HONG KONG LAW JOURNAL

香港法律學刊

VOLUME 30 ■ PART 3 ■ 2000

GOOD FAITH, GREED AND TIME OF THE ESSENCE

■

Mitchell E Kowalski

FOCUS

Union Eagle Ltd v Golden Achievement Ltd

The decisions of the Hong Kong Court of Appeal and the Privy Council in *Union Eagle Ltd v Golden Achievement* continue to both trouble and fascinate, opting as they do for commercial certainty over equitable notions of fairness and conscionability. In the bluntness of their result, these decisions came as a surprise to some, while for others, they merely confirmed the court's traditional approach to the question of certainty and punctuality in contractual dealings, even where only a few brief moments were at stake. In this focus three commentators express their independent critical views on these decisions, and provide their recommendations for the way forward.

Good Faith, Greed and Time of the Essence or How to Make HK$15 Million in 600 Seconds (Reflections of a Canadian Real Property Solicitor)

Mitchell E Kowalski[*]

This article critiques the (in)famous 1997 decision of the Privy Council (and of the Hong Kong Courts) in Union Eagle Ltd v Golden Achievement Ltd, in which a vendor was allowed to resile from an agreement of purchase of sale solely because the purchaser was ten minutes late in tendering the purchase monies and other necessary closing documents as 'time was of the essence'. The author argues that the Court erred in employing a strict and ancient interpretation that equity will not intervene when time is made of the essence. The author suggests that the Courts should have taken the more modern approach utilized by Canadian and Australian courts. The Courts should have invoked the concepts of 'good faith', 'unconscionability', or de minimis non curat lex, among others, to force the vendor to complete the transaction, as the lateness was trivial and caused no damage. The article calls for Hong Kong courts to introduce commercial decency and reasonable standards of fair dealings into their decision making so as to allow the completion of bargains that are honestly made. The author concludes by suggesting a test for determining when equity may intervene to allow a 'grace' period for the breaching party despite time being made of the essence.

* Partner, Aylesworth Thompson Phelan O'Brien LLP (Toronto), of the Ontario and British Columbia Bars. The author wishes to thank Hilary Cordell for her comments on an earlier draft of this paper. However, all errors, omissions, inaccuracies and opinions in this paper remain the author's alone. This article does not reflect the opinion of the law firm of Aylesworth Thompson Phelan O'Brien.

Introduction

As we travel life's journey we sometimes encounter situations that so offend our sensibilities that we are moved to action. However, in the daily practice of real property law, such situations are few and far between. And so it was that I was happily proceeding with my Canadian real property practice when I was introduced to the Privy Council case of *Union Eagle Ltd* v *Golden Achievement Ltd*.[1] The case is of interest to me not only because it clearly shows that the notion of good faith in the performance of contracts is quite dead in Hong Kong but also because the decision was in large part determined upon an old Canadian-based case, which I suggest, is no longer the law in Canada. The failure of all three levels of court that heard the case to introduce equity and a notion of good faith into their decisions, was the genesis of this paper. There are also at least three other reasons for the writing of this commentary: first, given our common law heritage, Privy Council decisions have some persuasive value in Canada; second, in my view and with all due respect to the Privy Council, erroneous and unjust common law decisions are, in and of themselves, worthy of critique; and third, this case allows solicitors in both Hong Kong and Canada to reflect upon what the state of the law should be in our respective jurisdictions.

Union Eagle Ltd v Golden Achievement Ltd

The facts of *Union Eagle* are frighteningly familiar to those of us who are real property solicitors. A purchaser (Union Eagle) agreed to purchase a flat on August 1, 1991 from the vendor (Golden Achievement) at a price of HK$4.2 million.[2] The purchaser gave the vendor a deposit in the amount of HK$420,000. The sale of the flat was to have been completed on or before 5:00 pm on September 30, 1991. In the usual Hong Kong style, the transaction was to be completed at the offices of the vendor's solicitor with undertakings exchanged to send duly executed documents within a specified number of days thereafter; an escrow closing of sorts. As such, in *Union Eagle* the need to comply with the time deadline of 5:00 pm was not driven, as in many Canadian provinces (including my home province of Ontario), by the hours of the local registry office.

