

Report

Full investigation - *Ombudsman Act 1972*

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| Complainant | Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i> |
| Agency | Public Trustee |
| Ombudsman reference | 2017/10389 |
| Agency reference | PTCR17/007 |
| Date complaint received | 13 October 2017 |
| Issues | <ol style="list-style-type: none">1. Whether the Public Trustee's decision to not cancel the lease on [X]'s unit was unreasonable2. Whether the Public Trustee failed to prevent [X] from seeking professional services and accruing significant fees |

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972* (the **Ombudsman Act**).

The initial complaint

[X], a complainant, contacted my Office by telephone on 13 October 2017.

The exact nature of [X]'s complaint was not entirely clear. It appeared, however, that he had concerns about the agency's refusal to provide him with money to pay for legal fees, and the Office of the Public Advocate's (OPA) actions in allegedly causing him to lose his home.

It became evident, from information provided to my Office during the course of making enquiries into [X]'s complaint, that the decision to cancel the lease on [X]'s unit was supported by advice from medical professionals, and not taken lightly by the OPA.

In regard to [X]'s complaint that the agency had refused to pay his legal costs, information provided by the agency made it apparent that such requests were not all declined. The agency also explained that the fees incurred for professional services were considered and discussed with individual service providers. Given [X]'s limited capacity, I am of the view that it was reasonably open for the agency to decline to pay for such services.

As such, I do not consider that investigation of the issues, as framed by [X], are necessary or justifiable as I do not consider the agency or the OPA acted in a way that was possibly unlawful, unreasonable or wrong within the meaning of the Ombudsman Act.

I consider, however, that my initial enquiries in response to [X]'s complaint raised issues requiring investigation.

On that basis, I commenced an 'own initiative' investigation under section 13(2) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by [X]
- seeking further information from [X]'s guardian, Mr Stephen Burns, Advocate/Guardian, of the OPA
- seeking information and obtaining responses from the agency
- considering the Ombudsman Act
- preparing a provisional report and seeking a response to that report from the interested parties
- preparing this final report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

Response to my provisional report

The agency

In response to my provisional report, the agency submitted that:

- it considered it was prevented from cancelling [X]'s lease on his unit due to [X]'s various applications to revoke his Administration Orders
- it did not want to cancel the lease against [X]'s wishes
- [X] was still residing at the unit three days a week until March 2016
- that cancellation of the lease would have caused him to lose his Entry Contribution fee
- [X] did not cooperate with the agency's request to assist in vacating the unit.

These submissions more or less mirror the agency's initial response to my investigation, and have therefore already been addressed in my provisional report.

The agency also made the following comment, accepting my view that decisions concerning [X]'s accommodation are a matter for the OPA to determine:

...Public Trustee acknowledges that the ultimate decision in respect of [X]'s accommodation lay with the Public Advocate, as [X]'s guardian.

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

The agency further conceded that it ought to have taken steps to relinquish [X]'s unit, however, it considered that this should have occurred from 15 April 2016, rather than 1 March 2016 as I elected in my provisional report, for the following reasons:

...In the face of [X]'s continued failure to cooperate in relinquishing the unit, Public Trustee sought assistance from the Office of the Public Advocate on 14 April 2016. On 15 April 2016, the Public Advocate indicated unequivocally to the Public Trustee that the lease on the unit should be cancelled.

With the benefit of hindsight, Public Trustee accepts that it should have given the required notice at this point to ACH Group to cancel the Residence Agreement and arrange for the removal of [X]'s effects.

Assuming that it would have been reasonable to give ACH Group one month's notice of termination of the Residence Agreement, and to allow for the removal of the contents and any necessary cleaning and remedial works to be undertaken in accordance with the terms of that agreement, Public Trustee submits that it would have been appropriate to give notice of cancellation with effect from 16 May 2016.

I remain of the view that the agency was given sufficient notice by the OPA, and it was made clear to the agency during the meeting held on 1 March 2016, that he was not capable of returning to independent living. I am also persuaded the agency understood [X] was unable to return to his unit at this time, as it instructed him to clear out his unit.

[X]'s reluctance to vacate his unit also does not affect my views. As noted in my provisional report, and the body of my report below:

...The agency ought to have known that [X] was a vulnerable person with limited capacity, who demonstrated considerable reluctance to relinquish his unit. I consider the agency ought to have taken proper and active steps to assist [X] in clearing out his unit, as soon as the decision had been made by OPA that he would not be returning.

