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The Supreme Court sitting as a Court of Appeals in Administrative Affairs

AAA 2978/13

Before: The Honorable Deputy President E. Rubinstein
The Honorable Justice H. Melcer
The Honorable Justice N. Hendel

The Appellant: Mei Hagalil – The Regional Sewage and Water Corporation Ltd.

v e r s u s

The Respondent: Yousef Ahmad Younis

Appeal on the judgment of the Haifa Administrative Affairs Court (Judge A. Keasry) dated February 19, 2013 in AP 054114-07-12

Date of Session: 29th of Adar B, 5774 (March 31, 2014)
Completion of Supplemental Court Documents: (November 26, 2014)

On behalf of the Appellant: Adv. Eli Elias

On behalf of the Respondent: Adv. Nasaar Saber

On behalf of the Attorney General: Adv. Yoav Shacham

J U D G M E N T

Deputy President E. Rubinstein:

1. Are a class action plaintiff and his attorney who are intending to file a class action against an administrative authority obligated to apply to the authority prior to filing the class action? If so – in what manner and under what circumstances would the absence of such an application be reflected in the class action proceeding, especially with regard to awarding remuneration and legal fees for the class action plaintiff and his attorney? Furthermore, if a motion to certify a class action was denied due to the authority ceasing the allegedly illegal collection – can remuneration and legal fees be awarded in accordance with the "percentage method" which prescribes that these amounts are derived as a percentage of the relief that was ruled for the benefit of the group? These are the general questions that emerge in the circumstances of this case, beyond the concrete matter of the amounts of the remuneration and the legal fees that were awarded to the Respondent and his attorney, with respect to which this appeal was filed. In addressing these questions, we must adopt a broad perspective and weigh a number of considerations, *inter alia*, the nature and objectives of the class action, which are expressed in the Class Action Law, 5766-2006; the preservation of the set of incentives that encourage the filing of appropriate class actions; the fulfillment of the procedural obligations that are imposed upon both the class action plaintiff and his attorney to properly, loyally and in a *bona fide* manner represent the interests of the members of the group with the objective of

attaining their best interest; efficiency considerations, particularly saving judicial time and resources of the members of the represented group as well as of the entire public – particularly in the case of a defendant that is an authority; as well as considerations which stem from administrative law, including the basic obligation imposed upon an individual to exhaust proceedings vis-à-vis an authority prior to applying to the courts. The opposing considerations, in the broad context, are that exhausting proceedings vis-à-vis an authority could, on the one hand, eliminate the need for the class action, if and to the extent the authority shall amend its ways by ceasing the collection, if necessary – however, on the other hand, the expenses incurred in preparing the action or the prior application could be left uncompensated. Which path shall the court choose to follow?

Before us is an appeal on the judgment of the Haifa District Court (Judge **A. Keisary**), AP 54114-07-12, dated February 19, 2013, in the framework of which the Respondent's motion to certify his claim against the Appellant as a class action was denied while awarding remuneration to the Respondent (NIS 10,000) and of legal fees to his attorney (NIS 80,000). At the core of the dispute is the Appellant's argument that the court of first instance erred in awarding these amounts, *inter alia*, since the Respondent and his attorney did not apply to the Appellant prior to filing the action and the motion for certification. According to the Appellant this conduct denied the Respondent and his attorney the right to receive remuneration and legal fees, and at the least, the court of first instance should have awarded amounts that are significantly lower than those that it actually awarded. The Appellant is further of the opinion that the court erred when calculating these amounts using the percentage method, given that no relief was actually ruled for the benefit of the group since the Appellant ceased the activity for which the action had been filed.

Background and Previous Proceedings

2. The Appellant is a water corporation – a statutory corporation that was established pursuant to Part A of Chapter B of the Sewage and Water Corporations Law, 5761-2001 – and is responsible for supplying sewage and water services to seven local authorities in the north of the country, including the Arraba Local Council. On July 29, 2012, the Respondent, a resident of Arraba who owns 6 water meters that are installed at various assets that he owns, filed a motion to certify a class action against the Appellant, claiming that it collected excessive interest for payments that were paid thereto pursuant to an arrangement that is prescribed in Section 32(b) of the Water and Sewage (Criteria for Provisions Regarding the Level, Nature and Quality of the Services the Company Must Provide its Consumers) Rules, 5771-2011. It is argued that the Appellant added interest to these payments at the "**Accountant General's Delay Interest**" rate, while Section 32(b) instructs to add the "**Accountant General's Interest**" which is lower than the rate of the delay interest). This was in addition to payments that were not regulated in the payments arrangement (as stated in Rule 31) at all. The amount of the personal action was set at 3.42 shekels and the total amount – at approximately one million shekels; it shall be further noted – and we shall revisit this point further on – that the motion to certify the action was filed both pursuant to Item 1 of the First Addendum of the Class Action Law, as an action against a "business" in a matter between it and a consumer and in reliance upon Item 11 of the Addendum, as an action against an authority for the restitution of amounts that were collected unlawfully. On October 28, 2012, the Appellant filed a notice of

cessation of collection in accordance with Section 9(b) of the Class Action Law, in which it was argued that due to a mistake that originated from an external company that provides collection services, an interest rate that does not comply with the payments arrangement prescribed in Section 32(b) was indeed collected from consumers and that following examination of the matter the Appellant ceased the excessive collection. It was further argued that there is no basis to file the motion pursuant to Item 1 of the Addendum, since the Appellant operates in the instant circumstance as an "authority" and not as a "business"; and finally, that remuneration and legal fees should not be awarded to the representative plaintiff and his attorney since they did not apply to the Appellant prior to filing their motion.

3. In his response to the notice of cessation of collection, the Respondent argued that although the Appellant indeed constitutes a public authority, in the circumstances of the matter of hand it operated as a business – since it is incorporated as a limited liability company that collects value added tax on prices that consumers pay and the essence of its activity is the business sale of water services. It was further argued that prescribing that a class action plaintiff is required to make a prior application to an authority is contrary to the underlying rationale of the class action proceeding; that its absence does not constitute a relevant consideration in the class action proceeding, both when the court examines whether to accept a motion to certify a class action and with respect to awarding remuneration and legal fees to the class action plaintiff and his attorney; and that in similar cases where a notice of cessation of collection was also filed, remuneration and legal fee amounts were awarded in amounts that were significantly higher than those awarded by the court of first instance. In the Appellant's response to the Respondent's response it argued that the Respondent's attorney is a "serial plaintiff" who has filed at least 8 different motions for certification of class actions against water and sewage corporations and that he intentionally refrained from making a prior application which may have eliminated the need to file the action. It was argued in this matter that had the Respondent first applied to the Appellant, there would not have been a concern that it would remove his individual claim in a manner that would deny him a personal cause of action and eliminate his status as a class action plaintiff, since as an administrative authority that operates pursuant to the law it is obligated to operate in a manner that treats all of the group members equally and the result would have also been applied to them; this is especially the case when the excessive collection stemmed from an honest mistake. It was argued with respect to the matter of the remuneration and the legal fees that the amounts that were awarded harm the corporation's purse, and this means harming the public purse and the public interest; that in the instant circumstances few resources were needed to prepare the action and the motion for certification; and that the notice of cessation of collection ended the proceedings and led to significant savings in resources and judicial time. In the supplemental arguments that the Respondent filed – which were permitted pursuant to the decision of the court of first instance dated December 31, 2012 – it was argued, based on AAA 6687/11 **The State of Israel v. Abutbul** (2012) (hereinafter: the "**Abutbul** Case"), that in the framework of the considerations relating to the benefit brought to the members of the represented group by filing the action, the future savings that derive from the authority ceasing to collect should be taken into consideration. It was argued that if these savings amounts shall derive from the benefit relating to the past, class action plaintiffs and their attorneys shall be incentivized to wait until the collection amounts rise to large amounts and that this is contrary to the purposes of the Class Action Law, primarily – law

enforcement; therefore, the amounts should be calculated as a percentage of the future savings achieved as a result of the cessation of collection over a period of 24 months. Finally it was argued that the Appellant's statements regarding the harm to the public purse are unbefitting given that it is the one that violated the law prior to the action being filed; that the authority must first itself abide by the law before demanding that class action plaintiffs make a prior application thereto; and that there is no relevance to the fact that the Respondent's attorney filed a number of class actions against water corporations. For the sake of portraying a complete picture it shall be stated that the Appellant's motion to file a response to the supplemental arguments was denied in a decision dated January 6, 2013.

The District Court's Judgment

4. In its judgment, the court of first instance accepted the notice of cessation of collection and denied the motion for certification while awarding remuneration and legal fees in the amounts specified above. It was ruled, that the absence of a prior application does not in and of itself deny entitlement to remuneration and legal fees and that the relevant circumstances must be examined in each case on their merits, both with respect to awarding remuneration and legal fees and with respect to whether and to what extent the absence of an application may impact the prospects of the motion to certify the action. It was noted thereafter that it is indeed difficult to extract a uniform principle from case-law regarding the amounts of the remuneration and legal fees which should be awarded in a case such as this, however the judgment in the **Abutbul** Case, in which the court approved remuneration and legal fees amounts that were awarded as a percentage of the future benefit to the members of the group incorporated in the prevention of the illegal collection from such time forward, must be considered. In reliance thereupon, the court of first instance awarded remuneration and legal fees based on percentages of the estimated future benefit due to the Appellant's cessation of collection; this saving was estimated to be NIS 1,000,000 (according to the Respondent's estimation); and 8% thereof – as mentioned, NIS 80,000 – were awarded to the Respondent's representative, and 10,000 (1%) to the Respondent himself. The court stated in summary that among all of its considerations, it took into account the degree of caution that should be applied with respect to public funds.

The Appeal

5. It was first argued that it is necessary to distinguish between the Appellant ceasing to collect interest at a rate that exceeds that which is permitted by law in the framework of a payments arrangement that the Appellant is **permitted** to apply with respect to those it defines as "payment refusers" and the cessation of collection that relates to illegal mandatory payments which affect the entire consumer public. According to this argument, if and to extent at issue is an optional payments arrangement which is subject to the Appellant's discretion, the notice of cessation of collection shall not necessarily result in those future savings which the Respondent stated in his claim based on the assumption that the scope of the savings shall be identical during the next 24 months. It was additionally argued that when the members of the represented group are not normative consumers, decisive weight should be attributed to protecting the public purse and to avoiding rolling over the costs onto normative consumers who do not benefit from the Appellant's cessation of

collection. In this context, the Appellant refers to a case in which, so it was argued, the court refrained from awarding remuneration and legal fees, *inter alia*, since the motion for certification was filed against the interest rate that was imposed with respect to tax payments which were not paid by the class action plaintiff and the members of the group who were defined as "tax refusers", who harm the public purse. It was further argued that awarding remuneration and legal fees as a percentage of the future savings in circumstances in which a notice of cessation of collection was delivered is contrary to that stated in C.A 2046/10 **Shemesh v. Reichart** (2012) (hereinafter: the "**Reichart** Rule"), pursuant to which when applying the percentage method, the legal fees shall be calculated as a percentage of a concrete amount that was ruled in a judgment or settlement, rather than of potential collection or damage. It was further argued that the obligation to make a prior application before filing an action primarily derives from the duty to act *bona fide* that is imposed upon the class action plaintiff while conducting a proceeding, an obligation that is enhanced when the action is filed against an authority, and that the fact that such an application was not made should be held against the Respondent and his attorney. It was finally argued that the amounts that were awarded in the case at hand are significantly higher than what is customary in similar cases, some of which even had a cause of action identical to that which underlies the Respondent's claim.

The Respondent's Response

6. It was argued in the Respondent's response that the consumer public in the class action should not be defined as "payment refusers" since the payments arrangement was meant for consumers who pay high water and sewage tolls and who are forced to pay the water bill in payment installments; and that in any event payments for water services do not constitute a "tax" but rather a "price" and therefore their situation is not similar to that of "tax refusers". The Respondent also argues that the prior application issue was already addressed and ruled upon in the past in CA 10262/05 **Aviv Legal Services Ltd. v. Bank Hapoalim B.M.** (2008) (hereinafter: the "**Aviv Services** Case") which held that a prior application is not a *sine qua non* for the certification of an action as a class action. The Respondent further argues that an obligation to make a prior application is contrary to the economic rationale underlying the class action institution and according to him this can be inferred from the fact that it is not included in the language of the Class Action Law, as opposed to the two significant protections from which the authority benefits: the option of ceasing collection which leads to the denial of the motion for certification, which is prescribed in Section 9(b), and the limitation of the restitution relief to the period of the 24 months preceding the filing of the motion, as provided in Section 21. It was further argued that identifying an authority's failures prior to applying thereto occasionally involves a thorough examination of the factual and legal background; and that in most cases when a prior application shall be made, the potential defendant will choose to eliminate the class action plaintiff's individual claim, thus eliminating his personal cause and preventing him from filing a class action and this will lead to prejudicing the existing incentive to prepare and file class actions. It was further argued that it is not customary for the appeal instance to interfere in the procedural instance's rulings on expenses even if it is of the opinion that the amounts that were awarded are at the top end of the scale. The Respondent further posits that the Appellant's arguments regarding protecting the public purse are irrelevant since in the matter at hand it operates as a business and that in any event this consideration should not be taken into

account given that the Appellant collected significant amounts unlawfully and given the protections that are already granted to the authority in the form of the option of ceasing to collect and the limitation on the restitution relief. It was finally argued that the amount of remuneration that was awarded is at the bottom end of the scale, particularly in light of the fact that it includes the Respondent's expenses for ordering an expert opinion.

The Discussion

7. In the hearing before us on March 31, 2014, the Appellant's attorney argued that the resources that are necessary to identify and discover a cause of action based upon which it will be possible to make a prior application are significantly lower than the investment that is involved in preparing a claim and filing a motion for its certification as a class action. It was further argued that in the majority of cases when a prior application shall be made, the defendant, particularly an administrative authority, shall strive to provide a solution to all of the members of the group; furthermore, even if the absence of a prior application does not justify absolute elimination of the right to receive remuneration and legal fees, when determining such amounts, the court must examine, among its other considerations, whether the class action plaintiff gave the defendant an opportunity to resolve the dispute other than in a legal proceeding. The Respondent's attorney reiterated his argument that there is no obligation in the language of the law to make such a prior application and that it was ruled in the aforementioned **Aviv Services** Case that in light of the class action's purposes, the absence of such an application does not necessarily indicate *male fide*. As to the amounts that were awarded, he argued that in the circumstances of the case at hand, an accounting opinion was required in order to make a prior application and that had the Respondent applied to the Appellant and it had ceased collection at that stage, he would not have received remuneration and his investment would have been in vain. At the end of the hearing, we asked for the Attorney General's opinion regarding the necessity of applying to an administrative authority prior to filing an action and a motion to certify it as a class action.

The Attorney General's Position (September 15, 2014)

The Prior Application Issue

8. The Attorney General first reviews the district courts' rulings while presenting a number of approaches: **According to the first approach** – A prior application should not be required and the absence thereof should not deny awarding remuneration and legal fees or lead to the denial of a motion to certify a class action; this is based on the reasoning that the legislator did not include such an obligation in the Class Action Law and that it is also contrary to its objectives (see: Civil Claim (Tel Aviv) 2286/03 **Turbatian v. Henkel Soad Ltd.**, Judge N. Ahituv's judgment (2007)). **According to the second approach –** The court must take the absence of a prior application into consideration in circumstances in which it is convinced that the defendant would have demonstrated willingness to accede to the demands of the entire group and not only to the representative plaintiff's personal claim, as well as in cases in which in the instant circumstances the best interest of the group requires such an application, and particularly when the defendant is an authority (see Class Action (Administrative Nazareth) 24252-07-12 **Ganadi v. The Nazareth Illit Municipality**,

Judge N. Zimering-Mounitz' judgment (2013)). **According to the third approach** – which is the prevalent one – principle rules should not be prescribed in the matter but rather the various considerations should be balanced in accordance with the concrete circumstances of each specific case. For example, a prior application could eliminate the need for legal proceedings – if the plaintiff shall discover that his claim is unfounded – or could clarify the disputed issues, in which events the absence of a prior application could lead to denying remuneration and legal fees or at least reducing their amounts; on the other hand, at times an application will not be useful – for example, if there are significant differences between the parties' positions or if the parties do not trust each other (see Administrative Action (Haifa) 25857-06-12 **Sa'ar v. The Nahariya Municipality**, Deputy President I. Grill's judgment (2013)). The Attorney General refers to two central judgments which support a prior application– LabA (National) 12842-07-10 **Eyal v. Hot** (2011) (hereinafter: the "**Eyal** Case") and Class Action (District-Central) 36086-07-11 **Harsat v. Yediot Achronot** (2012) (hereinafter: the "**Harsat** Case")). In the **Eyal** Case, the court ruled that there is an obligation to make a prior application based on the obligation imposed on both of the parties of the action to conduct themselves properly and fairly towards each other, towards the represented group and towards the court, and particularly based on the obligations to represent the group loyally and in a *bona fide* manner which are imposed upon the class action plaintiff and his attorney. It was further stated there that a prior application creates an opportunity to right the wrong without needing a legal proceeding and that even if the application shall not receive an affirmative response, it could contribute to making the hearing more efficient (we shall note that a petition was filed against this judgment – HCJ 5183/11 **Eyal v. The National Labor Court** (2011) – and it was denied without the merits of the National Labor Court's judgment being discussed). The **Harsat** Case held that the court must in each case examine whether a prior application could have served the best interest of the group and particularly whether the defendant would have sufficed with providing a specific solution to the representative plaintiff; that the class action tool should be designated only for situations in which it is not possible to resolve the dispute using more efficient ways; that only on rare occasions will the absence of a prior application lead to denying the motion for certification of an action, and that the implications – if any – of not making a prior application – shall be determined as per the circumstances of each case (an appeal was also filed on this judgment – CA 8290/12 Duanis v. Yediot Achronot *et al*. – which was denied with respect to most of the respondents, in the framework of settlement agreements that were validated as judgments. The matter of the other respondents is pending). It thus appears that the prevalent approach in the district courts is not to determine one rule on the matter but rather to examine the circumstances of each case, and primarily whether the defendant would have provided a solution only to the class action plaintiff and not to the entire group and whether the application would have eliminated the need for the proceeding; for the sake of portraying a complete picture it shall be noted that the question of the obligation to make a prior application to an authority was brought before this court in AAA 7206/12 **Levy v. The State of Israel** (2014), however the court accepted the appeal without addressing this question while stating that it is being addressed in the framework of this proceeding. It was noted that it has been emphasized in many judgments that the filing of a class action without making a prior application, solely due to the desire to receive remuneration and legal fees, is contrary to the obligations imposed upon the representative plaintiff and that while – as a rule – the absence of such an application will not lead to an *in limine* dismissal of the motion for

certification, it could bear not inconsequential weight when awarding remuneration and legal fees. Finally it was noted that the absence of an application shall be particularly taken under consideration in the framework of **administrative** class actions, since defending a class action against an authority, including payment of remuneration and legal fees, involves spending public funds and that when an authority is at issue there is no concern that it shall only address the representative plaintiff's individual claim, since it is presumed to act equally toward all.

