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RESTORING THE PRIMACY OF CHOSHEN MISHPAT

UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

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Dedicated by R' Shlome Werdiger in honor of the Shabbos Sheva Brachos of his granddaughter Avrohom Shea and Riki Streicher

CASE FILE

Rabbi Meir Orlian
Writer for the Business Halacha Institute

לע"נ הרב אהרן בן הרב גדליהו ע"ה

FRUIT BASKET

Mr. Halperin was doing his weekly fruit and vegetable shopping at the local store, Pri v'Yerek. Like other fruit and vegetable stores, the stands extended out to the sidewalk.

The store was very busy with many customers doing their shopping for Shabbos. Mr. Halperin carefully chose his tomatoes, cucumbers, peppers, bananas, melons, pears, etc. As he filled each bag, he placed it in the fruit basket at his feet.

While Mr. Halperin was standing by the stands, a reckless motorbike driver rode by. He careened into the fruit basket and sent it flying! The fruits and vegetables spilled out of the bags, scattered along the sidewalk and in the street. Many of them were bruised or mashed by the impact or the passing cars.

The motorbike sped off, without even looking behind him, and was soon out of sight.

Mr. Halperin collected the few fruit that were nearby and still in good condition. The loss of all the fruit amounted to about $20. He recalled that a week earlier a thug robbed the laden shopping cart that his wife was using in the supermarket, with all its contents.

Rabbi Dayan had explained why his wife was not liable for the shopping cart but did not address the question of the groceries. Now was another opportunity to inquire about them. Mr. Halperin called Rabbi Dayan and asked:

"Am I halachically liable for the fruit that I chose and were then damaged by the motorbike?"

"The *Gemara* (*B.M.* 81a; *B.B.* 87b-88a) teaches that a person who takes an item from a seller to check whether it is suitable for his purposes, in which case he will pay for it, is liable even for *oness* until he returns the item or indicates that he does not want it," replied Rabbi Dayan, "provided that the price is standard or was fixed beforehand" (*C.M.* 186:1; 200:11).

Ribbis Awareness Project

Brought to you by Cross River

RIBBIS IN HOME PURCHASES

We are excited to introduce our new ribbis awareness initiative, addressing various transactions that raise ribbis concerns. Over the next few weeks, we will publish a series of articles that highlight ribbis issues that people might not be aware of, which could pose problems during the home purchasing process.

PART I

Many business transactions can potentially involve problems of ribbis (halachically prohibited interest). Often, the first major transaction involving issues of ribbis that people encounter is the purchase of their first home.

As we will see, the way to avoid ribbis in each particular situation will depend on the specific conditions of the loan being taken for the home purchase. BHI is on the verge of launching an initiative enabling people to generate a heter iska document tailored to their specific loan, and these articles provide the background necessary to understand the need for the heter iska and how this document works.

Many *ribbis* issues can be avoided through minor adjustments made before a loan is issued. Once the parties have already signed on a mortgage loan document, however, these issues become much more complicated, and some might even be irreparable.

The first step in avoiding *ribbis* is choosing a suitable lender from which to take a mortgage or other loan. If a bank or lending institution is owned by Jews or at least one Jewish partner, and it does not have a *heter iska*, it is categorically forbidden to take an interest-bearing loan from them. (This applies only if the Jewish-owned company issues the loan — not if it merely manages it.)

Therefore, before beginning the approval process for the loan, you must find out whether the lender is Jewish, to determine whether a *heter iska* is needed. Do not assume that simply because your mortgage broker is *frum*, he will ensure that the loan involves no *ribbis* issues; remember

CASE FILE

"Elsewhere, the *Gemara* (*Nedarim* 31a-b) qualifies that the person is liable for *oness* only if the item is *zevina charifa* — an item in high demand, whereas regarding a regular item — and certainly an item hard to sell — the potential customer is liable only as a regular *shomer*, not for *oness*.

"The *Rishonim* dispute whether the liability of *oness* is because the person is considered a buyer on the item meanwhile or a borrower, because he has the option to decide whether to keep the item, whereas the seller can no longer retract and refuse to sell it (see *Tosfos B.B.* 87b s.v. *haloke'ach*; *Machaneh Ephraim Hil. Shomrim* #24).

"*Nesivos* (186:1) suggests that the prospective customer can be liable both as a buyer and as a borrower. When the price is fixed, he is considered a *buyer* even for regular items (unless the item is in low demand, in which case he will likely decide not to keep it). But then he is no longer liable once he indicates that he does not want the item.

"However, as a *borrower,* the prospective customer is liable until he actually returns the item, but that applies only to an item in high demand or that is on sale, because he has the absolute benefit of being able to decide whether to keep it.