On the day of closing the purchaser missed its appointment to inspect the flat. As is the customary and usual practice of prudent solicitors, the vendor's solicitor's clerk warned the purchaser's solicitor's clerk that if the balance of the purchase price was not paid by 5:00 pm the vendor would rescind the agreement

1 [1997] 2 All ER 215.

2 It should be noted that Golden Achievement Ltd had just purchased the same flat in March 1991 for HK$2,782,900.

and retain the deposit. The purchaser's solicitor assured the vendor's solicitor that the deal would close. At 5:01 pm the vendor's solicitor's clerk called the purchaser's solicitor's clerk to complain that she had not yet received the funds or the closing documents and that she was 'reserving the vendor's rights'. She was told that the messenger with all necessary documents and funds had left prior to 5:00 pm and that he was somewhere on his way to her office. The messenger arrived at 5:10 pm and attempted to the complete the transaction. The vendor's solicitor's clerk then telephoned the vendor for instructions. She was instructed not to close and thereupon at 5:11 pm she purported to accept the purchaser's repudiation of the contract and refused to close. The vendor also retained the deposit and litigation ensued.

The purchaser brought an action for specific performance or in the alternative, the return of its deposit on the ground that it was entitled to relief from forfeiture. There was no dispute as to the substance or form of the closing documents tendered by the messenger, nor of the amount of funds tendered by the messenger. There is no indication from the case as to whether or not the vendor had previously advised its solicitor to get out of the deal at any opportunity. There was no evidence that the vendor suffered any harm by the ten-minute delay or that the closing funds were urgently needed at 5:00 pm for another matter. There was also no evidence that there was a deliberate delay on the part of the purchaser or its solicitor. The delay seemed to have been inadvertent and possibly caused quite simply by typical traffic hold ups during the journey between the solicitors' offices.

All three levels of court found in favour of the vendor and all seemed leery of using equity to assist the purchaser. All three also strictly interpreted the 'time of the essence' provision in the contract and found that while the time delay may have been trivial, equity should not intervene to amend the bargain to allow the closing to be delayed by ten minutes. However, this reasoning fails to appreciate that in *Union Eagle* there was no substantive amendment to the bargain. The purchaser paid the same purchase price for the same flat, and completed the transaction on the appointed day. The purchaser did not seek relief from the substance of the bargain. Nor did the purchaser suggest that it made an unfair bargain. Instead it sought relief from the way in which the vendor performed, or rather, refused to perform, the bargain, based upon a number of arguments,[3] all of which failed. All three levels of court rejected the plaintiff's arguments on both practical business considerations and upon ancient authority.

According to Lord Hoffmann, who spoke on behalf of a unanimous Privy Council:

3 It is not the intention of this paper to explore or evaluate the arguments of the plaintiff, ingenious as they were.

> The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalizations are founded not merely upon authority ... but also upon practical considerations of business ... the parties should know with certainty that the terms of the contract will be enforced ... Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic.[4]

He went on to say:

> Their Lordships think that [this case] ... shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene.[5]

In my view, Lord Hoffmann greatly overstated the importance of certainty of time as well as the authority for not intervening.[6] The vendor placed no importance upon the certainty of knowing that the transaction would close no later than 5:00 pm and none of the court decisions in *Union Eagle* made any comment or determination as to the importance of the 5:00 pm closing time to the vendor. It may well be that this deadline was not even discussed at the time the agreement of purchase and sale was executed; it might have easily read 5:30 pm or 4:30 pm. The time was selected simply because it was the convention to complete transactions on or before 5:00 pm and it was in a standard form precedent. Yet the selection of this time resulted in the purchaser being triply penalized; (i) it did not obtain title to the flat, (ii) it had to pay the vendor's legal fees *and* (iii) it lost its deposit![7] The callousness of the *Union Eagle* decision becomes even more dramatic given the fact that the 5:00 pm closing time was, as stated earlier, a fiction; the 'closing' was an intermediary step to the formal completion of the transaction.

