LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards Tribunals Ontario

Citation: 2138658 Ontario Ltd. o/a Seeley's Bay Retirement Home, 2017 ONLAT 10460/RHA

Date: 2017-04-07
File Number: 10460/RHA

Appeal under section 100 of the *Retirement Homes Act, 2010*, S.O. 2010, c. 11 from an Order to Revoke a Licence.

Between:

2138658 Ontario Ltd. o/a Seeley's Bay Retirement Home

Appellant

and

Registrar, Retirement Homes Regulatory Authority

Respondent

DECISION AND ORDER

Panel: Laurie Sanford, Vice-Chair

Appearances:

For the Appellant: Ronald Rudd, Agent

For the Respondent: Jordan Glick, Counsel

Place and dates of hearing: Kingston, Ontario
March 20, 21,22, 2017

REASONS FOR DECISION AND ORDER

A. OVERVIEW

[1] Ronald Rudd is the owner/operator of 2138658 Ontario Ltd. o/a Seeley's Bay Retirement Home ("Seeley's Bay"). Seeley's Bay has been operating since 2006 and was licenced as a retirement home under the *Retirement Homes Act, 2010* (the "Act") in 2013. On September 1, 2016, the Registrar, Retirement Homes Regulatory Authority (the "Registrar") issued an Order to Revoke a Licence against Seeley's Bay. The Registrar alleges numerous grounds for the revocation. The most consequential of these are: first, the Registrar's allegation that Mr. Rudd is not competent to operate Seeley's Bay due to financial mismanagement. Second, the Registrar alleges that Mr. Rudd failed to protect some of his residents from financial abuse. Third, the Registrar alleges that Mr. Rudd's past conduct is grounds for revocation, primarily due to the alleged financial mismanagement and financial abuse of some residents.

[2] Mr. Rudd concedes that Seeley's Bay is facing financial troubles but he submits that he is in active negotiation with some investment partners who might give him the capital he needs. He denies that he financially abused any of his residents. He maintains that three of his residents chose to prepay their rent, which he submits is permissible under the *Residential Tenancies Act, 2006,* S.O. 2006, c.17 ("RTA"). Mr. Rudd introduced evidence from a current resident and from the family physician who provides care to many of the residents. Both witnesses testified that the level of care offered by Seeley's Bay is excellent.

[3] On the basis of the facts found and for the reasons given below, the Tribunal concludes that the licence for Seeley's Bay should be revoked. The financial difficulties faced by Seeley's Bay are imperilling the health, safety and security of the residents. Further, Mr. Rudd's importuning money from one of the residents and resisting requests for repayment constitutes financial abuse. His conduct in accepting money from residents raises concerns about his ability to conduct the business of Seeley's Bay in accordance with the standards set out in the Act.

B. LAW:

[4] Two statutes directly govern the operation of retirement homes in Ontario. The first of these is the Act. The fundamental principle of the Act is set out in Section 1 which provides that "a retirement home is to be operated so that it is a

place where residents live with dignity, respect, privacy and autonomy, in security, safety and comfort and can make informed choices about their care options."

[5] Under the Act, a licence to operate a retirement home is not an entitlement. Section 35 of the Act provides that an applicant for a licence must demonstrate that the persons operating the home are competent "to operate the home in a responsible manner in accordance with this Act and the regulations and are in a position to provide or facilitate the provision of care services to its residents". Further, applicants must demonstrate that their past conduct gives reasonable grounds to believe that the retirement home will be operated:

i. In accordance with this Act and the regulations and all other applicable Acts, regulations and municipal by-laws,
ii. With honesty and integrity, and
iii. In a manner that is not prejudicial to the health, safety or welfare of its residents.

[6] If the Registrar concludes at any time that the qualifying criteria set out in section 35 are no longer being met or that the licensee has contravened a requirement of the Act or that the licensee has made a "false statement in the application for the licence or in any document or information required to be provided under this Act", then the Registrar may move under section 95 to revoke the licence. Under subsection 95(2), the Registrar may order the licensee to cease operating the home and to comply with such orders as the Registrar considers necessary to achieve this cessation.

[7] A licensee may appeal the Registrar's revocation order to the Tribunal under section 100 of the Act and, following the hearing, the Tribunal is empowered under section 103 of the Act to affirm or rescind the order, substitute its decision for the Registrar's order and direct the Registrar to implement the Tribunal's decision in accordance with any directions the Tribunal finds appropriate.

[8] The second statute that governs the operation of a retirement home is the RTA which governs the landlord and tenant relationship between the retirement home and its residents.

[9] The specific sections of Act and the RTA which are relevant to the issues in this hearing will be considered below.

C. ISSUES AND ANALYSIS:

[10] The first question for the Tribunal is whether Mr. Rudd ought to have his licence revoked or not. The Registrar cited numerous grounds for her Order to Revoke. The Registrar asserts that Mr. Rudd no longer meets the licensing criteria set out in section 35 of the Act for two reasons. First, the Registrar submits that Mr. Rudd is no longer competent to operate Seeley's Bay in a responsible manner in accordance with the Act Second, Mr. Rudd's past conduct does not afford grounds to believe that Seeley's Bay will be operated in accordance with all applicable statutes and in a manner that is not prejudicial to the welfare of the residents. The Registrar alleges that Mr. Rudd failed to protect the residents of Seeley's Bay from financial abuse as required under section 67 of the Act. The Registrar alleges that Mr. Rudd made false statements to inspectors for the Retirement Home Regulatory Authority ("RHRA"). The Registrar also alleges that Mr. Rudd has not complied with the Registrar's orders concerning the operation of Seeley's Bay. Mr. Rudd disputes these allegations.

