CITATION: Jennings Lodge Inc. v. Canadian Mental Health Association, 2024 ONSC 6426
BARRIE COURT FILE NO.: CV-24-2819
DATE: 20241119

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jennings Lodge Inc., Plaintiff

AND:

Canadian Mental Health Association, Simcoe County Branch, Defendant

BEFORE: The Honourable Justice S.E. Fraser

COUNSEL: Soumya Roop Sanyal, for the Plaintiff

Emily Durst, for the Defendant

HEARD: November 14, 2024

ENDORSEMENT

I. Nature of the Application

[1] The Plaintiff, Jennings Lodge Inc. ("Jennings Lodge"), brings this motion for an interlocutory injunction to restrain and enjoin the Canadian Mental Health Agency – South Simcoe Branch ("CMHA") from relocating its residents. Specifically, it seeks an order that the Defendant shall be restrained and enjoined from directly or indirectly, by any means whatsoever relocating any residents of Jennings Lodge at 38 Church St., Penetanguishene until either the resolution of the Plaintiff's claim or until January 22, 2025, whichever is earlier.

[2] Jennings Lodge operated as a licensed home for special care under the *Homes for Special Care Act*, R.S.O. 1990, c. H.12 (the Act) for approximately 40 years in Penetanguishene, Ontario serving persons with serious mental health challenges who require significant support.

[3] Under the Act, a home for special care provides nursing, residential and sheltered care and the Minister is responsible for the Act. A resident under the Act is a person received and lodged under the Act.

[4] The Act provides for the licensing of special care homes which can be renewed or canceled on terms and conditions as prescribed in the regulations. The inspection of homes, fire safety standards, admissions, trust funds for residence and other aspects of the home were regulated and subject to licensing standards. Under the Act, Jennings Lodge was licensed

and funded by the Waypoint Centre for Mental Health Care and subject to the Act, regulation, and Policy Manual.

[5] In October, 2018, the Ministry of Health began to wind down the Homes for Special Care program and created a new program called the Community Homes for Opportunity (CHO) program. The Act was not repealed. CHO homes do not operate under the Act but rather as a Ministry program.

[6] Under this program, rather than being licensed, homes that were licensed under the Act were required to enter into a Transfer Payment Agreement with a community agency running the program. The community agency for Jennings Lodge was the Canadian Mental Health Agency – South Simcoe Branch (CMHA). As a result, the CMHA South Simcoe Branch in charge of administering Jennings Lodge entered into a Transfer Payment Agreement with the CMHA.

[7] The Transfer Payment Agreement is a standard agreement created by the Ministry of Health. Under the agreement, CMHA may terminate the agreement on 90 days' notice. Jennings Lodge resisted the inclusion of this term before entering into the agreement. However, the CMHA, after checking with the Ministry of Health, refused to change the term arguing that it was a standard term across all CHO homes. CMHA told Jennings Lodge that the agreement is standardized across all homes in Ontario and while the Ministry was willing to meet with Jennings Lodge, the outcome would not change.

[8] Jennings Lodge wanted to continue to provide the service and operate the home so it reluctantly signed the agreement and transitioned from a Home for Special Care to a CHO with the same residents.

[9] Under the CHO program, homes subject to a TPA must meet certain program standards for which the CMHA is responsible to ensure compliance. CMHA also appears to deliver services for the residents of the Jennings Lodge CHO program, such that it is both delivering a program and ensuring compliance of the home.

[10] Under the TPA, the CMHA and the CHO Homeowner agreed to "Relationship Principles" where the tenant is said to be at the centre of the CHO program. These principles provide, among other things, that:

- The tenant is the centre of the Community Homes for Opportunity (CHO) program;
- Decisions will be based on tenant needs;
- Where possible, we will include tenants in decisions that affect him/her. We are committed to supporting a recovery-based approach for the tenant which includes:
    - Supporting the tenant to live as independently as possible respecting the human dignity and rights of tenants.

