



BUSINESS WEEKLY

WERDIGER EDITION

Restoring the primacy of Choshen Mishpat

Issue #402 | Tzav | Friday, March 23, 2018 | 7 Nissan 5778

UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA



STORY LINE

By Rabbi Meir Orlian

THE LOAN IS FOR YOU

"I applied for a \$50,000 loan to renovate my house," Pinchas said to his brother, Asher, "but the bank is not willing to lend me at a reasonable rate."

"Why not?" asked Asher.

"They're concerned about my credit rating," sighed Pinchas. "My business has been struggling recently."

"You've mentioned that," said Asher. "I wish I could help somehow!"

"I can't expect you to lend me the money," replied Pinchas, "but maybe you can take out a loan in your name at a lower rate? I'll reimburse the monthly payment."

"The truth is, the bank recently offered me a loan at an attractive rate," said Asher. "I don't need a loan now, but I could take it for you!"

"That would be very helpful," said Pinchas. "Could you please check it out and let me know?"

"I'll speak with the bank tomorrow," promised Asher.

A week later Asher said, "The bank approved a \$50,000 loan to me. I'm happy to take it for you! I just ask that we sign a loan document between us."

"That's fine," replied Pinchas. "I'll write that you are lending me \$50,000 and that I will cover the monthly installments until the loan is repaid. What about a *heter iska*?"

"Why should we need a *heter iska*?" asked Asher. "The loan is for you! You're simply reimbursing the payment to the bank of the loan that I'm taking for you. I'm not gaining any interest!"

"I'd like to double check with Rabbi Dayan," insisted Pinchas.

"Sure, go ahead," said Asher.

Pinchas called Rabbi Dayan and asked, "If my brother takes a \$50,000 loan from the bank intended for me, and I'll reimburse him for the monthly installments, do we need a *heter iska*?"

"Yes, you need a *heter iska*," answered Rabbi Dayan. "If you don't, and the loan is taken from a non-Jewish bank, or a Jewish bank without a *heter iska*, you can pay only the \$50,000 principal. Paying the interest would constitute prohibited *ribbis*."

"Could you please explain?" asked Pinchas.

"The *Gemara* (B.M. 71b) addresses the case of a person who borrowed from a non-Jew, and another Jew wants to



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BETWEEN CONTRACT AND CLOSING. PART II

In last week's issue you discussed the prohibition against lowering the cost of a property if

the buyer grants the seller access to the earnest money before the closing. I am a real estate lawyer and often negotiate such arrangements. I will certainly be careful about this in the future.

Q: I am currently involved in a deal where the buyer and seller included such a provision. Is there anything that could be done at this point?

A: Before addressing your question, we must emphasize the importance of acquiring a working knowledge of the *halachos* of *ribbis*. In your area of law, there are many *ribbis* situations that arise, and it may be that most transactions contain at least a question involving *ribbis*. A working knowledge of *ribbis* will allow you to prevent many *ribbis* violations (see *Shach*, Y.D. 160:1) and potentially avoid a lot of distress that results from initiating a *ribbis* transaction. Your question allows us to present some of these *halachos*. However, since your question was somewhat vague, for the sake of thoroughness we will present three different scenarios:

A) Reuven signed a contract to purchase a home and is scheduled to close next week. It was agreed that since Reuven permitted the seller to use the earnest money before the closing, the cost of the home will be lowered from \$700,000 to \$680,000.

In this situation, since the stipulation involves a loan (Reuven permitting the seller to use the money in advance of the closing) and *ribbis* (the seller is lowering the price by \$20,000), it is prohibited for Reuven to accept that discount and Reuven must pay the original purchase price of \$700,000. The seller may

DID YOU KNOW?

That some lending institutions and banks are Jewish-owned and one may not take a loan from them without a Heter Iska?



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borrow that money from him," replied Rabbi Dayan. "When he gives the money to the second Jew, the first borrower cannot charge him the interest that he pays the non-Jew. Even if the non-Jew said to transfer the money, the second loan is viewed as between the two Jews, since there is no concept of agency regarding a non-Jew" (Y.D. 168/9:1, 2, 17; Taz, Y.D. 170:3).

