IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1996] SGCA 55

CA 20/1996, 25/1996

Between

Diamond Centre Pte Ltd
Another

… *Appellant*

And

R Esmerian, Inc and Another
and Another Appeal

… *Respondent*

GROUNDS OF DECISION

Conflict of Laws — Choice of law; Tort — Conversion; Trusts — Constructive trusts

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Diamond Centre Pte Ltd and Another v R Esmerian, Inc and Another and Another Appeal

[1996] SGCA 55

CA 20/1996, 25/1996
Karthigesu JA; Lai Kew Chai J; L P Thean JA
26 September 1996

1 Cur Adv Vult

2 This is an appeal and cross-appeal from the decision of Goh Joon Seng J in Suits No 279 of 1991 and 1704 of 1992. The actions were consolidated. In Suit No 279 of 1991, R Esmerian, Inc (RE Inc) claimed against Ghassan Fakhreddin (Fakhreddin), Diamond Centre Pte Ltd (Diamond Centre) and Zhang Qing Ying @ Peter Teo (Teo) for conversion. RE Inc sought, inter alia, the return of certain pieces of jewellery, damages, a declaration that they are the rightful owners of the jewellery and a declaration that Teo and Diamond Centre were constructive trustees of other pieces of jewellery allegedly received by them. In Suit No 1704 of 1992, Corvina Securities Inc (Corvina) claimed against Teo, also for conversion. Corvina sought, inter alia, the return of certain pieces of jewellery and damages. The facts of the case are set out below.

3 ***The parties***

4 RE Inc is a company incorporated in the State of New York with a reputation for fine jewellery. Its chief operating officer is Ralph Oliver

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Esmerian (Esmerian). Corvina is a company incorporated in Panama. Its sole shareholder is Emmanuel Guillaume (Guillaume).

5 Wolfers Trading AG (Wolfers) is an old Swiss company dealing in jewellery. At the relevant time, it had just been recently acquired and was controlled by the Descamps brothers, one of whom is Patrick Descamps.

6 Fakhreddin is an Iraqi national. At the time of the trial, he was serving a sentence of imprisonment in Switzerland for offences arising out of jewellery entrusted to him on consignment, including those claimed by the plaintiffs in these two actions. He was named as a defendant, but was not served with the writ. Although described as having the aliases Elias Samir Edouard or Samir Edouard, it appeared that this was a name he used on a fake passport. It was mentioned below that Samir Edouard is actually a respected person in Dubai.

7 Diamond Centre is a company incorporated in Singapore dealing with jewellery. Teo is a director of Diamond Centre. According to the records in the Registry of Companies and Businesses, he is a minority shareholder in Diamond Centre. However, he claims to be entitled to 50% of its profits. Teo and Diamond Centre will be collectively referred to as the defendants and RE Inc and Corvina as the plaintiffs.

8 ***The plaintiffs` evidence***

9 The consignment

10 Sometime towards the middle of 1989, the Descamps brothers approached Guillaume in Paris. The Descamps brothers informed Guillaume that a royal marriage was about to take place in the United Arab Emirates

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(UAE). The Descamps brothers were looking for jewellery to sell in connection with this wedding and asked Guillaume to source for high quality jewellery. Guillaume approached Esmerian in New York and conveyed to him what the Descamps brothers had told him. Guillaume requested for a consignment of jewellery in the name of Corvina. It was understood that Corvina would, in turn, consign the jewellery to Wolfers after a mark-up. Esmerian was familiar with Wolfers as his family had dealings with Wolfers stretching over three generations. Esmerian and Guillaume selected jewellery that they thought would be suitable.

11 The first consignment to Corvina was handed over on 7 and 8 September 1989. The jewellery were consigned on RE Inc`s standard terms of consignment in a memorandum. This stated, inter alia:

> *The merchandise described on the other side is received ... upon the express condition that all such merchandise shall remain the property of R Esmerian, Inc and shall be returned on demand ... . Consignee acquires no right or authority to sell, pledge, hypothecate or otherwise dispose of the merchandise, or any part thereof ... . A sale of all or any portion of the merchandise shall occur only if and when consignee shall have received from R Esmerian, Inc a separate invoice covering specific merchandise on the memorandum ... .*

12 Guillaume took delivery of this consignment and proceeded to Geneva. There, at Geneva Airport, on behalf of Corvina, he consigned the jewellery to Patrick Descamps, who was representing Wolfers. Wolfers in turn consigned the jewellery to Fakhreddin. Fakhreddin selected the jewellery in the presence of Guillaume, Patrick Descamps and one Horriyat.

13 Patrick Descamps had consulted Guillaume on the terms of the consignment memorandum between Wolfers and Fakhreddin. Guillaume was not present when the agreement was signed. The memorandum was signed

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when part of the consignment was handed to Fakhreddin by Patrick Descamps. Youssel Alain Edery (Edery), who gave evidence for the plaintiffs, was present when Fakhreddin signed the memorandum on 22 September 1989 and took delivery of the items. Edery was a partner of Fakhreddin.

14 By art 1 of Wolfers` memorandum, which was in French, the jewellery were handed to Fakhreddin to enable him to do a special presentation to his customers in the UAE. They might not leave the UAE for any destination except Geneva. By art 2, the jewellery were entrusted to Fakhreddin for 15 days only and had to be returned to Geneva unless an extension was obtained from Wolfers. By art 7, any item sold was to be paid for immediately and any item not paid for and not returned remained the property of Wolfers. By art 10, it was agreed that the Wolfers memorandum was to be interpreted according to Swiss law and both parties agreed to submit to the jurisdiction of the Swiss courts.

15 Guillaume handed the rest of the jewellery in the first consignment to Fakhreddin on 27 September 1989. On this occasion, Guillaume also delivered to Fakhreddin a second consignment of jewellery. Except for a 30.31 carat sapphire ring (the Wolfers sapphire ring) which was Wolfers`, these belonged to another jeweller, Horovitz & Totah. The items in the second consignment do not form part of the subject matter of these proceedings, though the Wolfers sapphire ring was part of the evidence. A third consignment consisting of two items was delivered by Guillaume, for Wolfers, to Fakhreddin on 7 October 1989. These are also not the subject matter of the proceedings.

