Motion no. 26

Before the honorable Justice Khaled Kabub, Vice-President

The plaintiffs	**Guy Gissin – the trustee for the performance of the debt arrangement of Urbancorp Inc.**
	v.
The defendants	**1. Alan Saskin** **2. Philip Gales** **3. Deloitte Brightman, Almagor, Zohar** **4. Apex Issuances Ltd.** **5. Midroog Ltd. (private company 513377424)** **6. Janterra Real Estate Advisors Inc.** **7. AIG Europe Limited** **8. AIG Europe (Services) Limited** **9. TCC/Urbancorp Bay Stadium LP.** **10. The Webster Trust** **11. Urbancorp Management Inc.** **12. Urbancorp Holdco Inc.** **13. Mrs. Doreen Saskin** **14. Terra Firma Capital Corporation** **15. Mr. Dov Meyer**

And in the matter of: The Official Receiver

Present:
The plaintiff, Adv. Guy Gissin and Adv. Yael Hershkovitz, Amir Paz
Attorney for defendants 1-2, Adv. Uri Shenler
Attorneys for defendant 3, Advs. Dr. Gil Orion and Yana Rabinovitz
Attorneys for defendant 4, Advs. Raanan Kalir, Efrat Rozner and Shira Yarom
Attorneys for defendant 5, Advs. Yoram Samuel and Maayan Abitbul
Attorneys for defendant 6, Advs. Omer Meiri and Erez Golan, with a limited power of attorney
Attorneys for defendants 7 and 8, Advs. Noam Zamir, Shlomit Wallerstein and Lioz Epstein

Transcript

Adv. Gissin:
The claim that was filed in Canada was filed by the company by the Canadian attorneys, a conflict of interest. They received fees from the company. Operations that they performed with respect to transactions were done in a situation where they were in a conflict of interests and while preferring the controlling owner, Mr. Saskin.
First, there are currently two claims that I am litigating, a consolidated claim here, the

company's claim, and a claim by virtue of the rights of action that were assigned. There is an additional proceeding of which I gave notice. I filed it in Canada. I filed it on behalf of the company against Canadian attorneys who handled the company's affairs and instead of ensuring its interests, they carried out operations including removing assets from the company in favor of the controlling owner at a time when they knew that the company was going to raise money here in Israel, a claim of negligence and a conflict of interest that was filed in Canada. In their defense, the Canadian attorneys claims that, from their viewpoint, one of the reasons for the things that they did was that the was that the firm of Shimonov demanded this, in the knowledge, so it is alleged in the Third Party Notice, that the company was insolvent and the acts that were being done by the firm of Canadian attorneys resulted in the company not having money to return the debt. Section 79 [reads]. This is a new claim that they raised against Apex and Shimonov, which they received approval to file with the court. They claim that two weeks before the issuance, section 80 [reads]. They did not allow the company according to the terms of the prospectus to raise in the future additional money on account of assets that were in the company, Apex wanted to respond to this, this is a proceeding in Canada, relating to negligence whether they made such a demand of them, ire releases the form of Canadian attorneys, no. The opinions that they gave was given to a company with a fine and they were not included in the prospectus. the claim against Apex is a claim pursuant to the Securities Law pursuant. to section 31 of the Securities Law. Who signed the prospectus. It was filed two years after the issuance. It was filed in December 2017. It was filed at a moment that it was possible to do it by virtue of the rights of action of the bondholders that were assigned in favor of the creditors' arrangement. Other proceedings are class actions that have not yet been certified, there is no claim, there is only a motion for certification.

The Motion for Certification that was filed in the class action was based on the fact that my colleague claimed before Justice Altuvia that all of the company rights of the class plaintiff were assigned to me. The rights of action, according to him, are mine. There was a vote of the current bondholders. They approved the assignment of their rights in the company. There are two classes of holders: persons who are current holders and a class of persons who sold the bond beforehand. They are not creditors of the company, in my opinion. Monrov's claim does not contain any claim against the company regarding the class plaintiff. There is a claim against Apex, where they say that there are two classes: persons who are holders as of today, and persons who suffered damage, sold at a loss and are claiming damages for this loss. Even this is not correct. In the Monrov claim, it is stated as a result of a disclosure of specific information that the company cannot sell with Trio's approval. That was not reported. Therefore, the moment this was published, the value of the bonds fell by 40, 50 percent, and therefore he claimed 45 agorot, the loss of value on the Stock Exchange. My claim is different. Damage was caused as a result of all this negligence. The damage is the amount of the difference between what I know should be returned to the company's account. That is my claim. A different claim in its remedy and its causes of action. My causes of action relate to an opinion, valuations and assets that were not described correctly in the prospectus. One of the defendants is an appraiser. Defendant 6. That is the claim. The information that I have in my possession as a result of thorough investigations that we made – we succeeded in obtaining correspondence in real time between the people, which proves these things, and therefore we attached two additional

defendants.