C1. Does Mr. Rudd's financial management of Seeley's Bay meet the licensing criteria of the Act?

[11] Mr. Rudd gave testimony about the history of Seeley's Bay which was not disputed by the Registrar and which may be summarised as follows.

[12] Mr. Rudd bought Seeley's Bay in 2006. The exterior of the building needed work and the one full floor of the interior was not finished. Mr. Rudd had some residents from the beginning but did not feel he could charge them market rents given the state of the property. There is no evidence that Mr. Rudd took advantage of any of the provisions of the RTA that might have permitted him to increase rent as the building was renovated. For example, Mr. Rudd apparently made no effort to enter into agreements with any of the residents for an increase, due to his capital expenditure as might have been possible under section 121 of the RTA. Nor did he apply for permission to increase rent above the guidelines as is contemplated in section 126 of the RTA. Mr. Rudd did begin increasing rents last year. He had planned on there being a fair degree of resident turn-over which might have permitted him to move new residents to a rent he regarded as fair market value. However, the resident turn-over rate has been low. Some residents have refused a transfer to long term care facilities, citing the family-like atmosphere and care they enjoy at Seeley's Bay.

[13] When Mr. Rudd bought Seeley's Bay, he was extended a first mortgage for approximately $290,000 and a second mortgage of $90,000 for a total indebtedness of $380,000.

[14] The costs of renovation mounted and eventually exceeded $300,000, according to Mr. Rudd. Operating costs were also high. Seeley's Bay has 26 residents in 24 rooms and suites and a full time and part time staff of 11. Services provided include meals, cleaning and laundry. Additionally, Seeley's Bay has Personal Support Workers on staff to both monitor and administer medication. There is staff available at Seeley's Bay 24 hours a day, 7 days a week. Mr. Rudd testified that Seeley's Bay is full and there is a waiting list. Mr. Rudd did not produce operating statements so it is not possible to quantify his expenses.

[15] Mr. Rudd does not receive a salary and has taken no money from the business. His wife receives a salary of $2,000 a month. The couple live on the premises.

[16] In 2013, Seeley's Bay was licensed under the Act. The costs of regulation were higher than Mr. Rudd expected and he understood that he could not pass on his licensing fees or costs of compliance to his residents. Mr. Rudd complained about how onerous these costs are, especially for smaller, rural operators. In fact, there is nothing in the Act that prohibits Mr. Rudd from passing on some of those costs and the RTA contemplates that certain types of increased operating expenses might flow through to the residents.

[17] Mr. Rudd believes that he can clear between $200 and $300 a month from the operation of Seeley's Bay, net of what he considers "operating costs". It is not clear what Mr. Rudd means by operating costs. These costs appear to exclude Hydro, or any provision for non-routine maintenance, such as the replacement of the fire panel.

[18] In September, 2014, Mr. Rudd refinanced his first mortgage with Westboro Mortgage Investments LP ("Westboro"), increasing it to $650,000. $340,000 of that amount was to cover his renovation costs. He was left with $61,000 surplus, which appears to have gone to operating expenses. He also refinanced his existing second mortgage and assumed a new one for $70,000, elevating his total indebtedness to $720,000.

[19] Mr. Rudd believed that if he could add a floor to one of the wings of Seeley's Bay, he would be able to add new residents at a minimal cost, thereby increasing his revenue. He retained engineers to do a preliminary analysis but did not proceed with the addition.

[20] Sometime after the Westboro mortgage was advanced, Mr. Rudd learned that the Province was imposing a mandatory requirement for sprinkler systems,

for businesses such as Seeley's Bay. He understood that the sprinklers had to be installed by December, 2017 but that some grant or other form of funding might be available. He received an estimate for the work of $150,000, well beyond his ability to pay. Although the issue of the sprinkler system is of importance to Mr. Rudd, he was unaware that the Province had extended the deadline for installation of the sprinkler systems until January, 2019. He decided to, in his words, "struggle through" until he could learn what kind of funding might be available.

[21] Mr. Rudd stopped making payments on his first mortgage in April, 2016. He testified that not making these payments made meeting his monthly expenses easier. He understood that Westboro was willing to work with him to finance the sprinkler system. However, the Westboro Special Projects Manager testified that, while Westboro was willing to work with Mr. Rudd, he had been unresponsive. The Vice President of Operations for Westboro denied that there had been any approval to advance further funds, although she does recall the subject being discussed in March, 2016.

[22] Westboro issued a "Notice of Sale under Mortgage" on June 8, 2016, claiming an indebtedness of $661,399.32. The Notice of Sale expired on July 25, 2016. The Vice President of Operations for Westboro testified that the total indebtedness under the mortgage as of March 20, 2017 stood at $745,937.53 and is accumulating at $173.71 per day. This includes charges for municipal taxes, which Westboro assumed when Seeley's Bay stopped paying them two years ago.

