[HOUSE OF LORDS]

BRADLEY . . . . . APPELLANT

AND

EAGLE STAR INSURANCE CO. LTD. . . . RESPONDENTS

1989 Jan. 30, 31; March 2

Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Templeman, Lord Oliver of Aylmerton and Lord Jauncey of Tullichettle

Insurance—Third parties' rights—Employers' liability—Employee claiming damages for personal injury—Employers voluntarily wound up and dissolved—Whether employee able to bring action against employers' insurers—Whether entitled to discovery—Third Parties (Rights against Insurers) Act 1930 (20 & 21 Geo. 5, c. 25), s. 1[1]

The applicant was employed by a company, D. Ltd., in the cardroom of its cotton mill for various periods between 1933 and 1970. In 1970 she was certified by the Pneumoconiosis Medical Panel to be suffering from byssinosis, a respiratory disease caused by the inhalation of cotton dust. The company was wound up in 1975 and dissolved in 1976. In 1984 the applicant, intending to bring an action against the defunct company's insurers under section 1(1) of the Third Parties (Rights against Insurers) Act 1930, applied for pre-action discovery against the insurers pursuant to section 33(2) of the Supreme Court Act 1981 and R.S.C., Ord. 24, r. 7A. She sought an order that the insurers should disclose the terms and particulars of all contracts of insurance issued by them to the defunct company in respect of the company's liabilities to its employees for personal injuries sustained at work during the relevant periods between 1933 and 1970. The district registrar granted the application but his order was set aside by Macpherson J. on the insurers' appeal. The Court of Appeal dismissed the applicant's appeal.

On appeal by the applicant:—

Held, dismissing the appeal (Lord Templeman dissenting), that under a policy of insurance against liabilities to third parties, the insured person could not sue for an indemnity from the insurers unless and until the existence and amount of his liability to a third party had been established by a judgment of a court in an action, or by an award in an arbitration, or by an agreement between the insured and the third party; that since the dissolution of D. Ltd. made it impossible to establish the existence and amount of any liability to the applicant there was no right of indemnity which could be transferred to and vested in the applicant under section 1(1) of the Act of 1930; and that accordingly, no useful purpose could be served in making an order for pre-action discovery in an action which could not succeed (post, pp. 961H, 963E–H, 966A–B, 968G–H, 970E–G).

Post Office v. Norwich Union Fire Insurance Society Ltd. [1967] 2 Q.B. 363, C.A. approved.

Decision of the Court of Appeal [1988] 2 Lloyd's Rep. 233 affirmed.

[1] Third Parties (Rights against Insurers) Act 1930, s. 1: see post, p. 963A–D.

The following cases are referred to in the opinion of Lord Brandon of Oakbrook:

Harrington Motor Co. Ltd., In re, Ex parte Chaplin [1928] 1 Ch. 105, C.A.
Hood's Trustees v. Southern Union General Insurance Co. of Australasia Ltd. [1928] 1 Ch. 793, Tomlin J. and C.A.
Post Office v. Norwich Union Fire Insurance Society Ltd. [1967] 2 Q.B. 363; [1967] 2 W.L.R. 709; [1967] 1 All E.R. 577, C.A.

The following additional cases were cited in argument:

Calder v. H. Kitson Vickers & Sons (Engineers) Ltd. [1988] I.C.R. 232, C.A.
Dunning v. United Liverpool Hospitals' Board of Governors [1973] 1 W.L.R. 586; [1973] 2 All E.R. 454, C.A.
Firma C-Trade S.A. v. Newcastle Protection and Indemnity Association [1987] 2 Lloyd's Rep. 299
West Wake Price & Co. v. Ching [1957] 1 W.L.R. 45; [1956] 3 All E.R. 821

APPEAL from the Court of Appeal.

This was an appeal by leave of the House of Lords (Lord Keith of Kinkel, Lord Templeman and Lord Jauncey of Tullichettle) dated 14 July 1988 by the applicant, Mrs. Doris Bradley, from the decision of the Court of Appeal (Purchas, Lloyd and Staughton L.JJ.) [1988] 2 Lloyd's Rep. 233 dated 25 March 1988 dismissing her appeal from the judgment of Macpherson J. The judge had allowed the insurers' appeal from an order made by Mr. District Registrar Burton granting the applicant's application for pre-action discovery pursuant to section 33(2) of the Supreme Court Act 1981 and R.S.C., Ord. 24, r. 7A.