In light of the above, my views remain unaffected by the majority of the agency's submissions.

I accept, however, the agency's submission that a month's notice was required to cancel the lease. As such, I have amended my recommendation in my report below to reflect that the agency should reimburse the complaint from 1 April 2016.

The agency also provided the following comments in response to my provisional report:

Public Trustee officers are often presented with the difficult task of balancing their duties and obligations to a client in circumstances where other agencies are involved in a client's management, care and support. Whilst there have been many instances in which Public Trustee has been asked to step in to fulfil a role that does not fall strictly within the scope of a particular agency's appointment, Public Trustee acknowledges that this is not such a case, and that it should have deferred to the decision of the Public Advocate regarding [X]'s accommodation arrangements.

Public Trustee nonetheless invites you to accept that at all times its officers acted in good faith and in the belief that its actions were in [X]'s best interests.

Public Trustee has reviewed this matter with relevant senior officers and staff for development purposes and to ensure that the respective roles of Public Trustee and other agencies are identified and fulfilled in accordance with applicable orders in the future.

I have considered the agency's comments, and despite my findings that the agency acted in a manner that was unreasonable under the Ombudsman Act, I accept that the agency's officers attempted to act in [X]'s best interests.

[X]

[X] responded to my provisional report. His comments, however, did not address my provisional findings. As such, I have not discussed [X]'s response in my final report.

Mr Burns

Mr Burns responded to my provisional report, indicating that he agreed with my provisional findings and that he had no further comments to make.

Background

1. [X] is a protected person and is subject to limited Guardianship and full Administration Orders. The agency was appointed as [X]'s administrator by the South Australian Civil and Administrative Tribunal (**SACAT**) on 20 August 2015. [X] remains subject to the Orders to this day.
2. [X] first contacted my Office by telephone on 13 October 2017. As noted above, the exact nature of [X]'s complaint was not entirely clear.
3. My Assessment Officer contacted the agency by telephone on 13 October 2017 in order to obtain more information about [X]'s history, and the issues alluded to by [X] during his telephone call on 13 October 2017.
4. Ms Deborah Gully, Personal Estate Officer, of the agency, advised my Assessment Officer that [X]:
 - previously resided in a unit at an independent living facility (**the unit**)
 - had been paying \$247 fortnightly maintenance fees for his unit, in addition to paying rent for a nursing home (the [Y]), which he had been transferred to as a result of a decision by the OPA, for approximately a year
 - had made an application to SACAT to have the Guardianship and Administration Orders revoked, and had engaged a lawyer to do so, but a request by the Tribunal to provide medical documents was not fulfilled by [X] and as a result the application for revocation of Orders was cancelled
 - again applied, unsuccessfully,³ to revoke the Orders following an attempt by the agency to remove items from the unit.
5. Ms Gully also provided a detailed chronology outlining the history of [X]'s dealings with the agency, in an email to my Office dated 23 October 2017. The events outlined in that chronology are set out in order of relevance in my report. My Office also obtained information from [X]'s guardian, Mr Stephen Burns, by email dated 17 October 2017.
6. In relation to [X]'s living arrangements, Mr Burns advised that [X] first moved out of his unit and commenced residency at the [Y] in 2013 whilst under the guardianship of his brother, Mr Steven Blee.⁴ Mr Burns explained that at the request of [X], Mr Steven Blee did not relinquish the unit in 2013.
7. Ms Gully also offered the following explanation as to why [X]'s unit was not relinquished in 2013:

....a decision had not been made regarding whether the client was able to return home or not.

³ The Administration Orders were upheld by SACAT on 4 August 2017.

⁴ On 7 October 2014, SACAT appointed the OPA as limited guardian of Mr Blee, and on 20 August 2015, the Public Trustee was appointed as Mr Blee's full administrator.

8. On 22 October 2015, Mr Burns advised Mr Nektarios Hassiotis, New Estates Officer, of the agency, by email that:

...This email is to confirm that [X] will not be returning to his unit at ACH. The OPA has consulted extensively with mental health professionals who are of the view that [X] would be at imminent risk of harm if he were to return to independent living.

