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Independent legal advice is for real

A recent decision of the Ontario Superior Court underlines the purpose of a borrower obtaining independent legal advice, and what a client can and cannot expect from a lawyer in those circumstances.

In 1998, Jean Webb agreed to lend her ex-husband, Reg Webb, \$100,000 so he could purchase an auto-wrecking business. Reg was sure the business was a "goldmine" but needed to borrow the cash to complete the purchase. He had no one else to turn to except his former spouse.

Jean agreed to take out a one-year \$100,000 mortgage on her house, which then had a value of about \$210,000. She lent the money to Reg, who told her he could pay off the loan within a year.

Reg's lawyer prepared the mortgage documentation on Jean's house, but because he had been the lawyer for both of them for many years, he told her she needed independent legal advice.

An appointment was arranged for Jean to see another lawyer, James Tomlinson.

Jean met with Tomlinson at his office in March 1998. At the end of the meeting, she signed a certificate acknowledging she had received independent advice, explaining the content and effect of the loan, and the rights and remedies of the lender, National Bank of Canada, in connection with the loan. The mortgage was registered, and Jean in turn lent the entire \$100,000 to Reg.

Predictably, Reg could not pay off the money within one year, and the loan was extended for a second year. Later, the mortgage was renewed for a third year when Jean's signature was forged on a renewal agreement.

It turned out that the annual sales of the wrecking business had been seriously misrepresented, and by March 2003, Reg had closed the business and declared bankruptcy. Jean was stuck with paying off about \$71,000 remaining on the mortgage.

Jean then sued Tomlinson claiming he had provided her with defective and inadequate legal advice. She said she never would have signed the \$100,000 mortgage if he had explained to her that she could lose her home in the event Reg's business failed.

The case was tried before Justice Edward Belobaba this past May. Jean testified that her meeting with Tomlinson was very short and he never told her about the risk that the business could fail, that Reg might not pay off the loan, and that she could lose her house.

As a result, her lawyer argued that Tomlinson breached his duty to Jean and should pay her damages.

Jean admitted that she knew what a mortgage was and understood that the bank could sell her property if payments were not made.

She told the court she was willing to take that risk because she had confidence in Reg's business abilities.

When he gave evidence, James produced a checklist that had been published by the Lawyers' Professional Indemnity Company, the Law Society's insurer. James had completed the checklist during his meeting with Jean. He also produced four pages of notes that confirmed that he had fully explained the nature and consequences of the mortgage to Jean, and the risks to the client if her ex-husband defaulted in payment.

In his decision at the end of May, Justice Belobaba ruled in favour of Tomlinson. He quoted an earlier Ontario court decision involving a loan by Toronto-Dominion Bank. "People are free to take risks and make bad deals," that court said, "as long as they are aware of those risks and the possible adverse consequences."

Given the conflict in evidence provided by Jean and Tomlinson, Justice Belobaba decided to accept the testimony of the lawyer, as it was based on extensive notes made at the time.

Courts in the past have said that "the purpose of requiring independent legal advice is to assure that there is an appreciation of the nature and consequence of completing a transaction with potential adverse results."

"In my view," Justice Belobaba ruled, "Jean knew what she was doing. Her decision to mortgage her home and lend Reg the money was not rash or ill-considered. She knew that she was getting nothing tangible in return.

"She probably understood the risks of mortgage default even before she attended the meeting with Tomlinson and she certainly understood them after the meeting was over. She executed the mortgage because she believed in her ex-husband; she believed his business would succeed and that the mortgage would be paid off. She understood and willingly accepted the risk of non-payment."

Justice Belobaba ruled that lawyers providing independent legal advice are generally not required to go beyond the mortgage transaction to assess the financial feasibility of how the mortgage funds will be spent.

Lawyers giving independent legal advice are not required to give business advice along with advice about the nature and consequences of a mortgage.

In any event, Tomlinson did explain to Jean that she could lose her home if the mortgage went into default.