The facts are stated in the opinion of Lord Brandon of Oakbrook.

David Clarke Q.C. and *David Allan* for the applicant. The question for decision in the appeal is whether the applicant has a right of action against the insurers pursuant to the provisions of section 1(1) of the Third Parties (Rights against Insurers) Act 1930 when the insured tortfeasor no longer exists and his liability to the applicant has not previously been adjudicated on or quantified. The Court of Appeal held that it was bound by the previous decision of that court in *Post Office v. Norwich Union Fire Insurance Society Ltd.* [1967] 2 Q.B. 363, which stated that although the liability to the injured person arose at the time when damage was sustained the right of the insured to indemnity from the insurer did not arise until his liability to the injured person had been ascertained and determined to exist either by judgment or by an award in arbitration or by agreement. That decision is wrong and must be overruled.

The applicant made an application under section 33(2) of the Supreme Court Act 1981 (its predecessor was section 31 of the Administration of Justice Act 1970) because *Dunning v. United Liverpool Hospitals' Board of Governors* [1973] 1 W.L.R. 586 decided that where proceedings were likely to be brought pre-action discovery should be

A brought: see p. 590. In reliance on that principle which is unchallenged the applicant seeks sight of the relevant policies of insurance to consider the conditions therein and to ascertain what rights against the insurers had been transferred to her under the Act of 1930 on the winding up of Dart Mill Ltd.

It is common ground that any liability to a third party is incurred within the meaning of section 1(1) of the Act of 1930 as soon as the B third party's claim against the insured tortfeasor is complete, for example, where there is a breach of duty by the tortfeasor. In the present case the cause of action was complete in 1970 when the applicant was certified as suffering from byssinosis. In 1976 Dart Mill Ltd. was wound up—that triggered off the situation provided for in section 1(1)(*b*) whereby the rights of the company was transferred to and vested C in the third party. What are those rights, if any? Once a cause of action is acquired the injured party has an inchoate right of action against the tortfeasor. At that stage, the tortfeasor acquires an inchoate right to be indemnified by the insurer. It is inchoate because his liability has not yet been established and quantified. It is a contractual right to be indemnified subject to the terms of the policy, against his liability to the injured party. That contractual right is a right capable of being transferred D under section 1(1) of the Act of 1930.

The applicant accepts that it is necessary for her to establish the existence and amount of the liability which Dart Mill Ltd. incurred to her in the past in order to enable her to recover damages in an action against the insurers under section 1(1) of the Act of 1930. However, these matters can be established as a step in the action proposed to be E brought by the applicant against the insurers. In certain kinds of cases, such as an action against a solicitor for negligence for failing to bring an action within a relevant period of limitation, the court is accustomed, in order to assess the damages recoverable, to put a value on the lost claim, and that process involves consideration of the existence and amount of the liability of a third party who was not a party to the action. Even if Dart Mill Ltd. were still in existence or capable of being F resurrected, so as to make it possible for the applicant to bring an action against that company to establish the existence and amount of its liability to her, such action would in practice be defended by the insurers in the company's name. In substance, though not in form, the dispute would be between the applicant on one side and the insurers on the other. That being so, it makes no difference to the substance of the G matter that Dart Mill Ltd. itself can no longer be sued.

There is no practical difficulty in an insurer conducting the insured's defence against a plaintiff's claim, and thereafter taking its own policy points to seek to avoid a liability to indemnify: see *Calder v. H. Kitson Vickers & Sons (Engineers) Ltd.* [1988] I.C.R. 232.

In the *Post Office* case [1967] 2 Q.B. 363, 373–374, 377–378, Lord Denning M.R. and Salmon L.J. placed reliance on a dictum of Devlin J. H in an earlier case, *West Wake Price & Co. v. Ching* [1957] 1 W.L.R. 45, 49. That was an example of a case where rights existed although there was no cause of action and it was sought to establish those rights by a declaration. The case failed on the facts but the form of action was

considered entirely proper. Those rights were themselves capable of transfer under section 1(1) of the Act of 1930.

In the *Post Office* case [1967] 2 Q.B. 363, the reasoning of Harman L.J., who was in the minority, is to be preferred to the view of the majority.