"Similarly, the person who takes the loan from the bank is considered their borrower," continued Rabbi Dayan. "If he lends the money to another Jew, he is considered the lender to the other Jew. Therefore only your brother is liable to the bank; they have no connection to you. That is why you need a *heter iska*" (Bris Yehudah 6:20-23).

"What if the bank has a *heter iska*?" asked Pinchas.

"If the bank has a *heter iska*, and the loan was initially intended for the second person, the *heter iska* can extend to the second loan," replied Rabbi Dayan. "Just as the borrower received the money with an *iska* arrangement, he handed it to the other person. Ideally, there should still be a separate *heter iska* between the two people, or at least an explicit statement that their arrangement follows the *heter iska* of the bank. However, *Poskim* are lenient even if they did not address the issue explicitly, and even if the second borrower did not know of the *heter iska*" (Maharsham 1:20, 7:63; Toras Ribbis 17:14).

"What if the first person initially borrowed the money for his own use?" asked Pinchas.

"That certainly needs a separate *heter iska*," answered Rabbi Dayan. "In that case, the first person was not an agent of the second person, and it is a new, unrelated loan" (The Laws of Ribbis 13:36-37, 17:17-21).



MONEY MATTERS

GIFTS #12

Friend or foe?

(Based on writings of Harav Chaim Kohn, shlita)

Q: I gave an expensive gift to someone. Shortly afterward, we got into a serious fight and he became very antagonistic toward me. Can I demand the gift back, since he was given it as a friend, not a foe?

A: A valid gift is not voided when the friend turns foe. One has no guarantee that the recipient will remain a friend forever (Rivash #301; Chelkas Mechokek, E.H. 99:7). However, if the gift was given in error — e.g., the recipient was secretly antagonistic from the beginning and there was a statement or clear indication that the gift was given because he was a friend — the gift can be nullified (see Pischei Teshuvah, E.H. 99:7).

Rema rules that jewelry that a husband gives his wife should be returned if they get divorced, since he gave it to her only to use and adorn herself for him, not as an absolute gift. This ruling is usually not applied nowadays, as the jewelry is generally viewed now as an absolute gift to the wife (Rema, E.H. 99:2; Beis Shmuel 99:6; Pischei Teshuvah 99:8).



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not even give Reuven a gift of \$20,000 since it would be obvious that he is doing so because he wants to give Reuven the *ribbis* that he promised (Y.D. 160:5).

B) Shimon, the buyer, granted the seller permission to use the earnest money before the closing and in consideration of that, the seller permitted Shimon to use the property before the closing. Permission to use the property without requiring him to pay constitutes *ribbis*; therefore it is necessary to add the amount that rent would have cost to the final purchase price.

C) Levi and the seller recently signed a contract and the closing will take place in a couple of months. They stipulated that if Levi permits the seller to use the earnest money, the seller will lower the price.

In contrast to the first scenario where they are scheduled to close in the next week, in this scenario since there are a couple of months before closing, the issue can be rectified and structured in a permitted manner. The two parties can arrange a *heter iska* by making a *kinyan*. Generally, a *heter iska* does not require a *kinyan* since the transfer of money is a *kinyan*. However, when a loan was issued that the two parties now wish to transform into a *heter iska*, it is necessary to make a *kinyan*. The *kinyan* involves the "lender" handing a utensil to the "borrower" and in doing so the "lender" acquires property from the "borrower" equal to the amount of the loan for the *iska* (C.M. 176:1; Shach, Y.D. 177:15, 41 and Dagul Mervavah).

If one of the parties opposes making a *heter iska*, many *Poskim* maintain that the seller can be forced to return the earnest money that he took (Chavas Daas, Y.D. 161:5; Machaneh Efraim, Ribbis 37 and Even HaAzel, Malveh 8:1). Others disagree and contend that the loan remains in force even though the buyer will not receive the discount that he expected (Bris Yehudah 1:11).

For questions on monetary matters,
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