I have found that clients tend to view independent legal advice as a mere formality, and approach the lawyer with an attitude of "let's get this over with quickly."

The reality, however, is that if the client isn't listening or doesn't take the advice seriously, she assumes the risk of a negative result.

In this case, Jean got stuck with the unpaid mortgage on her house, her own legal fees, and a costs award of \$17,500 in favour of Tomlinson.

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Ontario >> Superior Court of Justice >>

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jean Webb (Plaintiff) v. James Tomlinson (Defendant)

BEFORE: Belobaba J.

COUNSEL: *J. Lester Davies*

For the Plaintiff

Christine Fotopoulos

For the Defendant

HEARD: May 15, 16, 17 and 18, 2006

ENDORSEMENT

[1] The issue in this action is the extent of a lawyer's obligation in providing independent legal advice to a client who mortgages her home in order to loan money to her ex-husband for his business venture. Is it sufficient that the client understands the nature and consequence of the mortgage agreement and, in particular, that she may lose her home if her ex-husband fails to make the mortgage payments? Or is the lawyer also required to make clear that business ventures are inherently risky and her ex-husband's business venture could fail?

Background

[2] In 1998, Jean Webb agreed to loan her ex-husband \$100,000 so that he could purchase an auto wrecking business. She had been divorced from Reginald Webb for 14 years. At the time, she was 57 years old and working as a human resources assistant at North York General Hospital. She earned about \$40,000 a year. Her only substantial asset was her home in Scarborough. The home had a value of about \$210,000.

[3] Reg came to see Jean in February, 1998. Their divorce had been amicable and their relationship remained civil. He told her about his plan to buy an auto wrecking business. According to the financials, the business was generating about \$500,000 in annual sales. Reg's accountants thought it was a solid business opportunity. His lawyer, Brian McMurter, agreed. For his part, Reg was sure it was a gold mine. But he needed to borrow \$100,000 to complete the purchase. He had no one else to turn to. He asked Jean if she would put a mortgage on her home and loan him the money for one year. Reg was sure that he could pay off the loan in full in one year's time.

[4] Jean knew that Reg had always been a hard worker and she had confidence in his business abilities. She trusted him. She said she would think about it. She discussed the request with her three adult children. They reassured her that Dad wouldn't screw you. She agreed to take out a one-year mortgage and lend Reg the money. She knew she would get no financial benefit. She did this as a favour to her ex-husband. Reg had no security to give and nothing was put in writing.

[5] Reg's lawyer, Brian McMurter, prepared the necessary documentation. Mr. McMurter had been Reg and Jean's lawyer for years and was well-known to Jean. He advised Jean that she needed independent legal advice (ILA) on the mortgage and that he had arranged a meeting with a nearby lawyer, the defendant, James Tomlinson (Tomlinson).

[6] Jean met with Tomlinson at his office on March 4, 1998. At the conclusion of the meeting she signed the Certificate of Independent Legal Advice and the mortgage documents. Then she went over to Mr. McMurter's office to finalize some remaining details.

[7] Reg was very grateful. He offered to pay down the \$5000 balance on Jean's car lease and he dutifully made all of the required monthly mortgage payments. Unfortunately, after he purchased the new business, he realized that the annual sales figures had been seriously misrepresented. The business was not nearly as profitable as he had been told. He was unable to pay off Jean's mortgage after one year. He told Jean that he needed a bit more time, and he asked her to renew it for another year. Reluctantly, she agreed to do so. Reg did not tell his ex-wife that the business was not doing well. He kept reassuring her that everything was okay.

[8] For her part, Jean continued to assume that all was well and that Reg had paid off the mortgage by the end of the second year. All of the correspondence from the bank was routinely forwarded to Reg for his review. If there were letters advising that the mortgage had not been discharged or needed to be renewed, Jean did not see them.