Firma C. Trade S.A. v. Newcastle Protection and Indemnity Association [1987] 2 Lloyd's Rep. 299 was also a case concerning third parties' rights under the Act of 1930. The applicant relies on the clear distinction drawn between contractual rights and a completed cause of action: see Staughton J.'s judgment at pp. 304–306. In the instant case rights were transferred under the Act of 1930 to the applicant and litigation is the right course for her to take.

Stephen Grime Q.C. and *Patrick Field* for the insurers. The insurers are taking a limitation point which owes its origin to the fact that a company is an artificial creature and that it is now impossible for the applicant to obtain compensation or damages because the company was extinguished in 1976 and cannot be restored. If the cause of action that was transferred to the applicant arose at the same time that it arose against the company then it is time-barred.

The Act of 1930 was passed in order to correct an injustice which had been recognised after two decisions of the Court of Appeal had considered the position of injured persons where the tortfeasor who was liable to them became insolvent: see *In re Harrington Motor Co. Ltd., Ex parte Chaplin* [1928] 1 Ch. 105 and *Hood's Trustees v. Southern Union General Insurance Co. of Australasia Ltd.* [1928] 1 Ch. 793. Those two decisions demonstrate that the vesting provisions of the law relating to winding up and bankruptcy could prevent the victim of a tort benefiting from the moneys paid in respect of his claim by insurers whilst allowing the general body of creditors to receive the insurance moneys. Neither case concerned any of the other impediments which might prevent an injured person from recovering damages as, for example, the law as to limitation or as to the dissolution of companies.

The scheme of the Act of 1930 shows that it was enacted for the limited purpose of dealing with the problems highlighted by *Harrington's* case and *Hood's* case. The operative part of the Act is section 1. Subsection (1) deals with companies while subsection (2) deals with individuals. In each case the Act achieves its aims by setting up a different route for the transfer of rights under a contract of third party liability insurance to that which would be followed by other rights in the event of liquidation, receivership, bankruptcy or the like by securing that insurance rights be transferred to the third party claimant rather than the liquidator, trustee or person otherwise entitled but for the Act. Subsection (3) is designed to outlaw provisions in insurance policies which have the effect of circumventing the Act and subsection (4) prevents the statutory transfer from having the effect of enhancing the entitlement of the claimant so as to make it greater than that which he may have possessed against the original tortfeasor.

Since the passing of the Act of 1930 it has been established that the injured person in his position as statutory transferee of the insurance rights of the original tortfeasor is affected by all of the adverse provisions

of the policy of insurance. So if there has been non-disclosure or misrepresentation entitling insurers to avoid the injured person will not recover. Similarly a breach of condition precedent on the policy even after the statutory transfer has taken place will entitle insurers to decline the claim. If there is an arbitration provision the claimant must still go through the process of arbitration to establish his entitlement against the insurers. If there exists a contingent right capable of being transferred to a third party something else must occur for it to mature into a concrete right which entitles the third party to monetary compensation. Any declaratory judgment in the present case would have to contain a conditional clause to the effect that Dart Mill Ltd. if sued would have been found to be liable, and also the date when Dart Mill Ltd. could have been sued in which case the limitation point would crop up.

What are the rights acquired by injured third parties which may be converted into any kind of remedy for them? It could be posed in the form of a question "has there been at any stage in the past or could there be at any stage in the future a cause of action against the insurers for monetary compensation?" The answer to that question in the present case is in the negative for the simple reason that the liability of the insurers is a liability to indemnify. By its very nature an indemnity could only arise if the beneficiary of the insurance policy (the insured) has suffered a monetary loss. If that is correct, there could never be a cause of action in this case. There exists a contingent right in the present case which has never been translated into a cause of action. If the applicant succeeds in the present appeal the right transferred by virtue of the Act of 1930 would not be the same right which the insured company possessed but a greater right.

The decision of the Court of Appeal in the *Post Office* case [1967] 2 Q.B. 363 is correct. The judgments of the majority, Lord Denning M.R., at pp. 373–374 and Salmon L.J., at pp. 377–378, represent not only the true view of the law but also the only possible logical analysis of the nature of a policy of liability insurance. The decision shows that where a policy of insurance which has been the subject of a statutory transfer under the Act of 1930 is a policy providing the insured with an indemnity against his legal liability, the injured person cannot recover against the insurers until the liability of the original tortfeasor has been established by agreement, judgment or arbitration.

