

**TERRITORY OF MONTSERRAT**

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE**

Claim No MNIHCV2014/0037

**In the Matter of the Montserrat Constitution Order 2010 Section 17 (1)**

And

**In the Matter of S.R.O. 41 of 2014**

Between:

**JOHN ROSEVELT LEE**

Claimant

and

[1] **DIRECTOR GENERAL OF MONTSERRAT CUSTOMS  
& REVENUE SERVICE**

[2] **THE HON. ATTORNEY GENERAL**

Defendants

Appearances

Mr Sylvester Carrott for the Claimant

Ms Amelia Daley for the Defendants

.....  
2015: September 28; October 8; 15

2016: February 10  
.....

**JUDGMENT**

**INTRODUCTORY AND BACKGROUND**

[1] **LANNS, J.** [Ag]: By a Fixed Date Claim Form and statement of claim dated 16<sup>th</sup> October 2014, the Claimant, Mr John Rosevelt Lee (Mr Lee) brought an action against the Director General of

Montserrat Customs & Revenue Service ("the Director General, MCRS) and the Attorney General seeking (1) a declaration that the continuing failure of the Government of Montserrat to grant him an exemption in accordance with Statutory Rule and Order 41 of 2014; (S.R.& O.41 of 2014); alternatively, in accordance with its predecessor rules and orders, on goods imported by Mr Lee as a returning Montserratian, is unlawful, and a breach of Mr Lee's rights under section 17(1) of the Montserrat Constitution Order 2010; (2) An order compelling the Government of Montserrat to grant the said exemption and to procure payment forthwith; or alternatively, reimburse Mr Lee with duties which he has paid on such goods which are exempt in accordance with SRO 41 of 2014, and or its predecessor statutory rules and orders; (3) An order compelling the Director General, MCRS to procure payment forthwith to Mr Lee of all sums due to Mr Lee in the amount of \$57,089.80; (4) Damages for breach of Mr Lee's constitutional rights; (5) Interest; and (6) Costs.

[2] During the period 2002 and 2014, the Government of Montserrat passed a number of Statutory Rules and Orders (SR&Os) under which Montserrat nationals who have resided outside of Montserrat for five years or more, and are returning to reside on Montserrat with the intention of remaining there permanently, are to be exempted from paying customs duties and consumption tax on the importation of certain specified items. The SR&Os contain conditions under which Montserrat Nationals might be entitled to, or be granted exemptions. Those conditions, with minor exceptions are basically the same.

[3] Mr Lee lived outside of Montserrat for five years until the 26th November 2012. During the period 8th August 2011 to 27th November 2012, Mr Lee imported certain items on which he paid customs duties and consumption taxes. Subsequently, he sought, to get a refund of the duties and taxes paid in respect of those items. His request for a refund was apparently discussed among government officials in the former Administration, and based on those discussions, it was agreed that Mr Lee was entitled to a refund, and a discretionary SR&O was to be prepared in order for him to be refunded. Correspondence passed between Mr Lee and the Director General, MCRS, and between Mr Lee's legal representative and the Director General, MRCS, but no positive word was

forthcoming from the Director General, MCRS. Although he seemed to have been part of the initial discussions, he seemed to have taken a different view as to Mr Lee's entitlement to a refund. As far as the Director General was concerned, Mr Lee was not entitled to a refund. He said that he had already provided Mr Lee with a response to that effect. Further, he was not of the view that Mr Lee's legal representative had provided any ground for the request he had made of the Director General in his letter of 30th June 2014, that the Director General furnish him with documents pertaining to Mr Lee's request for exemption. Case closed, the Director General stated. Against that background, the claim herein for a declaration and other reliefs for alleged breach of Mr Lee's constitutional rights, resulted.

### **THE CLAIMANT'S CASE**

[4] Mr Lee's case is that he is a Montserratian by birth. Prior to February 2007, he was "a permanent resident in Montserrat", working for the Montserrat Fire & Rescue Service. In February 2007, he moved to Afghanistan where he worked as a water purification supervisor. He returned to permanently reside in Montserrat on the 26th November 2012. Prior to his return to Montserrat, he imported a motor vehicle and a number of goods in connection with the construction of his home. He filled in forms to claim exemption on those goods, since he was advised that as a returning resident, he was entitled to claim such exemption. He was interviewed by one Mr Terrod Chalmers of the MCRS in connection with his claim, and was led to believe that he qualified for exemption as a returning resident.

[5] By letters dated 10th December 2012 and 12th February 2014, he formally requested a refund of the import duties paid in relation to the goods imported. He met and held discussions with a number of government officials, as well as the former Premier Mr Reuben Meade concerning his right to be granted an exemption and a refund of the duties he paid. Some government officials agreed that he was entitled to a refund, but the government did not have sufficient funds at the time to reimburse Mr Lee. Mr Lee avers that his claim falls under SRO 41 of 2014, but the Director, MCRS has failed to make the refund of the sum of \$57,089.80.

[6] By a further letter dated the 30th June 2014, Mr Lee's legal practitioner Mr Sylvester Carrott (Mr Carrott) wrote to the Director General, MCRS requesting copies of all correspondence in connection with Mr Lee's claim to an exemption, and all copies of his application for an exemption, and interview notes. The Director General, by letter dated the 22nd July 2014 replied stating that he was unable to accede to the request, since Mr Lee has not put forward any grounds upon which the application can be acceded to, and the records show that the matter had been attended to and was now closed. Mr Lee says that the continued failure to grant the exemption in accordance with the law amounts to a breach of his rights under section 17 (1) of the Constitution. Hence, he seeks redress for the alleged breach.

[7] Mr Lee has exhibited copies of correspondence passed between him and or his lawyer and various government officials including; (a) the Financial Secretary Mr John R. Skerritt; (Mr Skerritt); (b) the Director General, MCRS, Mr Peter .W.A. Whyte. Also exhibited is a list/description of items imported during the period 15th November 2011 and 27th November 2012, showing the date imported. Beside each item is the amount paid as customs duties and consumption taxes.

### **THE DEFENDANTS' CASE**

[8] The defendants' case (as put forward in the affidavit of the Director General, MCRS in response to the Fixed Date Claim, and that of Mr Chalmers,) is that on the 18<sup>th</sup> December 2012, Mr Lee applied for duty concession for the import of a number of items under SR&Os 51 of 2002 and 52 of 2002. An interview was held with Mr Lee on the 18<sup>th</sup> December 2012, by Senior Customs Officer Mr Terrod Chalmers. Mr Chalmers has denied that he made any representation to Mr Lee that he (Mr Lee) qualified for exemption on items he imported prior to returning to Montserrat.

[9] The Director General, MCRS admits that on the 13<sup>th</sup> February 2013, his Department received a letter dated 12th February 2014 (with attachments) from Mr Lee requesting a refund of monies paid on items he imported during the period 15th November 2011 and 27th November 2012 under SR&Os

51 of 2002 and 43 of 2011. The Director General pointed out that Mr Lee clearly stated that he imported the items prior to his return in November 2012. He asserts that the items list and the customs declarations support the defendants' case that the items were imported prior to Mr Lee's return to Montserrat, and prior to his application for exemption. The Director General, MCRS acknowledged that on the 19<sup>th</sup> March 2014, he wrote to Mr Lee informing him that the MCRS was unable to grant his request because the subject items were imported into Montserrat before he applied for, and was formally approved as a qualified returning Montserratian in accordance with SR&O 51 of 2002. According to the Director General, MCRS, Mr Lee was also informed that he could not seek a concession under the provisions of SR&O 43 of 2011 because he had not satisfied the conditions laid out therein. A copy of the letter of 19<sup>th</sup> March 2014 is exhibited.

[10] The Director General accepted that the MCRS received a letter from Mr Lee's legal representative, Mr Carrott requesting certain documents and information in connection with the claim for a refund. He disclosed his response to that letter, which is in accord with the version given by Mr Lee.

