

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF MONTSERRAT
(CIVIL)
AD

CLAIM NO. MNIHCV 2003/0005

BETWEEN:

Alberta Brandt, Donald Brandt, Andrew Burk, Tracy Burk, Elizabeth Breur,
Paul Breur, Elizabeth Corso, Alfred Dyett, Cynthia Dyett, Stephan Grewe,
Kurt Foot, Hank Henry, John Kelsick, Beverly Kleeb, Robert Kleeb, Greg Mehring,
Lester Parry, Samuel Rhys-Williams, Barbara Russell, Anthony Simpson,
Sally Simpson, Denzil Tuitt, Audrey Tyson and Raymond Tyson

Claimants

AND

The Governor of Montserrat

1st Defendant

The Attorney General

2nd Defendant

APPEARANCES:

Mr. Jean Kelsick for the Claimants

Mrs. Esco Henry Greer with Mr. Warren Cassell for the Defendants

Date: November 17th 18th 19th
24th 2003, 21st October 2004

JUDGMENT

[1] **GEORGE-CREQUE, J.:** This action which is a product of the volcanic activity in Montserrat, commenced by Originating Motion on 28th April, 2003 following the granting of leave by the Court on 15th April, 2003 under Part 56 of the Civil Procedure Rules 2000 ("CPR 2000"). The Claimants in their Originating Motion (as amended) claimed the following reliefs:-

- (i) A declaration that their right to reside in their properties and to have free and unhindered access thereto as guaranteed by section 62 of the Montserrat Constitution Order of 1989 ("The Constitution") has been breached by the First Defendant;
- (ii) A declaration that their right to protection from inhuman or degrading treatment as guaranteed by section 54(1) of The Constitution has been breached by the First Defendant;
- (iii) A declaration that their right to protection from deprivation of their property as guaranteed by section 64 of The Constitution has been breached by the First Defendant;
- (iv) A declaration that Regulations 5,10 and 13 of the Emergency Powers Regulations 1996 (No.26 of 1996) are unconstitutional or in the alternative, are invalid to the extent that they breach constitutional rights and /or are in violation of the doctrine of separation of powers;
- (v) A declaration that the First Defendant has, at common law, exercised his emergency powers unreasonably, irrationally, and disproportionately and that he has abused his discretion by failing to revoke the Emergency Powers Order 2002 (No. 49 of 2002) which is therefore quashed by order of the court;
- (vi) An injunction and /or an Order requiring and directing the Defendants (1) to allow the Claimants to reside in their properties and have free and unhindered access thereto and (2) to remove all boulders, chains, police barriers and other obstructions prohibiting access to the said properties;
- (vii) Restitution, damages and compensation for out of pocket expenses and other losses incurred by the Claimants as a result of the said breaches in the amounts set out in each of their supporting affidavits.

[2] On the first date of trial the Claimants' pending application seeking leave to add a further prayer for relief was granted in the following terms:-

(viii) A declaration that the Emergency Powers Order (No. 49 of 2002) contravenes the provisions of Section 23 of the Interpretation Act and is therefore null and void.

At the onset of the hearing of this matter, both counsel agreed that the reliefs numbered (v) and (vi) were no longer being pursued, as Order 49 of 2002 had by the time of hearing been repealed and as being overtaken by time and events respectively.

[3] Several affidavits were sworn to and filed by the Claimants in support of their claim and the complaints and factual circumstances giving rise to the claim are, in the main, similar. Several affidavits were also sworn to and filed on behalf of the Defendants setting out the actions taken by the First Defendant and others and the bases therefor. It was agreed by both sides that Dr. Peter Dunkley would be treated as the sole expert witness in the matter. He swore to an affidavit filed on 28th March, 2003 and another on 30th June, 2003.

Background

[4] The reliefs being sought by the Claimants arise against the following background, which is gleaned from the several affidavits filed and treated as examination in chief in this matter in respect of the deponents and the evidence led at the trial:

(a) The Soufriere Hills volcano in Montserrat roared to life in July 1995 and since then has remained in an active state going through various phases of lava dome growth, pyroclastic flows and explosive activity. It is a notorious fact that the general population in Montserrat has been considerably reduced, currently standing at less than one half, as a result of the volcanic activity and the majority now reside in what is called the Northern Zone.

(b) Between November 1999 to June 2003 dome growth was steady and two major dome collapses were experienced to wit on 20th March 2000 and on 29th July, 2001. After July 2001 the dome continued to grow at a steady pace and by June

2003 the dome was considerably larger than any other time since commencement of volcanic activity.

- (c) The First Defendant in his Affidavit sworn on 27th June, 2003, described the Montserrat volcano as highly dangerous because it produces fast moving pyroclastic flows rather than slow moving lava. Large flows take only a few minutes to reach the sea. These flows also produce very hot incandescent rock and ash as well as clouds of superheated gas and ash, which can rise up to about 100 metres and spread several hundred metres or more on either side of the main flow depending on topography. Contact with them is invariably fatal. In June 1997 during one of the major eruptions some 19 persons were killed in a pyroclastic flow.
- (d) This volcanic crisis triggered the invocation of section 65 of The Constitution and the application of the Leeward Islands (Emergency Powers) Order in Council, 1959 ("The EPO") in order to manage this ongoing crisis. Section 3 of The EPO gives to the Governor the power during a period of emergency to make such laws for Montserrat as appear to him to be necessary or expedient for, inter alia, securing the public safety and maintaining supplies and services essential to the life of the community.
- (e) On 3rd April, 1996 by Proclamation made pursuant to The EPO, a state of public emergency was declared to exist in Montserrat by the Governor. Regulations were also introduced on even date of the Proclamation namely, the Emergency Powers Regulations 1996 ("the 1996 Regulations")
- (f) Other machinery for managing the volcanic crisis was also established and developed which included:
 - (i) The Montserrat Volcano Observatory ("MVO") a facility staffed by skilled scientists under the directorship of Dr. Peter Dunkley and buttressed by other technical and administrative staff in Montserrat tasked with giving

advice on the volcanic threat to the First Defendant and the Government of Montserrat on a 24 hour basis;