The Court of Appeal was correct to hold in the instant case that since there was no possibility of the applicant making a successful claim against the respondents under the Act of 1930 it would be wrong to make any order for pre-action discovery such as that sought by the applicant.

Clarke Q.C. replied.

Their Lordships took time for consideration.

2 March. LORD KEITH OF KINKEL. My Lords, I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend, Lord Brandon of Oakbrook. I agree with it, and for the reasons he gives would dismiss this appeal.

LORD BRANDON OF OAKBROOK. My Lords, the appellant, Mrs. Doris Bradley, was employed by Dart Mill Ltd. in the cardroom of its cotton mill at Bolton from 1933 to 1934, 1940 to 1946 and 1953 to 1970. In August 1970 she was certified by the Pneumoconiosis Medical Panel to be suffering from byssinosis and her disability caused by it was assessed at 30 per cent. Byssinosis is a respiratory disease caused by the inhalation of cotton dust. It is the appellant's case, first, that in the course of her employment by Dart Mill Ltd., the conditions in which she worked necessarily involved her in the inhalation of substantial quantities of cotton dust; secondly, that the byssinosis from which she suffers was caused by such inhalation; thirdly, that the exposure to such inhalation was caused by the negligence and breach of statutory duty of Dart Mill Ltd.; and, fourthly, that Dart Mill Ltd. was, during the periods when she was employed by that company, insured in respect of liability for personal injuries to its employees by the respondents, Eagle Star Insurance Co. Ltd.

Dart Mill Ltd. was voluntarily wound up in 1975 and dissolved in 1976. Under section 651 of the Companies Act 1985 the company could not be restored to the register more than two years after it was dissolved. In the result the company no longer exists and is incapable by any means of being restored to existence.

In 1984 the appellant's solicitor decided to bring an action on her behalf against the respondents under section 1(1) of the Third Parties (Rights against Insurers) Act 1930. In order to enable him to have the necessary material on which to found the action, the appellant's solicitor required to have prior discovery of the relevant insurance policies issued by the respondents to Dart Mill Ltd. Accordingly on 26 September 1986 he applied on behalf of the appellant, under section 33(2) of the Supreme Court Act 1981 and R.S.C., Ord. 24, r. 7A, in the Oldham District Registry of the High Court, Queen's Bench Division, for an order that the respondents should disclose to the appellant the terms and particulars of all contracts of insurance issued by the respondents to Dart Mill Ltd. in respect of that company's liability to its employees for personal injuries sustained at work during the periods 1933 to 1934, 1940 to 1946 and 1953 to 1970.

The originating summons came first before Mr. District Registrar Burton who on 30 January 1987 ordered the respondents to make substantially the disclosure applied for on behalf of the appellant. The respondents appealed to Macpherson J. who on 9 April 1987 allowed the appeal and set aside the order of the district registrar. Macpherson J. refused the appellant leave to appeal to the Court of Appeal, but such leave was subsequently given by that court. On 25 March 1988 the Court of Appeal (Purchas, Lloyd and Staughton L.JJ.) unanimously dismissed the appeal.

In order to understand the basis of the substantive claim which the appellant seeks to bring against the respondents, and the grounds on which the Court of Appeal decided her application for pre-action discovery against her, it is necessary to refer to the relevant provisions of the Third Parties (Rights against Insurers) Act 1930. That Act provides:

"1(1) Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—(*a*) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or (*b*) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, with respect to the company, or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge; if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred. (2) Where an order is made under section 130 of the Bankruptcy Act 1914, for the administration of the estate of a deceased debtor according to the law of bankruptcy, then, if any debt provable in bankruptcy is owing by the deceased in respect of a liability against which he was insured under a contract of insurance as being a liability to a third party, the deceased's debtor's rights against the insurer under the contract in respect of that liability shall, notwithstanding anything in the said Act, be transferred to and vest in the person to whom the debt is owing."

