NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 82/96

COR: THE HON MR JUSTICE DOWNER JA
THE HON MR JUSTICE BINGHAM JA
THE HON MR JUSTICE WALKER JA (AG)

BETWEEN	PETER WILLIAMS (SNR) PETER WILLIAMS (JNR) (an infant by his father and next friend Peter Williams Snr.) SHEREEN WILLIAMS FLORENCE SAMUELS	APPELLANTS
A N D	UNITED GENERAL INSURANCE COMPANY LIMITED	RESPONDENT

Dr. Lloyd Barnett & Clark Cousins instructed by Rattray Patterson & Rattray for the appellants

Dennis Morrison QC, and David Johnson instructed by Piper & Samuda for the respondent

9th, 10th December 1996 & 28th April 1997

DOWNER JA

The issue on appeal is whether Peter Williams Jnr. (an infant by his father and next friend Peter Williams) Peter Williams Snr., Shereen Williams and Florence Samuels are entitled to petition for the winding up of United General Insurance Co. Ltd. Ellis J in the court below dismissed the application.

To appreciate the basis on which the petition was based, it is necessary to advert to the proceedings before Courtney Orr J where he awarded damages against Michael Davis for the sum of $1,324,325.80. As for the facts they are summarised in the affidavit of Christopher Samuda on behalf of the insurer. It reads as follows:

> "2. That my knowledge of the facts and matters deponed to herein is derived from my conduct of the proceedings herein, as well as Suit No. C.L.W-270 of 1990, Suit No. C.L.W-271 of 1990, Suit No. C.L.W-272 of 1990 and Suit No. C.L. S-268 of 1990, (hereinafter called 'the principal suits') instituted by the Petitioners herein against Michael Davis, an insured of the Defendant Company, and such facts and matters, in so far as they are within my knowledge, are true and, in so far as they are not within my knowledge, are true to the best of my knowledge information and belief.
>
> 3. That these proceedings herein arise from the principal suits which were filed by the Petitioners against the said insured to recover damages sustained by the Petitioners in a motor vehicle accident which occurred on the 26th March, 1988 along the Black River Main Road in the Parish of Saint Elizabeth. I exhibit herewith copies of the Writs of Summonses respecting the principal suits all marked 'CLS-1' for identification.
>
> 4. That the trial of the principal suits, (which by order of the Master were consolidated), was heard by the Honourable Mr. Justice Courtney Orr who delivered Judgment on the 27th March, 1996 against the insured and, accordingly, assessed damages against him."

There is a pending appeal, but there has been no stay of execution. Consequently, other things being equal, the appeal could not serve to delay or debar the petitioners from instituting proceedings for winding up. See **In re Amalgamated Properties of Rhodesia (1913) Ltd.** [1917] 2 Ch. 115.

It is now necessary to refer to section 18 of the Motor Vehicle Insurance (Third Party Risks) Act (the Act). It reads:

> "**18.-(1)** If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under

> subsections (1), (2) and (3) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may, be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

Since there is legislative reference to section 5 it is best to advert to it. The material part:

> "**5.-(1)** In order to comply with the requirements of this Act the policy of insurance must be a policy which-
>
> > *(a)* is issued by a person who is an insurer; and
> >
> > (b) subject to the provisions of this section, insures such person, persons or classes of persons, as may be specified in the policy, against any liability incurred by him or them in respect of -
> >
> > > (i) the death of, or bodily injury to, any person; and
> > >
> > > (ii) any damage to property, caused by or arising out of the use of the motor vehicle on the road.

The mandatory coverage is stipulated in section 5 (2) which states:

> " (2) In respect of death or bodily injury claims, the policy shall be required to cover -
>
> > (a) subject to paragraph (b), liability to any one person for a sum of not less than two hundred thousand dollars; and

> (b) a total liability of not less than one million dollars, in relation to each motor vehicle insured under the policy, arising out of all such claims as aforesaid in connection with any one accident."