[11] As far as the defendants are concerned, Mr Lee does not qualify for an exemption under SR&O 41 of 2014 because, like under SR&O 51 of 2002, an applicant must have first returned to reside in Montserrat, and has made the application for the exemption, and has been approved for such exemption, before importing the items. Based on those contentions, the defendants deny that the MCRS, its officers and the Government of Montserrat breached Mr Lee's rights under section 17 (1) of the Montserrat Constitution Order 2010. The Defendants further deny that Mr Lee is entitled to any exemption, or to a refund of monies that were legally paid as duty on the items imported prior to his return to Montserrat, and prior to him making an application for exemption.

## **ISSUES**

[12] The issues which fall for determination are:

1. Whether, in view of (a) the issues arising on the pleadings, (b) the facts in dispute and the undisputed facts shown in the affidavits of the affiants, and elicited in cross examination, Mr Lee is entitled to an exemption or refund under SR&O 41 of 2014 or any of its predecessor SR&Os (51 of 2002; 52 of 2002 and 43 of 2011) and a reimbursement of the duties allegedly paid in the amount of \$57,089.80 in respect of items imported into Montserrat during 15th November 2011 and 26th November 2012.
2. If Mr Lee is entitled to customs duty exemption in relation to the items so imported, whether the failure to grant a customs duty exemption or refund of customs duty amounts to the breach of Mr Lee's constitutional right under section 17 (1) of the Montserrat Constitution Order 2010, not to be deprived of property.
3. Whether Mr Lee's resort to a constitutional motion amounts to an abuse of process in light of the availability of alternative remedies.

**IS MR LEE ENTITLED TO AN EXEMPTION UNDER SR&O 41 OF 2014; OR SR&O 43 OF 2011; OR SR&O 52 OF 2002; OR SR&O 51 OF 2002; AND A REFUND OF MONIES PAID IN RESPECT OF GOODS IMPORTED INTO MONTSERRAT BETWEEN THE PERIOD 15TH NOVEMBER 2011 AND 27TH NOVEMBER 2012?**

Mr Carrott's position on issue 1

[13] In summary, learned counsel Mr Carrott grounded his submissions on the following points:

- 1) Mr Lee is entitled to an exemption under SR&O 41 of 2014 and its predecessor SR&Os and as such, he is entitled to a refund of the duties paid on the goods

- 2) There is nothing in the SR&Os which supports the Director General's contentions that an applicant must apply before he returns to Montserrat; or that an applicant can only apply upon his return to Montserrat.
- 3) None of the SR&Os dictate the manner in which an application for an exemption is to be made. The claimant applied by letter dated 10th December 2012 for a refund. The evidence of Mr Reuben Meade makes it clear that there is nothing unusual about Mr Lee's case because other Montserratians have found themselves in the very same position as Mr Lee and have been granted a refund/exemption. Mr Meade gave evidence that the Government of Montserrat agreed that Mr Lee was entitled to payment, but the Government just did not have the funds at the time.
- 4) The SR&Os contemplate that an application can be made before or after a resident has returned.
- 5) The key concept in the SR&Os is the concept of returning resident. Once an applicant has demonstrated an intention to return, it follows that subject to the goods falling into the requisite category, an exemption or refund should follow.
- 6) Whereas SR&O 43 of 2011 requires as a condition certification by the Director of Public Works that the quantities qualify for exemption, the responsibility for certification rests with the Director General, MCRS alone.
- 7) The provisions of SR&O 41 of 2014 (which came into force on the 26th June 2014) are retrospective. Mr Lee's application was made in 2012 when he wrote to the Financial Secretary, and in February 2014 when he wrote to the Director General, MCRS. The Director General's letter in response was to frustrate any attempt by the claimant to obtain an exemption to which he was entitled, and this attempt represents an infringement of the

claimant's constitutional rights. There is nothing before the court other than the unwillingness of the defendants to grant a refund, to explain why Mr Lee has not been granted a refund. Section 77 of the Customs (Control and Management Act Cap 17.04 should not be invoked in circumstances where an SRO exists which allows for an exemption or refund.

- 8) It is unbelievable that the defendants can say that no application has been made, or that Mr Lee is not a returning resident simply for the sake of refusing payment.

The defendants' position on issue 1.

[14] In summary, learned counsel Ms Daley grounded her submissions on the following points:

- 1) At the time the items in question were imported, the claimant did not qualify for an exemption under SR&O 41 of 2014; nor SR&Os 52 of 2002 and 43 of 2011. Therefore, he is not entitled to a refund of the customs duties paid on the items imported.
- 2) In accordance with Sections 3 and 5 of the Customs Duty and Consumption Tax Act, Cap 17.05, all goods imported into Montserrat must be subject to the payment of import duties.
- 3) The fact that an Order granting exemption has been passed, does not afford a person an automatic right to be granted an exemption from payment of Customs Duties under that Order. The exemption Order affords a category of persons the opportunity to apply for the exemption. If a person wishes to import goods under an exemption Order, he or she must first apply for the exemption; the relevant authority must determine whether or not the applicant meets the statutory requirements for the exemption; if the applicant meets the statutory requirement, then the exemption would be granted. The goods would then be imported under the exemption order. The unchallenged evidence of Mr Reuben Meade, a former Premier and Minister of Finance supports this contention.



- 4) SR&O 41 of 2014 and its predecessor SR&Os all have the requirement that in order to qualify for an exemption, a Montserrat national must have resided outside of Montserrat for a period of five years or more, and return to Montserrat to reside with the intention of remaining in Montserrat permanently in order to import the items set out in the Schedule free of customs duties and consumption tax; and may import into, or purchase a motor vehicle in Montserrat free of customs duties and consumption tax.
  
- 5) The claimant has deposed that he moved to Afghanistan in February 2007 and returned to reside in Montserrat in November 2012. The items for which the claimant is claiming exemption were all imported during the period November 2011 to November 2012. By his own admission as contained in his letter to the Financial Secretary dated the 10th December 2012, the claimant had not returned to reside permanently in Montserrat until the 26th November 2012, and he deposed that shortly before his return he had imported a motor vehicle and a number of goods in connection with the construction of his home. These representations confirm that the items imported prior to his return do not fall under the exemption orders.
  
- 6) An individual seeking an exemption must have, among other things, fulfilled the requirement of having returned to reside in Montserrat with the intention of remaining there permanently in order to qualify for the exemption. At the time the goods were imported, the claimant had not applied for, and had not been granted any customs duty exemption under any of the Returning Montserratian Exemption Orders.
  
- 7) The claimant's itemized list shows that items 1 and 2 were imported before the claimant reached the 5 year period stipulated for being resident outside Montserrat, and on that basis alone, those items would have been automatically disqualified for exemption.

- 8) Items 3 to 13 were all imported prior to the claimant's return date of 26th November 2012 and hence, would also be disqualified based on the requirements of the Returning Montserratian Exemption Orders.
- 9) Only item number 14 was imported after the 26th November 2012, (that is the 27th November 2012) and that too would have been disqualified, because, at that time, no exemption had been applied for or received.
- 10) As the claimant had not applied for, or received an exemption from the payment of customs duties before he imported the goods, the customs duties were lawfully collected, and he cannot now claim entitlement to an exemption retroactively, or entitlement to a refund of import duties legally paid. The requirements of the SR&Os are not applicable retroactively. The customs duties were legally paid on the imports in accordance with the provisions of the Customs Duties and Consumption Tax Act, Cap 17.05. The letter of 10th December 2012 was not an application for a refund on payment of customs duties. It was simply a letter addressed to the Financial Secretary to which an itemized list of imported goods is attached.
- 11) The only means by which a person can be granted a refund on the payment of customs duties, is if the Governor, on the advice of the Cabinet, has taken a decision to grant a refund. As no such decision has been taken, there is no basis upon which the claimant could be paid, or be entitled to a refund of the duties lawfully paid. Additionally, as the statute prescribes the competent authority, and vests the decision making power to grant a refund in the Governor, the relief sought by the claimant for an order granting an exemption and or a reimbursement of the duties paid, is not one which the court can grant.

