THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 34 – Part II

Administration Bonds

WORKING PAPER

JUNE 1975

INTRODUCTION

The Law Reform Commission has been asked to consider and report on the law relating to administration bonds.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 8 September 1975.

Copies of the paper are being sent to the -

Chief Justice and Judges of the Supreme Court
Citizens Advice Bureau
Institute of Legal Executives
Judges of the District Court
Law School of the University of W.A.
Law Society of W.A.
Magistrates' Institute
Perpetual Executors, Trustees and Agency Co. (W.A.) Limited
Solicitor General
Under Secretary for Law
West Australian Trustee Executor and Agency Co. Ltd.
Law Reform Commissions and Committees with which this Commission is in correspondence

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and to submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

C O N T E N T S

TERMS OF REFERNCE

1. "To consider and report on the law relating to administration bonds and sureties".

The Commission has also been asked to consider and report on other aspects of the law relating to the administration of deceased estates. The Commission will issue working papers on these other aspects in due course.

HISTORICAL BACKGROUND

2. Before 1857, jurisdiction in England to grant letters of administration was vested in the Ecclesiastical Courts.

Before the *Statute of Distribution 1670* (22 and 23 Chas. II Ch. 10), the law in regard to intestacy and the administration of an intestate estate was in a state of chaos. Administrators were appointed by the Ordinary (the bishop). However, the Ordinary could not supervise the administrator and there was no effective control over him. The administrator was answerable for the debts of the deceased, but, before the Statute, there was nothing to compel him to distribute the surplus after payment of debts. This resulted in serious abuses.

The *Statute of Distribution* defined the rights of the persons entitled to take on an intestacy and obliged the administrator to distribute in accordance with its provisions. It expressly provided that upon the granting of administration, the Ordinary was to take a bond from the administrator with two or more sureties. The condition of the bond was in a form which is similar to that still in use in Western Australia.

The administration bond was introduced at a time when the law relating to intestacy and the administration of an intestate estate was in a chaotic state and it was introduced with the object of ensuring that the estate was distributed to those persons entitled to it.

In Western Australia, it is still necessary for an administrator to execute a bond despite the fact that a comparable state of law to that which existed in England before 1670 does not exist today in this State.

PRESENT LAW IN WESTERN AUSTRALIA

3. Before an administrator can obtain a grant of Letters of Administration of a deceased estate, he is required to execute an administration bond to Her Majesty the Queen in an amount equal to the gross amount of the estate (*Administration Act 1903*, s.26) .The bond must be in accordance with Form 2 of the *Non-contentious Probate Rules 1967* (see Appendix), unless otherwise ordered by the Master of the Supreme Court (5.26, *Non-contentious Probate Rules 1967*, rule 27). Normally the bond must be supported by two persons as sureties (ss.26 and 27, rule 27). These requirements do not apply to an executor, and they are subject to the following qualifications -

(a) No bond is required from the Public Trustee or a person obtaining administration to the use or for the benefit of the Crown (s.26(2)).

(b) The court may dispense with a bond where the applicant for the grant is a trustee company (s.26(3)). (The Perpetual Executors, Trustees and Agency Company (W.A.) Limited and the West Australian Trustee Executor and Agency company Limited are the only trustee companies in Western Australia, and the Court in fact always dispenses with a bond where the applicant is one of these companies.)

(c) The court may reduce the amount of the bond, or in place of the bond accept the security of an approved company or guarantee society (s.27). (The Commission understands that application is never made to the court for the security of a company or a guarantee society to be accepted in place of a bond. In practice the bond is always given by the administrator himself, but sometimes the surety to the bond is a company.)

(d) The court may dispense with one or both sureties or limit the liability of any surety (s.27). (This is commonly done where the applicant for the grant is the sole beneficiary and there are no debts or where the other beneficiaries being of full legal capacity consent to dispensing with sureties.)

(e) No sureties are required where the estate does not exceed a gross value of $5,000 and administration is granted to the husband or widow of the deceased (s.28(1)).