[23] Additionally, Seeley's Bay is in arrears on its income tax. There is a lien filed on the land title of Seeley's Bay for $145,668.98. Mr. Rudd testified that he has paid $24,000 of this debt but that interest continues to accrue. The Canada Revenue Agency ("CRA") is proposing payments of $10,000 to $15,000 a month, which he cannot afford. The CRA has now frozen the bank account of Seeley's Bay. Mr. Rudd is able to continue operating because he has opened an account in a second bank without disclosing the CRA actions to his new bankers.

[24] Mr. Rudd testified that he has made some payments of his second mortgage and that the current balance is $44,000. While Mr. Rudd testified that the loan remains "current" he also testified that he had not made last month's payment. The indebtedness registered on title is $70,000.

[25] In November, 2016, a fire broke out in Seeley's Bay. None of the residents were injured but all had to be evacuated and eventually all were relocated to a local hotel where they were provided with care by the staff of Seeley's Bay. Two

of the residents decided to relocate to a long term care facility but the rest of the residents returned to Seeley's Bay recently. Mr. Rudd incurred expenses in relation to refurnishing Seeley's Bay and believes he has an insurance claim for approximately $60,000 that is payable to him. He is hoping to use that money to help settle his debts.

[26] Two representatives of Westboro testified, the Vice President of Operations for the Registrar and the Special Projects Manager for Seeley's Bay. Westboro has delayed taking possession under a Power of Sale for several reasons. First, this is Westboro's first exposure to a retirement home and they wanted to move deliberately. Second, the fire postponed their plans. Westboro wanted Mr. Rudd to be able to make a claim on the insurance. They also felt they would achieve a higher sale price for Seeley's Bay, if it could be sold as an operating retirement home.

[27] The Westboro Special Projects Manager testified that he tried to work with Mr. Rudd but was unable to persuade Mr. Rudd to disclose his financial records or to put forward a business plan. Mr. Rudd explained that he thought Westboro wanted current financial records and the Seeley's Bay financial reports for 2016 are being prepared. He was unable to explain why no monthly statements had been provided other than to say that these too were under preparation.

[28] Mr. Rudd testified that Seeley's Bay is in arrears on its Hydro payments but that Hydro One had not yet served notice that it was cutting off service. Seeley's Bay has been in arrears on Hydro payments before and Mr. Rudd handled this by taking what he characterised as "prepaid rent" from two of his residents. Mr. Rudd assured the Tribunal in closing submissions that he would pay the Hydro bill but he did not say how.

[29] Additionally, Seeley's Bay and Mr. Rudd may owe the estate of one of his former residents, a woman who will be known as "HG", the sum of approximately $61,000. He disputes this amount and this issue will be addressed below.

[30] Even excluding the disputed debt to HG and accepting Mr. Rudd's testimony about the amounts he has paid, Seeley's Bay now owes over $900,000 with no apparent way to pay. Mr. Rudd testified that he is meeting with two potential investors but he did not call them to testify or produce any expression of interest from them. He also did not produce any financial statements or business plans.

[31] Mr. Rudd testified that he has no business or financial training but that he did manage a restaurant for a number of years and ran a smaller, unregulated retirement home before acquiring Seeley's Bay.

[32] The Registrar in her Order to Revoke the Licence cites the deteriorating financial condition of Seeley's Bay as grounds for concluding that Mr. Rudd is no longer competent to operate Seeley's Bay in a responsible manner in accordance with the Act. The Registrar also asserts that Mr. Rudd's past conduct surrounding the finances of Seeley's Bay does not afford grounds to believe that Seeley's Bay "will be operated in accordance with all other applicable Acts and in a manner that is not prejudicial to the welfare of the residents", as subsection 35(2) of the Act requires.

[33] Considering first the question of competency, the word "competent" is not defined in the Act. The Canadian Oxford Dictionary defines competent as: "1 a) adequately qualified or capable. b) effective . . ." The financial facts speak for themselves. In 2014, Mr. Rudd increased the debt of Seeley's Bay from $390,000 to $720,000 with no prospect of an immediate increase in revenue to service that debt. Mr. Rudd appears to have either been unaware of or to have misunderstood provisions of the RTA and changes in the sprinkler time table, each of which might have assisted him. Since going into default on the first mortgage, Mr. Rudd has been strangely passive, making no effort to produce the financial statements requested by Westboro. Despite Westboro's willingness to work with him, Mr. Rudd did not update Westboro on any conversations he was having with potential investors or present a business plan. The financial situation of Seeley's Bay continues to deteriorate with arrears in income tax and basic operating expenses, such as hydro. The Tribunal concludes that Mr. Rudd is not capable of managing Seeley's Bay in a financially responsible way as required by the Act. Solvency is a basic requisite for operating a retirement home. Mr. Rudd's financial difficulties affect more than him and his family. Residents of Seeley's Bay are at risk of losing their home and the security that comes with that. Most immediately, the residents are at risk of losing power, and therefore, their electric heat, during a Canadian April.