9. In a letter dated 17 December 2015, Ms Gully wrote to [X] requesting that he identify which items he wished to take with him to the [Y], and advised that any items remaining at the unit would be collected and sold with the proceeds of the sale of these items to be credited to his account with the agency.
10. On 4 January 2016, Mr Burns contacted Mr Hassiotis seeking confirmation that [X] had been requested to clean out his unit. Ms Gully responded to Mr Burns by email dated 5 January 2016, and advised that [X] had been requested to do so by letter dated 17 December 2015.
11. Ms Gully's email dated 5 January 2016 also acknowledged that [X]'s total expenses were amounting to an \$800 fortnightly deficit, and that the unit would need to be relinquished as soon as possible to address this issue.
12. On 3 February 2016, the agency met with [X] at his unit. It was submitted to my Office by Ms Debra Contala, the Public Trustee, by letter dated 14 December 2017 that at that meeting, its officers had observed [X] in his unit and formed the view that he was 'quite capable of living in the unit with appropriate supports.'
13. Officers of the agency then met with officers of the OPA on 1 March 2016 to discuss the possibility of [X] returning to his unit. This meeting is reflected in notes dated 1 March 2016 that were provided by Mr Burns that state the following:

Meeting with [[X]], PT Julie Oxlade and Care Manager Tripti at Regis Burnside. Prior to meeting with [[X]] I asked Julie about the email I received from the facility regarding a meeting [[X]] had with the PT at his home [sic] "Public Trustee has seen him at his unit and mentioned that he should be living independently at his unit by himself as he is capable to do so". Julie replied that she had discussed the matter with [[X]] and may have mentioned that it is possible that he could return home. **I provided background information regarding the reasons why [[X]] is living in care and advised against the PT discussing Guardianship matters with [[X]] to avoid him misinterpreting information.** [my emphasis] I confirmed that I had already notified the PT that [[X]] will not be returning to live in his unit at [Z] and requested that the PT direct [[X]] to discuss accommodation decisions with OPA....repeated information regarding the termination of his lease and removing his belongings.

14. At the conclusion of the meeting between [X], the agency, and the OPA on 1 March 2016, it is my understanding that [X] was again given the task of sorting personal items that he wished to take with him to his residence at the [Y] by 31 March 2016.⁵ This was the second request by the Public Trustee directed at [X], requesting him to sort his personal belongings for removal.⁶
15. On 14 April 2016, Mr Clive Castile, Personal Estates Officer, of the agency, sent the following email to Mr Burns:

...[X] is refusing to vacate his [Z] unit. I understand he has keys to the property. We should arrange to collect items at his property and have it cleaned so that it does not incur more cost. Can you please advise?

⁵ Mr Blee did not complete this task by the prescribed date.

⁶ The first attempt being by letter dated 17 December 2015 from Ms Gully.

16. Mr Burns responded to Mr Castile's email above on 15 April 2016 as follows:

...Thank you for your update. A decision has been made for [X] to continue residing at [Y] and he will not be returning to live at his unit in [Z]. He has been provided with ample opportunity to collect items from his property.

... As [X]'s Administrator it is the Public Trustee's decision regarding what steps should be taken to access the property to collect items.

17. On 30 May 2016, Mr Burns sent a further email to Mr Castile, following up on whether the Public Trustee had taken steps to clear and cancel [X]'s unit:

Hi Clive

I hope you are well. Can you please update me regarding [X]'s property at [Z]. Has his property been removed and the licence cancelled? Does he still have access?

18. Mr Castile responded to Mr Burns' email later that day, and advised him that Ms Gully had taken over his workload in relation to [X]. Ms Gully was included as a recipient of Mr Burns' email.

19. By 10 June 2016, Ms Gully had not yet responded to Mr Burns' enquiry to Mr Castile, prompting him to follow up with her directly, and repeating his initial enquiry by email as follows:

Hi Deb

Can you please update me regarding [X]'s property at [Z]. Has his property been removed and the licence cancelled? Does he still have access?

20. By 10 August 2016, Mr Burns had still not yet received a response from Ms Gully, prompting a further follow up to his email dated 10 June 2016.

21. Mr Burns then contacted Ms Jan Baxter, Manager Personal Estates by email dated 12 August 2016 outlining his concerns that the agency had not taken immediate steps to relinquish [X]'s unit, causing a significant reduction to his estate. I have set out that email, which makes reference to a telephone conversation with Ms Gully, below:

Hi Jan

I have discussed [X]'s situation with Senior Guardian Ella Nalepa and she recommended that I bring this matter to your attention.

In summary; I sent an email to the Public Trustee Nek Hassiotis on 22/10/2015 confirming that [X] would not be returning to his ACH unit in [Z].