9. The Attorney General then addressed the nature of an administrative action, which is legislated in the Third Addendum of the Administrative Affairs Courts Law, 5762-2002. It was noted that it is located at the seam between civil law and administrative law and is characterized by "normative duality": the requested relief is not administrative by its nature but rather monetary and the Civil Procedure Regulations, 5744-1984 apply thereto; on the other hand, it is heard before the Administrative Affairs Court, its cause of action is administrative and its administrative characteristics impact the procedural and material requirements that are directed at both the plaintiffs and the authority. Thus, the court occasionally applies *in limine* arguments that originate from administrative law – such as laches, fairness or failure to exhaust proceedings – to such an action, even if less intensively than in administrative petitions. According to the Attorney General, while such statements were originally stated with respect to an administrative action for damages based on laws of tenders they can be applied with respect to a class action that is filed against an authority which is also listed in the Third Addendum of the Administrative Affairs Courts Law. It was further noted that in administrative actions in matters of tenders, the courts applied the obligation to exhaust proceedings vis-à-vis the authority, in such a manner that, as a rule, the failure to do so shall not lead to the *in limine* dismissal of the action but will be taken into consideration in the framework of awarding damages, and that this is similar to the case at hand in the sense that, as a rule, the absence of a prior application shall not lead to the dismissal of the motion to certify the action but will be reflected in the framework of the considerations for awarding remuneration and legal fees. The Attorney General is further of the opinion that the rationales underlying the obligation to exhaust proceedings – efficiency and conservation of resources, directing proper relations between the individual and the authority, mutual respect among the authorities and clarifying the disputes before the courts – apply in a more enhanced manner with respect to an administrative class action. The Attorney General further lists additional reasons which, according to him, justify a prior application, including: that in an administrative class action, similarly to an administrative petition, the enforcement purpose is more dominant than the compensation purpose and this can be inferred from the option granted to the authority to cease collection and from the aforementioned restitution relief limitation. It was further noted that the prior application obligation also derives from the citizen's duty of fairness towards the authority which is also a fundamental layer of administrative law.

10. Finally, the Attorney General refers to **the actual impact** of not having made a prior application on awarding remuneration and legal fees. On a principle level it was noted that the awarding of remuneration and legal fees was meant to incentivize potential plaintiffs to file appropriate class actions as a means to promote the public interest, however one must not mix the means – creating an economic incentive, with the end – protecting the represented group's best interest; furthermore, that the

absence of an application, in cases in which the group's best interest required that an application be made, in and of itself constitutes a breach of the representative plaintiff's fiduciary duty towards the group. On a practical level it was noted that when the application led to the cessation of collection without a claim being filed, nothing prevents the plaintiff from being left without remuneration, since the purpose of the class action was achieved in its entirety by means of the actual cessation of collection; however there is no concern of weakening the economic incentive for filing appropriate class actions since given that the courts already tend to consider the absence of a prior application when awarding remuneration and legal fees, this shall not lead to a decline in the number of class actions. In any event, the prior application requirement shall not be implemented in an absolute sweeping manner as in the case of an administrative petition, but rather in a flexible manner considering the civil aspects of the class action. It was further noted that the absence of an application shall be expressed in accordance with the circumstances of each case, on their merits and *inter alia*, considering these circumstances: whether such an application would have raised a concern that a solution would have been provided only to the representative plaintiff's individual matter; whether it would have realized the group's best interest; whether it would have led to the cessation of collection and conservation of authority resources; and the extent of resources required in such circumstances in order to prepare a prior application. It was emphasized that if a prior application was made and the authority did not cease collection and an action was eventually filed and was then accepted or denied due to cessation of collection, the effort exerted in the application should be reflected in remuneration and legal fees awarded and that in any event, as a rule, a motion for certification shall not be *in limine* dismissed only due to a prior application not having been made, even though there may be cases in which it may amount to extreme *male fide* which would justify that. In summary, the Attorney General's position was drafted as follows: "**A prior application to administrative authorities prior to filing a motion to certify class actions against them should be encouraged**" (paragraph 91, original emphasis). We shall note that this was said without setting hard and fast rules for cases in which the defendant is not an authority, but rather a private entity.

The Manner of Awarding Legal Fees and Remuneration Following an Authority Ceasing to Collect

11. According to the Attorney General: "**As a rule, it is inappropriate to award legal fees and remuneration after the cessation of collection using the percentage method and it is particularly inappropriate with respect to the speculative future benefit**" (paragraph 105, original emphasis). This is due to the fact that the main reason for incentivizing the representative plaintiff and his attorney to act for the best interest of the group – by ruling a monetary relief for its benefit – does not exist in the case of cessation of collection which in its essence is similar to an injunction, i.e., it is an enforcement, rather than a monetary, relief; and in furtherance thereof, according to the **Reichart** Rule the percentage method should not be applied except when a monetary relief is prescribed. It was specifically noted that awarding remuneration and legal fees as a percentage of the estimated future benefit is problematic for a number of reasons: because the **Reichart** Rule was prescribed explicitly for a relief that prescribed for past collections; because it is possible that the collection would have ceased without the action being filed, and alternatively that it would not have continued in the same scope for 24 months; and because such a ruling could lead to

charging the authority amounts that are greater than those which it would have owed the group had the class action been accepted on its merits. The Attorney General is further of the opinion that also calculating percentages from the amount that would have been ruled for the benefit of the group had the claim been accepted does not lack difficulties, primarily because the claim was not addressed on its merits and was not decided upon and it is possible that the mere cessation does not constitute an admission of the scope of collection that is alleged by the class action plaintiff. According to the Attorney General legal fees should be awarded after a notice of cessation of collection in accordance with all of the considerations listed in Sections 22-23 of the Class Action Law.

The Respondent's Response to the Attorney General's Position, dated November 24, 2014

12. It was argued in the Respondent's response that the Attorney General's position reflects what has been prescribed in case law, that there is no uniform rule on the matter and that each case must be examined on its merits in light of its concrete circumstances; and in furtherance thereto, that in the circumstances at hand it was inappropriate to make a prior application and that the absence thereof was also considered in the judgment of the court of first instance. It was further argued that in the circumstances at hand the representative plaintiff needed to order an expert opinion from an accountant and that this illustrates the concern that the application to an authority shall involve investment and study and if it shall lead to the cessation of collection by the authority prior to a claim being filed, the class action plaintiff will not be remunerated for his investment.

The Appellant's Response to the Attorney General's Position, dated November 26, 2014

13. The Appellant posits that the Attorney General's position should be accepted, that a prior application to authorities prior to filing a class action should be encouraged and that remuneration and legal fees should not be awarded using the percentage method when the proceedings ended by way of the authority's notice of cessation of collection. It was argued, based thereupon, that the court of first instance erred when it applied the percentage method using the future savings approach and that the amounts of remuneration and legal fees that it awarded should be significantly reduced.

Ruling

14. I shall begin by stating the bottom line of my position: I concur with the position that emerges from the Attorney General's comprehensive opinion – and I even go further by the strength of my attitude. I posit that not only should a prior application to an authority be encouraged, **but that such an application is the rule**, subject to a number of qualifications and remarks which shall be specified below; and that the absence of such an application should significantly impact the remuneration and legal fees. This does not mean that a plaintiff whose application led to cessation of collection shall not be remunerated at all, and this depends on the circumstances and investment; however the fundamental rule is that applying to an authority is the purpose of the class action. There shall also be cases, under this rule, where an action

shall be accepted despite an application not having been made, however in my opinion this shall be a strict exception. In my view, this legal policy strikes the necessary balance between two complementary trends: **On the one hand**, the realization of the clear public objectives underlying the institution of class actions and particularly those filed against an authority so it shall mend its ways; **and on the other hand**, the expression of the concrete individual interests – which are also a characteristic and essential part of the class action – and the insistence to that end on granting proper and fair reward to the representative plaintiff and his attorney for their efforts, even if they led to a cessation of collection and "abortion" of an action, all while protecting the existing set of incentives for filing appropriate class actions. This matter indeed raises the question "How can serving the public interest be reconciled with the monetary motivation in a fair manner that will serve the public without depriving those who perform the work" (CA 8037/06 **Barzilai v. Prinir (Hadas 1987) Ltd.** (2014) (the "**Prinir** Case"), in paragraph b of my opinion); and this tension accompanies the ruling in this matter. It appears that the benefit embedded in imposing an obligation to make a prior application to an authority outweighs the costs it involves, even if one considers the concern, which is occasionally expressed, that it shall create a "chilling" effect with regard to the filing of class actions. It shall already be emphasized that this conclusion of mine is with respect to class actions which are filed against an **authority**, without setting hard and fast rules with respect to cases in which the defendant is a private entity; while I am of the opinion that the duty of fairness and the duty to act *bona fide* also support a prior application to a private entity, although in such case there is no "statutory" relevance to the option of ceasing collection. As to the matter of the proper calculation method for awarding remuneration and legal fees after an authority ceases collection – I am of the opinion, somewhat contrary to the Attorney General, that flexibility should be applied and the court should have discretion, based on the concrete circumstances and the merits of each case, whether to award pursuant to the percentage method, based on the estimated future benefit and on the restitution relief that would have been ruled had the action been accepted – or to act otherwise, all as shall be specified below. Finally, as to the remuneration and legal fees that were awarded to the Respondent and his attorney in the case at hand, I am of the opinion – while applying these conclusions – that these amounts should, to certain extent, be reduced.

The Characteristics and Purposes of the Class Action

15. It shall be productive to first elaborate on the nature of the class action proceeding and its underlying objectives. I shall preface, due to my fondness of Jewish law, that fundamentally there is no proceeding in our sources that is identical to the class action, which is a modern legal creation that applies the procedural principle that "we may confer rights on a man not in his presence, we may not confer obligations on a man not in his presence" (Mishna ***Eruvin*** 7, 11), meaning, while one can monetarily credit a person not in his presence, it is unbefitting to obligate him not in his presence. This principle can be applied to the concern that the rights of a person shall be infringed if a class action was denied and any one of the members of the represented group is estopped and can no longer sue (see the Dr. M. Wygoda's book ***Shlichut*** (with contribution by the participation of C. Tzafri) (5764) 769 and onwards, regarding the "conferring rights" doctrine, and page 809, note 188 regarding the matter at hand. Indeed the arrangement prescribed in Section 24, along with Section 10(a) of the Class Action Law reflects an "opt out" mechanism, pursuant to which a

judgment in a class action constitutes "*res judicata*" with respect to all the members of the group on behalf of whom the action was conducted, unless such group member gave notice of his desire not to be included in the framework of the group (see CA 6887/03 **Reznick v. *Nir Shitufi* National Cooperative Settlement Association** (2010)). Notwithstanding, a few quasi-legal justifications may be found in Jewish law to the existence of such a proceeding – which are included in the concept of "*Tikkun Olam*" (repairing the world) (Rashi ***Bava Metzia*** 34, 2nd page, the part that starts with the words "*leshetava malve*") or in the concept of "A sinner shall not benefit from his transgression" (*Bavli* ***Menachot*** 6a) (see the article by A. Hacohen "'Conferring Rights on a Man Not in His Presence' – A Review of the Class Action Issue in Light of the Principles of Jewish Law" ***Sha'arei Mishpat*** D(1) 153 (5765)); CA 7187/12 **Zemach v. El-Al** (2014)). The existence of this proceeding can also be perceived as a certain expression of the Jewish law rules of "*Hefker Beit Din Hefker*" (in English: that which the court declares ownerless is ownerless) and "*Hefker Tzibur – Hefker*" (in English: that which the public declares ownerless is ownerless) (and see Dr. Michael Wygoda "The Class Action in Jewish Law", ***Parashat Hashavua*** (A. Hacohen and M. Wygoda, Ed.) ***Bamidbar*** (Numbers) 157; M. Elon **Jewish Law** (5748) 451, 417-421), and it also incorporates "Do What Is Right and Good" (**Deuteronomy**, 6, 18) (see the **Prinir** Case, in paragraph 5 of my opinion).

16. Israeli law is expressed in the Class Action Law which is a relatively new law that was legislated following prolonged discussions and after the class action institution had already been operating in Israel in certain contexts. The craft of legislation in the matter of class actions against authorities was complicated and I shall not elaborate on that here (see paragraph 24 below). I shall at the onset reiterate the principle approach – and this is also at the core of my words below – the objective of the law is fundamentally and in its essence **public**. As I recently stated in the **Prinir** matter:

> "The objective of my remarks – *inter alia* – is to emphasize that the objective of the Class Action Law, 5766-2006, is **public** and the court must keep this in mind while handling all of its rulings, including, in my opinion, with respect to the monetary results. In its rulings, the court must be careful about separating the wheat (the public) from the chaff (the financial interest of the individual plaintiffs and primarily that of their attorneys)" (paragraph 1, original emphasis – E.R.).
>
> …
>
> "The court must always keep in mind the question **how does the case, the way it is conducted and its results, serve the public interest**, **and the rest should be derived therefrom** (paragraph 17; emphases added – E.R.)"

The public nature of the law is also reflected in its objective, which is drafted in Section 1 – "**Improving the Protection of Rights**", while promoting the following:

> "(1) Realizing the right to access the court, including for

> types of populations that have difficulty approaching the courts as individuals;
> (2) Enforcing the law and deterring violations thereof;
> (3) Providing proper relief to victims of violations of the law;
> (4) Efficient, exhaustive and fair handling of claims"

17. It is evident that in designing the law, the legislator had objectives which are clearly public in their nature, in mind. Indeed, they also include an objective of providing proper relief to a person who was prejudiced by the violations of a law, which can certainly be perceived as a private-natured objective that focuses on the personal compensation of each separate plaintiff (although this can, in principle, also be viewed as realization of the public interest of fairness and respect for the law). However, first and foremost the law positions the class action proceeding as a powerful social and economic tool which is meant to realize the right of access to the court by creating a procedural framework for those whose personal damage does not economically justify filing a claim against the party causing the damage; to enforce the law and deter violations thereof; all while applying procedural efficiency and saving the judicial time that is involved in examining identical questions in various instances, which could even lead to contradicting rulings. The words of President **D. Beinisch**, in HCJ 2171/06 **Cohen v. The Speaker of the Knesset** (2011) (hereinafter: the "**Cohen** Case"), are appropriate in this context:

> "It is known that the class action is a legal-procedural tool that allows one person or a group of people, whose personal damage is relatively small, to sue the damaging party on behalf of everyone who is similarly injured, such that the total amount of the claim shall be high. **In doing so, the class action promotes a number of important social and economic goals**: It provides protection of the various individuals who for reasons of it not being economically worthwhile, or for other reasons, refrain from filing their personal claim; it enhances the enforcement of its underlying provisions of law and it deters against future violation thereof; it can eliminate the gaps in power between the lone individual and corporations and entities rich with financial and legal resources that wish to externalize their risks onto the public; it reduces the concern of contradicting rulings; and finally, intelligent use thereof could lead to saving judicial resources" (paragraph 3, emphases added – E.R; also see AAA 2395/07 **Acadia Software Systems Ltd. v. The State of Israel – The Director of Customs and Stamp Tax** (2010) (hereinafter: the "**Acadia** Case", in paragraphs 14-16).

18. As mentioned, the class action constitutes an important procedural platform for enforcing law and protecting the public's rights – both that of the represented group and that of the entire public – when an individual action is not worthwhile or not possible to conduct in the circumstances of the matter (see the **Zemach** Case, paragraph 75 of the judgment; LCA 2128/09 **Phoenix Insurance Company Ltd. v.**

Amosi (2012), paragraph 18); it can "voice and express matters of a public nature, that if it were not for them (the class actions – E.R.) would not be economically worthwhile to litigate" (the **Prinir** Case, in paragraph 2 of my opinion). This also emerges from the explanatory notes for the governmental bill (Class Actions Bill, 5766-2006, **Governmental Bills** 5766 256): "The class action is an important tool for increasing enforcement of rights, for which a private claim is not a practical and efficient proceeding, including claims of amounts that are negligible compared to the cost of the claim" (LCA 2598/08 **Bank Yahav For State Employees Ltd. v. Lior Shapira *et al.*** (2010) (hereinafter: the "**Bank Yahav** Case"), in paragraph 40 of my opinion; it shall be noted that there are those who are of the opinion that there are still advantages in conducting a joint action even when the damage of each of the group members is of a significant amount, see S. Goldstein "Remarks on the Class Action Law, 5766-2006" ***Alei Mishpat*** 6 7, 23 (5767-2007) (hereinafter: "**Goldstein**")). According to the purpose of the class action tool, it could fulfill a vital role in "private enforcement" and in promoting the rule of law in fields which by their nature are characterized by under-enforcement, such as consumer law and labor law (see the opinion of Justice **Joubran** in the **Prinir** Case; E. Taussig "Appeals in Class Actions", H. Ben-Noon and T. Havkin **The Civil Appeal** 634-635 (5772-2012)(Hebrew) (hereinafter: "**Appeals in Class Actions**"); S. Deutch **Consumer Protection – Volume 2** (5772) (hereinafter: "**Deutch**")). (Hebrew)

19. The public importance of class actions is also reflected in the establishment of the public fund for the financing thereof, in the framework of Sections 27 and 31 of the law, which operates pursuant to the Class Actions (Assistance in Funding Motions for Certification and Class Actions) Regulations, 5770-2010, and the Class Actions (Working Procedures for the Management of the Fund for Financing Class Actions) Regulations, 5770-2010, as part of the expansion of a more limited arrangement which had been prescribed in the past in the Securities Law, 5728-1968, which enables receiving funding from the Securities Authority and which was cancelled upon the enactment of the Class Action Law (alongside this arrangement, it is possible to receive funding for a class action by virtue of additional acts of legislations – see "**Appeals in Class Actions**", in note 16); in the obligation to notify the Attorney General regarding court decisions and motions that were filed in the framework of class actions, and the institutions listed in Section 25 of the Class Action Law, combined with Regulations 16(a) of the Class Actions Regulations, 5770-2010; and in the granting of standing to public entities both as initiators of the proceeding and as participants therein, including in the framework of settlement arrangements (see for example Section 4(3) of the Law; **Goldstein**, on pages 14-17). Moreover, this public aspect is also derived from the class action's power as a tool with far-reaching implications for extended groups in society and even for the entire market. This power is at the foundation of the various protections which are granted in the framework of the law to both public and private defendants (see LCA 4556 **Tetzet v. Zilbershatz**, IsrSC 49(5) 778, 774 (1995); the **Bank Yahav** Case, in paragraph 21 and the supporting references cited therein), and in the degree of caution the court applies when certifying such claims, and in the "that which was not permitted, is forbidden" approach, which is applied with respect to the types of claims which can be filed as class actions (***ibid***, paragraphs 20-21).