## **THE SR&Os**

(i) SR&O 51 of 2002

[15] SR&O 51 of 2002, regulations 2 and 3 are in the following terms:

"Exemption (1). A citizen of Montserrat and any believer of Montserrat who has been resident for a period of not less than five years out of the island, and returns to reside in Montserrat with the intention of remaining there permanently may import the items set out in the Schedule hereto free of Customs Duty and Consumption Tax." (Underline mine)

"(2) The person granted an exemption under paragraph (1) above may also import or purchase a motor vehicle locally free from Customs Duty and Consumption Tax."

'LIMITATIONS: (1) The exemption granted by regulation 2 ... shall be limited to an individual or a household to be availed by him within three months of his or her return. ...

(2) In case of any doubt as to a person's entitlement, the decision of the Comptroller shall be final. ..."

"3. CONDITIONS: (1) The following conditions shall apply to the exemptions that may be granted under these regulations -

(a) No person or member of any household to whom this exemption has been granted may apply for or be granted the same or similar exemption thereafter;

(b) If any item imported under an exemption granted under these regulations is sold or commercially exchanged within a period of five years from the date of the exemption, Customs Service Tax

waived under this exemption shall become due and payable on that item to the Comptroller of Customs;

- (c) Any person who, as an individual or as head of a household, is granted an exemption under these regulations who thereafter, within five years of the grant of the exemption, leaves Montserrat and resides abroad for a continuous period in excess of three months shall become liable to pay Customs Service Tax duties waived under the exemption to the Comptroller of Customs."

"(2) The Governor-in-Council may, however, in any particular case waive the liability arising under paragraph (b) or (c)."

(ii) SR&O 52 of 2002

[16] Regulations 2 and 3 of SR&O 52 of 2002 are in similar terms as SR&O 51 of 2002 save and except that Regulation 2 removes the payment of Customs Service Tax on items set out in the Schedule, in respect of persons who are exempted from paying Customs Duty and Consumption Tax on those items. The Customs Service Charge (Exemption) Order, 1994, (No 25 of 1994), is expressly repealed by SR&O 52 of 2002.

(iii) SR&O 43 of 2011

[17] Regulations 3, 4 and 5 of SR&O 43 of 2011 are the crucial regulations. By Regulation 3: "A Montserratian national is exempt from payment of customs duties and consumption tax on ... (a) construction material, and (b) building supplies and furnishings, intended for use in the construction of a family home owned by him or her." A "Montserratian national is defined in Regulation 2 as meaning:

"(a) A Montserratian by birth, descent, registration or naturalisation, who is returning to Montserrat to resettle or has resided on Montserrat for the last three years after a period of five years or more abroad;  
(Underline mine)

(b) An adult Montserratian by descent who has never lived in Montserrat; or

(c) A Montserratian by birth, descent, registration or naturalisation who is living abroad."

Regulation 4 sets out the conditions which apply to the exemptions on construction material, building supplies and furnishings:

(a) The exemptions shall be granted only once.

(b) The Montserrat national must contribute 100% of his or her own funds from income wholly generated abroad in the construction of the family home.

(c) The quantities that qualify for exemption must be certified by the Director of Public Works.

(d) Items qualifying for an exemption under this order must not be sold or transferred to any person.

(e) The applicable customs duties and consumption tax on items sold or transferred to any person will be recoverable from the person to whom the exemption was granted, by the Director General, MCRS.

(f) A list of the items for which the exemption is sought must be presented at the time of application for the exemption. (Underline mine).

Regulation 5 addresses the duration of the Order. It provides that "The exemption will expire at the end of five years from the date of publication of this Order." The Order was published on the 23rd September 2011.

(iv) SR&O 41 of 2014

[18] Mr Lee's claim is based primarily on SR&O 41 of 2014 which was made by the Governor on the 26th June 2014 and published on the 31st July 2014. Regulation 2 of SR&O 41 of 2014 reads in part:

## "2. Exemption

- (1) A Montserratian who has resided outside of Montserrat for a period of five years or more; and returns to Montserrat to reside with the intention of remaining in Montserrat permanently may--
  - (a) import the items set out in the Schedule free of customs duties and consumption tax; and
  - (b) import into or purchase a motor vehicle in Montserrat free of customs duties and consumption tax. (Underline mine).
- (2) A Montserratian who qualifies for an exemption under subparagraph (1) shall not be eligible for an exemption on the expiration of three years after his return to Montserrat." (Underline mine)
- (3). A Montserratian who --
  - (a) has resided outside of Montserrat for a period of five years or more; and
  - (b) returned to Montserrat during the period 1 January 2011 to 11 March 2013 to reside with the intention of remaining in Montserrat permanently, may import the items set out in the Schedule, or import into, or purchase in Montserrat a motor vehicle free of customs duties and consumption tax.
- (4) A Montserratian who qualifies for an exemption under subparagraph (3) shall not be eligible for an exemption after December 2014.

(5) A grantee of an exemption under subparagraph (1) or (3) shall pay processing fees on the first \$50,000 of the value of the items set out in the Schedule and is exempted from the payment of any further processing fee.

(6). A grantee of an exemption under subparagraph (1) or (3) shall pay processing fees on the first \$50,000 of the value of a motor vehicle imported into or purchased in Montserrat and is exempted from the payment of any further processing fee."

3. "LIMITATION.

(1) An application for an exemption made under paragraph 2 may be made to the Comptroller of Customs and Excise ... "

"4. CONDITIONS"

[19] Regulation 4 stipulates the conditions which apply in granting exemptions under regulation 2 of SR&O 41 of 2014. It reads in part:

"... (a) a grantee of an exemption shall not subsequently be granted the same exemption under this Order; (b) a grantee of an exemption who within five years from the date of the exemption sells or commercially exchange an item imported or purchased under the exemption shall pay to the Comptroller of Customs and Exercise all taxes and duties waived under the exemption; (c) a grantee of an exemption who, within five years of the grant of the exemption, leaves Montserrat and resides outside Montserrat for a continuous period in excess of one year shall pay to the Comptroller of customs and Excise all taxes and duties waived under the exemption."

### INTERPRETING THE SR&OS

[20] I read SR&O 41 of 2014, regulation 2 (1) as having this effect: An individual, to qualify, or to be eligible for an exemption from the payment of customs duties and consumption tax, has to show the Director General, MCRS, (a) that he is a Montserratian; (b) that he resided outside of Montserrat for

five years or more; (c) that he has returned to Montserrat to reside; and that he intends to remain in Montserrat permanently, and a list of the items for which the exemption is sought, must accompany the application for the exemption.

[21] It is observed that there is a difference in Regulation 2(1) and Regulation 2(3) (b) in that Regulation 2(3)(b) refers to Montserrat nationals who return to reside in Montserrat permanently during a specific time period. Accordingly, under regulation 2 (3) (b), an individual may be permitted to import certain specified items and a motor vehicle if he or she establishes (a) that he is a Montserrat national; (b) that he/she resided outside of Montserrat for five years or more; (c) that he/she returned to Montserrat during the period 1st January 2011 to the 11th March 2013 to reside, and intends to reside permanently, or for the rest of his/her life. As I see it, the language in Regulation 2(3) (b) is similar to that in Regulation 2(1) except that Regulation 2 (3)(b) looks backwards, and extends to a certain category of Montserratians, being those Montserrat nationals who had returned to Montserrat during the period 1st January 2011 and 11th March 2013.

Retroactivity/Retrospectivity: The application of the SROs

[22] In their written submissions, counsel used the words 'retrospective' and 'retroactive' - Mr Carrott submitting that "the provisions of SR&O 41 of 2014 ... are retrospective." And counsel Ms Daley submitting that "the requirements of the SR&Os are not applicable retroactively. ... Mr Lee cannot claim entitlement to an exemption retroactively. ..." Additionally, the Director General, MCRCs also in his letter to Mr Lee dated 19th March 2014 used the word 'retroactive' when he stated: "The provisions of the regulations that govern the programme are not retroactive. ..."

