IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 90

Suit 1723/1989

Between

Darwish MKF Al Gobaishi

… *Plaintiff*

And

House of Hung Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Commercial Transactions — Sale of goods — Breach of contract; Commercial Transactions — Sale of services — Breach of contract; Commercial Transactions — Sale of goods; Commercial Transactions — Sale of goods; Commercial Transactions — Sale of goods; Contract — Contractual terms; Tort — Misrepresentation — Negligent misrepresentation

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Darwish MKF Al Gobaishi v House of Hung Pte Ltd

[1995] SGHC 90

Suit 1723/1989
G P Selvam J
31 March 1995

Judgment:

1.**GP SELVAM**

The sale

Cur Adv Vult

The plaintiff, an engineer by training, runs a supermarket business in the United Arab Emirates known as Al-Aharam Supermarkets.

2.In 1981, 1982 and 1983 he went to Brazil as a tourist to watch the carnival at Rio De Janerio. During his visits to Brazil he saw some precious stones in the shops. Other than this, he claimed, he had no understanding of precious stones.

3.In September 1986 he visited Singapore. While walking along Orchard Road a display in the defendants` jewellery shop offering 70% discount caught his eye. He went into the shop. During his stay in Singapore he patronised the shop on a few occasions. From 10 to 14 September 1988 he made purchases

evidenced by 12 invoices/cash memos. The total value of the purchases exceeded a million Singapore dollars. A substantial part of the purchases comprised amethysts, aquamarines, topaz, tourmalines and beryls. There were also small jewellery items. His purchases of 39 beryls were evidenced by five of the twelve invoices. The beryls were of three types: natural beryls (Maxixe), natural greenish yellow beryls and natural brownish beryls. At the bottom of each invoice was printed this sentence: `Goods sold are not returnable`.

4.Each beryl purchased was accompanied by a certificate of gem identification issued by a Singapore company called International Gemological Laboratory (S) Pte Ltd (the IGL certificate). International Gemological Laboratory had its place of business very close to the defendants. The IGL certificates on their reverse side carried the following printed clauses:

> *Important Limitations*
>
> *The laboratory reports is not a guarantee valuation or appraisals and (IGL) has made no warranty or representation regarding this laboratory report or the colored stone described herein. This laboratory report contains a description of the characteristics of the colored stone based upon the application of the identification techniques used by IGL at the time of its examination.*
>
> *By accepting this laboratory report, the client agrees (1) to release IGL, its officers, directors and employees from all liability for any loss, expense or damages of every kind and description and (2) IGL, its officers, directors and employees shall not be liable for any loss, damage or expense for any error in or omission from this laboratory report or for its issuance or use, even if caused by or resulting from the negligence or other fault of IGL or any of its employees.*
>
> *The client agrees that this laboratory report is for his/her exclusive use. Neither IGL nor any of its employees shall be responsible for any action that may be taken based upon this laboratory report.*
>
> *The client also agrees that in the event of any dispute arising out of this laboratory report the liability of IGL will be limited up to the fee paid for this report and in such a case IGL shall refund*

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> *the fee to the client and shall be released from all liabilities and/or claim of whatsoever nature.*
>
> *This laboratory report, the name and trademark of IGL may not be reproduced in whole or in part for purposes of advertising, publicity or promotion without express prior written authorisation from IGL.*

5. **The claim**

The purchases were sent to Switzerland by the plaintiff as air cargo consigned to his bankers. In Switzerland some of the gemstones were tested by a gemmological laboratory known as Gubelin. Gubelin reported that some of the beryls had been treated in that their colour weakened under action of strong illumination. The plaintiff brought the findings of Gubelin to the notice of the defendants and asked how the defendants wished to resolve the problem.

6.The defendants` immediate reaction was short and to the effect that they were willing to exchange the blue beryls (Maxixe type) for amethysts. This was not acceptable to the plaintiff. He asserted that the certificates from Gubelin and IGL were not compatible. The Gubelin certificate, he said, revealed important information concerning the stones whereas the IGL certificates did not `indicate the usual technical information pertaining to the authenticity of the stones`. He declined to accept the intense blue beryls and the greenish yellow beryls and proposed to return them against refund of the moneys he had paid for them and the interest charges.

7.The defendants had a change of heart and refused to accede to the plaintiff`s request for refund on the Maxixe blue beryls, and indeed any beryls he had purchased. Their reasons and response were as follows:

> *Received your fax dated 28 January 1989. Please note that we cannot accede to your request of refund on the Maxixe blue beryls nor all the beryls you purchased. The reasons are as follows:*

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(1) We have made it clear to you that `Goods sold are not returnable.` You have countersigned on each individual receipt. Please look at receipts faxed to you.

(2) You have accepted the beryls as they are. The certification of the gems indicated on the certificates by IGL clearly shows that they are `Certificates of Gem Identification.` In fact during the course of purchase, you mentioned that you do not recognised the IGL certificates. To quote you: `They are just pieces of papers. I purchase what I like.`

(3) The beryls were displayed in the shop and were purchased by you on your own accord without coercion. You agreed and paid the price. In view of the large purchase made by you we offered you several gift items. A list of the gift is enclosed.

(4) Most colour stones in the market are either heat treated or enhanced in colour through irradiation. According to Guberlin`s report, the 126.65cts brownish yellow colour is stable even after five hours of strong illumination under ultra violet exposure. Sapphires and rubies are also enhanced in colour and are stable.

(5) You mentioned that you wanted to purchase kunzite as well. According to the gem profile by David Federman, I quote: `Hot lights can, and do, turn this stone a whiter shade of pale, although colour loss is usually very gradual. Maxixe beryl are also in this category.

(6) As for the blue beryl, the certification by IGL clearly indicates that they are of Maxixe type. All gemologists know what Maxixe means and we did not give you a false report. Unless you are still aware of what Maxixe type means. I quote a report from GIA:

The following is a direct quote from the Gemological Institute of America`s Assignment 29 of the 1980 copywrite edition on beryl, p 8:

`C Maxixe type beryl

In 1917, beryl of deep intense blue color was discovered in Minas Gerais, Brazil. The color sometimes likened to a cobalt blue, is unlike the color of Aquamarine. Sadly, it was found to fade drastically when exposed to light or heat. Because of this fading characteristic, the mine was closed soon after its discovery. Thus, any material with this distinctive color now on the market is probably artificially colored by gamma ray or short wave ultraviolet treatment.`

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> (7) You are making a comparison of the two reports by Guberlin, the other IGL. Gubelin gave you a more detailed representation of beryls but that does not imply that we have misrepresented you without, I quote you `indicate the usual technical information pertaining to the authenticity of the stones.`
>
> (8) Please do not re-negotiate after making purchases as the cost of the gems are negotiated through a package deal of aquamarines, amethysts, beryls and gifts. All prices were agreed by you throughout. The beryls were displayed in the counters. You took photos of them and negotiated the prices and selected the gifts.