20. However, it shall be emphasized that alongside these public elements, the class action is also meant to realize the private interests of the members of the group

to receive appropriate relief and this is also reflected – explicitly – in the provisions of the Class Action Law, which throughout the law emphasize the importance of protecting the best interest of the members of the group – *inter alia*, in Section 8 which addresses the conditions for certifying an action as a class action; in Section 17 which specifies the obligations of the representative attorney towards the group; in Sections 22-23, which list the considerations which the court shall consider when determining remuneration and legal fees. Ultimately, at the base of any class action is an alleged tortious conduct, with monetary implications, even if they are miniscule in terms of the personal damage to each of the group members separately. Indeed, alongside the enforcement purpose, there is also the compensation purpose: "The district court stated that the purpose of the institution of class actions is not compensation but rather enforcement. However it appears that this statement… is an excessively narrow interpretation of the purposes of the class action…" (the **Aviv Services** Case, paragraph 8, the words of Deputy President **E. Rivlin**); also see the **Prinir** Case, where it was emphasized that criminal enforcement of the law – and in that case the existence of a criminal proceedings pursuant to the Consumer Protection Law, 5741-1981 – in and of itself does not achieve one of the purposes of the class action which is to "provide appropriate relief to the victims of the violations of the law" (paragraph 80 of Justice **H. Melcer**'s judgment).

21. Additional private interests which are reflected in the Class Action Law – and which are at the focus of the question of the necessity of a prior application – are those of the class action plaintiff and his attorney to receive monetary remuneration. Based on the understanding that the public objective will not be achieved if those who perform the work do not receive proper payment in consideration for their deeds, the legislator created a set of economic incentives for filing such actions and to promote the public interest embedded therein, in the form of a joint "business venture" of the representative plaintiff and his attorney (CA 1834/07 **Keren v. Dan Region Assessing Officer** (2012)). These take action hoping that they will be awarded generous amounts of legal fees and remuneration: "the representative deterrence mechanism is based on harnessing the private interest of the attorney (and of the plaintiff) for a public cause" (Section 93 of Justice **H. Melcer**'s judgment in the **Prinir** Case). Remuneration and legal fees are befitting "also in order to provide an incentive for the class action plaintiff to realize the individual right and public interest" (CA 7430/99 **Analyst v. Arad** IsrSC 56(2) 247, 259, the words of President **A. Barak**; see the **Prinir** Case, in paragraph 12 of my opinion). According to this approach, the economic motivation is a legitimate motivation for filing class actions, and is not, in and of itself, indicative of *male fide* or of any other flaw in filing the action – "Thus, the motivations of a plaintiff who is initiating a representative proceeding and who wishes to gain a profit do not disqualify his *bona fide* and do not prevent his action from being examined as a class action (subject to the fulfillment of the other requisite conditions)" (the words of Justice **Melcer** in the **Prinir** Case, in paragraph 87), and more:

> "The mere fact that the plaintiff shall gain a profit for himself as a result of his being the representative plaintiff does not – in and of itself – disqualify his *bona fide*. In this matter I agree with the words of the judge in the first instance, that "Had the legislator wished to only allow the claim to plaintiffs who want to represent the group on

> altruistic grounds, it would not have prescribed an economic incentive… once it has been prescribed in the law that the court may award special reward to a class action plaintiff, it is inappropriate to argue that he lacks *bona fide* solely because he adhered to the legislator's call.'" (the words of Justice **T. Strasberg-Cohen** in LCA 8268/96 **Reichart v. Shemesh**, IsrSC 55(5) 276, 295 (2001)).

Indeed, the economic interest is the engine that keeps the class actions moving, and in proper dimensions it is not in and of itself fundamentally flawed (see also the **Prinir** Case, paragraph 11 of my opinion); however this holds true as long as it does not lead to the violation of the duties that are imposed upon the representative plaintiff and his attorney and does not turn the tables on the interests such that the "handmaid is heir to her mistress", meaning, that the race for remuneration and legal fees shall override and drown the public objective. This cannot be accepted and the court's tight supervision plays a vital role in maintaining the balance. One must not forget: the public interest – enforcing the law while attending to the group's best interest is the **end objective**, and the private economic interest of the representative plaintiff and his attorney – is the **means**; "the economic interest is recruited to serve the public interest" (the words of Justice **Joubran** and in the **Prinir** Case). We must separate the wheat from the chaff, and these priorities are clearly evident from the provisions of the law which throughout the law emphasize the duty of the representative plaintiff and his attorney to act loyally, devotedly and in a *bona fide* manner in order to promote the group's best interest; from the entirety of the court's extensive considerations when awarding remuneration and legal fees; and from its tight supervision which is necessary throughout all of the stages of the proceeding. Occasionally, the private economic interest which motivates the filing of the claim may prejudice the best interest of the members of the group:

> "Occasionally there is the impression that the race for remuneration in Section 22 of the Class Action Law (and perhaps even beyond that) could cause the filing of claims that are not ripe or properly prepared; all this within the complex framework of this law in which the claim binds, or is meant to bind – at least in certain senses – the entire group" (CA 3506/09 **Zaig v. Kesselman and Kesselman C.P.A.**, my opinion there (2011) (hereinafter: the "**Zaig** Case").

As mentioned – the remedy for these concerns lies "**in the court's diligent and relentless supervision, at each and every stage of the class action**, meaning the certification stage … the stages of settlement and of ruling reliefs, remuneration and legal fees; and in the Attorney General's role of issuing opinions in the proceeding" (the **Prinir** Case, in paragraph 16 of my opinion, original emphases, E.R.). This is particularly relevant in all that relates to settlement arrangements, since the group members' inherent absence enhances the concern of deprivation of their rights (CA 5503/11 **Dabach v. Dinari** (2012) (hereinafter: the "**Dabach** Case"), in paragraph 21 of my opinion; A. Weizenbluth "Proper Representation in Settlements in Class Actions" ***Mishpatim*** 43 351, 356-357 (2013); A. Klement "Class Action Settlements and Voluntary Dismissals" ***Mishpatim*** 41 5 (2011); "**Appeals in Class Actions**", on

pages 639-640). This representative problem is at the base of the investigative nature of the mechanism that was prescribed in the law for approving such arrangements and which, *inter alia*, includes the appointment of an external examiner to present his opinion before the court with respect to the settlement (Section 19(b)), along with the ability of the group members, the Attorney General and public organizations to object to any settlement that shall be proposed (see LAA 4303/12 **Insler v. The Emek Hefer Regional Council** (2012), in paragraph 13).

22. With respect to the same concern – that the economic interest of filing class actions could be at the expense of the best interest of the members of the group and could undermine the law's public objectives – I shall also note the phenomenon of the **initiation** of such actions by lawyers, such as in the form of approaching a certain group in order to interest it in filing an action. In the **Prinir** Case, I was of the opinion, albeit beyond the scope necessary in that case, that although such an initiation is not necessarily *male fide*, it is necessary to be cautious that the filing of class actions not become a "sub-specialty, the benefit of which does not serve the public interest, but rather only someone's pocket" (***ibid***, in paragraph 16) and the court's tight supervision is required to this end as well. In the same context I noted that the legislator's choice to follow a path of creating an incentive by means of a private representative plaintiff together with his attorney, creates a certain dissonance with the clear public objective underlying the law; since it could have been expected that the representation in such claims would also – and perhaps primarily – come from the direction of public not-for-profit organizations which act to promote social goals and not necessarily from the direction of holders of private economic interests (see ***ibid***, in paragraph 11); see the article by A. Fink "Class Actions as a Tool for Social Change" ***Ma'asei Mishpat*** 6 157 (2014), who posits – and with all due respect, I tend to agree – that not-for-profit and public organizations should be encouraged to use the class action tool to promote important public interests. According to the author the current set of incentives prevents social organizations from filing class actions, *inter alia*, due to their feeling that making the economic interest the essence creates a sense of disrespect and in light of concern of prejudicing the organization's reputation; and the "entrepreneurship model" occasionally results in the filing of hasty and unfounded claims by private entities in cases in which they could have been filed by social organizations that specialize in the field at issue (pages 164-165). It is interesting to note that the class action does not generally serve as a tool to promote political and civil rights in Israel, as opposed to the United States where it is widely used for to protect disadvantaged groups in society, to eradicate discrimination and to promote rights; for example, the well-known claim against the policy of segregation between whites and blacks – "separate but equal" – which was applied between black and white students at public schools and which was cancelled in the framework of Brown v. Board of Education, 374 U.S. 483 (1954), and see **Fink**, on page 171 and in note 53; and Deborah R. Hensler, *Class Action Dilemmas: Pursuing Public Goals for Private Gains* 12 (2000); G. Halfteck "A General Theory Regarding the Social Value of Class Actions as a Means for Law Enforcement" ***Mishpat ve-Asakim*** 3 247 (2005) (hereinafter: "**Halfteck**"), in note 31; Prof. D. Barak-Erez **Constitutional Torts – The Monetary Protection of Constitutional Rights** 296-297 (1993)). It should however be noted that a number of class actions were filed in Israel in order to protect rights of persons with disabilities (see **Appeals in Class Actions**, on page 636).

23. In summary, I shall reiterate that ultimately, the legislator chose a law that

allows leveraging the private economic interest of a public of citizens and attorneys in order to realize the public interest that is embedded in the class action tool. The fair remuneration for class actions plaintiffs and their attorneys is part of the existing set of incentives for filing class actions and of this tool's efficiency; however it is important to remember alongside this – as was elaborately emphasized above – that the objectives of the class action proceeding are fundamentally **public**, while the economic incentive, albeit necessary, constitutes one of the **means** to realize these objectives, under tight court supervision. In my opinion this approach and the priorities it incorporates lead to the conclusion that a prior application must be made to an authority before filing a class action against it, since if the public objective can be achieved and realized by a means that shall be more efficient, and ultimately – less expensive, this should be preferred.

Class Actions that are Filed Against an Authority

24. It is clear that that stated above regarding the public nature of the class action, and particularly its role in law enforcement, is enhanced when at issue is a class action against an authority – a class action that is filed against an authority as an "authority", pursuant to Item 11 of the Addendum, as shall be elaborated below in paragraphs 28-29. I shall mention that in its original wording the Class Action Law did not apply to an authority and only following tempestuous discussions in the Knesset's Constitution, Law and Justice Committee (see, *inter alia*, pages 23-41 of the Minutes of the Sub-Committee of the Constitution, Law and Justice Committee dated January 11, 2006) was the law changed to include the possibility of also filing a class action against an authority (see AAA 7752/12 **Asal v. Israel Lands** (2014) (hereinafter: the "**Asal** Case"), in paragraph 13). Indeed, on a literal level the law applies to an authority as it applies to a private defendant – and in the words of Section 29 of the law: "This law shall apply to the State". However, and considering a class action's possible budgetary implications for an authority and its functionality, the legislator included special protections with respect thereto (see LAA 5438/14 **The Kiryat Motzkin Municipality v.** ***Hazut Bat Sheva*** (2015), in paragraph 10; the **Acadia** Case, in paragraphs 17-18). For an exhaustive review of the relevant provisions of the law, see the **Cohen** Case mentioned in paragraphs 5-7, which denied a petition regarding the constitutionality of the provisions which regulate the special status of an authority as a class action defendant. In addition to Sections 9(c) (the authority's cessation of collection) and 21 (limiting the restitution relief to two years) – we shall mention Section 3 of the law which limits the causes of action for which one can file a class action against an authority and prevents the filing of an action against it "for damage which was caused by a third party on the grounds that the authority used or abstained from using the authority's powers of supervision, regulation or enforcement in respect of that third party"; Section 8(b)(1) which allows the court, when a motion has been filed thereto to certify an action against an authority, to consider whether the damage in conducting the proceeding is expected to significantly exceed the benefit therein; and Section 20(d)(1) which allows the court, when imposing upon the authority to pay damages, to also consider the damage which could be caused "to the defendant, to the public that needs the defendant's services or to the public in general", and to weigh this against the benefit to the group members and to the public.

25. As to the underlying justifications of these protections, it was noted in the **Cohen** Case that the State's status as a litigating party indeed is not ordinarily

different than that of a private litigating party, however the legislator may – for reasons of public interest, and in that context, for the sake of protecting budgetary certainty and preventing prejudicing the authority's functionality – reduce the duties that are imposed thereupon and thus create a procedural distinction between it and a private litigating party. In this context, in his opinion in the **Cohen** Case the Attorney General mentioned the concern that the State, being a "deep pocket", would be added to any class action proceeding; that a large payment that the authority shall be required to make shall be "rolled over" onto the entire public, including the members of the group represented in the action; and that empirically speaking, the State, as a governmental entity, does not in any event directly respond to economic incentives (see the **Cohen** Case, in paragraph 35; **Goldstein**, on page 11; Assaf Hamdani and Alon Klement "The Class Defense and Mistaken Payments" ***Mishpatim*** 38(3) 445, 469-471 (5769) (hereinafter: "**Class Defense**")). It was stated with regard to the authority's special status in the law, as follows:

> "… One cannot ignore the entire set of unique considerations which must be addressed when the defendant is an authority that serves as a trustee of public funds and which is responsible for realizing the public goals for which it exists. For example, obligating a public authority to pay very large amounts could lead to prejudicing its budgetary certainty and prevent it from continuing to properly perform its duties… In this sense, prejudicing the public authority, which in fact "does not have anything of its own" could lead to harming the entire public, and such harm could occasionally exceed the benefit which the public could gain from accepting the class action at issue (in this matter, also see the appeal in the **Eshet** Case 271-274, where Justice (as was her title at the time) **Beinisch** elaborated on the alternative mechanisms that exist in our legal system regarding claims against authorities, and also see Michael Karayanni "Class Actions in Israel on a Crossroad" ***Din U'dvarim*** 1 449, 502-504, (5765)" (The words of Justice **E. Hayut** in LCA **The Tel Aviv Municipality v. Hagai Tiomkin** (2011) (hereinafter: the **Tiomkin** Case), in paragraph 23).

The public nature of the class action against an authority is also reflected in the fact that the central purpose is **enforcing the law and preventing continued collection that is contrary to the law**, which can clearly be inferred from the authority's option to cease collection and the limitation on the restitution relief (see the **Bank Yahav** Case, paragraph 8; **Goldstein**, on page 12); "The provisions of Section 9 of the law clearly indicate that the objective of the class action filed against the State is to end illegal collection" (the words of Justice **U. Shoham** in the **Abutbul** Case, paragraph 46). Additionally, when awarding remuneration and legal fees in a class action against an authority the court takes the consideration of protecting the public purse into account and this was also reflected to a certain degree in the protection that is granted to the State in the framework of the provisions of Section 9(b) of the law (***ibid***, in paragraph 36). It shall be noted that it is clear that the authority must not use the argument of protecting the public purse in a cynical or tendentious manner, and in

cases in which the class action that was filed against it is accepted – or when a cessation of collection notice was filed pursuant thereto – one must not forget that the authority acted unlawfully until the action was filed. In any event, the legislator allowed filing a class action against authorities, but concurrently attempted to reduce the harm to the public purse, based on the desire to protect the public interest that is embedded in the authority's continued proper function and its provision of services to the public. Throughout the entire proceeding, the court will also keep the protection of the authority, which incorporates the protection of the public, in mind, since "The authority has nothing of its own" (HCJ 2671/98 **The Israel Women's Network v. The Minister of Labor and Welfare**, IsrSC 52(3) 630, 648 (1998) the words of Justice (as was his title at the time) **M. Cheshin**). We shall emphasize that those same characteristics of providing essential or important service to the public which justify complying with higher norms – for example an action against an authority and against an entity that provides an essential service to the public, such as a bank – are what justify exposing the defendant to liability by means of a class action (A. Klement, "Guidelines to Interpreting the Class Action Law, 5766-2006" ***Hapraklit*** 49 131, 154 (5767) (hereinafter: "**Klement**")). This leads to the importance of protecting the existing incentives for filing class actions against the authority – alongside the rule that the plaintiff must apply to it prior to filing the action.

The Class Action Against an Authority as an Administrative Action

26. As mentioned, a class action against an authority is an administrative action, which by its nature is distinguished both from an ordinary civil proceeding and from the "classic" administrative proceeding, meaning an administrative petition (or a petition to the High Court of Justice) and an administrative appeal. The authority of the Administrative Affairs Court to address this action was established in Section 5(3) of the Administrative Affairs Court Law which addresses an "action that is listed in the Third Addendum (hereinafter: an "Administrative Action")" (see I. Zamir **The Administrative Authority – Volume 3** 1604 (5774-2014)(Hebrew) (hereinafter: "**Zamir – Volume 3**"). The Addendum lists two types of actions – the **first**, an action for damages due to a tender; the **second**, an action pursuant to Section 5(b)(2) of the Class Action Law, which addresses "a motion for certification against an authority in a claim due to a decision made by the authority, and for which the requested relief is damages or restitution, including restitution of amounts that the authority collected as a tax, fee or other mandatory payment … In this sub-section, a 'decision of an authority' – is as defined in Section 2 of the Administrative Affairs Court Law". According to that same definition, a decision of an authority is: "A decision of an authority while fulfilling a public rule pursuant to law, including the lack of a decision as well as an act or omission". It shall be further noted that the term "authority" in Sections 3(a), 5(b)(2), 9 and 21 of the Class Action Law has the meaning of the term as defined in the Administrative Affairs Court Law: "One of the State's authorities, a local authority as well as other persons and entities that fulfill public roles pursuant to law".