[9] It was only in September, 2001, when she was inquiring at her own bank about a possible home renovation loan that she learned that Reg had not paid off the mortgage and that it was still registered on title. She also learned that Reg had renewed the mortgage for a third year by forging her name to the renewal document. When she confronted her ex-husband, he told her that he was not in a position to pay off the loan.

[10] Reg also told Jean that he was trying to sell the business and he had a couple of offers that looked promising. He persuaded Jean to give him a bit more time so that he could sell the business and pay off the mortgage. As things turned out, he was unable to sell the business. In March, 2003, Reg Webb and his second wife, Nelly Webb, declared bankruptcy.

[11] Jean sold her Scarborough home. She moved into a smaller house in Oshawa and refinanced the unpaid mortgage. After deductions for the mortgage payments, the \$5000 that Reg had paid on her car lease, and the dividends received from Reg and Nelly's bankruptcy, Jean lost about \$64,635. With prejudgment interest, the total amount of the loss sustained to date is \$71,404.62.

[12] Jean now seeks to recover this amount from Tomlinson.

The position of the parties

[13] Jean says that Tomlinson failed to provide the required ILA. Jean says she would never have agreed to mortgage her only asset and loan Reg the \$100,000 if Tomlinson had explained the risks, and in particular, the risk that she could lose her home if Reg's business failed and he was unable to pay off the mortgage.

[14] Tomlinson denies that he failed to provide the required ILA. Quite the contrary, he says he followed the ILA Checklist recommended by the Lawyer's Professional Indemnity Company (LPIC), did exactly what was required and made detailed notes about what was said.

The meeting on March 4, 1998

[15] Jean testified that she attended Tomlinson's office on March 4, 1998, with her daughter Lori. They got there around 4.30 pm. The meeting was quite short, maybe 20 minutes. Lori talked about Reg and the new business venture. Jean asked Tomlinson what would happen if the mortgage was not paid off and he replied, it will be discharged in a year at the end of one year, you will be free and clear. Both Jean and Lori testified that nothing was said about the risks to Jean if Reg could not pay off the mortgage; nothing about the risk that Reg's business could fail; nothing about the risk that she could lose her home. Jean signed the ILA Certificate and then went to meet with Mr. McMurter where she signed the mortgage documents.

[16] Tomlinson is 52 years old. He was called to the bar in 1995. Law is his second career; his first was in government services. Tomlinson testified that he learned as an articling student to take ILA retainers very seriously. He articulated with a senior practitioner in Windsor who taught him about the importance of the ILA meeting and the need to take detailed notes. During his articling year, he observed six ILA meetings involving his principal, and between 1995 and March 4, 1998 when he met with Jean Webb, he had also conducted three or four ILA meetings on his own in his practice as a sole practitioner.

[17] Tomlinson testified that only Jean attended the meeting in his office he says he would never have permitted her daughter or any other family member to be present at a meeting where he was retained to provide ILA to a mortgagor.

[18] He began the meeting by introducing himself and telling Jean that she was there to be advised on the mortgage transaction. He used an ILA Checklist that he had reviewed and photocopied from a 1997 LPIC newsletter.

[19] He produced the Checklist that he had filled in during the course of the meeting. The Checklist indicates that the meeting lasted from 4:35 pm to 5:20 pm and that the following items were noted: Jean's address, her marital status, her net worth and that the reason for the ILA was mtge 100K by NB of C, the latter referring to the mortgagee, the National Bank of Canada.

[20] The Checklist also shows Tomlinson's check marks and his hand-written insertions apparently indicating that the following items were explained to Jean: the nature and consequences of the mortgage; the effect of the power of sale, judicial sale and foreclosure remedies; the risks to the client should Mr. Webb not be able to fulfill obligation. Tomlinson noted that Jean was satisfied the business would do well and she would be repaid fully. This was Tomlinson's understanding of why Jean consented to the mortgage loan.