[34] Considering the question of Mr. Rudd's past conduct, based on his financial struggles and the way in which he has handled them, his past conduct no longer provides reasonable grounds to believe that Seeley's Bay will be operated in a manner that is not prejudicial to the welfare of the residents, for the reasons given above.

C2. Did Mr. Rudd fail to protect some of the residents of Seeley's Bay from financial abuse?

[35] The Registrar alleges that Mr. Rudd failed to protect three residents from financial abuse. Section 67 of the Act provides that every licensee shall protect residents of the home from abuse by anyone. Section 1 of Ontario Regulation 166/11 to the Act (the "Regulation") defines "financial abuse" as "any misappropriation or misuse of a resident's money or property". Section 72 of the Act provides that if money is entrusted to a licensee by a resident, the licensee will establish a trust fund for the money in accordance with the Regulation. The Act appears to be silent on whether and under what circumstances it is appropriate for a resident to loan money to a licensee.

[36] The Registrar called Mr. David Burnes, currently an Assistant Professor at the University of Toronto. Mr. Burnes was qualified as an expert in the measurement of the incidence of and risk factors for elder abuse. "Elder", Mr. Burnes explained, is defined by the Centers for Disease Control and Prevention in the United States of America as anyone over the age of 60. Mr. Burnes testified that elder financial abuse is a subset of elder mistreatment and is defined as follows:

> The illegal, unauthorized, or improper use of an older individual's resources by a caregiver or other person in a trusting relationship, for the benefit of someone other than the older individual.

[37] This definition aligns with the definition in the Regulation but it is important to note that the two definitions are not identical. Neither the Act nor the Regulation provides that the operator must be in a "trusting relationship" for there to be financial abuse. Mr. Burnes gave his opinion that operators of retirement homes would be in a position of trust as the resident is vulnerable due to dependence. Presumably, Mr. Burnes was using the word "trust" in its ordinary, not its legal, sense. The critical component of the definition in the Regulation is "misappropriation or misuse" of the funds or property.

[38] Mr. Burnes testified that elders are at increased risk for financial abuse because the avoidance of such abuse often requires higher order cognitive functions which even mild cognitive impairment will affect. Mr. Burnes quoted from a 2012 article appearing in *PloS one,* 7(8) e43647: "Even among older adults without cognitive impairment or dementia, normal age-related changes in cognition are associated with poor decision-making and greater susceptibility to financial scams." However, Mr. Burnes also expressed the view that aging alone

is not necessarily a risk factor for financial abuse; it is the cognitive decline that creates the vulnerability.

[39] Other factors which, in Mr. Burnes' opinion, would increase the risk of or vulnerability to financial abuse, would be factors that tend to increase dependence on others for the conduct of financial transactions or for financial advice. These factors include mobility impairment, visual impairment and being without a spouse or friend. These factors are not cumulative; each is independent, according to Mr. Burnes. However, in Mr. Burnes' opinion, the more factors that are present, the greater the risk of vulnerability to financial abuse. Mr. Burnes testified that the vulnerability is greater if the operator of a retirement home expresses financial need. Since the elder is dependent on the operator for housing, safety and care, vulnerability is increased by creating uncertainty about how these needs might be met.

[40] In 2014 when Mr. Rudd was arranging his mortgage from Westboro, a woman, who is now a former resident, offered to grant him a second mortgage. The former resident retained independent counsel and a mortgage was drawn up with interest set at 17%. The Registrar took the position that this mortgage was breached by Mr. Rudd but that ultimately the mortgage was paid in full. However, Mr. Rudd testified that he repaid the mortgage within months of concluding his mortgage with Westboro. The Registrar provided no evidence to support her claim of a breach of the mortgage and the Tribunal accepts Mr. Rudd's testimony. There is no evidence that the former resident was incompetent at the time the mortgage was granted.

[41] The more prudent course of action would be for an operator to avoid taking loans from residents, given the vulnerability of elders to financial abuse. However, neither party was able to point to a provision in the Act or Regulation that prohibits such loans. In this case, the resident was protected by independent legal advice, a written mortgage and an interest rate which was not unduly low. The Registrar cited this situation as evidence that Mr. Rudd knew the formalities that might operate to protect a resident in the circumstances of this loan.

[42] The first two residents who the Registrar alleges were financially abused by Mr. Rudd are a couple who will be referred to as BL and GL BL testified at the hearing that she had been a resident of Seeley's Bay for approximately seven years and that she and GL are in their 80's. She and her husband have been friends with Mr. Rudd for 25 or 30 years and she regards Mr. Rudd as a son. She testified that she and GL are very comfortable at Seeley's Bay and are well cared for. When she has been in trouble, she testified, Mr. Rudd "stepped up to

the plate". "He would deprive himself before he would deprive us," she said. She testified that she would seek help from Mr. Rudd before she would seek it from her own children. She described Mr. Rudd as "pouring himself out for the residents". The residents in turn love being at Seeley's Bay, she testified. "It is like being at home", she said.

[43] She described GL and herself as people of faith. Informed by this faith, when people are in a tight spot, GL and she loan them money in the short term. They have made many, many such loans. "We get it back when they are able," she said.

