

**(1) Myron Goldfinger and
(2) Cove Castles Development Corporation**

Appellants

v.

Norman Luxemburg

Respondent

FROM

THE COURT OF APPEAL OF ANGUILLA

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 11th November 2002

Present at the hearing:-

Lord Hoffmann
Lord Lloyd of Berwick
Lord Millett
Lord Walker of Gestingthorpe
The Rt. Hon. Justice Gault

[Delivered by Lord Walker of Gestingthorpe]

1. Mr Myron Goldfinger, the first appellant, is an architect of international reputation. He and his wife (who is an interior designer) had ambitious plans for an up-market tourist development in Anguilla. With encouragement from the Government of Anguilla these plans have been realised in the form of the Cove Castles Villa Resort on a ten-acre seafront site at Shoal Bay West. The development and management of the resort has been undertaken by two companies, a Delaware corporation named Cove Castles Development Corporation (CCDC), the second appellant, and an Anguillan company named Cove Castles Limited (CCL).

2. The shareholders in CCDC were Mr and Mrs Goldfinger and two other individual investors. CCDC had a shareholding in CCL (at the time of CCL's annual return for 1998, it was a fifty per cent shareholding). The other shareholders in CCL were the

shareholders in CCDC, although not in the same proportions. Mr and Mrs Goldfinger were the largest individual shareholders. Mr Goldfinger was a director of both companies. The trial judge, Saunders J, made an error in his judgment (stating that CCL held shares in CCDC) but that error has not proved to be material.

3. The respondent to the appeal is Mr Norman Luxemburg, who was the plaintiff at first instance. He is a United States citizen who lived in Anguilla between 1990 and 2000 and was employed as general manager of the Cove Castle Villa Resort from February 1995 until March 1998. Soon after the end of his employment he brought proceedings against Mr Goldfinger and CCDC (but not CCL) claiming US\$25,000 as a reasonable fee due on a *quantum meruit* in respect of Villa No 5, and a further \$75,000 as sales commission (in respect of Villa No 6) under a written agreement dated 29 May 1997.

4. These claims were disputed on various grounds, including the alleged illegality of the agreement as infringing the Trades, Businesses, Occupations and Professions Licensing Ordinance 1978 (the 1978 Ordinance) and the Control of Employment Ordinance 1980 (the 1980 Ordinance). The *quantum meruit* claim was rejected at trial and has not been pursued further. Indeed of the numerous issues raised on the pleadings that of illegality is the only one on which it was necessary for their Lordships to hear oral argument.

5. Saunders J rejected the plea of illegality and gave judgment against both defendants for US\$75,000. The Court of Appeal upheld that judgment, basically for the reasons given by the judge, although Matthew JA (in a separate judgment) regarded the case as an appropriate one for piercing the corporate veil. He regarded CCL and CCDC as being the same party, and as an alter ego of Mr Goldfinger. These observations were made in the part of the judgment of Matthew JA dealing with illegality, and it is not clear whether they were also intended to justify the entry of judgment against Mr Goldfinger personally, as well as against CCDC.

6. There is no other explanation in the judgments of why Mr Goldfinger should have been personally liable under a written agreement which he was expressed to enter into as a director of CCDC, and on behalf of CCDC. In the event counsel for Mr Luxemburg did not seek to support the judgment against Mr Goldfinger himself, and it must be set aside.

7. Apart from costs, the only live issue before their Lordships was the illegality issue. In order to assess the submissions made on this issue it is necessary to summarise the 1978 Ordinance and the 1980 Ordinance and to go more fully into the evidence and findings about Mr Luxemburg's employment and activities.

8. The 1978 Ordinance provides for the licensing of persons engaged in specified trades, businesses, occupations and professions (that is as an accountant, agent, building contractor, doctor, lawyer, merchant, printer or surveyor). The need for a licence applies whether or not the trader has permanent ties with Anguilla but does not apply to employees. A licence is required for and in respect of each "premises or place" where the occupation is carried on.