27. As mentioned, the administrative action is located between civil law and administrative law: on the one hand, it addresses the actions of the administrative authority – meaning, its cause of action by its nature is administrative-enforcement-related (for example, there are causes of actions that are adopted from the field of the laws of tenders and administrative law, such as fairness, infringing equality and the

like (see AAA 3309/11 **Kotlarsky v. The Tel-Mond Local Council** (2013) (hereinafter: the "**Kotlarsky Case**")). As may be recalled, the cause of action of a motion for certification that is filed in a class action against an authority pursuant to Section 5(b)(2) is administrative and it addresses a "decision of an authority" – an expression that has a clear administrative tone, particularly when the expression "decision of an authority" is interpreted, as aforementioned, pursuant to its definition in the Administrative Affairs Court Law. However, on the other hand, the requested relief in the administrative action is not administrative by its nature – such as a mandatory or prohibitive injunction or the cancellation of an administrative decisions – but rather is **civil**, in the form of restitution of funds that were unlawfully collected (and indeed in a class action against an authority, as opposed to in actions for damages due to a tender, the dominant relief is one of enforcement – an additional administrative characteristic of this proceeding). Additionally, the court must hear this action in accordance with the Civil Procedure Regulations – as stated in Regulation 29 of the Administrative Affairs Court (Procedures) Regulations, 5761-2001 – while administrative petitions and appeals are heard in accordance with the "causes of action, the authorities and the reliefs which the Supreme Court applies as a High Court of Justice", as stated in Section 8 of the Administrative Affairs Court Law (although there are those who interpret this section as also applying to administrative actions). It has been said that the "Administrative action is a hybrid action. On the one hand, its roots are rooted in administrative law and stem from the violation of one of the duties imposed by administrative law… On the other hand the purpose of the administrative action is to receive monetary compensation which is a clear civil relief" (E. Shraga and R. Shahar **Administrative Law (6) Procedures and Evidence in Administrative Affairs Courts** 420 (5771-2011) (hereinafter: **Shraga and Shahar**")(Hebrew). With respect to an administrative action for damages due to a tender it was ruled that due to its administrative characteristics, it shall be heard by an Administrative Affairs Court whose "daily bread" is the administrative law that serves as its guiding star (AAA 9660/03 **The Rechovot Municipality v. Schwadron,** IsrSC 59(6) 243, 248 (2005); **Zamir**, on pages 1608, 1686):

> "In my opinion there is significance to the fact that the legislator choose to place the administrative action in this law. On the one hand, the administrative action is indeed characterized by the characteristics of a civil action in the sense of the essence, procedures and rules of evidence, and its linkage to the Civil Procedure Regulations, 5744-1984 relates to this. On the other hand, by merely being "administrative" and in a "working environment" that applies administrative law, it is characterized by certain characteristics of administrative law and it is conceivable that over time, it is impacted by its content. This idea is allegedly two-directional in terms of the litigating parties: on the one hand, certain weight will naturally be given to the fact that the action is being heard in an administrative court in all that relates to the administrative authority's conduct and what is expected therefrom and on the other hand, this shall also apply to the characteristics of the plaintiffs' conduct… It is not for nothing that the administrative action was allegedly placed by the legislator

> before judges whose expertise and thinking process are anchored in administrative law. Actions of the Administrative Affairs Court shall be guided by the guiding star of the fundamental principles of administrative law …. Indeed when applying civil procedures while hearing an administrative action, the court will remember that it is addressing an action for damages but it also will not forget its daily bread. **Without setting hard and fast rules, one can assume that criteria, such as laches, which would be applied sparingly in civil law … may be significantly more accessible in an administrative action.**
>
> …
>
> (4) The message emerging from that stated is that on the one hand, the main normative foundation for the Administrative Courts' activity is administrative law. This is the legislator's approach to administrative petitions and administrative appeals. The administrative action is indeed an exception. Although it is located in the Administrative Court, it is immersed in civil law … It is conceivable that the Administrative Court shall not ignore the "administrativeness of the action" when hearing the cases that are brought before it as administrative actions, even though they are fundamentally civil" (paragraph D(3)-(4), emphases added – E.R.; also see the **Kotlarsky** Case).

The Administrative Affairs Court to which an administrative action for damages due to tender laws is brought, can deny it based on administrative *in limine* arguments, such as laches and failure to exhaust proceedings, albeit in a less strict and stringent manner than in administrative petitions (I shall note that in CA 510/05 **The State of Israel v. Steinberg** (2007) I expressed the opinion that the laches requirement can similarly also be applied to an administrative authority even in the framework of a civil claim – and not necessarily an administrative action – which was filed against it). The Attorney General demonstrates in his opinion that on more than one occasion the Administrative Affairs Courts apply administrative *in limine* arguments in administrative actions (see, for example Administrative Action (District-Jerusalem) 12/01 **Atir Ltd. v. The State of Israel** (2008); Administrative Action (District-Jerusalem) **T.V *Shalosh* Ltd. v. The Second Television and Radio Authority** (2007)). However, it appears that in the majority of cases it is inappropriate to *per se* dismiss administrative actions *in limine* due to failure to exhaust proceedings and this shall – in my opinion – be significantly reflected in the framework of ruling damages to the plaintiff (CA 11145/08 ***Chanyonei Hatzlacha* Ltd. v. The State of Israel – The Ministry of Defense** (2011)). Similarly, given that a class action against an authority is also an administrative action that is characterized by normative duality, it appears that the same administrative criteria can be applied in the framework thereof; as we shall now see the imposition of an obligation to apply to an authority prior to filing a class action against it can be justified, *inter alia*, based on applying the requirement to exhaust proceedings in the framework of such an action. In my opinion this coincides with common sense.

28. It shall be mentioned at this stage – and this projects onto the administrative nature of the class action proceeding against an authority and onto the need to make a prior application in the framework thereof – that the only class action that can be filed against an authority in its capacity as such is pursuant to Item 11 of the Second Addendum of the law: "**A claim against an authority for restitution of amounts it collected unlawfully, as a tax, a fee or another mandatory payment**". This clarification is important due to the fact that a number of types of class actions can be filed against an authority in its other capacities and in light of a certain ambiguity that characterizes the provisions of the Class Actions Law, as shall be clarified. Thus, it is possible to file a class action against an authority in its capacity as a "business" as defined in the Consumer Protection Law, 5741-1981, pursuant to Item 1 of the Second Addendum (and we shall relate below to the distinction between the authority's capacities as an "authority" on the one hand and as a "business" on the other). Additionally, it is possible to file a class action against an authority in its capacity as an employer (pursuant to Item 8) or in a matter related to preserving equal rights and providing accessibility to persons with disabilities (pursuant to Item 9). And why is this of significance in the case at hand? As noted, a class action against an authority is an administrative action which is located in an "administrative working environment", meaning, the legislator chose to place it in the Administrative Affairs Court Law and it is heard before an Administrative Affairs Court; despite the requested relief being civil, the cause of action is administrative. However, this "administrativeness" does not characterize class actions against an authority that are not filed pursuant to Item 11 of the Addendum, which are not administrative actions – they are not regulated in the Administrative Affairs Court Law and are not heard before these courts; the protections that are granted to the authority, and which testify to the fact that the class action proceeding against an authority primarily targets law enforcement – the cessation of collection option in Section 9 and the restriction of the restitution relief in Section 21 – only apply to actions which are filed pursuant to Item 11 of the Addendum (which are defined in the law as a "restitution claim against an authority"). In other actions that are filed against an authority, including an action against it in its "business" capacity, "it has the protections in the law which grant the court discretion regarding certifying the action and determining the rate of compensation" (the **Asal** Case, in paragraph 12). The significance of the aforesaid is that as a rule the determination that it is necessary to make a prior application to an authority before filing a class action is directed to an action that is filed pursuant to Item 11 of the Second Addendum; while in the case of class actions that are filed against an authority in its other capacities, such as that of a business, the starting point is identical to the circumstances in which the business is a private entity – since in such case the State is acting in a private capacity rather than a governmental one (LCA 2701/97 **The State of Israel v. Chertok**, IsrSC 56(2) 876 (2002) (hereinafter: the "**Chertok** Case"); CA 382/96 (District Tel-Aviv) **Langbert v. The State of Israel** (2002) (hereinafter: the "**Langbart** Case"). In such cases there is no said general obligation to make a prior application, although the court may, in certain circumstances, take into consideration the fact that no such application was made (and this shall be addressed below).

29. This clarification is also important with respect to an action that is filed against an authority for damages; according to the literal reading of Section 5(b)(2) – which complements Item 2 of the Third Addendum of the Administrative Affairs

Courts Law – any class action against an authority "the cause of action of which is a decision of an authority and the requested relief is **damages** or **restitution, including restitution of amounts which the authority collected as a tax, a fee or another mandatory payment**" (original emphasis) constitutes an administrative action which is heard by an Administrative Affairs Court (and is therefore characterized by said normative duality). The material jurisdiction for any such motion for certification – and for hearing the action itself, if and to the extent the motion shall be certified – is granted to the Administrative Affairs Court. But what is the rule for a claim for damages and claims for restitution of amounts that are not a "tax, fee or other mandatory payment"? As may be recalled, Item 11 of the Second Addendum, pursuant to which a class action can be filed against an authority in its capacity as such, and which incorporates the cessation of collection and restriction of restitution relief protections, does not include an action for damages, and even lacks the term "including" – an omission which raises the question what is the rule for such actions for damages that are not a "tax, fee or other mandatory payment". As mentioned, it thus appears that it is not possible to file an action for damages against an authority in its capacity as such except pursuant to Item 11 of the Addendum and this conclusion is also reflected in the fact that the legislator intended to only include claims for restitution pursuant to Item 11 in the framework of Section 5(b)(2) (see the **Asal** Case, in paragraph 34).

Meaning, the administrative class action is actually one that is filed pursuant to Item 11 of the Addendum, as opposed to another class action that is filed against an authority pursuant to another item of the Addendum. This court was of the opinion in the **Asal** Case that a class action that is filed against an authority for the restitution of amounts that are not "tax, fee or other mandatory payment" is not included in Item 11 of the Addendum. It follows that claims against an authority which are not pursuant to Item 11 – restitution for amounts that are not specified therein, claims for damages and claims against an authority in its other capacities, such as that of a business – are not heard before an Administrative Affairs Court but rather before a civil court (see and compare with CA 546/04 **The Municipality of Jerusalem v. Clalit Health Services** (2009), in paragraph 72). This adds to the aforesaid that these claims lack the "administrativeness" that characterizes class actions that are filed pursuant to Item 11, which, as mentioned, are the ones that constitute administrative actions. We shall reiterate in this matter – and this has implications for the case at hand – that when the motion for certification of the action is directed against an act of the authority in its administrative capacity, the Administrative Affairs Court has jurisdiction, and when the action which is being challenged was performed in the authority's business capacity, the claim belongs in the district court, and the mere filing of a motion pursuant to one item or another does not project onto the substantive cause of action (the **Asal** Case, in paragraphs 35-36).

The Prior Application and the Requirement to Exhaust Proceedings in Administrative Law

30. We elaborated on the administrative nature of the class action that is filed against an authority pursuant to Item 11, the meaning of which is the application of fundamental administrative law principles thereupon, even if to a less absolute degree than in administrative petitions and appeals. One principle which could directly project onto the matter at hand is the obligation of the individual, in administrative

law in general, to exhaust proceedings vis-à-vis the authority prior to approaching the court, an obligation which if not fulfilled, could lead to the *in limine* dismissal of any claim or petition. Failure to exhaust proceedings can appear in various forms, such as filing a petition against a decision of an authority by an "indirect challenge, when there is a control mechanism in place on such decision by means of an administrative body, which must be exhausted prior to approaching the courts" (**Zamir**, on page 1883); a more blatant case of a premature petition – which is relevant to the case at hand – is not making a prior application to the administrative authority before petitioning the court: "The rule, indeed, is that applying to the administrative authority is the first step towards judicial review" (***ibid***, on page 1874, and in note 28 and in the references cited there). In this context, Prof. **Zamir** expresses his position that this is fundamental in all that relates to conduct vis-à-vis the authorities: "This basic rule is so simple and worthy that it is difficult to understand why a person would approach the court with allegations against an administrative authority before he applied to the authority itself" (***ibid***, on page 1876). The justifications underlying this rule are clear: occasionally such an application will lead to the applicant becoming convinced that the authorities are justified, or *vice versa* – the authority will become convinced that the claim is justified; the application could lead to saving resources and judicial time and could clarify or reduce the existing disputes.

> "First, applying to the competent authority could resolve the problem, thus eliminating the need to approach the court. Second, from the court's perspective, fulfilling this requirement could prevent the filing of petitions which shall be discovered to be unnecessary. Third, even if the authority's response to the application shall be negative, the application and the response may focus the dispute and reduce it" (the words of the President (Ret.) **A. Grunis** in HCJ 7823/10 ***Tnuat Yesh Gvul*** **v. The Advisory Committee for the Appointments of Senior Positions** (2011), in paragraph 6).

Indeed, the matter is clear, at least when at hand is a public authority; and also generally with respect to an individual – if there is a complaint, it should be handled by first applying to the person who has the power to resolve it.

31. Thus, a prior application allows the problem to be resolved by the entity that has the expertise and it can also contribute to creating a fruitful and effective discussion between the individual and the authorities (see, *inter alia*, HCJ 3581/07 **Kelo v. The National Committee for National Infrastructures** (2010)). It appears, *prima facie*, that these reasons are also relevant to imposing a duty to make a prior application before filing a class action against an authority. However, at this point there is a certain distinction between the characteristics of a prior application in the framework of "ordinary" administrative law and the manner it should be applied in the framework of class actions against an authority as an administrative action. First of all, on the conceptual level, a fundamental layer underlying the obligation to make a prior application is that the court can only apply judicial review to an administrative decision that was made. However, a class action against an authority due to illegal collection by definition, pursuant to Section 5(b)(2) of the Class Action Law, is directed against a "decision of the authority". More importantly, on a practical level –

an additional aspect of fulfilling the duty of making a prior application is that the citizen must allow the authority reasonable time to respond to the application and the duration of time is determined in each case as per its circumstances. It shall be noted that according to Section 2 of the Administrative Procedures Amendment (Decisions and Reasons) Law, 5719-1958, a public servant – who is defined in this law as an "authority who was granted power pursuant to law" – who was petitioned in writing to exercise his power "shall respond to the petitioner promptly, and no later than 45 days from the date of receipt of the petition" (see LCA 150/07 **E.I.M International Electronics Ltd. The Ministry of Finance – The V.A.T and Customs Department** (2007), in paragraph 6; see also Section 11 of the Interpretation Law, 5741-1981, which imposes upon the authority a duty to exercise its powers "with due dispatch", which was interpreted as reasonable dispatch in the circumstances of the matter (**Zamir**, on page 1881)). In the case of a class action against an authority, it appears that if and to the extent an obligation to make a prior application to an authority is to be imposed, and that is my position, the court must be strict regarding its response time; this is due to the fact that the more the representative plaintiff shall wait to file the action, the longer it will be possible for the authority to continue the illegal collection – and this is contrary to the best interest of the group and the public interest – and the greater the class action plaintiff's concern that others will preempt him and file an action before him. Additionally, in the framework of the obligation to exhaust proceedings vis-à-vis an authority, an individual is required to raise all of his arguments against the authority in the framework of the prior application and shall not be permitted to present requests or arguments in court that were not raised earlier in his application to the administrative authority (**Zamir**, on page 1875). In light of the power inequalities in class actions and their underlying social objectives, it appears that it is not necessary to insist on this requirement if and to the extent a prior application was made before filing a class action against an authority; meaning, it is possible that certain arguments that are raised in the framework of an action and a motion to certify it as a class action, do not necessarily have to be disqualified even if they were not raised in the framework of the prior application, subject to such an application having been made. In any event, the requirement to exhaust proceedings vis-à-vis an authority in the framework of a class action against an authority – as it is an administrative action – in the form of the obligation to apply thereto prior to filing an action, can definitely be presented as a fundamental principle of administrative law.

32. In addition, in certain circumstances, it is possible to perceive the absence of a prior application as a failure to fulfill the duty of fairness towards a public authority that is imposed on an individual. Case-law accepts that alongside the great duty that is imposed upon the authority to act fairly towards the individual, which is well-rooted and fundamental in our legal system (see LCA 480/08 **Carmel Desalination Ltd. v. The State of Israel – The Ministry of Finance** (2010)), in paragraph 9 of my opinion, albeit in a minority opinion there, however it appears that not on this matter; CFH 3993/07 **Jerusalem Assessment Officer 3 v. Ikafood Ltd.** (2011), in paragraph 6 of my opinion and the references cited there), there is also a duty imposed upon the individual to act fairly vis-à-vis the authority, although it is of a lesser scope than the excessive duty imposed upon the authority (HCJ 164/97 **Conterm Ltd. v. The Ministry of Finance**, IsrSC 52(1) 289 (1998); AAA 7217/10 **Ilanit Rehabilitation Center Ltd. v. The State of Israel – Director of Haifa District** (2012), in paragraph 3 of my opinion; LCA 5210/08 **Zorach Rosenblum, Adv. v. Hevel Modi'in Local**

Council (2010); LCA 5541 **The Economic Company for the Development of Kiryat Ata v. Israel Lands Administration** (2012), in paragraph 10). This approach was originally developed in the aforementioned **Conterm** Case, where a dispute emerged between Justice **Zamir** and President **Barak**: Justice **Zamir** was of the position that there is a general duty in administrative law that is imposed upon the citizen from which the court can derive rules of conduct, while according to President **Barak**'s position there are indeed duties towards the authority that are imposed upon the individual, however these are specifically prescribed for each case separately (see **Zamir – Volume 3**, on pages 1070-1077). It emerges from case-law that the court tends towards Justice Zamir's approach, although it has hardly drawn operative significance from the existence of this duty (see D. Barak-Erez **Administrative Law – Volume 1** (5770-2010) on pages 282-287). Indeed the typical case of failure to fulfill this duty towards the authority exists when an individual intentionally conceals vital information from the authority in the form of material non-disclosure (HCJ 1884/02 **Dimitrov v. The Minister of Interior, Eli Yishai** (2010), in paragraph 27), which generally is different, by its nature, from not making a prior application before filing an action against it; this raises the question whether the individual's duty of fairness can establish a duty to actively make a prior application in all matters. As far as I am concerned, I tend to answer this question affirmatively, however even if we do not necessarily establish the requirement to make a prior application based on the duty of fairness, we have already mentioned that in administrative law there is a duty to exhaust proceedings prior to petitioning an administrative court or the High Court of Justice. Furthermore – and in another context – the cost of an "ordinary" civil action in terms of fees and legal fees is also a consideration not to sue before applying to an authority, of course, each matter and its own classification. Moreover, administrative law's approach is immersed in transparency, and see, *inter alia*, the Freedom of Information Law, 5758-1998; also in civil law the judicial and legislative policy is that of cards as open as possible, subject to exceptions such as privileges; see LA 2498/07 **Mekorot v. Bar**, paragraph 9 (2007); Dr. S. Levin **Theory of Civil Procedure – Introduction and Basic Principles** 179-180 (2nd Edition, 5768-2008). In any event, in my opinion, in the circumstances of alleged illegal collection by an authority, fairness towards the authority the shall require that an application be made prior to filing a class action, which shall provide an opportunity to right the wrong without the need for a judicial proceeding. This is even more appropriate in a class action than in the "ordinary" relationship between a citizen and an authority (where "proper disclosure" and a prior application are also preferable). The class action was designed by the legislator as a social tool and therefore when the social objective can be achieved at low costs by making a prior application there is no reason not to do so. We shall also recall that one of the central reasons for imposing the duty of fairness of an individual towards an authority is that a citizen is required to assist the authority in realizing it purposes (**Barak-Erez – Volume 1**, on page 278). This also allegedly coincides with the requirement to make a prior application in order to allow the authority to right the wrong without needing to conduct a judicial proceeding. I shall add that as we shall see further on, the duty of fairness of the authority itself must also be reflected in this context.