Then section 5(8) sets out the persons who are to be indemnified. It reads thus:

> " (8) Notwithstanding any rule of law or anything in this or any other enactment to the contrary, a person issuing a policy of insurance under this section shall be liable to indemnify the persons, or classes of persons, specified in the policy, in respect of any liability which the policy purports to cover, in the case of those persons or classes of persons."

The combined effect of sections 18 (1), 5 (1)(b) and section 5 (8) is that the statute provides its own code for third parties to recover on the contract of insurance for personal injury. The insured is liable to be indemnified by the insurers by the terms of the policy. See section 5 (1) (b) (i) and section 5 (8). Then section 18 (1) enables the third party who has the benefit of a judgment against the insured to be indemnified by the insurer. Since an indemnity can only be enforced by an action the appellants could never succeed in this court. For the policy to be effective there must be a "certificate of insurance." This is provided for in section 5(9) which reads:

Turning now to the analysis of Section 18 of the Act supra. To reiterate, it provides that third parties, the petitioners who are the appellants in this case are entitled to the benefits of the insured. In this case the insured is Michael Davis. This is admitted by the respondent insurers. The admission runs thus:

> "2. That my knowledge of the facts and matters deponed to herein is derived from my office as the General Manager of the Defendant

> Company and my conduct of the relevant files in respect of these proceedings and such facts and matters, in so far as they are within my knowledge, are true to the best of my knowledge information and belief.
>
> 3. That the subject of these proceedings arises out of actions filed in this Honourable Court by the Petitioners, to wit, Suit No. C.L. W-270 of 1990, Suit No. C.L. W-271 of 1990, Suit No. C.L. W-272 of 1990 and Suit No. C.L. S268 of 1990, (hereinafter called 'the said Suits') against Michael Davis, who was insured by the Company, to recover damages in respect of a motor vehicle accident which occurred on the 26th March, 1988 along the Black River Main Road in the Parish of Saint Elizabeth.
>
> 4. That I am advised by the Company's Attorneys-at-Law, Messrs. Piper & Samuda, and do verily believe that the said suit progressed to trial and that on the 29th March, 1996 the Trial Judge, the Honourable, Mr Justice Courtney Orr, delivered Judgment against the Company's insured in respect of which an appeal was lodged on the 8th May, 1996."

Then the deponent acknowledges:

> "5. That on the 9th May, 1996 the Company received a letter dated the 7th May, 1996 from Messrs. Rattray Patterson Rattray, hereinafter called 'the Petitioners' said Attorneys-at-Law', making a demand on behalf of the Petitioners as Judgment Creditors of the Defendant Company and on or about the 29th June, 1996 the Company received the Petition dated the 5th June, 1996 and filed herein."

Then comes the crucial paragraph 6 which states the defence to the petition.

Here it is:

> "6. That the Company has not, as at the date hereof, received any Court process on behalf of the Petitioners with respect to the institution of proceedings against the Company for the recovery of the Judgment given in the said suits in respect of which the Company did

> not receive any notice of the commencement of the same."

What is the effect of section 18 of the Act referred to previously. Since the petitioners have obtained a judgment against the insured, then the insurer is liable to pay the petitioners the sums claimed. What procedures are mandatory to secure payment? The answer is that proceedings must be instituted against the insurer for recovery of the sum claimed. In the course of those proceedings the insurer may have defences against the insured and they can be raised if the need arises. This is recognised by the authorities and in any event it confirms the ordinary principles of the common law.