The attached email from Deb Gully dated 5/01/2016 reports that "[X] is currently in \$800 deficit each fortnight and we need to relinquish the unit as soon as possible".

I confirmed the decision that [X] would not be returning to his unit at a meeting with [X] and the Public Trustee Julie Oxlade on 01/03/2016. I again confirmed this decision via email to Clive Castile on 15/04/2016.

I spoke with Deb Gully earlier today and she advised that the PT is liaising with ACH but the licence has still not been cancelled.

This office is very concerned that the Public Trustee did not take immediate action to relinquish the ACH unit. Due to this delay, [X]'s estate has incurred significant and unnecessary expenses.

I have attached the email stream which clearly demonstrates that the Public Trustee received ample notification regarding OPA's decision that [X] will not be returning to his ACH unit...[my emphasis]

22. Ms Baxter, responded to Mr Burns' email above on 15 August 2016 as follows:
- ...I have asked this to be investigated as I understand that [X]'s personal belongings are still at the unit. I understand also that ACH have been obstructive on giving PT access to clear the unit. I understand that Deb advised you on Friday that this matter would be her priority today. That remains the case and Deb is working to resolve this matter...
23. On 19 August 2016, solicitors acting for [X], Commercial & Co Lawyers (**C&C**), advised the agency that they had been instructed to commence Supreme Court proceedings to revoke the Administration Order.⁷ In response, the agency advised C&C that it was of the view that [X] did not have capacity to instruct them, and that the agency had been appointed by SACAT.
24. It does not appear that the applicant, nor C&C, lodged any application to revoke the Orders following the telephone call on 19 August 2016.
25. A SACAT Hearing was held on 22 August 2016, at which time the Tribunal initiated a review of the Orders and determined they should be upheld.
26. [X] then sought to have the Orders revoked at a SACAT Hearing held on 3 November 2016, at which time the Tribunal instructed [X] to provide it with various medical and psychiatric reports by 8 December 2016 to assist the Tribunal with considering his application. [X] instructed new solicitors, Websters Lawyers, to prepare the reports requested by the Tribunal.⁸
27. The agency first took steps to clear out [X]'s unit on 31 November 2016 by emailing Mason Gray Storage (**MGS**) with instructions to value, collect and store his furniture. As [X] had refused to return his keys for the unit, the agency determined it would be necessary to change the locks on the unit.
28. On 16 December 2016, MGS attended [X]'s unit and removed his furniture and belongings to put into storage.
29. As [X] had not provided medical reports by 8 December 2016 as requested by SACAT, [X]'s application to have the Orders revoked lapsed. This prompted the agency to advise [X] by letter dated 3 March 2017 that the lease on his unit would be relinquished.
30. The agency was advised by letter dated 21 March 2017 from Websters Lawyers that [X] had instructed them again to make an application to SACAT to revoke the Orders. As no application was on foot by 27 March 2017, however, the agency advised Websters Lawyers by telephone that it would proceed with cancelling [X]'s lease.
31. On 4 August 2017, a SACAT initiated review of the Orders occurred and the Orders were upheld. Shortly after, the agency obtained keys to the unit from MGS in order to clear it out entirely and cancel the lease.

⁷ This was not the first attempt by Mr Blee to seek revocation of the Orders made by SACAT. Mr Blee had previously sought a review of the Orders 12 months earlier on 20 August 2015. SACAT upheld the Orders on 15 October 2015.

⁸ The Public Trustee advised Websters Lawyers on 31 December 2016 that Mr Blee did not have capacity to instruct, and that he did not require legal representation for the purpose of preparing the medical reports. The Public Trustee reiterated this views to Websters Lawyers on 1 February 2017, emphasising the view that it did not consider it was in Mr Blee's best interests financially to unnecessarily engage solicitors for the purpose of preparing medical reports.

32. [X], however, continued to pay for the unit until 10 October 2017. The following reason for the delay in finalising the cancellation and payments for the lease was provided by Ms Gully by email dated 31 October 2017:

...The delay was due to obtaining keys from Mason Gray Strange and organising cleaners and gardeners in order to return the unit to ACH at a standard they requested.

33. In total, from the date that Mr Burns first advised the agency on 22 October 2015 that [X] would require permanent placement at the [Y] and therefore not be returning to his unit, to the lease being cancelled on 10 October 2017, [X] had been paying rent for both the unit and his nursing home accommodation for almost two years.