[23] Although there is abundant case law on retrospective and retroactive legislation, no authorities were cited by counsel on the principles pertaining to same, and counsel never elaborate on, or canvass the rules of statutory interpretation before me. Suffice it to say that my research revealed, among other things that according to the general rule of statutory interpretation, no statute or order is to be given retroactive effect unless its language clearly requires it to be treated in that way (**Gardener v Cone** (1927) Ch 955 at 967.); **Gustavson Drilling (1964) Ltd v Minister of National Revenue**, [1977] 1,



S.C.R. 271. Neither the **Customs (Control and Management) Act** Cap 17.04, nor the Orders/Regulations made under it, contain any express provision for retrospectivity or retroactivity. However, it would appear from the language of Regulation 2(3) (b) of SR&O 41 of 2014 that retrospective/retroactive effect is impliedly given to Regulation 2 (3)(b) in order to allow Montserrat nationals who returned during the period 1st January 2011 to 11th March 2013 to live permanently, to import items and be eligible for consideration for exemption from such items imported by them under the Regulation. Indeed, that is what I understood counsel Mr Carrott to be saying. It mattered not to counsel that SR&O 41 of 2014 came into force on the 26th June 2014, or published 31st July 2014, about two years after Mr Lee's return, and after his importation of the items in question, and after his application for refund was made. As far as counsel was concerned, Mr Lee had accrued a legal right to an exemption and or to a refund before the Regulation came into force because he is a Montserrat national who returned to Montserrat on the 26th November 2012, and he made his application for refund on 10th December 2012 and in February 2014; and he requested of the Director General, MCRS a refund of duties paid on items he imported during the period covered by Regulation 2(3) (b) of SR&O 41 of 2014; and he wrote to the Director General MCRS during the time SR&O 41 of 2014 was in force. That is my understanding of the submissions advanced by Mr Carrott on this aspect of the case. It is\_\_ perplexing that one can have accrued/acquired a legal right to an exemption under an Act or Order before that Act/Order comes into force.

[24] Coming back to the retrospectivity/retroactivity point/issue. A review of the authorities concerning the principles of statutory interpretation further reveals that there is a distinction between retroactive and retrospective legislation, but there is a school of thought which opines that the distinction is not clearly understood and leads to confusion. Thus, in the case of **Benner v Canada (Secretary of State)**, 1997, Canlii 376 (SCC), [1977] S.C.R. 358, (which considered an appeal involving constitutional law), the court, in considering the difference between retroactivity and retrospectivity wrote:

"The distinction between "retroactivity" and "retrospectivity" while frequently used in relation to statutory construction can be confusing. E.A. Dredger, in "Statutes: Retroactive Retrospective

Reflections" (1978), 56 Can Bar Rev 264 at pp.268-269 has offered these concise definitions which I find helpful:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would have been with respect to a prior event."

[25] I must honestly say that I am no more enlightened, but perhaps more confused as to whether this definition/distinction applies to the interpretation of SRO 41 of 2014 upon which Mr Lee's claim is based primarily. However, Regulation 2(3)(b) seems to be consistent with the definition of retrospective and retroactive. As I see it, based on the distinction advanced by Dredger, whereas Regulation 2 (1) of SRO 41 of 2014 is prospective, Regulation 2 (3) (b) of SRO 41 of 2014 is perhaps both retroactive and retrospective in its operation. Cases which adopt the distinction, accept that retroactive legislation refers to legislation that changes past effects of past situations. In contrast, retrospective legislation changes the future effects of past situations. Since Mr Lee is a Montserratian who returned home during the period 1st January 2011 and 11th March 2013, he seems to have been entitled to claim an exemption on items in the Schedule. And adopting the definition of retrospectivity, I am of the view that the effect of Regulation 2 (3) (b) of SR&O 41 of 2014, is to confer on Montserratians who returned during the period 1st January 2011 and 11th March 2013 entitlement to claim an exemption or refund on items that were imported by them during the period 1st January 2011 and 11th March 2013; and or before that period. In other words, Regulation 2 (3) (b) operates with respect to transactions or events occurring prior to its enactment; in this case, the return of Mr Lee on the 26th November 2012 and the importation of items prior to his return. If I am right, the duties paid by Mr Lee would have been refundable, once Mr Lee had acquired the status of a Montserrat national within the meaning of the

SR&Os, and Regulation 2 (3) (b) would not have precluded him from claiming an exemption or refund in respect of the items imported during the period 1st January 2011 and the 11th March 2013. The arguments of the defendants tend to ignore the effect of Regulation 2 (3)(b), perhaps because it was not in existence when the goods were imported or when the application for exemption/refund was made. They do not accept that SR&O 41 of 2014 applies to Mr Lee's situation. If in fact SR&O is inapplicable to Mr Lee's situation, his recourse is to the predecessor SR&Os. Indeed, those are the alternate SR&Os on which Mr Lee relies to base his claim to exemption/refund and for constitutional redress.

#### Are the exemptions automatic under the predecessor SR&Os?

[26] It appears to me, from a reading of SR&O 43 of 2011, that exemptions under that SR&O are automatic, based on the use of the words "is exempt" Yet that SR&O stipulates conditions which the Director General say have not been met, and thus, Mr Lee was not entitled to a refund. The conditions in SR&O 43 of 2011 seem to create an ambiguity which must be resolved by resorting to the purpose of the SR&O and the intendment of Parliament.

[27] As regard the other SR&Os, exemptions under them do not appear to be automatic, based on the language used, and the qualifications/limitations/requirements/conditions which the SR&Os effected at the same time. Accordingly, these SR&Os should not be looked upon purely as conferring an entitlement or a right to an exemption or refund. The entitlement is subject to the fulfillment the conditions, limitations., requirements. Part of the limitations is the requirement for an application.

#### Requirement for an application

[28] By Regulation 3 of SR&O 41 of 2014, a returning Montserrat national or an individual who is part of a household is required to apply for an exemption to the Comptroller of Customs and Exercise.

The Regulation is silent as to when the application must be made, it does not prescribe the form in which it is to be made, but it specifies to whom it is to be made. Both counsel laid much stress on the application, Mr Carrott submitting that Mr Lee first made an application on the 10th December 2012

when he wrote to Mr Skerritt, the Financial Secretary informing that he had moved to Afghanistan in February 2007 "until November 26, 2012". Clearly, the letter to the Financial Secretary was not worded as an application for a refund. It did not say expressly that Mr Lee was invoking the provisions of any of the SR&Os that were in force at the time; or that Mr Lee had returned to permanently to reside in Montserrat, nor did it say expressly that he was making an application for a refund, although a list of the items he had imported prior to this return, was appended. Counsel Ms Daley was of the view that the letter was not an application for a refund. It was simply a letter to the Financial Secretary, she opined. Mr Carrott does not agree. He says it was a formal application which was not refused, but the government just did not have the money. Ms Daley laid no store on the fact that Mr Lee in paragraph 6 of his affidavit filed on the 16th October 2014, said "I formally claimed a refund on 10th December 2012." Mr Lee could only be referring to the letter dated 10th December 2012 that he addressed to the Financial Secretary, from which discussions ensued.

[29] In any event, even if that letter was intended to be an application for a refund, (which I think it could have been treated as) it pre-dated coming into force of SR&O 41 of 2014. It could only have been treated as an application under the SR&Os that were in force at the time. So the question remains, in these circumstances, can Mr Lee have had recourse to SR&O 41 of 2014 to claim a refund for the subject goods?