8.With that letter the defendants sent a list of 21 gift items they said they gave to the plaintiff. The plaintiff then decided to take legal action against the defendants. In the event he brought this action against the defendants for the return of the entire amount he paid under the five invoices. In the alternative, he claimed damages.

9. **The plaintiff`s case: tort, contract and collateral contract**

The bases of his claim as set out in the statement of claim and the particulars furnished are as follows: . First, the plaintiff said that during his visits to the defendants` shop, the defendants represented to the plaintiff that:

(1). the defendants were one of the biggest dealers in coloured gemstones in Singapore;

(2). the defendants had a good reputation and could not afford to deal in inferior quality gemstones;

(3). Mr Wong (the manager) and Mr Hung (the managing director) had considerable experience in coloured gemstones;

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(4). all the gemstones the plaintiff agreed to purchase were genuine, natural, without flaws and not treated in any way;

(5). to support the representation made in (4) above, the IGL certificates identifying the coloured gemstones were produced to the plaintiff, showing that the gemstones were genuine and perfect;

(6). if the plaintiff should in any way be dissatisfied with any of the gemstones after receiving an analysis from an independent gemological laboratory the defendant would accept such gemstone back and refund its full value;

(7). the gemstones which the plaintiff agreed to purchase came from Brazil with which country the defendants had excellent connections.

10.It was alleged that Mr Wong made several of the representations and Mr Hung made all the representations. All the representations were oral representations.

11.The plaintiff added that he relied on the representations and was induced to purchase between 10 and 14 September 1988, a substantial number of gemstones as set out in the invoices. The gemstones purchased and reflected in invoices 54818, 54830, 54834, 54836 and 54841 subsequently proved to be defective in that they had been treated. The representations made by the defendants were untrue and/or were made negligently in that the defendant failed to exercise any or proper care to ascertain whether the gemstones were defective. The defendants failed to exercise any or proper care to ascertain whether the gemstones were of the quality and description as described to the plaintiff. In consequence the plaintiff suffered loss and damage.

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12.Secondly, the plaintiff contended that the representations set out under items (4), (5) and (6) above were included as terms of the contracts between the parties. The contracts were evidenced by the oral representations and the invoices. There were implied in the contracts the following terms: (a). that the gemstones being sold corresponded with their description in the said invoices/cash memos;

(b). that the gemstones were of merchantable quality;

(c). that the gemstones were fit for their intended purpose.

13.The intended purpose was resale and it was communicated to the defendants. In any case such purpose was to be implied from the plaintiff`s conduct. The defendants were in breach of the contracts and the implied terms. In consequence the plaintiff suffered loss and damage.

14.Thirdly, the representations were terms of a collateral contract or series of collateral contracts pursuant to which the plaintiff agreed to enter into the contracts. The defendants were in breach of the collateral contracts. In consequence the plaintiff suffered loss and damage.

15.The gemstones in respect of which he brought the action were particularised as follows:

Intense Blue Beryl (Maxixe)
Quantity Carat Invoice No
1 29.74 54818
3 100.12 54830
14 383.00 54841
Natural Golden Beryl

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Quantity Carat Invoice No

1 30.24 54818

1 33.85 54818

3 140.34 54830

3 293.21 54834

1 166.05 54836

Natural Green Beryl

Quantity Carat Invoice No

1 20.40 54818

3 187.78 54830

3 208.91 54834

1 43.77 54836

8 255.06 54836

The defect in the stones according to the plaintiff was that the stones had been treated. The refunds he claimed are as follows: . Under Invoice No 54818 $ 55,350

. Under Invoice No 54830 $177,755

. Under Invoice No 54834 $250,673

. Under Invoice No 54836 $100,000

. Under Invoice No 54841 $ 93.750

. $677,528

16. **The defence**

By their re-amended defence the defendants took issue with the plaintiff as follows: the defendants denied the plaintiff`s claim that he informed them that `he had only a limited knowledge of gemology and was purchasing gemstones for resale`.

17.The defendants admitted having made the first three representations attributed to them but denied having made the next four representations. As regards the sixth representation, the defendants said that they expressly made it clear to the plaintiff that `goods sold are not returnable` which words were in bold letters on all the invoices/cash memos. The defendants further denied telling the plaintiff that they had excellent connections with several business dealers in gemstones. They admitted that all the gemstones sold to the plaintiff were from Brazil.

18.The defendants went on to assert that at all material times they had expressly made known to the plaintiff that they were selling the gemstones to him subject to and in reliance on the IGL certificates given by International Gemological Laboratory containing the conditions and limitations printed on the back of the said certificates.

19.The defendants admitted that the plaintiff purchased the gemstones as set out in the 12 invoices/cash memos but denied that the plaintiff was induced to purchase the gemstones by the representations of the defendants. The gemstones purchased by the plaintiff were displayed in showcases in the defendants` premises. The plaintiff selected the gemstones he purchased. Each gemstone he selected had an IGL certificate attached to it. At the time of making the purchases the plaintiff showed that he did not rely on the defendants or the contents of the IGL certificate.

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20.The defendants specifically denied that: (a). the gemstones were defective;

(b). they did not correspond with the description in the said invoices/cash memos;

(c). they were not of merchantable quality; and

(d). they were not fit for their intended purpose.

21.The defendants denied that the plaintiff made known to them the intended purpose for which the plaintiff purchased the gemstones or at all. The defendants thus denied fault and the plaintiff`s alleged claim for loss and damage and put him to strict proof of the same. The defendants denied that the gemstones sold were defective in that they had been treated as alleged or otherwise or as alleged in the plaintiff`s pleadings.

22.As regards the damage the defendants said that the plaintiff has failed to take into account the discount and gifts they had given him.

23.The defence, it will be noted, was essentially one of denial. No positive case as such was pleaded.

24. **Claim based on negligent misrepresentation**

At the outset it would be apt to deal with the claim based on the tort of negligent misrepresentation. In **Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd** [1986] AC 80 considering a claim by a bank against its customer for negligence in the running of the customer`s account, Lord Scarman said at p 107:

> *Their lordships do not believe that there is anything to the advantage of the law`s development in searching for a liability in tort where the parties are in a contractual relationship. This is*

> *particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct any analysis of the right and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis.*