Justice Altuvia writes 'The motion for summary dismissal is based on a claim…' [reads].

Since there is an additional class, the claim at this stage is denied. The fact that there are two benches that are considering the same matters is not efficient, but my colleague can apply to the president to apply to change a bench in a way that it is possible to combine. The information that your honor has will also be considered in this motion, and thus we have prevented a problem of creating a danger of conflicting decisions. If Monrov's claim speaks of non-publication of the fact… and my claim does not relate to this point with the causes of action and the factual description. Since this is the case, I do not see a conflict between the claims, and still…

Ultimately, the purpose of the defendants here is to play for time and to push off as much as possible the decision, since in the meanwhile we are making progress in the proceedings of realizing the company's assets. The damage that is being claimed by me is limited for the purpose of the case. I am litigating proceedings and there are also contacts. I published and reported settlement contacts with some of the defendants in this case. There was talk of a mediation. I was ready to go to mediation. My colleagues wanted to bring to the mediation a proposal that a company controlled by the Saskin company sent. In essence, it said I will give money and I will buy all the company's assets in return for a full waiver. The bondholders and the creditors will have a haircut; I will buy all the company's assets. The amount that they proposed I obtained from the company's assets without them. I have no objection that all the parties will be present. Mr. Saskin, the negotiations that will be held with him and his family, how much he wants to pay for a waiver. This contradicts the principle in the traumatic case of Urbanco., to hold negotiations with it for it to buy assets at a price that will leave a haircut.

I want my colleagues to file Statements of Defense. I want to litigate the proceeding properly, on the assumption that there will be a settlement with some of the defendants. This may create an opening through which other defendants will also find their way.

Adv. Kalir:

I reiterate the motion and what we wrote in the reply.

The practical side, my colleague claims that we are aiming to delay proceedings and explained why, because we are waiting for money to be collected. This is an incorrect claim. My colleague defines his claim as residual. He wants the defendants here everything that he cannot glean elsewhere. The company in Canada on behalf of which he is suing will not receive twice.

I have not gone into the merits of the proceeding. One of our claims will be that the claim is residual. Let my colleague show what he is collecting.

My colleague is still clashing in this case with some of the additional defendants that he added

for the purpose of service outside the jurisdiction. He requested an extension from your honor to reply to them. In any case, there is a delay. There is defendant 1. Mrs. Saskin received a decision that it is not possible to serve her, and now he has filed an appeal. There is no urgency in the proceeding from a practical viewpoint.

Your honor reminded us of the previous hearings. At the previous hearing, we raised two claims. In truth, as a result of it, your honor recommended to the plaintiff to consolidate the claims and this claim was interpreted by us as meaning that there were two claims of his. We thought that this might resolve the matter, because then our claim to assign the rights of Monrov was pending. If Justice Altuvia will deny the claim, the second branch of our motion that says that it is impossible to litigate this case at the same time as the Monrov claim, Justice Altuvia thought differently from us and therefore we want to appeal to the Supreme Court.

On the practical level, we shall wait as we waited the previous time, in case the Supreme Court will grant our motion that is consistent with the claim of my colleague who says that the rights were assigned and the Monrov proceeding should be dismissed. Our claim is that from the moment that the rights were assigned, the Monrov claim should fall. As long as this is not the case, my colleague is distributing to several classes. I disagree with regard to how many classes. There is a class of bondholders. It held both at the end of March 2016 and also on the date of approval of the creditors. We called it the class of remaining persons. My colleague says they have assigned the right to me and I am suing on their behalf. Monrov purports to sue on behalf of that class. We are in a situation that is contrary to the rule of exhausting the cause of action, regulations 44, 45. That holder of bonds, who held on March 31 and also on the date of approval of the creditors, made an assignment. There is the Monrov claim, which is filed on his behalf and my colleague's claim that is filed on his behalf. If he was the same person, the court would dismiss this summarily. If my colleague were to say, 'I want to continue only for the other class,' it would be possible to conceive that he might continue, but my colleague wants to continue with the whole class of the remaining persons. I want to sue after Monrov has filed.

