

CANADA / JUDGMENT

Huston v. Century Services Inc.

2002 BCSC 684

COURT

Supreme Court of British Columbia

DECIDED

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2002BCSC0684

Citation:	Garry Huston and Carol Anne Huston v. Century Services Inc. Date: 20020506 2002 BCSC 684
Docket:	S065390 New Westminster Registry IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	GARRY HUSTON and carol anne huston plaintiffs
AND:	century services inc. defendant

REASONS FOR JUDGMENT

OF THE

HONOURABLE mr. JUSTICE grist

Counsel for the plaintiffs

Peter J. Goodwin

Counsel for the defendant

John F. Grieve

Date and Place of Hearing/Trial:

January 18, 2002

New Westminster, BC

- [1] This summary trial is concerned with whether the interest, fees and bonus charged by the defendant under an agreement to advance credit to the plaintiffs stipulates a criminal rate of interest, contrary to s.347(1)(a) of the Criminal Code of Canada.
- [2] The evidence indicates the following:
1. April 23, 1999 - Mrs. Huston contacted CMS Real Estate to secure financing for funds necessary to complete the purchase of an apartment building.
 2. May 3, 1999 - Mr. Blair of CMS corresponded with Mrs. Huston, advising her to contact an official of the defendant (Century) with respect to possible financing.
 3. May 7, 1999 - Mr. Blair advised Mrs. Huston that Century had contacted an appraiser to value the yacht she was offering security for the loan. Mrs. Huston was to instruct the appraiser and to be responsible for his fee. Payment for the appraisal was made by Mrs. Huston on May 15th, 1999.
 4. June 24, 1999 - Century issued a commitment letter in relation to a loan of \$280,000, with a term of six months, at an interest rate of 2% per month. The letter also stipulated payments of a commitment fee and a legal fee of \$10,000 and \$5,000 respectively, with \$2,000 of the legal fee to be paid by way of a deposit.
 5. June 30, 1999 - the date for reference of a loan agreement executed by the plaintiffs and Century.
 6. July 14, 1999 - the plaintiffs' solicitors notified the defendants that the apartment sale had fallen through and that the plaintiffs would not proceed with the loan. The defendants claimed damages resulting from the plaintiffs' action and treated the \$2,000 paid in advance as forfeit.
 7. October 1, 1999 - the date for reference of a Loan Amending Agreement between the parties, struck after a request by the plaintiffs to proceed with a loan on the original terms to finance a second land acquisition project. The amending agreement stipulated the same principal amount, \$280,000, interest at 2% per month, a commitment fee of \$10,000, and a \$30,000 interest reserve. The loan was to have a six-month term with a six-month extension subsequent to payment of a further \$5,000 fee. The agreement required the plaintiffs to cover the defendant's legal fees to a maximum of \$5,000 and required payment of the \$6,000 brokerage fee owed to CMS. A further term of the agreement required the plaintiffs to secure registration of the yacht under the Canada Shipping Act to allow registration of a ship's mortgage as security. The expenses of registration included the plaintiffs' solicitor's account for this service, a ship's survey, and the expense of a sign displaying the vessels new name.
 8. April 15, 2000 - the loan is extended for six months on payment of the \$5,000 extension fee.

9. September 26, 2000 - Century demands full payment on default.

[3] The plaintiffs argue that each of: (1) the appraisal fee, (2) the brokerage fee, (3) the forfeit deposit, and (4) the expenses of registration of the yacht, are sums to be included in the definition of interest in determining whether the Loan Amendment Agreement constituted an agreement to receive interest at a criminal rate. Counsel advise that the actuarial evidence tendered indicates that if the brokerage fee is included as interest, the criminal rate will be exceeded if one of the other forms of impugned payments is also included in the definition of interest. Conversely, if the broker's fee is excluded, all three of the other payments would have to be included before there would be the prospect of an effective rate of greater than 60%.

[4] Section 347(1)(a) provides:

347(1) Notwithstanding any Act of Parliament, every one who

(a) enters into an agreement or arrangement to receive interest at a criminal rate or

(b) receives a payment or partial payment of interest at a criminal rate,

is guilty of

(c) an indictable offence and is liable to imprisonment for a term not exceeding five years.

(d) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

[5] The definition of interest in subsection 2 is:

"interest" 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, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, over-draft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes.

[6] In *Garland v. Consumers' Gas Co.* (1998) 165 D.L.R.(4th) 385, Major J. commented on the definition of interest. He said at paras. 27-28:

It is apparent from this definition that for the purposes of s.347 "interest" is an extremely comprehensive term, encompassing many types of fixed payments which would not be considered interest proper at common law or under general accounting principles

The broad language of s.347 was presumably intended (as it was in the Small Loans Act to prevent creditors from avoiding the statute simply by manipulating the form of payment exacted from their debtors - a practice which has historically undermined the effectiveness of anti-usury laws applying a strict definition of interest: Thompson, *supra*, at pp. 548-49; see also K. Keest, *The Cost of Credit* (1995), at p.38. It is the substance, and not merely the form, of a charge or expense which determines whether it is governed by s.347.

[7] The critical element to inclusion as interest is set out at paragraph 30:

It is equally clear, however, that not every charge or expense will be subject to the criminal interest rate provision. In order to constitute "interest" under s.347, a charge - whatever its form - must be "paid or payable for the advancing of credit under an agreement or arrangement" (emphasis in original).

[8] In *Helo Enterprises Ltd. v. Standard Trust Co.* [1993] B.C.J. No. 2662, the payment in question was a broker's fee paid by the lender from proceeds advanced under the loan. In determining the question Southin J.A. distinguished the payment from interest, finding at paras 23-24:

Certain salient facts must be borne in mind. First, the would-be borrowers retained Pro-Mor (the broker) to act for them in finding a lender. Secondly, Pro-Mor's fee was earned pursuant to an engagement for services between the petitioner and Pro-Mor. Thirdly, Pro-Mor was not the agent of, or related to, Standard Trust. Fourthly, Standard Trust did not choose Pro-Mor to act for the borrowers.

Thus, Pro-Mor's fee was not a charge or expense "paid or payable for the advancing of credit." It was a charge or expense incurred by the borrower for professional assistance in finding someone who would lend the money that the promoters wanted to borrow.

[9] The facts of this case are indistinguishable. CMS was retained by the plaintiffs before any contact was made with Century and was entitled to its fee for finding the lender, chargeable to the plaintiffs on the commitment being made to lend the monies, subject only to the advance of the loan funds. CMS had no contractual or other formal relationship with Century, and ultimately CMS's fee was negotiated directly between CMS and the plaintiffs.

[10] Additionally, the deposit portion of the legal fee stipulated in the original agreement, treated as forfeit in July 1999, cannot be said to constitute money paid for the advancing of credit under the ultimate agreement. When the plaintiffs decided not to proceed with the original loan, the defendant treated the agreement as at an end and claimed the deposit as forfeit. Notwithstanding that the written contract was styled a "Loan Amending Agreement", the subsequent dealings in my view created a new agreement on similar terms. The forfeit deposit was in relation to the original contract and cannot be seen to be monies paid under the new agreement. The fact that the subsequent loan proceeded on deposit of a second amount is in my view indicative of this fact.

[11] With exclusion of these sums, the interest rate does not exceed the proscribed percentage. Accordingly, the plaintiffs' claim for a declaration that the interest charged constitutes a criminal rate is dismissed. The defendant is entitled to judgment on the counterclaim for the balance of the funds outstanding.

"W.G. Grist, J."

The Honourable Mr. Justice W.G. Grist

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