- (ii) A Volcano Executive Group (“VEG”) comprising the Chief Minister, other ministers of Government of Montserrat, other senior officials such as the Commissioner of Police, Head of the Emergency Unit, and Head of the Defence Force and chaired by the First Defendant as Governor. VEG’s general scope of operation is to take operational decisions on volcano related issues rather than Executive Council (“EXCO”).
 - (iii) An international Risk Assessment Panel (“RAP”) comprising eminent volcanologists from various countries each with a thorough knowledge of Montserrat’s volcano tasked with meeting from time to time and producing in-depth studies of the volcanic risks and the various areas or parts of the island of Montserrat likely to be affected by the volcanic activity. Their studies, conclusions and advice would also be taken into account by the First Defendant and the Government in their management of the crisis.
- (g) The direction of the dome growth of the volcano which, according to the evidence of the First Defendant and the First Affidavit of Dr. Dunkley, was mainly towards the north east and at times to the South East and South, even though continuing and enlarged after the July 2001 collapse, had continued to be focused away from the populated areas. Dr. Dunkley further stated that a risk assessment was undertaken on 3rd – 4th September, 2002 and one of the conclusions reached was that *“with a very large dome and continuing dome growth, situations can arise rapidly where currently populated areas in and marginal to the lower Belham Valley will be at high risk. If the dome switches its direction of growth to the north or north west then collapses are possible which could generate pyroclastic flows that would reach the lower Belham Valley”*
- (h) The RAP briefed VEG on their findings and a joint press statement was issued by the Governor and Chief Minister in which the public was advised that if the dome

growth switched to the north or north west and material started spilling into the upper reaches of the Belham Valley then measures to evacuate the areas around the Valley would need to be put in place at short notice.

- (i) An evacuation plan was put in place for the area covering Isle Bay, Waterworks, Happy Hill, Lower Friths, and Old Towne, based upon a line produced by RAP in the September Risk Assessment in respect of areas likely to be affected by pyroclastic flows and surges based upon a 10 million cubic metre collapse of the dome directed to the north or north west.

- (j) In the last week of September, 2002 the direction of the dome growth suddenly switched towards the north west first recognised on 26th September. Rapid and dramatic growth of the dome occurred and there were rock falls and small pyroclastic flows spilling northwards into the areas of Riley's Estate, Farrell's Plain and the top of Tyre's Ghaut. On 29th September, pyroclastic flows had reached the sea at Spanish Point. Concern was raised by the director of MVO at VEG's meetings on 7th October in respect of the rapid and dramatic growth towards the northwest, which could result in a sudden collapse producing pyroclastic flows in the Belham Valley.

- (k) A public meeting was held in Salem on 7th October, 2002 where the director of MVO informed the public of the most recent volcanic developments and the immediate threats which they considered the volcanic activity posed. The decision for the immediate evacuation of the areas around the Belham Valley was therefore taken on 7th October, 2002 for evacuation to occur not later than 1800 hours on 9th October, 2002. Road access to these areas was closed off initially by the placing of large boulders at the road entries. Paul Norris, superintendent of police, described this method of blockage as crude and in retrospect, dangerous and offensive to displaced residents but stated that this was due to time constraints and the lack at that time, of suitable material. Further, at that time, re-entry was not envisaged.

- (l) On 9th October, 2002 came The Emergency Powers (Unsafe Areas) Order, 2002 (“the Unsafe Areas Order”) stated to be made pursuant to Regulation 5 of the 1996 Regulations. This Order designated the boundaries of the unsafe areas, provided for the daytime occupation of those unsafe areas and gave power to the Commissioner of Police to restrict entry into the Day Time Entry Zone. Annexed and referred to in the Unsafe Areas Order was a plan depicting the boundaries of the various areas described as zones namely the Exclusion Zone, the Day time Entry Zone and the Northern Zone.

- (m) At the time of the commencement of this action in April, 2003, the dome had not collapsed but the areas evacuated in October, 2002 remained evacuated. It is accepted that no one could say with certainty if and when the dome would collapse or the areas which would in fact be affected. This is so because, as accepted by both sides, volcanology is not a precise or exact science. The dome eventually collapsed between 12th and 13th July, 2003 and has been categorized as a considerably large event – much larger than previous events. The First Defendant in his Affidavit filed on 7th November, 2003 described it as being “possibly one of the largest events of its type worldwide”.

- (n) As it turned out, pyroclastic flows were concentrated down the Tar River Valley and away from populated areas. Some ten square kilometres of land in the Exclusion Zone were affected by flows and surges. However, the Belham Valley was not impacted by pyroclastic flows but was badly affected by ash falls and fall out from pumice fragments.

- (o) On 31st July, 2003 all restrictions on entry to the areas evacuated in October, 2002 were lifted.

The Claimants' complaints.

- [5] The gravamen of the Claimants' complaint is that the First Defendant, in imposing the evacuation coupled with the short notice given, the manner of imposing same, the restrictions on entry to the areas evacuated, and the lengthy period of the said evacuation, abused his discretionary powers, acted unreasonably and/or unconstitutionally and disproportionately and in breach of certain of the Claimants' fundamental rights protected under sections 54, 62 and 64 of The Constitution.
- [6] Each prayer of the Claimants' will be addressed in turn but in so doing, the determination of whether the Claimants' fundamental rights as aforesaid which they allege have been breached by First Defendant must be considered against the backdrop of the state of public emergency which was declared to exist in Montserrat and the provisions contained in section 65 of The Constitution in respect of the period of public emergency.

