An Angel named 'The Bank': The Bank's Fiduciary Duty as the Basic Theory in Israeli Banking Law

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Abstract The concept of imposing a fiduciary duty on banks is not originally an Israeli one. The Israeli courts adopted it from English principles of equity. However, from the moment it was introduced into Israeli law, the courts have expanded it far beyond its original equitable counterpart. This process of expansion has been performed in various ways: in terms of the content of the duty; in terms of the scope of the beneficiaries—other than customers—that are entitled to the duty; or in terms of the remedies granted in respect of breach thereof. As a result of this process, the Israeli concept of the banks' fiduciary duty has evolved over the years. From a narrowly applied duty, as in English common law, it became the basic theory in Israeli banking law. The article examines this interesting process from a critical point of view.

I. Introduction

According to Israeli law, the general rule is that the bank always owes a fiduciary duty to its customers. The courts in Israel have stressed the tremendous power which the bank wields over its customers, the trust which the customer places in the bank and the almost blind reliance of the customer on the bank's advice. The instrument for curbing the bank's power and for protecting the customer lies in the form of the imposition of the fiduciary duty on the banks, a duty whose practical meaning is the subordination of the banks to a very high standard of conduct towards their customers, as will be explained below.

Imposing a fiduciary duty on the banks is not originally an Israeli idea. The Israeli courts adopted it from English principles of equity. However, from the moment that it was introduced in Israel, the courts

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expanded it far beyond its original equitable counterpart. Over the years, the fiduciary duty has been established as a basic theory in Israeli banking laws. Its draft as an obscure standard left the courts with an extensive area for discretion and casuistic application, and they applied it in a manner consistent with basic human and social attitudes.

Until recently the limits of the Israeli fiduciary duty had been more or less clear, but lately it has been undergoing interesting changes. In the case law and the legal literature in Israel, an approach is gradually developing that expands the bank's fiduciary duty in various ways: in terms of the scope of those entitled to the fiduciary duty; in terms of the content of the duty; and in terms of the remedies granted in respect of breach thereof. However, this raises the question to what extent the expansion of the fiduciary duty can be reconciled with traditional banking principles and patterns.

The goal of this article is to examine the process that has changed the bank's fiduciary duty from a narrowly applied duty, as in English common law, to the very foundation of banking relationships, and in consequence thereof to the basic theory in Israeli banking law.

We shall begin by noting that the thesis presented in the article recognizes the fiduciary duty as a justified and worthy instrument protecting the bank's customer. Nevertheless, due caution must be taken to avoid a sweeping expansion of the duty. Determining the degree and nature of the fiduciary duty is a powerful process, which not only influences the relationship between the bank and its customer, but also affects third parties and the public in general. The bank's fiduciary duty has not only an economic and business influence, but also a crucial role in designing the shape of the society as a whole. Excessive application of the fiduciary duty would create an incorrect balance of social, economic and business forces, both in theory and in practice. Determining the content, scope and characteristics of the bank's fiduciary duty must, therefore, be done in a moderate manner, while drafting a cautious judicial programme and conducting a true examination of the legal propositions underlying this programme.

The approach of the article will be as follows: in the next section, we shall describe the exact nature of the bank's fiduciary duty. After this we shall examine the implementation of the duty and the process of its widening from a narrowly applied duty, as in English common law, into a basic theory, as in Israeli banking law. This examination will be done in three different contexts. Section III will deal with the bank's fiduciary duty vis-à-vis its customer, section IV will deal with the bank's fiduciary duty vis-à-vis the guarantor, and in section V we shall examine the concept of the bank's fiduciary duty vis-à-vis the general public. Section VI of the article will deal with a subject that is common to all the types of beneficiaries enjoying the bank's fiduciary duty: the ability to make stipulations in respect of the duty.

II. The Bank's Fiduciary Duty as a Legal Obligation

The concept of trust has a crucial role in designing and fulfilling contractual engagements.[1] An atmosphere of trust creates a reasonable expectation of fair conduct, the ability to rely on the promises of the other party and a willingness to cooperate with that party. Nevertheless, there are relationships in which the concept of trust and reliance assumes a special legal significance and requires a very high standard of conduct of one party to the relationship. One such relationship is that between a bank and its customer, in which a fiduciary duty is imposed on the bank.

The bank's fiduciary duty, whenever it is applied, sets a very high standard of conduct for the bank. The bank is obliged to act with integrity and fairness. It must also act with professionalism and skill. Underpinning the fiduciary duty is the bank's duty to exercise the power vested in the bank without abusing it. The key words are loyalty and fidelity. The bank 'as a fiduciary' is required to perform its duties solely for the purpose for which the power was vested in it, without ulterior motives and while protecting the interest of the beneficiary—the customer.[2] Moreover, the bank must prefer the interest of its customer to the interests of others, including its own self-interest. In fact, the bank may under no circumstances be in a situation of a conflict of interests.[3] The fear is that the bank might not withstand temptation and might not promptly guard the interest of the customer before its own interest.

By virtue of the fiduciary duty, the bank is prohibited from receiving any benefit from a third party; prohibited from competing with a customer's business or taking advantage of a customer's business opportunity; prohibited from making a profit, in any manner, from the performance of its duties; and prohibited from misleading the customer. Moreover, the fiduciary duty includes not only prohibitions or negative obligations,[4] but also positive obligations, such as the obligation of broad disclosure to the customer; the obligation to

1 With regard to the concept of trust in the laws of contract, see E. Bookspan, 'Totally Complete – About Trust as a Super-Theory of the Laws of Contract and about the Principle of Good Faith as Supplementary to Trust, Stability and Certainty in the Reflection of the Rulings of Chief Justice Shamgar' (2001) 23 *Iyunei Mishpat* 11. E. Bookspan and H. Goldschmidt, 'About Negotiations and the Contract Law: Section 12 of the Contract Law in the Reflection of Theoretical Approaches in the Field of Negotiations' in A. Barak (ed.), *Shamgar Book – Articles* (Israel Bar Association: Tel Aviv, 2003, Part C) 215, 246. M. Mautner, 'The Decline of Formalism and the Rise in Values in Israeli Law' (1993) 17 *Iyunei Mishpat* 503, 551–2.

2 Application for Civil Appeal 6830/00 *Baranovitz* v *Teomim* 57(5) PD 691, 700–1 (2003).

3 Aharon Barak, 'Conflict of Interests in the Performance of Duties' (1980) 10 *Mishpatim* 11. Compare *Bristol and West Building Society* v *Mothew* [1998] Ch 1, 18.

4 For a different approach, see E.P. Ellinger, E. Lomnicka and R. Hooley, *Modern Banking Law*, 4th edn (Oxford University Press: Oxford, 2006) 127.

provide explanations, including legal explanations with regard to the nature of the transaction and its results; and, of course, the obligation of maintaining confidentiality.[5] In section VI below, we shall discuss the ability to make stipulations in respect of certain obligations. But the basic rule is that the bank is subject to all the above-mentioned obligations.

From the above review it can be seen that the fiduciary duty is difficult to put into practice.