9. The 1980 Ordinance is described as intended to control employment in Anguilla of persons who are not "belongers" (as defined in section 2(2)) to Anguilla. Subject to exemptions which are not material, section 3 makes it an offence for a person who is not a believer and does not hold a work permit to

- “(a) engage in any occupation in Anguilla for profit or reward; or
- (b) be employed in Anguilla for a wage, salary or other remuneration;”

10. Mr Luxemburg held three successive annual work permits issued under the 1980 Ordinance. They were valid from 11 March 1995, 1996 and 1997 respectively. They were in almost identical terms, and permitted Mr Luxemburg to be employed in the capacity of "general manager" (or in the 1997 permit "manager") "Covecastles Villa Resort". The employer was not more precisely identified, although one of the standard conditions was that there should be no change of employer or occupation.

11. The parts which CCDC and CCL respectively played in the development appear reasonably clearly from the evidence and the judgments, although not all the detail is sharply defined. CCDC acquired and owned the site and developed it (in the late 1980's or early 1990's) by the erection of four substantial holiday villas which were sold (usually while in course of construction) to wealthy purchasers. A purchaser would occupy the villa for part of the year and make it available for letting to holidaymakers at other times. Later two further villas (designated No 5 and No 6) were

built on land owned by CCDC; these were constructed during Mr Luxemburg's time as general manager.

12. The development included a reception building, a tennis court, and other infrastructure and facilities which were vested in CCL. There was also a restaurant which was owned by CCDC. CCL's function was to manage the resort. Mr Vincent Nelson QC (who appeared before their Lordships for the appellants, not having appeared below) explained that there was a management committee representing the villa-owners and that CCL managed the resort on their behalf as a sort of co-operative. It may well be that in practice CCL's budget was organised in that way but it is clear that the company was not a co-operative in the full sense, since it was owned, directly or indirectly, by Mr and Mrs Goldfinger and their fellow investors.

13. It is also clear that Mr Luxemburg was employed by CCL. He and his wife (who was employed as guest services manager) had a written contract dated 6 March 1995 consisting of a letter signed by Mr Goldfinger (as a director of CCL) and three annexed pages of terms. These included a term that

“The Resort shall pay for the required work permits and the Company [CCL] shall make all reasonable efforts to secure the required work permits.”

14. This agreement was superseded by a new employment agreement dated 8 March 1997 which was for a fixed period of one year. It contained a similar provision about work permits.

15. It was common ground at trial that when Mr Luxemburg was first appointed as general manager of CCL, he was told by Mr Goldfinger that he would have the opportunity of earning more money (that is, five per cent of the total sale price) by finding purchasers for Villa No 5 and Villa No 6. Later, when these villas were in the course of construction, Mr Goldfinger (as a director of CCDC) sent Mr Luxemburg a fax dated 12 March 1997 referring to “your offer of reducing your commission should the negotiations for sale so require”.

16. This fax seems to have upset Mr Luxemburg. It led to various exchanges ending with a fax dated 29 May 1997, signed by Mr Goldfinger on behalf of CCDC and countersigned by Mr Luxemburg. It was in the following terms:

“You are to receive a 5% commission on the total sale price (land, house and contents) for Villa 6. This will be paid within 30 days after closing.

Nothing in this agreement has any bearing on the operations of CCL, however you will be entitled to the Villa 6 commission even if the closing has not taken place prior to the expiration of your contract with CCL and whether terminated for cause or not.

Any and all of your expenses as ‘Broker’ (such as meals, entertainment, postage, phone, etc) for your client must be paid by you personally.

Nothing in this agreement should have any bearing on your deals with individual Unit Owners sales.

This contract is for Villa 6 on Parcel 68 only and constitutes the only agreement between the parties. We will not at this time be building another villa.”

17. Later Mr Luxemburg was instrumental (as Mr Goldfinger said, without the need for any great negotiating skill or effort) in the sale of the villa for US\$1.5 m. Mr Luxemburg applied for commission of US\$75,000 which CCDC declined to pay, although it made an open offer of US\$50,000. At trial there were other issues as to the claim for commission, including the correct construction of the agreement, but before their Lordships the only issue was whether the agreement was enforceable as being in contravention of one or both of the 1978 Ordinance and the 1980 Ordinance.