(f) Where the claim of any creditor of the estate is secured by a mortgage of the deceased's real estate, sureties are only required as to the net value of the estate after deducting the mortgage debt (s.28(2)).

4. The court may order an administrator to execute a further or additional bond in such sum, with or without sureties, as the court may direct, or may order the liability of any surety to be reduced (s.29). However, the court has no general power to dispense with the bond altogether.

5. The form of the bond (see paragraph 3 above and Appendix) in effect restates the existing obligations of an administrator to collect, get in, administer and distribute the estate of the deceased according to law. If the administrator breaks a condition of the bond, the court may order its assignment to any person, who may sue upon the bond in his own name (s.30).

6. In every case where sureties are required, they must justify to the Master that their assets are sufficient to satisfy the amount of the bond (rule 27(3)).

7. Upon the application of a surety, if the estate is being or is in danger of being wasted or the surety prejudiced by the act or default of the administrator or if any surety desires to be relieved of further liability, the court may grant such relief as it thinks fit (s.31).

THE LAW IN OTHER JURISDICTIONS

Australia and New Zealand

8. The law relating to administration bonds in the other States of Australia, in the Australian Capital Territory and in New Zealand is basically the same as that applying in this State with some variations in matters of detail -

New South Wales: *Wills, Probate and Administration Act 1898*, ss.64-68.

Victoria: *Administration and Probate Act 1958*, ss.50(3), 57.

Queensland: *Probate Act 1867*, ss.36-38.

South Australia: *Administration and Probate Act 1919*, ss.31-33, 57, 58, 66 and 91.

Tasmania: *Administration and Probate Act 1935*, s.25.

Australian Capital Territory: *Administration and Probate Ordinance 1929*, ss.14, 17, 18, 18A and 19.

New Zealand: *Administration Act 1969*, ss.15 and 16.

9. In New South Wales, Queensland, South Australia and New Zealand the court has a statutory power to dispense with an administration bond and thus with sureties, In Tasmania and the Australian Capital Territory the requirement of a bond is mandatory, but sureties may be dispensed with. In Victoria the registrar may dispense with sureties in the case of estates sworn under $1,000 and in the case of estates over $1,000 may, in place of a bond with two sureties, accept a bond from a trust company, approved insurance company or guarantee society.

In the majority of jurisdictions the amount of the bond is the gross sworn value of the estate. However in Queensland the penalty is double the amount under which the estate is sworn (unless the amount is reduced by the Court) while in New Zealand the bond is limited to a maximum of $20,000.

In the Australian Capital Territory the law requires the surety to be an insurance company.

England

10. The law in England was also similar to that applying in this State until it was amended in 1971, following the report of the English Law Commission, *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters* (Law Com. No. 31, (1970) Cmnd, 4497).

Section 8 of the *Administration of Estates Act 1971* substituted a new s.167 for the former s.167 of the *Supreme Court of Judicature (Consolidation) Act 1925* to give effect to most of the recommendations of that report. Administration bonds have been abolished. In their place the Act provides that one or more sureties may be required in those circumstances specified in

the rules, to guarantee any loss arising from the breach by an administrator of his duties and within any limit of liability imposed by the court. The guarantee has effect as if under seal and made for the benefit of each of the persons interested in the administration of the estate, and no action can be brought upon the guarantee without leave of the High Court.

11. The English *Non-contentious Probate Rules 1954* were also amended in 1971. Rule 38 specifies that no guarantee is required as a condition of granting administration except where it is proposed to grant it to -

(a) a creditor or his personal representative or to a person who has no immediate beneficial interest in the estate but who may have such an interest in the event of an accretion to the estate;

(b) a person or some of the persons who would, if the person beneficially entitled to the whole of the estate died intestate, be entitled to his estate;

(c) the attorney of a person entitled to a grant;

(d) an applicant for the use and benefit of a minor;

(e) an applicant for the use and benefit of a person who is by reason of mental or physical incapacity incapable of managing his affairs;

(f) an applicant resident out of the United Kingdom;

(g) any other applicant where the registrar considers there are special circumstances making it desirable to require a guarantee.