Requiring a person to act for the beneficiary's interest and to prefer the beneficiary's interest to his or her own personal interest is a particularly stringent one. Both private civil law and common law in Israel have no obligation that sets a conduct threshold higher than the fiduciary duty. Even if we compare the fiduciary duty to other general obligations recognized in Israeli law, which set a high standard of conduct, the fiduciary duty is the most stringent of all. The fiduciary duty determines a standard of conduct higher than the duty of good faith, because while the duty of good faith requires a person to act fairly in the course of pursuing his or her own personal interest, the fiduciary duty requires that person to prefer the interest of the other to his or her own personal interest.[6] The duty of good faith is described as 'A person to another person—a person', whereas the fiduciary duty is described as 'A person to another person—an angel'.[7] The fiduciary duty is a stringent obligation also when compared to the duty of care that lies at the base of the tort of negligence, because the duty of care requires the taking of reasonable precautions only, and nothing more. Thus, while the duty of care is intended to prevent damage, the fiduciary duty is intended to prevent a person from abusing his power. It is therefore possible for a breach of fiduciary duty to occur without any damage being caused.[8]

Because the fiduciary duty determines the highest standard of conduct, any act performed by the bank unlawfully will also inevitably be deemed to be a breach of the fiduciary duty.[9] Nevertheless, it is obvious that the real importance of the fiduciary duty is with regard to those cases in which a breach of the fiduciary duty would lead to legal consequences different from those of a breach of the other duties, as shall be explained below.

After understanding the grave significance of the bank's fiduciary duty, the next stage is to examine the potential beneficiaries thereof:

5 For an analysis of the obligation of confidentiality in Israeli law, see R. Plato-Shinar, 'The Bank Safety Deposit Box as Reflected in the Right to Privacy' (2001) 1 *Kiryat Hamishpat* 279.

6 Civil Appeal 610/94 *Buchbinder* v *The Official Receiver*, 57(4) PD 289, 332 (2003). M. Rubinstein and B. Okon, 'The Bank as a Social Agency' in A. Barak (ed.), *Shamgar Book – Articles* (Israel Bar Association: Tel Aviv, 2003, Part C) 819, 821.

7 A. Barak, *Judicial Discretion* (Papirus: Jerusalem, 1987) 495.

8 *Buchbinder* v *The Official Receiver*, above n. 6 at 333.

9 For a different approach, see J. Wadsley and G. Penn, *The Law Relating to Domestic Banking*, 2nd edn (Sweet & Maxwell: London, 2000) 107.

customers, guarantors, other third parties, and—as lately suggested—the general public. The following discussion will show how the bank's fiduciary duty has gradually changed from a narrow obligation towards the customer, into a general theory relevant to all the banking connections.

III. The Bank's Fiduciary Duty as a Basic Theory in the Banker–Customer Relationship

According to English equitable principles, the bank–customer relationship is not inherently considered to be a fiduciary relationship, and therefore no fiduciary duty to its customers is imposed on the bank.[10] The rationale for this is that at the heart of the fiduciary duty lies the obligation to prefer the interest of the other. But the banks act in order to make a profit and therefore it is not possible to require them to prefer the interest of the customer to their own self-interest.[11] Nevertheless, with regard to a few types of transactions, the English courts have developed a certain recognition of the bank's fiduciary duty to the customers. The main categories are as follows:[12]

a. When the bank provides investment advice or financial advice to the customer.[13]
b. When the customer pledges an asset or signs a guarantee to secure the debt of another customer.[14]
c. When the bank acts as an agent or trustee for the customer.[15]

Even though it would apparently be possible to point to these categories, the English courts have stressed time and time again that the

10 J. Chuah, 'General Aspects of Lender Liability under English Law' in W. Blair (ed.), *Banks, Liability and Risk*, 3rd edn (LLP: London, 2001) 40. Ellinger, Lomnicka and Hooley, above n. 4 at 130. Wadsley and Penn, above n. 9 at 107.

11 Ellinger, Lomnicka and Hooley, *ibid*.; *Nat. Westminster Bank plc* v *Morgan* [1983] 3 All ER 85, revd [1985] AC 686.

12 To complete the picture, it is worth mentioning additional categories: (a) the provision of loans, particularly when the matter entails consulting by the bank (in this matter, see Chuah, above n. 10 at 40); (b) with the expansion of modern banking activity beyond the core banking business, there may be areas of activity in which the bank shall be subject to a fiduciary duty to the customer. For an example of a bank that manages an investment portfolio for a customer, in its sole discretion, see Ellinger, Lomnicka and Hooley, *ibid*. In Israel the banks are prohibited from dealing in portfolio management, pursuant to s. 9(a) of the Investment Advice Law.

13 Ellinger, Lomnicka and Hooley, *ibid*. See mainly the judgment of *Woods* v *Martins Bank* [1959] 1 QB 55.

14 The leading case is *Lloyds Bank Ltd* v *Bundy* [1975] QB 326. Adopted in *Nat. Westminster Bank plc* v *Morgan* [1983] 3 All ER 85, revd [1985] 1 AC 686, even though the last judgment deals with a mortgagor who is not a customer. With regard to a mortgagor who is not a customer, see section IV below. In recent years, the courts in the UK have preferred to apply the doctrine of undue influence, rather than that of the fiduciary duty. In this matter, see M.H. Ogilvie, *Canadian Banking Law* (Carswell: Toronto, 1998) 479. Ellinger, Lomnicka and Hooley, above n. 4 at 138.

15 Wadsley and Penn, above n. 9 at 107–9. Chuah, above n. 10 at 40.

actual, determining factor in the question as to whether a fiduciary duty has arisen are the circumstances of the particular case. The fiduciary duty shall arise solely under very special circumstances,[16] such as relations of proximity between the parties,[17] or the customer's reliance on the bank's advice.[18] The recurrent motifs are: trust, reliance, power differences between the parties, relations of dependency, the customer's inferiority or vulnerability, and the bank's ascendancy over the customer's affairs.[19] The general impression from English case law is that these are essential features for the creation of a fiduciary duty in the categories specified above. As a consequence thereof, the English banker–customer relationship will usually not be deemed to be a fiduciary one.

While according to English common law the bank is usually not deemed to be a fiduciary, the point of departure of the Israeli law is totally different, as will be immediately shown.

Israeli legislation contains no provision imposing a general fiduciary duty to its customers on the bank. In the performance of core banking business, the bank does not act as a trustee of the customer and therefore is not subject to the fiduciary duty as set forth in the Trusteeship Law 1979.[20] In certain transactions, the bank acts as the customer's agent, such as in the transfer of funds to a third party, the payment of accounts on behalf of the customer, the payment of cheques drawn by the customer, the conducting of transactions in securities on the stock market, etc. In these actions only, the bank shall be subject to the fiduciary duty contained in the Agency Law 1965.[21] When the bank provides investment consulting services, it is subject to the fiduciary duty contained in the Regulation of Investment Advice, Investment Marketing and Investment Portfolio Management Law 1995 (hereinafter: the 'Investment Advice Law').[22] However, beyond these isolated cases or, in other words, in most of the areas of banking operations, the bank is not subject to a statutory fiduciary duty to the customer. Nevertheless, a general fiduciary duty is imposed on the banks in Israel by the courts.

16 *Nat. Westminster Bank plc* v *Morgan*, above n. 14 at 689. *Lloyds Bank Ltd* v *Bundy*, above n. 14 at 340, 347.

17 Ellinger, Lomnicka and Hooley, above n. 4 at 128. *Lloyds Bank Ltd* v *Bundy*, above n. 14 at 340, 341, 347.

18 *Lloyds Bank Ltd* v *Bundy*, *ibid.*, at 339–41. *Woods* v *Martins Bank*, above n. 13 at 339–41. *Barclays Bank plc* v *O'Brien* [1994] 1 AC 180, 189. Ellinger, Lomnicka and Hooley, above n. 4 at 130–1. Ogilvie, above n. 14 at 474. Chuah, above n. 10 at 40.