25.After ***Tai Hing Cotton Mill*** it became clear that where parties are in a contractual relationship and one of the parties could have protected himself against economic loss by suitable contractual arrangements, it would be inappropriate for him to bring an action in tort for economic loss. In any event he cannot recover damages greater than he would be able to obtain in contract. The law can see no sense in a situation where a party negotiating a contract and thereby assuming contractual obligations should at the same time be wary of a duty in tort. Obligations in tort and contract are different. If duties in tort are imposed on contractual obligations it may be difficult to reconcile them. This is especially so in the case of a contract for the sale of goods. See **Simaan General Contracting Co v Pilkington Glass Ltd (No 2)** [1988] QB 758, ***Bank of New Zealand v Ginivan*** [1991] 1 NZLR 178 and ***Swiss Singapore Overseas Enterprise Pte Ltd v Horng Chang Enterprise Pte Ltd [2 SLR 478.*** **26.I would therefore not consider the claim based on tort. It will be observed that the misrepresentations relied on by the plaintiff to found his case in negligence are also part of his case based on contract. He is therefore not put to any serious disadvantage in being precluded from founding his case on tort. 27. An understanding of gemstonesUnderstanding gemstones and the gemstone trade is the critical first step toward understanding the main issue for determination in this case. 28.A gem is so designated because it is beautiful and attractive. The beauty may lie in colour as in the case of secondary gemstones or in lack of colour as in the case of diamonds. A**

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gemstone to be called so must also comprehend the elements of rarity and durability so as to retain the polish and enhancement applied to it and to withstand the wear and tear of constant use and exposure to heat and light. In the case of a coloured gemstone it must possess the ability to retain its colour even when subjected to heat and light. Not all gems have these defining qualities in the same degree. When the absence of one or more of these qualities is pronounced, it is reflected in the merchantability of the stones with the debility. That is why there is much variation in the values of different minerals and of different gems of the same mineral. 29.Furthermore gemstones are often viewed only as a capital investment in that they hold in such small form value against the pressures of inflation better than most investments. Thus longterm value in gemstones is based on beauty, rarity and their ability to hold their beauty almost infinitely. The optical quality of gemstones therefore can never be overstated. Value, of course, is a matter of market perception. 30. BerylsA beryl is a gemstone so called because it contains the mineral beryllium. It usually comes in different colours: emerald, green; aquamarine, blue; morganite, pink; and heliodor, golden. A blue beryl and a green beryl are commonly and commercially referred to as `aquamarine` and `emerald` respectively. Diamond, emerald, ruby and sapphire are principal gemstones. All others - including beryls except emeralds - are secondary gems. 31. Maxixe berylsInto the family of beryls there was in 1917 an intruder known as the Maxixe beryl. According to an article by K Nassau and DL Wood, *The Nature of the New Maxixe-Type Beryl* (1976), the Maxixe mine was discovered about 1917 in Brazil. The following is a summary of the article. (All italics for emphasis added by me.) 32.The Maxixe mine was discovered in about the year 1917 in Brazil. Here a deep blue beryl occurred together with a pale pink tourmaline. Some 10kgs of facetable deep blue material as

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well as another 15kgs of pale material were removed before it was discovered that this beryl faded on exposure to light. Since there resulted much unpleasantness, the pit was filled in. Experiments were done on the new materials. 33.It was found `that although both Maxixe and aquamarine beryls show a strong blue to almost colorless dichroism, in the Maxixe it is the ordinary ray that carries the blue color while in aquamarine it is the extraordinary ray that gives the blue color.` 34.Based on the results they used the term `Maxixe-type` beryl for material which showed these three characteristics: (1) the unusual dichroism with more intense color in the ordinary ray; (2) narrow banded absorption in the 5,000A to 7,500A region in the ordinary ray only leading to the blue or green color; and (3) fading of this color on extended exposure to light or on heating. 35.All samples studied, including the old Maxixe specimen, twenty-three blue cut stones, three green cut stones, as well as blue and *green rough* showed strong dichroism with the blue component being carried by the ordinary ray. In this they were all different from ordinary aquamarine. It was also noted that a number of these Maxixe-type stones were cut with the optic axis perpendicular to the table, while aquamarines are usually cut in the parallel position, each being the orientation for the best display of the color in the particular material. 36.Three of the blue Maxixe-type stones and both blue and green rough were exposed to daylight with sun or to a 100 watt tungsten filament light bulb at a distance of six inches in an air-conditioned room arranged so that the stones remained at room temperature. In the daylight exposure, the stones were turned every few hours when the sun was shining so that the table faced the sun for maximum effect. *After one week in day/sunlight (about three hours sunshine per day during the test period) the old Maxixe beryl, which was quite pale to start with, as well as a thin piece of green rough had bleached almost*

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completely (both to a yellow color), while a dark blue cut stone faded significantly **. Under the 100 watt blub 150 hours (six days) almost completely faded a thin piece of blue rough and significantly faded two dark blue cut stones to perhaps one half of the original color as estimated visually. 37.On heating samples in an electric oven for half hour periods at increasing temperatures, some deep blue rough and one deep blue cut stone needed 230[deg]C (450[deg]F) to bleach completely in half hour, while another deep blue stone was completely bleached in less than half hour at 100[deg]C (200[deg]F). 38.** ***The green rough material faded to a deep yellow color on exposure to light or on heating to 235[deg]C (450[deg]). On further heating to 40[deg]C (750[deg]F) it became colorless*** **. 39.All material showing one of three characteristics of Maxixe-type (dichroism, spectrum and fading) also showed the other two, and no aquamarine is known to show any of these characteristics. 40.The authors further pose this question: can light or heat bleached Maxixe-type beryl be returned to the original color, and if so, has this treatment been used on any of this material? They answer both parts of the question in the affirmative. 41.Then they pose this question: what causes the blue and green Maxixe-type color and can it be made permanent by some treatment? The answer they give is that the unpaired electrons of a `color center` cause the color, and** ***no known treatment can make it permanent*** **. 42.The authors add that: it is possible that some treatment we have not discussed could be found to convert any colorless, pink or** ***yellow*** **beryl to a permanent blue color, but the result would not then be Maxixe-type beryl, but a new type of beryl. We do not know of any such treatment. 43.Finally they make the following conclusions: `Based on our examination of 30 specimens, we identify blue and** ***green beryl*** **as Maxixe-type if it has the following characteristics: unusual dichroism with the color being in the ordinary ray; narrow**

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absorption bands in the ordinary ray spectrum only, between 5,000 and 7,500 Angstroms; and fading on heating (half hour at 200[deg]F to 450[deg]F) or prolonged *exposure to light more than one week in the sun* or 150 hours at six inches from a 100 watt tungsten lamp bulb may be needed to show pronounced fading in some specimens. In all these respects the Maxixe-type beryl differs from blue and green aquamarine beryls. 44. *The rate of fading on exposure to light appears to vary considerably, and we know of no test (other than destroying the color by exposure) which can determine the stability to light. An additional danger is that partly faded Maxixe-type blue beryl may resemble high quality aquamarine, only to fade subsequently to a valueless color* . 45.After fading, the color can in most cases be returned by irradiation with neutrons, with gamma rays or with X-rays but this color will once again fade with heat or light. This treatment does not turn just any beryl blue since a specific type of defect in Maxixe-type beryl must be present for it to work. In a set of fifteen random pale beryl specimens, two were found which showed the blue Maxixe-type color and spectrum after irradiation. This shows that a unique origin for the current material is not necessarily indicated. 46.Of the 30 current Maxixe-type beryls examined, three were proved to have been treated with neutrons either to improve the color or to return color which had faded. Some or all of the others may have been treated with gamma rays, which leaves no detectable evidence of treatment. 47.The focal point of the above article is that coloured secondary beryls like aquamarine have permanence of colour in that they do not fade in light or on heat. This important property, however, is absent in Maxixe and Maxixe-type beryls. *Non-fading Maxixe-type beryls?* 48.In the 1981 Winter issue of *Gems and Gemology* Dr Nassau and Dr Prescott published an article under the title: *Nonfading Maxixe-Type Beryl?* (I came by this article while looking up material on beryls. Dr