[30] In my view, even he could, his eligibility for the exemption/refund on the items in question could only have kicked in and crystallised on or after the 26th June 2014, the date when SR&O 41 of 2014 actually came into force. As previously stated, his letter of application to the Director, MCRS in respect of the items in question pre-dated the coming into force of SR&O 41 of 2014. Mr Carrott was no doubt aware of that, hence, his letter to the Director General, MCRS post 26th June 2014, i.e. 30th December 2014 after SR&O 41 of 2014 came into force. The question is, did that letter constitute a request for refund by virtue of SR&O 41 of 2014? I think not, although it referenced the Director General's letter to Mr Lee dated 19th March 2014. It might have been preferable for Mr Lee to have gone further and renew his application to bring it under SR&O 41 of 2014. Or he could ask that his

prior letter of application for a refund, be considered as an application under SR&O 41 of 2014. He did no such thing. So I fail to see on what basis he can rely on SR&O 41 of 2014 when he made no application under it.

[31] So far as the record discloses, on the 13th February 2013, by letter dated the 12th February 2013, Mr Lee made an application to the Director, MCRS for a refund in respect of items he imported during the period 15th November 2011 to 27th November 2012. The Defendants contend, and it is apparent that at the time the items were imported, no application was made and no exemption was granted. Indeed, they say that in order to be exempted, Mr Lee must have returned, apply for the exemption and import the items under the exemption order granted.

[32] The difficulty with the submission of the defendants is that there is nothing in the SR&Os which supports the Defendants' contentions that an applicant must apply before he returns to Montserrat; to reside, or that an applicant can only apply upon his return to Montserrat. It is perhaps worthy of note in this context, and at this juncture that it seemed there were other items imported by Mr Lee before an application or a claim for the exemption was made, and the exemption was granted in respect of those items, which goes to show that the implementation of the SR&Os is inconsistent.

#### The effect of the conditions under the SR&Os

[33] By incorporating conditions, Parliament sought to protect the Returning Montserrat Nationals Programme from abuse. Returning nationals who meet the criteria are prohibited from claiming the concessions more than once. Goods or property which are the subject of the concessions are barred from resale or redistribution as gifts or otherwise. Failure to satisfy these requirements may result in the duties and taxes waived becoming payable, and vehicles may be seized by the Director General, MCRS. As regards SR&O 43 of 2011, a condition precedent to exemption is certification by the Director of Public Works that the goods qualify for exemption.

[34] The Director General, MCRS, in his replying letter to Mr Lee dated the 19th March 2014 drew Mr Lee's attention to the conditions laid out in SR&O 43 of 2011, and suggested in effect (1) that Mr Lee cannot benefit under the programme unless he had satisfied the conditions laid out in the SR&Os and he had not done so; (2) that the building items for which he was claiming a refund were imported prior to his return to Montserrat, and thus, he cannot obtain a refund on those items. Mr Carrott seemed not to appreciate that there were conditions to be satisfied, and that entitlement to exemption arises upon fulfillment of certain conditions. He argues that the test is not to look at the conditions, but to look at the purpose for which the SR&Os were promulgated. He contended that the purpose was to encourage nationals to return home to rebuild the country. I make the observation that the critical conditions in SR&O 43 of 2011 are mandatory and not directory in that the words 'shall' and 'must' are used. It means that unless Mr Lee would have satisfied the conditions set forth under the SR&Os, he would not qualify for exemption, even though the SR&O 43 of 2011 seems to have automatically exempted him. As said before, the Director General contends that Mr Lee did not meet the stipulated conditions. The Director General did not specify which conditions were not satisfied. However, the letter seems to suggest that none of the conditions under SR&O 43 of 2011 were satisfied. Indeed, there is no document on file which fulfills the requirement of certification by the Director of Public Works.

[35] That said, in my judgment, the fact that the letter to the Financial Secretary was acted upon by Government Officials (who are part of the Cabinet), and resulted in discussions, among those officials, and a decision that Mr Lee was entitled to a refund, and was told same all along, suggests to me that the stipulated conditions under SR&O 43 of 2011 were impliedly waived, and the path was clear for the refund to be made possibly by installments, as it was represented to Mr Lee that the government had insufficient funds at the time to make a lump sum payment.

[36] From my reading of the SR&Os, it is observed that a common thread runs through them, that is, entitlement (after application) to exemptions offered to Montserrat nationals (subject to conditions) from

payment of custom duties and consumption taxes on specific items including personal effects, furnishing and fittings for family home, construction materials, and in some cases a motor vehicle. .

[37] As previously suggested, the SR&Os contemplate that exemption is not automatic;<sup>1</sup> an application for exemption is required either before or after the importation of items, and will only be processed following resettlement, in some cases, or after the date of arrival in, or return to Montserrat to reside permanently.<sup>2</sup>

#### Designated Claim Forms and Interview

[38] The processing of applications by the MCRS seem to require completing of claim forms by the applicant, followed by an interview. It appears that it is at the interview stage that the applicant's eligibility for an exemption is established. It must be remembered that Mr Lee stated at paragraph 6 of his affidavit filed on the 16th October 2014, that at the interview, he was led to believe that he qualified for the exemption on the goods he imported before his return on the 26th November 2012.

[39] Mr Chalmers, who conducted the interview, filed an affidavit on the 14th May 2014. In it, he described himself as a Senior Customs Officer within the MCRS. He recounted, among other things the procedures adopted by the MCRS for the processing of applications for exemptions. He stated that on the 18th December 2012, he conducted an interview with Mr Lee. At the time of the interview, Mr Lee was in possession of an application for an exemption form which he had already filled in. The application form was in relation to duty free exemption in respect of items Mr Lee intended to import, and also for items he had in the cargo shed at the time. On completion of the interview, he concluded that Mr Lee qualified for the exemption sought on those items. Mr Lee then read over the application and confirmed that he understood the terms of SR&Os 51 and 52, then he signed the application

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<sup>1</sup> But see SR&O 43 of 2011 which seems to suggest that exemption under that SR&O is automatic by the use of the words "is exempt"

<sup>2</sup> (See SR&O 41 of 2014 which uses the words "and returns"; SR&O 43 of 2011 which uses the words "who is returning"; SR&O 51 of 2001 which uses the words "and returns"; and SR&O 52 of 2011 which uses the words "and returns")

form and he (Mr Chalmers) signed the form. The application form is before the court. I make the observation that it is headed as follows:

**"Customs & Excise Department**

**Application for Duty Free Concession for the import of household and personal effects and motor vehicles SR& O 51 & 52 /2002".**

[40] Following that heading is a note which reads:

**"(For guidance on how to complete this form and to see if you qualify please see notice "Duty Free Concessions for Returning Nationals - General Conditions") "**

[41] The form requires information to be inserted such as name and surname of the applicant, address, contact numbers, email, passport number, issuing authority, date of arrival to take up residence, date of departure from Montserrat to reside abroad. It also asks for details of vehicle, and household/personal effects. It also requires the name of the agent/broker and his/her contact telephone number. The form then requires a declaration to be completed and signed by the applicant. The declaration sets out the following statements:

- I declare that the information in this form is true and to the best of my information and belief.
- I have read the notice "Duty Free Concession for Returning Nationals -- General Conditions" and agree to abide by the restrictions on disposal of the goods listed on this form.
- I understand that there are severe penalties (including fines, imprisonment and seizure of the goods for making false declarations to Customs and for failing to abide by the conditions of this concession.

[42] The remainder of the document is for Customs use only. There is space for the date of the interview, time started, and time ended. There is a requirement for the relevant Customs officer to include



notes of documents produced to show residence overseas, and of permanent move to Montserrat, and notes of other relevant information. There is also space on the application form for the relevant Customs officer to state whether the application was approved/disapproved and the reason for the decision. Then there is a place for the signature of the officer(s) dealing with the application and interview. In the space provided for 'notes' and 'reasons for decision', it is handwritten as follows: "Mr Lee stated that he understands the terms and conditions of SR&O 51 & 52 and that he had no intention of relocating out of Montserrat in the near future."

