COURT OF APPEAL FOR ONTARIO

CITATION: Retirement Homes Regulatory Authority v. Moore, 2024 ONCA 585
DATE: 20240725
DOCKET: COA-23-CV-0533

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Miller, Paciocco and Dawe JJ.A.

BETWEEN

Registrar, Retirement Homes Regulatory Authority

Applicant (Respondent)

and

Wesley Moore o/a the Village Manor Retirement Home and o/a the Village Manor, and St. Jacobs Carpenter House Inc. o/a St. Jacobs Country Living

Respondents (Appellants)

Edward L. D'Agostino, for the appellants

Jordan Glick and Jordan Stone, for the respondent

Heard: June 21, 2024

On appeal from the order of Justice Markus Koehnen of the Superior Court of Justice, dated April 11, 2023, with reasons reported at 2023 ONSC 2079.

REASONS FOR DECISION

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[1] Wesley Moore and St. Jacobs Carpenter House Inc. appeal an order secured by the Retirement Homes Regulatory Authority (“RHRA”) that, along with ancillary relief, required them to cease operating an unlicensed retirement home that they were operating as St. Jacobs Country Living. For reasons that follow, the appeal is dismissed.

[2] Until January 17, 2020, Mr. Moore’s ex-wife, Deborah Moore, held a licence under the *Retirement Homes Act, 2010,* S.O. 2010, c. 11 (the “Act”) to operate a retirement home in the building that was later to become St. Jacobs Country Living. Upon their separation in 2017, Mr. Moore became the sole owner and manager of the retirement home, but he continued to operate it pursuant to Ms. Moore’s licence. On January 17, 2020, Ms. Moore’s licence was revoked. The application judge found that this occurred because of Mr. Moore’s conduct, including continued breaches of a compliance order that was imposed because of abuse of residents, confinement of residents, and interference with external care providers. After Ms. Moore abandoned appeals from the licence revocation order, Mr. Moore changed the name of the home to St. Jacobs Country Living and continued to operate it, ostensibly as a “residential complex” rather than as a “retirement home” within the meaning of the Act. Ultimately, based on information received, an investigation was opened, and a search warrant was secured and executed, leading to the application that is the subject of this appeal, as well as a separate prosecution against the appellants for regulatory offences.

[3] The appellants argue that the application judge erred in finding that they were operating an unlicenced retirement home contrary to s. 33 of the Act, because, in their submission, St. Jacobs Country Living does not meet the Act's definition of a "retirement home". The statutory definition of a "retirement home" in s. 2(1) is met only if the residential complex at issue is occupied by at least six persons, who are primarily over 65 and unrelated to the operator of the home, and the operator "makes at least two care services available, directly or indirectly, to the residents." The appellants do not contest that St. Jacobs Country Living was occupied at the relevant time by at least six persons, who are primarily over 65, who are not related to Mr. Moore. The appellants' submission is that the application judge was wrong in finding that they made at least two care services available to residents. There are two layers to this argument.

[4] First, although the appellants conceded before the application judge that more than one of the enumerated "care services" was provided to one occupant of the building, R.W., a person with quadriplegia, they submit that R.W. did not reside in the same residential complex as the other residents, but in an "Outside Part" that is separate from them, with its own entrance and no direct access to the main areas of St. Jacobs Country Living. They submit that the application judge therefore erred in treating R.W. as a resident of the residential complex that is at issue.

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[5] Second, the appellants argue that the application judge erred in finding that they provided more than one care service to other residents. The appellants concede that they offered the "provision of meals" to these residents, which they acknowledge to be an enumerated care service. But they submit that the application judge misinterpreted the second enumerated care service that he found the appellants to be providing, namely, "the administration of a drug". The appellants concede that St. Jacobs Country Living assisted residents with their drugs by engaging in such activities as "receiving medication … storing medication, reminding or prompting ('cuing') some occupants to take their medication, bringing (or giving out or handing out) medication to occupants, returning unused medication to the pharmacy, having some 'house medication' available… and keeping a record of when occupants had 'self-administered' their medication." However, the appellants argue that they were not involved in the "administration of a drug", which they submit is confined to "applying" the medication to a resident or "putting medication into" a resident. They contend that they were merely "assisting" residents with their medication, which is not a care service.

[6] We do not accept either of these submissions.

[7] With respect to whether R.W. was a resident of the same residential complex as the other residents, the appellants point to no palpable and overriding errors in the application judge's decision. His conclusion that she was a resident

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of the same residential complex as the other residents is amply supported by the fact that R.W. was serviced by the same staff who were simultaneously servicing the other occupants of St. Jacobs Country Living. On the evidence, there was simply no administrative separation between the delivery of care to R.W. and the other residents. The only distinction the application judge discerned on the evidence was the physical separation between them. Although a physical separation within a building can be indicative of separate residence, it is not conclusive. Based on the record before him the application judge was entitled to come to the decision that he did.

[8] In support of their submissions that the application judge erred in finding that R.W. lived in the same residential complex as the other residents, the appellants argued that the application judge's determination should have been informed by evidence they presented before him that they had sought and relied upon advice from a care partner known to be in communication with the RHRA. They claim that this care partner, knowing they were seeking advice on the legality of the plan, told them that they would not be operating a "retirement home" if R.W. was moved into the Outside Part.