An apt illustration of this is **Guardian Insurance Co. Ltd. v. Sutherland** [1939] 2 KBD 246 at p. 250. Branson J said:

> "In **McCormick's** case (1934) 50 T.L.R. 528; Digest Supp.; 40 Com. Cas. 76 Scrutton, L.J., said, at pp. 84, 85:
>
> > 'I might approach that matter as I approached it in another case. It was a commonplace of the law that an insurance company was not liable on a policy obtained by fraud or by concealment or by innocent misrepresentation. That common law right you would not expect to be taken away, and on the construction the court has adopted it would not be taken away by Parliament without clear words showing to what the Act referred. There is a series of decisions under the Agricultural Holdings Act to that effect; and if I approach subsect. (4), meeting an argument that subsect. (4) intended to take away from insurance companies the right to object to a liability on a policy obtained by fraud or misrepresentation or concealment, I should expect very clear words to compel me to do it; and I find no such clear words in subsect. (4).
>
> Then he goes on to say that the subsection was intended to have the effect, and to make it clear, that a certain defence could no longer be raised. The effect of this paragraph can only be avoided by Mr. Holmes if he says that his action for indemnity is not upon the contract but upon the

> statutory right conferred by the section. The section does not, in my opinion, impose any statutory liability upon the insurer. It only gives to 'persons specified' a statutory right, which, apart from statute they did not possess, to sue upon the contract. This is on all fours with the right given by the Third Parties (Rights Against Insurers) Act, 1930, to third parties in the event of bankruptcy or winding up of persons insured, and the rights given by the Road Traffic Act, 1934, s. 10 to persons who have recovered judgment against persons insured. I am satisfied that subsect. (4) does not help the defendants." [Emphasis supplied]

Another is **English & American Insurance Co. Ltd v. Stanley McDermott & Motor & General Insurance Co. Ltd.** [1974] 22 W.I.R. 451; [1974] 12 JLR 1675

The following passage appears in the judgment of Graham Perkins JA at 1680:

> "... As against the M.G. Company, however, the position is fundamentally different. Warwar was, at the material times, a person insured by the M.G. policy and entitled to indemnity thereunder in respect of those sums which he became legally liable to pay to McDermott as a result of the judgment against him. McDermott could, therefore, step into Warwar's shoes in respect of the latter's right against the M.G. Company. This he could do because of the positive sanction contained in s. 16 (1) of Cap. 257."

An earlier passage at p. 1679 emphasises the point that the judgment creditor of the insured must institute proceedings against the insurance company. It reads:

> " The question may now be asked: did Feanny ever become legally liable to pay any monies to McDermott? I have not the least hesitation in answering that question with an emphatic 'No.' Clearly Feanny could not become 'legally liable to pay' until his liability to McDermott was 'ascertained and determined to exist, either by the judgment of a court or by an award in an arbitration or by an agreement:' see, for example *Post Office v Norwich Union Fire Insurance Society Ltd* (1967) 1 All E.R. per Lord Denning, M.R. at p. 579."

If this view is correct the petitioners are now eligible to institute proceedings against the insurer and when judgment is obtained then they can proceed pursuant to sections 204 - 205 of the Companies Act for winding up.. This was the gist of the submissions of Mr. Morrison QC and, Ellis J accepted them.

Dr. Barnett contended however, that:

> "... the effect of these provisions of the Motor Vehicle Insurance (Third-Party Risks Act is to impose a legal obligation on the insurer to make a monetary payment to the judgment creditor in the circumstances described. In effect it creates a statutory assignment of the benefit of the policy to the third-party on whom it confers an immediate right to recover against the insurer." [Emphasis supplied].

No complaint can be made of this admirable submission provided it is recalled that the immediate right to recover means a right to institute proceedings pursuant to section 18 of the Act. This principle is illustrated in Company Law fifth edition by Robert R Pennington. It reads at p. 843:

> " A creditor is a person who could enforce his claim against the company by an action of debt, and a person cannot petition as a creditor when he merely has a right of action against the company for unliquidated damages for breach of contract *Re Milford Docks Co* (1883) 23 Ch D 292 or tort *Re Pen Y Van Colliery Co (1877) 6 Ch D 477* doubted by Megarry J in *Re a Company* [1974] 1 All ER 256 at 260, [1973] 1 WLR 1566 at 1572 or for the restitution of money or property to him in equity. But if such a person obtains judgment against the company for an ascertained sum of money, the judgment itself creates a debt, and he is then able to petition. However, a person who has obtained judgment against a third party to whom the company is indebted, does not become a creditor of the company by obtaining a

