TAPPOO HOLDINGS LTD and Anor v ROBERT ARTHUR STUCHBERY (HBC0355 of 2001s)

HIGH COURT — CIVIL JURISDICTION

PATHIK J

19 May 2004

Insurance — general insurance — risk of loss or damage — whether exclusion clause of the policy satisfied — proximate cause — meaning of "directly or indirectly caused by or resulting from" — causation — Insurance Law Reform Act 1996 ss 25, 29, 29(1), 34(1) — Penal Code (Cap 17) s 86 — Public Safety Act s 2.

On 19 May 2000, George Speight together with his supporters stormed the parliament house of Fiji, held the Prime Minister and other persons hostage and asserted ownership and control over Fiji. A riot ensued after hearing of the actions of George Speight and his supporters. The rioters broke into buildings, looted stock and fittings and even set fire to buildings.

As a consequence of the riot, the Plaintiffs sued the Defendants for payment of the loss and damages suffered by their property caused by the riot. The Plaintiffs alleged that the Defendant failed to pay their losses under their insurance policy which amounted to a breach of the contract of insurance.

In response, the Defendants alleged that the acts of George Speight and his supporters constituted mutiny, rebellion, revolution or insurrection which was within terms under cl 1(a) (exclusion clause) of the policy. Thus, any losses or damages resulting from the said acts were not covered by the policy.

The Plaintiffs in their amended reply claimed that the exclusion clause did not apply and even if the loss or damage to the Plaintiffs was caused indirectly by or resulted from any of the excluded events, the Plaintiffs can still seek relief under s 25 of the Insurance Law Reform Act 1996 (the Act).

Held — (1) Based on the evidence presented the proximate cause of the loss and damage was a result of the riot and not the events that took place in the parliament. There was evidence that the looting was for personal gain of the looters and not part of the taking over of the parliament by George Speight and his supporters. Evidence likewise showed that the marchers were a separate group from those of George Speight's and that it was the rioters and looters who looted the Plaintiffs' shop. Moreover, the acts of George Speight's group did not amount to mutiny, revolution, rebellion or insurrection which may be considered as excluded acts under the exclusion policy. Therefore, the court said, the exclusion clause cannot be applied in this case.

(2) The words "caused or contributed" in s 25 meant "proximate cause" or "materially" contributed to the loss. The rioting and looting was not only the proximate cause but also the direct cause. Therefore, the Plaintiffs can seek relief under s 25 of the Act.

Cases referred to

Chappel v Hart (1998) 195 CLR 232; 156 ALR 517; [1998] HCA 55; *Francisco Nota Moises v Canadian Newspaper Co* [1993] BCSC 2503/88; *Re Dellow's Will Trusts* [1964] 1 WLR 451; [1964] 1 All ER 771; *Grell-Taurel Ltd v Caribbean Home Insurance Co Ltd* [2002] Lloyds Rep 655; *Groves v AMP Fire & General Insurance Co (NZ) Ltd* [1990] 2 NZLR 408; *Lindsay v General Accident, Fire and Life Assurance Corp Ltd* [1914] App Div 574; *New Zealand Insurance Co Ltd v Harris* [1990] 1 NZLR 10; *Pillay v General Insurance Co* [1985] LRC (Comm) 162; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; [1998] HCA 28, cited.

British & Foreign Marine Insurance Co Ltd v Gaunt [1921] 2 AC 41; [1921] All ER Rep 447; *Chandrika Prasad v AG* FCA Appeal No 78/2000; *Como*

Investments Pty Ltd (in liq) v Yenald Nominees Pty Ltd [1997] 19 ATPR 43; *Drinkwater v London Assurance* [1799] EngR 133; [1767] 95 ER 863; *Dunham v Clare* (1902) 71 LJKB 683; *Harris v NZ Insurance Co Ltd* (1987) 4 ANZ Ins Cases 60, 817; *Kavanagh v Commonwealth* [1960] 103 CLR 547; [1960] ALR 470; *National Oil Co of Zimbabwe v Sturge* [1991] 2 Lloyds Rep 281; *R v Grant* [1957] 1 WLR 906; [1957] 2 All ER 694; *Re H* [1996] AC 563; [1996] 1 All ER 1; *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406; *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691; [1942] 2 All ER 6; *Francisco Nota Moises v Canadian Newspaper Co* [1993] BCSC 2503/88, considered.

B. C. Patel for the Plaintiffs

M. Daubney and *S. Sorby* for the Defendants

Pathik J. By *writ of summons* dated 14 August 2001 Tappoo Holdings Ltd and Tappoo Ltd (hereafter referred to as the Plaintiffs) sued Robert Arthur Stuchbery (sued on his own behalf and on behalf of the other insurers subscribing to Lloyds insurance *policy number 509/PL008499*, hereafter referred to as the Defendants). The Defendants are underwriters at Lloyds.

This has been a lengthy case with long submissions with volumes of authorities having been cited. No doubt both the oral and written submissions from both sides have been very helpful.

A. Pleadings

(i) Statement of claim

The Plaintiffs' *statement of claim* as stated below sets out the background facts and the loss and damage they allegedly suffered on the crucial day, namely, 19 May 2000:

By a contract of insurance comprised in Lloyds policy of insurance number 509/PL008499 (the policy) the Defendants in consideration of a premium of FJ$115,000.00 paid by or on behalf of the first and second Plaintiffs (P1 and P2) agreed to insure, inter alia, P1 and P2 against loss or damage to their respective property for a period of 1 year from 9 July 1999 to 9 July 2000.

Under the policy the Defendants severally subscribed, inter alia, in respect of the risk of the following losses:

(a) the premises of P1 at the corner of Usher and Thomson Streets, Suva (the Suva premises) for the sum of FJ$3,420,000;

(b) contents of various premises including the Suva premises for the sum of FJ$2,500,000;

(c) stock, including stock of P2 on the Suva premises, for the sum of FJ$9 million;

(d) business interruption for the sum of FJ$250,000 for the rental value of the Suva premises and loss of gross profit for the sum of FJ$3,500,000.

On 19 May 2000, during the currency of the policy, P1 and P2 suffered the following respective losses and damage:

(a) The Suva premises belonging to P1 were broken into and damaged;

Particulars of Damage

(i) Full details have previously been supplied to Defendants' loss adjuster.

(ii) Cost of repairs FJ$59,998

(b) Contents of the Suva premises belonging to P2 were stolen, damaged or destroyed;

Particulars of Contents Stolen

(i) Goods held as bailees for customers, full particulars of which have already been provided to the Defendants' loss adjuster.

(ii) Replacement cost of contents stolen is FJ$27,649.

Particulars of Contents Damaged or Destroyed

(i) Full particulars have already been provided to the Defendants' loss adjuster.

(ii) Replacement cost of contents destroyed or damaged beyond economic repair is FJ$134,747.

(iii) Cost of repair of other damaged contents FJ$43,158.