"Based on these *halachos,* several contemporary *poskim* rule that when a person picks up an item in the store with clear intent to buy it — certainly if it is an item on sale or that the customer specifically chose, such as fruit — he is liable even for *oness* as a buyer or borrower *(Torah Lishmah C.M.* #349; *Mishneh Halachos* 14:216; *Hayashar v'Hatov*, vol. III, pp. 34-36).

"However, several *poskim* maintain that nowadays, the understanding in most stores is that until checkout the customer is not considered a buyer, and the storeowner could refuse to sell the item, even after the customer picked it up," concluded Rabbi Dayan. "Thus, they maintain that the customer is liable for *oness* only as a borrower when *zevina charifa* — an item in high demand or on sale; otherwise, he is liable only as a *shomer*" (*Orchosecha Lamdeini* #135; *Hayashar v'Hatov*, vol. 16, pp. 154-155).

Verdict: According to many poskim, Mr. Halperin is liable for the fruit that he chose, even when lost through oness, either as a buyer or a borrower. According to several contemporary poskim, nowadays he would be liable only as a borrower if the fruit were in high demand or on sale.

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
Pesach and Chametz
 # 7
Inheriting Chametz

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

A partially observant relative passed away on Pesach, and I inherited him. I don't know whether he sold his chametz. Is it permissible?

Chazal fined a person who possessed *chametz* on Pesach and declared it prohibited to benefit from even after Pesach (*O.C.* 448:3).

Some *poskim* maintain that the fine was not imposed on heirs when the owner passed away on Pesach, because *chametz* cannot be inherited on Pesach itself, so the heirs are not at fault to fine them afterward (*Noda B'Yehuda O.C.* #20 s.v. *umei'atah*).

However, most *poskim* maintain that the heirs were obligated to destroy the *chametz* on Pesach so that the fine applies also to them (*Mekor Chayim* 448:9; *Avnei Miluim* 92:5).

Nonetheless, when it is questionable whether the *chametz* was sold, there is a dispute among the *Acharonim* whether it is permissible to eat (*Mishnah Berurah* 449:5). Thus, if it is reasonable to think that the relative may have sold his *chametz,* it would not be prohibited — certainly where there is the additional factor of an heir.

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

BHI HOTLINE

to ask whether the lending institution is owned by Jews.

Furthermore, do not rely on someone's assurance that the lender has a *heter iska* from such-and-such Rav and that everyone borrows from him. Often, these claims are simply untrue, or the *heter iska* isn't appropriate for the specific type of loan the customer is taking. (As we explained in BHI issue 720, a *heter iska* establishes that the money being given by the financier is not a loan, but an investment that involves risk for the financier if the investment loses money.) We recommend that you procure a copy of the *heter iska* the lender is using early on and ask a Rav who is well-versed in *ribbis* matters to review it and ensure that it is valid.

Beyond the basic *heter iska* documents that are widely used, Rabbanim with expertise in *ribbis* matters may add elements to enhance the validity of the *heter iska* document. The following are a few examples:

Many banks that are owned by nonreligious Jews have a *heter iska*, but consider this document rabbinic mumbo-jumbo. Sometimes, they refuse to sign the document themselves, or to give a copy to a customer asking for it. According to many *poskim*, this invalidates the *heter iska*. Even if they do sign, some lenders assume that if they ever have to fight in court to override the *heter iska*, they will claim that it was a mere religious document and does not have legal legitimacy. In order to ensure that the *heter iska* is valid, some Rabbanim add an arbitration clause, appointing *beis din* as the arbitrators if any issue arises. According to many *poskim*, only a *heter iska* with this clause is reliable.

Today, banks typically sell their loans to other financing corporations. Such banks generally include in their *heter iska*, that the *heter iska* is valid only until the loan is sold, because federal agencies that buy loans (such as Fannie Mae and Freddy Mac) would never agree to buy a loan that includes a *heter iska*. Now, a *heter iska* is not necessary if a loan is taken from a non-Jew, but the *Chavas Daas* (*Yoreh De'ah* 168:1) rules that if a Jew issued a loan with a *heter iska* and included a clause requiring the borrower to pay interest to a non-Jew if he sells him the loan, then all the *ribbis* paid to the non-Jew is considered as though it is paid to the original Jewish lender, and because this is *ribbis d'Oraysa*, the lender must return it to the borrower (see, however, *Sh'eiris Chaim* and *Chelkas Binyanim* ibid.).

To remedy this issue, an enhanced *heter iska* includes a clause that if the loan is transferred to a non-Jew, that transaction will not be framed as a sale. Rather, the *iska* structures this transfer in such a way that the Jewish lender serves as an agent to find a non-Jewish bank to lend money to the borrower to repay the first bank. The borrower will then owe that money to the non-Jewish bank (see *Mishnas Ribbis* p. 587 and *Yeshurun* vol. 39 from p. 935).

These clauses are some of many other improvements that have recently been added to the basic *heter iska* texts.

For more information and iska templates, visit Ribbis.businesshalacha.com