TAPPOO HOLDINGS LTD and Anor v ROBERT ARTHUR STUCHBERY (CBV0003 of 2005S)

SUPREME COURT — CIVIL JURISDICTION

FATIAKI P, HANDLEY and SCOTT JJ

19 October 2005, 15 February 2006

Insurance — general insurance — all risks policy — "loss or damage directly or indirectly caused by or resulting from … insurrection" — Constitution of the Republic of Fiji s 122 — Insurance Law Reform Act 1996 s 25(b) — Supreme Court Act 1998 s 7(3).

The Petitioners owned a property and conducted business at a street corner. They were insured by Lloyds under an all risks policy which was in force on 19 May 2000. There was a coup and hostage taking at the Parliament House on the same day. The Petitioner's store was damaged and looted during a riot which also took place. The Petitioners claimed for their loss and damage under the policy, but the insurers denied liability relying on a clause which excluded their liability for "loss or damage directly or indirectly caused by or resulting from … insurrection". The Petitioners sought for damages to be assessed and obtained a favourable ruling in the High Court against the representative insurer. The Court of Appeal allowed the insurer's appeal and entered judgment for the defendant. The Petitioners applied for special leave to appeal in the Supreme Court. The issues were whether: (1) the actions of George Speight (Speight) and his confederates at the Parliament House constituted "an insurrection"; (2) the Respondent established that the loss or damage was directly or indirectly caused by an "insurrection"; and (3) the Petitioners were entitled to relief under s 25 of the Insurance Law Reform Act 1996 (the ILRA).

Held — (1) The actions of Speight and his confederates at the Parliament House at 10.45 am on 19 May 2000 constituted an "insurrection" within the meaning of the policy. Their statements, recorded in Hansard, made their intention to overthrow the established government very plain and their actions spoke as loudly as their words.

(2) There was no evidence that the persons taking part in the march were involved in the looting and wilful damage at the Petitioners' shop or elsewhere in Suva. There was also no evidence that Speight and his confederates planned or instigated the looting or arson. The looters were not part of the "insurrection" and it was not the direct cause of the loss or damage suffered by the Petitioners.

(3) The insurers had discharged the onus, under the policy exclusion, of proving that the loss or damage was caused indirectly by the "insurrection". Under s 25(b) of the ILRA, the Petitioners had the onus of proving that their loss "was not caused or contributed to by" the "insurrection". There was no distinction between an event which caused or contributed to a loss and an event which directly or indirectly caused that loss. The onus on the Petitioners was to prove a negative, which was to prove that there was no causation and no contribution. Thus, they had to prove that there was no causation, direct or indirect. The Petitioners could not discharge their negative onus under s 25(b) of the ILRA where the insurers had discharged their positive onus under the exclusion clause of proving the opposite.

Appeal dismissed.

Cases referred to

Grell-Taurel Ltd v Carribean Home Insurance Co Ltd [2002] Lloyd's (I&R) Rep 655; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; 99 ALR 423; 12 MVR 353; *National Oil Co of Zimbabwe v Sturge* [1991] 2 Lloyd's Rep 281; *Penioni Bulu v Housing Authority* [2005] FJSC 1, cited.

Home Insurance Co of New York v Davila (1954) 212 F 2d 731; *Jones v Wrotham Park Settled Estates* [1980] AC 74; [1979] 1 All ER 286; *Pan American World Airways Inc v Aetna Casualty & Surety Co* (1974) 505 F 2d 989; [1974] 1 Lloyd's Rep 207; *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406, considered.