4 Note 1 above at 217.

5 Ibid at 222.

6 Approximately one month after deciding *Union Eagle*, the Privy Council, including Lord Hoffmann, accepted the Hong Kong Court of Appeal's determination in *Chong Kai Tai & Anor v Lee Gee Kee & Anor* [1997] 1 HKC 359 that the words 'time is of the essence' were deemed to have been included in a Hong Kong agreement of purchase and sale from which they were absent. This was quite odd as the Privy Council had just determined in *Union Eagle* that if a contract expressly stipulated that 'time was of the essence' a party which breached this provision would be severely punished. If 'time is of the essence' is to have meaning *and* carry with it the harsh penalty meted out in *Union Eagle*, it does not follow that contracts that do not include such a provision should be deemed to include it and its ruthless consequences. The lack of consistency as to the importance of the words 'time is of the essence' in these two decisions is most troublesome and amplifies the need for reform in this area of the law.

7 This flat was subsequently sold by Golden Achievement Ltd after the Privy Council decision in August, 1997 for HK$19,500,000, an increase of almost 800% from its purchase price in March, 1991! It appears that the vendor, seeing a rise in prices since the date of the agreement to purchase, greedily sought to take advantage of the purchaser's trivial lateness in order to resell for a higher amount.

The Privy Council felt bound by its decision some 82 years earlier in *Steedman v Dinkle*[8] that reversed the decision of the Supreme Court of Saskatchewan. In *Steedman* the plaintiff purchased land in the province of Saskatchewan, Canada for $16,000 to be paid in 16 installments of $1,000 each on the first day of December of each year commencing in 1909. The December 1, 1915 installment was not paid until December 21, 1915 whereupon the defendant refused to accept it and claimed forfeiture under the agreement of purchase and sale. The Supreme Court of Saskatchewan determined that the Privy Council's decision in the Canadian based case of *Kilmer v BC Orchard Lands Co*[9] applied and allowed the plaintiff's claim of specific performance. In *Kilmer* the plaintiff had purchased lands in British Columbia, Canada under an installment plan and was several days late in making one of the payments after having been granted an extension of time; the Privy Council allowed the plaintiff's claim for specific performance.

The Privy Council in *Steedman* reversed the Supreme Court's decision stating that courts never intervene 'where the parties have expressly intimated in their agreement ... that time is to be of the essence of their bargain.'[10] The Privy Council then distinguished its previous decision in *Kilmer* on the basis that in *Kilmer* it had allowed the claim for specific performance on the basis that a provision in the agreement which required forfeiture of the lands if an installment was late was in the nature of a penalty and therefore unenforceable. In addition the Privy Council in *Steedman* found that the plaintiff in *Kilmer* had been granted an extension of the time to make the installment payment and thereby the defendant could no longer rely upon the 'time of the essence' provision in the agreement of purchase and sale. On both of these bases the Privy Council determined that *Kilmer* was not applicable in *Steedman*.

In my view the Privy Council in *Union Eagle* should have seized the opportunity to create a solution for the unfairness visited upon the purchaser. Instead the Privy Council closed its eyes to a more liberal interpretation and, draped in an ancient decision in which a purchaser was twenty days late, seemed determined to ensure that 'order', 'efficiency' and 'predictability' were to triumph over 'justice'. After reading all three decisions one cannot help but recall the following words of French author Jacques Ellul:

> When law is detached from justice, it becomes a compass without a needle. The substitution of order for justice, useful though this may be for the purpose of making law technical [predictable], itself quickly becomes a contributory factor in this disassociation ... Law thus becomes an activity without any end and without any meaning. It is efficient for efficiency's

8 [1915] 25 DLR 420.

9 [1913] 10 DLR 172.

10 *Steedman*, note 8 above at 423.

sake; and individual laws are conceived solely with a view to be efficient ... Law no longer co-ordinates man's functions in their relation to justice. As soon as that function is keyed to technique [or strict predictability], it becomes valid in and of itself. Everyone's function, once it has become technical finds in technique its meaning and validity; proper results and destiny are of little importance. The law becomes a mere organizer of individual functions.[11]

Deciding legal cases surely involves more than simply applying strict rules without consideration of any other factors. If such is not the case then the entire judiciary could be replaced by a powerful computer!