(c) Stock belonging to P2 and situate on the Suva premises was stolen, damaged or destroyed.

Particulars of Stock Stolen

(i) Full particulars have already been provided to the Defendants' loss adjuster.

(iv) Replacement cost of stock stolen is FJ$2,452,063.

(d) Loss of rental by P1 in respect of the Suva premises;

Particulars of Loss of Rental

(i) The Suva premises were leased by P1 to P2 for $20,000 per month and the said premises became untenantable for 2.4 months after 19 May 2000.

(ii) Loss of rental is FJ$50,000.

(e) Loss of gross profit by the P2 due to the interruption of P2's business at the Suva premises.

Particulars of Loss of Gross Profit

(i) The business of P2 hitherto conducted on the Suva premises was brought to a complete halt on 19 May 2000 when the premises were severely damaged and fittings, fixtures, equipment and stock thereon were either stolen, destroyed or severely damaged. Trading could not be resumed until 4 August 2000 when substantially the damage was repaired and/or destroyed or stolen items were replaced.

(ii) The loss claimed under this head is FJ$750,000.

The Plaintiffs allege that in breach of the contract of insurance in the policy the Defendants have failed to pay the Plaintiffs the amounts of their respective losses referred to hereabove or any part of those losses.

The Plaintiffs further claim *interest* on the said sums or damages from 19 May 2000 until judgment herein or sooner payment at such rate or rates as to the court seems fit.

The Plaintiffs' claims

The Plaintiffs' claims are as follows:

First Plaintiff

(1) *FJ$109,998.00* or, alternatively damages.

(2) Interest.

(3) Costs on an indemnity basis.

(4) Such other relief as to the court seems fit.

Second Plaintiff

(5) *FJ$3,407,617.00* or, alternatively damages.

(6) Interest.

(7) Costs on an indemnity basis.

(8) Such other relief as to the court seems fit.

(ii) Defendants' amended statement of defence

The Defendants deny some and admit certain paragraphs of the statement of claim. By way of defence the Defendants have, inter alia, in their amended statement of defence in paras 11 and 12 stated their defence as follows:

(11) Further:

(a) Exclusion clause 1(a) of the policy provided:

> This policy does not insure any loss or damage directly or indirectly caused by or resulting from war, invasion, act of foreign enemy, warlike operations (whether war is declared or not), civil war mutiny, rebellion, revolution, insurrection, military or usurped power.

(b) On the morning of 19 May 2000, one George Speight, together with a group of armed supporters (some of whom were serving members of the Fiji Military Forces) stormed the parliament house of Fiji in Suva and took the then Prime Minister, Mahendra Chaudhry, and about 40 cabinet members, parliamentarians, and other persons, hostage, and asserted "ownership", "control" and "executive power of Fiji".

(c) By so acting, Speight and his armed supporters committed acts of collective insubordination, collective defiance, collective disregard of the lawful authority of the country and/or collective refusal to obey the authority of the country.

(d) Further, or alternatively, the conduct of Speight and his armed supporters constituted organised resistance of the lawful government of the country for the purpose of supplanting the lawful government and/or depriving the lawful government of its authority.

(e) By his conduct aforesaid, George Speight expressed clear intentions and declarations of sovereignty over Fiji.

(f) On the morning of 19 May 2000, an organised protest march of Taukei Movement Supporters took place in the Suva Central Business District.

(g) The crowd of marchers, on hearing of the actions of George Speight and his armed supporters, erupted into rioting.

(h) The rioters, estimated as numbering between 1,000 and 2,000 ran through the Suva CBD, broke into a large number of buildings, looted stock and fittings, and in some instances set fire to buildings.

(i) The majority of the buildings affected by the rioters were owned or operated by members of the Fiji Indian community;

(j) On 19 May 2000, as a direct result of the actions of George Speight and his armed supporters, the President promulgated public emergency regulations pursuant to s 2 of the Public Safety Act, declaring the existence of a state of public emergency.

(k) In the premises, if the Plaintiffs suffered the losses and damage in the circumstances alleged in para 9 of the statement of claim (all of which is not admitted), such losses or damages fell within the terms of exclusion clause 1(a) of the policy in that they were caused, directly or indirectly, by resulting from acts of mutiny, rebellion, revolution and/or insurrection, and accordingly are not covered by the policy.

(12) Save as aforesaid, the Defendants deny each and every allegation in the statement of claim.

(iii) Amended reply to defence

The Plaintiffs in their *amended reply to defence* stated as follows setting out the whole of clause 1(a) of the policy and saying that the exclusion 1(a) of the policy does not apply:

1. The Plaintiffs join issue with the Defendants on para 9 of their defence.
2. As to paras 11(a)–(c) inclusive of the statement of defence the Plaintiffs say:
   (i) It will refer to the whole of clause 1(a) of the policy for its true meaning and effect. That clause in its entirety reads:

> This policy does not insure any loss or damage directly or indirectly caused by or resulting from war, invasion, act of foreign enemy, warlike operations (whether war is declared or not), civil war, mutiny, rebellion, revolution, insurrection, military or usurped power. This exclusion does not apply to loss or damage caused by acts of terrorism or sabotage, providing the acts are not committed in time of war by any agent acting in connection with any operation of armed forces of a government or sovereign power

   (ii) Eight persons including George Speight and two members of the CRW Unit stormed parliament on 19 May 2000 and took 40 members of parliament and others hostage.
   (iii) The President did not promulgate public emergency regulations pursuant to s 2 of the Public Safety Act declaring the existence of a state of public emergency on 19 May 200 as alleged.
   (iv) At the time of the loss and damage to the Plaintiffs' insured property on 19 May 2000:
      (a) The Constitution of Fiji was still in force.
      (b) Ratu Sir K K T Mara was the President of Fiji exercising executive and sovereign powers under the Constitution.
      (c) The Fiji Military Forces and the Fiji Police Force were performing their lawful duties.
      (d) The judiciary was functioning.
   (v) George Speight and his armed supporters and/or the persons who looted and damaged the Plaintiffs' shop on 19 May 2000, used violence for the purpose of putting the public or a section of the public in fear and/or for political ends and that amounted to acts of terrorism.
3. Consequently exclusion 1(a) of the policy does not apply.
4. If the loss or damage to the Plaintiffs was caused indirectly by or resulted from any of the excluded events then the Plaintiffs will seek relief under s 25 of the Insurance Law Reform Act 1996.

A. Issues for determination

The agreed issues on liability for court's determination are as stated below (as in the pre-trial conference minutes):

(1) Was there a mutiny or a rebellion or a revolution or an insurrection, in terms of exclusion 1(a) of the policy, on 19 May 2000?

(2) If so, was the Plaintiffs' loss or damage directly or indirectly caused by or result from any one or more of such events?

(3) Were the actions of George Speight and his men who stormed parliament on 19 May 2000 or of the persons who looted and damaged the Plaintiffs' shop that day acts of terrorism in terms of exclusion 1(a) of the policy?