> garnishee order against it to enforce his judgment, and this is so even if the garnishee order is made absolute, so that it will be contempt of court for the company not to comply with it. *Re Combined Weighing and Advertising Machine Co* (1989) 43 Ch D 99. If the judgment creditor cannot or does not wish to enforce the garnishee order by the normal processes of execution, he may sue the company for the amount owed by it to the judgment debtor, and when he has obtained judgment against the company for that amount, he may then present a winding up petition against it as a judgment creditor of the company itself. *Pritchett v English and Colonial Syndicate Ltd* [1899] 2 QB 428

As for further authorities which throw light on the problem see **Greaves v New India Assurance Co Ltd** [1975] 27 WIR 17 at p. 18. In **Motor General Insurance Co. Ltd v Pavy** [1993] 2 LRC 593 Lord Lowry giving the opinion of the Board in a case from Trinidad said at p. 603:

> " The third party must rely on s 10(1) of the Act. The relevant words, having regard to the 1974 amendment of s 4(1)(b), may for present purposes be paraphrased as follows:
>
> > 'If judgment in respect of any liability arising from the death of or bodily injury to or damage to the property of a third party (being a liability covered by the terms of the policy) is obtained against the insured, then the insurers shall pay to the third party the sum payable under the judgment in respect of the liability.'
>
> The insurers must therefore pay provided the insured's liability is a *liability covered by the terms of the policy.* These words are defined in s 10(5) as:
>
> > 'a liability which is covered by the policy or which would be so covered but for that fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy.'

> It should be noted that third parties are entitled to recover from the insurers under s 10(1) in every case in which judgment is obtained and s 4(1)(b) as amended applies, and not only in cases where the insured is insolvent or is in breach of or not covered by the policy."

Here Lord Lowry is using recovery in the same technical way as Dr. Barnett. See **Thomas v Garcia** 7 JLR 76 at p. 83 where it is reiterated that recovery means "to recover by action and by judgment of the Court."

It is now necessary to advert to section 203 and 204 of the Companies Act. Section 203 insofar as material reads:

> "(ii) WINDING UP BY THE COURT
>
> *Cases in which Company may be wound up by Court*
>
> **203.** A company may be wound up by the Court if-
>
> " (e) the company is unable to pay its debts;"

Then 204 sets out what is required to establish that a company is unable to pay its debts. It reads:

> "**204.** A Company shall be deemed to be unable to pay its debts -
>
> (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one hundred dollars then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
>
> (b) if execution or other process issued on a judgment, decree or order of any

> due, has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
>
> (b) if execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
>
> (c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company."

What then ought the petitioners to do? They must establish that they are creditors of the insurer by obtaining a judgment debt as stated earlier and then follow the procedures in 204(a).

Section 204(b) need not detain us for it was never sought to say that the petitioner complied with that condition. Turning then to section 204 (c), the initial condition is that the company is unable to pay its debt. In the circumstances of this case, the necessary pre-condition is that section 204 (a) must be proved. But the petitioners have not proved this. All that section 204 (c) states in determining the issue of whether a company can pay its debt, is that account must be taken of continuing and prospective liabilities. All that the petitioners have proved is that they have a right of action pursuant to section 18 of the Act as stated above.

In such an action, the insurer may raise defences that they have against the insured and the petitioners who are third parties as previously stated, would have no greater rights against the insurer than the insured.

So considered, Ellis J was correct to have dismissed the petition. The order below is affirmed and the petitioners must pay the respondent insurer its agreed or taxed costs.