Some comments on the Canadian and Australian positions

The Privy Council in *Union Eagle* did not review the current state of the law in Canada with respect to 'time of the essence'. In my view, by not doing so, the Privy Council erred. It should not have relied upon an old Canadian case regarding 'time of the essence' without examining whether or not the case was still good law in Canada. The Privy Council's reliance upon *Steedman* should have made the current state of the law in Canada regarding 'time of the essence' particularly relevant in *Union Eagle*; yet it appears that neither counsel brought it to the attention of the Privy Council, and the Privy Council did not seek to consider it.

I suggest that Canadian courts have since turned away from the strict interpretation of 'time of the essence' found in *Steedman* and have 'adopted the expansive view of equity's jurisdiction'[12] as preferred by learned jurists such as Romer J and Denning J in later English cases.[13] In particular, the following comments of Romer J appear to reflect the Canadian position,

> In my judgment, there is no sufficient ground for interfering with the contractual rights of a vendor under forfeiture clauses of the nature which are now under consideration, while the contract is still subsisting, beyond giving a purchaser who is in default, but who is able and willing to proceed with the contract, a further opportunity of doing so...[14]

Much like their Canadian brethren, Australian courts have also employed a more just and progressive approach to time of the essence. However, in *Union Eagle* the Privy Council also distinguished the Australian case of *Legione* v

11 Jacques Ellul, *The Technical Society* (New York: Vintage Books, 1964) pp 299-300.
12 Paul M Perell, 'Putting Together the Puzzle of Time of the Essence' (1990) 69 (No 3) CBR 417, 451.
13 The reader is referred to the excellent article by Paul Perell above which cites the case of *Stockloser v Johnson* [1954] 1 QB 476 and others in support of this.
14 *Stockloser v Johnson* [1954] 1 QB 476 at 501 as cited in Perell (note 12 above) at 449.

Hateley.[15] The facts in that case also involved the late payment of purchase monies for land. Like *Steedman*, the delay was several days, yet Gibbs CJ and Murphy J in *Legione* refused to follow *Steedman*. Instead they held that,

> A court of equity will grant specific performance notwithstanding a failure to make a payment within the time specified by the contract if there is nothing to render such an order inequitable ... on principle we can see no reason why such an order should not be made if it will not cause injustice but will on the contrary prevent injustice.[16]

The court in *Legione* determined that it would be inequitable and unjust for the vendors to insist upon a termination of the agreement of purchase and sale and that

> ... if the contract is rescinded the vendors will receive an ill-merited windfall ... The breach by the purchasers was neither willful nor apparently serious. To enforce the legal rights of the vendors in these circumstances would be to exact a harsh and excessive penalty for a comparatively trivial breach.[17]

What is particularly fascinating is the way the courts in *Union Eagle* dismiss *Legione* as not being the law in Hong Kong or England and therefore not to be applied. How is it that Hong Kong and England are so different from Australia that the same law cannot be applied? Australia has the same common law roots as Hong Kong. What is it that makes it 'just' in Australia for a purchaser to obtain equitable relief for a late payment but 'unjust' in Hong Kong or England? The genius of the common law is its ability to adapt, change and re-invent itself over time so as not to become a slave to the conventions and perceptions of the past. It is fluid and alive. To dismiss a case on the basis that it is 'not the law in England and Hong Kong' is to remain a slave to a decision rendered nearly a century before and to thereby stagnate the law. I also suggest that as the court