The Duty to Make a Prior Application to the Administrative Authority

33. As shall be specified below, although it realizes the objectives of the class action proceeding to a significant extent, imposing a duty make a prior application to

the authority involves costs which could harm the set of incentives for filing such actions. In fact, the current structure of the Class Action Law, and particularly the set of incentives that is embedded in its provisions, makes it not inconsequentially difficult to impose such a duty; and as mentioned, when ruling in this matter we are required to strike a balance between preserving this set of incentives and realizing the fundamental purposes of the Class Action Law. This balance will be expressed primarily in the way this duty is implemented, however it shall be emphasized **that the starting point is that an application should be made to the authority before filing an action and a motion to certify it as a class action, and that this is a relevant consideration when awarding remuneration and legal fees**. However, ultimately, each case shall be examined based on its circumstances, and occasionally – **without it at all being the rule** – the absence of an application shall not be held against the representative plaintiff and his attorney. Making a prior application is the rule.

General Arguments that Support Imposing a Duty to Make a Prior Application

34. For the sake of portraying a completed picture, we shall now address the arguments that support imposing a duty of making a prior application in class actions in general. These arguments are enhanced when an administrative authority is at issue. A prior application is first and foremost intended to ensure that the motion for certification of a class action is submitted after a proper examination of the underlying legal and factual foundation was performed. This is particularly the case given that the law incentivizes representative plaintiffs and lawyers to file class actions as quickly as possible; pursuant to Section 7 of the law, when motions for certification that raise similar questions of fact or law are filed, then if the first motion has already begun to be heard, and provided it was published in the Class Actions Register as required in Section 28 of the law, it is granted precedence over the second motion, while granting the court discretion to deviate from this rule if necessary and in accordance with considerations of justice (the **Dinari** Case, in paragraphs 19-21). In light of the above, "if a motion is filed, it can be assumed that a lawyer who is also considering filing a motion for certification will not take time to complete a preliminary examination prior to filing it. This set of incentives, by its very nature, leads to filing motions hastily, without the motion's prospects of being certified being properly examined and without a factual and legal foundation being laid (see my above-cited words in paragraph 21 – from the referenced **Zaig** Case); LCA 8562/06 **Pufik v. Pazgas 1993 Ltd.** (2007), in paragraph 8). In this state of affairs, the lawyer takes a risk that after receiving the defendant entity's response, the action will be denied and he shall be charged expenses; or alternatively, that if it shall be found that the motion has a reasonable chance of being certified, the plaintiff or his lawyer shall be replaced by more worthy representatives due to various circumstances, thus reducing the anticipated benefit from the action and making it not economically worthwhile. Indeed, a prior application may frequently prevent filing motions hastily in the described manner. However, it can be said in the same breath – and this shall be elaborated upon further below – that those "laws of speediness" can be detrimental to a prior application despite the benefit embedded therein.

35. Further to the support of a prior application in order to conserve resources for the potential plaintiffs and defendant and to reduce the burden imposed on the courts, occasionally a prior application will assist the representative plaintiff and his attorney

in establishing their claim, and *vice versa* – may eliminate the need to file the action if and to the extent it shall be discovered that it is unfounded or if the parties shall amicably reach a solution. For example, in the mentioned **Eyal** Case, the representative plaintiff filed a motion to certify a class action against his employer due to failure to pay "holiday pay". After negotiations between them, it became clear to him that his claim cannot be a class action, *inter alia*, due to the fact that the group he supposedly represented was not homogeneous and specific examination was required with respect to each member thereof, and that the defendant had paid the amount being claimed to dozens of employees who had individually applied thereto. Consequently, the plaintiff had to file a motion to remove his claim. This case demonstrates that even though imposing the duty to make a prior application involves a concern of creating a chilling effect with regard to filing appropriate class actions, it amounts to creating a "positive chilling effect" against filing futile actions that are not properly grounded. Such an application can also occasionally allow the potential defendant – who, generally, is interested in avoiding the costs involved in conducting a representative proceeding – an opportunity to right the wrong and modify his ways, while solving a real problem and also to save judicial time and resources of the litigating parties and the entire public:

> "Indeed we are not all angels, but are also not all wolves. The simple and proper thing which should have been done was to apply to the chain, present the flaw that was discovered and photographed and ask for an explanation. Only if the explanation is not acceptable and/or the chain did not respond to the citizen, and only then, is it appropriate to file a class action" (the words of Deputy President Dr. D. Pilpel, Class Action (District Tel-Aviv) 28063-05-11 **Bessler v. Tiv Reshatot Ltd.**, on page 3).

In that case a commercial company was being sued; but these words are all the more relevant when at issue is an action against an authority which is presumed to operate while applying equality and in the public's best interests. Further to the trend of efficiency, the duty to make a prior application derives from the obligation of the parties to the action to conduct themselves in an efficient and fair manner during the action and also prior to the filing thereof. This obligation is reflected in the law's objective that is described in Section 1(4): "Efficient, fair and exhaustive handling of claims"; similarly, in the provision that the court shall certify a class action only once it has been convinced that this is the "most efficient and fair way to rule in the dispute in the circumstances of the case" (Section (8)(a)(2)). This last provision reflects the approach that the class action tool should be designated for situations in which the dispute cannot be resolved using other efficient manners (see paragraph 8 above).

36. An additional justification to require a prior application is the obligation of the class action plaintiff and his attorney to act for the benefit of the group, loyally and in a *bona fide* manner, and this is taken into consideration by the court throughout all of the stages of the proceeding, **even prior to filing the action** – "The parties must conduct themselves loyally and fairly and in a *bona fide* manner beginning from the preliminary examinations between them, the results thereof and the implications therefor, in all that relates to the existence of causes of action that justify initiating the class action proceeding" (the **Eyal** Case, on page 6). It appears that not making a prior

application could occasionally amount to *male fide*, or at the least, lack of procedural fairness. Applying procedural norms of fairness and *bona fide* during the **pre-claim stage**, is grounded both in the general duty to act *bona fide* that is imposed upon litigating parties – and it can be assumed that holding discussions between the parties prior to initiating a legal proceeding is part of this obligation, even if this does not explicitly appear in the law – and in the provisions of Section 8(a)(4), pursuant to which the court will allow a class action if "there are reasonable grounds to assume that the interests of the all of the members of the group shall be represented and conducted in a *bona fide* manner ". **Halfteck** also states in his aforementioned article that filing a claim due to the violation of a law when the representative plaintiff and his attorney refrained from warning about it, could amount to *male fide*:

> "The *bona fide* element in filing a class action is not fulfilled when the filing of the claim is vexatious or extortive or when the lawyer requesting to represent the group or the representative plaintiff knew about the violation of the law but refrained from warning about it or did not prevent its consequences" (Page 328).

Additionally, occasionally a prior application will assist both the litigating parties and the court in clarifying the existing legal disputes and the entire interests at issue and in examining whether in the circumstances of the matter the class action is the most fair and efficient tool for resolving the dispute – meaning, even if the action will ultimately be filed to the court, a prior application could make the hearing more efficient and thus promote the public interest. As mentioned, in certain cases, naturally extreme ones, the absence of a prior application could even amount to "abuse of the class action proceeding for the purpose of filing futile claims that lack legal or factual foundation against defendants with 'deep pockets' (the words of Deputy President **E. Rivlin** in CA 1509/04 **Danosh v. Chrysler** (2007) in paragraph 15) – for example, if the representative plaintiff was of the opinion that his claim may be a futile claim and he could have easily clarified this by means of a prior application and he did not do so. Additionally, there may be cases in which in the absence of a prior application the group's best interest shall not be achieved and the obligations of the representative plaintiff and his attorney shall be breached:

> "Procedural *bona fide* means, *inter alia*, that the plaintiff is required, to begin with, to establish the motion for certification based on a thorough and in-depth examination of the relevant legal and factual foundation (the **Supersal** Case (see below – E.R.), paragraph 9(a)). Accordingly, filing a motion for certification without conducting a thorough examination of the relevant legal and factual foundation could, in and of itself, lead to the conclusion that there are reasonable grounds to assume that the class action plaintiff and his attorney will not represent the group in a *bona fide* manner " (the words of Justice **U. Vogelman** in the **Insler** Case, in paragraph 19; also see 2444/08 **Supersal Ltd. v. Cohen** (2008) in paragraph 19).

And:

> "The absence of a prior application and the failure to exhaust proceedings that are an integral part of the duty to act *bona fide* that is imposed upon a class action plaintiff in conducting a class action proceeding, on his behalf and on behalf of the group he represents… It follows that substantial weight should be attributed to this when awarding remuneration to the plaintiff and legal fees to his attorney. The duty to act *bona fide* includes a preliminary examination and a prior application to the respondent in order to avoid unnecessary waste of resources for both parties" (the words of Justice **N. Mounitz**, in Class Action (District Nazareth) 53027-02-13 **Blau v. Aloniel** (2013)).

The duty to act *bona fide* can be coupled with the matter of transparency, the "open cards" which we addressed above (paragraph 32).

37. Thus, refraining from a prior application due to the concern of remuneration and legal fees not being awarded, in such cases in which such an application would have realized the group's best interest, could amount to *male fide* and lack of loyalty towards the represented group and even to inappropriate conduct vis-à-vis the defendant; particularly when the group's main interest is preventing the potential defendant's future conduct, as opposed to a retrospective relief. Meaning, when at issue is a wrong or an illegal collection that harms the members of the group, a prior application could lead to the defendant immediately ceasing its conduct, and this will not be obtained other than by means of such an application:

> "One may wonder why the petitioners refrained from making a prior application which could have saved the need to file a motion for recognition as a class action and could have even made it easier for the respondents to respond affirmatively to the demand (since by agreeing they would not have exposed themselves to the monetary risk that is involved in accepting the petitioners' claims after a legal proceeding has been initiated). I can only speculate on this as well, even if the speculation appears quite established: had the petitioners applied prior to the action, then if their demand had received an affirmative response, they would not have been able to demand any payment from the respondents for their activity, as opposed to the remuneration and the payment which they can request in the framework of the class action proceeding. However, it is clear that this reason, if and to the extent it indeed guided the petitioners, cannot justify the absence of a prior application. The objective of the class action proceedings is first and foremost to promote the group's interest. Refraining from making a prior application based on considerations of remuneration and payment, in circumstances in which this is in the group's best interest, is an act that does not comply with the dedication and loyalty

> obligations on the part of those who request to represent the group. Such refraining is wrong, not only due to it being unfair and inappropriate conduct vis-à-vis the respondent (compare to Sections 4(1) and 8(a)(2) of the Class Action Law, which provide that the class action proceeding shall only be allowed when no more efficient means to resolve the dispute exist), but also due to it being a violation of the fiduciary duty towards the group (compare to Section 17 of the Class Action Law)" (the words of Judge **O. Grosskopf** in the **Harsat** Case, in paragraph 27).

On a practical level, according to this approach, if and to the extent there shall be an affirmative response to the prior application and the illegal activity shall cease, it shall be found that this was the efficient and fair way to resolve the dispute; if the application shall be rejected and the authority shall insist on its ways, the representative plaintiff shall be immune against a claim of inappropriate activity and hasty and unnecessary use of the action, and the application that was made shall be reflected in the remuneration and the legal fees that shall be awarded.

38. As mentioned, that stated above applies in principle to class actions against both private defendants and against authorities, although the grounds relating to efficiency and saving resources certainly apply with greater vigor when the defendant is an authority; as mentioned, the consideration of protecting the public purse is reflected in the law in the framework of the option to cease collection and in the limitation of the restitution relief and is taken into consideration by the court when awarding remuneration and legal fees against an authority. To these grounds we shall add what is stated above regarding the unique character of class actions against an authority: first, similarly to an administrative petition, that the central purpose is administrative-enforcement – the interest of highest priority is that of law enforcement and preventing the authority's continued illegal activity (although the purpose of compensation to the plaintiffs still exists, but to a lesser degree). As mentioned, this objective can occasionally be obtained by means of a prior application without needing any legal proceedings, as is indicated by the protections that are granted especially to an authority. For example, the entire objective of the cessation of collection option is to allow the authority to amend its ways, and by doing so, first to properly serve the public, and second to prevent unnecessary expenses. In furtherance thereto, as mentioned, a class action against an authority constitutes an administrative action and thus is characterized by normative duality; therefore the obligation to exhaust proceedings vis-à-vis an authority, in the form of the obligation to make a prior application before filing a class action, can, amidst the other administrative requirements, be applied. We also mentioned an individual's obligation to act fairly towards the authority, even though, as mentioned, the authority's obligation towards the individual is even greater. As we shall elaborate, these grounds – which are unique to the administrative class action – are what tilt the scales towards the proposed ruling, pursuant to which, as mentioned, there is a general obligation to apply to an authority prior to filing a class action. As shall be specified below, there are also additional grounds – and they shall now be detailed – which address the concerns that emerge from the requirement to make a prior application and which particularly characterize a class action against an authority. However, before that, it shall be emphasized that nothing in that stated sets hard and fast rules regarding the question

whether there is an obligation to make a prior application to a private defendant. Although, as mentioned, in my opinion, making a prior application constitutes desirable conduct in such actions as well – subject of course to the circumstances of the case and assuming this could not amount to prejudicing the group members – however, the unique characteristics of an action against an authority which can nullify the costs involved in imposing such an obligation, are *prima facie* lacking. I shall emphasize, however, that in certain circumstances, the absence of a prior application in a private action may also constitute a breach of the obligations that are imposed upon the class action plaintiff and his attorney, and this may be able to be taken into consideration by the court in the framework of the class action proceeding; however, not at the same normative intensity as in the case of an action against an authority in which case the starting point is that as a rule there is an obligation to make a prior application.

Arguments Against Imposing An Obligation To Make A Prior Application

39. The portrayal of a complete picture justifies summarizing the arguments **against** imposing an obligation to make a prior application as well. As we shall see, such an application involves various kinds of costs – not necessarily financial to be begin with, although they all lead to a financial result – which raise the concern of prejudicing the set of incentives for filing class actions and of prejudicing the efficiency of this tool. A comprehensive analysis of these costs can be found in the article by T. Havkin and H. Ben-Noon, "Should an Onus to Apply to a Defendant Prior to Filing a Motion for Certification of a Class Action be Imposed upon a Plaintiff?" (pending publication in ***Alei Mishpat*** 12) (hereinafter: "**Havkin and Ben-Noon**"), which addresses class actions filed against both an authority and a private defendant (and indeed special reasons were listed therein regarding an action filed against an authority). I shall state here and now that – with all due respect – my opinion differs and as far as I am concerned I posit that the advantages and importance of the prior application, of course especially against an authority, but also in a private action, outweigh its disadvantages. The esteemed authors posit that imposing an obligation to make a prior application does not coincide with the characteristics of the class action institution particularly regarding the existing incentives for filing such actions, and also makes it difficult for the court to supervise the parties' conduct prior to the proceeding and during the course thereof, and that this is a central layer of the Class Action Law. As to the costs involved in imposing an obligation to make a prior application, the authors argue, **first**, that a prior application could lead to exposing information in a way that is contrary to the economic interest of the representative plaintiff and his lawyer and even contrary to the best interest of the represented group. Thus, a prior application could expose the intention of filing a class action to others, and they may file an earlier motion for certification, in light of the set of incentives that is embedded in the "first come first represent" rule. **Second**, even if the defendant shall agree to grant the entire requested relief in response to the prior application, this will not save litigation in court – in light of the concern that the defendant may not fulfill its undertakings in the absence of court supervision, which should be operated in a manner similar to the supervision that is applied in the proceeding of approving settlement arrangements; furthermore, in order to preserve a future incentive for filing appropriate class actions the court in any event will still have to award remuneration and legal fees for the benefit of the representative plaintiff and his attorney. Additionally, if and to the extent the defendant admits to a

wrong, a relief shall be granted for the benefit of the group in the framework of the proceeding (even though, as mentioned, the authority has the option of ceasing collection), and it may perhaps be preferable that the illegality cease after a motion for certification is filed, such that the defendant's conduct shall receive media coverage, reflecting the law's public-deterring effect. **Third**, in contrast to an ordinary adversary proceeding, the efficiency of the preliminary out-of-court discussions between the parties is doubtful since a prior application intensifies the representative problem that is inherent to the class action institution and could lead to the defendant eliminating the plaintiff's personal cause of action by compensating him or alternatively by paying him a monetary amount in consideration for him waiving the filing of the motion for certification and this could even cause parts of the claim to become disqualified due to the lapse of the statute of limitations; or could lead to negotiations being held before the filing of a motion for certification this raising a concern that the parties will agree to a settlement that does not coincide with the interests of the group members; and even if the settlement arrangement shall be brought to the court for its approval – to the extent this can be done before filing a motion for certification – the court will not be able to examine its nature without statements of arguments on behalf of the parties.