BINGHAM, J.A.:

The facts giving rise to this appeal are not in dispute. The matter turns on the legal effect of the rights created in third parties by virtue of section 18 of the Motor Vehicles (Third Party Risks) Act. It may be convenient at this stage to set out what the section provides. It reads:

> "18.--(1) If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under subsections (1), (2) and (3) of section (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may, be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

Section 5 of the said Act (referred to supra) where relevant reads:

> "5.--(1) In order to comply with the requirements of this Act the policy of insurance must be a policy which--
>
> (a) is issued by a person who is an insurer; and
>
> (b) subject to the provisions of this section, insures such person, **persons or classes of persons, as may be specified in the policy, against any liability incurred by him or them in respect of--**

> "(i) the death of, or bodily injury to, any person; and
>
> (ii) any damage to property, caused by or arising out of the use of the motor vehicle on the road." [Emphasis supplied]

A person specified in the policy would include, apart from the insured, anyone using a motor vehicle by his authority or with his permission. The extent of the coverage under the policy of insurance is then set out in section 5(2), which states:

> "5.--(2) In respect of death or bodily injury claims, the policy shall be required to cover--
>
> (a) subject to paragraph (b), liability to any one person for a sum of not less than two hundred thousand dollars; and
>
> (b) a total liability of not less than one million dollars, in relation to each motor vehicle insured under the policy, arising out of all such claims as aforesaid in connection with any one accident."

The extent of the amount recoverable with respect to any one accident was recognised by the appellants when, through their attorneys, they sought to recover the judgment obtained against the insured Michael Davis from the respondent (the insurers). Although the amount of the judgment costs and interest was in excess of $1,324,325.80, the memorandum from their attorneys to the insurers was expressed in the following terms:

"May 7, 1996

The Claims Manager
Untied (sic) General Insurance Co. Ltd.,
4 Trafalgar Road
Kingston 5.

Dear Sirs;

RE: SUIT NO. C.L. W-270 OF 1990 - PETER WILLIAMS (JNR)
SUIT NO. C.L. W-271 OF 1990 - PETER WILLIAMS (SNR)
SUIT NO. C.L. W-272 OF 1990 - SHEREEN WILLIAMS &
SUIT NO. C.L. S-268 OF 1990 - FLORENCE SAMUELS
vs. MICHAEL DAVIS

We act for the Judgement Creditors in the consolidated suits.

Damages of $1,324,325.80 was awarded against the Defendant who is your insured by the Honourable Mr. Justice Courtnay Orr dated the 29th March 1996.

Pursuant to Section 204(a) of the Companies Act on behalf of the Judgement Creditors we hereby demand payment by your United General Insurance Company Limited of the sum of **One Million Dollars ($1M)** being the policy limit of your insured and take notice that if you United General Insurance fail to pay the said sum for the period of three (3) weeks succeeding the service of this demand on you, or to secure or compound the same to the reasonable satisfaction of the Judgement Creditors, you shall be deemed unable to pay your debts and a Petition for the winding up of United General Insurance Company Limited may be presented by the Judgment Creditors."

Dr. Barnett, in his presentation, having examined the Act with particular reference to sections 4, 5, 12 and 15, submitted that section 18 imposes a duty on an insurance company to satisfy a judgment entered against the insured once it is established that there is a certificate of insurance issued in his favour

{vide section 5(9) of the Motor Vehicles (Third-Party Risks) Act}. He further contends that the effect of section 18(1) of the said Act is to give a statutory right of recovery in favour of the third party against the insurance company. There was, therefore, he argued, an immediate obligation on the part of the insurers to pay the judgment.

From this submission the question which naturally arises is as to what was the nature of the right accruing to the appellants under section 18(1) of the Act by virtue of the statutory exception created by the subsection. Without this intervention by Parliament, a third party such as the appellants would have been without any remedy against the respondents (insurers), based on the common law rule as to privity of contract. Section 18(1), by virtue of the express words as set out therein, mandates that:

> "...the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

The effect of this provision, by creating a statutory exception to the common law rule based on the doctrine of privity of contract, is to assign to the successful third party, which in this case are the appellants, all such rights as are vested in the insured under the indemnity clause in the policy of insurance. Such a right would be one enabling the third party to enforce the judgment obtained against the insured by action against the insurers, limited in this case to one million dollars; such being the extent of the liability of the coverage under

the policy of insurance. In such an action, the insurers would be entitled to raise any defences available to them against the insured. This is so as by virtue of the statutory assignment under section 18(1) a third party could obtain no greater right of recovery against the insurers than the insured has under the contract of insurance.

