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No Additional Consideration Required to Support Loan Amendments

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Private loan arrangements lead to more than their fair share of litigation proceedings. Their disputes often require the courts to apply long-standing legal principles to informal loan documentation and verbal loan arrangements where the decisions can have significant ramifications when applied to institutional borrowers and lenders.

In *Rosas*[1], the British Columbia Court of Appeal examined a series of informal amendments to loan arrangements, specifically numerous extensions of the repayment date of a private loan extended by one friend to another pursuant to a verbal loan agreement.

Fortunately for the lender, the Court did not allow a borrower who had requested repeated extensions of the repayment date to allege that the lender's claim for recovery of the loan was statute-barred under British Columbia's limitations legislation[2] because the lender had indulged the borrower's requests for extensions. The Court also rejected the Borrower's claim that the extensions of the repayment date granted by the lender on the basis of verbal promises of "I will pay you next year" were amendments to the loan arrangement made without additional consideration (given for the forbearance of the lender's rights) and were therefore unenforceable.

Rosas involved the unusual situation of a lottery winner helping out a friend with a loan to assist in the purchase of a new home. The verbal loan agreement had an initial term of one year before the extension requests started to be made[3]. The forbearance process was very simple and did not involve any negotiations. Each year the borrower made a verbal request to forbear and the lender agreed. No payments were ever made on the loan, and the borrower did not provide anything to the lender in exchange for the lender's forbearance of its collection rights and extending the time for repayment. [4]

The Court undertook an extensive analysis of prior case law in several jurisdictions relating to the strict requirement that additional consideration be provided to support a contract amendment. It also considered the views of multiple academic experts on the topic. In the end the Court decided this case was the right one with the right facts to change the long-standing law on the consideration required to support a forbearance or other contract amendment. Chief Justice Bauman announced that the time had come to reform the doctrine of consideration[5]:

"The time has come to reform the doctrine of consideration as it applies in this context, and modify the pre-existing duty rule, as so many commentators and several courts have suggested. When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns which would render an otherwise valid term unenforceable. A variation supported by valid consideration may continue to be enforceable for that reason, but a lack of fresh consideration will no longer be determinative. In this way the legitimate expectations of the parties can be protected. To do otherwise would be to let the doctrine of consideration work an injustice."

In essence, the Court recognized that without such a reform, the accommodating lender's claim in this case may have been statute-barred or failed due to a lack of fresh consideration to support the lender's forbearance. Rather than being creative to "find" some

fresh consideration in the actions of the parties, Chief Justice Bauman held that the legitimate expectations of the parties in the case of a modification to an ongoing transaction should be protected.[6] The Court determined that in the absence of duress, unconscionability or other public policy considerations, such modifications should be upheld. [7] In this case, the agreed changes to the repayment date by the parties were upheld by the Court in the lender's favour as the court noted that there was no suggestion that the variations to the repayment date were procured under duress, were unconscionable or were otherwise invalid on the basis of public policy.[8]

Despite the decision in *Rosas*, no one is rushing out to delete the consideration clauses in their agreements, and the words, "For valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties" will still appear in commercial contracts for a long time. So far as we are aware, the Court's decision in *Rosas* has not yet been appealed, and it remains to be seen if it will be whole-heartedly adopted in other provinces. Nevertheless, lenders may wish to document the timing and circumstances of a borrower's requests for amendments to existing loan agreements to assist in the search for intangible forms of fresh consideration to support the amendment should the need ever arise.

[1]*Rosas v. Toca,* 422 D.L.R. (4th) 351 ***[Rosas]****.*

[2]The former *Limitation Act,* R.S.B.C. 1996, c. 266 applied at the relevant times in this case.

[3]It appears that all arrangements in respect of the loan were verbal, which were proven by evidence given at trial. The Court did not reference or examine the text of any documentation representing the loan other than the bank draft issued at the time of the deposit of the lottery proceeds.

[4]*Rosas* at para. 18.

[5]*Rosas* at para. 4.

[6]*Rosas at para.* 176. It should be noted that the Court nevertheless did conduct a "search for consideration" and found there was sufficient support for the forbearance. At para. 177 – 179.

[7]*Rosas* at para. 176 and 183.

[8]*Rosas* at para. 185.

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