Notwithstanding the above, rule 38(2) specifies that except in special circumstances, no guarantee is required from a trust corporation, a solicitor holding a current practising certificate, a servant of the Crown in his official capacity or a nominee of a public department or local authority.

Rule 38(5) provides that unless the Registrar otherwise directs, if it is decided to require a guarantee, it shall be given by two sureties except where the gross value of the estate does not exceed five hundred pounds or the proposed surety is a corporation, in which case one will suffice.

The sureties must be resident in the United Kingdom and the limit of their liability is the sworn gross amount of the estate.

PROPOSALS FOR REFORM

12. The Chief Justice's Law Reform Committee of Victoria, in the report of a subcommittee on Administration Bonds dated 27 May 1971, agreed with the recommendation of the 31st Report of the English Law Commission (see paragraph 10 above) in proposing that administration bonds be abolished, and that sureties should be required in the circumstances specified in the English report. It suggested that sureties should also be required in applications for letters of administration *ad colligenda bona* (limited to the administration of specific goods) and *ad litem* (pending court proceedings) and possibly for certain other limited forms of grants. The report of the Statute Law Revision Committee of Victoria upon Administration Bonds dated 30 September 1974 accepts the recommendations of the Chief Justice's Law Reform Committee and recommends that the judges consider making Court Rules to specify the circumstances in which sureties should be required.

13. The Law Reform Committee of South Australia in its twenty-second report *Relating to Administration Bonds and to Rights of Retained and Preference of Personal Representatives of Deceased Persons* (1972) recommended that the court should have a discretionary power to require a bond and sureties in proper cases and not as a matter of course. Sureties were only to be required in those cases specified in the English Law commission's report (see paragraph 10 above). Bonds should be enforceable by any interested party without assignment. In addition the report suggested that the Public Trustee should be given statutory powers to deal with defaulting administrators.

14. The Law Society of Western Australia has proposed that consideration should be given to amending the *Administration Act* (W.A.) to delete all requirements for administration

bonds and to require sureties only in those circumstances in which sureties are required in England (see paragraph 11 above).

DISCUSSION

15. The purposes of the administration bond are to afford an aggrieved creditor or beneficiary a remedy against a defaulting administrator, and also a remedy against sureties (if there are any) in the event of the administrator's default (see the English Law Reform Commission Report No. 31 paragraph 6). The remedy provided by the bond to an aggrieved creditor or beneficiary against a defaulting administrator is additional to remedies available to the creditor and the beneficiary under the general law. The administrator is, of course, liable under the general law to a creditor for the amount of any debt due to him. An administrator is also liable under the general law to a beneficiary for the amount of loss caused to that beneficiary by reason of any failure to carry out his duties.

16. It seems unnecessary to retain the bond for the purpose of repeating the duties of an administrator, particularly as the bond only expresses those duties in vague and general terms (see the English Law Commission Report No. 31, paragraph 10). However, for reasons of clarity there may be some advantages in specifying these duties by statute. This has been done in England. Section 25 of the English *Administration of Estates Act 1925*, as substituted by s.9 of the *Administration of Estates Act 1971*, specifies the duties of a personal representative as being to -

(a) collect and get in the real and personal estate of the deceased and administer it according to law;

(b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court;

(c) when required to do so by the High Court, deliver up the grant of probate or administration to that court.

17. In the Commission's view, it would also appear unnecessary to provide by means of a bond an additional remedy against a defaulting administrator. An administrator remains liable for any breach of his duties irrespective of whether there is a bond or not. The bond may have the anomalous result of depriving a trustee of the protection he would otherwise obtain pursuant to s.75 of the W.A. *Trustees Act 1962* where he has acted honestly and reasonably and ought fairly to be excused for any breach of trust (see the English Law Commission Report No. 31, paragraph 12). The Commission is not, however, aware of any instance in Western Australia where this issue has had to be decided by the court.