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Nassau, who gave evidence in this case as an expert for the defendants, referred to this article and said it was his impression that the article was submitted in evidence. I too was under the impression that it would be among the material submitted by the defendants. In the event I discovered to my amazement that it was not tendered to the court.) An introductory summary of the article reads as follows. (All italics for emphasis added by me.) 49.It is sometimes stated that there exists some Maxixe-type deep blue beryl (occasionally misnamed `aquamarine`) that does not fade. ***All specimens ever reported in the literature did fade, typically to almost colourless in one to two weeks in bright sunlight or over a somewhat longer period under less intense illumination*** **. A `nonfading` specimen recently examined proved to be typical fading Maxixe-type beryl. A possible reason why such a stone might give the impression that it is nonfading is discussed. With the** ***exception*** **of some brown topaz and some kunzite, no significant gemstone material fades on the same time scale as does Maxixe-type beryl. 50.The authors state the issue before them: `Several years ago there appeared on the gemology scene a deep blue beryl that had unusual properties. Specifically, the material was at first designated aquamarine, but the dichroism of the stone differed from that of aquamarine. It was soon shown that the color faded upon exposure of the material to heat or to light. A detailed study demonstrated that an irradiation-induced color center produced the color and that this material was closely related to, but not identical with, the naturally occurring deep blue beryl found in 1917 in the Maxixe mine in the Piaui area of northeastern Minas Gerais, Brazil, which also faded.** ***The new material was designated `Maxixe-type beryl` to distinguish it from the original, natural `Maxixe beryl`*** **. Although the stones appear to fade at the same rate, the color centers in these two materials have been shown to be slightly different. 51.Statements are occasionally**

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made that specific specimens of Maxixe-type beryl do not fade. All such material studied in detail and reported in the literature has been found to fade. ***One such purportedly non-fading specimen recently became available to the authors; it was examined to establish if it did fade and, if so, why the claim that it did not would have been made*** **. 52.Then they describe the experiment they carried out as follows:** ***A 2-cm fragment of blue beryl was obtained with the kind cooperation of Dr J Keane of KMC Inc (Bedford, MA). The specimen was reported to originate from a New England locality, although the exact site was unknown. It had been irradiated some years ago and purportedly had maintained its color during this time while lying on a desk. Examination showed a typical Maxixe-type beryl, but of a much paler blue than the intense color that usually results from irradiation to saturation. A slice cut from the specimen was polished and the polarized spectra were measured in a Cary Model 14 spectrophotometer at room temperature. The result was an absorption spectrum typical of a Maxixe-type beryl, with the blue-causing absorption bands in the ordinary ray. This specimen was exposed for 100 hours (at a distance of 10cm) to the focused light from a 25 watt microscope lamp equipped with a blue filter in an environment that was air-conditioned in such a way that no heat was experienced by the beryl. As can be seen from the much-reduced absorption this treatment produced a drastic bleaching. Heating in an oven at 200[deg]C overnight removed all the remaining color.*** **53.Finally they make the following conclusion: `** ***The specimen proved to be an "ordinary", fading Maxixe-type beryl and had undoubtedly faded significantly since it was irradiated*** **.` The question remained, though, why it had been thought to be nonfading. 54.A possible answer was obtained by means of some light-intensity observations taken with a photographic exposure meter. From a series of measurements recorded during a sunny day (late June in New Jersey) and from a sampling**

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of desks, ranging from brightly lit by a large window to the more usual interior desks lit by incandescent or fluorescent lamps, it was found that the average desk illumination was about one hundredth the average outdoor illumination. Accordingly, *a Maxixe-type beryl that faded in one week in the sun to less than one half its original color would reach the equivalent stage in 100 times as long a period on a typical desk, that is, in two years* . 55.A series of factors may slow the fading even more: the illumination at some desks is lower than at others; the stone may lie face down, so that what light there is does not enter as effectively as occurred in a purposely face-up positioned fade test; papers can inadvertently cover the specimen part of the time; and there is some small variability among Maxixe-type beryls that otherwise appear to be identical, as has been reported. 56. *The `nonfading` specimen examined in this report had not lost all of its color over several years on a desk. Clearly, though, it had lost some color, but the loss had been so slow and gradual that it was not evident to the eye in the absence of a color reference sample.* 57.A survey was made among various gem authorities for other gemstone materials that might fall into a similar fading category. Only three were candidates. Of these, amethyst was eliminated since reports of fading could not be substantiated where a high probability of exposure to heat was not also present. There remained brown topaz from a few localities (such as some in Mexico and in Utah) which fades rapidly, and also some kunzite. Apart from these, *all other acceptable gemstones do not fade even after many decades under bright spotlights in museum and store displays* . 58. *It may be concluded that no authentic instance of nonfading Maxixe-type beryl has been proved. Although fading may be delayed by exposure to only low levels of light and can be halted completely in the absence of light, there is a major qualitative difference between this material and nonfading gemstones acceptable to the trade.*

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59.The last sentence is important. It distinguishes the qualitative difference of the naturally coloured beryls which possess colour permanence which they called `nonfading gemstones` and the Maxixe-type beryls which do not hold their colour thus highlighting their propensity to fade when exposed to light and heat. It is therefore a legitimate inference to be drawn from the expression `nonfading gemstone *acceptable* to the trade` that the fading Maxixe-type beryl is *not an acceptable beryl* in the gemstone trade even though the basic material may be natural. Finally, an authentic gemstone to deserve that designation should not have the characteristics of the Maxixe-type stone. 60. Tiffany`s reject Maxixe-type berylsDr Nassau gave evidence in this case. He was called as an expert by the defendants. Part of his evidence was follows. Tiffany`s were offered some blue stones as aquamarine. He subjected them to test and found them to be of Maxixe-type deep blue stones. The stones were rejected since they were not aquamarine. His analyses of the stones were accordingly accepted not only by Tiffany but also by the Gemological Institute of America (GIA) - that is both the dichroism test and the spectrum test were accepted for identification of deep blue and deep green Maxixe-type beryls. 61. Description of Maxixe-type berylsAs stated earlier, a blue beryl is known by its trade name aquamarine. The distinct feature of aquamarine is its blueish colour which is obtained by heating. Once the blue colour is obtained it remains stable. It will not lose its blue hue partially or completely when subjected to light or heat. Therein lies its long term value and beauty and that is why it deserves its designation as a gemstone. The Maxixe-type beryls are different in that their colour is introduced by modern technology. But their colour fades - the rate of fading depending on the intensity of light and/or heat they encounter. Their colour is not permanent unless they are permanently kept in the dark. Tiffany obviously

