**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**
**cite: *Parnell v Melville Heights Retirement Living,* 2021 NSSM 35**

SCCH 507741

**Between:**

Emma Doreen Parnell (by her POA Dianne Dubowski)

Appellant

v.

Melville Heights Retirement Living

Respondent

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| **Adjudicator:** | Augustus M. Richardson, QC |
| **For the Appellant:** | Lisa Teryl, for the appellant |
| **For the Respondent:** | Michael Bourgeois, for the respondent |
| **Heard:** | October 1, 2021 (by Zoom) |
| **Decision:** | October 25, 2021 |

**DECISION and ORDER**

## Introduction

[1] The Covid pandemic has imposed restrictions, many of them severe, on the life and activities of the citizens of this province. These restrictions were rationalized and justified as reasonable steps intended to save the lives of its citizens. The question before me is whether such justification extends to a landlord's rule that denies a tenant's right to return to his or her apartment on the grounds that to permit re-entry could bring Covid into the building.

**The Hearing**

[2] This was an appeal from a Residential Tenancy Officer ("RTO") order dated July 13, 2021. In that order the RTO had dismissed the application by Ms Parnell for a rent rebate. The RTO had ruled that the issue involved legislation that was beyond her jurisdiction.

[3] The appeal before me proceeded by way of Zoom.

[4] On behalf of the appellant I heard from her daughter and power of attorney, Ms Dianne Dubowski.

[5] On behalf of the Respondent I heard the testimony of Ms Tammy Purcell, the Administrator for Melville Heights since April 6, 2020.

[6] Each side also provided me with documents.

[7] There was really no dispute as to the facts. The issues rather turned on the law and its application to those facts.

**The Facts**

[8] Melville Heights offers self-contained apartments. Each is fully equipped with a bedroom, kitchen, bathroom and living area. There are only two real differences between Melville Heights and an ordinary apartment building.

[9] First, as part of the rent Melville Heights offers tenants an evening meal served in a dining room. The tenants, if they wish, can have the meal delivered to their apartment instead.

[10] Second, the apartments are cleaned once a week. Again, that service is provided as part of the rent.

[11] There are 91 tenants in Melville Heights, ranging in age from 74 to 105. The average age is 87. They require little or no daily assistance—at least, not from Melville Heights. (Some may

have help in the form of visits or assistance from family members or care provided by outside contractors.) However, a significant number of them do have cardiovascular or respiratory deficits. It is a population, argued the Respondent, that was at significant risk to succumbing from a COVID-19 infection.

[12] Ms Parnell signed a "Registration for Residency" for Melville Heights on April 11, 2019. The agreement uses an odd mixture of terms, calling itself a "Registration for Residency" but referring to the obligations thereunder as being those of the "Resident/Landlord" and to the fee as "Rent." In other words, while the Respondent is referred to as "Landlord" the tenant is referred to as a "Resident." However, as noted, both parties agree that this agreement was a lease and that the relationship between the Respondent and Ms Parnell was that of Landlord/Tenant within the meaning of the Act.

[13] The Registration for Residency contained a section called "Statutory Conditions." Relevant are the following:

> 1 Good Behaviour - A Resident shall conduct him/herself in such a manner as not to interfere with other Residents or cause a nuisance to neighbours.
>
> 6 Safety - The Landlord will make every effort to maintain a safe environment, however the Landlord cannot guarantee complete safety.
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> 7 Admissions - All admissions must go through medical assessment approval:
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> A) A medical form filled out by the Physician
> B) Approved by the Head Nurse
>
> 8 Termination of Residency - The following conditions can result in the termination of residency:

A) Change of Condition - If the Resident dies or experiences a change in physical or mental health which necessitates movement to a hospital or another treatment facility, this contract and all obligations under it shall terminate on seven (7) days written notice. ...

9 Emergency Care - Melville Heights supplies **EMERGENCY CARE ONLY**. Arrangements for short-term care may be facilitated through our Nursing Supervisor, however, if long term and supportive care is required, such private arrangements are to be made by the Resident or family.

Melville Heights reserves the right to assess the growing needs of the Residents and also inform the next of kin. If any Resident requires long term and supportive care while the next of kin or trustee is absent (e.g. on vacation) this document will provide Melville Heights with such authority to implement this course of action.