19 Ogilvie, above n. 14 at 464. Ellinger, Lomnicka and Hooley, above n. 4 at 137.

20 R. Ben-Oliel, *Banking Law, General Part* (Sacher Institute: Jerusalem, 1996) 99, 100. Rubinstein and Okon, above n. 6 at 822. Compare M. Beisky, 'Relations of Trust between the Bank and Its Customers' in A. Barak (ed.), *Landau Book* (Bursi: Tel Aviv, 1995) 1095, 1099–1100.

21 Section 8 of the Agency Law 1968 determines: 'Should a person undertake to be an agent, he is required to act towards the principal with loyalty …'.

22 Section 11 of the Investment Advice Law 1995 determines: 'A licensee shall act to its customers with good faith …'.

The courts in Israel have determined, in various contexts, that 'The list of situations in which there is a fiduciary relationship is not closed and it exists in a diverse range of legal relations'.[23] Thus it was determined that the fiduciary duty has broad application and applies 'in every case where a person has power and control over another'.[24]

Indeed, the bank has power and control over the customer's interests and his or her financial property. The relations between the bank and the customer are relations of dependence by the customer on the bank. The customer depends on the bank, in terms of the consulting services provided by the bank, in the provision of the service itself and in the determination of the legal arrangement applicable thereto. In the provision of the service, the customer expects the bank to act with a high level of professionalism and responsibility and an enhanced level of good faith. Customers tend to have special confidence in the bank, and in many cases, they don't feel the need for a second opinion before acting in accordance with the bank's advice. The banks' involvement in the financial life of every individual in the State is so deep and comprehensive that, today, it is hard to imagine the possibility of an individual managing his financial affairs without the banks. The bank possesses information that is not available to the general public, and it also possesses special skills and technical means which individuals do not possess. All of the above enable the bank to prevent its customers from sustaining damages, whereas the customer does not possess a similar capability. The banks, for their part, are careful to cultivate the public's confidence in them, and it is even reasonable for duties to be imposed on them which are intended to realize the reasonable expectations which they themselves are instrumental in creating. Based on these considerations, an enhanced duty of care was imposed on the banks in relation to their customers,[25] and the practice took root whereby the bank owes a fiduciary duty to its customers.[26]

In effect, the judicial rhetoric of the courts is based on various descriptive theories.[27] Even though all these theories strive to realize the concept of trust, from an analytical point of view, these theories are justifications which differ from one another.

One justification is the theory of trust and reliance. According to this theory, relations of trust are established when a person places

23 Civil Appeal 817/79 *Kosoi* v *Bank Y.L. Feuchtwanger Ltd*, 38(3) PD 253, 278.
24 *Ibid*.
25 A. Porat, 'The Responsibility of the Banks in Respect of Negligence: Recent Developments' in A. Rozen-Tzvi (ed.), *Hamishpat Year Book of 1992–1993* (Israeli Bar Association: Tel Aviv, 1994) 324.
26 See, for example, Civil Appeal 5893/91 *Tefahot Mortgage Bank for Israel Ltd* v *Tsabach*, 48(2) PD 573, 585, 591–2, 595 (1994). Criminal Appeal 122/84 *Mantzur* v *The State of Israel*, 38(4) PD 94, 101 (1984). Civil Appeal 1/75 *Israeli Mortgage Bank Ltd* v *Hershko*, 29(2) PD 208, 211 (1975). Civil Appeal 7424/96 *Mizrahi Bank Ltd* v *Eliyahu Graziani Co*, 54(2) PD 145, 161–2 (2000). Ben-Oliel, above n. 20 at 102–5.
27 For an analysis of the various theories, see J.C. Shepherd, 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 *Law Quarterly Review* 51.

trust and confidence in another person and relies on his or her advice, and the other person is aware of this. This theory emphasizes the vulnerability of the weaker party and his or her dependence on the other party, hence the need to protect the weaker party. The theory takes into account the fact that trust and reliance are an essential basis in any contractual relationship; however, it is referring to those cases in which a special expectation is formed by one party that requires the imposition of a particularly high standard of conduct on the other party. The theory of trust and reliance stresses the close relationship between the concept of trust and the concept of expectation,[28] and allows the courts to balance the need for trust in an engagement against the practical limits of the fiduciary duty, and to realize the fulfilment of the reasonable expectations of the person placing trust in the other party. Originally, this theory was based on the particular factual relationship between the parties and not on external events. This was its advantage, but also its weakness, given that these tools are subjective and dependent on the concealed frame of mind of the parties. In practice, the application of this theory by the courts in Israel is implemented by means of objective parameters, and it is affected by the process of objectivity that characterizes various fields of law.[29] This approach obviates the need for a casuistic examination and allows the courts to demarcate the concept of trust into relatively clear categories of cases or relationships.

A second justification is the theory of control. According to this theory, relations of trust are created in any event in which one party has power and control over the interests or assets of the other,[30] whether *de jure*, as a result of defined legal relations, such as agency relations, or *de facto*, by virtue of physical control. The purpose of the fiduciary duty, according to this theory, is to curb the control and to ensure that it is not abused. The importance of this theory is expressed, in particular, in situations where there is a great temptation to take advantage of the situation, while causing harm to the other party. The control theory is originally based on measuring instruments that have an external, objective tone, and thus it provides a convenient basis for the analysis and comparison of individual relationships.

28 With regard to the relationship between trust and expectation, see Mautner, above n. 1 at 551–2. Bookspan, above n. 1 at 22–3.

29 In property law, with regard to competition of rights, Civil Appeal 2643/97 *Ganz* v *British and Colonial Company Ltd*, 57(2) PD 385, 403, 409, 410 (2001). In the law of bills, with regard to good faith: Application for Civil Appeal 2443/98 *Lieberman* v *Israel Discount Bank Ltd*, 53(4) PD 804, 811, 812 (1999). With regard to good faith in the law of contract, see G. Shalev, *Contract Laws – The General Part, towards Codification of the Civil Law* (Open University: Tel Aviv, 2005) vol. 1, 101. With regard to the decision to make a contract: Shalev, this note above at 173. D. Friedman and N. Cohen, *Contracts* (Aviram: Tel Aviv, 2002) Vol. B at 29, Vol. A at 156.

30 Civil Appeal 817/79, *Kosoi* v *Bank Y.L. Feuchtwanger Ltd*, above n. 23 at 277. Bookspan, above n. 1 at 19.

A third justification is the theory of the lack of equality of bargaining power between the parties. The obvious disadvantage of this theory is the difficulty in setting the limits for it, because it raises the inevitable question as to just what degree of inequality between the parties justifies the intervention of the law. Only rarely are relationships based on equality between the parties. In most cases, one of the parties is more experienced or has a stronger economic capacity. Even though, from a theoretical point of view, the fiduciary duty could be imposed in all of these cases, the inevitable consequence would be harm to competition, because, after all, the economic power that would be achieved as a result of effective competition would cause the imposition of a legal liability. The theory of inequality indeed refers to a substantial gap in power which causes the vulnerability and inferiority of one party vis-à-vis the other; however, its actual application, in practice, is not simple.

There is good reason why the Israeli courts have used these justifications in an integrative manner. Even though they derive from different sources, ultimately, when it comes to their actual implementation in practice, the differentiation between them is not so great. The three justifications are intertwined, and in many cases they even overlap. When a person has the power to change the legal situation of another person or has control over the interests and assets of another, then it is in the natural order of things for a large gap to be created in the power between them, and for this gap to lead to the inferiority of one of the parties, that party's dependence on the more powerful party, and, as a consequence, the placing of his or her trust in the other party and reliance on the other party's advice. All three of the justifications reflect the same systems of considerations, whether they are considerations of morality, justice and fairness, or paternalistic, protection considerations. They are integral justifications which operate in an interconnected manner to advance the concept of trust, in general, and in the banking context in particular.