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rejected them because, unlike aquamarine, a Maxixe or Maxixe-type beryl is not a legitimate or authentic or acceptable member of the gemstone market and they being reputable traders could not afford to trade in them even for what such stones are worth. 62.Extracts from *Gemstone Enhancement Information Guide* from *Information Guide of Jewellery Industry* were made available to me by the defendants. They carry information under three heads: (a) Tag Code, (b) Enhancement and (c) Consumer Care. As the whole publication was not made available to me I was left in the dark as to the full meaning of `Tag Code`. From the limited extracts I discerned the following information on aquamarine and Maxixe-type beryl which is set out in Table A annexed to this judgment. The Guide gives no information on green or yellow Maxixe-type beryls probably because they are rarer than the Maxixe-type blue beryls. 63.My understanding of the Guide is that it requires the seller to put tags on a product sold. Once a tag showing the correct code is attached to a stone, the buyer or dealer can ascertain its characteristics if he already does not know them. In the case of a Maxixe-type stone a buyer will at once know about a Maxixe-type stone that: (a) the stone was irradiated by the use of high energy or sub-atomic particle bombardment to alter and improve the gemstone`s colour and often it was followed by a heating process; (b) the irradiation turned pale pink into blue; (c) it is rarely used (the other inapplicable alternatives being occasionally, usually, commonly); (d) its` colour stability is poor (the other inapplicable alternatives being fair to good, good and excellent); (e) it requires special care; and (f) its` colour fades in light not to mention heat. 64.Dr Nassau said in evidence that the information that colour fades in light was based on empirical proof - that is exposure to sunlight for five days destroyed the colour. Dr Nassau further said in evidence that Maxixe or Maxixe-type beryls can be in colours other

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than blue. Specifically, he said that there can be dark green Maxixe type stones and golden beryls with a greenish tinge where the green comes from the presence of some Maxixe blue. He mentioned a report by one Mr Conningshield of a combination of golden beryls containing a little Maxixe. 65.The International Confederation of Jewelry, Silverware, Diamonds, Pearls and Stones in its booklet (exh P51) says in art 9(a): The adjectives `real`, `precious`, `genuine`, `natural` or other expressions refer to exclusively to natural gemstones, and natural pearls, and must only be used to designate the natural substances by definitions A to A3. Of these only A and A1 are relevant definitions and they read: *A: Nautral substances The term `genuine` is synonymous with `natural` and refers exclusively to substances which have been formed completely by nature without human interference. A1: Precious stones gemstones, and ornamental stones Precious stones, gemstones and ornamental stones are minerals and rocks which have been formed in natural deposits without man`s intervention.* Under the heading `Imitation` in art B1.3 it says: *B1.3 Imitations Imitations are simulations of natural or synthetic stones: or fancy products made entirely or partially by man. These stones imitate the effect, colour and appearance of natural gems or synthetic stones without possessing their chemical and/or their physical properties and/or their crystal structure.* 66.The above definitions in my view reflect the common understanding of the terms in the gem trade. Under these definitions the Maxixe-type stones do not qualify for the description `natural` but would come under `imitations` because though the stones are natural in origin, their colour is a simulation. They do not possess the physical properties of natural gemstones in that their colour is unstable. 67.Natural here means that the stone must not only be natural as distinct from synthetic material but also possess natural colour and have the natural property of retaining colour. There are one or

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two exceptions to this rule. It is unnecessary to consider the exceptions as they do not form the subject matter of this case. 68. *The Guide* published by Gemworld International Inc (exh D19) does not mention the Maxixe-type beryl at all. The inference to be drawn from this is that it is not part of the regular gem trade. 69.In summary the nub of the problem with the Maxixe-type stones is this: whereas an aquamarine beryl has colour stability ie permanence in the sense that it does not fade or lose its colour by reason of intense and prolonged exposure to light or heat (even 400[deg] 450[deg]C), the Maxixe-type of beryl fades and loses its colour when exposed to light which need not be intense and loses its colour when subjected to temperature in the region of 100[deg]C. This takes the Maxixe-type of beryl out of the ordinary class of gemstones and makes it sub-standard in the extreme. 70. The nature of stones in this caseThe plaintiff called an expert from Australia, Dr Brown. While in Australia he subjected a stone of each of the three colours to the three tests to identify their nature, in particular their colour stability - that is (a) use of spectroscope, (b) the use of a dichroscope, and (c) the fade test (which involved exposure to light and the application of heat to 100[deg]C). He submitted a report. The result of his tests showed with certainty that all three stones were of Maxixe-type. I compared the colour of each of the three stones with another stone of the same ilk which had been purchased by the plaintiff. I found that all three had faded. In the case of the blue and greenish yellow stones, the parts which had been exposed to direct light and heat had substantially lost their colour. The orangy yellow also had lost part of its colour but not so substantially. 71.Later, Dr Brown submitted another report dated 20 June 1993. As regards the 39 beryls in question his view was that all of them displayed their strong dichroic colour in their ordinary ray. Thus they manifested one of the three key characteristics of

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the Maxixe-type beryl. It was common ground that one of the tests was as good as any one of the other two or all of them. I had no hesitation in accepting Dr Brown`s evidence as the reflection of truth. And his evidence remained intact even after cross-examination. 72.Mr Palmeiri, another expert called by the plaintiff, was also of the view that all the 39 stones in question belonged to the ilk of Maxixe-type. Initially his view was very clear and strong as regards the blue stones but not the eight greenish yellow and four brownish orangy/yellow stones. But after he became aware of the findings of Dr Brown, he concluded that all of them were of the Maxixe-type. I looked at the stones of each of the three colours. They all had a peculiar murky look about them. They lacked sparkle. The colour of each group was similar. Accordingly, I had no hesitation in accepting the evidence that all the 39 stones were Maxixe-type stones. 73. Defendants` positionThe defendants` initial stance on the nature of the beryls is contained in correspondence between the parties. The plaintiff by his telex of 21 January 1989 complained about their propensity to fade under strong illumination. This shows that the plaintiff was not aware of this propensity at the time of purchase and that he had not been advised of it. The interpretation I place on that telex is that he placed these beryls within the same class as the aquamarines and amethysts he had purchased and which he was `naturally very happy about`. 74.The defendants` immediate response to the plaintiff`s complaint was that the results of the Gubelin tests were consistent with the IGL certificate. That was untrue because the IGL certificates said nothing about the propensity of the stones to fade. As the plaintiff pointed out correctly in his telex of 28 January 1989 `the two types of certificates are not compatible`. The defendants said that if the plaintiff was `unhappy with the blue beryl (Maxixe-type) they would allow him to exchange them for amethysts`. 75.By their fax of 10 February 1989 the