Section 65(1) of The Constitution states:

65.—(1) Nothing contained in or done under the authority of any regulation made under the Emergency Powers Orders in Council 1939 to 1973 or under the Leeward Islands (Emergency Powers) Order in Council, 1959 shall be held to be inconsistent with or in contravention of section 57, section 58 other than subsections (4) and (6) thereof or any provision of sections 59-64 (inclusive) of this Constitution to the extent that the regulation in question makes in relation to any period of public emergency, provision, or authorizes the doing during any such period of anything, that is reasonably justifiable in the circumstances of any situation arising or existing during that period for the purpose of dealing with that situation.'

This section of the Constitution therefore allows for derogation from certain of the fundamental rights and freedoms enshrined in The Constitution.

- [7] It is necessary also, to set out regulations 5, 10 and 13 of the 1996 Regulations, which are being challenged. Regulation 5 (1) states as follows:

“The Governor may by Order declare an area to be an unsafe area and may, in that Order, direct (my emphasis) that all unsafe areas be evacuated by a specified time and in accordance with specified procedures.”

Regulation 5 (2) of the 1996 Regulations went on to criminalize the acts of entry, being found in and failure or refusal to leave an unsafe area (my emphasis) without proper authorization with the maximum penalty being a fine of \$2,000 or a term of imprisonment of six months. Regulation 10 (1) states as follows:

“Notwithstanding anything contained in the Vehicles and Road Traffic Act or in any law respecting the movement and operation of vehicles, the Governor may by order issue directions to prohibit, or otherwise regulate the operation and movement of vehicles.”

Regulation 10(2) also criminalizes the refusal by any person to comply with a direction so issued and provides for like penalties as Regulation 5(2).

Regulation 13 states as follows:

“The Governor may by order, in relation to any subject or matter not expressly mentioned in these Regulations, issue such directions as may be necessary or expedient in the national interest.”

The decision in *Cavanaugh -v- The Commissioner of Police*

- [8] Before proceeding further, I must make reference to the judgment of the Court of Appeal in the case of **Brian Cavanaugh -v- The Commissioner of Police**¹ delivered on 12th January, 2004 after the hearing of submissions on this Motion and which had been alluded to by counsel for the Claimant in his address before the court. In that case, Mr. Cavanaugh was convicted and fined \$1,000 by the magistrate for being in an ‘unsafe area’ without proper authorization on 24th December, 2002. The Unsafe Areas Order was the focal point of consideration by the Court of Appeal which held that The Unsafe Areas Order, does not by its terms “direct that all unsafe areas be evacuated by a specified time and in accordance with specified procedures” as permitted by the 1996 Regulations under which Regulations the Governor made the Unsafe Areas Order. The Court of Appeal

¹ Magisterial Appeal No.2 of 2003 (Montserrat – unreported)

therefore concluded that neither the Governor nor the Commissioner of Police had lawfully assumed the power to enforce evacuation of householders in the unsafe areas and quashed Cavanaugh's conviction. The Court of Appeal also held that it was necessary that an evacuation order (*my emphasis*) be made under Regulation 5(1) of the 1996 Regulations in order for Regulation 5(2) to come into play for to hold otherwise, would be to deprive of all meaning the specific statutory provision in 5(1) empowering, but not requiring the Governor to direct that all unsafe areas be vacated by a specified time and in accordance with specified procedures.

- [9] These pronouncements by the Appellate Court in respect of the Unsafe Areas Order, which is the very Order under consideration in this Motion, are binding on this court and the issues arising in this case must accordingly be addressed with these pronouncements in mind. As in the case of **Cavanaugh**, if the Governor or the Commissioner of Police had not lawfully assumed the power to enforce evacuation of householders in the unsafe areas then requiring such householders to leave their homes, under threat of criminal prosecution, restricting their access to the said areas and limiting the time they were permitted to remain in the said areas would be without lawful authority.

Was an evacuation order made by the Governor?

- [10] It is useful to set out in part the Unsafe Areas Order.
- "1. Citation: *This Order may be cited as the Emergency Powers (Unsafe Areas) Order 2002 and shall come into force on the 9th day of October, 2002.*
 2. Designation of Unsafe Areas: *Notwithstanding anything contained in the Emergency Powers (Unsafe Areas) Order 1998 the unsafe areas shall be-*
 - (a) *all that area located South of a line, shown for descriptive purposes only on the plan annexed hereto, running from a point commencing from the northernmost part of the runway of W.H. Bramble Airport and continuing westward to the road at Mournful Ghaut to the point where it is gated and thereafter to the point bisecting the Belham*

Valley northwest of Molyneaux and continuing westward along the Belham Valley to the Belham Bridge and thereafter west south west to the sea; and

(b) the area commencing from the mouth of the ghaut at Lime Kiln Bay south-eastwards along the ghaut to the roundabout at Old Towne; and from there eastward along Logwood Drive to Olveston House; then continuing eastward to the Happy Hill/Friths Main road junction; and from there south-eastwards to the Waterworks Estate.”

The annexed plan is in essence a map of Montserrat depicting three zones namely the Northern zone, the Day Time Entry Zone, and the Exclusion Zone. It is not helpful however in identifying all the unsafe areas set out under paragraph 2 above as the names of several places mentioned therein are not depicted on the map. Paragraph 3 of the Unsafe Areas Order then goes on to provide for daytime occupation of unsafe areas therein described. Paragraph 4 thereof repealed The Emergency Powers (Unsafe Areas) Order 1999.