From the arguments both below and before this court, it is not an issue that the insured Michael Davis, by virtue of the judgment awarded against him by Courtenay Orr, J. in favour of the appellants (the petitioners), was entitled under the policy of insurance with the respondents (insurers) to be indemnified by that company. In this regard, the judgment entered against Michael Davis, he being a person who by section 5(1) of the Act was one who had insurance coverage which:

> "...specified in the policy, against any liability incurred by him or ... in respect of--
>
> > (i) the death of, or bodily injury to, any person; and
> >
> > (ii) any damage to property, caused by or arising out of the use of the motor vehicle on the road."

The effect of this judgment, however, would not be, as Dr. Barnett submitted, to create a debt or an immediate binding obligation on the part of the insurers to settle the judgment obtained against the insured. The rights created by section 18(1) in favour of the third party are to enforce the indemnity clause in the policy. Such an indemnity against liability in respect of third party risks is ordinarily enforceable by action (vide section 5(8) of the said Act).

Of the authorities relied on by counsel, those cited by Dr. Barnett were predicated on the basis that the effect of section 18(1) created a debt in relation to the said judgment due to the appellants. They relate to factual situations in which the petitioners were all judgment creditors, as such having the necessary locus standi to bring winding-up proceedings in their capacity as "contingent or prospective creditors." Although a judgment creditor, the appellants, vis-a-vis the insured, had a right to an indemnity this would not ipso facto make them creditors against the insurers.

Of the authorities cited, ***Motor and General Insurance Co. Ltd. v. Pavy*** [1993] 2 L.R.C. 593, a decision of the Judicial Committee of the Privy Council, and ***Greaves v. New India Assurance Co. Ltd.*** [1975] 27 W.I.R. 17 are examples of the manner in which the rights accruing to successful third parties are enforced against insurers under a policy of insurance.

Equally instructive is ***English and American Insurance Co. Ltd. v. McDermott and Motor and General Insurance Co. Ltd.*** [1974] 22 W.I.R. 451; [1974] 12 J.L.R. 1675. This was an action brought by a motor cyclist against insurers to be indemnified by them in respect of policies of insurance issued to the registered owner of a motor car and the authorised driver. The policy issued to the authorised driver was one covering him against liability while operating another motor vehicle. The policy covering the registered owner of the vehicle excluded indemnity to a third party where the authorised driver was covered under another policy. The subsequent action by the third party under section 16(1) of the Motor Vehicles (Third-Party Risks) Act (now section 18(1) of the

revised legislation) against the insurers of the registered owners of the motor car failed in the Court of Appeal but succeeded against the insurers of the authorised driver. Graham Perkins, J.A. in examining the nature of the relationship between the third party and the insurers put the matter this way:

> "Could McDermott, at any time after obtaining judgment against Warwar, and without proceeding to judgment against Feanny, say to Feanny 'I had a judgment in my favour against Warwar by whose negligence I was injured while he was driving a car of which you are the owner. I know nothing of the circumstances in which Warwar came to be driving your car as your servant and agent. I therefore require you without more to pay me the amount of that judgment notwithstanding that I have not proceeded to judgment against you?' I apprehend that Feanny would be entitled to say to McDermott 'If you do not have a judgment against me I am not interested in your demand."

Having determined that McDermott could not proceed against Feanny or his insurers, the learned judge then proceeded to consider his position in relation to Warwar and his insurers, Motor and General Insurance Co. Ltd. He then said (p. 456 G-H):

> "As against the M. G. Company, however, the position is fundamentally different. Warwar was, at the material time, a person insured by the M. G. Policy and entitled to indemnity thereunder in respect of those sums which he became legally liable to pay to McDermott as a result of the judgment against him. McDermott could, therefore, step into Warwar shoes in respect of the latter's rights against the M.G. Company. This he could do because of the positive sanction contained in s. 16(1) of Chapter 257."