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defendants made a volte face - they said they would not refund on the Maxixe beryls nor on any of the beryls he had purchased. They referred to the IGL `Certificates of Gem Identification` and added: `In fact during the course of purchase, you mentioned that you do not recognise the IGL certificates.` This clearly shows that the IGL certificates did not form the basis of the purchase. In any event the IGL certificates were certificates of identification and not description. Identification here means the specification which distinguished one stone from another. The letter went on with a comment on the nature of the stones as set out in pp 5 and 6 of this judgment. 76.It is plain that some five months after the purchase, far from denying the unstable colour, the defendants went on to assert the unstable nature of the stones. Suffice it to say for this moment that the defendants unreservedly admitted the nature of the Maxixe-beryls and that the plaintiff was not aware of that nature at the time he made the purchase. They of course rely on the mention of the word `Maxixe` in the IGL certificate. I will comment on this later. 77.Next, the defendants called Dr Nassau as their expert on the nature of the stones sold. His standpoint may be summarised as follows: (1). There is a distinction between a gemmological test and a scientific test to determine whether a beryl is a Maxixe-type stone. Exposure to light and subjecting the beryl to heat is a scientific test as it reduces or destroys colour. The scientific test of subjecting the beryls to heat is unnecessary for gemmological purposes as it may destroy the colour. Any one of the four criteria (ie treating light and heat as separate tests) would serve the purpose. (2). At first he said that Maxixe-type of beryl was confined to deep blue colour but after much cross-examination conceded that there can be greenish and golden yellow Maxixe type beryls. (3). His earlier conclusions about Maxixe-type beryls were somewhat an overstatement and accordingly he was revising his view

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to the effect that they would not fade as fast as had been thought earlier. (4). The orangy beryls in question did not belong to the Maxixe-type class. (5) All the beryls were natural as described and those described as Maxixe-type were correctly described so in the IGL certificates. 78.I am unable to accept the thrust of Dr Nassau`s evidence. My finding that all the 39 beryls were of the Maxixe-type is not altered by the evidence of Dr Nassau. Moreover, his evidence in this case on the whole did not detract from the conventional understanding of Maxixe-type beryls - that is to say they would fade when subjected to strong illumination and/or heat, they require special care and that they are rarely used and they are unacceptable in reputable gem trade. 79.The above background description of gemstones and my findings on beryls provides the basis for decision on the alleged breach of terms of contract. Paragraph 7 of the statement of claim relies on breach of the following terms of contract: (a). non-conformity with description; (b). unmerchantability; and (c). unfitness of purpose. 80.It is unnecessary to treat the alleged representations as collateral contracts. If the representations were made they would form part of the main contract itself. 81.I shall now consider each breach separately. 82. Sale by description - The lawSection 13(1) and (3) of the Sale of Goods Act 1979 provides as follows: (1) Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description. (3) A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer. Whether there is a sale by description is a question of construction of the words used to define the goods sold and the circumstances of the sale. `Where goods are described by contract, and the buyer contracts in reliance on that description, there is a sale by description even if the goods be specific ` And it may apply where the purchaser has

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seen and selected the goods, if the deviation of the goods from the description is not apparent. The only sales not by description are sales of specific goods as such. Specific goods may be sold as such when they are sold without any description, express or implied; or where any statement made about them is not essential to their identity; or where, though the goods are described, the description is not relied upon, as where the buyer buys the goods such as they are - *Chalmers Sale of Goods* (8th Ed) p 120. See also Beale v Taylor [1967] 1 WLR 1193 and Elder Smith Goldsbrough Mort Ltd v McBride [1976] 2 NSWLR 631 where the above statement of law in *Chalmers Sale of Goods* was approved. 83.Lord Wright pointed out in Grant v Australian Knitting Mills Ltd [1936] AC 85 at p 100: *there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, eg woollen under-garments, a hot water bottle, a second-hand reaping machine, to select a few obvious illustrations.* 84.In Beale v Taylor [1967] 1 WLR p 1193 the defendant owner of a secondhand car inserted the following advertisement in a trade paper for secondhand cars: `Herald convertible, white, 1961, twin cabs 190.` The plaintiff purchased the car. It was held that there was a sale by description as the advertisement showed the kind of car the plaintiff was buying. 85.In Couchman v Hill [1947] KB 554 the plaintiff purchased at an auction sale a heifer belonging to the defendant which was described in the sale catalogue as `unserved`. The catalogue stated that the sale would be subject to the auctioneers` usual conditions and that all lots must be taken subject to all faults or errors of description; and the conditions of sale, which were exhibited at the auction, stated that the lots were sold `with all faults, imperfections and errors of description.` At the sale the plaintiff asked both

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the defendant and the auctioneer whether they could confirm that the heifer in question was unserved and received from both the answer `Yes`. Later the heifer was found to be in calf and died as a result of carrying a calf at too young an age. In an action in the county court for damages for breach of warranty the county court judge held that the value of the confirmation by the defendant and the auctioneer that the heifer was unserved was destroyed by the conditions of sale and gave judgment for the defendant. On appeal it was held that in the circumstances the answers of the defendant and the auctioneer to the plaintiff`s question amounted to an offer of a warranty overriding the conditions of sale; that such offer was accepted by the plaintiff`s bid for the heifer; and that the description amounted to a condition on the breach of which the plaintiff was entitled to treat it as a warranty and recover damages. On the printed condition Scott LJ said at p 559: *The printed condition that the vendor will take no responsibility for errors of description of things or animals specifically offered for sale on inspection is reasonable for visible defects, but for qualities or attributes which are invisible it is not reasonable. It may well become a mere trap for the unwary.* 86.Finally when applying the provisions of the Sale of Goods Act 1979, the trial judge should always keep in mind the following salutory words of Lord Wilberforce in Christopher Hill v Ashington Piggeries Ltd [1972] AC at 489: *Further I do not believe that the Sale of Goods Act was designed to provoke metaphysical discussions as to the nature of what is delivered, in comparison with what is sold. The test of description, at least where commodities are concerned, is intended to be a broader, more common sense, test of mercantile character. The question whether that is what the buyer bargained for has to be answered according to such tests as men in the market would apply, leaving more delicate questions of condition, or quality, to be determined under other clauses of the contract or sections of the*