[43] Mr Chalmers stated in his affidavit that he did not at any time during or after the interview make any representations to Mr Lee, or conceded that he qualified for exemption on the items he imported prior to him returning to Montserrat, or prior to him making the application for exemption; neither did he inform Mr Lee that he was entitled to a refund of the monies paid on those items as duty and consumption tax. This evidence was not challenged in cross examination, but Mr Lee in his replying affidavit refuted Mr Chalmers' assertion that he had no discussions with him at all in respect of the goods in question.

[44] It is to be noted that Mr Lee admitted that he received exemptions for the items that were in the cargo shed but waiting to be cleared, and those that arrived after his return. These items were referred to as the "**category 2 and category 3 items**". Mr Lee complained that he did not receive exemptions for the items that he shipped and were cleared prior to his return to Montserrat. These items Mr Carrott referred to as the "**category 1**" items and which are the subject of the dispute between the parties.

#### **DISCUSSION AND DECISION ON ISSUE NO 1**

[45] There is no dispute between the parties that Mr. Lee is a Montserrat national within the meaning of the SR&Os. And there is no dispute that he resided outside of Montserrat for five years and returned on the 26th November 2012 with the intention of remaining there permanently. There is also no dispute that the items for which a refund is sought were imported into Montserrat prior to Mr Lee's return to reside in Montserrat, and he paid duties and taxes on them. Indeed, by his own admission, the

items in dispute were shipped when Mr Lee "formed the specific intention" to return home to Montserrat. Where the parties part company is on the question of his purported entitlement to an exemption/refund in respect of the category 1 items -- those items that he imported before he met the requirement of residing outside of Montserrat for five years, and before he returned to reside in Montserrat on the 26th November 2012, and before he had applied for an exemption for, and granted an exemption order. Also, of importance is the issue as to whether Mr Lee could have recourse to SR&O 41 of 2014.

[46] In her written submissions, Ms Daley pointed to the itemized list and noted that items 1 and 2 were imported even before Mr Lee reached the five year period stipulated for being resident outside of Montserrat, and on that alone, those items would have been automatically disqualified for any exemption, counsel submitted.

[47] Items 3 - 13 submitted counsel, were all imported prior to Mr Lee's return on the 26th November 2012, and as such, would also be disqualified. Counsel further pointed out that item number 14 was the only item imported after the 26th November 2012, and that too would not have qualified for an exemption because at the time of importation, no exemption had been applied for or received. On those contentions, counsel maintained that the customs duties paid on those goods were lawfully paid and Mr Lee cannot now claim entitlement to an exemption.

[48] Based on the evidence as a whole, the court finds that on the 18th December 2012, Mr Lee presented at the MCRS, completed application form for exemption from payment of customs duties and consumption tax in relation to certain goods under SRO's 51 of 2002 and 52, and 43 of 2011. Those were the SR&Os that were in force at the material time. The completed application form was in relation to items that were in the cargo shed waiting to be cleared, and items that were pending importation. As was said before, Mr Carrott referred to them as the category 2 and category 3 goods. Exemptions were granted in relation to the category 2 and category 3 goods. I get the distinct impression that the category 2 items (those in the cargo shed) were imported prior to Mr Lee's

return. If I am right, then the question becomes, on what basis was Mr Lee granted exemption in relation to those goods. Was it because he completed the form of application designed as the application form for exemption concerning those goods; or was it because his interview was satisfactory?

[49] I also find, based on the list exhibited to the letter to Mr Skerritt and to the director General MCRS, that Mr Lee imported items 1 and 2 therein before he acquired the qualifying status of a Montserrat national within the meaning of SR&O 43 of 2011, as he had not yet lived abroad for five years. In those circumstances, I am in agreement with counsel Ms Daley that the duties and consumption tax paid on items 1 and 2 on that list, were legally paid, and thus, in my judgment, Mr Lee is not entitled to a refund in respect of those items.

[50] I do not accept the evidence of Mr Chalmers that he held no discussion with Mr Lee, or made any representations to Mr Lee, in relation to an exemption for items that he imported prior his return and for which no application for exemption had been made or granted. It is more likely than not that Mr Lee would have raised the question of an exemption in respect of those items, and Mr Chalmers promised to discuss it with his superiors; but did not revert. The interview lasted ten minutes. It could not be that it was simply to ask about Mr Lee's understanding of the terms of the SR&O 51 and 52 of 2002. The interview notes were scant.

[51] I accept Mr Lee's evidence that when Mr Chalmers did not revert, Mr Lee took it upon himself to hold informal discussions with certain government officials including the then Premier Mr Reuben Meade, the issue of a refund of monies paid in respect of the category 1 items. Mr Meade, (who was on vacation at the time) promised to address the matter on his return to office. According to Mr Meade, the issue at the time was not one of entitlement to an exemption or refund, it was one of insufficient funds at the time. Mr Meade stated in effect that he, along with those involved in processing Mr Lee's claim, was of the view that Mr Lee qualified for the exemption under SR&O 41 of 2014. Mr Meade stated further that the position which is now adopted by the Director, MCRS was not the position

which was adopted at the material time, and neither does it accord with the Government's then view, or his understanding of the SR&Os. Mr Meade in his affidavit, expressed surprise that the Director, MCRS has now taken a different view. It will be convenient to reproduce in their entirety, the contents of the concluding paragraphs of Mr Meade's affidavit:

"8. I can say that there are Montserratians who found themselves in the same circumstances as the Claimant who have been granted an exemption/refund and I cannot understand why it is that the Director General has in this case acted contrary to the clear meaning and spirit of the SROs. The overriding purpose of the SROs is to encourage Montserratians to return home and to remove the possible deterrent of additional taxation for those seeking to return home and contributing to the rebuilding of the country."

"9. The meaning and intent of the SROs is clear and I can confirm that notwithstanding a new Government, the intent and purpose of the SROs has not changed."

[52] It might have been preferable for Mr Meade to have said that notwithstanding any deficiency or irregularity if any in the procedures employed by Mr Lee, the intent and purpose of the SR&Os have not changed and should trump technicalities that would exclude Mr Lee from claiming an exemption/refund of duties and taxes paid. That said, it might have been helpful if Mr Meade had particularized his assertion that 'there are Montserratians who found themselves in the same circumstances'. Who are these Montserratians, and what were their factual circumstances? It might also have been helpful if Mr Meade had provided documentary proof to show that a decision had already been taken to grant a refund in respect of the category 1 items, e.g. a cabinet minute, a memo or intradepartmental minute/circular etc. However, under cross-examination, Mr Meade seemed to have clarified his deposition. He stated, in cross-examination that when there is an exemption Order, one does not get an exemption under that Order unless it is applied for. The application, he said, would normally be made before the goods are imported. I understand Mr Meade to be saying that the exemption is not automatic. It has to be applied for and once certain conditions have been satisfied, the exemption will be granted.

[53] There is evidence before the court which tend to corroborate Mr Meade's averment that a decision was in fact taken to refund Mr Lee. The evidence reveals that there were face to face discussions, email enquiries, telephone conversations, whatsapp messaging between Mrs Lindorna Brade, Acting Financial Secretary and Ms Marcelle Watts, a lawyer who was said to have been acting on behalf of Mr Carrott while he was away in England. It is apparent or possible, based on the evidence of Ms Marcelle Watts and Mrs Brade, that at one point, based on internal discussions, consideration was given to procuring an SR&O to enable the refund to be made, but that did not materialize, apparently because of intervening circumstances, including the filing of this action, for alleged breach of Mr Lee's rights under the Montserrat Constitution. That said, I find that aspects of the evidence given by both witnesses were replete with hearsay, and seem to have been acquired and/or disclosed in a very cunning manner. The court is not of the view that it can, without more attach any significant weight to the evidence of these two witnesses, in so far as it involves conversations with certain former government officials who have not been called to give evidence.

[54] Looking at the SR&Os it is abundantly clear, that the overriding purpose of the SROs is to encourage Montserradians to return home and to remove the possible deterrent of additional taxation for those seeking to return home and contributing to the rebuilding of the country.