Nevertheless, even if the use of the above integral justifications was strong enough to justify the imposition of the fiduciary duty on the banks, the courts did not deem them alone to be sufficient and developed an additional justification for the bank's fiduciary duty, which is based on the quasi-public status of the banks.[31] It was explained that their activities have the characteristics of a vital service to the public, and their quasi-monopolistic power by virtue of the law was stressed.

31 Civil File (Bat Yam) 786/93 *Stiller* v *Bank Leumi LeIsrael Ltd* (not reported, 1996) at paras 51–4, 61. Miscellaneous Civil Application (Tel Aviv) 3706/03 *Bank Hapoalim Ltd* v *Rimon* (not reported, 2003) at para. 5. Civil File (Tel Aviv) 2759/98 *Yaakobi* v *Israel Discount Bank Ltd* (not reported, 2004) at paras 3, 9. Civil Appeal 5479/95 *Sahar* v *Discount Bank*, 51(4) PD 464, 476–7 (1997). Civil Appeal (Tel Aviv) 2344/00 *Israel Discount Bank Ltd* v *Hamifras Management and Construction Company Ltd* (not reported, 2003) at para. 9. Civil Appeal 2855/00 *Weintrob* v *Union Bank of Israel Ltd* (not reported, 2003) at para. 27. Civil Appeal 5893/91 *Tefahot Mortgage Bank for Israel Ltd v Tsabach*, above n. 26 at p. 585. Civil Appeal 1570/92 *United*

The banks perform many public duties, serve as agents for the implementation of government policy and a pipeline for the transfer of government loans to the public, and enjoy back-up from the Bank of Israel to secure the deposits of their customers. The individual sees the bank as a quasi-public body and places a great deal of trust in it.

While the three justifications which we presented above are based on descriptive theories, the last justification is based on a totally different discipline, that is, on considerations of legal policy. Basing the fiduciary duty on considerations of policy means that the fiduciary duty shall be imposed by the courts when they feel that it is essential or justified to demand that a person or a type of person behave according to a higher standard of conduct than the norm. The courts, as a guide to conduct, observe the relationship being discussed before them from an overall perspective, rather than focusing on the resolution of the specific conflict that was brought before them. These considerations of legal policy reflect how the courts perceive the objectives of the duty and how they justify its meaning. And as far as banks are concerned, the clearly evident trend is towards expansion of their responsibility and commitment to the general public.

All of the above reasons led the Israeli courts to the conclusion that the bank's fiduciary duty applies to the bank–customer relationship in its entirety and to the diverse range of services and activities provided by the bank to the customer.[32] The point of departure is that upon the creation of the bank–customer relationship, the bank's fiduciary duty emerges automatically, and it continues to apply for such time as this relationship exists. Furthermore, from the moment the fiduciary duty has arisen, it continues to exist, including after the closing of the account and termination of the contractual relationship between the parties.[33] Certain aspects of the fiduciary duty, such as the bank's duty of confidentiality, continue even after the death of the customer.

One can easily understand this perception, according to the justifications for the fiduciary duty that we proposed above. These justifications lie at the basis of the overall relationship between the bank and its customer, and they are not contingent upon any particular act. The justification based on the theory of trust and reliance is appropriate for the bank–customer relationship in its entirety, because the customer's trust and reliance on the bank exist with regard to all the aspects of the banking activity (albeit to a different extent with regard to the

Mizrahi Bank Ltd v *Ziegler*, 49(1) PD 369, 384 (1995). Civil Appeal 8068/01 *Ayalon Insurance Company Ltd* v *The Executor of the Estate of the Late Oppelgar*, 59(2) PD 349, 369 (2004). See also Rubinstein and Okon, above n. 6 at 831. A. Weinroth and B. Medina, *Loan Laws, Protection of the Borrower in Israeli Law* (Bursi: Tel Aviv, 2000) 98–102.

32 *Tefahot Mortgage Bank for Israel Ltd* v *Tsabach*, above n. 26 at 595. Ben-Oliel, above n. 20 at 102–5.

33 Civil File (Dimona) 1099/99 *Turgeman* v *Bank Leumi LeIsrael Ltd* (not reported, 2000), at para. 6. See also D. Friedman, *Unjust Enrichment Laws*, 2nd edn (Aviram: Tel Aviv, 1998) Vol. A, 558 at n. 109.

different types of transactions). The justification based on the theory of control is also appropriate for the bank–customer relationship in its entirety, because the bank's control over the customer's monies and assets (including information) and the customer's interests is not limited to a specific banking transaction. The justification based on the theory of the inequality in the bargaining power between the parties is most certainly not limited to a specific banking transaction and it is one of the characteristics of the bank–customer relationship in its entirety. Finally, the justification from legal policy considerations of the perception of the bank as a quasi-public body is based on the bank's status and on its own characteristics; it is most certainly not dependent on the nature of the transaction which the bank performs with or for the customer. Indeed, there are transactions in which one particular justification exists with greater force than the others. This is the case, for example, at the time of receiving financial advice: the foundation of reliance and trust underlying the basis of the theory of trust and reliance is clearly evident. However subtle they may be, all four justifications are expressed concurrently and integratively in the bank–customer relationship in its entirety. Hence one can easily understand the Israeli practice whereby the fiduciary duty applies to all of the transactions and services which the bank performs for the customer.[34]

The Israeli bank's fiduciary duty is far broader than that of the English common bank in another aspect. According to Israeli law, a customer does not need to be an account holder, nor must he or she have had a long and regular relationship with the bank. Even someone who conducts a one-off transaction will be deemed to be a customer for the purpose of that particular service which he or she received from the bank,[35] and the bank is a fiduciary also to such one-off customers. In contrast, according to English law only someone who has a bank account is considered to be a customer,[36] and, as stated, even this fact *per se* is not sufficient to impose a fiduciary duty on the bank regarding this customer.

The attitudes of the Israeli courts are reflected also in regard to the remedies available in cases of a breach of the fiduciary duty. The courts in Israel tend to award a vast variety of remedies in cases of breach of the bank's fiduciary duty, as requested in each particular case, without paying too much attention to this issue. Thus it was ruled that the consequences in respect of such a breach vary in accordance with the context in which the question arises. At times, the

34 *Tefahot Mortgage Bank for Israel Ltd* v *Tsabach*, above n. 26 at 595. Ben-Oliel, above n. 20 at 102–5.

35 This arises from the definition of the terms 'customer' and 'service' in The Banking (Service to Customers) Law 1981. Ben-Oliel, above n. 20 at 58.

36 M. Hapgood, *Paget's Law of Banking*, 11th edn (Butterworths: London, 1996) 106.

consequence of non-compliance with the duty is the payment of compensation or the grant of enforcement to the party injured. At other times, the consequence is the denial of compensation or enforcement to the party in breach, or the nullification of the power conferred on him or her pursuant to the contract. And at other times, the consequence is none other than that the act performed while committing a breach of the duty is deemed to be void.[37]

The courts attribute special importance to the protection of the fiduciary duty, and this is expressed *inter alia* in the broad spectrum of remedies they are willing to grant.[38] The willingness of the courts is an additional reflection of the acknowledgement of the fiduciary duty as a basic theory in Israeli banking law. Theoretical rulings that recognize the fiduciary duty as a most stringent obligation or apply it widely vis-à-vis different third-party beneficiaries other than the customers are not enough. In order to strengthen the power of the duty and to give it the weight that it should receive, according to the court's point of view, it must be strictly and efficiently enforced. And the way to do this is by a clear willingness to widen the spectrum of remedies available. We will return to this trend in section V when we discuss the possibility of the existence of a wide fiduciary duty to the general public.