40. According to the position of authors Havkin and Ben-Noon the objectives of the prior application – and primarily, a proper examination that shall lead to the filing of appropriate claims – can be achieved by other, more efficient, means. For example, the information that is required can be achieved by means of a private investigation, an examination of the members of a potential group and an attempt to clarify the facts with the defendant without exposing the objective of the examination. Finally, the authors are of the opinion that when the defendant is an **authority**, there are additional considerations which reinforce their conclusion: according to them, a prior application shall extend the period of time between the application and the filing of the motion for certification – if and to the extent such shall be filed – and if the authority shall file a cessation of collection notice, the payment that was unlawfully collected shall not be returned to the members of the group; also, it is easy to collect information to establish a cause of action with respect to an authority without needing a prior application – for example, by means of filing a request pursuant to the Freedom of Information Law, 5758-1998. According to the authors, the incentive for filing class actions against an authority is weak to begin with due to the court's custom of awarding low amounts of remuneration and legal fees for the sake of protecting the public purse. Finally, the authors argue that the duty to act *bona fide* that is imposed by the legislator upon the representative plaintiff and his attorney in the framework of Section 8(a)(4) applies with regard to the relationship between them and the members of the group and not with regard to their relationship with the class action defendant. According to them, one must refrain from expanding the duty to act *bona fide* in this context, so as not to harm the incentive for filing class actions (see **Klement**, on page 150-151), since due to the reasons stated above, contrary to an ordinary civil proceeding, the class action plaintiff does not have any interest in applying to the defendant prior to initiating a legal proceeding. One may also add to these reasons that the costs involved in making a prior application and in the authority responding to the application may in any event be identical to those that are involved in filing a class action and a motion for certification, on the one hand and to filing a notice of cessation of collection on the part of the authority, on the other hand; furthermore, why should one impose an obligation to make a prior application to an authority while there already is a tool that makes it possible to eliminate the proceeding at an early

stage, i.e. the option of cessation of collection? However at the end of this chapter I shall emphasize, as mentioned, that in my opinion the public interest that underlies the class action institution, and certainly when at issue is an authority – clearly outweighs all of the above; I shall add that in my opinion, the mere existence of the "cessation of collection institution" reinforces the need to make a prior application which shall achieve the cessation of collection quickly.

Conclusion – As a Rule - A Prior Application Should be Made to an Administrative Authority

41. Thus, I posit that despite the described costs, a general obligation to make a prior application to an authority is completely justified, based on a combination of the various reasons – the characteristics of the class action in general, as a social tool that is intended to most efficiently achieve the best interest of the parties, the procedural obligations that are imposed in the framework thereof upon the representative plaintiff and his attorney; and the characteristics of the class action that is filed against an authority, which is primarily directed at enforcing law and preventing continued illegal collection, which, as mentioned, is reflected, *inter alia*, in the cessation of collection option and in restitution relief restriction; and the administrative characteristics of a class action that is filed against an authority – an administrative action – from which one can derive the individual's obligation to exhaust proceedings vis-à-vis an authority. The obligation to make a prior application to an authority is sister to the obligation to act fairly vis-à-vis an authority.

42. As may be recalled, the Respondent argued that the authority should not be granted any additional privileges, as it already benefits from the restitution relief restriction and particularly from the option to cease collection. *Prima facie*, these arguments are appealing; however, in my opinion referring to these protections as privileges that are granted to an authority is inaccurate; as mentioned, the authority has nothing of its own – and protecting the public purse is simultaneously protecting the public interest and this is the underlying rationale of the protections (see the citing from the **Tiomkin** Case, mentioned in Paragraph 25 above). Of course, one must, to the extent possible, avoid a situation in which such savings are at the expense of any individual, however, occasionally this is inevitable and this is also the reason for the checks and balances mechanism in the Class Action Law. This approach is also reflected in the fact that the court is required to keep the protection of the public purse in mind when granting relief to the group and when awarding remuneration and legal fees. It thus appears that the existence of these protections reinforces the justification of imposing a general obligation of making a prior application even if such obligation is not explicitly mentioned in the law. In my opinion this coincides with the law and is particularly implied by the duties imposed upon the representative plaintiff and his attorney in the framework thereof and from the protections that are granted to an authority that is a defendant. More explicitly: despite the existence of the cessation of collection option in the law which allows changing the authority's policy while saving resources, it is still appropriate that the representing plaintiff and his attorney make a prior application since this could also bring about additional benefit in the form of a quick resolution. As mentioned, it can be argued that it is possible that the costs involved in making a prior application and in the authority's response to the application may be identical to the costs involved in preparing an action and motion for certification and a notice of cessation of collection. However, I doubt whether a

preliminary examination in the framework of a prior application involves the same costs that are involved in preparing a claim and motion for certification. It is even more difficult to accept that the cost of preparing the authority's response to an application – even though it can be assumed that occasionally it may require the investment of certain resources, such as conducting an internal examination – is the same as the cost that is involved in filing a notice of cessation of collection, with all that that entails. Thus, in the case at hand – it appears that a prior application would have eliminated the need to file the action and the motion for certification, and it is essentially difficult to assume that the costs involved in the parties' conduct were similar to those they have already borne until this stage of the proceeding. As to the position of the scholars **Havkin and Ben-Noon**, that the duty to act *bona fide* that is imposed upon the class action plaintiff and his attorney in the framework of the Class Action Law does not apply vis-à-vis the defendant, my opinion, with all due respect, differs, in light of the public and social characteristics of this tool, and particularly its significant power and its ability to bring about law enforcement while realizing the right of access to courts. In my opinion this enhanced duty can definitely be interpreted as also applying to the relationship between the class action plaintiff and his attorney and the class action defendant.

43. My position is also based, *inter alia*, on the approach that was expressed above regarding the priorities between the public objectives of the class action proceeding and the means of realizing them – the filing of class actions by individuals and their attorneys, as a result of the set of incentives that is prescribed in the law. While the class action is essentially a tool to obtain public objectives, the filing of a class action and the representation of a group based on the desire to make a profit was not, in and of itself, delegitimized by the legislator; it is indeed necessary to be as diligent as possible regarding the terms and conditions of the law and case-law regarding granting appropriate remuneration to those performing the work both in order for justice to be done in the individual case and – from a broader perspective – in order to preserve the incentives for filing appropriate class actions. This tension is an inherent part of the class action institution and is fully revealed in the matter at issue. Indeed, although as a rule, a prior application to an authority strictly fulfills the objectives of the class action proceedings, it could amount to creating a certain chilling effect, due to the concern that remuneration and legal fees will not be awarded. However, the said approach regarding priorities leads to the conclusion that even if a prior application may occasionally not be completely unproblematic, as a rule, it is a necessary step before filing class actions against an authority. Alongside this, awareness of the importance of granting rewards shall be reflected – as shall now be clarified – in all that relates to the manner the court must act when such a prior application has been made, both in the case that filing a claim become unnecessary and in the case that it was ultimately filed.

44. In furtherance thereof and on a practical level, it appears that more than a few of the concerns can be cured by the manner in which the prior application rule shall be implemented. Indeed, the starting point, as a rule, is that an application should be made to an authority before filing an action and that the absence of an application could be reflected in the framework of the class action proceedings, particularly with regard to awarding remuneration and legal fees. However, occasionally the court will discover that a prior application would not have eliminated the need for the class action proceeding and in such case – of course – this shall not be held against the

class action plaintiff and his attorney. The court must examine, *inter alia*, whether, in the circumstances at hand, a prior application would have raised a concern of selective response to the class action plaintiff; what resources were required therefrom to make a prior application; and whether it could have realized the group's best interest. Additionally, generally, the absence of an application will lead to a reduction in the amounts of remuneration and legal fees that shall be awarded, and as mentioned, occasionally, even to denial of the class action plaintiff and his attorney's entitlement to receive them at all. It is also possible – in circumstances in which not making a prior application amounts to clear *male fide* – that this shall lead to dismissing the motion for certification; and this is separate from the cessation of collection option. The implementation of this rule in this matter reflects the premise that the requirements of administrative law shall be implemented in a "softer" manner in administrative actions than in administrative petitions and appeals, such that the absence of an application will not necessarily inherently lead to the dismissal of the motion for certification, but will be reflected at the remuneration and legal fees level. I shall also mention that the same characteristics of an authority which underlie the protections granted thereto in the framework of the law, concurrently justify refraining from prejudicing the incentives for it to act in accordance with the law, and therefore one must be cautious when dismissing motions filed against it *in limine*. On the other hand, if the representative plaintiff did not make a prior application but the action and the motion for its certification as a class action actually led to the authority ceasing to collect, then even if the court shall award remuneration and legal fees that reflect the said benefit, the absence of a prior application could reduce the amounts that shall be awarded.

45. As mentioned, an additional concern embedded in imposing an obligation to make a prior application is that the defendant shall "selectively" handle the individual claim of the class action plaintiff and in doing so shall eliminate his personal cause of action, which is a condition for him to be representative plaintiff. However, by virtue of the authority's role and the duty of fairness imposed thereupon, it is obligated to conduct itself equally in a manner that significantly removes the concern that it would so eliminate only the individual claim of the representative plaintiff, since it is required to apply the solution to all of the members of the potential group. This premise constitutes a central justification for distinguishing between imposing an obligation to make a prior application to a defendant that is an authority and circumstances in which the defendant is a private entity since, at least on a formal level and subject to the provisions of law, private entities are not necessarily presumed to act equally towards all, of course as opposed to various market considerations. In this context I shall note that there are those who propose to amend Section 4(1) of the law, which lists those who are permitted to file class actions, such that it shall include not only a "person who **has** a cause of action" (emphasis added – E.R.) but also a person who **had a cause of action** in the past. This arrangement allows avoiding the risk that a prior application would frustrate the representative plaintiff's venture – which could add costs of finding a new plaintiff – and allows the court to establish the obligation to make a prior application; see also D.M. **Dembitz** "Class Actions, Prior Warning – Existing Law and Desired Law" ***Orech Ha'Din*** 110 (July 110) (hereinafter: "**Dembitz**"), on page 114. According to the author, the class action proceeding is meant for the public and the said amendment is proposed in a spirit similar to granting standing in High Court of Justice proceedings to any person wishing to protect the public interest; i.e., to expanding standing. According to **Ben-**

Noon and Havkin, given the social objectives underlying the class action, even without such an amendment, it is doubtful whether granting such compensation would eliminate the class action plaintiff's personal cause of action if he refused to accept the compensation – or received it against his will – and insisted on his right to file the motion (also see Hillel Sommer, "'A Hand Grenade with Its Pin Removed'? The First Decade of the Consumer Class Action" ***Din U'dvarim*** 1 347 (5765), on pages 390-392)).

46. We must now refer to how the authority is expected to conduct itself after the prior application and to how the court must take the application into consideration when awarding remuneration and legal fees. As mentioned, the need to apply to an authority before filing the class action derives, *inter alia*, from the duty to exhaust proceedings vis-à-vis the authority. However, how long must the representative plaintiff wait for the authority's response to the application? As may be recalled, the longer an action and a motion for certification are not filed, the concern that others may file an earlier action and, alternatively, that part of the claim may become disqualified due to the lapse of the statute of limitations, increases; additionally, if and to the extent the authority shall cease to collect, the members of the group shall not receive compensation for the time that lapsed from the prior application and until the date of the notice of cessation of collection, which can be filed upon the lapse of 90 days (and even beyond such time with the approval of the court). At this point I shall note that there are those who propose a different mechanism for restitution claims against an authority – "class action defense", which allows defendants to conduct their defense in a collective manner – which, according to them could incentivize early detection of collection flaws and quick presentation of them to the courts (see "**Class Action Defense**") but this is not the place to elaborate thereupon. In any event, it is customary in administrative law that an authority must respond to a citizen's application within reasonable time, in accordance with the circumstances. It appears, due to the concerns that were noted, that the authority must respond to the prior application as quickly as possible and as an interpretative starting point, when at issue is an application before filing a class action, the authority should be treated more diligently than in an ordinary state of affairs:

> "**There are cases in which an administrative authority must response urgently to a citizen's application**. This depends on the circumstances of the matter, the complexity of handling the matter, the damage that could be caused by the lapse of time, and such other considerations. The criterion in each case is that of reasonableness: an administrative authority must discuss and respond with reasonable dispatch" (the words of Justice **I. Zamir** in HCJ 2624/97 **Ronel v. The Government of Israel**, IsrSC 51(3) 71, 82 (1997); emphases added – E.R.)

It can also be said that prompt and efficient handling of such a prior application – whether by granting the requested information or by admitting to the alleged collection or by denying it – falls within the scope of the duty of fairness that is imposed upon the authority. Thus, if and to the extent the authority shall be delayed in its response to the application and shall force the representative plaintiff to file an

action only following which the authority shall cease the collection, it is possible that that this shall be deemed lack of fairness and *male fide* on the part of the authority and shall be taken into consideration when awarding remuneration and legal fees. In any event it is clear that all depends on the circumstances – and it is reasonable to assume that the scope of the examination that is required in order to respond to a prior application changes from case to case; however, as mentioned, the starting point is that the authority must try to respond to the application as soon as possible. An additional concern we mentioned is that if the authority shall cease the collection due to the application this would eliminate the need to file the action and the class action plaintiff and his attorney would not be remunerated. The Attorney General's approach is that there is nothing wrong with remuneration and legal fee amounts not being awarded to the class action plaintiff and to his attorney in such a case, since in any event the objective of the class action against the authority was achieved by the authority ceasing the illegal collection. In my opinion, this approach should not be sweepingly accepted, since occasionally a prior application also involves costs and the absolute absence of remuneration and legal fees could harm the set of incentives for filing class actions against an authority and give too much of a "discount" to the authority. In my opinion, if an authority ceased the collection following a prior application, the representative plaintiff and his attorney shall be able to file a motion to the Administrative Affairs Court which shall examine whether in the circumstances of the matter remuneration and legal fees should be awarded for the investment that was involved and due to the fact that their prior application led to the authority ceasing the collection. As **Havkin and Ben-Noon** stated in their article, in this situation, the court will still have to conduct a proceeding – but it is clear that in any event the prior application rule leads to saving more judicial time. Moreover, if the representative plaintiff made a prior application to the authority and the class action was later filed and accepted on its merits, the courts must note this to the representative plaintiff's credit, thereby incentivizing prior applications.

47. I shall add that although, as mentioned, I posit that as a rule a prior application to an authority is necessary, I shall not deny that the set of incentives embedded in the law makes this somewhat difficult; in light of the "laws of speediness" and the concern of competition, the representative plaintiff and his attorney will tend to file their motion as soon as possible, even if the information required to establish their argument is not complete. Therefore, and in light of the concern that the authority being sued shall request to "put the action to an early death", it is reasonable to assume that the representative plaintiff and his attorney will often not apply thereto before filing a claim. This situation frustrates the possibility of properly clarifying the factual and legal situation and leads to the filing of inappropriate actions. On the other hand, in light of the information gaps, rational players – even if they believe in their motion – will prefer not to file an action due to the concern that expenses will be imposed thereon if it shall be denied, and yet will not make a prior application to address their concern (see **Dembitz**, on page 110). In light of this state of affairs, here are other ideas which apply both at the private level and vis-à-vis public authorities for statutory solutions which may incentivize class action plaintiffs to make applications before filing actions. As to the concern regarding a settlement arrangement that shall be reached without court supervision, an arrangement can be prescribed in the law that would deem void an arrangement that is not approved by the court, *inter alia*, with linkage to Section 30 of the Contracts Law, 5733-1973, which allows for the cancellation of an agreement based on grounds of protecting

public policy; with respect to the negative incentive that the "laws of speediness" create – a provision can be considered that when selecting a class action plaintiff, the person who applied to the defendant to begin with, prior to filing an action and who operated efficiently vis-à-vis the defendant in order to examine his cause of action and defend it, is the one who shall be heard even if others filed a motion for certification before him (this proposal is also raised by authors **Havkin and Ben-Noon** in their aforementioned article). Such an arrangement could incentivize potential plaintiffs to make a prior application and could legally reinforce the approach that as a rule, making such an application promotes the group's best interest as well as the public interest. In addition to the above, I shall note, with all due respect, that in my opinion these authors make a valid point regarding the fact that if the authority ceased to illegally collect out of court, meaning, following a prior application, this lacks public and media resonance; since at issue are actions of an authority that affect a wide public – and not only the personal case of any given individual – it is possible that it is appropriate that an authority, if it admits to illegal collection, and as part of the response to the prior application, publish an appropriate notice in the media regarding the cessation of collection, in a manner similar to what is done in many settlement arrangements that are accepted in the framework of class actions. This matter can be legislated, however, in my opinion the court can also obligate it to do so in appropriate cases. Parenthetically to these proposals I shall mention the Attorney General's statement that the number of class actions filed since 2013 has not declined despite the fact that when currently awarding remuneration and legal fee amounts the district courts often hold the absence of a prior application against the representative plaintiff and his attorney.

Ruling Compensation and Legal Fees After the Authority's Cessation of Collection

48. An additional general question that emerged in the circumstances of this case is how remuneration and legal fees should be awarded after a notice of cessation of collection. We shall reiterate that the law allows the court, in the framework of Section 9(c)(1) and (2) to award remuneration and legal fees for the representative plaintiff and his attorney even after the delivery of a notice of cessation of collection, and indeed, in recognition that the filing of the motion led to the authority ceasing the illegal collection, it is, allegedly, in appropriate cases, appropriate to reward the plaintiff and his attorney for preparing the action and the motion for certification and to preserve the incentive that exists to file class actions against an authority. The language of the section is as follows:

> **9. Motion for Certification in a Claim for Restitution Against an Authority – Special Provisions**
>
> (a) …
>
> (b) The court shall not certify a class action in a claim for restitution against an authority, if the authority notified that it will cease the collection in respect of which the motion for certification was filed, and it was proven to the court that it ceased the said collection by no later than the effective date.

> (c) If the court decided as stated in subsection (b), then it may –
> (1) Notwithstanding the provisions of Section 22, award remuneration to the party filing the motion, having taken the considerations said in Section 22(b) into account;
> (2) Prescribe legal fees for the representative attorney in accordance with the provisions of Section 23".

49. The legislator wished, by means of this arrangement, to strike a balance between the protection of an authority by means of the cessation of collection mechanism and the desire to properly reward those who perform the work. However, this state of affairs raises a certain difficulty – what will the court take into consideration when prescribing the remuneration and legal fees amounts, when the motion for certification was denied due to the cessation of collection and no amount was ruled for the plaintiffs for the damages? In these circumstances, the relief that was actually achieved is that the authority ceased the collection and the law was enforced prospectively speaking. As mentioned, in the case at hand – and based on the **Abutbul** Case – the court of first instance calculated the amounts of the remuneration and the legal fees using the percentage method, based on the estimated future benefit, meaning, as a derivative of the future damages that the filing of the action prevented, looking forward for a period of 24 months, reflecting the limitation existing in Section 21 of the law with respect to imposing restitution payments upon an authority.