Another decision which further illustrates the true nature of the relationship between the appellants and the respondent is that of ***Attorney General v. Official Receiver*** [1987] L.R.C. (Comm.) 782. A case from Hong Kong, which contains a similar scheme of legislation to Jamaica. There Huggins, V.P., in dealing with the nature of the relationship said (p. 784):

> "First we have to consider the nature of the demands against the companies which are here in issue. Clearly there is no privity of contract between the third party claimants and the insurance companies: **those contracts were made by the insurers with the insured**. But for the statute the third parties could have no right to proceed against the insurers. However, the protection which the legislature intended to afford to third party victims of traffic accidents by imposing on users of motor vehicles an obligation to insure against third party risks could only be fully effective if a direct right of action against the insurers were conferred. As I understand it, third party claims must be brought under section 10(1)." [Emphasis supplied]

The subsection referred to which is in pari materia with section 18(1) of the Motor Vehicle (Third-Party Risks) Act was also examined and considered in ***Guardian Insurance Co. Ltd. v. Sutherland*** [1939] 2 All E.R. 246, a case concerned with the right of insurer to avoid a policy issued in reliance upon representations which were shown to be false. There Branson, J., in the course of his judgment, said:

> "The section does not in my opinion impose any statutory liability upon the insurer. **It only gives to the 'persons specified' in the policy a statutory right, which apart from statute they did not possess, to sue upon the contract**. This is on all fours with the right given by the Third Party (Right Against Insurers) Act, 1930, to third parties in the event of bankruptcy or winding up of persons insured, **and the Rights given**

> **by the Road Traffic Act, 1934, section 10, to persons "who have recovered judgment against the persons insured.**" [Emphasis supplied]

As the above citations, as well as the several cases mentioned and relied on by Mr. Morrison, Q.C. for the respondents, establish that right being one entitling the appellants to sue upon the Contract of Insurance entered into between the insurers (respondent) and the insured Michael Davis.

As it is common ground that no action has so far been brought by the appellants against the respondent on the judgment debt, it follows that there is no relationship of debtor and creditor in existence between the respondent and the appellants. Such a relationship presupposes that there is an ascertained sum due from the respondent to the appellants. This situation would not arise until judgment has been obtained by the appellants against the respondent in relation to the debt created by the judgment against the insured.

The learned editor of ***Pennington's Company Law (5th Edition)*** in considering the nature of the relationship of debtor and creditor and its limitations deals with the question in this way (p. 843):

> "A creditor is a person who could enforce his claim against the company by action of debt, and a person cannot petition as a creditor when he merely has a right of action against the company for unliquidated damages for breach of contract or tort or for restitution of money or property to him in equity.
>
> **But if such a person obtains judgment against the company for an ascertained sum of money, the judgment itself creates a debt, and he is then able to petition.**" [Emphasis supplied]

In the instant case, that stage, as represented by the underlined words, has not been arrived at.

In light of the above, it is my view that on the law and the authorities relied on by the respondent, Ellis, J. was correct in dismissing the petition. I would also join with Downer, J.A. in dismissing the appeal in terms of the order as proposed by him.

WALKER JA

On March 26, 1988 the appellants were injured in a motor vehicle accident which was caused by the negligence of the respondent's insured, Michael Davis. Michael Davis was subsequently convicted of careless driving arising out of this accident. Thereafter, having first served the notice required by the Motor Vehicles Insurance (Third-Party Risks) Act, the appellants instituted civil proceedings against the respondent's insured. On March 29, 1996 these suits were heard in the Supreme Court and a judgment was given in favour of the appellants whereunder the appellants were awarded damages and costs totalling in excess of $1,000,000.00.

This judgment having remained unsatisfied despite a statutory demand made on the respondent, the appellants filed a petition to wind-up the respondent. On July 4, 1996 this petition was heard and dismissed. It is against this order of the court that this appeal lies.