16 Guillaume then returned to New York. He obtained a second consignment of jewellery from Esmerian on 25 October 1989. These were subject to a memorandum between RE Inc and Corvina, which was similar to

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the first one. This consignment, together with a pair of pear-shaped emerald and diamond earrings from Rima Investors Corporation (Rima) (the earrings will be referred to as `the Rima emerald earrings`), was handed over to Fakhreddin on behalf of Wolfers by Guillaume on 27 October 1989.

17 ***The failure by Fakhreddin to return the jewels***

18 Fakhreddin was supposed to return the consignments by 11 November 1989. He failed to do so or to pay for the goods. Between 11 November 1989 and 5 December 1989, Guillaume kept in constant touch with Patrick Descamps. According to Guillaume, Patrick Descamps told him that Wolfers had finally told Fakhreddin (via a telex exhibited in evidence) that he must return all the jewels by 5 December 1989 and pay for whatever was not returned. Patrick Decamps faxed to Guillaume a file of correspondence between Wolfers and Fakhreddin.

19 Following that telex, Guillaume and Patrick Descamps met Fakhreddin at Geneva Airport on 5 December 1989. Fakhreddin returned some of the jewels. They then proceeded to the premises of Horovitz & Totah. There, they were joined by Totah of Horovitz & Totah, and one Ador who was Paul Descamps` lawyer. Ador was there to represent Wolfers.

20 Fakhreddin was asked why he had not returned the jewels. Fakhreddin said that they were in the hands of some sheikhs in the UAE. Fakhreddin listed the names of these sheikhs. Guillaume later called up the private secretary to one of the sheikhs mentioned and was told that Fakhreddin had never shown the sheikh the jewels. Fakhreddin signed an undertaking to return the remaining jewels by 19 December 1989 and to procure a letter of credit for the jewels by

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way of security. The jewellery were not returned by 19 December 1989 and no letter of credit was opened.

21 In 1990, Guillaume went to Dubai on three occasions to attempt to recover the jewellery. On his first trip in January 1990, Fakhreddin returned a few items. The second trip was fruitless. On the third trip, Fakhreddin returned a few more items of little value.

22 ***What Fakhreddin had been doing in the mean time***

23 Evidence relating to this was given by Edery. Edery had known Fakhreddin for some ten years. They had started a clothing company in 1983, which was wound up in 1986. Edery lost touch with Fakhreddin until 1988, when Fakhreddin invited Edery to join him in the jewellery business, which Edery did in 1989. They started off with a couple of consignments from a jeweller named de Becker.

24 In the same year, Edery contacted a jeweller by the name of Alexandre Reza (Reza). Reza initially let them have some jewellery on consignment but insisted that they be accompanied by his employee, one Fournet. Edery and Fakhreddin signed for these consignments jointly. After two consignments, Reza agreed that Fournet need not accompany them. However, Reza insisted that he arrange for the insurance himself.

25 Edery`s agreement with Fakhreddin was that each party could still do their own private business. In September 1989, Edery accompanied Fakhreddin to Geneva, where Fakhreddin signed a consignment agreement and took delivery of some jewels. Edery was asked to go along to help Fakhreddin read the French agreement. They met Patrick Descamps at Geneva Airport, where

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the transactions took place. Edery explained the contract to Fakhreddin before Fakhreddin signed it. Edery left for Paris after this.

26 It was Fakhreddin`s idea to come to Singapore. They brought along the Reza consignments as they could not be sold in Dubai. They arrived in Singapore on 14 January 1990 together with a friend, Zurita, who was a boxing promoter. In Singapore, they met one Dr Tay of the Hour Glass, a company selling expensive watches. Fakhreddin had left some carpets there and he wanted to show the Reza consignments to Dr Tay. Dr Tay was not in, so they went to Orchard Road. Edery had wanted to have some shirts made. They stopped at Lucky Plaza. They encountered a jewellery shop called Diamond Centre. They asked to see the manager. An appointment was made for the afternoon.

27 Fakhreddin and Edery returned to Diamond Centre in the afternoon. Fakhreddin brought along two sapphires he had with him. Edery was not certain whether they were loose stones or rings. There they met Teo. Teo agreed to meet them again in the evening to view the consignments. They introduced themselves as representatives of Reza and showed Teo the consignment notes. The next day, they went to Teo`s office again as Fakhreddin wanted to sell the two sapphires.

28 Teo requested that the stones be left with him so that he could study them. Fakhreddin proposed that Teo give him a cashier`s cheque for US$600,000 as security. It was agreed that Fakhreddin will undertake not to cash it for a few days. They then went with Teo to the Republic National Bank of New York. The agreement was drafted by the vice-president, Yap Lip Leong

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(Yap). Yap talked about Teo in glowing terms, saying that Teo was an important businessman with business in Brunei.

29 Fakhreddin persuaded Edery to allow Teo to bring the Reza consignments to Brunei. Edery was initially reluctant as they were not supposed to part with the consignments. Edery required Fakhreddin to sign a memorandum whereby Fakhreddin took full responsibility for the goods entrusted to Teo. Teo also signed a consignment note. These were destroyed when Teo returned the consignment on 18 January 1990.

30 Edery went back to Dubai and returned to Singapore. Fakhreddin told him that he had sold the sapphire to Teo for US$200,000 (then S$375,000). This turned out to be the Wolfers sapphire ring.

31 On their second trip to Singapore, they consigned to Teo a second Reza consignment. On the third trip in March 1990, Fakhreddin showed Teo a number of jewels for sale. These were for his own account. When they left on 22 March 1990, Teo gave Fakhreddin a small consignment of jewellery for sale in Dubai. There was a fourth trip to Singapore in April 1990 but it appeared to Edery that no business was transacted.

32 On 15 May 1990, Reza summoned Edery to his house. Fakhreddin had told Edery that he (Fakhreddin) had collected a consignment of jewellery from Reza on 30 March 1990. Fakhreddin told him that the consignment was with Teo. Reza wanted Edery to sign the consignment note. This Edery did on 18 May 1990 after indicating that it was signed on that day. Immediately thereafter, Edery was served by a process server with papers calling for the return of the consignment. Reza ordered Edery to go to Singapore and collect the

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consignment. Reza was given the impression that they were in a bank vault in Singapore. Edery asked Fakhreddin to call Teo.