50. Lacking explicit guidance in the Class Action Law, also in this matter one must strive towards a result that realizes the purpose of the law, while diligently granting appropriate remuneration to class action plaintiffs and their attorneys, in appropriate cases, and while protecting the set of incentives for filing class actions. It shall be reiterated in the broad context that in light of the importance of the class action, this court even "called to act moderately when the court finds that those who filed motions that were denied should be charged expenses" (CFH 944/15 **Pelephone Communications v. E.R.M Technologies Ltd.**, paragraph 12 of President Naor's decision (2015); CA 5378/11 **Frank v. Elfasi**, paragraph 7 (2014)); however, it is appropriate "to beware of the abuse of the proceeding when claims that are legally or factually unfounded are filed with *male fide* against defendants with 'deep pockets' " (the **Pelephone** Case, *ibid*). This conceptual approach seeks a balance that is anchored in the purpose of the law. We shall note that in the aforementioned **Reichart** case, the percentage method was adopted as a method by which legal fees can be ruled, while preferring it over the "hours method", pursuant to which legal fees were calculated by the amount of hours invested by the representative lawyer in handling the case, multiplied by the hourly fee he charges. As to the underlying reason, we shall briefly note that the court perceived the percentage method as directly linking between the group members' remuneration and the lawyer's fees – thus incentivizing the latter to act towards attaining the group's best interest while increasing his own fees – and as increasing the incentive for filing efficient class actions. It was further prescribed that the percentage method can be implemented only when the relief is monetary, while leaving the question regarding the manner of awarding remuneration and legal fees in cases in which an injunction or another non-monetary relief is granted, to be further discussed. It shall be noted that the judgment did not explicitly address the manner of awarding remuneration and legal fees after the cessation of collection by an authority.

51. Hence, the starting point is that the customary method for calculating legal fees and remuneration in class actions in Israel is the percentage method which applies when a monetary relief is ruled for the benefit of the members of the represented group. Indeed, this does not mean that the court is **obligated** to rule using this method, but rather that if it shall desire to apply a certain calculation method, then, beyond the general considerations that are listed in Sections 22-23 of the law, which address remuneration to the representative plaintiff and legal fees to his attorney, this should be done by way of the percentage method. As to awarding these amounts **after the cessation of collection**: this court referred to this matter on several occasions, first in the aforementioned **Acadia** Case, where it was said that attention must be drawn to certain considerations, which we shall list: **First**, that following the filing of the class action, the authority decided to change its policy and ceased the activity for which the action was filed and this contributes to the realization of the public interest in a manner which could justify granting remuneration and legal fees; this could amount to encouraging class action plaintiffs to bring other failures in the authorities' conduct under review – without the public purse being harmed due to the conduct of proceedings and the ruling of high amounts against the authority. **Second**, that the court must take into account the entire considerations listed in Sections 22-23 of the law, which are drawn from the underlying purposes of the law, particularly with respect to actions against an authority, while considering the concrete circumstances of each and every case. We shall note that the implementation of these criteria in the **Acadia** Case led to reducing the amounts that had been awarded by the district court. Indeed, the judgment does not refer to the implementation of the percentage method; it is possible that it can be inferred that this method should not be applied following cessation of collection but that one should rather award based on the general considerations that are listed in the law, in addition to the unique considerations that relate to the authority ceasing the collection and the public contribution embedded therein; however, the judgment was delivered approximately a year and half before the **Reichart** Rule, while it is reasonable that the court was aware of the existence of this method in the **Acadia** Case, since the **Reichart** Rule is the **adoption** of the percentage method, which had already been expressed before in the framework of district court rulings. In any event, it appears that one cannot draw a positive case-law rule from the judgment in the **Acadia** Case regarding the use of the percentage method when awarding remuneration and legal fees following a cessation of collection.

52. Additionally, this court referred to the **application** of the percentage method after the cessation of collection while addressing two appeals on judgments in which the district court applied the percentage method after an authority ceased collection. The first case – the aforementioned **Abutbul** Case – is an appeal that had been filed on remuneration and legal fees amounts that had been awarded after the authority ceased collection, by a district court, that applied the percentage method, based on the estimated future benefit, and the appeal was denied. In the appeal judgment this court did not refer to the **mere** use of the percentage method but rather only to the **way** it was used – meaning, the dispute revolved around the question whether these amounts should be ruled as a percentage of the amount that would have been ruled had the action been accepted or as a percentage of the estimated future benefit. The State was of the opinion that the remuneration and legal fees percentages should be based on the relief that would have been awarded to the group for the maximum restitution period

(up to two years) and not based on the estimated future benefit. However, the court determined that the amount should actually be derived from the future benefit that was achieved due to the filing of the action and the subsequent cessation of collection by the authority, and thus approved the amounts that had been awarded based on multiplying the amount of the illegal collection (in an average month) by a period of 24 months; it did so based on its approach that a ruling based on the relief that would have been granted had the action been accepted would have incentivized future plaintiffs to wait to file their claims until the amounts that were collected were high enough to justify filing a claim and that this would be contrary to the objectives of the Class Action Law, primarily law enforcement:

> "In my opinion, examination of the reasonableness of the remuneration to a representative plaintiff and of the legal fees of his attorney, shall be made based on the total benefits to the group due to the filing of the action and the motion to certify it as a class action, and not, as the appellant's approach, as a derivative of the **maximum period of restitution in which the authority was exposed to restitution**, meaning, the period from the beginning of the collection and until the date of the notice of cessation of collection. Accepting the appellant's position could incentivize future plaintiffs not to file class actions against an authority immediately upon the commencement of collection, as in the case at issue; but rather to wait until the amounts which were collected from the group, and from which, according to the appellant's approach, the remuneration and legal fees amounts are derived, shall be sufficiently high and, therefore, "**worthwhile**" for the representative plaintiff and his attorney. I cannot agree with this approach and it is contrary to the underlying logic of the class action, in general, and class actions that are directed against the State or its authorities, in particular (see and compare, the **Bank Yahav** Case)" (paragraph 33 of the judgment of Justice **U. Shoham**; original emphases – E.R.)

In an additional case, AAA 9237/12 **The Modi'in Macabim Re'ut Municipality v. A.S. Barka'i Ltd.** (2014) (hereinafter: the "**Modi'in Municipality** Case"), the percentage method was used in awarding remuneration and legal fees after a notice of cessation of collection was delivered, however it was used based on the amount that would have been awarded to the group had the claim been accepted: "For the purpose of the case before us, and we shall mention that at issue is a restitution claim against an authority, the percentage method can be applied assuming that the amount that would have been awarded in favor of the group at the end of the proceeding would have been the amount of the disputed collection" (the words of President (Ret.) **A. Grunis**, in paragraph 5). It appears that also in this judgment this court took for granted the mere ability to use the percentage method after a cessation of collection, based on the benefit in the past; the court did not refer to the option of awarding percentages based on the estimated future benefit. I shall here mention the Attorney General's approach that the rationale for adopting the percentage method – incentivizing the representative plaintiff to increase the monetary relief based on his

desire to attain his own benefit – does not exist when a notice of cessation of collection is filed, since, as mentioned, no monetary relief is ruled, and on a substantive level a notice of cessation of collection is similar to a future injunction. According to the Attorney General's approach, when the court decides to award remuneration and legal fees after a notice of cessation of collection has been filed, it must do so only according to the general considerations that guide the court in Sections 22-23 and in accordance with the circumstances of the case; as to the calculation method, the Attorney General is of the opinion that awarding these amounts based on an estimated future benefit is not correct, since according to the **Reichart** Rule this can only be done with respect to a monetary relief that was granted, and this is not the case in a cessation of collection; since it is difficult, on a practical level, to estimate this benefit; and since there may be cases in which an amount shall be awarded that is greater than the amount that would have been awarded had the claim been heard on its merits and decided in the group's favor. According to the Attorney General, the application of the percentage method based on the period that preceded the cessation of collection is also problematic since the motion for certification was not heard on its merits and disputes could emerge regarding whether the motion would have been certified and to what extent – meaning, the mere cessation of collection by the authority does not constitute full consent to the content of the motion for certification with regard to the details stated therein (the duration of the period of collection, the collection amounts, and the like).

53. In my opinion – in appropriate circumstances, as shall be explained – it is possible to apply the percentage method both based on the estimated future benefit, in a manner limited to the upcoming 24 months, and as a derivative of the relief that would have been ruled for the benefit of the group had the claim been accepted, in a manner limited to the past 24 months. A few preliminary remarks: First, this conclusion coincides with this court's general approach that broad discretion is granted to the procedural instance when awarding legal fees and legal expenses; it is known that it is not customary for an appeal instance to interfere in the legal fee amounts that are awarded in the procedural instance, except if a fundamental legal error or other flaw occurred – this is the case in a "classic" legal proceeding (CA 378/78 **Mordechai Klinger v. The Director of Estate Tax**, IsrSC 33(1) 509, 510 (1979); CA 733/87 **Hayat v. The Organization of *Hapoel Mizrachi Moshav*s Ltd.**, IsrSC 43(4) 768 (1989), and this is also the case in class actions (see for example, CA 4714/13 **Diab v. I-Digital Store Company Ltd.**, in paragraph 7 (September 29, 2013); CA 3640/13 **Argas v. Unilever Israel Food Ltd.**, in paragraph 3 (January 7, 2014). In a class action proceeding the court is permitted to award remuneration and legal fees as per its discretion and it is entrusted with the precise determination of these amounts (the **Abutbul** Case, in paragraph 27). The list of considerations that is in the law (Sections 22-23) is also not a closed list and, as mentioned, the court is not **obligated** to rule in accordance with any specific method, such as the percentage method, and the meaning of the **Reichart** Rule is that the percentage method should be preferred if and to the extent the court wishes to apply any calculation method, beyond the considerations that are listed in Sections 22-23. Second, the set of circumstances in which a motion for certification of a class action is denied due to cessation of collection, is indeed unique: on the one hand, the class action was not decided in favor of the group members – in fact, it was not heard at all – and on the other hand, the authority ceased the illegal collection, even if this is not necessarily an admission of the scope of the damage alleged by the class action plaintiff and his

attorney. As was said in the **Abutbul** Case: "A class action which was filed against the State and denied by virtue of the provisions of Section 9(b) of the law, as in the case at hand, constitutes a special kind of class action which has a different character, and therefore the set of rules that applies thereto is also not identical to the set of rules that applies to other class actions (paragraph 32); and in the **Acadia** Case it was said that "A situation of denying a motion to certify a class action due to the cessation of collection by the authority is unique in terms of the complexity of the considerations that should be weighed with respect to awarding remuneration and legal fees" (the words of Justice **A. Procaccia**, in paragraph 25). Indeed, the decision in this matter requires taking into consideration the nature of this action, which is a type of a hybrid, with regard to awarding remuneration and legal fees.

54. In my opinion, the starting point is that, as a rule, when a cessation of collection was filed by an authority, remuneration and legal fees should be awarded to the representative plaintiff and his attorney, if a causal connection has been proven between the filing of the action and the cessation of collection notice. In such a case the action benefitted the members of the group and the entire public (the **Acadia** Case, the **Modi'in Municipality** Case, in paragraph 5; AAA 135/11 **The Ra'anana Municipality v. Adv. Lilach Ackerman**); Additionally, and from a wide perspective, this can protect the set of incentives for filing appropriate class actions against an authority. Indeed, in the **Reichart** case it was stated regarding the percentage method (paragraph 7) that: "It is clear that in actions in which the requested relief is an injunction or another non-monetary relief, this method cannot be used for the purpose of awarding legal fees" and it can allegedly be inferred from the literal meaning of the above that the percentage method should not be applied after the authority ceases collection since the only relief (although legally speaking, no relief was granted by the court) is the mere cessation of collection which constitutes a kind of "injunction" and certainly is not a monetary relief. However, it appears that the focus in the cited statement is the **requested** relief in the action and not necessarily the relief that was **actually granted**. It shall be noted that in restitution actions against an authority which are filed pursuant to Item 11 of the Second Addendum, the requested relief is monetary by definition, even if after the cessation of collection such relief is not granted. It appears that in such situations, the court may need an Archimedean point, based upon which it can calculate the amount of remuneration and legal fees, beyond the general principles which are outlined in Sections 22-23. This point exists in the form of the relief that would have been ruled had the action been accepted, and alternatively, in the future damage that the filing of the action prevented. Indeed, in the case of a notice of cessation of collection, the claim is not heard on its merits and it is possible that the defendant disputes the alleged scope of infringement – both with respect to the duration of the period of collection and with respect to the scope of the amounts unlawfully collected; however the actual outcome of the cessation of collection is the termination of collection due to the filing of the class action, an act that constitutes an admission – albeit not explicit – of the illegality of the collection. Furthermore, on a practical level it is possible in each case as per its circumstances, to address the differences between the parties as to the scope of the amount in dispute. Thus, the court can strike a balance or "mediate" between them, as it indeed did in the aforementioned **Modi'in Municipality** Case – and we shall again emphasize that in applying the percentage method in this manner the amount of the restitution is limited to a period of two years, as is customary in cases in which the class action is accepted on its merits; and perhaps *a fortiori*, in cases where the differences between the

parties regarding the monetary value of the illegal collection shall be so significant that it is difficult to so mediate, the court will act in accordance with the circumstances of the merits of each case and as per its discretion, while considering the principles of Sections 22-23, the data presented and common sense.

55. As mentioned, the Attorney General was of the opinion that the main reason for using the percentage method – incentivizing the class action plaintiff to attend to the benefit of the group – does not apply in the case of cessation of collection, and that using this method will not incentivize the plaintiff to act for the benefit of the group. I am of the opinion that another direction of thought can also be considered – without setting hard and fast rules in the matter and with due caution – that ruling based on the percentage method after cessation of collection is what will incentivize the plaintiff to increase the benefit of the group, since when the court also applies the percentage method after cessation of collection, the more the group's benefit increases, the legal fee that is derived therefrom does too (although it shall be noted that the greater the relief that is awarded to the members of the group, the smaller the **percentage** that is awarded for the benefit of the lawyer, and see the **Reichart** case in paragraph 9). If the court will not at all be able to apply the percentage method after the authority ceases to collect, this could actually harm the class action plaintiff's incentive to increase the benefit of the group, knowing that if the authority shall cease its collection without any such Archimedean point, the court could leave him without any remuneration. I am aware of the fact that in the **Reichart** Rule it was prescribed that the lawyer's fee shall be derived from the amount that was **actually** collected and not from the amount that was awarded (see paragraph 8), however in the case at hand, no amount was awarded and, subsequently nothing reached the possession of the members of the group. Indeed, in the **Abutbul** Case the court drew attention to the concern that the application of the percentage method, based on the monetary relief that would have been awarded had the claim been accepted, could create a negative incentive, following which class action plaintiffs and their attorneys may wait until the damage increases prior to filing the claim, even after discovering the illegal collection. I am aware of this concern however I believe it is less significant than it appears to be at first glance, for two reasons: First, since the existing set of incentives, as was elaborately emphasized, still encourages filing actions as quickly as possible and therefore I doubt if class action plaintiffs and their attorneys will wait a significant amount of time to file the action as they will be concerned that others will preempt them and file a claim before them. Second, if and to the extent the court will discover that the plaintiffs knew of the illegality and waited before filing the action so that the amount of the damage will increase, this shall be a consideration for not awarding remuneration and legal fees, and could even amount to *male fide* which could justify denying the motion.

56. As to the application of the percentage method based on the estimated future benefit – indeed using this method is essentially characterized by some uncertainty, since this benefit, but its very nature, is difficult to estimate. For example, in the case before us, it is possible that the Appellant would have discovered the interest calculation error on its own a few months after the action was filed or would have changed the rate of collection. However, it seems that the court is permitted, in accordance with the circumstances, to assume that had it not been for the filing of the class action, the authority would have conducted itself in the same manner for a total future period of 24 months – as the district court applied in the **Abutbul** Case. Indeed,

sometimes the database makes it easier to estimate the authority's future conduct and sometimes this involves difficulty. In my opinion, in the framework of the broad discretion that is granted to the court when awarding remuneration and legal fees, it may apply the percentage method in this matter, all in accordance with the circumstances. Indeed, it is necessary to deal with the concern that by deriving the percentages as a function of the future benefit a situation could be created in which remuneration and legal fees amounts shall be awarded that exceed the rate of restitution that was requested in the motion for certification; for example, if restitution for a year was requested and a notice of cessation of collection was filed, and thereafter the court awarded based on the future benefit for a period of two years. In my opinion this concern can be cured by the court diligently ensuring that an **amount awarded based on the estimated future benefit not exceed the collection amount that was requested as retroactive restitution**; as may be recalled, the estimated future benefit is limited to up to 24 months, corresponding to the provisions of Section 21, however **the court may also award based on a shorter period of time**. Furthermore – instead of a meticulous application of the percentage method, the court can also, in a general manner, consider the future benefit that was attained as part of the entire considerations and in accordance with the circumstances of each case (see the **Acadia** Case). In any event, and this should be emphasized, since at issue is a public authority, the court will keep the protection of the public purse in mind, among the other considerations, also when applying the percentage method following a cessation of collection.

57. In conclusion, in the event that a motion for certification of a class action against an authority is denied due to its cessation of collection, the court may, as per its discretion and in accordance with circumstances of each case, apply the percentage method both based on the relief that would have been awarded had the claim been accepted and based on the estimated future benefit, all while taking the considerations that are listed in Sections 22-23 of the law into consideration and while protecting the public purse. It appears that this approach coincides with the existing case law, the **Abutbul** Case, on the one hand, and the **Modi'in Municipality** Case, on the other hand, as in each one of them, as per their circumstances, this court upheld a judgment in which the percentage method had been applied in a different way – once based on the benefit in the past, had the claim been accepted (the **Modi'in Municipality**) and once based on the estimated future benefit (**Abutbul**). It shall be reemphasized that at hand are public circumstances, and the court's comprehensive perspective must include this public insight at all time.

The Appellant's Status – Is it a Business or an Authority?

