



Is Interest at a Criminal Rate When it is Demanded or Received?

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Abstract

Although a lender may demand a payout on a mortgage that exceeds 60 percent of annual interest, the demand does not constitute an offence under the Criminal Code unless the lender actually receives said discharge monies.

Full Article

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It is very important for all mortgage professionals and lenders to be fully aware as to the interpretation of the criminal interest rate provisions in s. 347 of the Criminal Code, R.S.C. 1985, c. C-46 (the "Criminal Code"). A recent British Columbia Court of Appeal decision clearly shows that a lender only violated the provision when it received interest at a criminal rate.

In *426008 B.C. Ltd. v. Simons*, 2007, B.C.C.A. 477, the borrower claimed that the mortgage registered against her property was illegal and therefore unenforceable. The mortgage was in the principal amount of \$685,000 and the interest rate was 20 per cent per annum. The mortgage did not require the lender to advance the whole of the principal amount to the borrower. More specifically, the lender advanced \$310,000 to the borrower and advanced a further sum in the amount of \$17,576.25 to its solicitors and others at the direction of the borrower. The borrower then decided to refinance the property and requested a discharge statement from the lender. Upon receipt of a discharge statement that was not acceptable to the borrower, the borrower refused to continue to make payments under the mortgage. The trial judge found that the sums demanded in the payout letters prepared by the lender were in excess of what was actually due under the mortgage because they included an interest payment calculated at 20 per cent per annum of the entire \$685,000 rather than on the amount that had actually been advanced, and a brokerage fee of \$68,500 which the borrower had never agreed to pay to the lender. The trial judge rejected the borrower's argument that she be relieved of the requirement to pay interest after the demands for excessive payments were made, or alternatively, that the court exercise its discretion by reducing the interest payable. The trial judge found that the lender had sought payment at a criminal rate of interest in the



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payout letters. However, the trial judge found that the lender had not received the payout sum and therefore s. 347(1)(b) of the Criminal Code did not apply.

The trial decision was appealed to the British Columbia Court of Appeal. The Court of Appeal agreed with the decision of the trial court. This appeal concerns the interpretation of the criminal interest rate provisions in s. 347 of the Criminal Code. The particular question raised by the appeal is whether a lender violates s. 347(1)(b) of the Criminal Code when it demands interest at a criminal rate, or only when it receives interest at a criminal rate?

Section 347(1)(b) of the Criminal Code provides that everyone who “receives a payment or a partial payment of interest at a criminal rate” is guilty of an offence.

“Interest” and “criminal rate” are defined in s. 347(2):

“[I]nterest” means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement. . .

“[C]riminal rate” means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principals that exceed sixty percent on the credit advanced under an agreement or arrangement. . .

Section 347(1)(a) provides that everyone who “enters into an agreement or arrangement to receive interest at a criminal rate” is guilty of an offence.

It was held by the Court of Appeal that on a plain reading of s. 347(1)(b), it is clear that a lender only violates the provision when it receives interest at a criminal rate. The borrower contends that, because the definition of “interest” in s. 347(2) includes all charges and expenses “paid and payable”, a lender violates the provision when it demands a criminal rate of interest. The inclusion of amounts “payable” in the definition of “interest” does not alter the plain meaning of s. 347(1)(b). The provision applies to “received” interest payments and thus obviously refers to “paid”, and not to “payable” amounts. The inclusion of “payable” amounts in the definition of “interest” does not prevent another provision from referring only to “paid” amounts. Furthermore, the case law establishes that a lender does not violate s. 347(1)(b) unless it receives interest at a criminal rate.

Based on the above, it is clear that although a lender may demand a payout on a mortgage that exceeds 60 percent of annual interest, the demand does not constitute an offence under the Criminal Code unless the lender actually receives said discharge monies. As such, it is important for mortgage professionals and lenders to be careful when reviewing or preparing discharge statements in that the amount required to discharge the mortgage be in accordance with the mortgage and the aggregate of all interest and charges be below 60 percent per annum.