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The Seeley's Bay Case: What Constitutes Financial Abuse of Residents in a Retirement Home?

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Elder Abuse and Ways of Protecting the Elderly
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by

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I: INTRODUCTION

One of the unfortunate but well-documented consequences of the near-miraculous lengthening of the average human life span in developed countries over the last century is that many older adults are living for extended periods of time in situations of dependency. As Canada's baby boomers prepare to enter their golden years en masse, buoyed by the transfer of billions of dollars in generational wealth from their parents, Canadian estates and trusts professionals should be prepared for an accompanying increase in elder abuse as this population segment leans on family, friends, caregivers and institutions for the provision of personal care and the management of assets.

Many alarming and clear-cut cases of elder abuse, both physical and financial, have drawn the attention of the media and public in recent years. However, the subject of this case comment, *2138658 Ontario Ltd (Re),*[1] concerns a less black-and-white case involving financial mismanagement by the owner of a retirement home that evolved into financial abuse of residents, who were in a sense "willing victims"[2] of the abuse perpetrated against them. This case demonstrates the necessity of subjecting retirement homes to high standards of care, and highlights the less obvious ways that older adults experience financial abuse in an institutional setting.

II: BACKGROUND

[1] 2017 CarswellOnt 5778, 2017 CanLII 35342 (LAT).

[2] To borrow a phrase from Justice Cullity's excellent decision in *Banton v. Banton,* 1998 CarswellOnt 3423, [1998] O.J. No. 3528 (O.C.J. Gen. Div.).

Ronald Rudd was the owner/operator of 2138650 Ontario Ltd., operating as Seeley's Bay Retirement Home ("**Seeley's Bay**"), which began its operations in 2006, and became a licensee under the *Retirement Homes Act, 2010*[3] (the "**Act**") in 2013. At the time Mr. Rudd purchased the property, it required extensive renovations, which he undertook in due course. At the time of purchase, Mr. Rudd was extended a first and second mortgage for a total indebtedness of $380,000. After costs of renovation exceeded $300,000, Mr. Rudd refinanced his first and second mortgages. He stopped paying the first mortgage in April, 2016, and made some payments on the second mortgage. A Notice of Sale under Mortgage was issued by Westboro Mortgage Investments ("**Westboro**") on June 8, 2016. At this time, there was also a lien on title to Seeley's Bay with regard to unpaid taxes.

A fire broke out at the property in November, 2016, incurring further expenses. Westboro's Special Projects manager attempted to work with Mr. Rudd with respect to his indebtedness, which totaled roughly $900,000, Mr. Rudd consistently refused to provide financial statements to Westboro.

The claims of financial abuse, meanwhile, arose out of rent and loan arrangements Mr. Rudd made with three residents. The first two such residents, BL and GL, are a couple that had been resident at Seeley's Bay for seven years at the time of the Tribunal hearing. The couple testified that they received a high quality of care at Seeley's Bay, and that they were amenable to prepaying rent, and on certain occasions offered to do

[3] S.O. 2010, c. 11.

so of their own accord without being approached by Mr. Rudd. However, during the entirety of their stay, the couple only paid rent when due on one occasion; otherwise they prepaid rent to assist Mr. Rudd with his financial difficulties. The prepayment of rent was not documented, no interest was offered to the couple, nor were BL and GL given independent legal or financial advice.

The third resident who Mr. Rudd was accused of having improper dealing with was HG. HG lived in Seeley's Bay from 2010 until her death in 2016. Mr. Rudd approached HG for prepaid rent, telling her that it would be credited against her ongoing rent, but continued to ask for prepayments beyond what was due to Seeley's Bay and credited to HG. Eventually, the loans totaled about $60,000 beyond what HG owed as rent. HG was not available to give evidence to the Tribunal, but had previously suggested that while she was happy to help Mr. Rudd initially, she felt that the *quantum* of the monies advanced to Mr. Rudd eventually became unreasonable, though she continued to loan him money. Mr. Rudd testified that he suggested HG get legal advice and draw up a contract, but she refused. Nonetheless, the high amounts of the loans that Mr. Rudd received from HG were sufficient to undermine her peace of mind, and to raise concerns with respect to her ability to fund her care and day-to-day expenses in the last years of her life.