[14] Ms Parnell took up residence in her unit on June 1, 2019. The rent was $3,400 a month. Her usual practice was to prepare her breakfast and lunch in her kitchen. For supper she usually went with her friend down the hall to the dining room. If she did not feel like supper in the dining room she could have it delivered up from the main kitchen. She did not have a car. (Some residents did.) Her family would take her from time to time to visit her sister. She did not go shopping on her own. Her family was her transport, and had been for some years even before she moved to Melville Heights. She could go for walks in the grounds around Melville Heights.

[15] In March 2020 COVID-19 came to Nova Scotia. The first wave was followed by a second and third. In response to the resulting province wide lockdowns Melville Heights instituted two lock-downs of its own. The first was over 11 weeks between March 30 and June 17, 2020; and the second was over four weeks between April 22 and May 21, 2021.

**2020**

[16] On March 17, 2020 Melville Heights announced that had "made the difficult decision to not allow visitors, including family, to enter the building." The decision was made "to reduce the risk of any infection at Melville Heights." Morning coffee, afternoon tea and lunch and supper service would continue as usual. "Outings with family or friends is strongly discouraged."

[17] On March 30, 2020 Melville Heights announced that it was barring residents from walking outdoors:

> "This is unfortunate but we discovered that some family members visited residents on the weekend and did not practice the required social distancing. This high risk behaviour puts us all in jeopardy. Families are asked not to visit, except for visits from windows."

[18] On April 16, 2020 Melville Heights announced that it would allow residents to go out on the back deck every day between 10:45 a.m. and noon. The number of residents allowed on the deck at any one time was five, with each permitted to be outside for 20 minutes. They were not permitted to go any farther.

**2021**

[19] On April 28, 2021 Melville Heights announced that all visits were suspended. Virtual and window visits were offered. Residents were permitted to go for walks in the parking lot while maintaining social distance rules. Family members and friends who were not residents were not permitted to join them. As well, "[a]ll non-essential travel into the community, whether with family or independently, is temporarily suspended."

[20] On May 7, 2021 Melville Heights announced that it was "on a complete lock down for at least the next 2 weeks." As it explained,

> "That means there will be no visitors, no outside care agencies, no designated care givers, no contract workers, and no family members permitted to enter the building.
>
> "No outside appointments of any kind are permitted for residents with the exception of medical emergency."

[21] Family members were permitted to drop off items to deliver to residents in the foyer. Staff would then deliver them to the residents.

[22] On May 13, 2021, in response to Ms Dubowski's concerns about the restrictions being placed on residents and their family members, counsel for Melville Heights advised that if she "wishes to take her mother out of Melville Heights, she could do so but her mother could not return to the Heights until the lockdown ends and we have satisfactory medical evidence that the mother does not have COVID-19 and is not a carrier of the virus."

[23] On June 8, 2021 Melville Heights announced that it had "closed our facility to all visitors, designated care givers and external care agencies to minimize any risk of potential exposure to our residents." These precautions were in place for two weeks.

[24] On May 21, 2021 Melville Heights announced that because of the declining number of positive cases in the central zone it had decided to re-open the facility.

**Issues**

[25] The issues arising out of these facts are these:

a. Was Melville Heights within its rights to impose the restrictions that it did on the residents?

b. If not, what damages if any flow from that?

**A: Could Melville Heights Impose The Restrictions That It Did?**

[26] Melville Heights is not a nursing home. It is not a residential care facility. Both of those types of facilities are governed and licensed by the *Homes for Special Care Act*, RSNS 1989, c.203, as amended. Such facilities are and were subject to the Orders issued by Nova Scotia's Medical Officer of Health pursuant to the *Health Protection Act*, SNS 2004, c.4.

[27] Melville Heights is instead a residential and assisted living facility. As such (and the parties agree) it is governed by the *Residential Tenancies Act*, RSNS 1989, c.401, as amended (the "Act"). The appellant (via her daughter) argues that Melville Heights lacked the right to impose the restrictions that it did, and that as a result she should be entitled to a rebate of rent, and damages, for the lockdowns that were imposed on her. The respondent argues that it did have the right under the Act to impose reasonable rules on its residents, and that the lockdowns represented reasonable steps taken to prevent the spread of COVID-19 amongst residents who by virtue of their age and often frail condition particularly susceptible to the virus.

**Landlord Rules**

[28] The rules that a landlord may establish for tenants is governed by three provisions in the Act.