The grounds on which the Court of Appeal decided against the appellant on her application for pre-action discovery can be stated as follows. First, under section 1(1) of the Act of 1930 the appellant only had transferred to and vested in her such rights against the respondents as Dart Mill Ltd. itself would have had under the relevant contracts of insurance. Secondly, Dart Mill Ltd. would only have been entitled, under such contracts of insurance, to be indemnified by the respondents in respect of any liability incurred by it to the appellant if the existence and amount of that liability had first been established either by a judgment of a court, or by an award in an arbitration, or by an agreement between Dart Mill Ltd. and the appellant. Thirdly, the existence and amount of any liability incurred by Dart Mill Ltd. to the appellant had never been established in any of those three ways while Dart Mill Ltd. existed or was capable of being restored to existence, and there was now therefore no longer any means by which the existence and amount of any such liability could be established. Fourthly, that being so, there was not, and could not now ever be, any right of indemnity of Dart Mill Ltd. against the respondents in respect of any such liability, which could be transferred to and vested in the appellant under section 1(1) of the Act of 1930. Fifthly, that being so, the appellant's proposed action against the respondents could not succeed, and it would therefore serve no useful purpose to make the order for pre-action discovery sought by her.

The Court of Appeal, rightly in my view, considered themselves bound to reach the conclusion which they did by an earlier decision of that court in *Post Office v. Norwich Union Fire Insurance Society Ltd.* [1967] 2 Q.B. 363. It follows that this appeal requires your Lordships to consider whether that earlier case was rightly decided.

The facts in the *Post Office* case, as they appear mainly from the headnote of the report, were these. In May 1963 a company of contractors called Potters damaged a Post Office cable. The Post Office by letter claimed £839 10s. 3d. for its repair. The contractors denied liability. Before any proceedings had been begun to determine liability and quantum, the contractors in June 1964 went into compulsory liquidation. The contractors were insured under a public liability policy in the usual terms, which provided that the insurers "will indemnify the insured against all sums which the insured shall become legally liable to pay . . . in respect of . . . damage to property." On 17 June 1965 the Post Office issued a writ against the contractor's insurance company claiming that under section 1 of the Act of 1930 they were entitled, once the contractors had gone into liquidation, to claim against the insurance company direct the sum of £839 10s. 3d. The trial judge gave judgment for the Post Office, against which the insurers appealed to the Court of Appeal (Lord Denning M.R. and Harman and Salmon L.JJ.).

That court allowed the appeal and dismissed the Post Office's claim on two grounds. The first ground, which was unanimous, turned on a particular condition of the contract of insurance, to which it is not necessary to refer further. The second ground, which was relied on by Lord Denning M.R. and Salmon L.J. but not by Harman L.J., was that the contractors could not have claimed to be indemnified by the insurance company until the existence and amount of their liability to the Post Office had been properly established, and the Post Office could not be in any better position as against the insurance company in this respect than the contractors.

Referring to section 1(1) of the Act of 1930, Lord Denning M.R. said [1967] 2 Q.B. 363, 373–374:

> "Under that section the injured person steps into the shoes of the wrongdoer. There are transferred to him the wrongdoer's 'rights against the insurers under the contract.' What are those rights? When do they arise? So far as the 'liability' of the insured is concerned, there is no doubt that his liability to the injured person arises at the time of the accident, when negligence and damage coincide. But the 'rights' of the insured person against the insurers do not arise at that time. The policy says that 'the company will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss of or damage to property.' It seems to me that the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. His liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement. Until that is done, the right to an indemnity does not arise. I agree with the statement by Devlin J. in

A *West Wake Price & Co. v. Ching* [1957] 1 W.L.R. 45, 49. 'The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss.' Under the section it is clear to me that the injured person cannot sue the insurance company except in such circumstances as the insured himself could have sued the insurance company. The insured could only have sued for an B indemnity when his liability to the third person was established and the amount of the loss ascertained. In some circumstances the insured might sue earlier for a declaration, for example, if the insurance company were repudiating the policy for some reason. But where the policy is admittedly good, the insured cannot sue for an indemnity until his own liability to the third person is ascertained."

C Lord Denning M.R. continued, at p. 375:

"In these circumstances I think the right to sue for these moneys does not arise until the liability of the wrongdoer is established and the amount ascertained. How is this to be done? If there is an unascertained claim for damages in tort, it cannot be proved in the bankruptcy; nor in the liquidation of the company. But nevertheless D the injured person can bring an action against the wrongdoer. In the case of a company, he must get the leave of the court. No doubt leave would automatically be given. The insurance company can fight that action in the name of the wrongdoer. In that way liability can be established and the loss ascertained. Then the injured person can go against the insurance company."