According to Israeli law, the fiduciary duty applies with regard to all types of customers. This is true both when the customer is a business customer, steeped in the business and financial world, and when planning the steps personally,[39] and also when the customer is accompanied by an attorney who is advising him or her.[40] However, the scope of the fiduciary duty to the different customers and in the different cases varies.[41] As far as we are concerned, the most important circumstance in the determination of the scope of the fiduciary duty is the degree of reliance by the customer on the bank. A test of this is the type of service or transaction.[42] The more complex the transaction, or the more the transaction requires greater discretion from the bank for the purpose of implementation of the transaction, then we may assume the larger will be the degree of the customer's reliance on the bank. Another test is the nature of the relationship between the bank and the customer. The higher the degree of proximity between them, then we may assume the higher also will be the customer's reliance on

37 Civil File (Haifa) 5295/88 *Israel Discount Bank Ltd* v *Haimi*, 1991 (3) PM 421, 440.
38 O. Grosskopf, 'Invalid Contract' in D. Friedman and N. Dohen (eds), *Contracts* (Aviram: Tel Aviv, 2004) Vol. C, 473, 548.
39 *Mizrahi Bank Ltd* v *Eliyahu Graziani Co*, above n. 26 at 161.
40 *Israeli Mortgage Bank Ltd* v *Hershko*, above n. 26 at 211.
41 *Tefahot Mortgage Bank for Israel Ltd* v *Tsabach*, above n. 26 at 592. See also *Mizrahi Bank Ltd* v *Eliyahu Graziani Co*, above n. 26 at 161.
42 Ben-Oliel, above n. 20 at 105–6.

the bank and the greater the trust in it. On the other hand, the customer's personality is a problematic circumstance. The distinction between a long-standing customer and a new customer, a customer who holds an account and a customer who carries out a one-off transaction,[43] a 'small' customer as opposed to a 'large' customer, is not necessarily relevant. As a rule, the bank is required to comply with the fiduciary duty to all of its customers, in an identical manner, without taking such considerations into account. A bank clerk is prohibited from treating the various customers differently. Such a distinction is forbidden, particularly when it concerns an institution of a public nature. Furthermore, it is doubtful whether, in practice, the bank clerk would be able to make a separation between the manner of his or her work with a customer to whom the bank owes an enhanced fiduciary duty and with a customer to whom the bank owes a more limited fiduciary duty. Nevertheless, with regard to certain components of the fiduciary duty, the personality of the customer may have a certain implication, due to its influence on the nature of the relationship between him or her and the bank, and the extent of his or her reliance on and trust in the bank. This is the case, for example, with regard to the duty of disclosure to a customer; after all, a business customer steeped in the business and financial world and accompanied by his or her attorney is not the same as an ordinary member of the public with no business experience.[44] However, we wish to stress that taking the customer's personality into account can only serve as a test to determine the degree of the customer's reliance on the bank, and only with regard to certain components of the fiduciary duty. If we take, for example, one concrete aspect of the fiduciary duty, the prohibition of a conflict of interests, this prohibition is binding on the bank to all its customers to the same degree, irrespective of the customer's personality. This is also the case with regard to banking secrecy.

As stated, the fiduciary duty requires the bank to act in the customer's best interest, preferring it to the bank's own interests. In this regard, two comments will be added. First, the fiduciary duty does not mean the release of the customer from the responsibility for his or her acts or blind reliance on the bank. At the same time, the customer is subject to a minimal responsibility to take care of his or her own interests.[45] Secondly, the fiduciary duty does not impose on the bank

43 As stated, pursuant to s. 1 of The Banking (Service to Customers) Law 1981, a person who carries out a one-off transaction is also deemed to be a customer. See the text above, p. 37.

44 Compare, with regard to the bank's duty of care, Civil Further Hearing 1740/91 *Barclays Discount Bank Ltd* v *Kostman*, 47(5) PD 31, 61 (1993). With regard to the duty of disclosure to a guarantor, see R. Plato-Shinar, 'Book Review: Banking Law: Guarantees Given to Banks and the Pledge of Movable Property and Securities' (2005) 1 *Haifa Law Review* 559, 568.

45 *Israel Discount Bank Ltd* v *Hamifras Management and Construction Company Ltd*, above n. 31 at para. 9. Civil File (Jerusalem) 1302/98 *Bank Poalei Agudat Israel Ltd* v *Jerusalem Tour Haifa 95 Ltd (in dissolution)* (not reported, 2003) at para. 24.

an obligation to act while totally disregarding the bank's own interests.[46] Therefore, the bank is entitled to collect commissions, to refuse to grant a customer's application to increase his or her credit-line, etc. In this regard, needless to say, a delicate balance is necessary between the bank's interests and the customer's interests, with clear preference being given to the latter, but without totally disregarding the former. This is the case, for example, with commissions: if it is possible to conduct a banking transaction in two ways, when the commission for one of those ways is lower than the other, then by virtue of the fiduciary duty, the bank is required to inform the customer of this and to allow the customer to choose the way in which the commission is lower.[47] For the purpose of creating the said balance, the following trilateral test may be applied:[48]

a. The test of legitimate interests. The bank is required to make use of its power solely in order to advance its legitimate interests, and not to advance any other interest.
b. The test of reasonableness. The bank is required to make use of its power in a reasonable manner and to reduce its requirements of the customer, as long as it succeeds in protecting its legitimate interests.
c. The test of proportionality. Should the bank protect an interest of small importance, but cause significant damage to the customer or to a third party, then it shall be required to refrain from acting in this manner, even if the draft of the contract between it and the customer allows it to do so.[49]

IV. The Bank's Fiduciary Duty as a Basic Theory in the Banker–Guarantor Relationship

According to English common law, as stated, one of the categories in which a fiduciary duty may arise on the part of the bank is to a person who has signed a guarantee in favour of the bank or a person who mortgages his or her asset to secure the debt of another.[50] English common law does not attribute importance to the question of whether the guarantor or the mortgagor is also a customer of the bank itself, or not. However, in Israeli law this question is of extreme importance.

46 Civil Appeal 6505/97 *Bonei Hatichon Ltd* v *Bank Hapoalim Ltd*, 53(1) PD 577, 592 (1999). Civil File (Tel Aviv) 26339/99 *Cohen Uzi* v *Bank Mizrahi* (not reported, 2002) at para. 6. Civil File (Tel Aviv) 2982/99 *Rehitei Nativ Co Ltd et al.* v *United Mizrahi Bank Ltd* (not reported, 2002) at para. 17.

47 In this matter, an application was filed for a class action: Civil File (Tel Aviv) 1133/02 *Meonot Ezrat Israel* v *Mercantile Discount Bank* (not reported, 2003).

48 I. Haviv-Segal, *Corporate Laws after the New Companies Law* (El-Tek: Tel Aviv, 2004) Vol. B, 139.

49 The test of proportionality was also adopted in Civil Appeal (Tel Aviv) 62294/96 *First International Bank of Israel* v *B.I.K. Imports and Marketing Ltd* (not reported, 1998) at para. 48.