34. In response to enquiries by my Office as to why the agency had delayed cancelling the lease on [X]'s unit, Ms Contala stated the following in a letter dated 14 December 2017:

...The decision to cancel the lease over the unit was not a decision taken by Public Trustee. OPA is responsible for accommodation decisions for [X] and instructed Public Trustee that [X] would not be returning to the property to live. However Public Trustee was supportive of this decision as it was not prudent to maintain the property lease while paying nursing home fees.

...The arrangement whereby [X] was residing in residential care but paying rent on a unit was put in place by [X] in 2013, prior to Public Trustee's and OPA's appointment by SACAT. The timing of the cancellation of the lease was solely related to the ongoing appeals lodged by [X] with SACAT. Until a final determination was made as to the standing of both the guardianship and administration Orders it was not considered appropriate to take long term actions which were knowingly contrary to [X]'s wishes.

...Once it was finally determined by SACAT that [X] should remain under guardianship and administration Orders the lease was terminated.

35. My Office also made enquiries with the agency in regard to a number of fees and charges accrued by [X] for professional services from accountants and solicitors in 2016 and 2017. The following breakdown of fees was provided by Ms Gully by email dated 31 October 2017:

Solicitors & Legal Fees

23/02/2016 \$330.00 Commercial and Legal - Consultation
07/07/2016 \$ 3,764.20 Commercial and Legal - Advice SACAT application
15/09/2017 \$1,309.00 Commercial and Legal - Attend SACAT Hearing

Medical Fees for SACAT:

25/05/2017 \$1,322.20 Anthony Welsh - Neuropsych Assessment

Invoices received but PT declined to pay:

17/05/16 - Collison & Co \$761.00 - registered trade mark application
13/12/16 - Webster Lawyers \$1,200.00 to prepare medical report as per SACAT orders
24/04/17 - CAD International \$1,795.86 for computer software as per [X]'s instructions.
31/07/17 - Collison & Co \$454.00 - further request for trade mark application.

36. Given [X]'s limited capacity, and the fact that he was subject to Guardianship and Administration Orders for the period of time the fees above were incurred, my Office sought a further response from the agency as to whether it had taken steps to prevent [X] from incurring those fees. Ms Contala responded to that enquiry in her letter dated 14 December 2017 as follows:

[X] has been assessed by SACAT as not having the capacity to manage his financial and legal affairs. This decision has been reviewed and upheld by SACAT on three occasions. If a Public Trustee customer, who is under an Administration Order requires legal

services, Public Trustee arranges to obtain that service from either Outposted Crown Solicitor's Office solicitors or engages lawyers on the customer's behalf. However, since the date of the original SACAT Order in July 2015, [X] has personally and directly engaged a legal firm to assist him to revoke the SACAT Order, a patent lawyer, an accounting firm (Public Trustee prepares his taxation returns) and another legal firm to assist him to arrange medical appointments for a further appeal. This final service was available and ultimately arranged by the nursing home at which [X] resides.

On each occasion once we have become aware of the arrangements, Public Trustee has discussed [X]'s position with the firm involved and, with the exception of the final account from Webster Lawyers, paid any outstanding invoice incurred. The final account has not been paid following three separate discussions with the lawyer involved, advising them that their services were not required to assist [X] as he could obtain the same assistance at no charge from the nursing home, which was ultimately the case. Despite this advice, Webster Lawyers continued to pursue the matter.

Public Trustee only became aware that [X] had engaged professional assistance when contacted by the firm involved.

...Once we have become aware of the situation, Public Trustee has contacted each firm [X] has directly engaged and discussed the situation with them.

Public Trustee also communicated directly with [X] in order to assist him obtain the outcomes he was seeking without the need for external professional help.

Whether the agency's decision to not cancel the lease on [X]'s unit was unreasonable

37. As noted above, the agency submitted that the delay in relinquishing [X]'s lease on his unit:

... **was solely related to the ongoing appeals** lodged by [X] with SACAT. Until a final determination was made as to the standing of both the guardianship and administration Orders it was not considered appropriate to take long term actions which were knowingly contrary to [X]'s wishes. [my emphasis]

...Once it was finally determined by SACAT that [X] should remain under guardianship and administration Orders the lease was terminated.