18. At trial Saunders J took as his starting point the fact that Mr Luxemburg had a work permit, that it had been obtained by his employer (described both in the employment agreements and the work permits as the “Resort”, rather than CCL by name) and that it was to be assumed that the appropriate permit had been obtained. It did not prescribe Mr Luxemburg’s duties in any detail and these were to be derived from Mr Luxemburg’s contract of employment.

19. Saunders J attached importance to the fact that Mr Luxemburg had been told that he (like his predecessor, Mr de Lucinges, who seems to have left under a cloud) would have the opportunity to earn commission on the sale of CCDC’s villas. There was nothing surprising or unnatural about that since CCL and CCDC were

associated companies with a common commercial interest in the success of the resort.

20. Saunders J concluded that the work permit allowed Mr Luxemburg to do anything that fell within the scope of his duties as general manager of the resort, and that selling CCDC's villas certainly fell within that range. There was therefore no breach of the 1980 Ordinance. There was no breach of the 1978 Ordinance because Mr Luxemburg was carrying out his duties as an employed person and was not carrying on the occupation of an estate agent.

21. The majority of the Court of Appeal agreed with the trial judge. Matthew JA concurred but put his conclusion on rather different grounds of what he called piercing the corporate veil.

22. Before their Lordships Mr Nelson (in a commendably clear and brief argument) submitted that the correct analysis was that there were two separate contracts entered into by Mr Luxemburg, his employment contract with CCL and his agreement for sales commission with CCDC, and that the latter contract infringed one or both of the Ordinances.

23. The first part of this submission is correct. There were separate contracts (although they were not wholly unconnected since CCL permitted and perhaps even encouraged Mr Luxemburg to earn commission from CCDC, and the agreement of 29 May 1997 expressly referred to Mr Luxemburg's employment contract). But Mr Luxemburg's contract with CCDC was plainly not a contract of employment. Mr Luxemburg already had a full-time job as general manager. It related to a single transaction (as the final sentence of the agreement emphasised).

24. Not only was it not a contract of employment. The limited, one-off transaction which Mr Luxemburg performed under it did not amount to the carrying on of a trade, business, occupation or profession at any premises or place (the wording of the 1978 Ordinance) or to engaging in any occupation for profit or reward (the wording of the 1980 Ordinance). Whatever width is accorded to the term "occupation", the notions of carrying on or engaging in any occupation require some degree of regularity or continuity. Not every person who makes a loan is carrying on or engaging in the occupation of a moneylender.

25. The courts below were well placed to take account of the legislative background and purpose of the two Ordinances. They

reached the right conclusion as to their effect. To have held that the contract of 29 May 1997 was illegal and so unenforceable would have been stretching the statutory language and would have produced a harsh result.

26. Mr Courtney Abel (appearing with Mr Patrick Patterson for Mr Luxemburg) did not in the end seek to uphold the judgment against Mr Goldfinger personally. He was right not to do so. There was no evidence at trial to justify the conclusion that Mr Goldfinger was acting (in relation to the sales commission agreement) otherwise than as a director contracting on behalf of CCDC. In fact the documentary evidence shows that Mr Luxemburg and the management committee of CCL were well aware of the different personalities and interests of CCL, CCDC and Mr Goldfinger himself, and forthrightly opposed the practice of CCL making disbursements (to be reimbursed later) on behalf of CCDC or Mr Goldfinger.

27. That leaves the issue of costs. The appellants have lost on the only issue on which their Lordships found it necessary to hear oral argument. Mr Luxemburg's counsel left it until the last possible moment to concede that judgment should not have been entered against Mr Goldfinger, and Mr Nelson submitted that he was entitled to some order for costs, both before their Lordships and below. However the fact is that Mr Goldfinger and CCDC have made common cause throughout; his personal position seems not to have been raised at trial, and (although mentioned in the supplementary notice of appeal) also attracted little attention in the Court of Appeal; and it was not suggested that the appellants' costs have been materially increased, at any stage, by the joinder of Mr Goldfinger. He would have been a witness in any case. The sum paid into court was provided by CCDC, not by Mr Goldfinger.

28. In these circumstances their Lordships will humbly advise Her Majesty that the order of Saunders J should be varied so as to be an order for damages and costs against CCDC alone; that in all other respects the appeal should be dismissed; and that CCDC should pay Mr Luxemburg's costs of the appeal.