The ultimate point which must now be determined is whether, having obtained their judgment against the respondent's insured, the plaintiffs have become creditors of the respondent within the intendment of the Companies Act and, as such, are entitled to petition for the winding-up of the respondent.

Counsel for the appellants submitted that section 18 (1) of the Motor Vehicles Insurance (Third-Party Risks) Act imposes a legal obligation on an insurer to satisfy a judgment obtained by an insured person in the circumstances described therein. He submitted that in effect the provisions of section 18 (1) create a statutory assignment of the benefit of an insurance policy to a third-party on whom is then conferred an immediate right to recover against an insurer. From this standpoint Dr. Barnett proceeded to embark upon a close examination of the provisions of certain sections of the Companies Act, particularly sections 203, 204 and 205 which deal with the winding-up of a company by the court. He contended that section 205 provided that a contingent or prospective creditor had a sufficient "locus standi" to present a petition for winding-up a delinquent company. A fortiori, where, as in the present case, plaintiffs, by virtue of a judgment obtained against an insured, stood in the position of creditors to whom there was an immediate obligation to pay. The word "creditor" it was submitted should be given a wide and not a restricted meaning when used within the context of the Companies Act.

According to counsel for the appellants, these provisions of the law, when properly construed, and considered in conjunction with the legal principles to be extracted from the several authorities which he cited and when applied to the circumstances of the present case, support the following conclusions:

(i) that pursuant to the provisions of section

> 18 (1) of the Motor Vehicles Insurance (Third-Party Risks) Act the respondent was under a legal obligation to pay the judgment debt and costs due to the appellants;
>
> (ii) that the appellants had an immediate right to recover the said judgment debt and costs directly from the respondent;
>
> (iii) that, in the circumstances, the appellants were creditors, even contingent or prospective creditors, of the respondent and, as such, were entitled to apply to wind-up the respondent pursuant to the provisions of the Companies Act.

It is necessary to quote the relevant sections of the enactments upon which reliance has been placed. Section 18 (1) of the Motor Vehicles Insurance (Third-Party Risks) Act provides as follows:

> "18.-(1) If after a certificate of insurance has been issued under subsection (4) of section 5 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may, be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

So far as is relevant section 203 of the Companies Act reads as follows:

> "**203.** A Company may be wound up by the Court if -
>
> ...
>
> (e) the company is unable to pay its debts."

Section 204 of the Companies Act provides:

> "**204**. A company shall be deemed to be unable to pay its debts-
>
> (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one hundred dollars then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
>
> (b) if execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
>
> (c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company."

So far as is relevant section 205 provides as follows:

> "**205**.-(1) An application to the Court for the winding up of a company shall be by petition, presented subject to the provisions of this section either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately:
>
> Provided that -
>
> ...
>
> (c) the Court shall not give a hearing to a winding up petition presented by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of the Court; and
>
> (d) ..."

In my judgment section 18 (1) (supra) does not create a legally enforceable debt, let alone a debt which is immediately enforceable against an insurer by an insured. What the section does is to give to persons specified therein a statutory right to sue upon a contract of insurance. It does not place a statutory liability upon the insurer: see **Guardian Assurance Co. Ltd. v. Sutherland** [1939] 2 KBD 246: **English and American Insurance Co. Ltd. v Stanley McDermott and Motor and General Insurance Co. Ltd.** [1974] 12 JLR 1675.

When, having sued, the insured obtains a judgment against the insurer for the sum claimed, the insured may then present a winding-up petition against the insurer where, as here, the insurer is a company. This the insured may do as a judgment creditor of the company itself: see **Pritchett v English and Colonial Syndicate Ltd.** [1899] 2 QB 428.

In the present case, the appellants have not taken civil proceedings against the respondent although the judgment debt and costs to which they are entitled remains unsatisfied. They must sue and hope to obtain a judgment against the respondent. If they do so and succeed, only then would they become creditors of the respondent so as to be able to invoke the provisions of the Companies Act.

In the result, I too, would dismiss this appeal with costs to the respondent to be agreed or taxed.