(4) If so, can the Defendants rely on exclusion 1(a) of the policy to deny the Plaintiffs' claim?

(5) If the loss or damage was indirectly caused by or result from any of the excluded events, are the Plaintiffs entitled to relief under s 25 of the Insurance Law Reform Act 1996?

(6) Should the court determine issues in relation to interest and costs at the trial on liability or at the subsequent trial on quantum? If at the trial on liability, then:

  (a) If the Defendants are held liable under the policy, are they also liable to pay to the Plaintiffs interest on the judgment sum?

  (b) If so,

    (i) at what rate?

    (ii) For what period?

    (iii) Should the interest be calculated on a compound or simple basis?

  (c) Should the costs payable to the successful party be:

    (i) an indemnity costs?

    (ii) Costs in excess of the scale, and if so, to what extent?

    (iii) Costs on any other basis, and if so, on what basis?

B. Quantum of claim

The quantum of the Plaintiffs' claim is to be assessed by the court (if not agreed or resolved by the parties) after the issue of liability is decided.

C. Burden of proof

The burden of proof is on the Defendants to prove on a balance of probabilities that the following two limbs of the *exclusion clause (1)(a)* are satisfied:

(a) that there was a mutiny, rebellion, revolution or insurrection in parliament and/or in Suva city on 19 May 2000; *and*

(b) that the Plaintiffs' loss or damage was directly or indirectly caused by or result from one or more of those occurrences.

In this case as Mr Patel submits and I agree, it means that the Defendants must prove that at the time the Plaintiffs' shop was looted at 12.49 pm what happened in parliament and/or in the City of Suva on 19 May 2000 was one or more of *mutiny, revolution, rebellion, or insurrection*. And once the Defendants get over that hurdle then it is for them to prove *causal connection* between the occurred excluded events and the loss to the Plaintiffs.

Therefore, unless these two requirements are proved, the Defendants will fail in their defence. It must also be remembered, and again as submitted by Mr Patel, that the exclusion cannot also apply if the loss was caused by rioting and looting

or civil commotion or acts of terrorism because these perils are insured against in the "*all risk policy*" and not excluded by clause 1(a). Cover for terrorism is an exception to the exclusion.

D. Standard of proof

I shall now deal with the *standard of proof* required in a case of this nature. As for "*causation*", this must be decided in the light of all the circumstances and probabilities of the particular case: *Chappel v Hart* (1998) 195 CLR 232 at 255; 156 ALR 517 at 533; [1998] HCA 55 per Gummow J.

The allegation that the excluded events of *mutiny, revolution, rebellion or insurrection* occurred in Suva on 19 May 2000 are *serious allegations*. Therefore, *strong evidence* is required to prove even on a balance of probabilities. The following passage from the judgment of Lord Nicholls in *Re H (Minors)* [1996] AC 563 at 586; [1996] 1 All ER 1 at 16 is apt:

> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

Lord Nicholls goes on to say:

> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in *Re Dellow's Will Trusts* [1964] 1 WLR 451 at 455; [1964] 1 All ER 771 at 773: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it" … This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.

E. Defendants' submission

Mr Daubney for the Defendants submitted separately on the *issues* as spelt out in the minutes of pre-trial conference as follows:

(a) Was there a mutiny or a rebellion or a revolution or an insurrection, in terms of exclusion 1(a) of the policy, on 19 May 2000?

Mr Daubney referred the court to Parliamentary Hansard of 19 May 2000 where it is stated, inter alia, as follows as to what happened at 10.45 am in parliament:

> The Parliamentary Hansard of 19 May 2000 (Ex D1, document 5) provides graphic evidence of the events which occurred at the Parliamentary Complex on that day. It records that at 10.45 am, several heavily armed strangers, one wearing a balaclava, stormed into the Parliament Chamber, kicked and jumped over the Bar of Parliament, shouting "Sit down, sit still and remain clam". In response to the Honourable Speaker asking "What is this?" the person identified as "Stranger No 1" (undoubtedly George Speight) said "This is a civil Coup. Hold tight, nobody move". He is further recorded

as saying, "This is a civil Coup by the people, the taukei people and we ask you to please retire to your Chamber right now, Mr Speaker. Please co-operate so nobody will get hurt".

The House was unceremoniously adjourned at 10.55 am.

Mr Daubney refers to incidents at parliament when Mr Zahir Khan, Assistant Commissioner Operations arrived at parliament house shortly before 11 am and left about 1 pm and was back at Central Police Station at 1.20 pm. Mr Imraz Iqbal Ali, then a reporter with Fiji TV testified that a gunman was within the parliamentary compound who prevented the members from entering.

Counsel submitted that the Defendants do not contend that the actions of Speight and his followers constituted invasion, act of foreign enemy, war-like operations, civil war, or military or usurped power, but he submits that the *conduct of Speight* and his supporters *are caught within the meaning of one or more of* the words "*mutiny*", "*rebellion*", "*revolution*" and "*insurrection*".

Mr Daubney talks of events at parliament compound and wants the court to find that there was a *mutiny*, *rebellion*, *revolution* or *insurrection*, in terms of exclusion 1(a) of the policy on 19 May 2000.

(b) Was the Plaintiffs' loss or damage directly or indirectly caused by or didn't result from any one or more of such events?

Counsel referred to the time at which the march assembled and proceeded to government house. Assembly was at 8.30 am and confirmed by various witnesses who saw the march. They were Daniel Whippy, Imraz Ali, Jahir Khan and Francis Herman. They said the march proceeded in a peaceful and orderly manner. There was no violence or looting.

Then at 10.45 am there was coup at parliamentary complex and Mr Herman made live broadcast of it within 5 or 10 minutes of the coup.

At 10.50 am President of Fiji, through Mr Brown refused to receive the marchers' petition at government house because someone had taken over parliament. They made their way to parliament house on the way and damaged shops in that area. It is to be noted that this area is a long distance away from Tappoo's building. Mr Daubney submitted some 10–20 people, a breakaway group of members headed back to the Suva Central Business District (CBD). Mr Herman saw this from Fiji Broadcasting Commission building.

It is agreed that the looting of Plaintiffs' shop took place about 12.49 pm which is approximately 2 hours after the coup. According to witnesses who testified, looting did not take place until after the coup.

It is Mr Daubney's submission that the *only possible inference* that can be drawn is that the happening of the "*coup*" was the "*catalyst*" for the looting, or gave rise to the situation in which the looting could occur. He says that the Plaintiffs have not led any evidence to suggest that there was any other catalyst for the looting. Counsel submits that all that evidence as stated hereabove is sufficient, under the terms of exclusion 1(a), for the Plaintiffs' loss or damage to have been *indirectly* caused by or resulting from the actions of Speight and his supporters. He referred the court to the Court of Appeal case of *Grell-Taurel Ltd v Caribbean Home Insurance Co Ltd* [2002] Lloyds Rep 655 (*Grell-Taurel*) (Court of Appeal Trinidad) where it was held that the loss suffered by the Plaintiff was as a result of riot and whether the loss occurred was "occasioned by or through or in consequence, directly or indirectly, of insurrection".