D. F. Jackson QC, *J. A. Steele* and *B. C. Patel* for the Petitioners

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

[1] Fatiaki P, Handley and Scott JJ. At 10.45 on 19 May 2000, Mr George Speight and several armed confederates seized the parliament and took the prime minister and other members of the government hostage. A breakdown of law and order in Suva followed and at 12.49 a riot began at the Petitioners' shop in the Central Business District of Suva which a mob looted and damaged. The Petitioners who were insured under a Lloyds' policy claimed for their losses but the underwriters declined indemnity on the ground that the damage was caused by excluded events. The Petitioners sued a representative underwriter claiming a loss of $F3,517,615 and the trial took place before Pathik J in the High Court. He held that the exclusions did not apply and entered judgment for the Petitioners for damages to be assessed. An appeal to the Court of Appeal was allowed and judgment was entered for the defendant. The Petitioners now seek special leave to appeal to this court.

Special leave

[2] Appeals to this court in civil matters are governed by s 122 of the Constitution and s 7(3) of the Supreme Court Act (14 of 1998). Section 7(3) provides that this court:

> … must not grant special leave to appeal unless the case raises—
> (a) a far — reaching question of law;
> (b) a matter of great general or public importance;
> (c) a matter that is otherwise of substantial general interest to the administration of civil justice.

[3] The Respondent objected to the grant of special leave and submitted that the precondition in s 7(3) are not satisfied. Mr Daubney SC, in his written submissions, argued that in substance the proposed appeal only challenged the inference of fact drawn by the Court of Appeal that the Petitioners' loss or damage was caused "*indirectly*" or resulted "*indirectly*" from the Speight coup which was correctly characterised as an "*insurrection*" within the meaning of exclusion 1(a) of the policy.

[4] The primary facts, as agreed or as found by the trial judge, were not disturbed by the Court of Appeal, but their Lordships drew the inference that the coup was an indirect cause of the Petitioners' loss or damage. It was submitted that special leave was really being sought just to challenge that inference.

[5] There is force in the Respondent's argument on this point. However the present claims are very large and this attracts a measure of public importance. They concern what we infer was a standard form or one of the standard forms of Lloyds' policies available at the top end of the insurance market in Fiji, which are probably still in use. We were also informed that there are five actions pending in the High Court at Lautoka and one in the High Court at Suva against different insurers which raise the "*insurrection*" issue. This certainly suggests that the present case involves questions of public importance.

[6] Hopefully the events which occurred in Suva on 19 May 2000 and the days that followed will never be repeated but owners of substantial properties and businesses in Suva and elsewhere are likely to want insurance cover against risks arising from similar events, assuming it is available at a price they are willing and able to pay. In our judgment it is a matter of great general and public importance that the scope of this form of policy, in relation to events such as these, should be finally settled for Fiji, so that the market can be fully informed. It would be most unfortunate if the court were to refuse special leave and then decide, perhaps years later, that the decision of the Court of Appeal should be overruled.

[7] While the proposed appeal does invite this court to review the inference of an indirect causal link drawn by the Court of Appeal, it will also involve the construction of the policy, particularly the meaning of "*insurrection*", and the effect of cover being withheld for the indirect, as well as the direct, results of excluded events. The requirements for special leave discussed in *Penioni Bulu v Housing Authority* [2005] FJSC 1 are therefore satisfied and special leave will be granted.

The issues

[8] The material damage cover provided:

> If any physical loss or damage — unintended and unforseen by the Insured — happens to any of the Insured Property during the Period of Insurance, the Company will indemnify the Insured for that loss or damage up to but not exceeding the Limit of Liability.

[9] This was effectively an all risks cover. The exclusion relied on was relevantly:

> (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, warlike operations (whether war is declared or not), civil war, mutiny, rebellion, revolution, insurrection, military or usurped power …

[10] The issues which remain for consideration by this court are:

(1) whether the actions of George Speight and his confederates at Parliament House at and after 10.45 on 19 May 2000 constituted "an insurrection";

(2) whether the defendant established that the loss or damage was directly or indirectly caused by an "insurrection";

(3) whether the plaintiffs were entitled to relief under s 25 of the Insurance Law Reform Act (9 of 1996).