[11] It is clear that the Unsafe Areas Order made under Regulation 5 of the 1996 Regulations does not therein direct that all unsafe areas be evacuated by a specified time and in accordance with specified procedures. Regulation 2 of the 1996 Regulations defines “evacuated area” as ‘an area declared by the Governor to be an unsafe area **and** in respect of which an evacuation order has been issued by the Governor under Regulation 5 (*my emphasis*). “Order” is defined in the said Regulation as ‘an order published at the notice board located at the Salem Police Station or at the Cudjoe Head Police Station, or where in the circumstances such publication is not expedient, to give directions, through the media or otherwise, orally or in writing or by any method which is expedient in the circumstances’.

[12] In answering this question the evidence of the First Defendant must also be examined. In paragraph 14 of his affidavit of June 27th 2003 he stated thus:
“A detailed account of events leading up to the evacuation and the scientific advice on which this decision was based are contained in Annex 1 to this Affidavit. (Marked Exhibit “1”). This Exhibit is captioned “SCIENTIFIC ASSESSMENTS OF THE VOLCANIC

THREAT SEPTEMBER 2002 ONWARDS". In paragraph 18 thereof, First Defendant states as follows:

"At a public meeting on the evening of 7th October, residents were told by me and the Chief Minister that following the earlier warnings, the situation was now such that those in the danger area would have to evacuate their homes by 1800 hours on 9th October at the latest. This information was confirmed the following morning by me on the radio when the background and information which led to the decision was again fully explained." (my emphasis).

[13] It must be noted that the Unsafe Areas Order in its citation is stated as coming into force on **9th October, 2002**. This therefore begs the question as to the basis for the authority assumed by the First Defendant on **7th October, 2002** requiring the residents in what he described as the danger area to evacuate their homes by 1800 hours on 9th October. The evacuation order, if indeed the decision taken at the meeting on 7th October and confirmed on radio on 8th October, may be accorded that status, would appear to have preempted the very Order viz. the Unsafe Areas Order, from which its authoritative force would have sprung as contemplated by Regulation 5 of the 1996 Regulations.

[14] Based upon the foregoing, I am constrained to hold that no evacuation order was made in keeping with Regulation 5 of the 1996 Regulations upon which First Defendant could lawfully assume the power and authority requiring the residents of the designated unsafe areas described in the Unsafe Areas Order to evacuate their homes, to restrict their access thereto or to limit the time they may remain therein. Accordingly, the evacuation of the Claimants from their homes on 9th October, 2002 cannot be said to be an act done under the authority of any regulation made under the Leeward Islands (Emergency Powers) Order in Council 1959 so as to bring the said actions within the scope and shield of the provisions of section 65 of The Constitution.

Have the Claimants' right under section 54(1) of the Constitution been breached?

[15] Section 54(1) of The Constitution provides that no person shall be subjected to torture or to inhuman or degrading treatment or punishment. The Claimants have all asserted that

they were forced to leave their homes at short notice under threat of criminal prosecution, and additionally, with respect to some Claimants, threats of deportation. They were forced to find alternative accommodation resulting in financial hardship and were unable to properly maintain their homes and gardens resulting in a state of disrepair exacerbated by roaming livestock and subjecting their properties to looting and vandalism. Chains and boulders were placed across the roads prohibiting normal ingress and egress and the period allowed to remain in their properties were restricted to five hours each day, six days per week. They also assert that the period over which they were not permitted free access to their homes was inordinately long. These acts, they say, caused them to suffer emotional distress and financial hardship.

[16] The Claimants have not complained of any other actions or treatment neither in their affidavits or in oral evidence given. Counsel for the Claimants asked the Court to consider the financial and emotional hardships suffered as a result of being evacuated from their homes and contends that the actions of First Defendant were deliberate. Mr. Warren Cassell who addressed the court on this aspect of the matter on behalf of the Defendants referred the Court to the cases of **Harding -v- The Superintendent of Prisons and the Attorney General**², **Hobbs (Victor) and Mitchell (David) -v- R**³, and **The Oxford Dictionary** in respect of the meaning of the word “inhuman”. **Harding’s** case is a decision of the Court of Appeal of this jurisdiction, and therefore binding on this court whereas the case of **Hobbs** is a decision of the Court of Appeal of Barbados and is of persuasive authority. These cases involved a determination of whether the right to protection from torture, degrading and inhumane punishment was being breached, the right being in virtually identical terms as section 54(1) The Constitution. The **Oxford Dictionary** defines “inhuman” as “brutal, unfeeling, barbarous”. In **Harding’s** case section 5 of the constitution of St. Lucia was under consideration. Singh JA. in delivering the judgment of the Court of Appeal, and after considering several cases including the case of **Ireland-v- the United Kingdom Series A No.25**, at paragraph 25 of his judgment, stated:

² Civil Appeal No. 13/2000 (St. Lucia –unreported)

³ (1992) 46 WIR 42

"From these authorities I crystallize the following principles which I accept as good law. Each word of Section 5 has a separate and distinct meaning. They apply to specific forms of punishment such as the deliberate and intentional infliction of intolerable pain and suffering, or treatment which causes severe and unacceptable pain and suffering whether physical or mental or both, calculated to dehumanize, or results in the deprivation of the elementary necessities of life and which triggers off instinctive human revulsion."

At paragraph 27 he went on to state thus:

"Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment. It implies a suffering of particular intensity and cruelty."

At paragraph 34 he concluded by saying:

".....punishment or treatment which was not deliberate and not intended to cause great pain and suffering or which does not cause severe pain or suffering, or does not result in the deprivation of the necessities of life is not caught by section 5."