38. In my view, this submission by the agency does not provide a compelling or logical explanation as to why it was reasonable to delay the cancellation of [X]'s unit for almost two years.
39. The agency was advised by the OPA on 22 October 2015 that [X] would not be returning to his unit. At that time there was an application⁹ for a review of the Orders on foot, however, on 25 November 2015 the Tribunal upheld the Orders.
40. The next review of the Orders, which was initiated by SACAT, not [X], did not occur for another nine months. That review was conducted on 22 August 2016, and a decision was made by the Tribunal to uphold the Orders.
41. The next attempt by [X] to have the Orders revoked, did not occur until the next SACAT Hearing held on 3 November 2016, 11 months after his previous unsuccessful appeal, and more than a year after Mr Burns had advised the agency that [X] would not return to his unit. At this Hearing, [X] was requested by the Tribunal to provide medical reports by 8 December 2016. As this did not occur, [X]'s application to revoke the Orders lapsed.

⁹ The date this application was submitted is unknown.

42. Although [X] attempted to instruct Websters Lawyers again following the unsuccessful attempt by [X] on 3 November 2016, no further application to review the Orders was submitted by [X] before the lease was relinquished and final payment was made on 10 October 2017.

43. For ease of reference, I have provided a summary of the dates referred to above, in addition to other key dates, below:

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|------------------|---|
| 22 October 2015 | Mr Burns advised the Public Trustee that [X] would not be returning to unit |
| 25 November 2015 | An appeal that was on foot on 22 October 2015 was rejected by the Tribunal |
| 17 December 2015 | Ms Gully wrote to the complainant requesting that he identify which items he wished to take with him to the [Y] |
| 4 January 2016 | Mr Burns contacted Mr Hassiotis seeking confirmation that [X] had been requested to clean out his unit |
| 5 January 2016 | Ms Gully acknowledged that [X]'s total expenses were amounting to an \$800 fortnightly deficit, and that the unit would need to be relinquished as soon as possible to address this issue |
| 3 February 2016 | The agency met with [X] at his unit, and Public Trustee officers formed the view that he was 'quite capable of living in the unit with appropriate supports |
| 1 March 2016 | Officers of the agency met with officers of the OPA to discuss the possibility of [X] returning to his unit. Mr Burns makes it clear this is not appropriate, and the Public Trustee instructs [X] to clear out his unit by 31 March 2016 |
| 22 August 2016 | SACAT initiated a review of the Orders and determined they should be upheld |
| 3 November 2016 | [X] sought to have the Orders revoked at a SACAT Hearing. The Tribunal instructed [X] to provide it with various medical and psychiatric reports by 8 December 2016 to assist with considering his application |
| 31 November 2016 | The agency emailed MGS with instructions to value, collect and store his furniture. |
| 16 December 2016 | MGS attended [X]'s unit and removed his furniture and belongings to put into storage |
| 8 December 2016 | [X]'s application to have the Orders revoked lapsed |
| 3 March 2017 | The agency advised [X] that the lease on his unit would be relinquished |
| 4 August 2017 | SACAT initiated review of the Orders occurred and the Orders were upheld |
| 10 October 2017 | The final payment on the unit was made. |

44. As the timeline highlighted above demonstrates, there were gaps spanning several months where no applications to revoke the Orders by [X] were on foot, providing the agency with ample opportunity to act on the OPA's advice to relinquish the unit.

45. Although there was an 11 month period of time, from 25 November 2015 to 3 November 2016, where no application for revocation of the Orders had been made by [X], I accept the agency was still considering whether [X] could return to his unit up until 1 March 2016.

46. By way of comment, I query the appropriateness of the agency's actions at the meeting with [X] on 3 February 2016, and again with [X] and officers of the OPA on 1 March 2016, and whether they were within the scope of the Public Trustee's role.

47. As administrator of [X]'s financial affairs, it is not the role of the Public Trustee to make decisions about his day to day life. That is the role of his guardian, and Mr Burns had provided clear advice to the Public Trustee that a decision based on medical advice had been made that [X] was not capable of returning to independent living.