Insurrection

[11] It will be convenient to start by considering the meaning of "*insurrection*". The earlier English authorities were comprehensively reviewed by Mustill J (as he then was) in *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406 (*Spinney's*) and the only other English decision which need be considered is that of Saville J (as he then was) in *National Oil Co of Zimbabwe v Sturge* [1991] 2 Lloyd's Rep 281 (*National Oil*). The only Commonwealth decision that need be considered is that of the Trinidad Court of Appeal in *Grell-Taurel Ltd v Carribean Home Insurance Co Ltd* [2002] Lloyd's (I&R) Rep 655 (*Grell-Taurel*). We will also consider two United States decisions: *Home Insurance Co of New York v Davila* (1954) 212 F 2d 731

(*Davila*) a decision of the First Circuit arising from an insurrection in Puerto Rico in 1950 and *Pan American World Airways Inc v Aetna Casualty & Surety Co* (1974) 505 F 2d 989; [1974] 1 Lloyd's Rep 207 (*Pan American*) a decision of the Second Circuit arising out of the hijacking and destruction of an aircraft in 1970.

[12] In *Spinney's* case Mustill J considered the meaning of "*rebellion*" and "*insurrection*" in an exception clause in the relevant policy. He said at Lloyds Rep 436–7:

> 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 …As regards rebellion I adopt the definition in the Oxford English Dictionary … "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 [the] 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 actions against the government with a view to supplanting it. Since … none of the factions had the intent to force a change of government by acts of violence, the exceptions do not apply.

[13] The causation clause in that policy relevantly provided:

> This Insurance does not cover any loss or damage occasioned by or through or in consequence, directly or indirectly, of any of the following occurrences …

[14] This is similar to the causation clause in the subject policy. Mustill J said of this provision (at Lloyds Rep 439):

> … the protection afforded to the insurers is … greatly increased by the provision admitting indirect causes of loss.

[15] He continued (at Lloyds Rep 441–2):

> I now turn to the question whether there was a sufficient causal connection between the operation of the excepted perils and the losses … The type of connection required is defined by the causation clause … I do not find it necessary to discuss the reported decisions on the meaning of the various individual words of the clause, for whatever they may mean on their own, it is quite clear that the draftsman has gone to great lengths to ensure that the doctrine of proximate cause does not apply. Plainly there must be some limit on the application of the clause, for the chain of causation recedes infinitely into the past. The draftsman must have intended to stop somewhere; and that place must be the point at which an event ceases to be a cause of the loss, and becomes merely an item of history. The draftsman has not explained how that point is to be identified, nor indeed do I believe that words can be found to do so. It is, eventually, a matter of instinct — but an instinct guided by the fact that this is the policy which … expressly insures against violent acts.

[16] In the context of the facts of that case the judge said (at Lloyds Rep 442):

> The plaintiffs have to face the assertion that the turbulence and collapse of public order … permitted and indeed even encouraged the acts of looting and vandalism of which the incidents at Spinney's were examples. Unless rebutted, this would in my view be sufficient to establish that the loss was occasioned indirectly … by, through or in consequence of the civil commotion. This assertion appears to me justified on the facts, so far as they are known…

[17] The policy in the *National Oil* case excluded liability for loss of damage "*caused by … rebellion, insurrection*" but the exclusion did not cover loss or damage indirectly caused by the excluded events. Saville J said (at Lloyds Rep 282):

> In the context of a commercial contract such as the policy under discussion, the expressions "civil war", "rebellion" and "insurrection" bear their ordinary business meaning. … rebellion and insurrection have somewhat similar meanings to each other. To my mind each means an organised 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 organisation and size than "rebellion" — see *Davila* (1954) 212 F 2d 731. Underwriters accept that if they cannot establish insurrection then they must necessarily fail on rebellion.

[18] His decision on the facts of that case is of no assistance in this case.