Counsel said that *Grell-Taurel* makes it clear that it makes no difference whether or not the insurgents took part in the looting.

Mr Daubney also stated that Warner JA in *Grell-Taurel* analysed the question of the causal link between the insurrection and the looting by reference to the judgment of Mustill J in *Spinneys* case: *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406. He also referred the court to the case of *Pillay v General Insurance Co* [1985] LRC (Comm) 162 of the Supreme Court of Seychelles. Counsel submits that the court should find at the very least, that the damage suffered by the Plaintiffs when the Suva shop was looted was at least *indirectly* caused by, or resulted from the coup perpetrated by Speight and his supporters. Accordingly, he says, the case prima facie falls within exclusion 1(a) of the policy, and the Defendants are not liable to indemnify the Plaintiffs under the policy.

(c) Were the actions of George Speight and his men who stormed parliament on 19 May 2000 or of the persons who looted and damaged the Plaintiffs' shop that day *acts of terrorism* ***in terms of exclusion 1(a) of the policy? If so, can the Defendants rely on exclusion 1(a) of the policy to deny the Plaintiffs' claim?***

After dealing with what constitutes "*terrorism*" counsel submits that on this issue the Plaintiffs have led no evidence to establish that the actions of Speight and his followers comprised "acts of terrorism". In particular, no evidence has been led to establish that Speight or his supporters committed criminal acts intended or calculated to create a state of terror in the minds of particular persons, or a group of persons, or the general public. Counsel submits that Speight and his supporters acted to overthrow the lawful government; and *committed at least insurrection*.

It is the counsel's submission that the crowd which ransacked the Plaintiffs' shop consisted of "*opportunistic thieves*" who clearly looted the place for their own personal gain. He said that that there is not a shred of evidence in which the court could base a finding that the conduct of the looters constituted an "*act of terrorism*". Counsel submits that the Plaintiffs have been at pains to dissociate the looters from Speight and his supporters. He says that on a proper construction of the exception, the onus was on the Plaintiffs to prove that the people who caused the damage, namely, the looters, were committing acts of terrorism. This they have failed to do. He says that the exception does not operate and no case has been established by the Plaintiffs to disentitle the Defendants from relying on exclusion 1(a).

(d) If the loss or damage was indirectly caused by or result from any of the excluded events, are the Plaintiffs entitled to relief under s 25 of the Insurance Law Reform Act 1996?

Counsel submits that s 25 of the Insurance Law Reform Act 1996 is "incomprehensible and undecipherable". Quite simply, it is "grammatical nonsense, and is incapable of being assigned any sensible meaning".

Mr Daubney said that the "modern approach to statutory construction requires a Court to give effect to the purpose of legislation and to avoid the construction of words, phrases or provisions which, taken in isolation, would tend to defeat the purpose": vide *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; 72 ALJR 841 at 850–1; [1998] HCA 28 per Brennan CJ. He says that in that case such an approach fails, because the "section in question makes no grammatical sense whatsoever".

The said s 25 reads as follows:

> 25. Where—
>
> (a) the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and
>
> (b) in the view of the court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because of the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring—
>
> the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

Counsel said that "in the absence of court being able to assign any sensible or grammatical meaning to s 25, this claim by Plaintiffs fails "in limine".

Mr Daubney referred the court to the New Zealand Court of Appeal case of *New Zealand Insurance Co Ltd v Harris* [1990] 1 NZLR 10. In that case, the Court held that s 11 contemplates a two-step inquiry where the contract of insurance excludes or limits the insurer's liability on the happening of certain events on the existence of certain circumstances. He then outlines what these two steps are and concludes by saying that the Plaintiffs have led no evidence whatsoever to enable this court to make a conclusion with respect of either of these steps prescribed by the New Zealand Court of Appeal. Accordingly, he says, that the Plaintiffs have not made out any case for relief under s 25 of the Insurance Law Reform Act 1996.

(e) If the Defendants are held liable under the policy, are they also liable to pay to the Plaintiffs interest on the judgment sum?

The position in regard to *interest* is stated as follows in Mr Daubney's written submission (at p 47)

> 46. If the Defendants are held liable under the policy in this hearing, it will then be necessary for there to be a hearing to determine what, if any, of the damages claimed by the Plaintiffs are recoverable under the policy, and the quantum thereof.
>
> 47. If, after such a further hearing, it is determined that there is a sum payable by the Defendants to the Plaintiffs under the policy, then by s 34(1) of the Insurance Law Reform Act, the Defendants will be liable to pay interest in accordance with s 34.
>
> 48. Counsel for the Plaintiffs expressly conceded that, for the purposes of this hearing, the only question to be determined is that which appears in para 6(a) of the minutes of the pre-trial conference (T 124 line 27) (referred to hereabove). That question is answered in the affirmative. The subsequent questions, which deal with rate of interest, period of calculation and method of calculation are (presumably) to be dealt with in the trial on quantum.

F. Plaintiffs' submission

The learned counsel for the Plaintiffs, Mr B C Patel referred the court to the said para 11 of the amended defence.

He said that para 11(b)–11(e) are stated to support the occurrence of one or more of the excluded events, namely, *mutiny, revolution, rebellion or insurrection* and the allegations in 11(g)–(i) are stated to support the *causal link* between the excluded event and the Plaintiffs' loss. He says that there is *insufficient evidence* in the allegations 11(b)–(e) to support any legal submission to make a finding.

Counsel submitted that the *transcript of parliamentary proceedings* of 19 May 2000 shows that there was an attempted coup; Speight and his group took the Prime Minister and others hostage. So the *position at 12.49 pm*, when the Plaintiffs' shop was looted, was that of armed men having taken hostage. There is no evidence of any statement, media or otherwise, issued by Speight and his group of his claims or intentions at 12.49 pm.

Counsel further submits that there is no evidence or insufficient evidence to support a conclusion that one of the excluded events had occurred in parliament at 12.49 pm on 19 May 2000. The event that occurred was a *criminal act of hostage taking*.

He further submits that the allegations in 11(g)–11(j) have not been proved. It is *not borne out* by the evidence *that* the *marchers were the rioters* and *looters*. He then refers to the evidence of some of the witnesses who testified in court.

He says that para 11(g) and (h) have been categorically disproved by the Plaintiffs through the evidence of Imraz Iqbal Ali, Jahir Khan and James Dutta. Public Emergency (11(j)) was not declared until 7 pm on 19 May 2000 (Public Emergency Regulations, Legal Notice No 54 of 2000) which is well after the Plaintiffs' shop was looted.

Counsel says that on the evidence of the various witnesses herein it is clear that *the marchers were a separate group* from those who stormed parliament and from the rioters and looters at the Plaintiffs' shop.

