rental agreement itself, I do not accept Menorah's argument that the waiver in the rental contract was restricted to those parts of the building that are considered "the rental property." I arrive at this conclusion both on the basis of a *literal* interpretation of clause 15 of the lease and also – and this is my principal reason – on the basis of its *objective*.

Rejection of Menorah's Interpretation: Literal Interpretation of the Rental Agreement

Clause 15 of the rental contract does not use the term "building,", which is defined in its definitions clause. It refers to the landlord's obligation to insure the "rental building" at his own expense. What is the "the rental building?" The words

"rental" and "building" appear adjacently, and the *literal* meaning is: the structure of the rental property. The question at issue is whether the structure of the rental property means the outer walls, ceiling and floors of the rented space, or whether it means the entire 6,000 square meter structure.

50. I am of the opinion that the "rental building" is *not* "the rented structure" Baranowitz took upon itself to insure the *entire* building structure, while waiving its right of subrogation toward Magma in the case that Magma causes damage to any part of the building.

The word "rental property," as defined in the preface, would *in any case*, include the outer walls, ceiling and floor. Magma is not renting empty spaces that are not enclosed by walls, floor and ceiling; it is also renting the walls surrounding the rented property. The term "rental building" is not identical to the term "the rental property". Had it been the intention of the parties that the owner insure only the "rental property" (including its outer walls, floor and ceiling) for the tenant's benefit, it would not have been necessary to use the words "rental building"; it would have been sufficient to write the "rental property".

Rejection of Menorah's Interpretation: Purposive Interpretation

51. Menorah's interpretation is not consistent with the economic objectives that the parties wished to achieve in the rental agreement. In clause 15 of the rental agreement, the parties showed themselves to be risk averse. They wished to reach a comprehensive arrangement, by which the risks would be transferred from them to the shoulders of the insurance companies, while also distributing the risk between the latter. Menorah's interpretation creates a "limping" arrangement. According to Menorah's interpretation of the arrangement, the tenant does not release himself from the common

risk of a fire spreading from the rented property in his possession to other parts of the building, which are not in his possession. A spreading fire does not keep to borders; it does not limit itself to the walls surrounding the rented spaces. Its nature is to spread and cause damage, and it can harm the *entire* building structure. Regarding this risk, the tenant finds himself exposed (*if* we accept Menorah's interpretation). As we will soon see, Phoenix's policy does not insure *any* part of the structure, but rather only its contents. According to Baranowitz's interpretation, if a fire breaks out in the space that Magma rented and harms part of the building structure not rented by it, Magma will find itself exposed to a subrogation claim.

52. Menorah's interpretation is not consistent with the reasonable expectations of the parties to the rental contract. It is not consistent with the accepted practice regarding the "basic contracts" accepted in this type of deal, which we discussed above. The principal and economic objective behind clause 15 is that the property be insured for the benefit of both parties to the rental agreement, while at the same time distributing the burden of insurance between them. *Compare* CA 846/93 [5]. Menorah's interpretation does not attain this objective. Only an interpretation by which the landlord must insure the *entire* building, for the benefit of the tenant as well, achieves the economic objective of the parties.

53. Contrary to Menorah's claim, Magma cannot make an insurance claim against its own insurance company, Phoenix, for the damages to the building. In the risk distribution agreed upon by the parties to the rental agreement, *Baranowitz* was to insure the building structure, and Menorah was to be the sole "address" for compensation for damages incurred to the building structure. Phoenix took upon itself to insure only the *contents* of Magma's rented space.

54. Menorah, who claims that the damage to the space rented to Magma is covered by Phoenix's policy, refers us to clause 24 of that policy, which provides:

The Liability of the Tenant

> The following provisions will apply in any case of loss or damage, due to the insured risks, to the buildings rented by the tenant:
>
> 1. If the insured chooses to reinstate or replace the loss or damage, the abovementioned reinstatement clause will apply.
> 2. If the insured cannot, is not permitted to, or is not interested in repairing or replacing the loss or damage in the abovementioned way, then the coverage will be as follows:
>   a) The insurer will indemnify the insured for any amount the insured is legally bound to pay the owner of the property due to the loss or damage, and
>   b) The insurer will indemnify the insured for the loss of a protected right (as assessed by a real estate assessor) to maintain and operate his business on the premises in which the insurance event occurred (in all or in part) as a result of the insurance event.
>
> The amount of compensation pursuant to this extension will not exceed the total value of the reinstatement value of the lost or damaged property.