[44] BL would periodically ask Mr. Rudd if everything was going well or about how things were going financially. Mr. Rudd would talk about building, in particular about adding a floor to one wing. BL testified that she asked if they could help. According to her, it was her idea for them to prepay their rent. The only two times that she can recall when Mr. Rudd approached them were first, when he had a very high hydro bill and they prepaid rent to pay for it. A second time an engineer's bill needed to be paid and again, Mr. Rudd approached them and they prepaid rent. Her testimony was that the prepaid rent has been cleared and that Mr. Rudd owes them nothing. She and GL will owe their usual rent at the end of March, according to her testimony.

[45] After she had completed her testimony, BL pleaded with the Tribunal not to shut Seeley's Bay down.

[46] Mr. Rudd had originally planned to call both GL and BL but after BL had completed her testimony, Mr. Rudd said he was not comfortable calling GL, despite the very positive testimony BL had given. Mr. Rudd thanked counsel for the Registrar for being gentle with BL. The panel was struck with how protective Mr. Rudd seemed to be of both BL and GL.

[47] BL gave her evidence in a competent and straightforward manner. One of the Registrar's witnesses testified that GL also appeared "competent and capable". While GL did not give evidence, one of the Registrar's investigators interviewed him and testified that GL told him that in the approximately six years that BL and GL have been residents at Seeley's Bay, they have only paid one rent cheque when due. All other rent has been advanced as prepaid rent, often as a result of a request by Mr. Rudd for money. This statement differs from BL's evidence that there were only two times when Mr. Rudd approached them for money. The Tribunal prefers GL's evidence as he was the spouse who kept records of their financial dealings with Mr. Rudd and so could be expected to have a more objective recollection of events. GL told the interviewer that the only

pressure he felt, was that he felt sorry for Mr. Rudd. GL thought Mr. Rudd would be a better manager of money. While GL did not feel taken advantage of, he felt sad that it "always has to happen".

[48] Mr. Rudd testified that there was no documentation for this prepaid rent, no lawyers were consulted and no interest was paid on the rent. Mr. Rudd introduced a newspaper article which reported on a case, *Corvers v Bumbia,* 2014 ONSC 7548, upheld by the Divisional Court in 2014 ONSC 985. This is a decision of the Superior Court of Justice in which the Court held that while a landlord was prohibited from demanding that a tenant prepay rent, a tenant was not prohibited from voluntarily pre-paying rent. In this case, while Mr. Rudd did not "demand" the prepayment of rent, that fact is not determinative of the issue of financial abuse.

[49] While it is clear from their evidence that neither BL nor GL felt either victimized or abused, the definition of "financial abuse" in the Regulation does not require those elements. Nor is it necessary that the prepaid rent be either prohibited or allowed under the RTA, although that may be relevant evidence. What is required is misappropriation or misuse of the funds advanced. "Misappropriate" is defined in the Canadian Oxford Dictionary as: "apply (usually another's money) to one's own use or to a wrong use." "Misuse" is defined as: "1. Use wrongly or improperly; apply to the wrong purpose . . . .".

[50] Mr. Rudd did credit BL and GL with the rent they prepaid. While he did not pay interest on the rent, it was clear from BL's testimony, that she would not have sought it. Instead, she regarded the benefit she conferred on Mr. Rudd to be a matter of friendship and of faith. These are trade-offs that people who are competent to manage their affairs ought to be allowed to make, whether they are protected under the Act or not. Obviously, the question of financial abuse will depend very much on the circumstances of each case but here, the Tribunal does not find that Mr. Rudd failed to protect either BL or GL from financial abuse.

[51] Having said that, Mr. Rudd, in repeatedly approaching BL and GL for funds, in not suggesting they get independent advice, in not documenting their arrangement and in not offering to pay interest, showed a lack of integrity that falls below the standards of the Act. His past conduct in this matter calls into question his ability to operate the home in accordance with the standards set out in subsection 35(2).

[52] The third resident of concern to the Registrar is a woman who will be referred to as "HG". HG moved into Seeley's Bay in 2010 and died in the care of the home on December 24, 2016. She was described by her physician as

"completely aware until the day before she died." Her physician testified that she understood in the autumn of 2016 that she was terminally ill and understood the pros and cons of various treatment options. "She knew what she wanted and was very clear about her decisions," her doctor said. HG was a "hoarder" according to her doctor and to Mr. Rudd. She had piles of paper in her room. This became an issue because her records were disorganised. HG chose to stay at the local hotel after the fire under the care of the Seeley's Bay staff because she considered the staff as family and Seeley's Bay as home, her doctor testified.

[53] HG met with an inspector of the RHRA in May, 2016 as a result of an anonymous report of financial abuse. The inspector testified that HG told her that she had no close family and looked after all her own money. At some point, Mr. Rudd began approaching her for money, which he told her would be applied against her rent. Her understanding, which Mr. Rudd confirmed, was that her rent was prepaid until March, 2017. However, Mr. Rudd continued to borrow money beyond the prepaid rent. HG stated that Seeley's Bay was a good home and that she had been very happy until September, 2015. At that point, she felt the amount of money she had loaned to Mr. Rudd was becoming too high. Since then, she said she had loaned Mr. Rudd about $60,000 as of April, 2016, which she felt was well beyond what she considered reasonable. Her health deteriorated and she was concerned that if she had to move to a nursing home or buy a scooter, she might not have to funds to pay for it. She worried about the lack of paperwork and the fact that she had lost track of what she had paid Mr. Rudd before September, 2015. HG approached a friend to take her to a lawyer for advice about the loan and it was this request that triggered the RHRA's involvement. Eventually, the RHRA found evidence of about $60,000 in loans, beyond HG's rent. HG approached Mr. Rudd about the loans and he reassured her that he would look after her but he took no action.