[19] The decision of the Trinidad Court of Appeal in *Grell-Taurel* was based on the events of 27 and 28 July 1990 when armed insurgents stormed the parliament, taking the prime minister and others hostage, attacked the police headquarters which was destroyed by fire and took over the main television station. The leader of the insurgents made a televised broadcast to the nation shortly afterwards in which he appealed for calm and discouraged looting, but extensive looting broke out. Similarities between the facts of that case and the present are of little significance because a decision on particular facts has no value as a precedent.

[20] The policy in that case included a reverse onus clause which is not found in the present policy, but the exclusion clause was similar:

> This insurance does not cover any loss or damage occasioned by or through or in consequence, directly or indirectly of any of the following occurrences namely:
>
> (d) Mutiny, riot, military or popular rising, insurrection, rebellion…

[21] Hamel-Smith JA said at Lloyds (I&R) Rep 659:

> whether the looting was done for private gain or to further the ends of insurgents is immaterial … the fact that the insurrection was confined to [parliament] and Television House is of no moment. The exception in the policy applied to loss occasioned by insurrection occurring in Trinidad … It may be that the further from the area where the excepted occurrence takes place the less likely the loss will be occasioned by the excepted peril but that is a question of degree and nothing more.

[22] Warner JA, who gave the principal judgment, agreed (at Lloyds (I&R) Rep 666) that the fact that the looters were motivated by personal gain was irrelevant and that it made no difference whether or not insurgents took part in the looting. The trial judge had found that there was no credible evidence to implicate the insurgents in the looting. Warner JA adopted the statement of Mustill J in *Spinney's* quoted above [15] and said at Lloyds (I&R) Rep 667:

> If therefore, the reasoning in Spinney is applied to the instant case, I do not think it can be said that the insurrection was so far removed in time and place, to the extent that it had nothing to do with the looting.

The court, affirming the decision of the trial judge, held that the case fell within the exception excluding loss or damage occasioned directly or indirectly by insurrection and the insured failed.

[23] In the *Davila* case Magruder CJ writing for the First Circuit said at F 2d 736:

> … the district Judge correctly told the jury that, to constitute an insurrection or rebellion within the meaning of these policies, there must have been a movement accompanied

> by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof. An insurrection aimed to accomplish the overthrow of the constituted government is no less an insurrection because the chances of success are forlorn … At the time of its breaking out, an insurrection may not necessarily look impressive either in numbers, equipment, or organisation … at its inception an insurrection may be a pretty loosely organised affair … It may start as a sudden surprise attack upon the civil authorities of a community.

[24] Later he said at F 2d 737–8:

> Whether it was an insurrection or not depended upon what was in [the] minds [of its leaders] as the objective or objectives of the uprising.

[25] In the *Pan American* case Hays J writing for the Second Circuit said at Lloyds Rep 88–9:

> … for there to be an "insurrection" there must be an intent to overthrow a lawfully constituted regime … The all risks policies exclude "loss or damage" due to or resulting from the various enumerated perils, a phrase that clearly refers to the proximate cause of the loss. Remote causes of causes are not relevant to the characterisation of an insurance loss. In the context of this commercial litigation the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings. The words "due to or resulting from" limit the inquiry to the facts immediately surrounding the loss … if the insurer desires to have more remote causes determine the scope of exclusion, he may draft language to effectuate that desire.

[26] Later he said at Lloyds Rep 96–7:

> Insurrection presents the key issue because "rebellion", "revolution", and "civil war" are progressive stages in the development of civil unrest, the most rudimentary form of which is "insurrection". See *Davila* … The District Court held that the word insurrection means … a violent uprising by a group or movement acting for the specific purpose of overthrowing the constituted government and seizing its powers … It based this definition on the opinion of Chief Judge Magruder in *Davila* … which, so far as we can find, is the chief case on the insurance meaning of insurrection … Under *Davila* the revolutionary purpose need not be objectively reasonable. Any intent to overthrow, no matter how quixotic, is sufficient.

