

# On the instructions of the Public Trustee

You often see this on real estate advertisements.

It is the equivalent of saying "liquidator's sale" or "deceased estate."

In real-estate speak it is an invitation to snap up a bargain. The property (which may or may not be a bit run down) must be sold.

It's not just a matter of deceased estates. Commonly, a sale on the instructions of the public trustee will occur when an elderly person's affairs are committed to its management and the house has to be sold in order to meet the expenses of that person's new accommodation.

It turns out (though this will hardly come as a surprise to anyone who has dealt with the Public Trustee) that those instructions do not amount to much. If you are a family member, you might want to do something about that. But it can be difficult getting the Trustee to pay any attention to you. Quite possibly the Trustee is under-resourced. More troublingly, because the Public Trustee is often appointed out of situations of family conflict or to manage the affairs of less-competent members of society, there seems to be an institutional tendency to discount and disregard such troublesome interventions. Neutrality may be the goal but minimalism verging on inaction often seems to be the outcome.

The problem is that the Public Trustee's discretion is so broad that its decisions and actions (or, more commonly, inactions) are practically un-reviewable. I have yet to see a case where the trustee has been properly taken to task. It is all too hard. If anyone complains, the trustee can hide behind the skirts of antecedent familial disputes and it would be a brave judicial officer or tribunal which would step in.

*AMC and ALQ v NSW Trustee and Guardian* [2012] NSWADT 217 is a recent

case in point.

The NSW Guardianship Tribunal appointed the public trustee financial manager of AMC's affairs. Prior to the appointment, AMC's house of 60 years had been on the market, though it isn't clear from the report who was really driving that decision. After the appointment, the Trustee called off that sale (why?) then called the sale on again. In between, a new villa was bought for AMC in a different part of town (presumably in an old people's development) and the sale of AMC's house was needed to pay out the mortgage taken for that purchase. The property went on the market on 21 August 2012 with an auction due on 15 September 2012. Prior to the inspection period, AMC's daughter and that daughter's teenage son had still been living in the house. No effort at all seems to have been taken to make the house

presentable. AMQ, AMC's son, went along to the inspection and saw that it was in a state of disarray in some rooms, for example unmade beds, unwashed items in the kitchen sink and the like. He also thought that a better effort could be made to market the property with a view to emphasising its redevelopment potential.

On 7 September 2012, AMQ's solicitor wrote to the Trustee about this. Presumably ALQ had made some previous attempt to raise this with the Trustee. The Trustee did not respond.

AMQ appealed to the ADT against the Trustee's decision to sell the property as presently proposed and specifically sought an interim stay of that decision – that is, a delay on the auction in order (ALQ said) to enable a better marketing campaign.

As well as complaining about the marketing and presentation, AMQ also complained that the Trustee would not reveal to him its proposed reserve price. Judge K P Connor accepted that this was confidential and need not be disclosed. The Trustee had had problems with this in the past.

He was more critical of the conduct of the sale.

At the hearing, Richard Mosvessian of Century 21 Real Estate Randwick, gave evidence by the phone about the marketing campaign. He:

“confirmed that the son's assertions regarding the state of some the rooms on the recent open days was accurate. He disputed the son's contention that it mattered how a property of this kind was presented. He said that the interested market looked past these things, and focussed on the essentials of the property and such matters as the possible cost of renovation. He rejected the practicality of marketing the property as one with subdivisional and redevelopment potential. He referred to the number of parties that had inspected the property, the number of contracts that had been issued, and the number of building inspections that had been obtained by interested parties.”

The mind boggles about Mr Mosvessian's views about how a property is presented. Is that the advice that Mr Mosvessian gives to all his vendors?

Mr Caldwell, the Trustee's property manager, stated that no special instructions were given to agents engaged to handle clients' properties as to how they were presented for sale, and the office [of the Public Trustee] did no monitoring in that regard.

Judge Connor was clearly taken aback:

21 The evidence of the poor state of the presentation of the property at open days has been available now for some time. I have noticed in the paperwork that Mr Mendelssohn

(solicitor for the applicants) commenced to take action formally on 7 September 2012 (see letter of complaint to the NSW Trustee). It may be that he engaged in representations of a more informal character predating that date.

22 I think it is a matter of concern that the evidence of these issues was raised by the son and Mr Mendelssohn with the NSW Trustee and met, it would seem, with no action. My firm opinion is that the office should proceed on a principle of respect for the protected person's likely views on the matter, in relation to the way in which their homes are presented to market. I do not understand my view to be that of the office. As I have understood it from Mr Caldwell (Manager, NSW Trustee), the office is relatively inactive in that matter and leaves things entirely to the discretion of the agent.

23 It is clear from the evidence today that Mr Movsessian has made his own call on this issue. He appears not to be of a view that this matter is of importance in terms of the market, and that closes the issue in his mind.

24 I think this is something that would matter to the protected person and their family; and it did seem to matter to the mother and her son in this case. It is a matter of regret that we have had this sort of insouciance in relation to this issue.

25 I accept having said that, that there are houses often that the NSW Trustee is called on to manage and put to market that are in shocking states of disrepair. I am not talking about houses of that kind. I am talking about houses that are within the ordinary framework of home management.

Respect and regret for its lack is one thing (or maybe they are two); overturning a decision of the Trustee is another. The lettuce leaf got limper.

26 Nevertheless it seems to me that the factors of prejudice that exist today are such that it would be inappropriate of me to make a restraining order at this late stage. I accept what Mr Movsessian says that there had been a significant level of buyer interest, evidenced by various contracts going out.

The main prejudice was, as far as I can make out, that AMC had already bought a new place and had a mortgage to pay off plus, presumably, some expenses of advertising. The other potential prejudice from any sub-par presentation of the house was let through to the keeper with regret. It's water under the bridge.

Judge Connor expressly accepted the concerns expressed by the son and his mother, but the decision stood with the mildest of rebukes to the Trustee:

31 I think it would have been more respectful had the property been presented in a better way. I think though it is now too late and too close to the auction date to interfere so

radically with the decision that has been taken. Some reassurance can at least be obtained from the fact that there is the level of activity and interest in the property that has been indicated.

32For those various reasons I am not prepared to intervene.

33I do not for a moment think it is an entirely happy state of affairs that we have experienced today.

34We hear cases here frequently where there is criticism of the unavailability of estate officers to people with grievances. I realise that your officers, Mr Caldwell, are under enormous pressure and often are faced with difficulty in dealing with representations. We also hear complaints about phones not being answered. The Tribunal had that experience today when it was unable to reach you at the appointed time on the number you had given; it constantly went to message.

35So I just hope you can take some of those concerns back into the office administration and do what you can to improve levels of communication.

I'm sure that was a lot of comfort to ALQ and (to the extent that she was able to understand what was going on) AMC Or *not*.