- [17] Applying these principles to the instant case, I take into account the public state of emergency in effect on the island coupled with the undisputed fact that the Soufriere Hills volcano posed a continuing and significant threat to residents and more so to residents in particular areas of the island. Whilst the relocation of the Claimants who were required to evacuate, whether lawfully or not, obviously suffered some degree of inconvenience, frustration and emotional distress, the acts complained of by the Claimants do not, in my view, amount to torture, punishment or treatment which was deliberate and intended to cause severe pain and suffering or resulted in the deprivation of the necessities of life. The acts complained of did not go above and beyond what may have been necessary to protect life and limb in the peculiar circumstances of this case and accordingly I hold that the acts complained of are not caught by section 54(1) of The Constitution.

Have the Claimants' right under section 62 of the Constitution been breached?

- [18] Section 62 of the Constitution states in part as follows:

"62(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of movement, that is to say, the right to move freely throughout Montserrat, the right to reside in any part thereof,and immunity from expulsion therefrom."

(2) Nothing contained in or done under the authority of any law (my emphasis) shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) for the imposition of restrictions on the movement or residence within Montserrat or on the right to leave Montserrat of persons generally or any class of persons that are reasonably required—

(i) in the interests of defence, public safety, public order, public morality or public health, or

(ii) for the purpose of protecting the rights and freedoms of other persons,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;

(b)..... .

(c)..... .

(d) for the imposition of restrictions on the movement or residence within Montserrat of any person who does not belong to Montserrat or the exclusion or expulsion therefrom of any such person;

(e) for the imposition of restrictions on the acquisition or use by any person of land or other property in Montserrat;

(f)..... . or

(g) for the imposition of restrictions on the right of any person to leave Montserrat that are reasonably required in order to secure the fulfillment of any obligation imposed by law, except so far as the provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

[19] The Claimants contend that they were forced to leave their homes, which were now situated in the areas designated as unsafe under the Unsafe Areas Order, under threat of arrest, imprisonment, fines and deportation. The Claimant, Paul Breuer who owned a golf course, a home and lived at Old Towne, filed several affidavits in this matter and was also cross examined during the trial. In his affidavit filed on 28th April, 2003, he stated that in October, 2002, he was informed by the First Defendant that he had to leave his home within 48 hours as the Soufriere Hills dome could collapse at any time and the resultant volcanic surges could damage Old Towne; that he refused to move until First Defendant threatened him with deportation. He says that he was also threatened by the First

Defendant with being arrested, fined and jailed. Mr. David Brandt, a lawyer, has confirmed this in his affidavit filed on 25th July, 2003. Mr. Robert Kleeb says he was threatened with deportation. Counsel for the Claimant swore to an affidavit confirming this to be so. The daytime entry hours allowing the Claimants access to their homes were quite limited being from 9:00 am to 2:00 pm, 6 days a week.

[20] Paul Breuer, in his Supplementary and third Affidavit filed on June 27th 2003, stated that at a public meeting held at Salem on 17th June, 2003, First Defendant refused to relax any restrictions relating to the exclusion zone imposed in October, 2002. He further states in paragraph 6 of this Affidavit that Superintendent of Police Paul Norris stated the reason for refusal to enlarge the entry hours was so as not to inconvenience the police; that he and other residents were on several occasions unreasonably harassed by the police when trying to gain entry to their properties for the purpose of maintaining them. In paragraph 8 he stated that residents were refused entry into the evacuated areas on 9, 10 and 26 November, 8, 28 and 29 December, 2002 and 4, 5, 11, 12, 18, 26 and 27 January, 2003 without prior warning being given. Further, that before being allowed to enter the evacuated area persons were first required to sign at Salem Police Station an "Indemnity" the form of which was exhibited. The terms of this Indemnity in essence required of persons seeking permission to enter the evacuated areas, an undertaking to indemnify and hold blameless the Government of Montserrat, the Commissioner of Police and his officers from any liability whatsoever however arising directly or indirectly from entry into the areas said to be prohibited by law. Interestingly, the Claimants, on the other hand, had offered a written release to the British and Montserrat Governments, their servants and agents from any liability whatsoever, should they suffer injury or death by volcanic activity if they remained in their home but this was refused by first Defendant as being legally inefficacious. The First Defendant at paragraph 45 of his Affidavit of 27th June 2003 stated in essence that having consulted with Second Defendant, it considered that such waivers or indemnities being offered by such residents may not necessarily cover all eventualities in respect of all persons such as visitors or rescue workers, which may arise. He further stated that he was not aware of any other government, which permits citizens to put their lives at high risk in exchange for such waivers or releases.

[21] It is accepted that the Claimants' movement and their right to reside in their homes located in those parts of Montserrat declared as unsafe, were restricted for the period complained of in this action. For the reasons already expressed in this judgment, I have already concluded that no evacuation order can be said to have been, lawfully made. As such, the Claimants could not lawfully be restricted from occupying their homes or gaining access to their homes in those areas declared as unsafe. I accordingly hold that the Claimants were hindered in the enjoyment of their right to move freely throughout Montserrat and their right to reside in their homes in breach of section 62 of the Constitution.

The 1996 Regulations- Regulations 10 and 13 and the doctrines of legal certainty and separation of powers.

[22] Counsel for the Claimants contends that Regulations 10 and 13 of the 1996 Regulations are invalid in that they violate the doctrines of legal certainty and the separation of powers. He relied on the cases of **J. Astaphan & Co (1970) –v- The Comptroller of Customs of Dominica & Ors.**⁴, **Observer Publications Ltd.-v- Campbell “Mickie” Matthew & Ors.**⁵, **de Freitas -v- Permanent Secretary of Ministry of Agriculture & Ors.**⁶ and **Attorney General –v- Reynolds**⁷.