[21] In addition to the Checklist, Tomlinson also produced four pages of hand-written notes that he said he had made during and at the conclusion of the meeting. The notes show that Tomlinson discussed and explained the nature and the consequences of the mortgage loan to Jean Webb personally, particularly that she risked losing her home if Reg was unable to pay off the mortgage. Here are some excerpts reproduced exactly as written:

Initially client advised she knew what the financial obligation with National Bank of Canada was about and she just wanted to sign the documents. I insisted that I first satisfy myself as to whether she understood the consequences of her actions regarding the mortgage.

Client advised of the risk she face should the debtor not able to make the payments. Client confirms she knew what she was doing and wanted to proceed with the deal. Client said transaction should have closed February 98.

I advised client she could eventually lose her asset (house) if the payments became in default I advised client she could lose other property if there was insufficient equity in the house.

Advised client that if payments were not made, the result following default would P of sale, advised client of power of sale. Client indicates she understood she was fully responsible for the payments under the mortgage.

I inquired as to whether client had obtained security, client advised that Mr. Webb had no security to provide to her, however, she was confident/satisfied he would repay the full amount of the obligations to her husband's business was a good venture.

Advised client that if business became financially unable to pay its debts (Mr. Webb) the whole amount would have to be paid by her if Mr. Webb could not pay. Client advised she would not have attended at Institution NB of Canada and sign mortgage papers if she thought she would not get back the \$100,000.

Client advised prior to agreeing to the mortgage being placed on her home she knew what the money was being used for and she would not have agreed to put charge on her home otherwise.

I reviewed C of ILA with Ms. Webb, she confirmed that she understood what she was doing and the financial consequences of the transaction.

[22] At the conclusion of the meeting, Jean signed the ILA Certificate acknowledging that she had retained Tomlinson in regard to a mortgage and that he had explained its content and effect, and in particular, the rights and remedies of the National Bank of Canada in connection with said mortgage. She also signed the mortgage documents that Mr. McMurter had delivered to Tomlinson's office several days earlier. Tomlinson is certain the mortgage and directions were signed in his office because he had made several hand-written insertions that remain apparent on the face of the documents.

[23] Jean did not bring any materials pertaining to the auto wrecking business to the meeting and Tomlinson admits that he did not discuss the auto wrecking business venture with her in any detail. Nor did he say specifically that business are inherently risky or that Reg s business could fail .

Analysis

1. Did Tomlinson explain the nature and consequences of the mortgage?

[24] Banks typically require mortgagors to obtain ILA in order to prevent later claims of *non est factum*, undue influence or unconscionability. The lawyer that is retained to provide the ILA is required to ensure that the mortgagor fully understands the nature and consequences of entering into a mortgage transaction and is doing so voluntarily. Once the mortgage is explained and the risks of non-payment and the possibility of losing the property that is being secured are understood, and the mortgagor signs the ILA Certificate, she is free to do as she wishes. As noted in *Orlando v. Toronto Dominion Bank*, [2001] O.J. No. 349 (S.C.J.) at para. 34, [p]eople are free to take risks and make bad deals, as long as they are aware of those risks and the possible adverse consequences .

[25] In this case, there is no suggestion of undue influence, misrepresentation or unconscionability. There is no evidence that Jean had a language difficulty or any other handicap. The allegation against Tomlinson is that he breached his duty of care in not telling Jean that she could risk losing her house if Reg failed to make the mortgage payments.

[26] I accept that Jean Webb is not an experienced or sophisticated business woman. But nor is she unsophisticated or uninformed. She was employed as human resources assistant at North York General Hospital. When she was married to Reg she did all of the invoicing for his trucking company and she handled the financial matters relating to a small cottage rental business that they operated over the summers.

[27] She testified that she knew what a mortgage was, having signed or co-signed several over the years. She said she understood that if mortgage payments were not made, the bank could sell the mortgaged property that there was a risk that one could lose her home.

[28] She also gave evidence that she was willing to take this risk because she had confidence in Reg s business abilities. She didn t think that Reg s business venture would fail.