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Act. **87.The question of sale by description in this case can be approached from two angles. First, indisputably when the plaintiff purchased the beryls in question he purchased them as `gemstones` and the defendants sold them as such. Given that, what did the expression `gemstones` convey? It is clear that it meant that the stones possessed the properties outlined earlier - one of them being `permanence or stability` of colour. Although each of the properties is relative, a stone which is liable to fade upon exposure to light and/or heat by definition is not a gemstone. This was the thrust of the evidence of Mr Palmeiri, the expert witness on the gem trade called by the plaintiff. 88.Another aspect of it is that the defendants admitted they did not deal in `inferior quality gemstones`. The plaintiff said that the defendants stated that `all the gemstones the plaintiff agreed to purchase were genuine, natural, without flaws and not treated in any way`. The defendants` witnesses denied having said so. I believe the plaintiff and disbelieve the defendants. I cannot accept that as gem traders the defendants kept mum about the description of the stones. It is highly probable that they described the stones as alleged by the plaintiff. Furthermore, the defendants` statement that they did not deal in `inferior quality gemstones` meant that the stones were `without flaws or defects`. A restatement of the representations is that they described the beryls as superior quality gemstones and flawless beryls. Taking a broad and commonsensical approach, beryls which were liable to fade upon exposure to light and heat and needed special care and could only be used rarely do not fit the description of superior quality `gemstones` or `gemstones without flaw or defects`. As the plaintiff said in evidence, the beryls did not possess `what is considered to be a very necessary feature in the jewellery trade. That is permanent colour, stable colour.` Accordingly, the plaintiffs were in breach of the implied condition of conformity with description.**

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89.The defendants said that they described the stones as `natural` and that they were indeed natural. This, however, was only one of the descriptions and conformity with that description does not absolve them from unconformity with the other descriptions. 90.The defendants further said that the IGL certificates described the blue stones as `Maxixe-type` and indeed they were Maxixe-type stones. This does not absolve the defendants because as they admitted and asserted, the plaintiff did not rely on the certificates. The plaintiff said in evidence `I did not rely on the IGL certificates. I relied on Peter Hung.` Further, the plaintiff and probably the defendants also, did not at the time of the sale understand the import of the word `Maxixe-type`. Accordingly, that term was not part of the description the plaintiff relied on and it did not form part of the contract. Additionally, the plaintiff said he was told by the defendants that the term referred to the origin of the stones - namely `a very famous mine in Brazil`. The plaintiff in any event did not purchase the stones on the basis of that description. 91. Condition as to merchantable quality - The lawSection 14(2) Sale of Goods Act 1979 provides that: where goods are sold in the course of business, there is an implied condition in the sale that the goods are of merchantable quality, except where the defect was specifically brought to the buyer`s attention before the contract was made or where the buyer examined the goods before purchase and the defect ought to have been revealed by that examination. 92.A sale is done `in the course of business` if selling merchandise of the kind in question is the declared vocation of the seller. In Singapore there is no difficulty in understanding that expression. If a limited company or a business firm declares itself a seller or habitually sells a given product or merchandise either as a manufacturer or trader, then anything within the class of that product or merchandise sold by that company or firm is sold in the course of business. This may be contrasted

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with a seller, whose normal vocation being not the selling of the product or thing, sells it as he has no need for it. For example a teacher selling his car or a lawyer selling his computer because he intends to acquire a new one would not be selling the car or the computer in the course of business. 93.Merchantable quality` is defined in s 14(6) of the Sale of Goods Act 1979 as follows: *Goods of any kind are of merchantable quality within the meaning of subsection (2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.* 94. *Chalmers Sale of Goods* states at p 128, `Merchantable is a composite quality comprising elements of prescription, purpose, condition and price. The relevant significance of those elements will vary from case to case according to the nature of the goods in question and the characteristics of the market which exists for them.` 95.As s 14(2) imposes a inherent quality, questions as to whether the buyer relied on the skill or judgement of the seller and whether the seller was conscious of any unmerchantable quality are irrelevant in the application of this provision. 96. ApplicationThe first question to ask is whether the sale was made in the course of business. The answer plainly must be in the affirmative since the defendants admittedly were dealers in coloured gemstones, one of the biggest dealers at that. The next matter to be considered is the purpose for which the stones are commonly bought for. The immediate purpose for which the goods in such large quantity were purchased was undoubtedly for resale. Resale could be to other dealers or to consumers. 97.The evidence before me clearly pointed to only one conclusion - that the stones were not of merchantable quality. Maxixe-type stones attract very little, if any, demand in the gem trade as they are rarely used. Mr Palmeiri, the plaintiff`s expert on market and value said that Maxixe-type stones are not

commonly sold in the gem trade and their value, if any, is very low. His evidence, which I accept as a reflection of the true condition, is also supported by the literature placed before me. Mr Palmeiri`s evidence was not effectively contradicted by the defendants. Maxixe-type stones historically have had an adverse market perception in the gem trade which perception either destroyed or diminished their merchantability. In the circumstances, I conclude that all the beryls were not of merchantable quality. 98.As to the proviso in s 14(2), there was no evidence that the defect in the stones was brought to the buyer`s attention before the contract was made or that the buyer could have discovered the defect upon reasonable examination. It was the job of a scientist not a layman. Although the defendants ought to have known of the problem with the beryls, the evidence before me showed that they in all probability did not know of it until after the plaintiff complained. 99. Condition as to fitness for declared purpose - The lawWhere goods are sold in the course of business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which they are being bought, there is implied in the sale, a condition that the goods are reasonably fit for that purpose unless the buyer did not rely, or it was unreasonable for him to rely, on the seller`s skill or judgement. See s 14(3) of the Sale of Goods Act 1979. 100.Under this provision, the seller bears the burden of showing that the buyer did not rely on his skill and judgement or that in all the circumstances it would be unreasonable for the buyer to rely on his skill or judgement. 101.A buyer may show his reliance on the seller`s skill or judgement by stating the purpose for which the goods are purchased with sufficient particularity and it is always a question of fact depending on all the circumstances of the case. In *Grant* `s case Lord Wright stated at p 99: *It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication.*

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The reliance will seldom be express: it will usually arise by implication from the circumstances: thus to take a case like that in question, of a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment: the retailer need know nothing about the process of manufacture: it is immaterial whether he be manufacturer or not: the main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make: **102.In Hardwick Game Far v Suffolk Agricultural Poultry Producers Association [1969] 2 AC 31 at p 82 Lord Reid said: `A shopkeeper`s goodwill consists largely in his reputation of being reliable - the better the shop the easier it is to draw this inference.` The reliance on a seller`s skill and judgment need not be total or exclusive. See Christopher Hill Ltd v Ashington Piggeries Ltd [1972] AC 441 at p 468. Ignorance of unfitness, however, would not excuse the seller from liability. 103. ApplicationThe purpose for which the plaintiff purchased the beryls was for resale. This was shown not only by the plaintiff`s own evidence but also admissions made by the defendants. Additionally it also follows as a matter of reasonable inference: purchase of such a large quantity stones of the same type would normally be for resale. 104.It is settled law that resale can be a particular purpose of purchase of any good: Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd [1991] 1 QB 564. 105.Given that, were the stones fit for resale by the plaintiff. The answer plainly will be `No`. The reasons for this conclusions are the same as those outlined in the preceding part of this judgment. 106. The remedyThe plaintiff in effect seeks rescission. The breach of a condition in a contract entitles the plaintiff to the remedy of rescission as a matter of right. It is not a matter of discretion. 107.It is trite law that the effect of an implied term being a condition is that**

