DEMANDING REPAYMENT: WHAT IS REASONABLE? (THE REASONABLE NOTICE REQUIREMENT IN *LISTER V. DUNLOP*)

By Philip Cho and Solomon Khan
Kronis Rotsztain Margles Cappel LLP

INTRODUCTION

It is common for a loan agreement to essentially provide that the creditor may, either at its discretion or in the event of default, "immediately" demand repayment of the amount outstanding on that particular credit facility. In the context of a secured loan, the agreement often further provides that if the debtor fails to comply with that demand, any security obtained shall become enforceable. On a plain reading, this type of language would suggest that the creditor in such an agreement is *literally* entitled to receive repayment "upon demand", failing which steps to enforce the security can be taken. Not surprisingly however, numerous decisions have held that despite the express language of a particular loan agreement, a debtor must be given a *reasonable amount of time* to in order to comply, before a creditor is entitled to enforce upon its security.

The purpose of this paper is to provide a review of this common law requirement for a creditor to provide reasonable notice to a debtor before enforcing upon its rights pursuant to a demand loan. In particular, it will outline the various factors to be considered in determining what a reasonable amount of notice is, and also when it would be reasonable for a lender to impose an almost immediate deadline for repayment. Lastly, the paper will conclude with a brief discussion on the potential ramifications of failing to provide a debtor with reasonable notice.

THE REASONABLE NOTICE REQUIREMENT

In the seminal decision of *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, the Supreme Court of Canada held that even though a loan agreement itself expressly states that a creditor is entitled to repayment of a loan "on demand", a debtor must be given a reasonable amount of notice upon which to act.[1] In this decision, on default, the creditor made its demand for amounts owing by the debtor. At the same time, the creditor appointed a receiver to take possession of the debtor's premises. The debtor initially resisted the claim for possession by the receiver. However, a few hours later, after being assured by a representative of the creditor that the personal guarantees would not be enforced, the debtor withdrew his opposition and the receiver took possession of the debtor's premises. The debenture provided that if an event of default occurred, all unpaid principal and interest owing shall "forthwith become due and payable and the security hereby constituted shall become enforceable". The fact that the creditor was *entitled* to enforce its debenture by reason of the default was not at issue. At issue was whether the *procedure* in enforcing the debenture was wrongful in that no reasonable time was afforded to the debtor to pay the amounts owing.

In the Court of Appeal, the majority found that in order to invoke the reasonable notice entitlement, the debtor must ask for time to make the payment. The Supreme Court disagreed and noted that there was no authority cited for such a proposition. As such, the debtor was entitled to reasonable notice and the subsequent relenting by the debtor to the receiver did not constitute waiver. The creditor was liable for trespass and conversion.

[1] *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd*. [1982] 1 S.C.R. 726.

Lister v. Dunlop arguably expanded the principle of reasonable notice that came before it. Prior to this decision, the cases focused largely on the physical and practical reality that a debtor must be given some time to comply with a demand; i.e. a debtor cannot realistically comply with a demand instantaneously. The earlier cases discuss the fact that a debtor would, at a minimum, need sufficient time to go to his desk or to his bank in order to retrieve the money. This principle has now evolved however, to require that a creditor is to provide a debtor with reasonable time in which to attempt to raise the money necessary to comply with the demand.[2]

To clarify, and as alluded to above, the reasonable notice requirement primarily concerns itself with the self-help enforcement steps available to a secured creditor which, otherwise, is an interference with the debtor's property rights. As stated by the British Columbia Court of Appeal:

> The Lister principle is a principle about giving reasonable notice before a seizure. The mischief which the principle was designed to remedy, from its earliest origins, was the possibility that a person might suffer serious harm from an unanticipated seizure that was not necessary.[3]

As such, the lack of any enforcement rights in the context of an unsecured loan (save and except commencing an action on a debt), makes the reasonable notice requirement something of a non-issue. However, when a creditor has the benefit of security, the enforcement and realization of this security can have a serious negative impact on the debtor. Reasonable notice is, therefore, required to be given prior to the creditor taking steps to realize its security *notwithstanding the*

[2] *Kavcar Investments Ltd. v. Aetna Financial* (1989), 70 O.R. (2d) 225 (Q.L.) at p. 9 to 12.

[3] *Waldron v. Royal Bank of Canada* [1991] B.C.J. No. 390 (Q.L.) at p.23 (B.C. C.A.).

language in the loan agreement.[4] If reasonable notice is found to be wanting, a creditor's steps in realizing on its security may be found to be an unlawful interference with the debtor's property rights.[5]

Thus, in *Kavcar Investments Ltd. v. Aetna Financial Services Ltd*., while the immediate appointment of a receiver was not necessarily improper, the taking of possession by the receiver of the debtor's assets only *three hours* after the demand was held to be unlawful.[6] The seizure was held to have effected an unlawful conversion of the debtor's assets. It is worth noting that in this case, the court found that there was insufficient evidence to persuade the court that the debtor was unable to obtain alternative financing. The corollary is that if sufficient evidence that the debtor was unable to find alternative financing (i.e. hopelessly insolvent) were available, this could impact the assessment of damages flowing from the unlawful conversion.[7]

[4] Of course this is codified in certain circumstances. See for example *Personal Property Security Act*, R.S.O. 1990, c. P.10, s. 63, *Mortgages Act*, R.S.O. 1990, c. M., s. 32, *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 244. But note that the *Personal Property Security Act* does not require notice prior to taking possession of the collateral.