In **Astaphan's** case Sir Vincent Floissac CJ at page 158 of his judgment opined that *“if the legislature delegates or transfers its legislative power to the executive and does so without circumscribing the power or without prescribing guidelines or a policy for its exercise the legislature should be deemed to have surrendered or abdicated the power. In the event, the delegation or transfer of power is inconsistent with the basic principle of separation of powers”*.

In the **Observer Publication's** case Lord Cooke of Thornton in delivering the Judgment of the Board of the Judicial Committee of the Privy Council, at paragraph 28 of his Judgment, referred to the judgment of Lord Clyde (page 78) in the case of **de Freitas** in respect of the principle of legal certainty where he stated thus: *“legal provisions which*

⁴ (1996) 54 WIR 153

⁵ (Antigua) UKPC 2001 – No. 3/2000

⁶ (1998) 53 WIR 141

interfere with individual rights must be formulated with sufficient precision to enable a citizen to regulate his conduct”.

[23] Regulation 10, in essence, empowers the Governor by order, to issue directions to prohibit or otherwise regulate the operation and movement of vehicles. The instant case is not concerned with any direction(s) issued by the Governor pursuant to this Regulation. I do not consider that the mere granting of this power, without more, is so vague or general in its terms as to be uncertain. Given the circumstances creating the state of public emergency such a power would in my view, have been necessary and therefore reasonably justifiable in the circumstances of the situation arising. For the same reason, I do not accept that Regulation 13 offends against the doctrine of legal certainty.

[24] I am in agreement with the view expressed by the Attorney General that this Regulations 10 and 13 in reality reflect the tone and spirit of section 65 of The Constitution and captures the essence of Section 52 of the Constitution in terms of balancing the individual rights and freedoms protected, against the public or national interest. I hasten to add that it is section 65 of The Constitution itself which lends its force to The EPO and it is pursuant to section 3 thereof that the Governor is empowered during a period of emergency to make such laws for the colony as appear to him to be necessary or expedient for securing the public safety, defence and, among other things, for maintaining services and supplies essential to life. (*emphasis added*). I hold therefore, that neither Regulations 10 nor 13 offend against the doctrine of separation of powers.

The test of reasonableness in determining whether the 1996 Regulations 5, 10 and 13 are unconstitutional.

[25] Counsel for the Claimant also contends that Regulations 5, 10 and 13 are invalid to the extent that they breach constitutional rights contained in sections, 54, 62 and 64 of the Constitution. Regulation 5 was principally challenged on this ground. He urged the court to look beyond section 65 and to consider paragraph (c) of the preamble in Part IV of The

⁷ (1979) 43 WIR 108

Constitution which affords protection of privacy of one's home or other property and from deprivation of same without compensation which he says is subject only to the rights and freedoms of others and the public interest. He further contends that Section 52 of the Constitution imposes on the Defendants a burden of proof in that they must show that any actions or laws, which restrict those rights, are with a view to avoiding prejudice to the rights and freedoms of others or for the public interest. Looking beyond section 65 he says is in keeping with the true spirit of The Constitution and in keeping with the pronouncement of Lord Diplock in the case of **Attorney General of The Gambia –v- Momodou Jobe**⁸ where at page 700H of his judgment he said thus: *“A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction”*. He conceded however, and in my view rightly, that section 65 of The Constitution makes special provisions for a period of public emergency.

[26] The Attorney General contends that Regulations 5, 10 and 13 of the 1996 Regulations are not unconstitutional in that certain freedoms may be curtailed under section 65 and 62(2)(1)(a) or (e) of the Constitution and cites in support the case of **Richards and Anr. -v- AG of St. Vincent and the Grenadines**⁹, **Zinka –v- A-G of Zambia**¹⁰, **The State –v- Adel Osman & Ors.**¹¹ and **Prasad-v- Republic of Fiji & Anr.**¹² Singh J at page 317 of his judgment in **Richard’s** case quoted Robotham CJ in the case of **AG of Antigua & Barbuda –v- Hector**¹³ thus: *“Absolute and unrestricted individual rights, wholly freed from any form of restraint cannot exist in a modern democratic society. Thus it is, that the enjoyment of all rights guaranteed by the Constitution must be subject to such reasonable conditions or restrictions as may be seen by the authorities in control to be essential for the general order, safety health and peace of the State.”*

⁸ [1948] AC 689

⁹ (1991) LRC (const) 311

¹⁰ [1993] 3 LRC 1

¹¹ [1988] LRC 212

¹² [2001] 1LRC 665

¹³ (1986) (unreported) Civil Appeal 5/1986 (St. Vincent)

[27] The cases of **Zinka and Odel Osman** being decisions of the Supreme Courts of Zambia and Sierra Leone respectively are of persuasive authority only. They however lend support to the view that fundamental rights and freedoms are curtailed in emergency situations. In the **Odel Osman's** case Kutubu CJ delivering the judgment of the court adopted the words of Rodrigo J in **Visuvalingam and others –v- Liyanage and others**¹⁴ where he stated thus: *“Emergency regulations are laws to which the fundamental rights constitutionally have to give way. They take a back seat to the extent the Emergency Regulations take the front seat. There is no room for both in the front seat. An emergency is what the word means.”*

[28] Section 65 is not expressed to be subject to any other provision in The Constitution. Furthermore, it expressly provides for the derogation of the rights contained in sections 57 and 58 and sections 59-64. It is to be noted that section 54, already addressed in this judgment, is not referenced therein. Under Section 65, it seems to me, that the test of constitutionality of any regulation made under the Emergency Powers Orders as described therein is whether the regulation in question and/or any action taken in pursuance thereof is reasonably justifiable in the circumstances of the situation arising or existing during that period for the purpose of dealing with that situation. In **Richard's case**, Singh J (as he then was) referred in his judgment to the dicta of Sastri CJ in the case of the **State of Madras –v- Row AIR**¹⁵ thus:

“It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern of unreasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that, the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the

¹⁴ [1985] LRC (Const) 909

sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them reasonable.”