Counsel says that the rioters and marchers were surprised to learn from Joe Brown at government house gate of the takeover of parliament. These marchers then rushed to parliament but remained outside the parliament gate and were not allowed to join Speight and his group inside the parliamentary complex.

G. Consideration and determination of the issues

There are certain facts about which there is no dispute. P1 is the owner of the building situated at the corner of Thomson and Usher Streets in the city of Suva and P2 is the owner of the retail business carried on from that building. The Plaintiffs insured their building and business with the Defendants upon and subject to the terms and conditions contained in Lloyds Policy No 509/PL0084999 (hereafter referred to as the *policy*).

The period of insurance under the policy was from 4 pm on 9 July 1999 to 4 pm on 9 July 2000. The insurance was for material damage to the building and for business interruption. The limit of liability for the combined material damage and business interruption for the Suva shop was $5 million subject to the special limits and deductions.

The learned counsel for the Plaintiffs, Mr B C Patel submits that the *policy is an "all risks"* policy because the wording of the indemnity clause makes no reference therein to "Insured Perils" and because insured perils are neither enumerated nor referred to in the policy.

The relevant *exclusion clause* in the policy is clause 1(a) which provides:

> (1) This Policy does not insure any loss or damage directly or indirectly caused by or resulting from:
>
> (a) war, invasion, act of foreign enemy, war-like operations (whether war is declared or not), civil war, mutiny, rebellion, revolution, insurrection, military or usurped power. This exclusion does not apply to loss or damage caused by acts of terrorism or sabotage, providing the acts are not committed in time of war by any agent acting in connection with any operation of armed forces of a government or sovereign power.

The Defendants rely upon the *exclusion items of mutiny, rebellion, revolution and/or insurrection*.

As the learned counsel for the Defendants Mr M Daubney says, *the primary issue for determination* in this hearing is whether the Defendant insurers are entitled to the benefit of exclusion 1(a) in the policy and are thereby exonerated from liability to indemnify under the policy. Counsel for the Defendants submits that if the issue is determined in favour of the Defendants then that is the end of the Plaintiffs' claims. If, however, the court determines that the Defendants' liability is not excluded by reason of exclusion 1(a) then there will be a need for a separate trial to determine what (if any) amounts the Defendants are liable to pay under the terms of the policy.

It is common ground that on 19 May 2000 while the policy was valid and in force, the Plaintiffs' shop at Suva was looted and damaged by persons rampaging the streets of Suva.

Issue

In all the circumstances of this case the court has to find *whether the excluded events occurred on 19 May 2000* and if so what was it and where did it occur. Then also whether the loss suffered by the Plaintiffs at 12.49 pm on 19 May 2000 was "*directly or indirectly caused by or result from*" by such events. So, as pleaded, if the actions of Speight group was an excluded event as maintained by the Defendants, were the looters causally connected to this or, as Mr Patel put it, "a leaderless, disorganised common mob answering the description of rioters (as opposed to being a rebellious mob) who took advantage of the situation for personal profit or gain (as opposed to looting in furtherance of the objectives of the Speight group)".

Events of 19 May 2000

In this case whether the Defendants have discharged the burden of proof in establishing their case depends on my findings of fact on the evidence adduced through the various witnesses.

It is the case for the Defendants that the alleged treacherous conduct of George Speight and his supporters constituted *mutiny, rebellion, revolution or insurrection* within the meaning of those terms in the policy.

It is also their case that those treacherous acts at the parliamentary complex on the *morning 19 May 2000* were *directly or indirectly* the cause of the rioting and looting from which the damage to the Plaintiffs' store suffered.

One other matter has been raised by Mr Daubney and that is whether the "acts of Speight and his men who stormed parliament on 19 May, or of the persons who looted and damaged the Plaintiffs' shop that day, acts of terrorism in terms of exclusion 1(a)?" The burden of proof on this Mr Daubney says falls on the

Plaintiffs. The Defendants led evidence to establish their entitlement to rely on the exclusion from particularly media representatives who covered for both television and radio the events that occurred on 19 May particularly the "*March*" that proceeded along Victoria Parade to government house and from there to parliament complex where Speight staged a "coup".

The Defendants' witness Mr Sakuisa Bolaira testified as to what he witnessed. He received the news in the morning that there was a coup at parliament house and that armed men had taken over the government. Later he was informed that looting and rioting had commenced in the streets of *downtown* Suva and it was *noon* by the time he made his reunion with the cameraman and driver and proceeded to the main shopping area. The witness admitted in cross-examination that when he arrived at the scene, Tappoo's shop had been looted and damaged. He agreed that it was "*guesswork*" when he said in his evidence in chief that the looting was immediately after the takeover of parliament. He further said that he cannot put a time on how long after the event he tried taking the "shots" in the shop.

The other witness Mr Francis Herman in cross-examination said that after leaving his team at parliament complex he went into downtown Suva *late morning* and saw Pepe's shop had been looted and damaged and so was *Tappoo's*. Other shops in Cumming Street were also looted.

Then we have the witness Mr Daniel Whippy who left his office and went out of his building and walked through downtown Suva in "*early afternoon*". He went to *Tappoo's shop*. While he was there for about 5 or 10 minutes this is how he described the scene:

> Q. Can you tell His Lordship what you saw as you approached the Tappoo shop?
>
> A. Well, as I came around the corner, the BP's Home Centre corner, I could smell perfume in the air — very strong perfume. There were lots of people gathered in between the Home Centre building and the car park and the Tappoo shop. As I made my way through the crowd I noticed people holding sunglasses and cameras and they were sharing things among themselves. As I came to the front of the Tappoo shop I noticed there were about three or four policemen standing by the front door and there were people trickling out. As they trickled out they dropped all the stuff they had in their hands by the front door. I could see a lot of stock gathered around the front door.

The witness Mr Imraz Iqbal Ali said in evidence in chief that the "march" was to "travel" from the "market" in Rodwell Road and was supposed to only go up to the government house but it travelled all the way up to parliament complex. He said that while at the government house when they were given news what had had happened they ran towards parliament house. He said that he was on a truck and he "*had a pretty good view of where people were going*". The majority of the people came towards parliament and he did not see them going anywhere else. Those who followed him in the police van he was in and going towards parliament the crowd represented virtually the marchers who had gathered at government house gate. The Plaintiffs' witness James Datta gave a graphic account, inter alia, of what he saw on the day in question as far as looting at Tappoo's shop is concerned. He said that about 10 am the "Marchers" in thousands went past while he was standing in front of his store. Their dress code was "somewhat different to the normal customers that we are used to seeing on a Friday in the City of Suva". A lot of them, he said, had no shoes, some wore

"flip-flops, most of them shorts". After they had gone past his building everything had gone back to normal. After hearing what is alleged to have taken place at parliament Mr Datta closed his store. This was about 11.45 am then at 12.45 pm he was told and he saw that there were about 200 to 300 people had gathered outside Tappoo's main store.