58. Before we apply that which has been stated thus far to the amounts in dispute between the parties, we shall briefly address an additional issue that arose – could the class action have been filed against the Appellant, in the circumstances at hand, pursuant to Item 1 of the Third Addendum of the Class Action Law, as a "business" as defined in the Consumer Protection Law, based on the existence of a business-consumer relationship between the parties? As mentioned, the action was filed against the Appellant both pursuant to Item 1, in its capacity as a business and pursuant to Item 11, in its capacity as an authority. According to the Respondent's approach, in the circumstances at hand, although the Appellant is an authority that was established pursuant to law, as defined in the Administrative Affairs Courts Law, in all that

relates to the collection of payments for sewage and water services, it operates as a business: it is a limited liability company with independent interests, primarily to make profits, which operates in the case at hand in a "private-commercial" capacity, and not in a "public-governmental" capacity; it was further argued that the mere fact that the interest rates and the water rates are, according to the law determined by the water authority, does not derogate from that stated. On the other hand, according to the Appellant, it is a public authority that fulfills a public role pursuant to law and the motion against it could only have been filed pursuant to Item 11 of the Addendum. Indeed, occasionally a situation arises in which a class action could allegedly be filed either pursuant to Item 11 or pursuant to Item 1 – i.e., a situation in which a business-consumer relationship between an individual and an authority acting as a business exits in parallel to a claim for restitution of an amount that the authority unlawfully collected as a tax, fee or other mandatory payment. It can ordinarily be assumed that in such situations the class action plaintiff shall prefer that his claim be certified as a claim pursuant to Item 1, since a claim against an authority pursuant to Item 11 benefits from unique protections which were elaborated upon extensively above. It has recently been ruled regarding this matter that class action plaintiffs must be diligent about not filing a class action for the same cause of action that simultaneously relies on these two items, but rather at most can file a motion for certification based on one of the items and can state that the claim alternatively relies on another item (the **Asal** Case, in paragraph 6 of the opinion of President (Ret.) **A. Grunis**). In the case at hand the Respondent filed his claim both pursuant to Item 11 and pursuant to item 1, and not as "alternatives". In any event, in such a state of affairs, in which a class action can allegedly be filed both pursuant to Item 1 and pursuant to Item 11, it is necessary to examine which aspect prevails in the nature of the authority's activity – what is dominant, the business-private aspect or the governmental-public aspect? (see the aforementioned **Chertok** Case and **Langbert** Case; **Deutch**, on pages 476-489). Having said that, there are also hybrid situations in which the authority acts in both of its capacities in a certain activity and in these cases the court must determine which aspect prevails (the **Asal** Case).

59. In the case before us, in which the Appellant is a statutory corporation, the distinction between the business aspect and the governmental aspect in its activity is of interest. Statutory corporations, by their mere definition, blur the distinction between the private arena and the public arena: at issue are administrative entities that were established by law in order to fulfill a public role, which are separate from the State and constitute a separate legal entity in private law (a limited liability company), allowing them to act pursuant to the laws of **private** law for the **purpose of fulfilling their public role**; they must also, of course, be perceived as administrative authorities which are subject to administrative law (**Barak-Erez – Volume 2**, on pages 450-451). At issue is not a private entity, not even a hybrid entity, but rather a public entity (A. Harel **Hybrid Entities: Private Entities in Administrative Law** (5768-2008), on page 41), with all that that implies, even if is accompanied by private law aspects. Indeed, the Appellant complies with the definition of an authority acting pursuant to law, however there are alleged business-consumer relations between the parties and there is a business aspect to its activity by the mere fact that the Appellant is a corporation. It has been found in district court rulings that when a claim is filed against a water corporation due to unlawful collection of money it is an action against an authority by virtue of Item 11, and not against a business; see, for example, CApp (District Jerusalem) 10835/09 **Hagichon Ltd. Company v. Haim Korfu** (2010),

where an action was filed against a water toll that – allegedly – was collected unlawfully, based on Item 1 of the Addendum. The district court ruled that such a claim completely meets the definition of Item 11. The court further noted that a policy of collection of sewage and water services tolls, has a governmental, rather than business, nature:

> "Above and beyond that which is necessary I shall add that a review of the Sewage and Water Corporations Law, by virtue of which the applicant operates, indicates that the applicant is indeed an entity that fulfills a public role: the purpose of the applicant is to provide sewage and water services to the residents of Jerusalem; the applicant was established in accordance with Section 1(b) of the law as a "public service" company"; the law specifies the applicant's duties and its powers (Sections 31-34); the law further prescribes that the company requires a license in order to provide the "vital activity" of sewage and water services and in order to provide other activities (Sections 14 and 22); the applicant is subject to the Governmental Sewage and Water Authority's supervision and review (Chapters 6-7 of the law). We thus see that the applicant fulfills a public rule *par excellence*." (the words of Judge – as was his title at the time – **Y. Inbar**, in paragraph 9(a)).

A number of additional indications can also be noted which attest to the fact that the dominant characteristics of the Appellant's activity in the case at hand – the collection of interest on payments for water services – are governmental-public characteristics and not business-private characteristics: Thus, the water rates that are collected from the consumer public – as well as the interest rates that are collected in the payments arrangement – are prescribed by law and are not contractual; at hand is a unilateral coercive decision. Furthermore, the underlying rationale of the Consumer Protection Law which is limiting the power inequalities between the business and the consumer, does not exist at the same intensity when at issue is collection from many consumers at rates that are prescribed by law, as opposed to cases in which the authority makes separate and complex transactions with private counterparts (such as transactions between the Israel Lands Authority, a specialized entity that possesses the majority of the vital information, and individual lessors – see the **Asal** Case, in paragraph 27). Moreover, other than a general description regarding the Appellant being a limited liability company, the Respondent did not point to any indication of purely business considerations that are at the foundation of its activity which is the object of the class action that was filed. For the sake of comparison, in the **Asal** Case this court ruled that business considerations that were meant to increase the authority's revenues by way of directing resources to its various needs served the Israel Lands Authority's decision to provide permit fees and that this was indicative that said action was characterized as intending to generate profits (see ***ibid***, in paragraph 26).

The Amounts of Legal Fees and Remuneration Awarded in the Circumstances at Hand

60. As mentioned, a court of appeals does not customarily interfere in the amounts

of remuneration and legal fees prescribed by the procedural instance. However, it appears that the application of that stated above with regard to the absence of a prior application, along with the criteria that were delineated with regard to awarding remuneration and legal fees after the authority ceases collection, lead to the conclusion that the amounts that were prescribed by the court of first instance should be reduced. As a starting point, consideration should be attributed to the fact that following the filing of the action and the motion for certification, the authority acted to correct the collection mistake thus benefiting the members of the represented group as well as the public of consumers that could have been prejudiced and benefiting the entire public as it protected proper conduct by the authority and ceased an activity that was contrary to law; this should be noted to the Respondent and his attorney's credit. Furthermore, it is necessary to refer to the "scope of the effort, the savings, the benefit and the public importance of the class action, and for the purposes of legal fees – also to the complexity of the proceeding and the manner in which it was handled by the representative attorney" (the **Acadia** Case, in paragraph 26). In the case at hand, with all due respect and without prejudice, it does not appear that very significant efforts were required in examining the factual and legal background for the purpose of filing the action – the subject of the claim is not complex and is exhausted by examining the interest rates that were collected compared to those prescribed in the law, and the Respondent and his attorney did not undertake a significant risk. Moreover, the Respondent's attorney has experience in class actions against water corporations, some of which are based on a similar cause of action. Additionally, the investment involved in conducting a class action when the motion for certification was denied due to cessation of collection, is naturally not the same as that which is required for conducting an action on its merits, whether it ended in a settlement or in a judicial decision.

61. Indeed public benefit was achieved by filing the action and this should not be taken lightly, however one must recall that on an economic level, at issue are relatively small amounts, even when calculated cumulatively; in principle terms – and as the Appellant argued – we are dealing with the violation of a statutory provision which regulates an optional payments arrangement – one that the Appellant may, and is not obligated, to apply with respect to consumers who did not pay the entire bill on time. Given this state of affairs, even if the case is not identical to that of "tax refusers" – tax evasion is a "national plague" – the fact that at issue is an optional payments arrangement reduces the public benefit that filing the action achieved, to a certain extent, of course, without minimizing the importance of diligently complying with any law. I shall parenthetically note that in HCJ 1195/10 **The Local Government Center v. The Water Authority *et al*.,** (2014), this court ruled that payment for water is a "price" and not a "tax" – as the Respondent argued – however, this has no practical relevance in the case at hand, since pursuant to Item 11, an action can be filed against an authority for illegal collection of amounts that were unlawfully collected "**as a tax**, fee or other mandatory payment" (emphasis added – E.R.).

62. As to the manner of conducting the proceeding by the representative plaintiff and the Respondent and his attorney – in my opinion the absence of a prior application to the authority should be held against them. It emerges from the circumstances that had the Respondent and his attorney made such a prior application, the authority would have amended the interest rate without there being a need for a legal proceeding; the unlawful collection stemmed from an honest mistake which

originated from an external service provider. The authority is presumed – and the circumstances at hand do not contradict this presumption – to have acted to right the wrong in an equal manner, not only as a specific solution to the Respondent's individual claim. Moreover, it appears that a prior application would not have required significant investment beyond examining information that raises a concern of unlawful collection. Indeed, the class action plaintiff needed an accounting opinion, however even had he ordered this opinion before the prior application, he could have approached the court and requested that remuneration and legal fees be awarded for the investment involved in preparing the prior application which was addressed without needing to file a class action. Finally, the court must act cautiously with public funds that are paid as remuneration and legal fees by a public authority. In light of the above, and when striking a balance between the various considerations – and primarily the degree of the required investment, the public benefit that was achieved, the significance of the absence of a prior application under the circumstances – I am of the opinion that the remuneration and legal fees amounts that were prescribed should be reduced, I shall suggest to my colleagues that the Respondent's remuneration be set at NIS 5,000 (instead of 10,000) and his attorney's legal fees be set at NIS 40,000 (instead of 80,000).

Epilogue and Conclusion

63. In conclusion: **First**, as a rule, a class action plaintiff and his attorney have a general obligation to make a prior application to an administrative authority before filing a class action against it and the absence of such an application, may, in accordance with the circumstances, be reflected in the court's decision to award remuneration and legal fees and with respect to the rates of these amounts as well as in its decision in a motion to certify a class action. **Second**, when awarding remuneration and legal fees after a notice of cessation of collection has been delivered by an authority, the court may – but is not obligated – to apply the percentage method, both while applying it based on the relief that would have been ruled had the class action been accepted on its merits and based on the estimated benefit, all in accordance with the circumstances and as per the court's discretion, and while considering the provisions of Sections 22-23 of the Class Action Law and that at issue are public funds. **Third** – and in the case at hand – the amounts of remuneration and legal fees that were prescribed for the Respondent and his attorney were high in the circumstances of the case at hand and should be reduced as prescribed above in paragraph 62.

The Rule of the Matter

64. If my opinion shall be heard, we shall accept the appeal as stated in paragraphs 61-62. In the circumstances of the matter I shall suggest not to issue an order charging expenses.

65. Following the above I reviewed the opinions of my colleagues Justices Melcer and Hendel. We are in agreement as to the obligation of a class action plaintiff and his attorneys who wish to file a class action against an administrative authority – to make a prior application thereto. I agree with my colleague Justice Melcer as to the authority's obligation regarding the timetable for its responses and the implications therefor. I also agree with my colleague Justice Hendel that is would be desirable for

the legislator to explicitly prescribe the option of applying to an administrative court for legal fees and expenses in such cases in which a prior application led to results. As to the forum to which the application shall be made until such legislation, it appears to us – by a majority opinion of the undersigned and Justice Melcer and a dissenting opinion of Justice Hendel – that when at issue is an application to an authority regarding an administrative matter, which would have been filed to the administrative court had a claim been filed with respect thereto, then an application regarding the legal fees should also be filed thereto, as stated in paragraph 46 above and in the opinion of my colleague Justice Melcer.

Deputy President

Justice H. Melcer:

1. I concur with the comprehensive judgment of my colleague, Deputy President **E. Rubinstein**.

I take the liberty to clarify a number of matters and to add:

(a) I accept that a class action plaintiff and his attorney who wish to file a class action against an administrative authority must apply thereto before doing so.

When doing so – the provisions of the **Administrative Procedures Amendment (Decisions and Reasons) Law, 5719-1958** (hereinafter: the "**Reasons Law**" or the "**Law**"), shall apply, including the required dates for responses that are prescribed therein and the implications prescribed in Section 6 of the **Reasons Law** regarding the non-compliance with the provisions of the **Law** with respect to the application.

(b) If and to the extent the prior application mentioned in the aforementioned sub-section (a) shall either not receive an affirmative response within the prescribed period of the time or shall be refused – then, for the purpose of Section 7 of the **Class Action Law, 5766-2006** (hereinafter: the "**Class Action Law**"), the prior application can be considered to be the **actual first in line** compared to a similar, prior, class action that was filed to the court without a prior application to the authority having been made.

(c) If, following the prior application mentioned in the aforementioned sub-section (a) – the authority shall attempt to solve only the applicant's "personal problem" or shall give a notice of cessation of the illegal collection, a written document will be required to anchor the arrangement. In the framework of the negotiations between the parties towards such a pre-claim settlement, the class action plaintiff and his attorney shall be entitled to request reimbursement of their expenses (against receipts) as well as a certain payment. If disputes in these matters or a refusal to pay shall emerge – the actual class action plaintiff and his attorney shall be able to file an action pursuant to Section 5(b) of the **Class Action Law** due to the authority's negative position and its requested relief, beyond the willingness to cease collection, shall be compensation in the amount that is allegedly owed to them, based on a cause of action of negotiating in *male fide* with respect to the pre-claim cessation of collection. Clearly the amounts at issue shall correspond to this stage of handling the

case.

(d) If such a pre-claim cessation of collection arrangement (including the reimbursement of expenses and the payment that was promised to the actual class action plaintiff and his attorney) shall be signed, it shall be published in public by the authority and at its expense. Such publication shall meet the transparency requirement, shall allow the necessary degree of public and legal review (compare: HCJ 1601/90 **Shalit v. Peres**, IsrSC 44(3) 353, 361 363-364 (1990); HCJ 1635/90 **Zarzevsky v. The Prime Minister**, IsrSC 45(1) 749 (1991)), shall prevent the filing of (new) class actions based on the same cause of action in light of the cessation of collection and shall, in fact, inform anyone affected of the option of a personal claim regarding the past (subject to statute of limitations), as stated at the end of Section 21 of the **Class Action Law**.

2. Without derogating from that stated above, I also join the opinion of my colleague Justice N. Hendel that it is appropriate that the legislator explicitly and specifically address the matter that has been brought before us, however, according to my understanding, until it shall do so, one can act as I have proposed.

3. My above consent and the additions proposed by me in paragraph 1 above do not derogate from the approach accepted in CA 8037/06 **Barzilai v. Prinir (Hadas 1987) Ltd.** (September 4, 2014) which related to other situations.

Justice

Justice N. Hendel:

1. I agree that a class action plaintiff and his attorney are obligated to make a prior application to an administrative authority before initiating a proceeding against it. This holds true in private law, in administrative law and in the field of class actions. Each set of laws has its own reasons, and this is *a fortiori* the case when at issue are cumulative sets of laws.

As my colleagues have noted, this position is difficult when the application is effective in producing a result. This prevents the possibility of filing a class action and the lawyer's fee is not guaranteed. My colleague, Deputy President **E. Rubinstein** proposed that the lawyer shall be entitled to apply to the administrative court for it to award remuneration and legal fees. The weakness of this solution, despite its logical outcome, lies, in my opinion, in the limits of the provisions of the Class Action Law, 5766-2006, which prescribes in Section 9 as follows:

> "(b) The court shall not certify a class action in a claim for restitution against an authority, if the authority notified that it will cease the collection in respect of which the motion for certification was filed, and it was proven to the court that it ceased the said collection by no later than the effective date.
>
> (c) If the court decided as stated in subsection (b), then it

> may –
>
> (1) Notwithstanding the provisions of Section 22, award remuneration for the party filing the motion, having taken the considerations said in Section 22(b) into account;
>
> (2) Prescribe legal fees for the representative attorney in accordance with the provisions of Section 23".

It emerges that Section (c) applies in a situation when a motion for certification of a class action was filed after an application was refused or without an application being made and the authority later proved that it ceased the collection for which the motion was filed. However, if the prior application led to a notice of cessation of collection, it appears that it is no longer possible to apply to the administrative court, in general, and to receive legal fees, in particular. In my opinion that is what emerges from the language and context of the section, which not only does not recognize such cause of action but rather prevents it from being examined.

My colleague Justice **H. Melcer** raised the option of filing an action pursuant to Section 5(b) of the Class Action Law, for the payment of compensation based on a cause of action of *male fide* negotiations, in the case that a prior application received an affirmative response and no legal fees are paid. In my opinion the obstacle standing before such a proceeding is that a public authority could argue that it is not clear whether negotiations were actually held. And even if they were held, that it is not clear whether an authority is obligated to pay legal fees when, in my opinion, the law has not prescribed such a mechanism. Indeed, my colleague is correct that the above Section 5(b) refers to "compensation", however, in a situation in which an authority delivered a notice of cessation of collection and in light of that stated in Section 9(b) of the Class Action Law – it emerges that the opening for certifying an action has been shut. I thus doubt whether in these circumstances it is possible to file a motion for "certification of a class action" as per the words of Section 5(b)(2), all in order to receive the personal compensation of lawyer's legal fees. I shall add that according to my understanding, the Class Action Law distinguishes between four different reliefs – restitution, compensation, remuneration and the representative attorney's legal fees (see Sections 20-23). It is also possible, without setting hard and fast rules in the matter, that in the current legal situation, the prospects of such a claim are not clear or guaranteed, and it is possible that the damage to the party making the prior application shall exceed the benefit, if such an action shall be denied and the plaintiff shall be charged with expenses.

2. Is the existing law the desired law? This is a question for the legislator. I would propose that it consider prescribing a mechanism that allows applying to the administrative court – since at hand is an administrative action – regarding the matter of legal fees when a prior application achieved results. I have two remarks on this matter: First, a legal situation in which there is no clear procedural route for payment of expenses and perhaps even for payment of remuneration in the above-described situation can be challenged. This harms the incentive considerations – what point is there to apply to an authority before filing an action if the application's effectiveness will prevent the lawyer from being awarded expenses? It can be said that the situation is not so severe and that the incentive issue is more complex. That in any event those

who engage in this field operate according to a "percentage" method, in two senses of the phrase: both in how they manage filing claims and in how they calculate the legal fees.

The second remark is well reflected in the interesting and comprehensive opinion of my colleague the Deputy President. In my opinion it is not the economic analysis or lack of incentive that is the difficulty that is embedded in not paying expenses to the party that made the early application and who received an affirmative response, but rather the considerations of justice. A lawyer is requested to first apply to the municipality based on considerations of public fairness. Is public fairness a one-way street? Does this rule justify that a lawyer whose application, by means of a plaintiff, was effective, not be awarded any legal fees at all? And perhaps even remuneration? Is it right that the applying party shall prefer to receive a negative response since that may increase the chances that it shall be awarded legal fees? Where are the efficiency considerations in this picture?

3. There are many questions. And as mentioned – in my opinion, it is the legislator that must address the basic question on which I focused – the lawyer's legal fees. At the very least this matter must be considered. It is small consolation that the field of class actions in general, and actions against administrative authorities, in particular, is new and still in stages of development.

Justice

It was decided unanimously as stated in the judgment of the Deputy President, except for the majority and minority opinions in paragraph 65 regarding the subject addressed therein.

Delivered on this 7th day of Av, 5775 (July 23, 2015).

THE DEPUTY PRESIDENT JUSTICE JUSTICE