[11] Upon the transition to a CHO home, the CMHA worked to ensure that Jennings Lodge complied with program standards. Ultimately, Jennings Lodge and the CMHA created a compliance plan to bring Jennings Lodge into compliance.

[12] On September 24, 2024, the CMHA gave notice that it was terminating the agreement effective January 22, 2025. It began giving notice to the residents in early October, 2024, and some residents have already been relocated.

[13] The notice to the residents informed them that Jennings Lodge would cease to be a CHO home as of January 22, 2025. It explained that CMHA would no longer be administering the rent payments for the residents at Jennings Lodge and that they would be responsible for rent. It also set out that the residents to continue to receive CHO services would need to relocate, and that the only services that CMHA would provide to the resident after January 22, 2025, would be to assist them with relocating to new housing where they could receive CHO services.

[14] The CMHA asserts that this represented a choice for the residents: they could remain at Jennings Lodge without being part of the CHO program (meaning without rent or supports), or that CMHA would support them in finding a new residence.

[15] Neither party takes the position that the decision made constitutes the exercise of a statutory power such that it falls under the *Judicial Review Procedures Act*, R.S.O. 1990, c. J.1. As the CHO program operates outside of a statutory framework, I have jurisdiction to consider this motion.

II. Issues

[16] The issue on this motion is whether the interlocutory injunction should be granted.

III. Analysis

[17] I first address the governing principles and then apply them to the facts of this case.

(a) Governing Principles

[18] The test for an interlocutory injunction was set out in *RJR-MacDonald Inc. v. Canada*, [1994] 1 SCR 311 and re-affirmed in *Google Inc. v. Equustek Solutions Inc.*, [2017] SCJ No. 34 and *R. v. Canadian Broadcasting Corp.*, [2018] SCC 5. It requires the Court to assess whether there is a serious issue to be tried, whether the Plaintiff would suffer irreparable harm if the injunction is not granted, and where the balance of convenience lies. The balance of convenience requires the Court to examine which party will suffer the greater harm from the granting or the refusal of an interlocutory injunction.

[19] The threshold on serious issues to be tried is a low one such that if the Court is satisfied that the application is neither vexatious nor frivolous, the Court should examine steps two and three. See *RJR-MacDonald, supra*, at p. 402.

[20] On the second part of the test, the Plaintiff must demonstrate that irreparable harm will result if the relief is not granted.

[21] The third part of the test requires the Court to examine the balance of convenience. This means that I must determine which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

[22] Additionally, Rule 40.03 of the *Rules of Civil Procedure* provides:

> On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

[23] The undertaking is mandatory, and the Plaintiff has provided that undertaking.

(b) Application

(i) Serious Issue to Be Tried

[24] The Plaintiff argues that the issue to be tried is whether the termination without notice provision is enforceable.

[25] The Defendant did not appear to breach the contract. I accept that CMHA gave more than the 90-day notice period provided in the TPA.

[26] The Plaintiff argues that the TPA is a contract of adhesion and that terms imposed were unilaterally imposed. At issue is the termination with notice without cause.

[27] The Plaintiff has shown that there is a serious issue to be tried. The agreement was a take it or leave it agreement and can be considered a contract of adhesion.

[28] The Plaintiff also asserts that there is also a serious issue to be tried regarding whether the termination on notice clause is unconscionable such that it should be voided.

[29] In *Uber v. Heller,* 2020 SCC 16, [2020] 2 S.C.R. 118, at para. 65, the Supreme Court of Canada set out the two-part test for unconscionability in contract:

(a) Inequity in bargaining power between the parties; and

(b) An improvident bargain resulting from that inequity.

[30] The Plaintiff has shown a serious issue with respect to both. CMHA's take it or leave it position demonstrates the first prong of the two-part test in *Uber v. Heller, supra*. Jennings Lodge had no power to alter the agreement and could not alter the agreement. On the

evidence before me, there is a serious issue with respect to whether Jennings Lodge struck an improvident bargain. This is evident as Jennings Lodge, which has operated for approximately 40 years is forced to close on 120 days' notice.