[27] The reasoning of Magruder CJ and Hays J in these cases is consistent with the reasoning in the English and Trinidad cases that have been referred to. The first of those cases was also cited with approval by Saville J in the *National Oil* case: at Lloyds Rep 282. In *Spinney's* (at Lloyds Rep 435) Mustill J disapproved the decision in the *Pan American* on the meaning of military or usurped power, but he did not disapprove the reasoning on the proximate cause principle or the meaning of "*insurrection*" in a policy of this nature.

[28] In our judgment these authorities establish the following propositions which are relevant to the construction and operation of the present policy:

(1) An "*insurrection*" is an attempt by force to overthrow the established government. This depends on the objective of those involved, particularly the leaders. It does *not* depend on their prospects of success.

(2) The numbers taking part need not be large and there need not be a high level of planning. An "*insurrection*" may be a loosely organised affair.

(3) The exclusions in this policy are *not* limited to damage proximately or directly caused by an excluded event.

(4) The exclusions cover damage "*indirectly*" caused by an excluded event. How far the chain of indirect causation extends in time and space is a question of fact and degree calling for judgment.

(5) The fact that the looting was for personal gain does not establish that the "*insurrection*" was not an indirect cause.

(6) The fact that the insurgents were not involved in the looting and did not instigate it does not establish that the "*insurrection*" was not an "*indirect*" cause.

[29] In the light of these conclusions we are unable to accept Mr Jackson's submission that the number initially involved in the coup at Parliament House was too small for the enterprise to be characterised as an "*insurrection*".

[30] He also submitted that the court could not consider subsequent events, when deciding whether there was an "*insurrection*". The insurers, to succeed in their defence, must establish that the events at Parliament House that morning constituted an "*insurrection*" because there is no other excluded event on which they could rely as a direct or indirect cause of the loss and damage suffered by the petitioners after 12.49.

[31] If the events at Parliament House that morning did not themselves constitute an "*insurrection*" the fact that one developed later out of these events will be irrelevant. That later "*insurrection*" could not be a cause of loss or damage suffered before it came into existence. To that extent we accept Mr Jackson's submission.

[32] However as Magruder CJ said in *Davila*, in the passage quoted, an "*insurrection*" may be launched without impressive numbers, and its chances of success may appear forlorn. We may be permitted to know that, despite the small numbers initially involved, this coup was partly successful and proved anything but forlorn.

[33] Mr George Speight and his confederates judged the moment well. The widespread opposition to the government among some sections of the indigenous Fijian community, manifested in the growing numbers in the marches, and the taking of the hostages at the parliament allowed the coup to survive the critical early hours and then grow.

[34] The coup initiated by Mr Speight lasted much longer than the disturbances in Puerto Rico and Trinidad which were characterised as "*insurrection*" in *Davila* and *Grell-Taurel*. In the situation that existed in Fiji on 19 May 2000 the eight heavily armed men who seized Parliament House and took the hostages were plainly enough to start an "*insurrection*".

[35] We have no doubt therefore that the actions of Mr George Speight and his confederates at Parliament House at 10.45 on 19 May 2000 constituted an "*insurrection*" within the meaning of this policy. Their statements, recorded in Hansard make their intention to overthrow the established government (*this is a civil coup*) very plain, and their actions spoke as loudly as their words. We affirm the decision of the Court of Appeal on this issue.

[36] The coup or *insurrection* was timed to coincide with a peaceful protest march of indigenous Fijians that had the necessary permit. The march was to finish at Government House with the presentation of a petition to the President which outlined the marchers' grievances against the government. The coup occurred before they arrived and the news on Radio Fiji was received at Government House. As a result the President refused to come to the gates and accept the petition but his Official Secretary, Mr Brown, accepted it on his behalf.

