

BUSINESS WEEKLY



RESTORING THE PRIMACY OF CHOSHEN MISHPAT UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

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לע"נ הרה"ח ר' נחמיה בן הרה"ח ר' שלמה אלימלך ווערדיגער ז"ל נלב"ע - י"ב כסלו, תש"ע



CASE FILE

Rabbi Meir Orlian
Writer for the Business Halacha Institute

לע"נ הרב אהרן בן הרב גדליהו ע"ה

REPLACEMENT OF A JIG SAW

Mr. Handel enjoyed tinkering and fixing all kinds of things; he had a large tool collection. His neighbor, Mr. Niess needed a jig saw for an intricate wood project. "Do you happen to have a jig saw that I can

borrow?" he asked Mr. Handel.

"I do," replied Mr. Handel. "It's old, but still works well. You're welcome to borrow it."

Mr. Niess dropped by and picked up the jig saw. He used it for about a week, and then the motor died.

"I was using the jig saw and the motor suddenly died," Mr. Niess apologized. "I didn't do anything unusual."

"I told you that the saw was old," replied Mr. Handel. That's called *meisah machmas melachah*; it died through normal usage, and you're not liable" (C.M. 340:1).

"I would like to replace the saw, regardless," said Mr. Niess. "I appreciate your lending it to me, and feel bad that you should lose out."

"That's very nice of you," replied Mr. Handel. "It's really not necessary, though. Furthermore, if you buy a new jig saw when you're exempt, I'm afraid that it may be *ribbis*, especially if you return a new one, worth more than the old one you borrowed."

"I didn't think of that," replied Mr. Niess. "I'm not sure it's a problem, but I can check with Rabbi Dayan. If there is no problem of *ribbis*, I feel better replacing the saw."

Mr. Niess called Rabbi Dayan and asked:

"Can I return a new jig saw to Mr. Handel even though I'm exempt, and even though it's worth more than the one I borrowed?"

"In English, the word 'borrow' applies to both money and items, but there is significant halachic difference between them," replied Rabbi Dayan. "In Hebrew, there are two distinct words: borrowing money to spend is called '*halvaah*,' whereas borrowing items to use is called '*shaalah*.'"

"*Ribbis* applies to *halvaah*, borrowing money or items such as food, where the intent is to consume the borrowed items and return others, instead" (*Vayikra* 25:37; *Devarim* 23:20; *Y.D* 161:1).

"However, the *Gemara* (B.M. 69b) teaches that *ribbis* does not apply when borrowing an item to use with intent to return that item itself, *shaalah*, especially if there is wear-and-tear and depreciation by using the item. Therefore, it is permissible to charge for such usage, which is effectively rental payment" (*Y.D* 176:1-2; *Taz* 176:1; *Bris Yehudah* 29:1).

DID YOU KNOW?

Vendor agreements can have clauses that may be *ribbis* but can often be corrected with halachic guidance.

Ask your Rav or email
ask@businesshalacha.com
for guidance and solutions.



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לע"נ ר' שלמה ב"ר ברוך וזוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

MONEY-BACK GUARANTEE? PART II

Last week, we discussed a case in which a borrower from a *gemach* passed away without paying off the loan. The *gemach* approached one of the *arevim* (loan guarantors) for payment, and he turned to BHI to ask several questions. We dealt with some of those in last week's column, and we now address the rest.

Q. Is the *areiv* required to repay the entire loan, or may he pay only half and instruct the *gemach* to approach the other *areiv* for the rest?

A. There is a three-way dispute among the *poskim* regarding this *she'eilah*.

Some say that the lender may collect the entire loan from the guarantor of his choice, because each *areiv* obligated himself to guarantee the full loan (first opinion cited in *Shulchan Aruch*, C.M. 132:3).

Others say that if both guarantors have the resources to pay, each one is required to pay half, and the lender may not collect the entire debt from one of them (*ibid.*, second opinion; *Gra*, C.M. 77:18, who writes that in the case of an *areiv kablán*, all agree that this is the *halachah*).

The third opinion is that this depends on the specific circumstances of how the *arevim* agreed to guarantee the loan, as we will explain.

If the *arevim* agreed to guarantee the loan when the money was given (or any time beforehand), they essentially declared to the lender that he can rely on them, and he will be able to collect the loan. Because the *arevim* caused the lender to risk the full amount of the loan, they would be required to repay the loan even if the lender did not make a *kinyan* with them to formalize the agreement.

Therefore, when there are two *arevim*, the lender risked his money based on the guarantee received from the two of them together that he will recoup his loan even if the borrower cannot repay. He is therefore entitled to collect only half of the sum from each *areiv*, unless the other *areiv* doesn't have



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Similarly, a person who borrows an item to use may give a gift to the owner in appreciation when returning it, or pay when exempt, even though the Sages prohibited giving a gift when returning an interest-free loan" (Y.D. 160:6; *Bris Yehuda* 29:11[27]).