It is inconceivable. The rule of exhausting the cause of action does not exist for no purpose. It also includes a motion for a class action.

We are also dealing with the rationale. The rationale says that the same person cannot sue the same defendant twice on the same matter. A motion for certification of a class action is litigated by raising claims, *res judicata*, evidence. With regard to summary dismissal for the class of remaining persons, my colleague has no claim against this.

The decision of the honorable Justice Altuvia Magen is on the basis of my colleague's notice. According to us, my colleague should have stood beside us in the motion for summary dismissal.

Regarding the rule of exhausting the cause of action, it is sufficient for me that my colleague wants to represent the class of the remaining persons, where there is no dispute.

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With regard to the other class, in my opinion, my colleague is making a legal claim. I have explained the matter, and I shall not repeat it now.

What I wrote is sufficient. On the practical level, let us wait. Maybe the Monrov claim will be dismissed in the Supreme Court.

With all due respect, we do not think that this is the correct solution to the problem that exists here. We cannot agree to a consolidation of the cases, for the reason that the claim that my colleague claimed is conflicting. We explained in the written pleadings the claim of Monrov. It is not conceivable that we, as a defendant. We do not want to delay. We are prepared to deal with the matter. But we have a right that for a certain matter we have before us one statement of claim. I refer to your honor's decision.

I refer to DA 815-19-13, where the honorable court refused to consolidate two motions for derivative actions. Section 37 determines that this is not possible *inter alia* for the reason that there are conflicting causes of action. In our case, my colleague says that the claims in Monrov do not relate to me at all. That is not correct, and my colleague does not address this. My colleague's claim says that there are five misleading items and it seeks to give a difference between each debt from the agorot of the bond to what he will succeed in collecting.

One hundred agorot less than what he will succeed in collecting is the damage. The basic premise is that had it not been for the misleading items that he indicates – had it not been for this the repayment would have been one hundred agorot. Therefore, he wants the difference. He assumes as a premise that without the misleading items it would be possible to return one hundred percent of the debt. On the other hand, Monrov's claim is based on three misleading items. He claims that on March 31… It is not possible to consolidate two conflicting claims.

My colleague attributes to us the proposal of Mr. Saskin or someone acting on his behalf. In the discussions, we agreed, as I understand it, to go to mediation without conditions. We also wanted one thing: if we go to mediation, we thought it was correct also to invite the plaintiffs.

Adv. Orion:

We are focusing the hearing on the other class. This is a theoretical, marginal and unimportant class, and it is inconceivable that the tail will wag the dog. We refer the matters to the court, because it is possible that the matters are before your honor. If you wait not a long time until the decision in the Supreme Court, we shall not find ourselves in an intolerable position, with the court, plaintiffs and defendants litigating two events with regard to the same event.

Adv. Zamir:

We filed a reply to the motion for summary dismissal. There is a consensus that the situation at the moment – there are disagreements with respect to the remedies. Further to what my colleague Adv. Orion said, the situation is illogical. There are several proceedings, each with

this or that nuance, to file another proceeding. We want the situation to be resolved also from the viewpoint of procedural efficiency. We came and said that we have no problem in there being one proceeding or that the whole matter will be before one bench. We have a concern that since the case is pending before several benches, the cases are moving forward, the class action. We are third parties in one of the class actions. There was no pretrial hearing. In the Monrov claim, there was a pretrial hearing. If we move forward with the proceedings, we are concerned about conflicting decisions. We think that all the cases should be before one bench. We are in a serious case. It is clear that we, as insurers, want to raise claims. We will want to present the picture that can be seen from the written pleadings, and therefore we think that if people want to want for Monrov's claim, that is not a problem. I understand that there are service issues in this case, and they will not be resolved within a month or two months. Insofar as the claims is not summarily dismissed, there will be one bench that will hear the proceedings, whether to stay the class action, and I would like to respond. A motion for a stay of proceedings was filed by the firm of Halevy. Justice Altuvia thought that since there are third parties, he would move ahead with the proceeding. We are third parties and therefore we did not want to file another motion of the same kind. If all the cases were before one bench, he could grab the bull by the horns and come to the parties and say what he thinks.

The proceeding in our case is at a preliminary stage. The issue of service is unclear. That may solve the procedural problem in which we find ourselves.