[37] The trial judge found that there was no evidence that persons taking part in the march were involved in the looting and wilful damage at the Petitioners' shop or elsewhere in Suva. This finding was affirmed by the Court of Appeal.

There was also no evidence that Mr Speight and his confederates planned or instigated the looting or arson. The looters were *not* part of the "insurrection" and it was not the direct cause of the loss or damage suffered by the Petitioners.

[38] A riot broke out at the Petitioners' shop at 12.49 2 hours after the coup. We may be permitted to know that the shop is approximately 3 kms by road from Parliament House. There was therefore little separation between the events in either space or time.

[39] Mr Bolaira, a reporter for Fiji TV, covered with a cameraman some of the events in the CBD that day. He was 27 and had lived in Suva all his life but had never seen anything like the rioting before. There had been no lawlessness after the two marches in the preceding weeks. Mr Herman, the Chief Executive Officer of Fiji Broadcasting Corporation Ltd, said that it was providing live coverage of parliament when the coup occurred and it carried the event live on its 5 stations within 5 or 10 minutes. He was unable to get into the parliament and made several trips around the CBD watching the rioting and looting. He said that there had been no reports of rioting and looting before the coup. When he went into the CBD late that morning general looting was under way and he saw men women and children breaking into shops and helping themselves to anything they wanted. He did not know which shop was first looted, or the identity of the looters.

[40] Mr Whippy of Carpenters Ltd heard of the coup quite early because he was Chairman of Fiji Broadcasting Corporation and received a call from the Chief Executive Officer. He immediately informed the General Managers of Carpenter's five stores in Suva who were told to protect stock, assets and staff. He observed general rioting and looting in the CBD later that day. Mr Mohammed Khan, then Assistant Commissioner Operations of the Police went to Parliament House following news of the coup. When he left about 1 pm, he noticed broken glass at shops at Nasese Shopping Centre. He said that 1,300 people in Suva were later charged with stealing on that day. There had been no reports of looting before the coup.

[41] The security tape at Tappoo's shop, played at the trial, showed that the break-in occurred at 12.49. The management closed the shop at 12.11, the staff left and the security alarm was turned on. We infer that this happed because they had news of the coup. Mr Datta, the Managing Director of Homecentre, heard of the coup at about 11.30, and immediately made arrangements to close his store. He observed the break-in at Tappoo's store and reported it to the police. He said that he had not seen anything before like the looting in Suva that day.

[42] The police incidents register at Suva for 19 May was in evidence. A report of the coup was received at 10.30 and the first report of looting, to a shop at Nasese, was received at 11.28. An attempted break in at a shop at Rewa Street was reported at 12.15, and the break in at Tappoos at 12.50. There had also been other reports of lawlessness at 11.35; 11.40; 12.42; and 12.45. Reports of break — ins or fires at other shops were reported at 14.13; 14.15; 14.18; 14.22; 14.24; 14.27; 14.30; 14.33; 14.35; 14.49; (at Vanua House) at 14.53; 14.55; 14.57; 14.59, (at Ratu Cakobau House) at 15.00; 15.03; 15.05; 15.09; 15.16, (at Suva Markets); at 15.40; 15.50; 16.23; 16.28; 17.02; and 17.30. Incidents continued to be reported but there is no need to set out further details. Persons are recorded as having been brought in under arrest for property offences at 13.13; 13.26; 13.30; 13.50; and 16.28.

[43] The records of the National Fire Authority Suva for 19 May tell a similar story. No incidents were recorded until 13.30 when a fire at a shop in Waimanu Road was reported. Further fire calls were received at 14.09; 14.20(2); 14.49; (at GPO); 15.00; 15.30; 15.45; 15.48; 15.50; and 17.24. Incidents continued to be reported but there is no need to set out further details. Fires in shops had also been reported to the police at 14.13; 14.15; 14.27; 14.30; 14.33; 15.03; 15.05; 15.50; and 17.30.