This clause is included in a chapter entitled "Special Conditions and Extensions" in Phoenix's fire insurance policy.

Menorah further refers us to a *list* in Phoenix's fire insurance policy, which defines the "insured property:"

"*The Insured Property*

Physical Damage To:	Insurance

	Amounts:
a) The contents, permanent equipment and improvements made to the rented property in the total amount of:	$ 500,000
b) Inventory of any type, , including, without derogation from the generality of the aforementioned: raw materials, products in stages of production, completed products, fuel, packaging materials and ancillary materials in the total amount of:	$450,000

> All the insured property is the property of the insured and/or property in his possession or under his supervision: in rental, bailment, commission, guardianship, trust or partnership with others, and/or property for which the insured is responsible in the case of loss or damage caused by the risks included in this policy, *while on the premises of the insured* and in any other place within the boundaries of the State of Israel and the administered territories."

On the basis of these clauses Menorah argues that the building ("the premises of the insured") is covered by Phoenix's policy. Thus, Magma and Phoenix foresaw the possibility that they would be obligated to pay insurance benefits to the owner of the property as a result of damage or loss caused to the building. From this Menorah asks us to deduce that the entire building is not included in the property that Baranowitz was obligated to insure, as per clause 15 of the rental agreement.

This argument was properly dismissed by the trial court. Phoenix's policy is limited to coverage of damage caused to the possessions of the insured that are *specified in the list*. The list ensures that the property specified in clauses (a) and (b) will be insured by the policy even if it is not owned by Magma, but is rather

in its possession due to rental or trusteeship, as long as it is situated within the perimeter of the building (the premises of the insured), the country or the territories of Judea, Samaria and the Gaza Strip. The property insured by Phoenix includes *only that which is specified in the list*. The only property insured by this policy which might be defined as "building structure" are any improvements made to the rental property, namely: the additions that Magma made to the rental property.

Thus, we should not conclude, on the basis of Phoenix's policy, that, in effect, Magma insured the building. Consequently, we should not conclude, on the basis of this policy, that the "rental building" in clause 15 of the rental agreement is restricted to the outer walls surrounding the rented space. Although it is unnecessary for the reasoning of this judgment, I shall make the following additional comment: Had I believed that Menorah was correct in its interpretation of Phoenix's policy, what we would have before us would be a case of double insurance; Menorah did not claim this. Its claim was that we should use Phoenix's policy as an aid to interpret its own policy.

The Settlement Agreement

55. I quoted above the settlement agreement provisions relevant to the issue at hand. In the settlement agreement, Baranowitz agreed to cooperate, to the extent necessary, in order to realize Menorah's indemnification right, but it was also noted that a suit of indemnification would *not* be filed against parties regarding whom Menorah waived the right of indemnification. As noted, no witnesses were called concerning the drafting of the settlement agreement. It was not explained against which relevant parties (in addition to Magma) Menorah had waived its right to file an indemnification claim.

As previously mentioned Baranowitz agreed, in the settlement agreement, to assist Menorah in the subrogation suit. The two shared legal counsel. It is hard to avoid the impression, that the suit which is the subject of this appeal was nothing but an attempt to turn to the party who caused the damage, despite the absence of the right, pursuant to the contractual system which bound the parties, to do so.

56. Regarding Menorah's other arguments, such as the arguments it makes on the basis of clause 18 of the rental agreement, I can only add my assent to the reasoning of the trial court.

57. I have also found no fault in the ruling of the trial court (CApp 3204/00), which granted defendants' request to amend a clerical error in its decision, as a result of which Menorah was obligated to pay defendants' costs resulting from the need to file third party notices, as well. *See* FHC 577/86 *Zerad v. Shaul*, [8] at 114; CA 3351/92 *Marshi v. Blan* [9].

Summary

58. If my opinion is accepted, we shall dismiss the appeal and obligate appellant to pay appellees' expenses and lawyer's fees in the total amount of 50,000 NIS.

President A. Barak

I concur.

Vice President S. Levin

I concur.

Held as per the opinion of Justice M. Naor.

HCJ 1993/03 The Movement for Quality Government
37
in Israel v. The Prime Minister

Justice D. Dorner

January 20, 2002