E Salmon L.J. agreed with Lord Denning M.R. He said, at pp. 377–378:

"The case really resolves itself into this simple question: Could Potters on June 17, 1965, have successfully sued their insurers for the sum of £839 10s. 3d. which they were denying they were under any obligation to pay to the Post Office? Stated in that way, I F should have thought the question admits of only one answer. Obviously Potters could not have claimed that money from their insurers. It is quite true that if Potters in the end are shown to have been legally liable for the damage resulting from the accident to the cable, their liability in law dates from the moment when the accident occurred and the damage was suffered. But whether or not G there is any legal liability and, if so, the amount due from Potters to the Post Office can, in my view, only be finally ascertained either by agreement between Potters and the Post Office or by an action or arbitration between Potters and the Post Office. It is quite unheard of in practice for any assured to sue his insurers in a money claim when the actual loss against which he wishes to be indemnified has not been ascertained. I have never heard of such an action and H there is nothing in law that makes such an action possible. I agree with the statement of Devlin J. in *West Wake Price & Co. v. Ching* [1957] 1 W.L.R. 45, 49, to which the Master of the Rolls has already referred. This statement is obiter but I think it correctly

states the legal position, although it does not expressly point out that liability and quantum can be ascertained not only by action but also by arbitration or agreement."

In my opinion the reasoning of Lord Denning M.R. and Salmon L.J. contained in the passages from their respective judgments in the *Post Office* case set out above, on the basis of which they concluded that, under a policy of insurance against liability to third parties, the insured person cannot sue for an indemnity from the insurers unless and until the existence and amount of his liability to a third party has been established by action, arbitration or agreement, is unassailably correct. I would, therefore, hold that the *Post Office* case was rightly decided, and that the principle laid down in it is applicable to the present case.

There is, however, a vital difference between the *Post Office* case and the present case. In the *Post Office* case the wrongdoing company, although in compulsory liquidation, was still in existence. It was, therefore, still open to the Post Office, as Lord Denning M.R. explained, to bring an action, with the leave of the Companies Court, against that company, in order to establish the existence and amount of the liability in issue. By contrast, in the present case, because Dart Mill Ltd. no longer exists and can no longer be resurrected, the same solution to the problem is not available, with the result arrived at by the Court of Appeal.

Counsel for the appellant accepted that it was necessary, in order to enable her to recover in an action against the respondents under section 1(1) of the Act of 1930, for her to establish the existence and amount of the liability which Dart Mill Ltd. incurred to her in the past. He contended, however, that these matters could be established in the action proposed to be brought by the appellant against the respondents. In support of this contention he made two forceful points which deserve careful consideration.

The first point was that, in certain kinds of cases, such as an action against a solicitor for negligence in failing to bring an action within a relevant period of limitation, the court was accustomed, in order to assess the damages recoverable, to put a value on the lost claim, and that process necessarily involved consideration of the existence and amount of the liability of a third party who was not a party to the action. The second point was that, even if Dart Mill Ltd. were still in existence or capable of being resurrected, so as to make it possible for the appellant, with the leave of the Companies Court, to bring an action against that company in order to establish the existence and amount of its liability to her, such action would in practice be defended by the respondents in the company's name, so that in substance, though not in form, the dispute would be between the appellant on one side and the respondents on the other. That being so, it made no difference to the substance of the matter that Dart Mill Ltd itself could no longer be sued.

The first point, though superficially attractive, is, in my view, unsound. In the case of an action of the kind suggested, namely, an action against a solicitor for negligence in failing to bring proceedings in

time, what the court has to do is not to establish that the lost claim would have succeeded and what the amount of damages recovered would have been. All that the court has to do is to make an assessment of the value of the claim as between the plaintiff and the defendant solicitor, which is in no way binding on the person against whom the plaintiff's action, if it had not been lost due to the solicitor's negligence, would have been brought. That assessment of value will take account of all contingencies, including where appropriate the contingency of complete or partial failure in the lost action. In these circumstances I do not consider that the kind of case suggested provides any real analogy to the kind of case with which your Lordships are here concerned.

The second point illustrates the fact that the difficulty which the appellant faces is, to a large extent at any rate, a procedural difficulty rather than a substantive one. But this difficulty, however it may be categorised, is a necessary consequence of two matters: first, the nature of the rights given to an insured person under a policy of insurance against liability to third parties; and, secondly, the terms of section 1(1) of the Act of 1930 relating to the transfer of rights, in certain events, from an insured person to a third party.