33 Edery arrived in Singapore on 22 May 1990, but Teo was overseas. Edery called Reza and lied to him that he had the jewels, but would return to Paris after two or three days. He told Reza he had to see some clients. The next day, Edery went to Yap`s office. Yap suggested that Edery speak to Fakhreddin to find out more about what transpired between Fakhreddin and Teo. Fakhreddin told Edery not to worry and that he would call Teo. Teo never contacted Edery.

34 Edery managed to reach Teo between 25 to 27 May 1990. Teo refused to return the jewellery. He said that he had consigned goods to Fakhreddin for Dubai and that Fakhreddin owed him money. The Reza consignment was security. Edery told Teo that as the consignment was not returned `some people were getting worried.` Edery suggested to Teo that he should not keep items that did not belong to him. He told Teo that he should settle the private account with Fakhreddin, as once Reza was involved `it would become a phenomenal problem.` According to Edery, Reza apparently had a fearsome reputation. Teo refused.

35 Edery had no choice but to tell Reza everything. Reza came to Singapore. They met Poon, the other shareholder and director of Diamond Centre. Teo was out of the country again. Poon confirmed that Diamond Centre had the jewellery. Poon refused to return them before Reza had spoken to Teo. They went to Yap`s office. Yap declined to disclose anything, on grounds of confidentiality, until Reza called someone on the phone, who in turn spoke to Yap. Apparently it was someone from the bank`s head office. Yap disclosed

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that Teo had signed a guarantee for Fakhreddin for US$1.2m towards the end of February 1990.

36 Fakhreddin arrived from Paris and joined them. Teo finally called Reza. Reza asked Teo to return part of the consignment as it was valued at US$17.5m, against the debt of US$1.2m. Teo agreed. Reza collected four items out of the eight that were in the consignment. We should mention that there was some confusion in Edery`s evidence as to the number of items involved. Eventually the matter was settled by Reza taking over Fakhreddin`s debt to Teo, which included US$300,000 for part of Teo`s consignment, which had not been returned, in return for jewellery and four carpets left by Fakhreddin with Teo.

37 According to Edery, in Proceedings No 1880/90 in the Tribunal de Grandi Instante in Paris, Reza admitted that he received the precious stones from Teo. That was an action by Reza against Fakhreddin and Edery. Edery said that Reza lost the action against him both at first instance and on appeal. However, the records of proceedings in the Paris proceedings are not admissible as evidence here.

38 ***The recovery of jewellery in Singapore***

39 In the meantime, Esmerian was trying to track down the Esmerian jewellery. Colour photocopies of photographs with full descriptions of the Esmerian jewellery were sent to dealers, auction houses and retailers all over the world. In late January 1991, he received information from a friend that some of the Esmerian jewellery had been seen in Singapore. Esmerian contacted Guillaume and they both came to Singapore. After visiting a few jewellery shops, they came across Diamond Centre.

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40 On display in the shop window was a ruby ring belonging to RE Inc (the Esmerian ruby ring). This was priced by Diamond Centre at S$620,000 to S$630,000. They inquired whether there were other outstanding pieces of jewellery available. They were shown the Wolfers sapphire ring. The next day, they were shown the Rima earrings.

41 Esmerian and Guillaume consulted their lawyers, Messrs Rodyk & Davidson. A police report was lodged on 4 February 1991. RE Inc commenced proceedings. An Anton Piller order was obtained on 7 February 1991. The police then raided the premises of Diamond Centre. This was immediately followed by the execution of the Anton Piller order.

42 The Wolfers sapphire ring and Esmerian ruby ring were seized. The Rima earrings could not be found. They had been consigned to the Hour Glass and were handed to the police by Teo. Two loose sapphires belonging to RE Inc (the Esmerian sapphires) were also found, as were six coloured diamonds and 107 round pink diamonds which were part of a pair of earrings from RE Inc. The earrings were described as fancy blue and canary diamond earrings (the Esmerian blue and canary diamond earrings). No document relating to these items were found in Diamond Centre`s files during the execution of the Anton Piller order.

43 ***The jewellery recovered***

44 The jewellery recovered were, firstly, the Wolfers sapphire ring. This is a 30.31 carat sapphire ring which belonged to Wolfers. It was priced by Wolfers at US$850,000.

45 Secondly, there were the Rima emerald earrings. These are a pair of pear-shaped emerald and diamond earrings from Rima Investors Corporation. The two emeralds weighed 25.48 carats. They were set with 48 diamonds weighing 28.5 carats. They were consigned by Rima to Corvina at US$625,000, by Corvina to Wolfers at US$630,000 and by Wolfers to Fakhreddin at US$770,000. Guillaume claimed that Corvina bought these from Rima, as Rima had demanded that Guillaume pay for them when they were not returned. Guillaume paid Rima US$600,000. Guillaume testified that Rima told him that they paid US$196,735 in November 1985 for them.

46 Third, there was the Esmerian ruby ring. This consists of a 6.28 carat Burma ruby mounted in a ring with round and pear-shaped diamonds. The Burma ruby was purchased by Esmerian in 1980 as a 6.64 carat stone for US$365,200. It was re-cut and mounted for Esmerian. It was consigned by RE Inc to Corvina at US$625,000, by Corvina to Wolfers at US$650,000 and by Wolfers to Fakhreddin at US$950,000.

47 Next, parts of the Esmerian blue and canary diamond earrings were found. The earrings consisted of a blue VVS2 marquise-shaped diamond of 3.11 carats, a blue I1 pear-shaped diamond of 3.07 carats, a greyish-blue IF round diamond of 1.47 carats, an intense yellow IF marquise-shaped diamond of 3.25 carats, an intense yellow VS1 pear-shaped diamond of 3.37 carats, an intense yellow VVS2 round diamond of 1.51 carats and 108 round pink diamonds totalling 4.88 carats.

48 The six stones and 107 pink diamonds were seized from Diamond Centre. They were in loose form. The invoices produced by Esmerian showed that RE Inc paid a total of US$334,505 for the six stones alone over a period of

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time starting from 1980. Esmerian designed the earrings and had them made. The earrings were consigned by Esmerian to Corvina at US$1.4m, by Corvina to Wolfers at US$1.45m and by Wolfers to Fakhreddin at US$1.65m.