[44] There is no evidence that these incidents were prearranged or planned and there was no evidence, as the trial judge held, that they had been instigated by Mr George Speight and his confederates. The number and widespread nature of the incidents including the attacks on public buildings and the miscellaneous acts of violence and lawlessness suggest a single cause. There was no evidence that a host of separate causes happened, by chance, to provoke all these incidents.

[45] There were 2 unusual events that day before the rioting and looting broke out, the protest march and the Speight coup. The trial judge found that the marchers were not involved in the rioting and looting and on the evidence the great majority went from Government House, where they heard the news, to Parliament House. This was the third of such marches, each larger than the first, but the earlier ones had not led to outbreaks of lawlessness. The march assembled about 8.30 and the marchers moved through the CBD to Government House without incident.

[46] The people of Suva, including the police, had known about the march for some time. This did not stop them going to work, and it did not stop the shopkeepers in the CBD opening their shops. There was business as usual before and after the marchers had passed through. Their confidence was justified, and, as had been the case with the earlier marches, there was no breakdown of law and order until after the coup. There is no reason for thinking that the march itself was a cause of the breakdown of law and order and an indirect cause of the loss and damage suffered by the Petitioners.

[47] The only other extraordinary event that day, before the rioting broke out, was the coup. Only 2 hours elapsed between the coup and the riot at Tappoos. Other shops had already been attacked during that interval at 11.28 and 12.15 and four other incidents of lawlessness had been reported to the police at 11.35, 11.40. 12.42 and 12.45.

[48] The reaction of traders in the CBD who gave evidence is instructive. They were open for business as usual before, during and after the march through the CBD. However when Mr Whippy of Carpenters and Mr Datta of Homecentre heard of the coup they did not "take any chances". They took immediate steps to close their stores and send their staff home. The surveillance tape from the Petitioners' shop tells the same story. The perception of these businessmen that the coup could lead to trouble in the CBD is cogent evidence that it was an indirect cause of the breakdown of law and order and the loss and damage.

[49] Mr Jackson did not challenge the conclusion reached by the Court of Appeal that clause 1(a) of the policy with its reference to indirect as well as direct causes excluded the normal proximate cause principle. He submitted however that there was no evidence that the coup was an indirect cause of the breakdown of law and order.

[50] There was no evidence that the marchers who heard the news at Government House brought the news to the CBD, and no evidence that any of the looters at the Petitioners' shop had heard the news. There was certainly no direct

evidence of this. The insurers did not call any of the 1,300 persons later charged with stealing to prove that they knew of the coup and how they found out.

[51] He also submitted that the Court of Appeal had misapplied the statement of Mustill J in *Spinney's* case [at 15] that there comes a point "*at which an event ceases to be a cause of the loss, and becomes merely an item of history*". This he said was directed to determining when an event, which was a cause, became a cause no longer. It did not establish how or when an event became a cause in the first place. We accept this submission, as far as it goes. Perhaps Mustill J was only saying that two events may be so separated in time and space that one cannot be said to be a cause of the other.

[52] We have concluded that the march alone was not a cause of the breakdown of law and order. There is also no evidence, or plausible inference that the events recorded by the police and the fire department were the result of a multiplicity of separate causes. The only other explanations for the breakdown of law and order are that this was a result of the coup, or the two events were just a coincidence.

[53] Causation has been said by appellate courts to be largely a matter of common sense: *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515; 99 ALR 423 at 431; 12 MVR 353. This is especially true in a case such as this where questions of legal responsibility do not arise. The view that because one event happened before another the earlier was the cause of the later may be bad logic, but in a particular case it may be a good working hypothesis. In our judgment the common sense view is that the coup was the catalyst or cause of the breakdown of law and order. Contrary to the Jackson's submission we do not consider that this is mere speculation.