For the reasons which I have given I am of opinion that neither of the two points relied on by counsel for the appellant, though fully deserving of consideration, is sustainable in law.

The complaint may be made, and has been forcefully made on behalf of the appellant in this appeal, that the decision reached by the Court of Appeal, with which it is apparent that I fully agree, depends really on procedural technicalities and produces a result which is unfair to the appellant and gives an unmerited bonus to the respondents. In answer to that complaint I think that it is right to draw attention to two matters: first, the historical reason for the passing of the Act of 1930; and, secondly, the inference to be drawn from the terms of section 1(2) of that Act, which I set out earlier above with section 1(1).

The historical reason for the passing of the Act of 1930 was to remedy a particular form of injustice which had become apparent from two then recent decisions of the Court of Appeal. The first of these two decisions was *In re Harrington Motor Co. Ltd., Ex parte Chaplin* [1928] 1 Ch. 105. In that case a person injured in a road accident had obtained a judgment for damages against a company, but had been unable to enforce the judgment before the company went into liquidation. The company's motor insurers paid the amount of the judgment to the liquidator, who then treated the injured person as an unsecured creditor with no special interest in the insurance moneys. It was held by the Court of Appeal that the liquidator had been right to deal with the matter in that way.

The second decision was *Hood's Trustees v. Southern Union General Insurance Co. of Australasia Ltd.* [1928] 1 Ch. 793. In that case H., being insured by the defendant company against liability to third parties, negligently injured C. in a road accident. C. subsequently brought an action against H. for damages, but before he could obtain judgment, H. was made bankrupt and the official receiver was appointed trustee in the bankruptcy. The trustee informed the defendant company in reply to a

question that he did not propose to take any part in C.'s action against H. H. later purported, for an agreed sum much below the value of the claim, to release the defendant company from its obligation under the policy to indemnify him in respect of any judgment obtained against him by C. Shortly afterwards C. obtained judgment against H. for damages for the personal injuries sustained by him. Subsequently H. was made bankrupt a second time and another trustee in bankruptcy was appointed. It was held by Tomlin J. that the benefit of the indemnity under H.'s policy of insurance vested in the trustee in the first bankruptcy, notwithstanding that C.'s claim, being one in respect of tort for which judgment was not obtained until after the commencement of the first bankruptcy, was not itself provable in bankruptcy. That decision was subsequently affirmed by the Court of Appeal.

These two decisions showed that, even where an injured person obtained a judgment for damages against a wrongdoer, if the wrongdoer being a company went into liquidation, or being an individual became bankrupt, and the judgment had not by then been enforced by execution, the moneys payable by way of indemnity under any policy of insurance by which the wrongdoer was insured against liability to third parties, did not go solely to benefit the injured person but were payable to the liquidator or trustee in bankruptcy of the wrongdoer for distribution pari passu among all the unsecured creditors. This was recognised to be plainly unjust, and the Act of 1930 was passed to remedy that injustice. It was not passed to remedy any injustice arising from other matters; in particular, it was not passed to remedy any injustice which might arise as a result of the dissolution of a company making it impossible to establish the existence and amount of the liability of such company to a third party. That kind of situation was not, in my view, contemplated by the legislature at all.

The significance of section 1(2) of the Act of 1930 is this. In that subsection the legislature dealt expressly with the situation where a deceased's estate was ordered to be administered in bankruptcy, and provided that, if any debt provable in bankruptcy was owing to the deceased in respect of a liability against which he was insured as being a liability to a third party, the deceased debtor's rights against the insurer should be transferred to and vest in the person to whom the debt was owing. While the legislature dealt expressly in this way with the case of a deceased debtor's estate being administered in bankruptcy, it made no provision of any kind with regard to the case of a company dissolved after being wound up. This again leads to the inference that the legislature, in enacting the Act of 1930, did not have a situation of that kind in contemplation at all.

My Lords, for the reasons which I have given, and despite the natural sympathy which one is bound to feel for the difficulty in which the appellant finds herself, I would dismiss this appeal. I would only add that, even if the appeal had succeeded, the appellant would still have had other serious difficulties to surmount with regard to limitation of actions under the Limitation Act 1980.