15 (1983) 152 CLR 406.
16 Ibid at 429.
17 Ibid. Shortly thereafter the Australian High Court again had the opportunity to review a situation where a purchaser tendered purchase monies after the time called for in the contract in *Stern v McArthur* (1988) 165 CLR 489. In *Stern*, a divided court, in a 3-2 decision, followed *Legione* and found in favour of the purchaser.
18 See *R v Phoenix Assurance Co Ltd* [1976] 2 FC 649 at 655 as per DeCary J 'There can be no *stare decisis* between judges of the same court. There may be a question of collegiality in a case where the facts are identical, or at least similar to the extent that a decision cannot be ignored.' See also *Re Canada Temperance Act* [1939] 4 DLR 14 at 33 as per McTague JA 'The Privy Council itself long ago also suggested that it had a right to go behind its own decisions. *Ridsdale v Clifton* (1877) 2 PD 276. The principle seems to have been decided finally in *Read v Bishop of Lincoln*, [1892] AC 644 at 655 where Lord Halsbury LC said: 'In the present case their Lordships cannot but adopt the view expressed in *Ridsdale v Clifton* as to the effect of previous decisions. Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which decisions rest, and to give effect to their own view of the law'.

of last resort, the Privy Council was not bound by any of its prior decisions.[18] It was free to take a fresh look at this case without being shackled to cases decided eighty years prior whose facts were not at all similar to those before it.

Good faith

Of the three levels of court which heard this case, only the Hong Kong Court of Appeal decision was not unanimous. Godfrey JA found the vendor's actions to be appalling:

> There was no reason why the jurisdiction of equity should be trammelled into a channel whereby it relieved against one form of unconscionability but not another. Where the circumstances established that it would be unjust, and inequitable, to allow the vendor to rely on the forfeiture and to resist specific performance, the court of equity would intervene at the suit of the purchaser to restrain him from doing so. It *was* unconscionable for one party to take unfair advantage of another, because of some slight or trivial breach of contract, not going to the substance of the bargain. This sort of case was the exemplar for the intervention of equity. If it was the common practice of vendors to seek to take advantage of a few minutes' delay by solicitors (or their messengers) to call off the bargain they had made with their purchasers then it was past high time for the court to step in to put a stop to it.[19]

These comments are not without some merit. However, unconscionability is typically utilized in cases where there was inequality of bargaining power or where one party had overwhelming or self-interested power or where one party is 'transactionally disadvantaged or is at some special disadvantage.'[20]

Union Eagle is unlike the typical case in which unconscionability is raised. The purchaser in *Union Eagle* was not 'transactionally disadvantaged' nor did there seem to be any inequality of bargaining power among the parties. As such the characterization of the actions of the vendor as unconscionable may be somewhat inaccurate. However, the action of the vendor in taking advantage of the minutest of time breaches was nonetheless excessively self-interested. There is ample literature regarding the need for parties to a contract to observe 'reasonable standards of fair dealings' and to comply with 'community standards on commercial decency ... fairness and reasonableness.'[21] Whether one calls

19 [1996] HKC 243.

20 See PD Finn, 'The Fiduciary Principle' in T Youdan (ed) *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) pp 1-56.

21 See the following articles and the myriad of authorities set out therein. Edward Belobaba, 'Good Faith in Canadian Contract Law' 1985 Law Society of Upper Canada Lectures p 78; MG Bridge, 'Does Anglo-Canadian Law Need a Doctrine of Good Faith?' [1984] Can Bus LJ 413; and PD Finn, note 20 above.

such a concept a doctrine of 'good faith', a principle of 'unconscionability' or a canon of 'protective responsibility' it does not change the fact that there are instances when equity will prevent a party from taking unfair advantage of the strictness of the common law; that is after all, why equity was created. Godfrey JA stated there is no logical reason why equity should be allowed to intervene in some unjust situations but not others. In *Union Eagle* the vendor suffered no prejudice, nor any loss by the ten minute delay. In my view the advantages of certainty in commercial contract — which appears to be one of the principles upon which all three courts decided this case — cannot oust equity's role in barring a vendor from requiring a purchaser to complete the transaction by the exact minute stipulated in the contract.

De Minimis Non Curat Lex and good faith

The vendor in *Union Eagle* received exactly what it bargained for, namely the agreed upon purchase price, at substantially the same time. The delay was trivial and immaterial to the substance of the transaction. As such should not the Latin legal maxim *de minimis non curat lex*[22] have some application? In Ontario, the *de minimis* doctrine is used most often by the courts when faced with a minor discrepancy between the actual size of a parcel of real property and the size as stated in the agreement of purchase and sale. In such cases, provided it is determined that the purchaser received substantially what he or she bargained for, the court will not allow one party to repudiate the agreement on that basis alone. In such cases equity amends these bargains by amending the size of the lands to be conveyed.