[55] It may seem unfortunate that Orders which were intended to liberalize the parent Act by removing a barrier to importation, by returning nationals, of personal effects, building materials and household items should have the effect of denying a returning Montserrat national from enjoying the benefits extended by the said SR&Os. We are here dealing with incentive provisions designed to encourage, not to concentrate on technicalities such as whether the letter of 10th December 2012 constituted an application for an exemption, or whether the individual should return first and then apply and import.

[56] Interestingly, the letter to the Director General stated that Mr Lee was making a request for a refund under SR&O 51 of 2002 and 43 of 2011. However, the heading of the Fixed Date claim

referenced the parent Act and SR&O 41 of 2014 only. And Mr Lee's claim for a declaration is sought under SR&O 41 of 2014. Obviously there is inconsistency here. However, no issue was taken on it by the defendants. Moreover, as previously stated, when the application was made, the goods in question were already imported, and SR&O 41 of 2014 was not yet promulgated or in operation; only its predecessor SR&Os 51 and 52 of 2002, and 43 of 2011 were in operation.

[57] In all the circumstances, and on the totality of the evidence, I am of the opinion that I must answer the question raised above in the following manner: The payments made by Mr Lee in relation to items 1 and 2 on the list appended to the letter to the Financial Secretary dated the 10th December 2012, and the list appended to the letter to the Director, MCRS dated the 12th February 2014, were legally paid and are not refundable under any of the SR&Os by reason that at the time those items were imported, Mr Lee had not yet acquired the status of a "Montserratian national" within the meaning of SR&O 43 of 2011; nor under SR&Os 51 and 52 of 2002 as he had not met the requirement of being abroad for five years or more. Items 1 and 2 are listed as building materials, tools, demolition hammer, fish tape, stove, refrigerator, washing machine, gas range stove, gas range connector. Based on the itemised list, those payments compute to \$6,272.59.

[58] However, in my judgment, Mr Lee is entitled to a refund under SR&O 43 of 2011, in respect of the remaining items 3 to 14 on the said list. And I so declare. Notwithstanding the apparent retrospective and or generous ambit of Regulation 2(3)(b) of SR&O 41 of 2014, for the reasons stated above, I am not of the view that Mr Lee can have recourse to that Regulation because the provisions of that SR&O do not extend to his circumstances. That brings me to the constitutional question.

**WHETHER THE FAILURE TO GRANT A CUSTOMS DUTY EXEMPTION OR REFUND OF CUSTOMS DUTY AMOUNTS TO THE BREACH OF MR LEE'S CONSTITUTIONAL RIGHT UNDER SECTION 17 (1) OF THE MONTSERRAT CONSTITUTION ORDER 2010, NOT TO BE DEPRIVED OF PROPERTY.**

[59] Section 17 (1) of the Constitution reads:

"17---(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 in accordance with a law to that taking of possession or acquisition and where the following conditions are satisfied, that is to say ---

(a) The taking of possession or acquisition is in the public interest, 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 the taking of possession or acquisition ---

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in or right over the property a right of access to the High Court ... for the determination of his or her interest or right, the legality of the taking possession or acquisition and the amount of any compensation to which he or she is entitled, and for the purpose of obtaining prompt payment of that compensation."

(2) ..."

(3) ..."

Learned counsel Ms Daley contends that Mr Lee's claim does not fall within the requirements of section 17 (1) of the Constitution because the monies which Mr Lee is seeking a refund of were legally paid and do not constitute property belonging to him.

[60] Counsel has further contended that there must be a right of ownership in the property which arises from possession, and in the instant case, Mr Lee had no right to the monies for which he is seeking a refund. In the circumstances, submitted counsel, there was no deprivation of property and no breach of Mr Lee's constitutional rights under section 17 (1). Ms Daley fortified her position by reference to the

cases of **Jaroo v. the Attorney General of Trinidad and Tobago**, [2002] UKPC, 5, where at paragraph 19, Lord Hope of Craighead stated: "It is not necessary for a person who wishes to assert his constitutional right to the enjoyment of property against the state to show that he is the owner of the property which he wishes to enjoy or to demonstrate that he has some other good title to it. It is sufficient to show at the relevant time, he was in possession of the property."

[61] Learned Counsel Mr Carrot in his written and oral submissions contends that Mr Lee had a right to a refund. The monies paid was a tax, and unlawful taxation constitutes an interference with the claimant's right to property. The taxation is both unlawful and unfair. No authority was cited by counsel in support of that submission.

[62] There is no doubt in my mind that "interest or right over property of any description" includes money<sup>3</sup> However, in my judgment, it cannot be said that Mr Lee had in the context of section 17 (1) been compulsorily deprived of any right or interest in the money paid in relation to items 1 and 2 that he imported on the 15th November 2011 and 8th December 2011 because in my view the money was legally paid. I am therefore in agreement with the submission of counsel for the defendants that there must be a right of ownership in the property and Mr Lee had no right of ownership in the duties paid in respect of items 1 and 2 on the list, because those monies were legally paid and do not constitute property belonging to him.

[63] As regard the duties and taxes paid in respect of the items 3 -14, I do not think that Mr Lee has suffered the sort of deprivation that substantially robs a man of the attributes of enjoyment which normally accompanies rights to, or an interest in property. As the learning establish, having an entitlement to something is one thing; having a legal right to it is another. To my mind, the matter does not reach the threshold requirement of Section 17 (1) of the Constitution. Therefore, the defendants did not violate any constitutional right of Mr Lee.

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<sup>3</sup> See *Lillyman et al v Inland Revenue Commissioners et al* (1968-69) 13, W.I.R.224



[64] This is not a case like **Lillyman et al v Inland Revenue Commissioners et al** (1968-69) 13 WIR 224, where, under the **National Development Savings Levy Ordinance** 1962 (No, 16), compulsory savings were levied against emoluments of every individual employed in the country to be utilised for development works; and where deductions were made from employees wages at source, and handed over to the Commissioner of Inland Revenue. The SR&Os did not breach any constitutional right of Mr Lee. Nor is it a case like **The Attorney General of the Gambia v Jobe** [1985], LRC (Constit) 556, which makes it clear that 'property' includes money that belongs to someone who has an immediate right to it. I am not of the view that Mr Lee had any immediate right to the monies paid.

[65] In all the circumstances, and on the totality of the evidence, and based on the authorities on the point, I am of the opinion that I must answer the constitutional question in the following manner: I do not find any evidence of breach of Mr Lee's constitutional right under section 17 (1) of the Montserrat Constitution Order 2010 as alleged. The allegation of such breach is without merit as it does not reach the threshold of being compulsorily devoid of enjoyment of 'property' namely the money paid as duties and taxes. Mr Lee has failed to establish that he was entitled to possession of the money which he paid legally as customs duty and consumption tax; or that he was compulsorily deprived of enjoyment of the moneys which he had paid, or had any immediate right to such moneys.

#### **ALTERNATIVE REMEDY**

[66] Having found as I have on the constitutional question, I do not think it is necessary for me to consider the issue of alternative remedy. However, in the event I am found to be wrong, I will go on to consider it. The defendants contend (and I am entirely in agreement) that Mr Lee had alternative means of seeking redress for what he perceived to be a breach of his constitutional rights under section 17 of the Constitution. This alternative remedy they say is to be found in section 77 of The Customs (Control and Management ) Act Cap 17.04 which reads:

"77 .(1) The Governor, acting on the advice of Cabinet may remit or authorise the refund of the whole or part of any duty paid or payable by any person in respect of any good.

(2) Any remission or refund made or authorised to be made under subsection (1) may apply to other specific instances or generally or in respect of specified persons or to persons of a specific class and may be subject to such conditions and restrictions as the governor acting on the advice of Cabinet may see fit to impose.

[67] In the light of the provisions of section 77, the defendants contend that Mr Lee's bringing the claim for constitutional redress was an abuse of process of the court. In as much as the defendants have not asked for the claim to be struck out as an abuse of process, that contention does not engage the court's attention.