[54] After HG's death, Mr. Rudd disputed the amount which he and Seeley's Bay owed her. His position is that he owes her estate the prepaid rent from HG's death through to March, 2017 but no more. Mr. Rudd acknowledges receiving approximately $60,000 from HG beyond the prepaid rent but testified that this was to pay arrears in her rent due to a delay in paying rent when she first moved to Seeley's Bay. Mr. Rudd did not provide any evidence of any arrears in rent and the Tribunal is not persuaded that such arrears could account for the full amount advanced by HG in addition to the rent she prepaid. Further, the approximately $60,000 was advanced by HG after September, 2015, according to an agreed statement of facts between the parties. That is inconsistent with Mr. Rudd's testimony that this was payment of rent arrears that existed years earlier.

The Tribunal finds that Mr. Rudd received loans in excess of the prepaid rent from HG.

[55] Mr. Rudd acknowledged that he would approach HG for money. He testified that he had suggested she get legal advice and draw up a contract but she refused. If that had been her position initially, she had changed her mind sometime around or after September, 2015, according to her statement to the RHRA. There is no evidence that Mr. Rudd repeated his suggestions about formalising the loans when HG became concerned about the arrangement. Mr. Rudd did not provide receipts for the money HG advanced or offer to set up a ledger in his books for the advances despite knowing that her records were disorganised. Mr. Rudd did not pay interest on either the prepaid rent or the loans advanced.

[56] The Tribunal finds that Mr. Rudd not only did not protect HG from financial abuse but he was the one who subjected her to it. Her loans were interest free, applied to Mr. Rudd's use and not returned on request. The Tribunal finds that this constitutes a "misappropriation" of HG's funds under the Act and Regulation.

[57] Mr. Rudd approached HG for money in circumstances that would have made it difficult for her to refuse, given her dependence on the staff of Seeley's Bay. Even when she began to feel uncomfortable about the amount of the outstanding loan in September, 2015, she nevertheless felt constrained to continue to advance him money. He did not suggest that she obtain independent legal advice when she expressed concern about the outstanding loan. He did not pay interest on the loan or the prepaid rent. He did not document her loans and he did not provide her with receipts, despite knowing that her records were disorganised. This past conduct falls seriously short of the required standards set out in the Act. It put HG at risk of not being able to pay for treatment, devices or long term care she might have required. It affected her peace of mind. Mr. Rudd's conduct raises grave concerns about his ability to operate a retirement home with honesty and integrity and in a manner that is not prejudicial to the health, safety or welfare of its residents.

C3. <u>Did Mr.Rudd and Seeley's Bay otherwise comply with the Act?</u>

[58] As stated above, the Registrar alleges that Mr. Rudd provided false statements to the RHRA and did not comply with the Registrar's orders concerning the operation of Seeley's Bay.

[59] In the spring of 2016, Hydro One reported to the RHRA that Seeley's Bay was in chronic arrears in paying its hydro bill, despite four different payment

plans entered into between the parties. Hydro One alerted the RHRA that it intended to cut off power shortly. When an RHRA inspector visited Seeley's Bay, she testified, Mr. Rudd told her he would be paying the hydro bill after the inspection and would be moving to an equal billing plan to avoid this in the future. He also told her that Seeley's Bay was full and had a waiting list. He advised her that Seeley's Bay had a very small mortgage and that if needs be, he could refinance. He assured the RHRA inspector that he had no intention of going out of business. The inspector testified that the impression Mr. Rudd left was that Seeley's Bay was in sound financial condition, despite the fact that this was not the case. On a subsequent inspection, Mr. Rudd told the RHRA that he had not been notified by Westboro that they were taking action under the mortgage, despite the fact that he had received the Notice of Sale Under Mortgage. The Registrar alleges that these statements constitute false statements made on "any document or information required to be provided under this Act", a ground for revocation under section 95.

[60] Mr. Rudd testified that he did not intend to deceive the inspectors and does not believe that he did. When he referred to having a small mortgage, he meant he did not have a high ratio mortgage, a statement which was confirmed by the Westboro Vice-President of Operations. When he said he had not received notice from Westboro, he believed that Westboro would be cancelling the Notice of Sale because it had agreed to work with him and to finance the sprinkler system. As noted above, the Vice-President of Operations disputes this. Finally, Mr. Rudd testified that he did pay the Hydro One bill, although it required an advance from BL and GL to do so.

[61] These discussions took place at Seeley's Bay during inspections. One specific issue raised in the first discussion was the report of Hydro One. Mr. Rudd must have realised that his comments would be taken seriously by the RHRA. On the other hand, it is not clear how formal the interview was and whether Mr. Rudd understood that any attempt to colour his answers might constitute grounds for revocation. While the Tribunal finds that Mr. Rudd did misstate the financial condition of Seeley's Bay, if this were the only issue between the parties, then it might give rise to some sanction short of revocation.