[29] Given this level of understanding and acceptance of the risks involved even before she met with Tomlinson, there is some basis in the law for finding against Jean even if the ILA was deficient or otherwise incomplete. See, for example, the observations of Whalen J. in *Orlando, supra*, at para. 35:

The purpose of requiring independent legal advice is to assure that there is an appreciation of the nature and consequence of completing a transaction with potential adverse results. However, where the understanding is complete without independent advice, the objective is still achieved and the purpose of the rule satisfied.

[30] For my part, I would prefer to base my decision on whether or not the various risks and consequences were in fact fully and properly explained by Tomlinson, even though Jean may well have already understood them.

[31] The evidence of Jean and Tomlinson as to what was discussed at the ILA meeting is diametrically opposed. However, as between the two parties, I prefer and accept the evidence of Tomlinson. I do so for two reasons. First, Jean was attempting to remember the details of a meeting that took place more than 8 years ago. She did not take notes. She was also mistaken in a number of important respects. She was adamant that it was a very short meeting; but given the issues that were discussed as recorded in the notes that were taken by Tomlinson, I find it more likely that the meeting was at least 45 minutes as indicated in the Checklist and in the notes. I also find, given Tomlinson s principled position that he would never allow family members into an ILA meeting, that Jean was mistaken when she said that her daughter Lori was present. And, given Tomlinson s evidence of his hand-written insertions on the face of the mortgage documents, I conclude that these were signed in Tomlinson s office, and not in McMurter s office as Jean recalled. Given these errors, I do not have a great deal of confidence in Jean s recollection of what was or was not discussed.

[32] Secondly, and more importantly, I accept the evidence of Tomlinson as based on his Checklist and his hand-written notes. I find that Tomlinson fully satisfied all of the requirements for ILA he assured himself that Jean was signing the mortgage of her own free will and that she understood the nature and consequences of so doing. In particular, he explained that if the mortgage payments were not made by Reg, the bank would pursue its rights under the mortgage and Jean could lose her home. In my view this is more than apparent from both the Checklist and the excerpts from the hand-written notes that were quoted above.

2. Was Tomlinson required to make clear that business ventures are risky and that Reg s business could fail?

[33] Jean s counsel submits that because Jean was about to mortgage her only asset simply as a favour to her ex-husband and get nothing in return, this was a presumptively improvident transaction. The lawyer providing ILA was therefore required to ensure not only that his client understood the nature and consequences of taking out the mortgage, but also that business ventures are inherently risky, Reg s business venture could fail and she could lose her home.

[34] Jean s counsel agrees that Tomlinson had no obligation to review the business plans or financial statements of Reg s auto wrecking business. The caselaw is clear that lawyers providing ILA in the execution of a mortgage loan are generally not required to go beyond the mortgage transaction to assess the financial feasibility of how the mortgage funds will be used. Lawyers giving ILA are required to explain to prospective mortgagors the legal responsibilities and liabilities arising from the execution of the mortgage. They are not required to give business advice: see *Fasciani v. Banca Commerciale Italiana of Canada*, [1996] O.J. No. 2631 (Gen. Div.) at para. 26 and *Accurate Fasteners Ltd. v. Gray*, [2005] O.J. No. 4175 (S.C.J.) at para. 11.

[35] Here, however, and at the very least, says Jean s counsel, Tomlinson should have clearly brought to Jean s attention that business ventures are risky and that any business venture, including Reg s auto wrecking business, can fail. Jean should have been told in no uncertain terms that if this happens, Reg would not be able to pay off the mortgage and Jean could lose her home. It was Tomlinson s responsibility, says Jean s counsel, not only to do so orally but to set out these risks in writing so that Jean could have fully understood the dangers of embarking on what was a most improvident transaction.