[54] Although there is no direct evidence that the news of the coup reached people in the CBD other than persons at the senior executive level there is sufficient circumstantial evidence. There is evidence that 7 substantial shops or stores were closed down and their staff sent home. The staff must have been told why they were being asked to go home. It is a reasonable inference that traders who had not heard the news would ask what was going on. Those passing by who did not know would also ask.

[55] The attacks on the other shops and the other incident of lawlessness which occurred before the riot at Tappoos took place over a wide area. An inference that the news spread like wildfire is fairly open and not farfetched or fanciful.

[56] In our judgment the Respondent proved that when the rioting broke out at the Petitioners' shop the insurrection had not become "*merely a matter of history*" but was causative and close enough in time and space to be an indirect cause of the Petitioners' loss and damage. We therefore affirm the decision of the Court of Appeal on this issue and hold that the Petitioners are not entitled to recover under the policy because an excluded event, namely an "*insurrection*", was an indirect cause of their loss and damage.

Insurance Law Reform Act 1996

[57] The Petitioners rely on s 25 of this Act which they submit overrides the exclusion clause in the circumstances of the present case. Section 25 provides:

> 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 … determining the claim of the insured the liability of the insurer has so been defined because 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.

[58] As the Court of Appeal held, but for the omission of the word "By" at the commencement of para (a), this section is in the same terms as s 11 of the Insurance Law Reform Act 1977 (NZ). Mr Daubney SC for the Respondent, submitted that s 25, as it stands, was meaningless and incapable of application by the court. We cannot agree. The conclusion that s 25 was copied from s 11 of the New Zealand Act is compelling. In these circumstances there is no difficulty in a court supplying the missing word by a process of construction. The relevant principles are those stated by Lord Diplock in *Jones v Wrotham Park Settled Estates* [1980] AC 74 at 105–6; [1979] 1 All ER 286 at 289:

> … the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it. … three conditions … must be fulfilled in order to justify this course … thirdly, it [is] possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts.

[59] A simple example will illustrate the mischief to which the sections were directed, and their operation. A typical motor vehicle damage policy provides that the insured is not entitled to indemnity if the car was being driven by a person under the influence of intoxicating liquor when the loss or damage occurred. The insured will almost certainly not be entitled to recover under the policy, despite the section, if the loss or damage occurred while the vehicle was in motion because he would not be able to prove, in terms of s 25(b) that the loss, "*was not caused or contributed to by*" the driver's intoxicated condition. If, however, the vehicle was stationary in a line of traffic or at traffic lights, and was struck from behind, the insured will be able to prove that the loss was *not* caused or contributed to by the driver's intoxicated condition, and the section will override the exclusion clause in the policy.

[60] This analysis demonstrates that the section cannot assist the Petitioners. Under the subject policy the insurers have the onus of proving that the loss or damage was caused directly or indirectly by or resulted from an "*insurrection*". It is clear, both as a matter of common sense and from the cases referred to, that the liability of the insurers under this policy was defined as it was because the insurers considered that an "*insurrection*" was likely to increase the risk of loss. The contrary was not argued.

[61] We have held that the insurers have discharged the onus, under the policy exclusion, of proving that the loss or damage was caused indirectly by the "*insurrection*". Under s 25(b) the Petitioners had the onus of proving that their loss "*was not caused or contributed to by*" the "*insurrection*". We can see no distinction between an event which caused or contributed to a loss and an event which directly or indirectly caused that loss.

[62] Mr Jackson submitted that the onus on the Petitioners under s 25(b) was discharged because they had established that the coup was not the proximate cause of their loss or damage. We do not agree. The onus on the Petitioners was to prove a negative that is to prove that there was no causation and no contribution. Thus they had to prove that there was no causation, direct or indirect.

[63] The Petitioners could not discharge their negative onus under s 25(b) where the insurers had discharged their positive onus under the exclusion clause of proving the opposite. The appeal therefore fails. We make the following orders:

(1) Special leave granted.
(2) Appeal dismissed with costs.

Appeal dismissed.