[62] The Registrar raised a number of other issues around the compliance of Mr. Rudd and Seeley's Bay with the requirements of the Act. Seeley's Bay was late in paying its January, 2017 licensing fee and the initial cheque did not clear. The Registrar acknowledges that the sum was paid eventually.

[63] By the same token, the Registrar issued a Compliance Order against Seeley's Bay for issues of non-compliance that largely related to incomplete records or policies. Seeley's Bay did bring itself into compliance by August of 2016 but the Registrar was concerned about the timeliness of Mr. Rudd's corrective actions.

[64] After the Order to Revoke was issued and following the fire at Seeley's Bay, the RHRA conducted a series of inspections. On December 8, 2016, the RHRA inspected the hotel where the residents were staying and found Seeley's Bay to be in compliance. The RHRA inspected again on January 23, 2017, March 1, 2017 and finally, very shortly after the residents had moved back to Seeley's Bay, on March 13, 2017. In each case, incidents of non-compliance were found. Some of these were very minor. For example, during the January 23, 2017 inspection, the inspector noted that "one of the residency agreements had white on it. Management advised not to use white out." Some issues were more serious such as Mr. Rudd's statement that he had not received a notice of sale from Westboro, which is discussed above, and his failure to produce financial records when requested. The most recent inspection had not been finalised at the date of the hearing and many of the issues related to paperwork which was still at the hotel and which had not come back to Seeley's Bay with the residents. At the date of the hearing, Seeley's Bay still had some time in which to either contest the findings or to bring itself into compliance.

[65] Mr. Rudd formed the impression that the increased frequency of inspections had more to do with the Registrar wishing to bolster her case than any real concern about the operation. He explained that he was reluctant to produce all of the paperwork demanded because of this concern. There is no evidence of that this was the motivation but the frequency of the inspections and the minor nature of some of the issues raised might lead a reasonable person to suspect it. Mr. Rudd acknowledged that he has struggled with some of the regulatory requirements. There was an RHRA program to help small operators like him understand the requirements of the Act and comply with it, but Mr. Rudd testified that he no longer receives those services. He feels that he sometimes gets conflicting advice and conflicting statements of policy from various RHRA inspectors.

[66] Offsetting these compliance issues is the level of care given to the residents. The family physician who sees about 50% of the residents of Seeley's Bay testified that she works in a number of retirement homes and would describe the standard of care at Seeley's Bay as "excellent". When asked whether she would send her mother there, she responded, "I would go and live there." BL

spoke very highly of the love that the residents had for the staff and the sense of family they imparted. HG refused to leave at the end of her life, despite being relocated to temporary quarters due to the fire. She also identified the staff as family and Seeley's Bay as her home. Based on both the written and oral evidence, the residents seemed unaware of the financial difficulties facing Mr. Rudd. They saw no decrease in the service levels.

[67] Given the level of care offered to the residents, the Tribunal is satisfied that if the "routine" issues of compliance were the only issues facing Seeley's Bay, it might have been possible to construct some terms and conditions to address the issues without resorting to the extreme sanction of revocation.

C4. <u>What sanction should Seeley's Bay face and how should it be invoked?</u>

[68] Unfortunately, the issues of compliance with the policies of the Act and the misleadingly optimistic statements by Mr. Rudd about his financial circumstances are not the only issues facing Seeley's Bay.

[69] Mr. Rudd's financial management of Seeley's Bay has left the company on the brink of financial collapse. He financially abused HG. His past conduct both in the financial mismanagement of the home and in his financial dealings with BL, GL and HG do not afford reasonable grounds to believe that Seeley's Bay will operated with "honesty and integrity, and in a manner that is not prejudicial to the health, safety or welfare of its residents". Each of these three grounds would alone have constituted a basis for revocation of Seeley's Bay's licence. Together, they clearly establish that the licence should be revoked.

[70] This result will not, and should not, please anyone. The residents of Seeley's Bay have been blissfully unaware of the financial storm clouds that have been building around the retirement home. They have enjoyed a superb level of care in a home-like setting with staff they regard as family. The Registrar acknowledged this level of care in his closing submissions. Counsel for the Registrar submitted that had the RHRA been informed of the deepening financial hole that Mr. Rudd was digging for Seeley's Bay earlier, the RHRA might have been able to help by allowing a financial manager to take over the business operations of the home. However, Mr. Rudd would have to pay that manager and, if that had ever been a realistic option, it is not now. Representatives of Westboro testified that they, too, had been willing to work with Mr. Rudd but found him unresponsive.

[71] The question now is how to implement the revocation order in such a way as to minimize its impact on the residents. The Act has a curious gap. If under

section 49 of the Act, a licensee wishes to voluntarily cease operations, the Act sets out a requirement for a transition plan for the home, notice to the residents and reasonable steps to find appropriate alternative accommodation for any resident requesting it. Where a revocation is ordered, subsection 95(2) of the Act gives the Registrar, and by extension, the Tribunal, the discretion to order a licensee to comply with requirements considered necessary for achieving the ceasing of the operation of the home. In the initial Order to Revoke, the Registrar set out a number of these requirements. However, these requirements only operate before the effective date of the revocation. After a revocation, the Act is silent about how the residents are to be protected. The only rights they would have are the protections under the RTA, which is not designed to protect the greater levels of care offered in a retirement home or to protect people whose age might make them less able to seek the legal protections available to them.