Legal History

The licence for Seeley's Bay was revoked on September 1, 2016, by the Registrar of the Retirement Homes Regulatory Authority (the "**Registrar**"). The Registrar provided the following grounds for the revocation: (1) Mr. Rudd was not competent to manage Seeley's Bay as a result of financial mismanagement; (2) Mr. Rudd failed to protect some of his residents from financial abuse; and (3) Mr. Rudd's past conduct, including the financial abuse of some residents. Mr. Rudd appealed the Registrar's order to the Ontario Licence Appeal Tribunal (the "**Tribunal**"), and such appeal was heard from March 20-22, 2017.

The Law

i. <u>General Standards for Licensees</u>

The Act is the primary piece of legislation that governs retirement homes in Ontario. The fundamental principle of the Act is in s. 1, and 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." The Act further provides at s. 32(2) that the past conduct of a would-be licensee must demonstrate:

> *reasonable grounds that that the 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.*

Additionally, the Resident Bill of Rights found at s. 51 of the Act provides residents with:

> *(8) The right to live in a safe and clean environment where he or she is treated with courtesy and respect and in a way that fully recognizes the resident's individuality and respects the resident's dignity.*

The Act therefore contains operating standards for licensees that go above and beyond mere health and safety requirements. Given the high incidence of elder abuse, these standards are essential to protect retirement home residents who may be especially vulnerable living apart from their family and community in a retirement residence.

ii. Abuse of Residents

The Act and the *Retirement Homes Act Regulations*[4] (the "**Regulations**") specifically define "abuse" and "financial abuse" in relation to the operation of retirement homes. The Act, at s. 2(1), states that abuse, "in relation to a resident, means physical abuse, sexual abuse, emotional abuse, verbal abuse or financial abuse, as may be defined in the regulations in each case." Meanwhile, the Regulations define "financial abuse" as "any misappropriation or misuse of a resident's money or property."[5] This broad definition in the Regulations means that any improper use of the assets of a resident may be defined as financial abuse, notwithstanding the intentions of the parties and any agreement between them.

[4] O. Reg. 166/11: General.

[5] *Ibid* at 1(1).

The duty in the regarding the abuse of residents goes beyond a negative duty to not commit abuse against residents, as at s. 67 of the Act mandates that licensees take an active role in protecting its residents:

> ***Protection against abuse and neglect***
> *67. (1) Every licensee of a retirement home shall protect residents of the home from abuse by anyone.*
>
> ***Same, neglect***
> *(2) Every licensee of a retirement home shall ensure that the licensee and the staff of the home do not neglect the residents.*
>
> ***Resident absent from home***
> *(3) The duties in subsections (1) and (2) do not apply if a resident is absent from the retirement home, unless the resident continues to receive care services from the licensee or the staff of the home.*
>
> ***Policy to promote zero tolerance***
> *(4) Without in any way restricting the generality of the duties described in subsections (1) and (2), the licensee shall ensure that there is a written policy to promote zero tolerance of abuse and neglect of residents and shall ensure that the policy is complied with.*
>
> ***Contents***
> *(5) At a minimum, the policy to promote zero tolerance of abuse and neglect of residents shall,*
>
> > *(a) clearly set out what constitutes abuse and neglect;*
> > *(b) provide that abuse and neglect are not to be tolerated;*
> > *(c) provide for a program for preventing abuse and neglect;*
> > *(d) contain an explanation of the duty under section 75 to report to the Registrar the matters specified in that section;*
> > *(e) contain procedures for investigating and responding to alleged, suspected or witnessed abuse and neglect of residents;*
> > *(f) set out the consequences for those who abuse or neglect residents;*
> > *(g) comply with the prescribed requirements, if any, respecting the matters described in clauses (a) to (f); and*
> > *(h) deal with the additional matters, if any, that are prescribed.*

iii. <u>Revocation of Licence</u>

If the Registrar believes, after an investigation, that a licensee no longer meets the requirements under the Act, or contravenes any provisions of the Act, the Registrar may revoke the licensee pursuant to s. 95 of the Act. A licensee may appeal a revocation order by the Registrar revoking a license per s. 200 of the Act.