50 See the text above, p. 31.

In a matter that concerns a guarantor who is also a customer of the bank, the deep-rooted rule whereby the bank owes a fiduciary duty to its customer will apply. On the other hand, in a matter that concerns a guarantor who is not a customer the situation is not clear. In Israeli case law we can find various expressions that, apparently, recognize the fiduciary duty to such a guarantor. But in most cases these expressions are done as general statements without detailed reasoning, and by relatively low courts.[51] In Israeli legal literature there is almost no reference to the subject.[52]

In the case of *Tefahot Mortgage Bank for Israel Ltd* v *Liepart*,[53] the Supreme Court ruled in a majority opinion that the guarantor (who is not a customer) does not receive any service from the bank. Such a guarantor, at the most, may have an interest in the provision of the service to the customer. Accordingly, it was determined that there is a basic difference between the customer and the guarantor: the customer needs the banking service and cannot receive it from any entity other than the bank. It was found that the consolidation of transactions by the banks gives them, with regard to their customers, a power that is similar to that held by monopolistic entities. It follows that there is a need to protect customers against the abuse of this tremendous power. The guarantor, on the other hand, is not forced to guarantee any obligation, including an obligation to a bank. And just as the guarantor is able to avoid contact with any creditor, so he or she is able to avoid contact with a creditor which happens to be a bank. The guarantor to a bank is not exposed to a claim by the bank, which is a creditor, any more than to a claim by any other creditor. Therefore, in any event, it is not necessary to provide him or her with special protection in his or her relations with the bank.[54]

Although this was the approach of the Israeli Supreme Court, the Israeli legislator rejected this approach and in a series of legislator amendments[55] adopted none other than the minority opinion in that case, whereby the guarantor is perceived as a type of customer and

51 *Bank Hapoalim Ltd* v *Rimon*, above n. 31 at para. 5. Opening Motion (Tel Aviv) 672/96 *Prioff* v *Bank Hapoalim Ltd* (not reported, 2000). Civil File (Jerusalem) 1790/88 *United Mizrahi Bank Ltd* v *Ziegler*, (1) PM 172, 175 (1992). Civil File (Jerusalem) 5272/03 *Iluz v Israel Discount Bank Ltd* (not reported, 2004), at para. 9, where the court discusses the fiduciary duty to the public in its entirety, but applies it to a guarantor. Opening Motion (Tel Aviv) 1086/01 *Cohen Judith* v *United Mizrahi Bank Ltd* (not reported, 2002) at para. 8. The same is true, to a certain extent, of Civil Appeal 6799/02 *Yulzari* v *United Mizrahi Bank Ltd*, 58(2) PD 145 (2003).

52 D. Pilpel, 'The Bank's Obligations to a Guarantor' (1994) 41 *Hapraklit* 414, 425. R. Ben-Oliel, *Banking Laws: A Guarantee in Favor of a Bank Corporation and the Pledge of Movable Assets and Securities* (Israeli Bar Association: Tel Aviv, 2002) 45.

53 Civil Appeal 1304/91, 47(3) PD 309 (1993).

54 *Ibid.*, at 333.

55 The addition of s. 17A of The Banking (Service to Customers) Law 1981. The amendments in Chapter B of the Guarantee Law 1967.

therefore does require protection from the bank which is no less than the protection required by the customer itself. The following can be included among the reasons for this approach: the quasi-monopolistic power of the banks; the need to protect the entire general public which comes into contact with the banking system; the socio-economic importance of the guarantee contract; the complexity of the guarantee contract; and the gap between the bank and the guarantor.[56]

The judicial rhetoric of the dissenting opinion reflects, in effect, the various justifications for the fiduciary duty. It would appear that the bank–guarantor relationship meets the various justifications that we presented above.[57] With regard to the theory of trust and reliance, the guarantor does indeed place his or her trust in the bank and relies on the bank's advice when he or she comes to sign the letter of guarantee. The proof of this lies in the fact that many guarantors do not even seek additional advice prior to their signing the letter of guarantee, and they make do with the bank clerk's explanations. Guarantors tend to place special trust in the bank. On many occasions, they rely on its advice and they sign the letter of guarantee without conducting any further examination. The guarantor expects the bank to act with a high standard of professionalism and enhanced responsibility. This is somewhat different from a guarantee that is given to another creditor, such as a lender in the grey market; in this case, the guarantor relies on the integrity and credibility of the bank. The theory of control also exists, but to a lesser degree. The bank does not control the assets of the guarantor, but it does control the information which the guarantor submitted to the bank. As is well known, before the bank is prepared to agree to rely on a certain guarantee as a security, it demands a large amount of information, primarily, but not solely, of a financial nature, about the guarantor. The theory of inequality in the bargaining power between the parties most certainly exists in the bank–guarantor relationship.[58] And finally, the way that the bank is treated as a quasi-public body imposes the fiduciary duty on the bank with regard to anyone who comes into contact with it, including guarantors. In conclusion, it would appear that the bank's fiduciary duty should be extended to apply also to guarantors.

Discussing the fiduciary duty towards the guarantor, we are obliged to treat a special type of guarantor—a person who mortgages his or her asset to secure a customer's debt to the bank. Section 12 of

56 *Tefahot Mortgage Bank for Israel Ltd* v *Liepart*, above n. 53 at 320–5. See also *United Mizrahi Bank Ltd* v *Ziegler*, above n. 31 at 383–5, 392.
57 In section III.
58 Pilpel, above n. 52 at 425.

the Israeli Pledge Law 1967 determines that: 'He shall be deemed the same as a person who guaranteed the said obligation, however, the bank shall not be repaid by him other than through the redemption of the pledge'.[59] It is widely believed that the provision of s. 12 of the Pledge Law applies the guarantee laws to the relationship between the mortgagor and the creditor, with the aim of providing the mortgagor with protection from those acts of the creditor which could harm him or her.[60]

Ostensibly, there would not appear to be any need to provide the mortgagor with the same degree of protection that is given to a 'regular' guarantor, because, according to s. 12, Pledge Law 1967 in any event the bank may not seize all of his or her assets, but can only redeem the pledge on the pledged asset. The mortgagor's subordination to the bank is concrete/real subordination only, which is restricted to the asset used as the pledge.[61] The risk to which the mortgagor is exposed is known to the mortgagor in advance, and it is not a risk of exposure to liability in an unlimited amount which he or she had not imagined when signing the pledge. Therefore, apparently, the mortgagor has a better status with the bank than that of a 'regular' guarantor. On the other hand, the relationship between the bank and the mortgagor is more complex than that with a 'regular' guarantor. Besides the guarantee contract, another contract is created between the bank and the mortgagor—a pledge contract. According to the Israeli approach, the pledge contract, like the guarantee contract, is a mutual contract which also imposes obligations on the bank to the mortgagor, and not just the other way round.[62] The pledge and the guarantee are two legal tools with a considerable number of similar traits. The risk inherent in the pledge, pursuant to s. 12 of the Pledge Law 1967, even if it is less than the risk entailed in a 'regular' guarantee, is a genuine risk, and the reasons underlying the protection of the guarantor also apply to the mortgagor. In light of this, we believe that just as it is necessary to recognize the fiduciary duty to the 'regular'

59 For an analysis of s. 12, see J. Weissman, *The Pledge Law 1967* (Sacher Institute: Jerusalem, 1975) 246.

60 *Ibid.*, at 249. Civil Appeal 664/89 *Bariah* v *Bank Otsar Hahayal Ltd*, 45(4) PD 783, 788–9 (1991); Opening Motion (Jerusalem) 684/97 *Ogli* v *Aviv Shani Economic Services Co Ltd*, 2002 (2) PM 449, at para. 29 (2003). Ben-Oliel, above n. 52 at 107–8, 111. However, not all the protections available to the 'regular' guarantor will also be available to the mortgagor. As a case in point, we can present the protections listed in the amendments to the Guarantee Law, in respect of which not everyone agrees whether and to what extent they shall apply to the mortgagor. See Plato-Shinar, above n. 44 at 569, and the sources referred to there.