[68] Mr Carrott has countered the argument of the defendants regarding 'alternative remedy' by submitting that a discretionary remedy cannot replace a legal right; that even if there was an alternative remedy, the door to this purported remedy had been firmly closed by advice given by the Chambers of the Attorney General. Mr Carrott stated that Mr Lee had already applied for a discretionary SRO (which is commonly invoked by the Government) so as to allow him to recover the refund. He contends that the Chambers of the Attorney General advised the Minister of Trade against this, and agreed that an SRO should not be done on Mr Lee's behalf. Accordingly, submitted Mr Carrott, since the Governor, under section 77, acts on the advice of Cabinet and since Cabinet has already said no, then it follows that the alternative remedy is unavailable or at best fanciful.

[69] The court does not accept this argument. There is no plausible evidence before the court that the Attorney General advised the Minister of Trade against the preparation of an SRO on behalf of Mr Lee. In this connection, I accept the evidence of Mrs. Brade in preference to that of Ms Watts, that she took advice

from the Attorney General, and that she did not tell Ms Watts that the Attorney General advised Minister Hogan against preparing the SRO.

[70] Remarkably, Mr Meade stated under cross-examination that normally one does not take a request for a refund to Cabinet. The request for refund is discussed internally by the Premier/Minster of Finance, Minster of Trade, the Financial Secretary and Customs Officer. The evidence is that after the matter had been brought to court, Ms Watts approached Mrs. Brade informally and asked her to do an SR&O to enable Mr Lee to get the refund. Reference was made to previous discussions with the former Financial Secretary in relation to the SR&O to enable a refund to Mr Lee. Mrs. Brade said she informed Ms Watts that she was not aware of those discussions whereupon Ms Watts furnished papers to Mrs Brade. Mrs Brade said the papers produced were court papers, but she promised to follow up. There was nothing in writing which spoke to the former Financial Secretary being directed, or having undertaken to prepare an SR&O in favour of Mr Lee. However, as stated before, it is apparent, based on the evidence of Mr Meade and Mrs Brade, a decision had been taken to prepare an SR&O in favour of Mr Lee, but that decision was apparently stayed after Ms Watts intervened and constantly pressed Mrs. Brade knowing full well that the matter was before the court. I think Mrs. Brade was right to have taken advice from the Attorney General, when she did (and I accept that she did), that it was not prudent to proceed in light of the ongoing proceedings in court. In the circumstances, I do not accept that the door to the alternative remedy is firmly closed, as contended by Mr Carrott. I think that the door is closed temporarily, and that the matter has been deferred, pending the outcome of these proceedings.

[71] In the premises, I must answer the question of whether the constitutional route that Mr Lee has chosen for his claim was inappropriate in light of the alternative remedy in this way: Mr Lee's recourse was to invoke section 77 of The **Customs (Control and Management ) Act, Cap 17.04** to seek a refund of duties paid in respect of the goods in question. The Act prescribes the competent authority to grant the refund; this authority being the Governor, acting on the advice of Cabinet.

[72] The court has seen no direct evidence of any advice being given to the Governor by Cabinet. It must be remembered however, that Mr Meade said the Cabinet does not meet to make a decision of that nature. If and when a request is made, discussions ensue internally, and a directive is given or a referral is made to the Financial Secretary.

[73] Notwithstanding there is no direct or documentary proof that such advice was given to the Governor, there is sufficient evidence and material before the court to support a finding that in response to a request or application of Mr Lee, a decision was taken, and advice was given to the former Financial Secretary, Mr Skerritt, and/or the present Financial Secretary, Mrs. Brade, to prepare a discretionary SR&O to enable a refund to be made to Mr Lee. As I see it, but for the filing of the constitutional motion, and the intervention of Ms Watts, and the subsequent advice given to Mrs. Brade by the Attorney General, (not to proceed any further in light of the pending court case), a discretionary SR&O would have been effected in favour of Mr Lee, to enable him to get a refund.

[74] In those circumstances, the court is of the opinion, that there was indeed available to Mr Lee an alternative remedy, and that Mr Lee did pursue that alternative remedy; that it was favourably considered; that action was being taken upon it culminating in the decision to prepare a discretionary SR&O which was discontinued after the matter was brought to court.

[75] Additionally, the court is of the opinion, that Mr Lee had available to him another alternative, that is, to apply for judicial review. Mr Lee has chosen to formulate his claim as a constitutional motion but the defendants did not make any serious challenge to this issue. In fact it was not a ground of challenge at all. The defendants simply raised, and glanced over the issue in their written submissions. In any event, the matter proceeded and was argued as a judicial review matter, and not as a constitutional claim per se.

## **CONCLUSION**

[76] In the foregoing premises, I grant the following reliefs:

- (1) A declaration that Mr. Lee is not entitled to a refund in respect of duties and taxes paid in respect of items imported into Montserrat on the following dates: 15th November 2011; and 8th December 2011 (being \$3, 892.01 + \$2380.58) = \$6,272.59.
- (2) A declaration that Mr Lee is entitled to a refund of the duties and taxes paid in respect of the items he imported into Montserrat on the following dates: 10th August 2012; 31st August 2012; 18th October 2012; 5th November 2012; 13th November 2012; 14th November 2012; 21st November 2012 and 27th November 2012. These compute to \$50,817.80, being (\$57,089.80 -- \$6,272.59). As Mr Lee has run afoul of CPR 8.6 (4), no interest is payable on the sum of \$50,817.80.
- (3) An order that the Defendants do whatever is necessary to effect a refund of the monies paid on the items referred to at paragraph (2) above
- (4) A declaration that there was no breach of Mr Lee's constitutional rights within the meaning of section 17 (1) of the Montserrat Constitution Order, 2010.
- (5) An order that the parties are to bear their own costs.

[77] I must honestly say that I found this matter to be a complex one - one that posed some difficulty in some respects particularly in respect of the interpretation and the working/implementing of the SR&Os. The SR&Os seem to be ambiguous in their language, which result in different constructions being placed on them, which in turn result in inconsistency in their operation/implementation.

[78] At first blush, I was of the view that SR&O 41 of 2014 was applicable to Mr Lee's case, because he imported the category 1 items in 2011 and 2012, prior to returning to Montserrat. SR&O 41 of 2014 came into force at least two years after such importations. Mr Lee's application was made in 2012 before SR&O 41 of 2014 was promulgated; so his application at the time could only have been under SR&O 51 and 52 of 2002 and SR&O 43 of 2011. Initially, I also took the view that SR&O 41 of 2014 was created to benefit persons in similar situations like Mr Lee, who returned during 1st January 2011 and

11th March 2013, and that that SR&O was wide enough to include goods imported by Mr Lee between the said period 1st January 2011 and 11th March 2013, in which case, he would have been entitled to an exemption and to apply retroactively for a refund. Based on the submissions of counsel, one can deduce that the SR&O's admit of more than one construction, and are ambiguous in the use of certain phrases like "is returning" used in SR&O 43 of 2011, which may indicate a reference to the present tense or the future; and the phrase "is exempt" also used in SR&O 43 of 2011, which seem to suggest automatic release from the obligation to pay taxes and duties on good imported into the country. From a practical standpoint, it might just not be possible to apply first and then import. Based on the factual circumstances, one might of necessity be forced to import first, then return and apply; or import, once you have decided to return, and then apply. Hence, the need for some flexibility in the application of the SR&Os.

[79] I am grateful to counsel for their assistance and for their industry, although, I am of the view that more assistance could have been offered in the area of the interpretation of the SR&Os especially SR&O 41 of 2014, Regulation 2 (3) (b) under which Mr Lee's case is based primarily. There seems to be no case which has interpreted any of the SR&Os. In this connection, I think the issue as to their interpretation is of sufficient importance to be determined by the Court of Appeal.

**PEARLETTA E. LANNS**  
**HIGH COURT JUDGE, [AG]**