49 Lastly, there were the Esmerian sapphires. The two sapphires came from a sapphire and diamond necklace and pendent set. The two sapphires respectively weighed 23.41 carats and 39.74 carats. The first was from the necklace. The second was from the pendent. The bigger sapphire cost Esmerian US$160,000 in 1976. The necklace and pendent set was priced by RE Inc at US$2.5m.

50 ***The defence`s evidence***

51 How the jewels were purchased from Fakhreddin

52 The main defence witness was Teo. According to Teo, sometime in January 1990, Poon informed him that one William Foo (Foo) who worked for Ong Beng Seng, a well-known hotelier and property developer, had brought Fakhreddin to see him. Ong Beng Seng was a personal friend of Teo`s for ten years, or so said Teo. Fakhreddin came with Edery and a body guard. Fakhreddin introduced himself as the president of Fakhreddin Brothers and an associate of Reza, whom Teo had heard of.

53 Fakhreddin showed Teo two rings and told him that he knew a Dr Tay of the Hour Glass and Ong Beng Seng. Fakhreddin said that he had entrusted carpets to the Hour Glass. Teo called up Robert Sia at the Hour Glass and confirmed that Fakhreddin had consigned carpets to them. According to Sia, this was all Teo asked. Fakhreddin asked for US$600,000 for the Wolfers sapphire ring. Teo had it consigned to him for a few days in return for a

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US$600,000 cashier`s cheque as security. He brought Fakhreddin to see Yap at the Republic Bank of New York. Teo brought the ring to Brunei and offered it for S$1.5m, but was unable to sell it.

54 Teo returned the Wolfers sapphire ring when he came back to Singapore and took back the cashier`s cheque. On 21 January 1990, Fakhreddin offered it to Teo for S$600,000. Teo asked Abishai Masih (Masih) for a second opinion and was told it was not worth more than S$350,000. Teo eventually bought it for S$375,000. Teo paid Fakhreddin by way of a cheque drawn in favour of Ghassan Abdul Hadi. He accompanied Fakhreddin to cash it. The purchase was for Diamond Centre`s account. The invoice, referred to as `C3`, was sent to him by courier a few days later. It read:

> *Ghassan A Fakhruddin*
>
> *For Fine Jewellery*
>
> *INVOICE*
>
> *(best wishes and success for the New Year)*
>
> *Diamond Centre Pte Ltd*
>
> *304, Orchard Road*
>
> *#01-09 Lucky Plaza*
>
> *Singapore 0923*
>
> *1 sapphire ring 30.31 ct with 2 triangle diamonds.*
>
> *Net price S$375,000.*
>
> *Thank you for yr payment made on 22 January 1990. Original certificate will be mailed to you by Skypak.*
>
> *Signed: Ghassan A Fakhreddin*
>
> *Tel 225486-282303. Tlx 45503 ARAFR EM*
>
> *P O Box 3377*
>
> *Deira - Dubai - UAE*

55 The original certificate was never mailed to Teo. According to Teo, this was not important. Certificates do not tell the value of the jewels. People in the jewellery trade depend on their own experience. Furthermore, if the stone is set, one cannot tell its weight and colour without removing the stone from its setting.

56 On Fakhreddin`s second trip in February, he brought along a Reza consignment. Fakhreddin consigned it to Teo for three weeks, during which Teo brought them to Brunei. No item was sold because of the high price. According to Teo, he was only insured for S$300,000 even though he said that the Reza consignment was worth US$7m.

57 Fakhreddin asked Teo to buy something from him, saying that he had spent a lot of money in Singapore. The Rima earrings was the cheapest item at S$850,000. Teo bargained it down to S$450,000. Masih had told him not to pay more than S$370,000. Teo paid in cash, in $10,000 notes. He bought the Rima earrings on his own account as Poon thought they were too expensive. The invoice for this was produced in evidence and is referred to as `C2`. This stated:

> *Ghassan A Fakhruddin*
> *For Fine Jewellery*
> *INVOICE*
> *Peter Teo*
> *(Diamond Centre)*
> *304 Orchard Road*
> *#01-09 Lucky Plaza*
> *Singapore 0923*
> *1 Emerald earrings 25.38 emerald*
> *32.80 diamond S$450,000*
> *Thanks for your purchase invoice paid full*

Sgd:

GHASSAN A FAKKEDDIN

President

Tel 225486 - 282303

Tlx 45503 ARAFR EM

P O Box: 3377

Deira - Dubai - UAE

58 Fakhreddin came back to Singapore again in March 1990. Fakhreddin showed Teo a few items but was not prepared to consign them to Teo. Teo bought the Esmerian ruby ring and the Esmerian blue and canary diamond earrings. He paid S$250,000 for the ring and S$450,000 for the earrings. Masih told him that the ruby was only worth S$180,000. Again, the items were bought by Teo for himself as Poon thought they were too expensive. Teo paid in cash.

59 The invoice referred to as `C1` was sent to Teo by courier. It stated:

Ghassan A Fakhruddin

For Fine Jewellery

INVOICE

Peter Teo

(Diamond Centre)

304 Orchard Road

#01-09 Lucky Plaza

Singapore 0923

1 Ruby ring 6.28 + diamond 3 carat S$250,000.00

Coloured diamond 7.60 blue

Coloured diamond 8.10 canary S$450,000.00

S$700,000.00

Thanks for your purchase invoice paid full.

GHASSAN A FAKKREDDIN

President

Tel 225486 - 282303

Tlx 45503 ARAFR EM

PO Box: 3377

Deira - Dubai - UAE

60 In every instance, there was correction fluid over the spaces in front of `S$`. The correction fluid covered the letter `U`.

61 Teo did not think that the invoices had insufficient details even though they were not dated and two of them did not have invoice numbers. He did not notice that Fakhreddin`s name was spelt wrongly on two occasions. The correction fluid marks did not worry him. According to Teo, it was more important whom he was dealing with. On this occasion, Teo also consigned Diamond Centre`s goods to Fakhreddin. Teo did not ask for security.