61 Weissman, above n. 59 at 250. Civil Appeal 6899/97 *Feiboshitz* v *Bank Leumi LeIsrael*, Takdin Supreme Court Judgments 2002 (3) 731, at paras 19–20 (2002). *Bariah* v *Bank Otsar Hahayal Ltd*, above n. 60 at 788–9. Civil Appeal 706/74 *Yaroni* v *Jerusalem Loans and Savings*, 29(2) PD 365, 371–2 (1975).

62 Ben-Oliel, above n. 52 at 108, 112.

guarantor, so it is also necessary to recognize the fiduciary duty to the mortgagor.[63]

V. The Bank's Fiduciary Duty as a Basic Theory Applied in Favour of the General Public

In Israeli case law and particularly in the Israeli legal literature the beginnings of a new approach may be seen, whereby a fiduciary duty should be imposed on the bank to a broad range of entities. The advocates of this approach explain that the bank has a special and respected status in the world of commerce, and among the duties that it performs it also conducts various transactions between its customers and other parties. For this reason, it was proposed that an enhanced fiduciary duty to third parties be imposed when the bank is aware or should be aware that these parties may be affected by its conduct.[64] By virtue of the recognition of the bank as a quasi-public body, it was proposed that the fiduciary duty be extended to all those persons who come into contact with it.[65] Some people are even proposing that the bank's fiduciary duty be applied to the general public as a whole.[66] It was explained that 'The existence of a general contract with the public expands the circle of those eligible to trust the bank, to the entire general public. The existence of such a contract imposes fiduciary duties on the banks to the public, without a direct connection to the particular service that is being provided or to the concrete circumstances surrounding the customer in his activity at the bank. It may be said that the general contract creates a starting threshold of fiduciary duties to the general public as a whole, which will be further intensified if the special circumstances so require.' In other words, the bank is perceived as 'a social agency'.[67] According to this approach, the imposition of the fiduciary duty to the general public as a whole

63 This was also ruled in *Cohen Judith* v *United Mizrahi Bank Ltd*, above n. 51 at para. 8.

64 Weinroth and Medina, above n. 31 at 26. A. Kerner, *Real-Estate Financing* (Israeli Bar Association: Tel Aviv, 2005) 108–9. *Prioff* v *Bank Hapoalim Ltd*, above n. 51. A. Weinroth and B. Adelstein, 'The Responsibility of a Financing Bank to the Purchasers of Apartments and the Owners of Land' (2005) 48 *Hapraklit* 68, 93, 98.

65 *Bank Hapoalim Ltd* v *Rimon*, above n. 31 at para. 5. *Stiller* v *Bank Leumi LeIsrael Ltd*, above n. 31 at para. 43. Civil File (Tel Aviv) 67077/97 *Sapir* v *Regavim Wholesale Marketing Ltd* (not reported, 2001) at para. 27.

66 Application for Civil Appeal 9374/04 *A & G Advanced Systems for Driving Instructors Ltd* v *Bank Leumi LeIsrael* (not reported, 2004) at para. 6(b). Civil File (Beit Shean) 275/92 *United Mizrahi Bank* v *Levi*, 2000 (3) PM 155, 167 (2000). Civil Appeal (Tel Aviv) 1655/97 *Lanir (Y.L.) Trade Ltd* v *The First International Bank of Israel* (not reported, 1999), at para. 2. *Yaakobi* v *Israel Discount Bank Ltd*, above n. 31 at para 3. *Iluz* v *Israel Discount Bank Ltd*, above n. 51 at para. 9. Civil File (Tel Aviv) 16318/96 *Hazan* v *Shimshon Insurance Co Ltd* (not reported, 1998) at para. 2.

67 Rubinstein and Okon, above n. 6 at 826, 828. *Iluz* v *Israel Discount Bank Ltd*, above n. 51 at paras 9, 13.

could lead to the imposition of general obligations which are not expressed only at the level of relations with a particular person. A fiduciary duty to the general public may be binding on the bank at the time of determining general policy, such as the bank's financial reporting policy or its investment policy, and may even impose on the bank responsibility for the financing of transactions that are detrimental to the public, for example in the field of environmental quality.[68]

Our opinion in this matter is different. We explained above[69] that the bank's fiduciary duty is based on four justifications. Three of them are theoretical; the fourth reflects legal policy. When we are concerned with a fiduciary duty to the general public as a whole, the three theoretical justifications do not exist. With regard to the theory of trust and reliance, indeed, we described above the trust which the public as a whole places in the banking system. However, reliance on the bank is done on a personal basis—personal reliance by those individuals who make up the general public. In other words, while it is true that many people from among the public place their trust in the bank, this still does not turn their personal reliance into collective reliance by the general public as a whole. The trust placed by the public in the banks is, in effect, a general, public expectation which does not justify a normative expression in the form of the imposition of a fiduciary duty to the general public as a whole. The same is true for the theory of control: the bank's control over its customers' money and property is not collective control over assets which are jointly owned by the general public as a whole, but individual control over the assets and interests of each individual separately. Furthermore, the said control does not even exist with regard to all of the individuals who make up the general public, but only with regard to certain individuals, and this necessitates an examination on a concrete and individual basis. With regard to the theory of inequality in bargaining power, if we compare the bargaining power of the general public as a whole with the bargaining power of the bank, it would appear that the bank's power is equal to that of the public, or perhaps is even weaker. The only justification which can support the imposition on the bank of the fiduciary duty to the general public as a whole is the justification based on considerations of policy—the recognition of the banks as a quasi-public body. Whether the banks do indeed constitute a quasi-public body is beyond the scope of this article. However, even if we assume that this is their status, we do not believe that this justification should impose on them a fiduciary duty to the general public. The imposition of a fiduciary duty to the general public as a whole is not consistent with the very nature of the duty itself.

68 Rubinstein and Okon, above n. 6 at 832.
69 In section III.

The fiduciary duty is a personal obligation, by nature,[70] that should be directed at a particular beneficiary (or group of particular beneficiaries) rather than being an obligation *erga omnes*.

As stated, the fiduciary duty determines an extremely high standard of conduct, pursuant to which the bank is required to prefer the interest of the beneficiary to its own self-interest. The requirement for altruistic conduct such as this is consistent with a relationship in which the relation between the parties is a personal one which creates a certain proximity between them. Furthermore, in many cases, the 'public' has conflicting interests, given that it is made up of many different kinds of individuals and groups. It would be difficult to envisage how the fiduciary duty would be applied in such cases. The difficult problem of the conflict of interests might also arise when the bank owes a fiduciary duty to various customers with conflicting interests. As a consequence of this conflict of interests, the bank may be prevented from providing the requested service. If we impose a fiduciary duty to the general public as a whole, including its various groups with conflicting interests, the problem of a conflict of interests will be expanded to such an extent that the bank, with its hands tied behind its back, will be unable to act.

We explained above that the fiduciary duty is based on a certain factual basis, with special circumstances that justify demanding such a high standard of conduct of the fiduciary, namely, preferring the interest of the other to its own. When we are concerned with the general public as a whole, no such factual system exists. Indeed, we described above the trust which the public as a whole places in the banking system. However, reliance on the bank is done on a personal basis, that is, personal reliance by those individuals who make up the general public. In other words, while it is true that many people from among the public place their trust in the bank, this still does not turn their personal reliance into collective reliance by the general public as a whole. The trust placed by the public in the banks is, in effect, a general, public expectation which does not justify a normative expression in the form of the imposition of a fiduciary duty to the general public as a whole.