[29] Fazal Ali J had this to say in the case of **Sri Sri Kalimata –v- Union of India**¹⁶ at page 959 of his judgment:

“ Whenever a complaint of violation of fundamental rights is made, the court has to determine whether or not the restrictions imposed contain the quality of reasonableness. In assessing these factors a doctrinaire approach should not be made but the essential facts and realities of life have to be duly considered”

[30] I am persuaded by and adopt the views of the learned judges referred to above as being the correct and sensible approach to resolving this issue in the present case particularly having regard to the clear wording of the qualification in section 65 which speaks to “**the circumstances of the situation arising or existing**” during the period of public emergency “for the purpose of dealing with that situation”. It is not contested, (nor could it be), that the state of public emergency, which was proclaimed on 3rd April for the island of Montserrat was in response to the serious and unpredictable nature of the threat posed by the Soufriere Hills volcano. Indeed a portion of the preamble to the said Proclamation reads as follows:

“AND WHEREAS a volcanic eruption is likely to substantially interfere with the supply and distribution of food, water and other resources, thereby depriving the community of a substantial portion of the essentials of life and is likely to be hazardous to the health and safety of the residents of Montserrat”.

[31] The 1996 Regulations were passed on the same date of this Proclamation for the purpose of dealing with that situation, i.e. the crisis created by the erupting state of the volcano. Regulations 5, 10 and 13 must accordingly be considered against this background. I have earlier stated that Regulations 10 and 13 are more in the nature of empowering provisions. I am unable to discern any basis on which it can be said that such provisions would not be

¹⁵ 1952 SC 196

¹⁶ [1981] 2 SCR 950

necessary in circumstances of a crisis such as this where decisions may be required to be taken quickly. In my view such powers as afforded by Regulations 10 and 13 are necessary to deal with an emergency of this nature. Accordingly, I find that Regulations 10 and 13 would be a reasonable limitation to the exercise of such rights such as the freedom of movement guaranteed by Section 62 of The Constitution in the interest of public safety. Learned Counsel for the Claimants urged that First Defendant was seeking to protect personal safety of the residents and was not concerned with public safety. This I do not accept, as the Regulations are not directed to residents of a particular area but to the safety of the general public.

[32] Regulation 5, specifically 5(2) however, poses some difficulty in its rationalization. Taken as read, it would be a criminal offence for a person to be or enter an **unsafe area** as distinct from entry upon or being in an **evacuated area**. This issue was also addressed by the Court of Appeal in **Cavanaugh's** case. That Court held that the offence was not that of being in an 'unsafe area' and that, in essence, for the offence to be committed, an evacuation order (*emphasis added*) must be made under Regulation 5(1) in order for 5(2) to come into play for to hold otherwise, would be to deprive of all meaning the specific statutory provision, in section 5(1) empowering but not requiring the Governor to direct that all unsafe areas be evacuated by a specified time and in accordance with specified procedures.

[33] An 'unsafe area' and an 'evacuated area' are distinctly different things based on their definitions in the 1996 Regulations. Regulation 2. defines an "unsafe area" as *"an area declared by the Governor under Regulation 5 to be an area in which a person is likely to suffer damage or injury from seismic activity"*. An "evacuated area" however, is defined as *"an area declared by the Governor to be an unsafe area and **in respect of which an evacuation order has been issued** by the Governor under Regulation 5."* (*emphasis added*) . Whilst an evacuated area would, a fortiori, be an unsafe area, it does not follow that an unsafe area is an evacuated area. There may well be circumstances where an area, even though declared unsafe, may not warrant evacuation. It is difficult then, in my view, to justify the criminalization of being in an "unsafe area". This would be a

disproportionate measure to dealing with a situation where the circumstances do not warrant evacuation and would be too far reaching an encroachment upon the individual's right to reside and their freedom of movement. Accordingly, I am inclined to hold that Regulation 5(2) would not be reasonably justifiable in the circumstances of the situation and as such ought not to stand as framed.

Have the Claimants been deprived of their property in breach of section 64 of the Constitution?

[34] Counsel for the Claimants contends that the curtailment of the Claimant's use of their properties pursuant to the evacuation is a deprivation of property or is tantamount to a compulsory acquisition of property. Section 64(1) of the Constitution states in part as follows:

64.—(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—

(a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit or the economic well-being of the community; and

(b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition—

(i) for the prompt payment of adequate compensation;

The Attorney General contends that deprivation of property can only be triggered by a compulsory acquisition and nothing of this sort has occurred in the instant case. She relies on **Attorney General & Anr.-v- Goodwin & Ors.**¹⁷ and **Astaphan's** case. In the case of **Goodwin** the Court of Appeal held that the constitutional right to property could only be triggered by a compulsory acquisition.

¹⁷ Antigua & Barbuda Civil Appeal -10 of 1997 (unreported)

[35] It is accepted that the Preamble to Part IV of The Constitution, which affords protection from deprivation of property is also an enacting provision. Whilst there can be no doubt that the Claimants' enjoyment of their property was restricted for a period of time as from 9th November 2003, up to 31st July, 2003 this does not, in my view, amount to deprivation of property as envisaged under the provisions of the Constitution which, on my reading of the language and the context thereof, contemplates an outright taking of possession and control of property unto the State. This has not occurred in the case at bar. Accordingly, I hold that section 64 of the Constitution has not been breached in relation to the Claimants.