62 Around the end of March or early April 1990, Fakhreddin was back in Singapore. He left a big collection of jewellery from Reza on consignment with Teo. Fakhreddin also showed him some sapphires. Teo bought two for S$220,000. There was no invoice for the two sapphires because of the police seizure. Fakhreddin needed a loan for US$1.2m. Teo stood as guarantor for Fakhreddin`s loan from the Republic Bank of New York. If Fakhreddin had defaulted on the loan, Teo would retain the consignment of Reza jewellery left by Fakhreddin. Teo claimed he had to show Fakhreddin the money to gain his confidence. Edery did not come on this trip.

63 In May 1990, Edery came to collect the consignment of Reza jewellery. Teo told Edery that only Fakhreddin could do so. He told Edery to inform

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Fakhreddin that if he wanted the goods back, he needed to repay the loan guaranteed by Teo. Teo did not hear from Edery again.

64 When Teo was in Paris in June 1990, he called Diamond Centre, as was his usual practice. He was informed that Reza, Edery and Fakhreddin had been to Diamond Centre in the morning. The next day, he spoke to Fakhreddin over the phone. Fakhreddin said that US$300,000 worth of Diamond Centre`s goods were sold. Fakhreddin asked Teo to return the Reza consignment to Reza. Teo asked about his guarantee and was told that Reza would take over the guarantee and the money for the sold goods. Reza confirmed this over the phone. Teo told Poon to release two sets of jewellery to Reza. Reza told Teo that, in future, he would deal directly with Teo. The guarantee was transferred in July and Teo returned the goods received from Fakhreddin to Reza.

65 On or about 7 February 1991, Teo was informed about the police search of Diamond Centre`s premises and the Anton Piller order. According to him, he retrieved the three invoices from the office. Two invoices were in his personal file, which was in the drawer. The third was in Diamond Centre`s file, which was in the cabinet. He went to see his solicitors.

66 Foo gave evidence in support of Teo`s defence. Foo is a real estate broker. He claimed to be Ong Beng Seng`s `in-house broker`. He also said that he ran errands for Ong Beng Seng. However, he has his own firm. His evidence was that Ong Beng Seng called him to his (Ong Beng Seng`s) office and asked Foo to introduce Fakhreddin to Teo. Foo brought Fakhreddin to Diamond Centre.

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67 In addition, Masih, a diamond and gem merchant, gave evidence that he was approached by Teo for a second opinion on the items Teo bought. Masih`s valuation was lower than what Teo eventually paid. David Tan, the vice president of the Singapore Diamond Exchange, was called by the defence to give expert evidence about the jewellery trade in Singapore.

68 ***The proceedings***

69 The reliefs sought by RE Inc and Corvina are already stated above. Originally, RE Inc included in its statement of claim a claim for the Wolfers sapphire ring and the Rima emerald earrings. The statement of claim was amended as these items did not belong to RE Inc. After Corvina bought over the rights and interest in the Rima emerald earrings from Rima, Corvina commenced proceedings for them. The two suits were consolidated.

70 ***Swiss law***

71 The defendants mounted an alternative defence that under Swiss law, property in the jewellery had passed to Fakhreddin. An expert witness on Swiss law was called by each side. The witness for the plaintiffs, Robert Philip Briner, gave evidence that the Wolfers memorandum was a `commission contract`. This is a contract under which the commissionaire undertakes to arrange the sale of movable property in the commissionaire`s own name, but for the account of the principal, to a third party buyer for a commission. Since the commissionaire acts for the account of the principal, he acquires no title.

72 The expert for the defendants, Michel Amaudruz (Amaudruz), testified that the Wolfers memorandum was a `consignment contract`. This is a contract whereby the consignor undertakes to transfer the goods at a fixed price to the

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consignee for the consignee to sell to a third party in the consignee`s own name and for the consignee`s own account.

73 In the case of a consignment contract, the consignment is always for a fixed period of time. In the present case, the deadline was for 15 days. At the end of this period, Fakhreddin had to decide whether to hand back the jewels or pay for them. If he paid for them, he becomes the owner. A problem arises where the consignee makes no choice at the end of the period. This gives rise to a `blocking` situation. It is necessary to terminate the agreement before the consignor can assert an ownership claim against the consignee. Until then, the consignor only has a claim in contract for the price of the goods. In any event, it is not clear whether an action for ownership is possible.

74 According to Amaudruz, there is a theory by Professor Paul Piotet designed to avoid a blocking situation in ***Le contrat estimatoire, Ed Stampfli,***

75 Bern 1967. According to this theory, the consignment contract is a conditional sale which is executed whenever the consignee acquires the property, sells the property to a third party or disposes of the property in violation of his obligations. If one of these events occur, the property passes to the consignee and the consignor can only claim the price.

76 ***The decision below***

77 The learned judge, after referring to 45 ***Halsbury`s Laws of England*** (4th Ed) para 1422, was of the view that the present case concerned a branch of conversion involving dealing with someone else`s goods in a manner inconsistent with the owner`s rights. In displaying the jewellery for sale as owners, Teo and Diamond Centre were asserting a right inconsistent with RE

Inc and Corvina`s rights. The defence was that Teo had bought the goods in good faith from Fakhreddin. This was of no avail unless the defendants could rely on the Factors Act or the Sale of Goods Act.

78 The learned judge held that s 9 of the Factors Act and s 25(1) of the Sale of Goods Act did not apply as the goods were consigned to Fakhreddin. He had not bought or agreed to buy them. The goods were only consigned for 15 days. The learned judge relied on ***Percy Edwards (Ltd) v Vaughan*** (1910) 26 TLR 545.

79 As for s 2(1) of the Factors Act, Fakhreddin was a mercantile agent who was in possession with the consent of the owner at the time of the disposition of the jewellery. Even though the consent had lapsed, the disposition would still be valid if the person taking under the disposition had no notice of this, provided he acted in good faith. The burden was on Teo and Diamond Centre to show that they purchased in good faith.

80 The learned judge was not persuaded that the burden had been discharged. There was no acceptable evidence as to Teo`s source of funds. According to Teo`s account, he would have misappropriated S$1.15m, from a `float fund` for his Brunei principal, to pay for the jewels. There were no accounts kept for the float fund. Teo maintained that his buyers paid attention only to the design of the jewellery and the person they were dealing with. They paid no attention to the size of the stones.