[29] First, there is s.9(1):

> 9(1) Notwithstanding any lease, agreement, waiver, declaration or other statement to the contrary, where the relation of landlord and tenant exists in respect of residential premises by virtue of this Act or otherwise, there is and is deemed to be an agreement between the landlord and tenant that the following conditions will apply as between the landlord and tenant as statutory conditions governing the residential premises:

[30] Section 9(1) then lists the "statutory conditions" that are to apply to every lease agreement between a landlord and a tenant. Relevant to the issue before me are the following:

1. Condition of Premises - The landlord shall keep the premises in a good state of repair and fit for habitation during the tenancy and shall comply with any statutory enactment or law respecting standards of health, safety or housing

3. Good Behaviour - A landlord or tenant shall conduct himself in such a manner as not to interfere with the possession or occupancy of the tenant or of the landlord and the other tenants, respectively.

[31] Section 26(1) of the Act authorizes the Governor in Council to make regulations. Section 26(1)(c) provides the Governor in Council with the authority to make regulations

> prescribing a printed standard form of lease which shall be used by all landlords and tenants and which shall include
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> (i) a description of the parties to the lease,
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> (ii) a description of the premises leased,
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> (iii) the term of the lease,
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> (iv) the rent payable under the lease,
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> (v) whether or not a security deposit is required,
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> (vi) the statutory conditions,
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> (vii) the terms under which the lease may be terminated,

(viii) a larger type notice to tenants that the lease will automatically renew if the tenant does not give a notice to quit within the time period set out in Section 10,

(ix) such additional provisions as the Governor in Council may prescribe.

[32] Turning to the *Residential Tenancies Regulations* enacted pursuant to s.26(1)(vi), we find Form P, which is the "Standard Form of Lease" under the Act. Schedule A to the Standard Form incorporates the wording and conditions listed under s.9(1) of the Act (above cited).

[33] A landlord's rules are not limited to the statutory conditions. Section 9A of the Act permits a landlord to add other rules governing the use and occupancy of the rental premises, provided those rules are "reasonable."

9A (1) A copy of reasonable rules established by a landlord that apply to the residential premises shall be given to a tenant prior to executing a lease.

9A(2) Rules may be changed or repealed upon four months notice to the tenant prior to the anniversary date in any year.

9A(3) A rule is reasonable if

(a) it is intended to

(i) promote a fair distribution of services and facilities to the occupants of the residential premises,

(ii) promote the safety, comfort or welfare of persons working or residing in the residential premises, or

(iii) protect the landlord's property from abuse;

(b) it is reasonably related to the purpose for which it is intended;

(c) it applies to all tenants in a fair manner; and

(d) it is clearly expressed so as to inform the tenant of what the tenant must or must not do to comply with the rule.

[34] Assuming for the moment that the landlord's restriction was reasonable, did it comply with s.9A(2)? Clearly it did not. It was not provided with the four months notice prior to the anniversary date of Ms Parnell's lease that is required by s.9A(2) for rule changes.

[35] But did the lockdowns constitute "reasonable rules" within the meaning of s.9A(1) and (3)? In *Beukema & Nelson Property Management v. Beaver*, 2013 NSSM 29 (CanLII) I interpreted s.9A(3) as follows:

> 27 First, the sub-section focusses on intent, not on fact. In other words, it is the underlying intent, not whether or not the rule effectively achieves that intent, that is important. Of course, a rule that is so far removed from the condition that it is intended to remedy as to be wholly ineffective might negative intent. But in ordinary course if a rule is intended to achieve a particular end, and the behaviour enforced by the rule would in ordinary course go some ways towards achieving that end then one may conclude that the necessary intent exists.

> 28 Second, the sub-section requires a finding that one of three sub-conditions is met. The sub-conditions listed in s.9A(3)(a) are disjunctive, not conjunctive. The word "or" rather than "and" is used to join them. Thus all that is necessary is to establish that the landlord intended the rule promote a fair distribution of services, or to promote safety or to protect the landlord's property from abuse.

[36] Clearly s.9A(3)(a)(i) or (iii) do not apply. The lock down rules were not intended to promote a fair distribution of services, or to protect the landlord's property.

[37] However, the Respondent argues that the rule was intended to "promote the safety, comfort or welfare of persons working or residing in the residential premises." The residents were older than 65. Many had compromised health conditions. They were a section of the general population that was at a higher risk of contracting—or at least succumbing to—a COVID-19 infection.