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48. The Public Trustee's actions also may have contributed to [X]'s reluctance to clear out his unit, by leading him to believe there was a possibility he may still be able to return. It also raises question as to why officers of the agency were diverting their attention to considering whether [X] could return to his unit, rather than implementing the OPA's decision.
49. That said, I am willing to accept that there may have been some confusion as to whether there was a possibility [X] could return to his unit. As such, the focus of my consideration has been limited to the period after 1 March 2016.
50. By 1 March 2016, however, the agency ought to have been unequivocally certain that [X] would not be returning, yet it does not appear the agency took steps in the 8 months prior to the application lodged by the applicant on 3 November 2016.
51. The agency then arranged for MGS to remove items from [X]'s unit, but no steps appeared to have been made to cancel the lease.
52. Then, following the lapse of [X]'s next application made on 8 December 2016, it took the agency another ten months, with no application for revocation by [X] on foot, for the agency to take the final steps of cancelling payments for the unit.
53. I have not considered the SACAT initiated reviews of the Orders in my assessment of the relevant timeframes above, as these are automatic reviews that the Tribunal is required to undertake under section 57(1) of the *Guardianship and Administration Act 1993*, which sets out that:
- (1) The Tribunal must review the circumstances of a protected person—
 - (a) in the case of a protected person who is being detained in any place pursuant to an order of the Tribunal—within six months of the making of the order and thereafter at intervals of not more than one year; and
 - (b) in any other case—at intervals of not more than three years.
- for the purpose of ascertaining whether the order or orders to which the person is subject under this Act are still appropriate.
54. As such, I am of the view that these reviews ought to bear no influence on the agency's actions, as SACAT is required to undertake them on a regular basis. If the agency held off all decision making in anticipation of such reviews, it would be prevented from taking any action indefinitely given the mandatory nature of the automatic reviews.
55. I now turn to the following submission by the agency:
- ...once it was finally determined by SACAT that [X] should remain under guardianship and administration Orders the lease was terminated.
56. I am perplexed by this submission, and consider it undermines the agency's logic as to why no action was taken, as the confirmation of the Orders by SACAT on 6 August 2017 were by no means 'final' Orders.
57. The Orders had been confirmed by the Tribunal on several occasions since the agency became [X]'s administrator, and [X] remains entitled to a review of his Orders to this day. This is reflected in every Order of the Tribunal I have cited in relation to [X], which consistently state that:
- ...the applicant and any other person entitled to apply to the Tribunal can apply to have this order varied or revoked at any time.

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58. Further, regardless of any right [X] had to have the Orders reviewed, the fact remains that the OPA made a definitive determination that he was not capable of returning to the unit, and Mr Burns repeatedly expressed concerns that nothing had been done to relinquish the unit, causing unnecessary expenditure for [X].
59. It was clearly not in [X]'s best interests to continue to make dual payments for accommodation, yet the agency failed to take action to prevent this from occurring, against advice from the OPA.
60. I also do not consider that the agency's explanation for the delays is consistent with the correspondence between its officers and the OPA as outlined above.
61. Various explanations were provided by the agency to Mr Burns in response to his concerns that the unit had not been relinquished, none of which make reference to any of the applications by [X] to have the Orders revoked.
62. For example, I refer to the correspondence from Mr Castile to Mr Burns above, stating that delays had been caused by [X]'s refusal to clear out his unit. By way of comment, I note Mr Burns' response to Mr Castile's email, in which he appropriately pointed out that:
- ... As [X]'s Administrator it is the Public Trustee's decision regarding what steps should be taken to access the property to collect items.
63. Ms Baxter then offered the following explanation for the delays on 15 August 2016:
- ...I have asked this to be investigated as I understand that [X]'s personal belongings are still at the unit. I understand also that ACH have been obstructive on giving PT access to clear the unit. I understand that Deb advised you on Friday that this matter would be her priority today. That remains the case and Deb is working to resolve this matter today...
64. At no point did any of the agency's officers state that the delays had been caused by applications to revoke the Orders. The first time this explanation appears to have been provided, is to my Office through the course of my investigation.
65. That said, I also find the agency's officers' explanations for the delays to Mr Burns unsatisfactory.
66. The agency ought to have known that [X] was a vulnerable person with limited capacity, who demonstrated considerable reluctance to relinquish his unit. I consider the agency ought to have taken proper and active steps to assist [X] in clearing out his unit, as soon as the decision had been made by OPA that he would not be returning.
67. Instead, the agency took a passive approach to the situation by requesting that [X] take steps to clear out his unit by 31 March 2016, and then failed to respond when [X] did not meet that deadline.
68. Repeated prompting, and expressions of concern by Mr Burns did not cause the agency to take action after that time. Even the undertaking by Ms Baxter in her email dated 15 August 2016 referred to above that the matter would be given priority, did not result in the agency cancelling the lease for another 14 months.
69. In light of the above, I am of the view that the agency acted unreasonably by failing to terminate and cancel payments for the lease on [X]'s unit once it became clear he would not be returning on 1 March 2016, causing him significant financial detriment.