[72] In this case, the Westboro Vice President of Operations has testified that Westboro wishes to create a smooth transition when it moves to exercise its Power of Sale. The Tribunal understands that Westboro is willing to hire an experienced retirement home manager to operate Seeley's Bay until it can be sold and is willing to develop a transition plan for the home if it cannot be sold as an operating retirement home. Westboro is to be commended for its responsible position. Mr. Rudd has also testified that he will work with Westboro to facilitate the transfer.

[73] Counsel for the Registrar submits that it is open to the Registrar to permit Westboro to operate Seeley's Bay as though it were the licensee, on receipt of a written notice from Westboro that it intends to proceed in this way and on receipt of a written plan specifying how Westboro intends to proceed. Support for this interpretation is found in Sections 45 and 46 of the Act and the Tribunal understands that the Registrar is prepared to proceed in this way, if Westboro provides notice and an operational plan.

[74] Westboro will need time to exercise its rights under the mortgage and to give notice to the Registrar of its intentions. Under subsection 46(2), Westboro would have 15 days after exercising its security interest to notify the Registrar and to develop a business plan. Subsection 46(3) gives the Registrar the ability to extend the time for developing the business plan if the requisite notice is given under subsection 46(2). The Tribunal should give effect to the provisions of section 46 of the Act by giving Westboro enough time to exercise its security interest before the revocation of the Seeley's Bay takes effect. In her Order to Revoke, the Registrar allowed 120 days for the Order to be effective. Subsequently, the parties consented to a further extension of the effective date to

April 10, 2017. However, the circumstances of the case have changed and it is necessary now to move quickly to protect the residents from the financial collapse of Seeley's Bay and, more immediately, the risk of losing their heat and power. The Tribunal will therefore direct that its Order will take effect April 21, 2017. In setting this date, the Tribunal has balanced the needs of the residents for an orderly transfer of the operations of Seeley's Bay against the immediate risk of a creditor taking action against the home in a way that harms the residents. The Tribunal has concluded that the date of April 21st will facilitate the smooth transition while keeping the risk to the residents at a minimum.

[75] Counsel for the Registrar submitted that the Tribunal does not have the jurisdiction to delay the effective date of a revocation order. However, the Tribunal finds nothing in the Act to prohibit such a delay. Given the necessarily complex requirements that might be expected to arise in ceasing the operation of a retirement home, it is not unreasonable to allow some time. Subsection 95(2) contemplates that actions might be required of a licensee as part of the cessation of operations, which again suggests that time might be allowed before a revocation takes effect. As noted above, the Registrar delayed the effective date of her Order to Revoke.

[76] At the hearing, Mr. Rudd moved for a stay of the revocation order, which was opposed by the Registrar. Mr. Rudd wished additional time to finalise an arrangement with his prospective partners and to refinance the mortgage. However, Mr. Rudd provided no evidence of the state of his negotiations with these prospective partners nor did he provide any evidence of an ongoing business plan. Therefore, the Tribunal gave no weight to his evidence about the possibility of new capital being put into the business. It is important to note that Mr. Rudd's licence is being revoked for reasons that go beyond the financial situation of Seeley's Bay. For these reasons and in light of the Tribunal's decision to revoke Mr. Rudd's licence effective April 21, 2017, the Tribunal dismisses Mr. Rudd's motion for a stay.

[77] It is appropriate that the residents of Seeley's Bay be given notice of this Decision and Order as quickly as possible. Mr. Rudd should also give Westboro a copy of this Decision and Order. In addition, Mr. Rudd should not hold money on behalf of any resident of the home between now and the effective date of the revocation. Further, Mr. Rudd should take reasonable steps to find appropriate alternate accommodation for a resident on request and to facilitate a resident's access to any external care providers that the resident needs.

ORDER:

[78] By its authority under section 103 of the Act, the Tribunal rescinds the order of the Registrar and substitutes its decision as follows:

a. The Tribunal directs the Registrar to revoke the licence of Seeley's Bay, effective April 21, 2017;

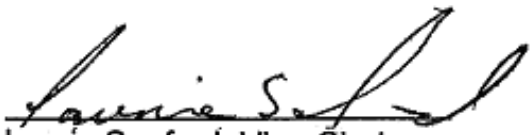
b. By April 10, 2017, Mr. Rudd shall notify each of the residents, or their substitute decision maker, of this Order and its effective date;

c. By April 10, 2017, Mr. Rudd shall provide Westboro with a copy of this Decision and Order;

d. Mr. Rudd shall not hold money on behalf of any resident of Seeley's Bay, including funds paid in advance for rent and care services, and

e. Mr. Rudd will take reasonable steps to find appropriate alternate accommodation for a resident on request and to facilitate a resident's access to any external care providers that the resident needs.

Released: April 7, 2017



Laurie Sanford, Vice-Chair