81 In the learned judge`s view, the invoices were suspicious, especially C1 and C2. The invoices appeared to have been altered. Their contents did not describe adequately the items and in the case of C2, the caratage was wrong.

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The purchases were at a gross undervalue. No original certificate from a laboratory was handed over. In the learned judge`s view, these would have put any buyer in the trade on notice. More importantly, the learned judge found that Teo was not at all a credible witness. The s 2(1) defence therefore failed.

82 The learned judge also considered the defendants` Swiss law argument. However, he did not appear to make a finding that Swiss law applied. It appears that he accepted that the lex situs rule does not apply where the person claiming title has not acted bona fide, though it was not clear whether he was referring to Singapore law or Swiss law as the lex situs. The learned judge was of the view that there was no blocking situation as Fakhreddin had in fact elected to return the jewellery by 19 December 1989. Thus Fakhreddin could acquire no title under Swiss law and hence could not confer title on the defendants.

83 As for the claim for an order that the defendants account, as constructive trustee, for the missing Esmerian jewellery allegedly delivered to Reza, the learned judge was of the view that the description of the items was not adequate to identify them as part of the missing Esmerian jewellery. This claim therefore failed.

84 ***Civil Appeal No 20 of 1996***

85 In this appeal, Teo and Diamond Centre appealed against the decision below. Although several grounds of appeal were raised in the appellants` case, Mr Elias in his submission informed us that there were really only two live issues. The first is the learned judge`s rejection of the Factors Act defence that the defendants bought the jewellery in good faith from a mercantile agent. This

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was purely a question of fact. The second ground was that the defendants obtained good title because of the operation of Swiss law.

86 ***Swiss law***

87 We shall deal with the issue of Swiss law first as this ground can be disposed of easily. Mr Elias submitted that the learned judge was right in accepting Amaudruz`s evidence that the transaction was a consignment contract. His contention was that the learned judge ought not to have accepted that Fakhreddin had elected to return the jewellery by 19 December 1989.

88 We do not think that Swiss law is applicable at all. The inescapable fact was that the jewellery were in Singapore when Fakhreddin sold them to Teo. It seems to us clear beyond argument that the lex situs was Singapore law. We need only refer to ***Cammell v Sewell*** (1860) 5 H & N 728; ***Janesich v George Attenborough & Son*** (1910) 26 TLR 278 and ***Winkworth v Christie Manson and Woods Ltd & Anor*** (1980) 1 Ch 496.

89 ***Janesich v George Attenborough*** is directly in point. In that case, the plaintiff, a Parisian jeweller, entrusted a diamond necklace to G for sale in England. The entrustment was subject to French law. In breach of the terms of the entrustment, G pledged the necklace to the defendants in London. The plaintiff sued the defendants for conversion. The plaintiff argued that under French law, the defendants did not get title. It was held that though the contract between the plaintiff and G was governed by French law, the validity of the transaction when G delivered the necklace to the defendants must be governed by English law as it took place in England.

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90 Swiss law is only relevant if it was shown that under Swiss law, Fakhreddin had acquired title to the goods in Switzerland, before he purported to sell them in Singapore to Teo. According to Professor Piotet`s theory, which was advanced by the defendants` expert witness, a consignee acquires the property to the consigned goods in a blocking situation when he either acquires the goods, sells them to a third party, or otherwise disposes of them in breach of his obligation. Fakhreddin did none of these acts while he was in Switzerland. It was only when the seized jewellery were in Singapore that he sold them to Teo. By which time, the lex situs was Singapore law.

91 Indeed, it was the unanimous opinion of both experts that Singapore law governed the sales to Teo. Amaudruz made no claim in court that property passed to Fakhreddin while the goods were in Switzerland.

92 We are therefore of the view that this ground of appeal is bound to fail. Hence, it is not necessary for us to decide whether Fakhreddin had elected to return the goods by 19 December 1989.

93 ***The Factors Act defence***

94 We turn next to the second ground of appeal. Firstly, Mr Elias contended that the jewellery were not purchased at an undervalue. The prices fixed by RE Inc, Corvina and Wolfers were aimed at royalty in the UAE. There was no market price for precious stones, apart from diamonds. The same was true of fancy coloured diamonds. The prices which Teo paid were wholesale prices. By comparing prices charged by Wolfers on consignment with the prices paid by Teo, the learned judge was not comparing like with like.

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95 Secondly, Mr Elias argued that the learned judge did not give any weight to the defence evidence that Fakhreddin was introduced by Foo following a meeting with Ong Beng Seng. The jewellery business is based on trust. This much was accepted by the plaintiffs` witnesses. Teo trusted Fakhreddin.

96 Next, it was argued that the absence of original certificates was not unusual as that was the custom and practice of the jewellery trade in Singapore. No certificate changes hand when goods are consigned. In fact, it is not controversial that jewellery may be on-sold without the consignee having sight of them. Lastly, it is contended that there was nothing unusual about the invoices.

97 Before we deal with these points, we have first to consider Mr Low`s argument that there was no credible evidence that Teo bought the jewellery at all. He was thus not a purchaser, much less a bona fide purchaser in good faith.

98 Mr Low pointed to the very unsatisfactory manner in which Teo gave evidence as to his source of funds. Initially, Teo said that the money came from Citibank in Brunei. When pressed, he revealed that his principal in Brunei left him in charge of a fund of some S$2m for use when the principal comes to Singapore. He added that he kept no accounts as the principal trusted him. According to Teo, he used the money in this fund. He then topped it up from money he obtained when he went to Brunei. When confronted with his passport, which showed that he did not go to Brunei during the relevant time, he admitted that he did not top up the money. He immediately changed tack and said that the money was a loan from his Brunei principal. In re-examination, he shifted his ground once more and said that they had been set off against purchases from him.

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99 In the circumstances, Mr Low submitted that the trial judge made no finding that Teo bought the jewellery. We do not agree with this submission. It seems to us that the learned judge had impliedly accepted, or was prepared to accept, that Teo did pay for the jewellery. Had it been otherwise, he would not have dealt with the issue of bona fide. If there was no finding that Teo bought the jewellery, that would have been the end of the matter. The defendants would not have discharged the burden of proving that they were purchasers.