LORD TEMPLEMAN. My Lords, the appellant, Mrs. Bradley, was employed by Dart Mill Ltd. at their cotton mill at times between 1933

A and 1970. For present purposes it must be assumed that the Dart Mill company was insured with the respondent, Eagle Star Insurance Co. Ltd., against claims by employees, including Mrs. Bradley, for injuries suffered as a result of the negligence or breach of statutory duty by the Dart Mill company. Mrs. Bradley asserts that she contracted byssinosis because she was exposed to cotton dust while she was working for the Dart Mill company and that she is entitled to damages for negligence B and breach of statutory duty which are risks covered by the Eagle Star insurance policy. At some stage, the court must consider whether Mrs. Bradley is entitled to proceed with her claim because of the delay which has occurred. For present purposes the delay is irrelevant. At some time after 1970, the Dart Mill company passed a resolution for voluntary winding up and, in 1976, the Dart Mill company was dissolved.

C Section 1 of the Third Parties (Rights against Insurers) Act 1930 applies:

> "(1) Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur . . ."

D In the present case, under a contract of insurance, the insured, the Dart Mill company, was insured by Eagle Star against liabilities to a third party, Mrs. Bradley, which the Dart Mill company may have incurred.

Where section 1 of the Act of 1930 applies then:

> "(*b*) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary E winding-up being passed . . . if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred."

F In the present case a resolution for the voluntary winding up of the Dart Mill company was passed, and if liability to Mrs. Bradley was incurred, the rights of the Dart Mill company against the insurers, Eagle Star, in respect of the liability to Mrs. Bradley were transferred to and are now vested in Mrs. Bradley. Mrs. Bradley seeks to enforce against Eagle Star the rights she claims are vested in her in respect of the policy. Of G course, any proceedings by Mrs. Bradley will fail if she cannot prove that the Dart Mill company by its negligence or breach of duty incurred a liability to her and that the Dart Mill company was insured against that liability with Eagle Star. But Eagle Star contend that even if the Dart Mill company became liable to Mrs. Bradley and even if that liability was covered by an insurance policy effected by the Dart Mill company with Eagle Star, nevertheless, Mrs. Bradley is not entitled to H exercise the rights under the insurance policy transferred to her by the Act of 1930.

It is said on behalf of Eagle Star that the Act of 1930 does not avail Mrs. Bradley because, following the resolution to wind up, the Dart Mill

company was dissolved in 1976 and no longer exists. But it seems to me that the existence or non-existence of the Dart Mill company at present is irrelevant. The Dart Mill company did exist and if it insured with Eagle Star against liability to Mrs. Bradley, if the Dart Mill company incurred liability to Mrs. Bradley its rights under the Eagle Star insurance policy are vested in Mrs. Bradley. The Act of 1930 was intended to protect a person who suffers an insured loss at the hands of a company which goes into liquidation. That protection was afforded by transferring the benefit of the insurance policy from the company to the injured person. In my opinion, Parliament cannot have intended that the protection afforded against a company in liquidation should cease as soon as the company in liquidation reaches its predestined and inevitable determination in the dissolution of the company. It is conceded that within two years (now twelve years) after the date of dissolution, Mrs. Bradley could have obtained an order of the court reviving the defunct Dart Mill company for the sole purpose of enabling Mrs. Bradley to recover against Eagle Star. But there would be no point in restoring the Dart Mill company for that limited purpose. The Dart Mill company would have no interest in a quarrel over an insurance policy between the insurance company, Eagle Star, and the person, Mrs. Bradley, in whom the benefit of the insurance policy is claimed to be already vested by virtue of the Act of 1930. To restore the Dart Mill company in these circumstances would do no more than authorise Mrs. Bradley to make use of a name carved on a tombstone. The use of the name could not restore life to the skeleton.

The dissolution of the Dart Mill company has no significance in the present case save that it enables Eagle Star to argue that they are not bound to pay in respect of a liability which they accepted and for which they were paid premiums. I would allow this appeal and enable Mrs. Bradley to proceed with her action against Eagle Star.

LORD OLIVER OF AYLMERTON. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend, Lord Brandon of Oakbrook, with which I entirely agree. I too would dismiss the appeal.

LORD JAUNCEY OF TULLICHETTLE. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Brandon of Oakbrook. I agree with it and for the reasons given therein I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Field Fisher & Martineau for John Pickering, Oldham; Davies Arnold & Cooper for T. Unsworth, Urmston.

M. F.