Mr Datta said that there were no policemen there. When asked by Mr Patel as to "what kind of people were they?" he replied: "They were the mums, the dads, the children, the grand mum, the grand dads, a lot of youth, a mixture of all sorts of people". He said that "they were the normal shoppers that came into our stores on Friday and that shop in the market and around the building. They are just the normal Friday shoppers".

The witness then described what happened in these words:

A. When I was standing there and all these people I noticed were standing outside or in front of Tappoo's, all of a sudden there was some youth who ran towards the front door and they had something that appeared to me like steel in their hand and they crashed into the front door and I heard a loud smash.

Q. Then what did you see?

A. I then saw people — I then saw a surge of people, these 200–300 people that were in front of the store, they rushed inside Tappoo's through the broken door and then they started to help themselves to the stocks that Tappoo's had for sale.

Q. Did you see people coming out with things?

A. Very much so. I saw people carrying Sanyo televisions on their shoulders. I saw young men coming out — running out with Nike shoes. They were literally taking off their own shoes and putting the new Nike shoes on. They were changing into Nike tracksuits, they were changing into Nike T-shirts, and then jewellery, black pearls, 22 carrot gold and all this, watches, and what have you, they were freely exchanged on the street. Mums, dads, kids, parents, everybody was just having a field day helping themselves and there was a lot of laughter, a lot of enjoyment that they got something for free.

The witness said that these 300 people had "enough stuff" so some of them had decided to find their way, to go. But the majority of them moved on from there into D V Diamonds' a jewellery shop.

H. Findings of fact

On the evidence before the court the following *findings of fact* are made:

(a) On 19 May 2000 at 10.45 am George Speight and several armed persons stormed parliament and took the Prime Minister and certain parliamentarians hostage.

(b) At 12.49 pm the Plaintiffs' shop was rioted and looted.

(c) There were three separate groups of people who were involved in the various incidents.

It is quite obvious on the evidence that the "*marchers*" were a separate group from those who stormed parliament; and the *rioters and looters* were an altogether different group which looted the Plaintiffs' shop.

(d) The marchers were issued with permits to march and present a petition to the President exercising their democratic right and seeking redress against certain policies of the government.

(e) The "marchers" learnt of takeover of parliament from Joe Brown at government house gate. They rushed to parliament and remained at the gate and were not allowed to join Speight and his group.

(f) Thereafter *rioting and looting* at *Tappoo's* took place 12.49 pm but there is no evidence that it was the marchers who returned to the city from government house gate who had started the riot and looting at Tappoo.

(g) The Tappoos were the first shop to be damaged and looted in the CBD of Suva. Looting was done by ordinary men, women and children.

It is quite clear from the evidence before the court and I have no hesitation in finding as fact that the *proximate cause* of the loss and damage to Tappoos was *looting* and *malicious damage* by the rioters and looters and not the events in parliament. The looting was for personal gain of the looters *and not* in furtherance of, or as part of, George Speight and his group. On the evidence before me it is abundantly clear that there were two separate events on 19 May 2000, namely, *first* takeover of parliament and *second*, the rioting and looting in the Central Business District of Suva. These events involved different people altogether with no common element in these two events occurring 2 hours apart and not continuous and in different parts of City of Suva quite some distance apart.

I accept as a fact, and I agree with Mr Patel that although the riot and looting occurred after the takeover of parliament there is no evidence that it occurred because of the takeover and nor is there evidence that the riot and looting was the result of the takeover as there was no causal connection between them. The chain of causation of the event in parliament was clearly broken by the riot and looting which was an independent proximate cause of the Plaintiffs' loss.

I agree with Mr Patel that despite the occurrence of these events these main institutions of government remained intact: in that Ratu Sir Kamisese Mara was still the President, the Fiji Military Forces and the Fiji Police Force were in place and carrying out their duties and the judiciary was functioning and the 1997 Constitution was still in force on 19 May 2000. As Mr Patel submits, judicial notice can be taken of these state of things.

I. Does exclusion clause 1 (a) apply?

In the light of the above findings of fact, I shall now consider whether the said exclusion clause 1(a) of the policy applies in all the circumstances of this case.

The terms of the contract between the parties are embodied in the policy of insurance issued by the Defendants to the Plaintiffs.

As stated earlier the only issue or condition material to the court's consideration in this case is whether the said exclusion clause 1(a), the terms of which have already been stated hereabove, applies or not. In the light of Mr Daubney's contention and submission as stated earlier I shall confine my consideration of the issue to whether the conduct of Speight and his supporters are caught within the meaning of one or more of the words "*mutiny*", "*rebellion*" "*revolution*" and "*insurrection*" of the exclusion clause 1(a).

(i) Was it a "mutiny"?

On the evidence before me, what took place on the day in question was not a "*mutiny*" according to its definition.

Lord Goddard in *R v Grant* [1957] 1 WLR 906 at 908; [1957] 2 All ER 694 at 696 referred to the definition of "mutiny" in the *Manual of Military Law* where it is stated that:

"mutiny" implies collective subordination or combination of two or more persons to resort to and induce others to *resist military authority* [Emphasis mine.]

(ii) Was it a "revolution"?

What took place on the critical day viz 19 May 2000 and at the critical time a revolution"? I do not think so on the evidence before me.

The Fiji Court of Appeal was attracted to the definition of the word "*revolution*" in *Brookfield's Waitangi and Indigenous Rights Revolution, Law and Legitimation* (1999 Auckland University Press, p 13 when dealing with the case of *Chandrika Prasad v AG* (unreported, FCA Appeal No 78/2000) at p 21 (Reported NZAR 1.3. 2001 385 at 404) where it is stated:

> For the purposes of a constitutional theorist (though one with practical concerns as well), a revolution may be widely defined as the overthrow and replacement of any kind of legal order, or other constitutional change to it — whether or not brought about by violence (internally or externally directed) — which takes place contrary to any limitation or rule of change belonging to that legal order.

The Court said:

> Not all revolutions are successful. We find that this one was not, for the reasons to be discussed later. Nor are all revolutions on the grand scale of the French Revolution or the Bolshevik Revolution in Russia. Nor are all revolutions "glorious", in the sense of ending the reign of a tyrant or replacing a repressive regime. Nor do all revolutions involve bloodshed.
>
> In this case, there was a purported change in the legal order when the Commander decided to abrogate rather than suspend the Constitution on 29 May; he reinforced this change when, he later chose to install the Interim Civilian Government which has purported to govern ever since.

On the facts, I find that on 19 May 2000 there was no "revolution".

(iii) Was it a "rebellion" and/or "insurrection"

The term "*rebellion*" and "*insurrection*" have been defined as follows by Saville J in *National Oil Co of Zimbabwe v Sturge* [1991] 2 Lloyds Rep 281 at 282:

> "Rebellion" and "insurrection" have somewhat similar meanings to each other. To my mind, each means that *organized and violent internal uprising in a country* with, as a main purpose, the object of trying to overthrow or supplant the government of that country though "insurrection" denotes a lesser degree of organization and size than "rebellion".