100 The learned judge was, however, not satisfied with the evidence given by Teo as to his source of funds. That evidently contributed to how he assessed Teo`s credibility. This is an altogether different matter with which we shall deal with later. In the event, we are not prepared to say that the defendants have not satisfied the trial judge that the jewellery were purchased by them. We will deal with the appeal on the basis that they did purchase the jewellery from Fakhreddin.

101 The first issue is the prices paid for the items. While it is true that there can be a wide spread between retail and trade prices for the seized jewellery, the evidence showed that the prices paid by Teo for the jewellery, except for the Wolfers sapphire ring and the Rima emerald earrings, were lower even than what Esmerian paid for the stones alone several years before.

102 The Burma ruby in the Esmerian ruby ring was purchased by Esmerian in 1980 for US$365,000. Teo claimed to have bought it in 1990 for S$250,000, which was approximately US$132,275 at 1990 rates. Granted, Esmerian had the stone recut so that the size was slightly reduced, but it was still a very low price.

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103 The six blue and canary diamonds alone cost Esmerian US$334,505 when purchased over a period of years from 1980. Teo bought the whole pair of earrings for S$450,000, which was roughly US$238,100. Very tellingly, when David Tan, the defendant`s own expert witness, was shown the invoice for this, he thought that Teo had bought 14 stones. The price suggested to him that the stones were about one carat each. A bigger stone is worth more per carat. In the present case, the smallest diamond was a 1.47 carat flawless blue diamond. Four of the six were larger than three carats each. The undervalue is evident.

104 The larger of the Esmerian sapphires cost US$160,000 in 1976. Teo bought this, together with the smaller one, for S$220,000 (approximately US$116,500). As for the Wolfers sapphire ring, Teo himself offered it for S$1.5m and provided security for it at US$600,000.

105 There is only hearsay from Guillaume as to how much the Rima emerald earrings cost Rima. Nevertheless, the figure of US$196,735 was accepted by Mr Elias, no doubt because it did not suggest substantial undervalue. Teo bought them for S$450,000, which was roughly US$238,095. However, we are of the view that this purchase must be viewed in the light of all the other transactions. The overall picture was one of substantial undervalue.

106 We could not accept the argument that Teo bought at these prices because the market for such high-priced goods are limited in Singapore. Fakhreddin was a foreigner. That he brought such goods to a place where there is a limited market for them, to sell at a lower price than what he could have got elsewhere, would have put any prudent businessman on notice. It is inconceivable that Teo, being in the jewellery trade, and according to him, doing

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substantial business, would not have known that the prices commanded by such items in other more established markets would be much higher than what he paid for them.

107 On the contrary, common business sense would suggest that he knew that the jewels were offered to him at a low price. That was why, despite there being a limited market for such goods, he purchased them, either on his own or on behalf of Diamond Centre. This is also consistent with his admission that he rarely bought precious stones for his business. In purchasing the jewellery, he was at best taking a calculated business risk. The fact that he could not sell the jewellery for about a year was neither here nor there, as there was a limited market in Singapore.

108 We now turn to the invoices. There were no doubts irregularities in them. The jewellery in some of them were not described properly. The Esmerian blue and canary diamond earrings were described in a manner which suggested that they were loose stones, when it was Teo`s evidence that they were bought as a pair of earrings, which Teo dismantled. There was no mention of the 108 pink diamonds. The size of the diamonds in the Esmerian ruby ring was stated wrongly. The same was true of the Esmerian emerald earrings. Apart from this, Fakhreddin`s name was twice spelt wrongly. The invoices were undated and two of them had no invoice numbers. The letter `U` before the prices was covered by correction fluid.

109 Nevertheless, we are not persuaded that these irregularities by themselves would necessarily have put a purchaser on notice. The description of the jewellery in the invoices as compared with those in the jewellery trade appears generally to be brief. With respect to the learned judge, we do not agree

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that they can be compared to the detailed descriptions found in a Sotheby`s auction catalogue. The two serve wholly different purposes. Neither was it suspicious that Fakhreddin`s name was spelt wrongly. The evidence showed that Fakhreddin was in the habit of spelling his name in slightly different manners. This could well be because of his difficulty with written English and French. We note however that there was no explanation why there was no invoice for the Esmerian sapphires.

110 The errors in the description of the sizes of some of the stones would, of course, not have put Teo on notice. The stones were mounted. Unless they are weighed, the exact size would not be known. This, however, suggests the importance of laboratory certificates, which we shall now deal with.

111 We accept that when jewellery are consigned, laboratory certificates are not necessary. However, the expert evidence from both sides was that when jewellery of this quality are sold to retail customers, it is expected that they will ask for these certificates. Hence, retail sellers would usually ask for certificates. In the present case, Teo was not a consignee of the jewellery. He was a purchaser, and he bought them with a view to selling to retail customers. There was no reason not to ask for a certificate. At the very least, it would have saved the purchaser the cost of having it re-certificated, as well as the freight and insurance involved in sending the jewel to the laboratory. It is a reasonable inference that certificates were not important because the jewellery were offered at a very low price.

112 There is yet another reason why laboratory certificates are necessary. This is the advent of man-made and enhanced gems. The prices for these are significantly below the price of natural ones. The evidence was that it is not

always the case that the two can be distinguished even by the trained eye. Laboratory certificates are therefore indispensable, especially for such high priced stones which are set.

113 Even if we do not go into this, it was accepted at a rather basic level that the difference in prices between a flawless stone and one with very small incisions, such as a VVS1, is quite substantial. However, the difference can often not be seen even by the trained eye, especially when the stone is mounted. This is an additional reason for laboratory certificates. We note that two of the coloured diamonds, including a 3.25 carat yellow diamond, are internally flawless. It only serves to illustrate the importance of certificates, unless prices are very low.

114 Furthermore, Teo was supplied with a copy of the laboratory certificate when he purchased the Wolfers sapphire ring. The evidence was that where a copy of the laboratory certificate is shown to a potential buyer, it is expected that the original is delivered upon purchase. According to Teo, he asked for the original certificate. We are of the view that the failure by Fakhreddin to deliver the original certificate to Teo ought to have put Teo on notice. At the very least, it would have a significant impact on the question of trust, which was one of the cornerstones of the defendants` case.