18. The only real value of the bond would therefore appear to be the provision of a remedy against any sureties. The arguments against retaining sureties are -

(a) It puts the estate to additional expense. Where sureties are required and no private sureties can be obtained, it is necessary to obtain the security of an approved insurance company. The Master of the Supreme Court of Western Australia has informed the Commission that in 1974 an insurance company acted as surety in 65 estates. A survey of all approved insurance companies undertaken by the Commission showed that the premium charged varied from between 0.1% to 1.125% of the sworn value of the estate depending on the number and status of the beneficiaries, the length of the administration and other matters. Some companies also require an immediate release from adult beneficiaries, thus collecting a premium without being at risk of action by those beneficiaries. At least one company also requires an indemnity from such beneficiaries. There is also expense involved in the additional documentation where a bond and/or sureties are required or where it is thought necessary to apply to dispense with the bond and/or sureties.

(b) Executors have never been required to give a bond, with or without sureties (see the English Law Commission Report No. 31. paragraph 13), and there would seem to be little justification for requiring administrators to do so.

TENTATIVE RECOMMENDATIONS

19. The Commission considers that the following are possible alternatives to the present law, and invites comments on them -

(a) to abolish bonds and sureties in all cases,

(b) to abolish bonds but to give the court power to require sureties whenever it considers them desirable,

(c) to abolish bonds but to specify in detail certain circumstances when sureties will be required and certain circumstances when they will not be required, as well as giving the court power to require sureties whenever it considers them desirable (as is the case in England) or to dispense with sureties in certain cases (see paragraph 21).

20. The Commission tentatively favour the third of these alternatives for reasons of predictability. It would at the same time, leave the court free to require sureties where the special circumstances warranted them.

21. If the alternative in paragraph 19(c) above is to be preferred, then apart from those specific cases where sureties are now required in England (see paragraph 11 above) it could be argued that sureties should also be required, with power to the court to dispense, in the following cases -

(a) certain limited grants of administration, for example, a grant *ad litem* (W.A. *Administration Act*, s.35), or a grant *ad colligenda bona*;

(b) where one or more of the beneficiaries are not of full legal capacity,

(c) where one or more of the beneficiaries are not resident in Western Australia and they have no agent or attorney in this State;

(d) where the gross sworn value of the estate is very large.

22. If bonds are to be abolished but sureties retained, the Commission suggests the enactment of a provision that no action be taken on sureties without the approval of the court. The view taken by the English Law Commission was that the -

> "...need to obtain leave, which may be refused in the court's discretion, fulfils a useful function since it prevents the sureties being harassed by an unreasonable creditor or beneficiary and enables the court, either by refusing leave or imposing conditions, to deal fairly with unusual situations such as that in which the various claims exceed the amount of the bond" (Report No. 31, paragraph 17).

A provision that no action be taken on sureties without the approval of the court would, in effect, amount to a continuation of the present position in that the court must order the assignment of a bond before any person may take action upon it (see paragraph 5 above).

23. If bonds are not abolished in all cases, then there would seem to be a good argument for abolishing bonds and sureties in those cases where the applicant for a grant is also the sole beneficiary and the unsecured debts of the estate do not exceed a specified percentage of the difference between the value of secured debts of the estate and the amount of the gross value of the estate, (say 20%). It may also be desirable to prohibit the practice of approved insurance companies requiring an immediate release from adult beneficiaries when providing the administrator with a surety (see paragraph 18(a) above).

WORKING PAPER APPENDIX
ADMINISTRATION BOND

By this bond we are jointly and severally bound to Her Majesty the Queen her heirs and successors, in the sum of dollars for the payment of which we bind ourselves and each of us and our executors and administrators.

Dated the day of , 19 .

The condition of this bond is that if the abovenamed
the intended administrator of the estate of late of
shall collect, get in, administer and distribute according to law the real and personal property of the said deceased and punctually comply with all duties and obligations imposed on him by law in relation to the estate of the said deceased, then this bond shall be void and of no effect; but otherwise it shall remain in full force and effect.