[36] I do not agree with this submission for the following three reasons. First, many mortgage loans that are taken out to lend money to a family member or friend are not commercially sensible. But this does not mean that they are improvident (that is, rash or ill-considered) transactions. The loan is often discussed and seriously considered. The lender knows that she is getting nothing out of the transaction, other

than the pleasure of helping, and the thanks of, the borrower. The money is being loaned as a favour and nothing more. Oftentimes, as here, the lender trusts the borrower and believes that the money will be paid back, and, in any event, is willing to accept the risk of non-payment.

[37] In these cases, if ILA is provided to the mortgagor and the latter fully understands the nature and consequences of what she is about to do, and is clearly acting on her own free will, then the job of the independent legal advisor is done. As was said many years ago by the English Court of Appeal in *Coomber v. Coomber*, [1911] 1 Ch. 723 at 730:

It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing.

[38] In my view, Jean knew what she was doing. Her decision to mortgage her home and lend Reg the money was not rash or ill-considered. She knew that she was getting nothing tangible in return. She probably understood the risks of mortgage default even before she attended the ILA meeting with Tomlinson and she certainly understood them after the meeting was over. She executed the mortgage because she believed in her ex-husband; she believed his business would succeed and that the mortgage would be paid off. She understood and willingly accepted the risk of non-payment.

[39] Secondly, the additional obligation that is being imposed upon Tomlinson to explain to Jean that Reg's business could fail and she could lose her home was in my view satisfied when Tomlinson told Jean that if Reg didn't make the mortgage payments, she could lose her home. If Reg couldn't make the mortgage payments as promised, it would probably be because his business was failing. The latter point about the business failing is surely subsumed in the former point about Reg not being able to make the payments.

[40] Thirdly, and in any event, I note that here Tomlinson explicitly discussed the risk that Reg's business could fail. According to his notes, Tomlinson told Jean the following:

Advised client that if business became financially unable to pay its debts (Mr. Webb) the whole amount would have to be paid by her if Mr. Webb could not pay. Client advised she would not have attended at Institution NB of Canada and sign mortgage papers if she thought she would not get back the \$100,000.

Client advised prior to agreeing to the mortgage being placed on her home she knew what the money was being used for and she would not have agreed to put charge on her home otherwise.

[41] I therefore conclude that even if Tomlinson was required to tell Jean explicitly that Reg's business could fail and she could lose her home, he did so. There is nothing further that Tomlinson could or should have done. He did not breach the standard of care in providing ILA to Jean Webb on March 4, 1998.

Disposition

[42] The action against the defendant James Tomlinson is dismissed with costs.

[43] If the parties cannot agree on costs, I will be pleased to receive written submissions not exceeding four pages within 30 days of the release of this Endorsement.

[44] I am grateful to counsel for their assistance.

DOCKET: 03-CV-257913 CM2

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jean Webb (Plaintiff) v. James Tomlinson (Defendant)

BEFORE: Belobaba J.

COUNSEL: *J. Lester Davies*

For the Plaintiff

Christine Fotopoulos

For the Defendant

Judgment: July 12, 2006.

COSTS AWARD

1 **EP. BELOBABA J.:** In the Endorsement released on May 31, 2006, I dismissed Jean Webb's action against her lawyer, James Tomlinson for allegedly breaching the appropriate standard of care in providing independent legal advice on a mortgage transaction. I found that Tomlinson did what was required of a lawyer providing independent legal advice and did not breach any duty or standard of care in doing so.

2 I have now reviewed the parties' costs submissions.

3 The successful party, Tomlinson, submits that he is entitled to costs on a substantial indemnity basis of some \$100,000, and about \$77,000 on a partial indemnity basis. He would, however, be content with a costs award of \$60,000. The unsuccessful party, Webb, argues that no costs should be awarded, or if any costs are awarded, they should be nominal.

4 For the reasons set out below, the submissions of both parties are, in my view, untenable.

5 I begin with the observation that this was a three and a half day trial. The amount in dispute, i.e. the damages being claimed by Webb, was about \$65,000. If costs are to be awarded on a partial indemnity basis, the costs award must reasonably reflect these two realities.