[31] Finally, despite the language in the contract that the tenants are at the centre of the relationship, CMHA's termination without cause has resulted in the present situation where the residents have been treated as chattels who can be moved without cause and without a meaningful choice.

(ii) Irreparable Harm

[32] The Plaintiff claims irreparable harm to the business, its reputation, the loss of its business, and for its residents, some of whom have lived at Jennings Lodge for decades.

[33] The Defendant states that the losses claimed by Jennings Lodge in respect of the business are quantifiable losses and that this aspect of the test is not met. It argues that I have no evidence of the harm to be suffered by the residents as the evidence before me is hearsay evidence.

[34] In *RJR*, the Supreme Court set out this part of the test as follows:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (R.L. *Crain Inc. v. Hendry* (1988), 1988 CanLII 5042 (SK KB), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, 1985 CanLII 154 (BC CA), [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[35] I agree with the CMHA, that the Plaintiff has been able to quantify the value of the business loss should the CHO program end. However, I find that that approach too narrowly construes the nature of the harm. The Plaintiff has demonstrated that the termination could result in damage to its business reputation and a permanent loss of its operation.

[36] As a result, I find that the Plaintiff has demonstrated that should the injunction not be issued that it could suffer irreparable harm.

[37] As for the interests of the residents, the record contains letters from family members concerned about the move and its impact on the care and stability of the residents. It also contains a short survey conducted by Jennings Lodge intended to draw out the wishes of the residents. I approach this latter piece of hearsay evidence with caution as it was solicited by the Plaintiff and cannot be viewed as either reliable or independent. This is one of the reasons why I did not take up the Plaintiff's offer made on the day of the hearing for affidavits of the residents to be provided.

[38] However, I find support that irreparable harm to the residents could occur in the obvious lack of consultation with them. While the TPA rests on principles that the tenants are at the centre of the relationship, they have been treated like chattels, things that can be moved. They were not consulted on the decision until after it was made. Their views appear irrelevant to CMHA's decision making.

[39] Once notified of the decision, the residents were given no real choice and forced to choose between staying, without CMHA paying rent or providing support, or move to a place to be determined. That is not a real choice.

[40] The Defendant has provided evidence that 17 of the 18 residents have expressed interest in relocating to another residence. This too is hearsay evidence. Even if admissible, I have concerns about whether that expression of interest was given after they were told that they could not receive rental payments or support to stay at Jennings Lodge.

[41] CMHA also states through its affidavit evidence that it is actively working with other residences and facilities in Simcoe County to house those residents who wish to move. Five residents have already moved. CMHA states that it will be able to move all residents prior to the termination but the scope of the move and disruption to the residents is unclear. It could be that the residents will eventually land in a better place. That remains unknown. However, as the residents are forced to find a new supportive residence, they have been made vulnerable because of program choices and decisions.

[42] In addition, CMHA's decision to terminate will sever relationships that tenants have made with each other and the professionals who work at Jennings Lodge.

[43] For these reasons, I conclude that the refusal to grant this relief could adversely affect the residents' interests as result of the CMHA decision to terminate the agreement. Irreparable harm has been made out in respect of the residents.

(iii) Balance of Convenience

[44] Under this part of the test, I consider the impact of the injunction and look at how each party might suffer should I grant or not grant the injunction.

[45] CMHA does not assert that it will be harmed. However, it asserts that should the injunction be granted, CMHA would be prevented from providing its clients with the supports and services that they require during the transition process.

[46] Jennings Lodge faces the loss of its business and the residents face the loss of their home. In my view, the balance of convenience lies with the Plaintiff as it will suffer the greatest harm.

IV. Disposition

[47] The motion is granted. I order that CMHA shall be restrained and enjoined from directly or indirectly, by any means whatsoever relocating any residents of Jennings Lodge at 38 Church St., Penetanguishene until either the resolution of the Plaintiff's claim or until January 22, 2025, whichever is earlier.

V. Costs

[48] I urge the parties to resolve costs. If they cannot reach an agreement within the next week as to costs, the parties may arrange an appointment before me.

Justice S.E. Fraser

Date: November 19, 2024