Custody Battle: When a Shomer Fails to Act
Adapted from the writings of Dayan Yitzhak Grossman
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Our previous article mentioned the halacha that an agent who fails to fulfill a commission to purchase merchandise for his principal is not liable, even if he thereby prevented him from realizing a profit, since causing the assets of another to be unproductive (*hamevatel kiso shel chaveiro*) does not engender an actionable claim for damages. We noted that in contrast to this is the *arvus* (guarantorship) doctrine articulated by the Ritva and endorsed by the Nesivos and Chasam Sofer, that one who fails to keep a commitment upon which someone else has relied is indeed liable for reliance damages.
Another relevant doctrine is advanced by R' Yehudah Shmuel Primo. He argues that limitations of liability such as *bitul kis* and *grama* (indirect causation of harm) apply only to someone who has no duty of *shmirah* (custodianship) toward his victim, but *shomrim*—and partners, who have the status of *shomrim*—are liable even for *grama* and *bitul kis*. This is why, he explains, a partner who sells partnership merchandise prematurely, at its current low price, and thereby prevents his partners from profiting by waiting to sell until the price rises, is liable for the loss of anticipated profit,[1] despite the fact that an outsider who somehow managed to do so would not be liable for anything beyond the value of the merchandise at the time that he sold it.[2]
As with the Ritva's doctrine of reliance damages,[3] however, we are left with the problem of explaining why the agent who fails to keep his commitment to purchase merchandise for his principal is not liable for the lost profit, since he is also a *shomer*. Perhaps Rav Primo distinguishes between a premature sale, where the consequent loss of the merchandise's subsequent price appreciation is considered an actual loss (despite the fact that outside the context of custodians, partners, and agents, it would be considered mere *bitul kis*), and a failure to purchase, where the consequent failure to profit from reselling the merchandise is not considered an actual loss, since the merchandise ultimately never belonged to the principal.
Whatever the merit of this distinction, though, it remains difficult to reconcile Rav Primo's unqualified assertion that the lack of liability for *bitul kis* does not extend to a partner or agent, with the fact that the Yerushalmi derives this very lack of liability for *bitul kis* from the lack of liability of an agent who fails to purchase the merchandise for his principal!
Yet another opinion relevant to our topic is that of various *Acharonim* that the lack of liability for *bitul kis* is limited to situations where it is not absolutely clear that the victim would have actually realized a profit absent the misconduct. The Mas'as Binyamin, discussing a case where someone had an enforceable claim against someone else and was prevented from collecting on it by his (the claimant's) partners, rules that this is considered actual damage and not *bitul kis*, since it is "as though [the money] was already in his wallet," and the lack of liability for *bitul kis* applies only to situations that do not involve "certain damage (*bari hezeika*)."[4]

Similarly, the Chavos Ya'ir maintains that the lack of liability for *bitul kis* is limited to cash, since generating profit from cash by doing business with it requires ingenuity and effort, to buy and sell merchandise, but this does not apply to assets such as homes and ships "which are destined to be rented out, and generally do not remain unused since there exist plenty of renters, and their owners do not need to expend any effort and toil" to generate revenue from them.[5] In the same vein, the Machanei Efraim proposes that one who prevents another from renting out his property may indeed be liable for the lost rental income insofar as the harm he causes is certain (*bari hezeika*), and he apparently concludes that the halacha hinges on a dispute between the *Rishonim*.[6]

Other *poskim*, however, reject the distinction between certain and uncertain harm.[7] Further, even according to the former *poskim*, it is unclear whether a post-facto demonstration of certain lost revenue is sufficient, or whether this certainty must have been evident at the time of the misconduct.

We began the previous article with the case of a securities broker who failed to accept or to execute a client's purchase order, and the client subsequently missed out on a rise in the security's price. As we have seen, the basic halacha is that an agent is not liable for failing to fulfill a commitment to purchase something on behalf of his principal. On the other hand, there are several doctrines advanced by the *poskim* that could engender liability: the Ritva's doctrine of reliance damages, Rav Primo's position that someone with custodial responsibilities is liable even for *bitul kis*, and the distinction of various *Acharonim* between uncertain and certain loss of revenue (although as we have noted, it is unclear whether a post-facto demonstration of certainty is sufficient, and securities price increases by their very nature are never "certain" before they occur). As we have noted, however, all these doctrines are controversial.

[1]Hagahos HaRama Shulchan Aruch C.M. 176:14.

[2]Shu"t Kehunas Olam *siman* 10 s.v. *Vnla"d dehaRosh s"l kehaRashba*, cited in Imrei Binah *halva'ah siman* 39 *s.v. Ve'ayen baBach*. [The responsum is by Rav Primo, the father-in-law of the author, R' Moshe Cohen.]

Cf. Shu"t Maharash *cheilek* 7 *siman* 78 s.v. *Al kol panim*.

Many *Acharonim* struggle with this question of why a partner who sells prematurely is liable for the lost profit while a *mazik* is only liable for the value of the property at the time of the damage; the Nesivos explains this based on the Ritva's doctrine of reliance damages (but see Sefer Yehoshua, *pesakim uchesavim siman* 64), and see Shu"t Maharshach *cheilek* 1 *siman* 32 s.v. *vegam amnam* (cf. Keneses Hagedolah Hagahos Tur *osios* 96-97); Ketzos Hachoshen ibid. *s.k.* 7 (cf. Shu"t Imrei Aish *siman* 23; Shu"t Chavatzeles Hasharon *cheilek* 2 *siman* 9 s.v. Hinei beChoshen Mishpat).

[3]See the previous article, in which we noted the Nesivos's limitation of the ruling that an agent who fails to keep his commitment to purchase merchandise is not liable to the case of an unpaid agent, as well as the Imrei Binah's argument against the normativity of the Ritva's doctrine of reliance damages from the unqualified language of the *poskim* in their

formulation of that ruling.
[4]Shu”t Mas’as Binyamin end of *siman* 28 s.v. *Ve’ain lehakshos*.
[5]Shu”t Chavos Ya’ir *siman* 151. Cf. Ketzos Hachoshen *siman* 310 *s.k.* 1; Nachalas Tzvi 292:7 s.v. Sham behagaha chayav liten harevach.
[6]Machanei Efraim Hilchos Gezeilah *siman* 11.
[7]See Pis’chei Choshen Hilchos Nezikin ch. 3 par. 29 and nn. 71-72. Cf. Mishpetei HaTorah, Bava Metzia *siman* 55 (“Kuntres ‘Mevatel Kiso Shel Chaveiro’”).