115 Turning to the question of trust itself, we are of the view that there was little merit in the argument that Teo trusted Fakhreddin. Even if we accept the defence`s version of how Teo met Fakhreddin (the learned judge apparently did not), we cannot see how this could be the basis of a trusting relationship to the extent contended by Teo. Assuming that Fakhreddin was referred to Teo by Ong Beng Seng, the basis for the introduction was simply that Fakhreddin had

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offered to sell Ong Beng Seng some jewellery and Ong Beng Seng referred him to Teo because he (Ong Beng Seng) did not wish to buy any. Likewise, the so-called reference from the Hour Glass was simply that Fakhreddin had consigned carpets and jewellery to them, but that they had never transacted any business with him. The Hour Glass did not even bother to show the jewellery to any one.

116 Even David Tan had to concede that trust in the jewellery business was built up over a period of years. The transactions in which the defendants bought the jewellery took place within a matter of months from the time Fakhreddin met Teo. The first purchase, of the Wolfers sapphire ring, was within days. If the defendant`s version of how they met Fakhreddin is rejected, there is even less ground on which to say that Teo trusted Fakhreddin. Fakhreddin was just a foreigner who had walked into Diamond Centre`s shop.

117 Lastly, we deal with the most difficult obstacle for the defendants to overcome, and that is the finding of fact by the learned judge that Teo was not a credible witness. The principles followed by an appellate court when dealing with a trial judge`s finding of facts were reiterated recently by this court in ***Peh Eng Leng v Pek Eng Leong*** [1996] 2 SLR 305. There is no need to repeat them here.

118 Having gone through the transcript of evidence carefully, we are of the view that the learned judge was entitled to come to the conclusion that Teo was not a credible witness. Teo`s testimony was full of contradictions and he shifted his ground often. We have already mentioned how he changed his evidence about his source of funds. We recite a few more instances in which his evidence was less than satisfactory.

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119 In relation to his profit margin, which had a material bearing on the question of undervalue, he first said that his margin was sometimes more than 50%, sometimes less, and sometimes at a loss. Shortly after saying this, he claimed that jewellers have margins of 200% to 500%, with a minimum of 200%.

120 On the one hand, he claimed or tried to convey the impression that Poon, who holds 97.5% of Diamond Centre`s shares, as someone who merely looks after the shop, opens the doors in the morning and locks them at night. On the other hand, his evidence was that he had to defer to Poon`s view when Poon thought that some of the jewellery were too expensive.

121 Teo was prepared to furnish security for the Wolfers sapphire ring for US$600,000. He offered it to his principal client for S$1.5m. Yet, he testified that it was worth no more than S$375,000. His answer was simply that he would only get a second opinion on the value of an item if he was buying it.

122 Lastly, according to Teo, Diamond Centre`s turnover for the previous year was over S$40m. His own private business was `much larger`. Yet, his income for 1993 was only S$980,000, which must be quite remarkable considering the margins he claimed to enjoy. For 1990, his personal turnover was around S$30m. His income tax was only S$200,000, and that was from Diamond Centre`s profits. Teo said that his business was done overseas out of Hong Kong. However, he does not pay tax in Hong Kong. Strangely enough, he does not issue invoices for sale of jewellery, but Diamond Centre issues them when it sells gold items.

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123 Mr Elias was forced to concede that Teo`s testimony was `cavalier`. The learned judge evidently thought that it went beyond that. We are not in a position to disagree with the learned judge. On the contrary, we agree with his findings.

124 The defence of bona fide purchase from a mercantile agent under s 2(1) of the Factors Act was based entirely on Teo`s evidence. This evidence was found not to be credible. This by itself, would have been fatal to the defendants` case. We agree with the learned judge that the defendants have not discharged the burden of proving that they are bona fide purchasers of the items of jewellery seized by the police and belonging to the plaintiffs.

125 ***Civil Appeal No 25 of 1996***

126 In the cross-appeal by RE Inc, Mr Low argued that the learned judge ought to have found that there was a constructive trust in favour of RE Inc over part of the jewellery delivered to Reza. The argument was that since there were only four items of jewellery from the Reza consignment in the hands of Teo when Teo purported to hand over 11 items of jewellery, it follows that seven of these items must be part of the Esmerian jewellery. The argument was premised on the basis that Fakhreddin did not have any other source of jewellery.

127 We cannot accept this argument. There was no credible evidence that jewellery in Fakhreddin`s hands must come either from Reza or RE Inc. Mr Low relied solely on Edery`s evidence that the last Reza consignment was the only consignment taken by Fakhreddin without his knowledge. However, this was a bare allegation. Edery could not know. Guillaume gave evidence that some consignments came from Wolfers, as well as Horovitz & Totah, though the latter is hearsay. Nevertheless, it is not hearsay that not all the jewellery

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handed to Fakhreddin by Wolfers were from RE Inc. Guillaume knew which jewellery he handed to Fakhreddin on Wolfers` behalf were from RE Inc.

128 On the evidence before us, it is impossible to hold, even if any adverse inference is drawn against Teo for not calling Poon or Yap, that the jewellery handed over to Reza must be part of the Esmerian jewellery. It remains to be said that, in any event, we are not persuaded that such an adverse inference ought to be drawn.

129 We therefore agree with the learned judge that there was inadequate identification of the subject matter of the alleged constructive trust. Accordingly, we dismiss RE Inc`s appeal.

130 ***Conclusion***

131 In the event, both Civil Appeal No 20 of 1996 and Civil Appeal No 25 of 1996 are dismissed with costs. We direct that the appeal deposit in Civil Appeal No 20 of 1996 be paid out to the respondents in that appeal or to their solicitors to account of the respondents` costs and that the appeal deposit in Civil Appeal No 25 of 1996 be paid out to the appellants or their solicitors.

132 ***Appeal and cross-appeal dismissed.***

Karthigesu JA
Lai Kew Chai J
L P Thean JA

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Diamond Centre Pte Ltd and Another v R Esmerian, Inc and Another and Another Appeal [1996] SGCA 55

Harry Elias, Salem Ibrahim and Amarjit Singh (Harry Elias & Partners) for the appellants in CA 20/96 and for the respondents in CA 25/96
Low Chai Chong (Rodyk & Davidson) for the respondents in CA 20/96 and for the appellant in CA 25/96