"*Insurrection*" also means "a rising of the people" in open resistance against established authority with the object of supplanting it. It was so held in *Lindsay and Pirie v General Accident, Fire and Life Assurance Corp Ltd* [1914] App Div 574.

On the meaning of "rebellion" and "insurrection" I think I ought to refer to the following passage from the judgment of Mustill J in *Spinney's* case (to which reference was also made by Mr Daubney) to complete the picture as to what these terms mean:

> "Rebellion", "Insurrection"
>
> In my judgment the events which occurred in Lebanon before and at the time in question did not constitute either a rebellion or an insurrection. These words have several shades of meaning. I consider that they are used here in their most narrow sense, and not in the wider and more metaphorical way in which they are employed (as I shall later suggest) in some of the reported cases.

> As regards "rebellion" I adopt the definition in the Oxford English Dictionary (Murray) — "… organised resistance to the ruler or government of one's country; insurrection, revolt".
>
> To this I would add that the purpose of the resistance must be to supplant the existing rulers or at least to deprive them of authority over part of their territory.
>
> The dictionary defines "insurrection" in a similar manner, but also suggests the notion of an incipient or limited rebellion. I believe that this reflects the distinction between two exceptions as they are used in the present clause, subject to the rider that a lesser degree of organisation may also mark off an insurrection from a rebellion. But with each exception there must be action against the government with a view to supplanting it. Since, on the findings which I have made, none of the factions had the intent, at the time with which we are concerned, to force a change of government by acts of violence, the exceptions do not apply.

In the context of this case the question is whether at the time when the Plaintiffs' shop was looted at 12.49 pm on 19 May 2000 there was in existence a "rebellion" and/or "insurrection" in so far as the incident of looting was concerned.

As is quite evident on the evidence, and it also stands out that at 12.49 pm the only event that had occurred was the takeover of parliament and holding hostage the Prime Minister and some parliamentarians. The Speight Group and Speight himself had not at that time "arrogated to themselves the proper law making and law enforcing functions of the State" to have usurped power: *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406.

In *Spinney's*, Mustill J said at 435 that "usurped power" does not necessarily cannote a rebellion or insurrection. In this context it is interesting to note Mustill J's further statement at 435 when he said:

> one must ask whether those participating in the events which occurred at the time in question had a sufficiently warlike posture, organisation and universality of purpose to constitute them an usurped power. So far as concerns casual looters, armed men settling personal scores, young people firing off guns for the sake of it, the answer is "No". But for the trained militia, and those armed civilians who were temporarily fighting at their side, the answer is, in my opinion, "Yes".

For these reasons, on the authorities, the said actions of the armed men and taking over parliament and holding the Prime Minister and others hostage did not amount to *mutiny, revolution, revolution, rebellion or insurrection* despite the eloquent submission of Mr Daubney.

(iv) Riot

It is my clear view when the Plaintiff's shop was looted, there was a riot and looting going on. These were staged by, as Mr Patel says, a leaderless, disorganized common mob who committed the crimes of malicious damage and theft but not rebellion or insurrection. Their actions constituted a riot. "*Riot*" is defined in s 86 of the Penal Code Cap 17 as follows:

> when an unlawful assembly has began to execute the purpose for which it assembled by a breach of the peace and to terror of the public, the assembly is called a riot, and the persons assembled are said to be riotously assembled.

"*Unlawful assembly*" has been defined in the same section as including three or more persons assembled with intent to commit an offence.

The actions of these rioters and looters did not pose a threat to the government and is not an insurrection. A common mob as it was in this case, must be distinguished from a rebellious mob. A common mob commits a "riot" whereas

a rebellious mob treason as stated by Wilmot CJ in *Drinkwater v London Assurance* [1799] EngR 133; [1767] 95 ER 863 at 864:

> The difference between a rebellious mob and a common mob is, that the first is high treason, the latter a riot or felony.

(v) Construction of exclusion clause

This was a broker policy, and the broker who prepared it acted for the Plaintiffs (the insured) and any ambiguity in the policy is to be construed against the insurer (the Defendants). In this regard under the caption "Part V — Construction of Policies, Proposals etc" s 29 of Insurance Law Reform Act 1996 sets out the rules of construction and begins thus:

> 29. Notwithstanding any law or agreement to the contrary, the following rules of Construction shall be observed in the interpretation of any proposal for insurance or any policy of insurance or endorsement on a policy of insurance: (a) to (n)..

This was an "*all-risk*" policy which has been described by Lord Summer in *British & Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41 at 57 as follows:

> The more widely the category of perils insured against is extended, the more nearly is it true to say that not only perils *of* the sea but perils *on* the sea are insured. "All risks" has the same effect as if all insurable risks were separately enumerated.

(vi) Meaning of "directly or indirectly caused by or resulting from ***…"***

The words of the exclusion clause 1(a) states that: "*This policy does not insure any loss or damage directly or indirectly caused by or resulting from …*"

These words mean what they say. On the evidence before the court I find that the incidents of the day did not lead straight or immediately, directly or indirectly to the looting that took place at *Tappoos*.

As Mr Patel submits the words "*resulting from*" in clause 1(a) is not prefixed by "*directly or indirectly*". That raises an ambiguity as it can mean either "*directly resulting from*" or "*indirectly resulting from*" or both. As stated in s 29(1) of the Insurance Land Reform Act such ambiguity should be resolved in favour of the insured.

Therefore, an interpretation which is favourable to the insured should be given and that would require interpretation that the loss or damage should directly result from the excluded event.

(vii) Meaning of "resulting from"

What the term "*resulting from*" means is that the loss in fact must have resulted from an excluded event. It has been defined by Collins MR in *Dunham v Clare* (1902) 71 LJKB 683 as follows:

> The question whether one event "results" from another involves an examination of the chain of causation. There must be no break in the chain. If there is a break, then the final event is not the result of the initial event. But the break must be an actual effective break, a novus actus interveniens, from which a new chain of causation commences. To constitute an actual effective break in the chain, the predominant and really efficient cause of the final event must be the new act intervening. Otherwise there is no such break in the chain as to prevent the final event from being the "result" (though an improbable result) of the initial event.

It means that that there has to be a causal connection between excluded event and the loss.

(viii) Meaning of "proximate cause"

Mr Patel referred the court to a number of authorities on what is "*proximate cause*".

It is a fundamental principle of insurance law that the insurer is not liable for any loss which is not *proximately caused* by the peril insured against: *Groves v AMP Fire & General Insurance Co (NZ) Ltd* [1990] 2 NZLR 408 CA at 411 per Hardie Boys J.