<u>Adv. Gissin</u>:

My colleague is relating to the rule of exhausting the cause of action, section 50 of his motion. He says the following: 'The practical purpose of the rule is to prevent a litigant…' [reads]. In our case, we examined the references to the judgments that Goren addresses. Each of them speaks of cases in which there was a decision and afterwards a claim was filed.

I would like to note that all the motions for certification of class actions are not claims. The only claims that exist are the claims here that were consolidated and the claim in Canada.

My colleague tried to say that I claimed that if the five items that were included had been precise, the company would have been able to repay all of its debt. That is not my claim. I claimed that if those items had been described correctly, people would not have invested in this issuance.

There are statements of defense in this case. My colleagues are ignoring them and trying to reach a situation where it is unnecessary to file statements of defense and to state their position. In this case, the time has come to move forward. The issue of service outside the jurisdiction: yesterday we requested and received an extension of a week to respond. I assume with a great deal of certainty that there will not be any need to consider this matter. These are the people with whom we are speaking about a settlement, and this is the reason for the motion to postpone. I assume that during the next week there will be a settlement.

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The issue of the findings regarding Mrs. Saskin should not delay matters. We filed an appeal against the ruling, but if our position is not accepted, I shall consider removing her from the Statement of Claim. Currently, this is not official and I cannot present this. There are consents, there are wordings and there is a settlement. The settlement will be brought before the liquidation court for approval, and from them to the court in Canada, and from them to your honor for approval.

All the other technical and non-technical problems that are preventing or delaying are the consolidation of the benches.

Dates should be set for the filing of statements of defense in the case. Doreen Saskin has a claim regarding service on her. That is not the material issue that is holding back the whole of this claim. If I am unsuccessful, I will file a separate claim against her in Canada. When the settlement will be published, it will allow me to file another proceeding.

There is nothing to prevent considering the issue of liability.

Adv. Kalir:

We shall file third-party notices, the filing of which involves a considerable amount of money.

Decision

Without making a firm determinations, I already thought before the hearing that there is no basis for granting the motion for summary dismissal, since granting the motion means that as long as the motions for certification that are being heard before the honorable Justice Altuvia have not been decided, there is no certainty that there is a claim proceeding, even if the cause of action and the damage in the various proceedings are no completely identical.

I also believe that there is no basis for staying the proceedings in this case until a decision is made in the other cases, even though I do not think that there is no weight to the arguments of the applicants Adv. Kalir and Adv. Orion, that it is not right to put their clients in double jeopardy when there are claims that may or might be heard by this court and also by another court in which they may reach conflicting or different decisions.

If we were speaking of a fixed period of time of a stay of proceedings, I would choose that path, but at this stage there is no certainty regarding the duration of the other proceedings, as well as the date on which the hearing will take place in the Supreme Court with respect to the motion filed by Adv. Kalir against the decision of Justice Altuvia, who denied the motion for summary dismissal before him, even though he added that the denial is for the moment only.

However, it has been brought to the attention of the court that Adv. Gissin has also filed an appeal on the decision that was given by the honorable Justice Shilo with regard to service of

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the pleadings on Mrs. Saskin, and in addition, he has also filed a motion for leave to perform service on two additional defendants that do not live in Israel.

For this reason, logic dictates that even were I to deny the motion for summary dismissal, this would not prejudice the applicants' rights, since in any case the preliminary proceedings from their viewpoint with regard to the defendants have not yet ended and they are still pending until Adv. Gissin will make his decision regarding Mrs. Saskin and the additional two defendants.

I have therefore seen fit to grant the defendants' motion for a stay of proceedings for a certain period of time until the Supreme Court makes its decision in the motion for leave to appeal filed by Adv. Kalir, at which point presumably the picture will become clearer as to whether to dismiss the proceeding that is the subject of the motion for leave to appear or not.

Therefore, I am staying the filing of the statements of defense by the defendants at this stage for a period of 60 days from today.

At the end of those sixty days, the period for the filing of statements of defense by any of the defendants who have not filed a statement of defense will begin to run.

If decisions are made in the two proceedings that are the subject of this decision, namely the motion for leave to appeal in the Supreme Court or the appeal on the decision of the honorable Justice Shilo, the parties shall notify the court.

Internal reminder in 60 days for the purpose of scheduling a date for hearing the case.

Given and notified today, 22 Shevat 5779, January 28, 2019, in the presence of those attending.

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Khaled Kabub, Justice, Vice-President

Typed by Keren Habani