Opinion

In light of the above, my view is that by failing to cancel [X]'s lease on his unit, the agency acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the agency reimburse [X] for the costs incurred as a result of its failure to terminate the lease on his unit for the period of 1 April 2016¹⁰ to 10 October 2017.

Whether the agency failed to prevent [X] from seeking professional services and accruing significant fees

70. As noted at paragraph 35 above, [X] has sought various professional services relating to legal proceedings whilst under the administration of the agency.
71. Some of the fees charged as a result of [X] seeking those services have been paid for by the agency, and some have not.
72. As submitted by Ms Contala in the following excerpt of her letter dated 14 December 2017, the fees incurred for professional services were considered by the agency on merit in consultation with the service providers:

...On each occasion once we have become aware of the arrangements, Public Trustee has discussed [X]'s position with the firm involved and, with the exception of the final account from Webster Lawyers, paid any outstanding invoice incurred. The final account has not been paid following three separate discussions with the lawyer involved, advising them that their services were not required to assist [X] as he could obtain the same assistance at no charge from the nursing home, which was ultimately the case. Despite this advice, Webster Lawyers continued to pursue the matter.

Public Trustee only became aware that [X] had engaged professional assistance when contacted by the firm involved.

...Once we have become aware of the situation, Public Trustee has contacted each firm [X] has directly engaged and discussed the situation with them.

Public Trustee also communicated with directly with [X] in order to assist him obtain the outcomes he was seeking without the need for external professional help.

73. Having considered the nature of professional services sought by [X], and which of those services the agency considered were reasonable to pay for, I do not consider the agency acted unreasonably in not preventing [X] from seeking those services and subsequently agreeing to pay for the fees charged as a result.
74. Although [X] is under Guardianship and Administration Orders, and has been determined by SACAT to have limited capacity to manage his finances and day to day life, it does not necessarily follow that he does not have capacity to instruct solicitors or to obtain reports for the purposes of legal proceedings.
75. It was noted in *Dalle Molle v Manos*¹¹, a South Australian case which considered a protected person's ability to give instructions to a solicitor, that:

¹⁰ This date accounts for the one month notice period required under Mr Blee's Residence Agreement.

¹¹ [2004] SASC 102 at 32.

...the question whether a person has the capacity to give sufficient instructions does not turn on whether or not the persons has the requisite mental capacity to make some other legally effective decision....the test is issue specific.

76. I do not consider it is necessary to consider whether [X] *did* have capacity to provide instructions to his solicitors on each occasion he attempted to do so. I consider, however, that *Dalle-Molle* rules out the possibility of [X] being excluded completely from being able to seek legal advice and any associated reports required for the purposes of legal proceedings.
77. I turn now to the agency's submissions above that it took steps to have discussions with [X] once it became aware that he had sought various services, and then paying or refusing to pay for those services once [X] had been charged for them.
78. I am of the view that the agency acted reasonably and appropriately by consulting with [X] and paying for services where appropriate to do so in consultation with the service provider.
79. I am also particularly satisfied that the agency acted appropriately by refusing to pay for services where the agency had formed the view that the services were not required or in the best interests of [X]. For example, as Ms Contala pointed out in her letter above, an account for services provided by Websters Lawyers was not paid for, as the agency had advised them that their services were not needed and [X] could obtain the same assistance through the [Y] at no extra cost.
80. Further, it is unlikely the agency could have anticipated that [X] would seek various services, and I accept the agency's submissions that it acted as soon as possible once it became aware that [X] had approached service providers.

Opinion

In light of the above, my view is that the agency did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act by failing to prevent [X] from seeking professional services and accruing significant fees.

Summary and Recommendation

In light of the above, my view is that:

- by failing to cancel [X]'s lease on his unit, the agency acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the agency:

1. reimburse [X] for the costs incurred as a result of its failure to terminate the lease on his unit for the period of 1 April 2016 to 10 October 2017.

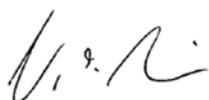
It is also my view that the agency did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act by failing to prevent [X] from seeking professional services and accruing significant fees.

In accordance with section 25(4) of the Ombudsman Act, the agency should report to me by **17 July 2018** on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

I have also sent a copy of my report to the Honourable Vickie Chapman MP, Attorney-General as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines
SA OMBUDSMAN

17 April 2018