On the *doctrine of proximate cause* he referred to Professor Hardy Ivamy, *General Principles of Insurance Law* (6th Ed 1993 at pp 406–9) as follows which is apt:

> The doctrine of proximate cause is based on the presumed intention of the parties as expressed in the contract, which they made. It must be applied with good sense, so as to give effect to, and not to defeat, that intention. Its application, therefore, depends on the broad principle that the policy was intended to cover any loss which can fairly be attributed to the operation of the peril. Wherever there is a succession of causes which must have existed in order to produce the loss, or which has, in fact, contributed or may have contributed to produce it, the doctrine of proximate cause has to be applied for the purpose of ascertaining which of the successive causes in the cause to which the loss is to be attributed within the intention of the policy — Professor Hardy Ivamy, General Principles of Insurance Law (6th ed 1993 at pp 406–409).

In regard to "*cause*" Lord Wright in *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 at 706; [1942] 2 All ER 6 at 15 summed-up the situation very well when he said:

> This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here means what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view.

And Windeyer J in *Kavanagh v Commonwealth* [1960] 103 CLR 547 at 584; [1960] ALR 470 added his observation when he said:

> Law must, for its purposes, extract one or more circumstances out of the whole complex of antecedent conditions of an event as its cause.

To conclude therefore on the authorities and on the evidence the *proximate cause* of the loss to the Plaintiffs' shop was the "*riot*" and "*looting*" and not what took place at parliament house irrespective of whether or not any of these events were also excluded events.

(ix) Causation

It must be noted that the *causal connection* between the excluded event and the loss:

(i) must not be too remote;
(ii) must not merely set the scene or give occasion for the operation of an independent cause;
(iii) must not be accidental; and
(iv) must not be broken.

Mr Patel dealt with the above matters at great lengths citing authorities. Because of the overwhelming evidence against the Defendants, I need only say that there was a break in the chain of 2 hours between the takeover of parliament and the beginning of the riot and looting.

In the circumstances of this case the following extract from the judgment of the full Federal Court in *Como Investments Pty Ltd (in liq) v Yenald Nominees Pty Ltd* [1997] 19 ATPR 43 at 43,619 is apt:

> The law does not consider cause and effect in mathematical or in philosophical terms. The law looks at what influences the actions of the parties. Acknowledging that people are often swayed by several considerations, influencing them to varying extents, the law attributes causality to a single one of those considerations, provided it had some substantial rather than negligible effect.

It is abundantly clear, and as I have found as fact, that George Speight and his group did not have any responsibility to or for the rioters and looters of the Plaintiffs' shop.

(ix) Act of terrorism

I have considered the submissions of both counsel on the subject of "*terrorism*".

In short, as I have stated hereabove it is Mr Daubney's argument that the onus is on the Plaintiffs to prove terrorism. He says that there is not a shred of evidence that he people who caused the damage, namely, the looters were committing acts of terrorism. Hence he says the exception clause does not operate in regard to "terrorism".

On the other hand, it is the Plaintiff's submission that act of terrorism was an insured peril in the "all risks policy". Hence, counsel says, it is not a defined peril. Mr Patel argued, inter alia, that the "act of terrorism must be given a dictionary meaning".

The *Collins English Dictionary* (2nd Ed 1986) defines "*terrorism*" "*as a person who employs terror or terrorism especially as a political weapon*".

In *Francisco Nota Moises v Canadian Newspaper Co* [1993] BCSC 2503/88 the court applied the dictionary meaning to "terrorism" in the absence of a statutory meaning. His Honour said:

> Where an organization or person is to be described as a terrorist, in many respects, depends upon the vantage point of the individual applying the word. One definition of "terrorism" which seems to be generally acceptable is taken from Random House Dictionary:
>
> > The use of violence and threats to intimidate or coerce, especially for political purposes.
>
> The Oxford English Dictionary, 2nd ed, defines "terrorist" as:
>
> > Any one who attempts to further his views by a system of coercive intimidation.

Mr Patel argues that the words "*caused by*" in the proviso can also mean "*indirectly caused by*" in view of the opening words of clause 1(a). He says that there is an ambiguity and that it should be resolved in favour of the insured giving an interpretation favourable to the insured: s 29(l) of the Insurance Law Reform Act 1996.

In view of my findings of fact particularly that the "*marchers*" were a separate group from those who stormed parliament, and that the rioters and looters were an altogether different group which looted the Plaintiffs' shop, no question of acts of terrorism arises as far as looting at Plaintiffs' shop is concerned. Hence there is no need for "terrorism" to be proved by the Plaintiffs. However, *if* the rioting and looting was in support of or in connection with the takeover of parliament, which I find it was not, then that would have been an act of terrorism. Again, to

use Mr Patel's own expression, with which I agree, *if* rioters and looters were part of the marchers, which they *were not* I find, that too was an act of terrorism because the rioting and looting were for "political ends", namely, to displace the government. Also, again if the rioting and looting was in support of, or resulting from, a protest march, which I find it *was not*, which was organised by Fijian political parties to present a petition to the President seeking solution to their grievances that was also an act of terrorism because such march was for "political ends", namely, directed at the government.

To sum up on this aspect, the Defendant is relying entirely on establishing one or more of the terms "*mutiny*", "*rebellion*", "*revolution*" and "*insurrection*" of exclusion clause 1(a). As I have found none of these have been established to enable the Defendant to take the benefit of the exclusion clause. Hence, the "acts of terrorism" if there were any referred to in the exclusion clause does not affect the Plaintiffs in any way in overcoming the Defendants' defence.

(xi) Applicability of s 25 of Insurance Law Reform Act 1996

There was no *causal connection* between the excluded events, which I find did not occur, the loss to the Plaintiffs, the evidence reveals was due to rioting and looting and that was not only the "proximate" cause of the loss but also the direct cause.

In s 25 "*caused or contributed*" mean that it must be the "*proximate*" cause or should have "*materially*" contributed to the loss. The following statement of Gallen J in *Harris v NZ Insurance Co Ltd* (1987) 4 ANZ Ins Cases 60, 817 (*Harris*) is apt:

> In my view, opportunity is not enough. What that section contemplates is something which is rather *most directly* related to the particular loss, … (emphasis mine).

It was in *Harris* that s 11 which is identical to s 25 of Insurance Law Reform Act 1996 was considered.

In the circumstances of this case the Plaintiffs are entitled to relief against the exclusion clause in the policies under s 25 of the Insurance Law Reform Act 1996.

Conclusion

In the outcome, for the above reasons and on the authorities the Plaintiffs succeed in their claims as the Defendants had failed to discharge the burden of proof that lay upon them to prove that the exclusion clause 1(a) applies in their favour to escape liability to pay under the policy for damage suffered by the Plaintiffs arising out of the events of 19 May 2000.

I hold that the Defendant is liable to pay for damage under the said policy.

There will therefore be *judgment* for the Plaintiffs against the Defendants for liability for damages. *It is ordered* that the Defendants pay *costs* to the Plaintiffs which are to be taxed if not agreed. It is further ordered that the Plaintiff apply to court within 14 days from the date of this judgment for the hearing of the determination of the *quantum* and *interest* (if not agreed or resolved by the parties).

Determination made.