The banks do indeed constitute a deep pocket, which is able to absorb high costs by itself, or to distribute financial damage among all its customers by raising interest rates or commission rates.[71] This policy, however, must be examined in any issue, on its own merits. There is no doubt as to the importance of the stability of the banking system, which constitutes one of the most important layers of the economy in general, and of the Israeli economy in particular. Just as it is in the public interest for supervision and obligations of fairness to

70 Ben-Oliel, above n. 20 at 100, also talks about 'the legal personal relation based on trust'.

71 With regard to this policy, see, for example, Weinroth and Medina, above n. 64 at 81, 101. Kerner, above n. 64 at 64 *et seq*.

be imposed on the bank's activities, so it is in the public interest that these obligations do not exceed the appropriate degree.[72] When determining the limits of the obligations, it is necessary to take into account the practical difficulties likely to accompany an obligation that is too broad, with which the banks would not be able to comply. The imposition of a fiduciary duty on the bank to the general public as a whole may definitely change the bank's work routine and impose on the bank additional burdens at the practical level, the most obvious example of this being the abstention from action due to a prohibition of conflict of interests, as explained above.

Indeed, it would be appropriate to impose on the bank various obligations to various entities who come into contact with it, and possibly also to the general public as a whole, such as the duty of good faith, the duty of enhanced disclosure, the duty of enhanced care, and perhaps even certain obligations from the realm of public law, by virtue of the bank's nature as a quasi-public body—but not the fiduciary duty.

In conclusion, in our opinion, a fiduciary duty to the general public as a whole should not be imposed on the bank.

VI. Ability to Make Stipulations in Respect of the Bank's Fiduciary Duty

After explaining the exact nature of the bank's fiduciary duty and examining its scope as to different beneficiaries, the question arises: is the bank's fiduciary duty a *jus cogens*? Israeli law makes some references to this issue. The Agency Law 1965, which applies to the bank with regard to those activities in which the bank acts as the agent of a customer, enables the principal (the customer) to waive certain aspects of the fiduciary duty to it.[73] The same attitude is found in the Investment Advice Law 1995, which applies when the bank provides investment consulting.[74] But except in these two areas, Israeli law makes no reference to the question of the ability to waive the bank's fiduciary duty.

It seems that the nature and character of the fiduciary duty itself should debar the making of stipulations. The very heart of the fiduciary duty is the protection of the interests of the other, even at the

72 *Tefahot Mortgage Bank for Israel Ltd* v *Liepart*, above n. 53 at 328, 334. Opening Motion (Jerusalem) 627/01 *Chelanov* v *Bank Leumi Mortgage Bank*, Takdin Supreme Court Judgments 2003 (2) 13431, at paras 27, 35 (2003).

73 Such as the prohibition that applies to the bank from making a transaction with itself; the prohibition on being an agent for a number of customers at the same time; the prohibition on receiving a benefit; or the prohibition with regard to a conflict of interests, etc. See s. 8 of the Agency Law 1965.

74 Such as the prohibition of conflict of interests (s. 15); the prohibition of preferring certain securities or financial assets in which the licensee has an interest (s. 16); the prohibition on receiving a benefit from a third party (s. 17); and the duty of confidentiality (s. 19).

price of harming one's own interests. Making stipulations in respect of the bank's fiduciary duty clearly is done to serve the bank's own interests and therefore constitutes a breach of the duty *per se*. Furthermore, we have seen that the bank's fiduciary duty imposes on the bank a standard of conduct higher than the duty of good faith. As is well known, the duty of good faith is a *jus cogens* in respect of which stipulations may not be made.[75] In keeping with the rule of *a minori ad majus*, the same determination must therefore be made with regard to the bank's fiduciary duty.

Moreover, all three of the theoretical justifications for the acknowledgement of the bank's fiduciary duty lead to the conclusion that the bank should not be allowed to make stipulations in respect thereof. According to the theory of inequality in bargaining power between the parties, the goal of the fiduciary duty is to protect the customer as the weaker party. This consideration makes essential a compelling intervention. Only in this way will it be possible to prevent the bank from abusing the relative weakness of the customer by making him or her sign a waiver in respect of the fiduciary duty.[76] This conclusion arises also from the theory of control. According to this theory, the rationale of the fiduciary duty is to curb the bank's control over the interests of the customer, in particular where there is a great temptation to take advantage of such control. Such a situation may occur when the customer is asked to sign the bank's forms, including a waiver in respect of the fiduciary duty. And as to the third theoretical justification, that of trust and reliance, since the customer places his or her trust and confidence in the bank and relies on it, often almost blindly, he or she becomes vulnerable and dependent on the bank's advice. The fiduciary duty as the principal means of protecting the customer's legitimate expectations of a particularly high standard of conduct on the part of the bank clearly establishes the fiduciary duty as *jus cogens*.

Nevertheless, the conclusion that the fiduciary duty is *jus cogens* is not an absolute conclusion. We believe that in certain cases it should be permissible to make stipulations in respect of this duty. Since it is such a stringent duty, requiring an extremely high level of altruistic behaviour, it is necessary to be wary of applying it in an extreme or excessive manner. Due caution must be taken against a too-strict implementation of the duty. An efficient means of softening this implementation is by recognizing the ability to make stipulations in respect of the duty in certain cases.

Against the rule of *a minori ad majus* mentioned above, we can argue that precisely because the fiduciary duty is more stringent than the duty of good faith, its classification as a *jus cogens* constitutes a severe blow to the freedom of contracts and has a stronger negative

75 Bookspan, above n. 1 at 24. Friedman and Cohen, above n. 29 at 552.
76 Friedman and Cohen, *ibid.* at 128.

effect on the mechanisms of the market. In general, in certain circumstances, it is possible that making stipulations in respect of the bank's fiduciary duty will not contradict the theoretical justifications underlying the basis of the fiduciary duty. There may be certain cases in which the customer's consent to waive a particular component of the bank's fiduciary duty arises from free will and a genuine intent, based on knowledge of all the relevant data. Under such circumstances, the inequality between the parties is removed and there is no practical significance to the characteristics of the bank's control or of the customer's dependence. As a consequence, the making of stipulations in respect of the bank's fiduciary duty actually works in favour of the customer and is conducive to the genuine achievement of the customer's own personal interests. In light of this, we believe that the making of certain stipulations in respect of the bank's fiduciary duty should be permitted, subject to three limitations. First, the waiver should be permitted only in respect of certain aspects of the bank's fiduciary duty, as distinct from a blanket exemption from the duty as a whole.[77] Second, a breach of the bank's fiduciary duty with malicious intent should not be permitted. Third, the stipulation should be made in advance, in writing, and care must be taken to ascertain that the customer has received all the relevant details and has understood the stipulation and what it implies.

VII. Conclusion

In this article we have reviewed the special characteristics of the bank's fiduciary duty pursuant to Israeli law, in order to explain the process of its widening from a narrowly applied obligation to a basic theory in Israeli banking law.

The process of the widening of the fiduciary duty has been made gradually, in three different plateaus: (a) by interpreting the meaning of the duty severely, giving it a wide content and including in it strict subordinate obligations; (b) in acknowledging a vast range of beneficiaries, other than the customers, who are entitled to the duty; (c) in awarding a vast range of remedies in case of a breach of the duty.

The Israeli courts, which were forced to contend with the obscurity of the fiduciary duty and to offer tools and typical situations for the application thereof, formulated a theory of banking law, while observing the consistency of the realization of the concept of trust and loyalty. Thus, in Israel, a banking concept of fiduciary has developed which has a crucial role in the shaping and implementation of a new banking standard of conduct, and which has a significant effect on the stability, quality and efficiency of the banking culture.

77 This is also the opinion of Ben-Oliel, above n. 20 at 106.