[5] Note that the reasonable notice requirement was held not to be applicable to a relationship dealing with margin accounts where the security was publicly traded securities, despite the similarity to a secured creditor/debtor relationship. See *Paciorka v. TD Waterhouse* (2007), 159 A.C.W.S. (3d) 154, 2007 CanLII 28749 (Ont. S.C.J.).

[6] *Kavcar*, *supra* at p. 14.

[7] Evidence of the debtor's inability to raise funds is also a factor in determining whether the notice given was reasonable or not. See discussion below.

WHAT IS "REASONABLE NOTICE"?

What constitutes a reasonable amount of time will depend on the circumstances of each particular case. In an exercise reminiscent of calculating a notice period in a wrongful dismissal case, the following factors are to be considered in determining what is reasonable: [8]

1. *the amount of the loan*: A greater loan balance weighs in favour of a longer notice period as it would be more difficult to raise large sums of money in a short period of time.

2. *the risk to the creditor of losing his money or the security*: If the security is at risk, this weighs in favour of a shorter notice period.

3. *the length of the relationship between the debtor and the creditor*: A longer relationship weighs in favour of a longer notice period, unless the length of that relationship reveals a history of defaults;

4. *the character and reputation of the debtor*: A debtor with a good reputation is entitled to a longer notice period. Conversely, as discussed further below, in cases of dishonest conduct on the part of the debtor, virtually no notice period may be acceptable.

[8] *Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal* (1979), 25 O.R. (2d) 198 (H.C.) rev'd on other grounds (1983) 44 O.R. (2d) 368, 4 D.L.R. (4th) 74 (C.A.): the Court of Appeal reversed the trial judge's decision on the basis that the trial judge erred in holding that a debtor was entitled to reasonable notice only if the debtor requested additional time. *Lister v. Dunlop* was decided between the trial and the appeal. However the trial judge's discussion regarding the factors that are to be considered in assessing reasonable notice has been relied upon by subsequent cases. See *Royal Bank of Canada v. W. Got Associates Electric Ltd.* [1999] 3 S.C.R. 408 and *Bank of Montreal v. Maple City Ford Sales (1986) Ltd.* (2002), 116 A.C.W.S. (3d) 722 (Ont. SCJ).

5. *the potential ability to raise the money required in a short period*: This can involve an assessment of a number factors including the state of the debtor's assets, inventory, operations, market conditions, etc. If the debtor will have difficulty raising the money, then this weighs in favour of a shorter notice period;

6. *the circumstances surrounding the demand for payment*: This invites a consideration of the events leading up to the default, any discussions between the parties prior to or surrounding the demand, and a consideration of the above factors taken together; and

7. *any other relevant factors*.

Furthermore in considering these factors, it is important to recall that the particular loan agreement itself often expressly provides that the creditor is entitled to repayment "on demand". As a result, even though courts have held that what is reasonable will vary depending on the circumstances, such time will generally be "of short duration" and would not encompass "anything approaching 30 days".[9] A brief summary of a select number of decisions which have held that the notice provided by a creditor was reasonable in the circumstances is set out below:

Case	**Comment**	**No. of Days**
Royal Bank of Canada v. Starr et al. (1987), 61 O.R. (2d) 6 (H. Ct. J.)	The demand was personally served on the principal officer of the corporation. The next day, a receiver took possession of the corporation's assets. The debtor had no realistic prospect of meeting the creditor's demand, and it later appeared that the loan had been obtained by fraud.	24 hours.

[9] *Bank of Montreal v. Carnival Leasing*, 2011 ONSC 1007at para. 13.

Whonnock Industries Ltd. v. National Bank of Canada, (1987) 16 B.C.L.R. (2d) 320 (C.A.)	At trial, the court found that a seven day notice was unreasonable, and that it should have been 30 days. Appeal allowed and initial seven day notice held to be reasonable.	7 days.
Toronto-Dominion Bank v. Pritchard [1997] O.J. No. 4622 (Sup. Ct.)	Debtor requested extension of time as it sought to finalize re-financing with another lender. Creditor refused to extend time.	14 days + 10 day statutory notice under *BIA*.
Bank of Montreal v. Maple City Ford Sales (1986) Ltd. [2002] O.J. No. 3573 (Sup. Ct.)	Creditor had a justifiable apprehension of dishonesty and the giving of additional time would have served no useful purpose as the debtor would not have been able to satisfy the demand.	5 hours.
Royal Bank of Canada v. Cal Glass Ltd., 1979 CanLII 570 (B.C. S.C.)	Creditor had reasonable belief that security was at risk of being depleted by debtor and there was evidence that the debtor would be unable to raise the funds to pay the amounts owing.	30 minutes.