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when the condition is breached the innocent buyer may treat the contract as discharged. 108.The innocent party is entitled to rescission or damages at his option. 109.In any event the only proper damages to be awarded in this case is the full value of the defective stones to be refunded. In my judgment the plaintiff is entitled to return the stones which were subjected to the heat and light test. This was necessitated by the defendants` refusal to accept the plaintiff`s proposal to return the stones which forced him to litigate and prove that the stones are defective. The return cannot be effected unless the plaintiff is able to return the stones and the gifts that went with them. 110.The defendants` argument that the plaintiff is precluded from this remedy because the invoices said that `Goods sold are not returnable` is unsound. The efficacy of such a clause is confined to instances where the buyer proposes to cancel the sale because he has changed his mind about the purchase without any fault or breach of a term of contract on the part of the seller. It does not affect or nullify the court`s power to order rescission of the contract or award damages when it finds that the seller is in breach of the contract. When awarding damages, in suitable cases, the court of course may order the return of the goods. 111. The IGL conditionsThe plaintiff furthermore is not precluded from this remedy by the conditions on the reverse side of the IGL certificates. For one thing these terms did not form part of the contract as the plaintiff did not transact on the basis of the certificates. More compelling is another reason. The conditions must be construed strictly. So construed they can only apply between IGL and its customer who in this case was the defendants and not the plaintiff who did not instruct IGL to issue the certificate nor pay for it. Additionally, the conditions were inserted in the certificates for the protection of IGL and not any other person. 112. The defendants` witnessesBefore concluding this judgment it is incumbent upon

me to discuss the evidence of the defendants. The employees of the defendants turned out to be unsatisfactory witnesses. In any event the materiality of their evidence centred on what misrepresentations, if any, they made. As I proceeded to decide the case on the basis of contract and not tort their evidence became secondary. The effect of their evidence material to the claim founded on contract was largely admitted in pleadings, documents and their evidence. 113.Dr Nassau was, of course, the mainstay of the defendants` case. His evidence, which I found unreliable, should not even be considered because the substance of evidence was not put to the plaintiff or his expert witnesses. Thus the defendants were in breach of the rule in Browne v Dunn [1894] 6 R 67. It is established law that the rule is not a question of procedure but of essential justice. I pointed this out during evidence but allowed Dr Nassau to complete his evidence as it was somewhat difficult at that time to separate the evidence that should have been put to the plaintiff`s witnesses from other evidence which might have been relevant. 114.Secondly, his thrust of his evidence was that the Maxixe-type stones were not as prone to fade as had been thought before his evidence in court. But what mattered was the market perception at the time of the sale. The plaintiff`s case was based on the state of the art that obtained at the time of purchase. Dr Nassau`s newfangled theory was not made known to the market in 1988 when the purchases were made. 115.He made an attempt to say that there was `already a partial correction` and referred to the article `A Non-fading Maxixe-type Beryl` which he sought to have tendered to the court but withheld it. During his testimony he visibly fumbled as will be seen from the notes of evidence. He was asked whether he had published any articles or notes which dealt with his newfangled theory. His answer was as follows: A: No. None. Correction. On the Maxixe there was already a partial correction. I believe we

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submitted in evidence. It was the article on `Is there Non-Fading Maxixe` or something like that. I do have a copy here but it was my impression that it was submitted. I don`t seem to find it at the moment. There is one entitled `Non-Fading Maxixe 1981`, sorry it was not after the book was published. It was just before the book was published. It actually happened after the book was written. 116.The article was published in 1981 whereas his book was published in 1984. Given that, why did he not make a correction in the book. The true reason as I see it is that there was nothing to correct. He dedicated his book to his wife Julia with the following quotation from William Shakespeare: *Love is not love Which alters when it alteration finds* 117.What was more amazing than his fumbling was the casual fashion in which he formed his newfangled theory. It was not an empirical conclusion as he had come to in the article but was based on hearsay and it was made for the purpose of this case. The information on which he based his evidence in court came from persons who were not called to give evidence. 118.He said the book was being revised and that the new edition will contain the following statement which he tendered to the court on a piece of paper: *Note (Addendum to pp 96 and 110) Both Maxixe and Maxixe-type deep blue and deep green beryls fade to about one half of their intensity after about one week in sunlight (the 5-8 carat stones were turned to always face the sun). However, indoor illumination levels are one hundredth to one two hundredth that of sunlight, so that these materials could then be expected to retain their color for one to two hundred weeks or two to four years when worn eight hours a day. There is the additional factor that in normal wear the stone does not always face the light; this extends the life by an estimated factor of ten and then gives a color retention time of 20 to 40 years in normal jewellry use. This reasonable stability to light has been confirmed by the observation of DV Manson (unpublished) that several Maxixe-type deep blue beryls of this*

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size maintained their color over a ten year period in a brightly lit display at the Gemological Institute of America in Santa Monica. It should be noted that in this display the light was directed at the side of the stones and fans were used to prevent the building up of heat. Larger stones would retain their colour even longer. **119.It will be seen that the conclusions appeared to contradict his co-authored article `A Non-fading Maxixe-type Beryl` where he, based on reliable tests, rejected any idea of an acceptable non-fading Maxixe beryl. 120.In his evidence he went on a tirade against Dr Brown`s test when in fact he had himself done the same test. When pressed on this he sought refuge in Alexander Pope. He said, `I admit I have not been 100% consistent on this. I believe Alexander Pope said: "To err is human, to forgive is divine." I trust I can be forgiven for this.` A more pertinent question about his evidence was why was he taking an inconsistent position before the court. The answer was crystal clear: he had lost all objectivity about the matter and become prejudiced in favour of the defendants who flew him down to Singapore. He shifted his position from a neutral to a partial standpoint. That accounted for his inability to identify the yellow beryls as Maxixe-type. He could not even secure a good instrument to peer into the stone. 121.I asked Dr Nassau to state the characteristics that define a gemstone. I did this to test his objectivity. He stressed the qualities other than stability which was of crucial importance in this case. He came out with it only when pressed by plaintiff`s counsel in cross-examination. 122.For these reasons and remarks I made about him during evidence I reject his evidence and much prefer that of Dr Brown and Mr Palmeiri. 123. DecisionFor reasons set out above I adjudge and order that the defendants shall refund to the plaintiff the value of the 39 stones tested by Dr Brown in exchange for the return of the stones together with the jewellery given as gifts by the defendants. If the plaintiff is unable to return**

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any of the stones, the value of such stones need not be refunded. If necessary, I shall hold an inquiry to give effect to this judgment and order. The defendants shall pay interest on the amount refunded at the rate of 6% per cent per annum from the date of the issue of the writ. 124.I shall hear submissions on the question of costs.

G P Selvam J

G Raman and Syed Yahya (John Tay Syed & Partners) for the plaintiff
KS Chung and Doris Chia (Harry Elias & Partners) for the defendants

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