6 Tomlinson suggests that costs should be a substantial indemnity basis because of the allegation that his hand-written notes of the meeting with Webb were fabricated and that

this is tantamount to an allegation of fraud. However, not every unproven allegation of fraud or dishonesty necessarily results in costs being awarded on a substantial indemnity scale. I accept Webb's submission that the case law requires a high standard of misconduct before costs on a substantial indemnity scale can be justified, i.e. conduct that is reprehensible, scandalous or outrageous. Such was not the case here.

7 Tomlinson also submits the proceedings were lengthened and made more costly because of certain issues that were raised by Webb and later withdrawn or not pursued and by the jousting over experts' reports. Tomlinson says he is entitled to at least \$77,000 on a partial indemnity but would be content with a costs award of \$60,000.

8 Webb is at the other end of the spectrum and urges that this is a case where no costs or at most nominal costs should be awarded. Webb says that this case was akin to a public interest lawsuit, or a test case where courts have often declined to award costs against the unsuccessful party.

9 I do not agree. Although no doubt important to the actual litigants, this is not a case that falls into either of these categories. This was not a public interest litigation as normally understood and as described in the cases cited by counsel for the plaintiff. Nor can it fairly be described as a test case. The action was not brought to vindicate the public interest. This was a conventional claim for damages against a solicitor for breaching the applicable standard of care in the provision of independent legal advice. Webb says that her argument that Tomlinson should have warned Webb that business ventures can fail is "novel". This may well be so, but no more so than any legal argument in any case that attempts to persuade the court that the defendant's action or inaction was in breach of the applicable standard of care.

10 I therefore do not agree that this is the kind of case where no costs or nominal costs should be awarded. The unsuccessful plaintiff should be required to pay some costs on a partial indemnity basis. The question is how much.

11 Webb says that if costs are awarded, the costs award should not exceed \$10,000. She asks the court to take into account her financial circumstances. She is already burdened by an \$80,000 mortgage from which she got no benefit, and her modest home is her only asset. A large costs award, she says, would be financially devastating.

12 The case law is clear that hardship and the personal circumstances of the parties are factors that may be taken into account in assessing costs: *Stronge v. London Life Insurance Company*, [1993] O.J. No. 103 (Ont. Ct. Gen. Div.), *Gagro v. Morrison* (1995), 43 C.P.C. (3d) 11 (Ont. Ct. Gen. Div.), and *Coughlin v. Comery*, [1996] O.J. No. 2253 (Ont. Ct. Gen. Div.).

13 However, it is also important that parties to litigation understand that the risks of losing at trial include the risk of having to pay what could be a significant costs award

14 On the other hand, one must remember that the overall objective in fixing costs is to fix an amount that is fair and reasonable to the unsuccessful party rather than an amount fixed by the actual costs incurred by the successful litigant: *Boucher v. Public Accountants Council of Ontario*, (2004) 71 O.R. (3d) 291 at para 26.

15 I note that that in her settlement offer of March 3, 2005, Webb would have accepted \$50,600 plus interest, plus another \$15,000 to cover her legal costs to date on a partial indemnity basis. Granted, this offer to accept \$15,000 in costs was contingent on receiving a further \$50,000 to settle the action. Nonetheless, it provides some indication Ms. Webb's expectation had she been successful in this action. If one adds another \$5000 for the three and a half day trial, then the appropriate costs award, using Ms. Webb's template, is somewhere in the range of \$20,000.

16 I recognize Ms. Webb's limited financial circumstances and I am prepared to make an adjustment in this regard. In my view, a costs award of \$17,500 is fair and reasonable having regard to the issues, the amount in dispute, the various disbursements incurred and the fact that the trial lasted three and a half days.

17 Costs are therefore fixed in the amount of \$17,500, inclusive of disbursements and GST, and are made payable forthwith to the defendant Tomlinson by the plaintiff Webb.