Judgment

Ultimately, the Tribunal, in a decision penned by Vice-Chair Laurie Sanford, upheld the Registrar's decision to revoke Mr. Rudd's licence, finding that Mr. Rudd's conduct imperiled the health, safety and security of residents, and that his requests for loans from residents, and his resistance to repaying same, constituted financial abuse. In so finding, the Tribunal held that prepaid rents were in effect interest-free loans that took advantage of the good nature and increased cognitive vulnerability of the three residents affected. There is nothing in the Act or Regulations specifically preventing licensees for taking loans from residents, however, in consideration of the Act as a whole, and the imprudence of the loan arrangements with respect to the residents, the Tribunal held that such loans constituted financial abuse.

III: ANALYSIS

Three distinct and important issues arise out of the Sealy's bay case. First of all, the broad definition of financial abuse of elders applied in the case speaks to a growing recognition of the ways in which order adults are vulnerable to more subtle forms of financial abuse. Secondly, the reasons for the competency requirements in the retirement home licensing process are outlined in this case and a very clear manner.

Finally, the difficult position of low-cost, Family run, rural retirement homes in, as raised in the Seeley's Bay case, is an issue which the government, as well as estates and trusts professionals, must plan and accommodate for as Canada's population continues to age.

The reasons of the Tribunal contains an excellent overview, provided by Dr. Burnes, a professor at the University of Toronto, about the risk factors for elder abuse and how they apply in retirement homes:

> *[…] 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.*[6]

This definition makes evident why older adults are generally more vulnerable to coercive forms of financial abuse, and thereby proves the necessity of the high standards of care outlined in the Act and Regulations.

Additionally, the definition of elder abuse and its risk factors provided by Dr. Burnes demonstrates the necessity of the financial competency requirements outlined in the Act. If the operator of a retirement expresses financial need to a resident, as per Dr. Burnes' evidence, an older adult may be inclined to assist not simply out of kindness, but out of anxiety about how their living situation might change if their residence ceases to operate. Just as someone under an undischarged bankruptcy may not act as a power of attorney for property, a licensee of a retirement home must demonstrate managerial and financial competency; an individual or organization that is already in financial straits is a poor candidate to be put in a position of power with respect to the assets and day-to-day living arrangements of persons already-vulnerable to financial abuse.

Finally, the Seeley's Bay case demonstrates that even seemingly well-intentioned individuals may fail to live up to the requirements of the Act, and that this has the potential to disrupt the lives of retirement home residents, and limit the availability of care facilities in a time when such facilities are increasingly necessary. In the course of

[6] Footnote one, *supra*, at 36-39.

his submissions, Mr. Rudd complained of the onerous costs of licensing for smaller, rural operators.[7] Importantly, the Tribunal held that Mr. Rudd had failed to take advantage of certain avenues that would have allowed him to pass on some of those costs to residents in a proper manner, and was otherwise a poor financial steward of Seeley's Bay; however, it remains relevant that the Act may serve to limit the options available to retirees, and especially those who may wish to remain in their rural communities.

In light of this possibility, it may be necessary to incentivize the development of retirement homes in under-served areas, and to plan for the transitional period for residents whose homes have lost their license, and who may be faced with financial constraints and a difficult move as a result. Finance and estates professionals should consider the costs of of disruptions to an older adult's care in the planning for old age and retirement.

CONCLUSION

While severe cases of elder abuse often capture the most attention, older adults are perhaps more vulnerable to smaller-scale financial dealings that involve a degree of coercion and are prejudicial to their overall financial well-being. In upholding the revocation of Mr. Rudd's license, the tribunal took a strong position on the duty of protection owed to residents in a care facility. Given the evidence of the residents affected, and the disruption the decision caused to all the residents of Seeley's Bay, it is

[7] *Ibid* at 16.

easy to imagine that it was difficult for the tribunal to uphold the revocation of Mr. Rudd's license. However, the need to protect already-vulnerable residents from the unfair dealings of those on whom they depend is an aim that requires the zero-tolerance policy mandated by the Act. However, as the Canadian population continues to age, it is also important to consider how to the high cost of licensing may limit the options of retirees, especially in rural communities, and how we might make the transition easier on residents after the retirement home in which they reside has had its license revoked.