[38] I do not for one moment doubt the good faith of the Respondent in imposing the rule (that is, the lock down) that it did. I accept that it acted out of genuine concern for the health and safety of its residents, and that its intent was to promote the health of its residents. However, such intent is not enough to save a rule where it seeks to address a safety issue in a manner distinct and separate from what would normally be expected in cases involving the health and safety of tenants.

[39] What I mean by that is this: the residents of Melville Heights were not the only aged people with compromised health conditions in the province. Many of those lived in apartment buildings or rental units. Under the various directives issued by the Medical Officer of Health under the *Health Protection Act* in 2020 and 2021 tenants in apartment buildings were still able to enter and exit their units, and to leave and return to their apartment buildings, provided that they complied with masking and social distancing practices. Indeed many if not most commercial and office buildings remained accessible to members of the public or tenants provided that social distancing and masking were in place and enforced; and provided various social group size limits were observed. Self-isolation and self-quarantine measures were only imposed on individuals who had or may have been exposed to COVID-19, or had travelled outside of the province. The fact that a tenant's neighbour was in self-isolation or self-quarantine

did not mean that the tenant him- or herself had to go into self-isolation or self-quarantine as well: see Orders by the Chief Medical Officer of Health, April 2, 2020; April 9, 2020; June 12, 2020; September 28, 2020.

[40] The question then is whether there was anything about the residents of Melville Heights that distinguished them from other aged tenants, with or without physical frailties, in the general population. Was there anything about their situation that made rules that were much more onerous that those imposed on "ordinary" aged tenants in the province necessary to "promote the safety, comfort or welfare of persons working or residing in the residential premises"? After all, they were living in self-contained apartments and not, as in the case of many nursing homes, sharing dormitory rooms with others in close proximity. It seems to me that the answer to that question has to be 'no.'

[41] One can see that the rules respecting dining-in that applied to restaurants might apply to the communal dining room at Melville Heights, necessitating a switch to room delivery of meals. But it is difficult to see how that alone could extend to a requirement that resident tenants remain in their rooms in the absence of any evidence that they had been exposed to the virus; or to remain in the building, or not come back in the event that they did. Nor can it explain why there could not be a designated family member permitted to visit, or to take the resident tenant out to shop or for a pleasant drive. After all, a good part of the enforcement of the directives of the Medical Officer of Health depended on the people of this province regulating themselves. The history of the pandemic in this province suggests that the vast majority of people did precisely that. And if that is the case for the general population, how or why was it reasonable to expect less of the resident tenants, or to impose on them rules more draconian than those affecting other tenants in the province?

[42] For these reasons I was satisfied that the rules imposed by way of a lock down by the Respondent on its tenants did not comply with the requirements of s.9A of the Act. In imposing them the Respondent exceeded its authority under the Act.

[43] That conclusion brings me to the question of damages or the rent rebate.

**B: What Damages or Rent Rebate Flow From the Imposition of an unreasonable rule?**

[44] Ms Dubowski on behalf of her mother claimed 50% of the rent paid for 19 weeks for the periods of the lock downs. She arrived at the 50% reduction because her mother had continued to receive many of the benefits under the lease: heat and water, a place to live. But she had lost the freedom of movement; the freedom to go outside whenever she wanted; the freedom to have a caregiver come to visit.

[45] By my calculation then the claim is for $3,400.00 divided by 4.3 (to arrive at a weekly rent of $809.52) times 19, which equals $15,380.06, which, when reduced by 50%, results in a rebate claim of $7,690.48.

[46] That approach does not strike me as reasonable. The Appellant received far more than 50% of the benefits secured by her rent. As well, the evidence as to how often in normal course Mrs Parnell would have left her unit or the building, either on her own or with a family caregiver, was scant at best. It is clear that she did from time to time, but it was not clear how often that happened before the pandemic struck. There is too the fact that even without the impugned rules in place people during the pandemic were more likely to stay home.

[47] I think a better approach is to calculate the rent on a daily basis ($109.68), and then determine how many days of outside activities were denied to the Appellant because of the lock downs. Doing the best that I can with the limited evidence I find that in normal course the Appellant would have left Melville Heights, or had visitors there, once a week. That results in a rebate of $2,083.87. I accordingly order the Respondent to pay to the Appellant a rebate in rent in the amount of $2,083.87.

DATED at Halifax,
this 25th day of October, 2021

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Augustus Richardson, QC
Adjudicator