Moreover, when borrowing an item for use, it is even permissible to stipulate initially that if the item should be ruined, the borrower will pay extra, such as by returning a new item, and not just the value of a used one" (*Chavas Daas* 161:1).

"In some cases there is both *shaalah* and *halvaah*. For example, when borrowing a car for the day, with the expectation of refilling the gasoline, there is *shaalah* of the car, which is returned itself, and *halvaah* of the gas, which is consumed. Thus, when returning the car, it is permissible to give a gift, even cash, in consideration for lending the car to use, but preferably the borrower should not purposely refill the gas tank more than there was when he borrowed the car. If the borrower explicitly states that he filled the tank fully – in appreciation for use of the car, it also seems permissible, since the loan of gas is incidental and insignificant relative to the primary loan of the car, which is *shaalah*" (see *Bris Pinchas*, *Sefer Hateshuvos* #284).

"Thus," concluded Rabbi Dayan, "although you are not liable, you may return a new jig saw to Mr. Handel."

Verdict: Ribbis applies to borrowing money and items intended for consumption, but not to items meant to be returned themselves.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS Dayanim (Judges) #24

Compromise for Orphans or Inheritors

לע"נ ר' יחיאל מיכל ב"ר חיים וזוג' ח'י בת ר' שמואל חיים ע"ה

Q: Is a compromise binding on orphans or inheritors?

A: An established *beis din* or the guardian of orphans can compromise for their benefit, even to forgo their rights to spare them from quarrels. When the orphans mature, they cannot object to the compromise. Some maintain that if the compromise was not within the framework of give-and-take, but rather forgoing their rights to spare quarrels, they can later object unless *beis din* initially declared otherwise; others disagree (C.M. 12:3-4, 110:11; *Pischei Teshuvah* 12:7; *Nesivos* 12:2; *Aruch Hashulchan* 12:4).

As previously mentioned, a compromise must be accompanied by a *kinyan* to be binding. Inheritors are then bound to the compromise, like any other ruling of *beis din* (C.M. 12:7).

A handshake is tantamount to an oath, when made with such intent. If a person made such a handshake on a compromise, *beis din* can coerce him to fulfill it like other oaths, even without a *kinyan*, but this compromise would not be binding on his inheritors (Y.D. 239:2; *Nesivos*, *Chiddushim* 12:11).



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money.

If, however, the *areivim* agreed to guarantee the loan only after it was given, he did not lend the money because of their guarantee; they only become *areivim* by making a *kinyan* obligating themselves to repay the loan if the borrower cannot pay. By making that *kinyan*, each *areiv* obligates himself to guarantee the full amount because there is no reason to say that he intended to guarantee only half, and the lender can collect from whichever one he chooses (*Ketzos Hachoshen* 77:3).

To avoid uncertainties, when a loan is guaranteed by more than one *areiv*, the loan document should state clearly whether each one is obligated to pay the full amount or only a part of the loan because whatever is specified is binding (C.M. 132:3).

Q: If one of the *areivim* wrote in the loan document that he is guaranteeing up to \$3,000 of the \$6,000 loan, and the borrower already repaid \$3,000 of it, is that *areiv* required to pay at all?

A: There are several possible definitions to this terminology:

1) He simply wanted to limit his liability to \$3,000. In such a case he remains liable up to that amount even if the borrower already repaid half (if there is another *areiv*, he would now be liable for \$1,500, as explained earlier).

2) His intention was to pay only half of the outstanding debt that the borrower is unable to pay. Since at this point the outstanding debt is \$3,000, he is liable for \$1,500 — even if the other *areiv* is unable to pay the rest.

3) His intention was to ensure that the lender didn't lose the entire sum he lent, and he therefore guaranteed that he would recoup at least half of that sum. But he agreed to pay half only if the borrower could not pay at all, and since in this case the borrower did pay, he is not responsible to pay anything. [If the other *areiv* did not limit his liability, he is responsible for the remaining \$3,000.]

Some *poskim* rule that since it is possible that his intention was the latter, he cannot be obligated to pay (*Yad Ramah [Maman]*, *Shtei Yados*, C.M. 17; *Emek Hamishpat* 27).

As we have seen over the course of these two essays, loan documents need to be written in a detailed manner, and a three-line document such as the one used by the *gemach* will lead to many uncertainties and will limit the possibility for the loan to be repaid. We therefore reiterate that such documents should be drawn up with guidance from someone experienced in this field.

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 or ask@businesshalacha.com

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