[9] This evidence is immaterial to the issues before the application judge and to the issues before us on this appeal. The genesis of any belief Mr. Moore may have had that he could provide more than one care service to R.W. in the same building as the other residents without operating a retirement home has no bearing on

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whether the appellants were, in fact, operating a retirement home. Assuming without deciding that it is possible to raise an officially induced error defence in an administrative application, no such defence was raised before the application judge, nor is there an apparent air of reality to that defence on the scenario described, given that if the advice was provided, it was not provided by someone with authority to represent RHRA's position. The application judge did not err in failing to consider this evidence or to rule on the credibility of witnesses who provided testimony about these events.

[10] In summary, the appellants have not persuaded us that the application judge erred in his decision relating to R.W.

[11] With respect to the interpretation of the "administration of a drug", the application judge chose not to offer a comprehensive definition, but to determine whether the activities that Mr. Moore's business was found to have engaged in would be included in any correct definition of that term. We can see no error in his decision that the administration of a drug encompasses the services the appellants have admitted to providing. The application judge's conclusion that the "administration of a drug" occurs if an operator assumes "control over or responsibility for a person taking a drug, giving a drug to a person and directing them to ingest or apply it, and cueing a person to take a specific drug", respects the grammatical and contextual meaning of the phrase and is in keeping with the purpose the legislation of ensuring that residents, who are often vulnerable, can

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live safely. The application judge considered the appellants' submissions and gave cogent reasons as to why they do not carry the narrow interpretation they advocate. The interpretive path he took was without error and leads inevitably to the conclusion he reached. His decision was correct.

[12] In this regard, we do not accept the appellants' submission that the natural and ordinary meaning of the term "administration" does not include acts of assistance. In our view, the natural meaning of the phrase "administration of drugs" can encompass acts of assistance provided with respect to drug acquisition, retention, or consumption. Indeed, the appellants' submission that "administration" does not encompass "assistance" is inconsistent with their concession during argument that "assistance" with the consumption or application of drugs would be "administration of drugs."

[13] Nor are we persuaded that the decision by legislators to use the word "administration" relating to drugs, but "assistance" relating to other services, demonstrates their intention to distinguish "administration" from "assistance". This submission ignores that the phrase is "administration of drugs" – the administration of a thing – whereas the references to "assistance" modify activities such as "feeding", "bathing" "dressing", "personal hygiene" and "ambulation". Since the terms are used for different purposes, the contrast between them is not useful in determining their meaning.

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[14] In support of its submission, the appellants also sought to rely on the phrasing used in subordinate legislation to support its theory that “administration of drugs” does not extend to assistance with drugs. We reject the appellants’ attempt to rely on the terminology found in subordinate legislation enacted by the executive branch of government as a compelling interpretive aid in determining the meaning that legislators intended.

[15] We therefore deny the appellants’ ground of appeal that the application judge erred by finding that they operated a retirement home.

[16] In addition to its attempt to argue that St. Jacobs Country Living was not a retirement home, the appellants sought to defend against the application by arguing that the RHRA contravened Mr. Moore’s *Charter* rights by strategically waiting until it had Mr. Moore’s evidence from the administrative application for a compliance order before laying regulatory charges. In effect, the appellants were arguing that the administrative proceedings were an abuse of process. That argument was not well-developed before the application judge, and we see no basis for interfering with his decision to reject it.

[17] First, he was correct in noting that s. 97 of the Act contemplates regulatory prosecutions following an administrative compliance order. It is clear on its face that an order made under “this Part”, which includes s. 96.1 orders made by a court

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upon application by the registrar, “does not affect the liability of the person to conviction for an offence arising from the non-compliance”.

[18] The application judge was also correct in noting that there are legal safeguards available to prevent self-incriminatory information secured during the administrative process from being used unfairly to support a quasi-criminal prosecution, such as applying for a stay of the administrative proceeding pending the completion of the prosecution (which was not done), or by invoking the protection of the Ontario *Evidence Act*, R.S.O. 1990. C. E-23.

[19] We therefore deny this ground of appeal.

[20] Finally, the appellants argue that the application judge erred by ordering them to cease operating the unlicensed retirement home and to vacate it. They argue before us, for the first time, that the only available outcome under s. 96.1 of the Act is a compliance order. We also disagree with this submission. The section provides that “upon the application, the court may make any order that the court thinks fit.” We agree with the decision of Nishikawa J. in *Retirement Home Regulatory Authority v. In Touch Retirement Living for Vegetarian/Vegans Inc.*, 2019 ONSC 3401, at paras. 65-69, that judges entertaining s. 96.1 applications are empowered to make the kinds of orders made by the application judge.

[21] Finally, the appellants argue that the application judge committed palpable and overriding error in making, without evidence, the key factual finding that

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supported the remedies he imposed, namely, that Mr. Moore's conduct reflects a culture of avoidance rather than one of compliance. There was ample evidence supporting the application judge's conclusion, which was his to make. In addition to operating a retirement home without a licence, a violation uncovered during the investigation, there have been a series of registrar's orders issued when Mr. Moore's wife was the licensee as the result of breaches of the Act identified as having been perpetrated by Mr. Moore himself. We do not accept that the RHRA was required to prove each of those allegations anew during the hearing before the application judge. Nor was the application judge obliged to directly reject the credibility of testimony Mr. Moore gave in launching a collateral attack against the findings of the registrar that precipitated these orders.

[22] We see no basis for interfering with the application judge's finding or with his discretionary decision to impose the remedies that he did. We therefore deny this ground of appeal, as well.

[23] The appeal is dismissed. Costs are payable to the respondent in the amount of $25,000, inclusive of disbursements and applicable taxes.

"B.W. Miller J.A."

"David M. Paciocco J.A."

"J. Dawe J.A."

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