Was the Emergency Powers Order (No. 49 of 2002) null and void as contravening the provisions of Section 23 of the Interpretation Act.

[36] Counsel for the Claimants submitted that the Emergency Powers Order (No 49 of 2002) has not been duly published in accordance with the provisions of section 23 of the Interpretation Act and accordingly is thereby rendered null and void. It is useful to set out section 23 of the Interpretation Act, which is in the following terms:

23.(1) All subsidiary legislation made under any Act or lawful authority and intended to have legislative effect, shall be published in accordance with this section, and unless it is therein otherwise provided shall take effect and come into operation as law on the date of first publication.

(2) Subsidiary legislation shall be published in the first instance by exhibition on one or more public notice boards designated for that purpose by the Governor in Council, by a public officer and in a manner approved by the Governor in Council.

(3) All subsidiary legislation published by exhibition in accordance with subsection (2) shall be notified in the next possible gazette by-

(a) printing and publication in full, together with a note of the date and place of exhibition, certified by the relevant public officer; or

(b) publication of a notice-

- (i) *that the subsidiary legislation has been published by exhibition,*
 - (ii) *stating the date, place, and manner of such exhibition and a certificate to that effect by the relevant public officer,*
 - (iii) *stating the name and number of the subsidiary legislation,*
 - (iv) *giving the general import and effect of the subsidiary legislation, and*
 - (v) *giving advice of where a full copy of the subsidiary legislation may be inspected and purchased.*
- (4) *Judicial notice shall be taken of –*
- (a) *a copy of any instrument of subsidiary legislation bearing on its face a certificate of a public officer that the instrument has been published by exhibition in accordance with this section;*
 - (b) *subsidiary legislation published in full in the Gazette.*

[37] Specifically, counsel for the Claimants say that sections 25(3)(b)(ii) and (iv) have not been complied with. The Emergency Powers Order (49 of 2002) of itself bears the certificate of the Clerk of Councils to the effect that it was published by exhibition at the clerk of Councils office, Farara Plaza, Brades on 9th October, 2002. Accordingly under section 25(4) I am entitled to take judicial notice of it. Further, I am satisfied having seen and considered:

- (a) The Interpretation (Publication) Orders No. 77 of 2000 and 40 of 2002 designating the Clerk of Councils as the public officer for purposes of publication by exhibition and Farara Plaza as the place of publication respectively, and
- (b) a copy of the Gazette No. 9 dated 24th September, 2003, in which the notice of the said order was published,

that all the provisions of section 25(3) of the Interpretation Act have been complied with. Accordingly, the said order is not null and void as flouting the provisions of Section 25 of the Interpretation Act.

Restitution, Damages and Compensation

[38] The Claimants have each sought restitution, damages and compensation for out of pocket expenses and other losses, which they say they have incurred as a result of the breaches

of their rights by the Defendants. There is no need for the making of a restitution order as no property has been taken away. In any event, persons were permitted to return to the unsafe areas evacuated in October, 2002 as at the end of July, 2003.

[39] It is reasonably foreseeable however, that if the Claimants were removed from their own homes that they would have suffered some loss flowing from the necessity to relocate to other accommodation in other areas of Montserrat. In the affidavits of the Claimants they have sought to particularize the items of damage. The learned Attorney General contends, that there has been no proof of the special damages particularized in their Claim. Further, relying on the authority of **Blackstone's Civil Practice 2001** she also contends that liability for damages must be grounded in a recognised cause of action. Counsel for the Claimants on the other hand contends that the instant proceedings are public law proceedings and not civil proceedings and that the court may grant such relief under section 66 of The Constitution as it may consider appropriate for the purpose of enforcing any of the fundamental rights therein given. He also relies on Part 56.8 (2) of CPR 2000, which in essence states that the court may, on a claim for judicial review or for relief under the constitution award damages if the Claimant has included in the claim form a claim for any such remedy. The Claimants have made claims for damages. I am persuaded therefore, that the court has power to award damages or compensation to the Claimants in the circumstances. I do not consider however, that mere particularization of the damages is adequate. I would think that the principle behind an award of damages even in public law proceedings is restitutio in integrum and accordingly the amount to be awarded must be properly assessed upon proof of loss directly flowing from the unlawful action.

Conclusion

[40] Based upon the foregoing, I find the following:

- (i) The right of the Claimants to reside in their properties and have free and unhindered access thereto as guaranteed by section 62 of the Constitution, has

been breached by the First Defendant and the Declaration sought by the Claimants is hereby granted.

- (ii) There has been no breach by the First Defendant of the Claimants' right to protection from inhuman or degrading treatment as guaranteed by section 54(1) of the Constitution and the Declaration sought by the Claimants is accordingly refused.
- (iii) The First Defendant has not breached the Claimants' right to protection from deprivation of their property as guaranteed by section 64 of the Constitution and accordingly the Declaration sought to this effect is also refused.
- (iv) Regulations 10 and 13 of the Emergency Powers Regulations 1996 (No. 26 of 1996) are not unconstitutional or invalid to the extent that they breach constitutional rights, nor are they invalid by virtue of violation of the doctrines of separation of powers or of legal certainty. Regulation 5 (2) however is invalid to the extent it breaches constitutional rights specifically section 62 and runs afoul of the test of reasonableness as required under section 65 of the Constitution.
- (v) The Emergency Powers Order (No.49 of 2002) is not null and void as contravening Section 23 of the Interpretation Act. Accordingly the Declaration sought to this effect is refused.

[41] It is further ordered damages be paid to the Claimants in respect of the breach by the First Defendant of section 62 of the Constitution, the amount to be determined by assessment.

[42] I make no order as to costs.

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Janice M. George-Creque
High Court Judge