WHEN REASONABLE NOTICE MAY BE MINIMAL

There are certain situations wherein the giving of little or no time to comply with a demand for payment will in fact satisfy the said reasonable requirement. Two of the cases cited above are examples of this: *Bank of Montreal v. Maple City Ford* and *RBC v. Cal Glass.* There appear to be three types of situations where reasonable notice may be minimal: (i) there is a justifiable apprehension of dishonesty on the part of the debtor; (ii) the giving of more time would serve no useful purpose because the debtor does not have the means to satisfy the demand; or (iii) the value of the creditor's security is at risk of depreciating rapidly.[10] This list is not exhaustive, and may be

[10] *Bank of Montreal v. Maple City Ford*, *supra* at para 158.

expanded to other situations as well.[11]

With respect to situation (i), the fact that the creditor was not fully aware of the extent of the history of dishonesty does not preclude a full consideration of that history in determining reasonable time. For example, in *Royal Bank of Canada v. Starr*, the court held that the fact that the debtor had obtained a substantial loan by means of fraudulent misrepresentations could be considered in assessing the issue of reasonable time, even though it was unknown to the creditor at the time of making the demand.[12] It is possible that establishing only a reasonable basis for the creditor's apprehension of dishonesty may suffice, even if a creditor falls short of proving actual dishonesty.[13]

In considering situation (ii), it is important to evaluate the debtor's response to the demand for payment. As noted above, it is clear that a creditor must provide the debtor with reasonable time to obtain the amount that has been demanded, regardless of whether the debtor asked for it. Interestingly however, the fact that that the debtor fails to make such a request may be relied upon to draw an inference that the debtor did not have the ability to in fact meet the demand for repayment.[14]

In any event, it is imperative to advise one's client that any very short notice period (for example, of one day) may be found to be *prima facie* unreasonable. Therefore, in such a case it would be up to the creditor to show why in the particular circumstances the period allowed was

[11] *Kavcar Investments*, *supra* at p.14.

[12] *Royal Bank of Canada v. Starr* (1987), 61 O.R. (2d) 6 (H.Ct.J.). The authors note the similarity to the concept of "after-acquired cause" in the wrongful dismissal context.

[13] *Bank of Montreal v. Maple City Ford Sales*, *supra* at para. 190.

[14] *Bank of Montreal v. Maple City Ford* Sales, *supra* at para. 208.

reasonable. In this regard, Mckinlay J.A. has provided a useful caution to creditors:

> It is important for creditors to keep in mind that while the creditor of a dishonest debtor may well have evidence of that dishonesty available to him, to obtain evidence of a debtor's inability to raise funds is a much more difficult matter. Even a technically insolvent debtor may have funds available through related individuals or corporations. If a creditor demands payment and gives his debtor no time or a very short time to pay, relying on the debtor's inability to raise funds, he takes the risk that he will be unable later to prove that inability.[15]

FAILURE TO PROVIDE REASONABLE NOTICE

As noted above, the failure of a creditor to provide reasonable notice and the ensuing seizure of assets, may expose the creditor to damages for breach of contract, as well for various torts such as conversion or trespass.

Royal Bank of Canada v. W. Got Associates Electric Ltd provides a useful example of such a possibility. In that decision, a demand letter was served on the debtor pursuant to monies extended under a line of credit. One day later, the creditor brought a motion to appoint a receiver. This motion was successful. The creditor thereafter commenced an action for the amount outstanding on the said loan. The debtor counterclaimed alleging that the creditor failed to provide lack of notice in calling its loan and appointing a receiver. The Supreme Court of Canada found that there "was neither a reason offered to explain why the creditor gave such little notice nor any indication of a cause for urgency or inability to pay the debt." As a result, the creditor was liable to the debtor for breach of contract as a result of having breached its implied contractual

[15] *Kavcar, supra at* 14.

obligation to provide reasonable notice. [16]

CONCLUSION

A creditor that demands repayment pursuant to its rights under a demand loan agreement must provide a debtor with a reasonable amount of time to comply with that demand. What is reasonable is a question of fact that ultimately will depend on the circumstances of a particular case.

When advising a lender client as to what is reasonable, consideration must be given to the seven factors noted above but generally, reasonable is measured in days – not by weeks, and certainly not in months.

In situations where a client would be prejudiced as a result of providing such time (for example if the value of its security is rapidly depreciating) a shorter deadline for repayment may be considered reasonable. In fact, courts have held that a notice period of less than one day may even be possible.[17] However, if a creditor were to proceed in this fashion, it should be in a position to provide convincing evidence of the exceptional circumstances *prior* to making such a demand or taking any steps to enforce upon the security. Failing to take such factors into account may place the creditor in the unexpected position of being liable to the debtor both in contract and in tort.

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[16] *Royal Bank of Canada v. W. Got Associates Electric Ltd*., *supra*. Another interesting aspect of this decision is that the trial judge awarded exemplary damages against the bank for having misled the court in its affidavit supporting the receiver's appointment. This award was upheld by the Supreme Court of Canada.

[17] See for example *Bank of Montreal v. Maple City Ford*, *supra*.