Briefing Note:
Deputy's Security Bond – Setting the appropriate level of insurance cover

On 15th October 2009, judgment was handed down in the case of *H*. This was a test case concerning the need for, and amount of, a security bond for a financial deputy. Although heard in private, HH Judge Hazel Marshall QC, sitting as a Judge of the Court of Protection, gave leave for the judgment to be reported, in view of the wider implications and interest in the issue.

Security bonds are mainly provided through HSBC as brokers, and underwritten by Aviva (who carry the risk up to £750,000 and reinsure the excess). The scheme provides for payment within two weeks of the Court calling the bond in (whether or not it proves that there is indeed any loss), without question. The bond is thus a powerful and valuable source of security for a vulnerable person.

The nature of the cover provided by the security bond is very different to professional indemnity insurance that a professional deputy must carry, since there is scope for a considerable delay between discovery of a loss and (any potential) receipt of monies with that type of policy. Such a delay would be catastrophic for a person who is totally reliant upon an award of damages.

Hence there is a perceived need for the security bond, even when there is a professional deputy with indemnity insurance cover.

The Protected Beneficiary bears the cost of the bond, which is directly related to the amount of security provided. The starting rate is 0.5% with the rate reducing to 0.25% at £40,000 (£100 pa) and continuing at that rate, up to £150,000 (£375 pa). Above that, rates gradually reduce to 0.2% pa for a bond of £250,000 (£500 pa) or above. Thus, the greater the level of security deemed necessary, the more the Protected Beneficiary must pay. Clearly, this will cause difficulties if the actual cost is greater than allowed for in a damages award.

Consequently, there is tension between wanting to maximise security and the cost of doing so.

Uncertainty arose from the apparently arbitrary setting of security bonds by the Court of Protection, and the steep rise in the level of cover in individual cases, with the consequent (and unanticipated) sharp increase in annual costs. This followed the replacement of receivers by deputies.

The court handed down general guidance as the starting point for establishing the appropriate amount of cover: however, case specific factors are to be taken into account.

The relevant part of the judgment is reproduced below.

1 *If the court has real doubts about whether a deputy can be trusted with P's assets, then it must consider not appointing him as a deputy. Alternatively (if this will largely allay such doubts) the court can and should consider imposing limits on the funds under the deputy's control and, in particular, should consider whether the general words of the order appointing the deputy should be narrowed to prevent his having any authority to deal with any property occupied by P as his home, (or any interest of P therein) without further order of the court.*

2 *The court should then consider the amount of funds that are to be placed in the deputy's hands or under his control, and envisage the costs and/or loss to P if there were to be a total default by the deputy.*

3 *The court should then consider whether the deputy carries professional indemnity insurance which would be effective to replace P's assets in his hands in the event of such a total default. This will include reviewing such matters as the level of aggregation of assets in the hands of a single deputy relative to his insurance.*

4 *In the absence of adequate insurance cover then the starting point will be the value of the assets in or passing through the deputy's hands. This consideration may lead back to a review of the terms of the deputyship order with a view to limiting the value of the vulnerable assets.*

5 *Where the deputy apparently has adequate and effective professional indemnity insurance, then the court*

(i) *should require him to deposit a copy of this with the OPG and inform the OPG/the court immediately if its level is reduced, and*

(ii) *should aim to set a level of security which will provide adequate resources to meet P's immediate expenditure needs for a period related to the time it may take to settle the insurance claim (perhaps up to 2-3 years), the costs of making such a claim, and an allowance in case immediate debts of P may have been left unpaid, applying a suitable margin for error.*

6 *Having formed the above provisional view as to the appropriate level of security, the court should finally consider the level of premium and whether this would cause P undue financial hardship, or would otherwise in all the circumstances (including the apparent status of the deputy) appear to be an unjustifiable or wasteful use of P's resources, when balanced against the benefit of having that security.*

Special circumstances (eg husband/wife deputyships, or lay deputies of obvious stature, or situations in which the real risk would appear to be merely negligence rather than total default) may mitigate this, but must provide some real justification for taking the view that such a level of security is not reasonably necessary. The court will then decide whether it is in P's best interests to maintain the level of security originally assessed, or to reduce it to any extent.

Paragraph 1 above is rather surprising: it might be expected that where the court has doubts about whether a person can be trusted to act as deputy, then the court must not consider appointing that person. The guidance is only that the court must consider not appointing.

In the case of *H*, the receiver's security bond was initially set at £15,000, requiring an annual premium of £37.50. Following settlement of *H*'s claim, the Court of Protection issued a deputy order, and required a security bond for £750,000, at a cost of £1,875 per annum. The professional deputy contended that such cover was excessive, unnecessary and the level of consequential premium wasteful.

In *H*, the professional deputy has control of an estate in the region of £1.25 million, plus periodical payments of damages, initially of £25,000 per annum. The estate comprises a property worth around £820,000, and liquid assets of £445,000.

The property is held on trust, with restrictions on the register of title to prevent disposition by a sole trustee, or during *H*'s lifetime, without an order of the court. It is therefore outside the effects of any potential default by the professional deputy. The remote risk of him trying to deal fraudulently with *H*'s beneficial interest would be covered by a restriction in the deputy order. Therefore, the property should be disregarded in setting the security bond.

The professional deputy's firm, Irwin Mitchell, maintains professional indemnity cover at £105 million, including an aggregate value of security for deputyships of £40.9 million. The court held that a total default by the deputy would be fully covered by professional indemnity, and that the deputy must lodge a copy of the insurance policy and certificate of the amount of cover, annually. The deputy is also required to notify the court if the overall level of cover should fall below £50 million, i.e. around half the present level, which would signify a major change in circumstances.

H's need therefore is for insurance to protect his immediate needs, pending recovery under a professional indemnity policy. *H* requires an income in the region of £55,000 per annum, £25,000 of which is covered by periodical payments. Thus, the assets under the direct control of the deputy must provide around £30,000 per annum. The court held that the period of need would be around 2½ years, thus £75,000.

Adding a margin for increases in *H*'s needs the court found that the sum required would be £90,000 to £120,000. This was increased to £150,000 to £200,000, having made allowance for possible unpaid bills and the costs of negotiating with insurers.

The premium for this level of cover would be £375 - £460 per annum, which was found to be within *H*'s budgeted expenditure and not disproportionate to his assets.

The court held that:

- The probity and experience of the professional deputy meant that it would not be necessary to set the bond at the top end of the range; and,
- The modest savings from reducing the security to the bottom end of the range would not be sufficient justification for doing so.

Accordingly the bond was set at £175,000.

The likely impact of this decision is to reduce the level, and therefore the cost, of a security bond where there is a professional deputy. Conversely, a lay deputy, without indemnity insurance or a track record is likely to be required to post a higher level of security, and thus incur higher annual costs. There is an upper limit of £500,000 on the cover available for lay deputies, but no upper limit for professional deputies. Consequently, the overall cost differential between having a professional Deputy and a lay Deputy may well have just narrowed significantly.

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