The making of real property requisitions is another area where equity intervenes to prevent a purchaser from refusing to close if all alleged title defects are not made absolutely perfect. In the Ontario case of *Bank of America* v *Mutual Trust Co*[23] the court chastised the defendant and its solicitor for making a large number of largely technical or incorrect requisitions in order to release the defendant from completing the transaction.[24] In that decision, the issue of good

22 Translated per *Black's Law Dictionary* as 'the law does not care for, or take notice of, very small or trifling matters' or 'the law does not concern itself about trifles'. See also Sir Walter Scott's (later Lord Stowell) comments in *The Reward* (1818) 165 ER 1482 at 1484: 'The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *De minimis non curat lex*. — Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.' See also *R* v *Webster* (1981) 15 MPLR 60 at 63 as per Vannini DCJ '... I do hold that the maxim is part of the common law of Ontario and applies to both civil causes of action and to offences created by ... statute.'

23 (1998) 18 RPR (3d) 213, aff'd (2000) 30 RPR (3d) 167 but varied as to interest payable on the damage award.

24 Ibid at 249. Interestingly, Hong Kong solicitors are constantly berated by the Hong Kong courts for raising trivial and technical requisitions that do not go to the substance of the vendor's title and so the comments in *Bank of America* appear to be shared by courts in Hong Kong. See *Castle City Ltd* v *Choi Yue Development Ltd* (1995) HCt, MP No 1147 of 1995 and *AIE Co Ltd* v *Kay Kam-yu* (1995) CA, Civ App No 45 of 1995 as cited in J Sihombing, 'Conveyancing Up-Date' in P Wesley-Smith (ed) *Law Lectures for Practitioners 1996* (Hong Kong: Hong Kong Law Journal Limited, 1996), at 175-76.

faith in the performance of contracts was raised by the court. Farley J stated that if the defendant had grounds to avoid its responsibilities under the contract, it had to act 'reasonably and in good faith in exercising its rights; it must not do so in a capricious manner.'[25] I suggest that acting in good faith would include not acting upon an immaterial default to terminate the agreement in order to sell at a higher price. The degree of materiality of the breach should be considered before a court allows a bargain to be terminated because one party failed to perform strictly in accordance with its terms. Farley J also cited with approval *Mason* v *Freedman*[26] in which Judson J determined that where a vendor seeks to take advantage of a provision in an agreement of purchase and sale to resile from the bargain, he,

> must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner ... Vendors and purchasers owe a duty to each other to act honestly to perform a contract honestly made. As Middleton J put it in Hurley v Roy (1921), 50 OLR 281 at p. 285, 64 DLR 375 at p 377: The policy of the court ought to be in favour of the enforcement of honest bargains ...[27]

In all of the above situations, it would appear that the courts apply, either overtly or discretely or under the guise of 'good faith', the concept of *de minimis non curat lex* in reaching their decisions. Query why the concept of *de minimis* may apply to the quality[28] or quantity[29] of title of the real property being purchased, but it cannot be applied to a closing delay of 600 seconds?

All three courts in *Union Eagle* failed to take into consideration that minor delays are inevitable in daily modern life. Traffic can become jammed due to, among other things, volume or accident. Banks may delay issuance of closing funds due to internal administrative errors or delays. Penalizing the purchaser for such delays when they have not caused the vendor any harm is grossly unfair. Is allowing a few minutes delay going to introduce such uncertainty into global commerce that it will crumble? I suggest the opposite is true. As Mr Justice Farley suggested, documents in a real estate transaction should be read 'as to give them business efficacy (which I am of the view is the reasonable and responsible way of doing so)'.[30] I would suggest that every business contract, if

25 Note 23 above at 269.
26 [1958] SCR 483.
27 Ibid at 251.
28 In *Fossume* v *Requa* 113 NE (New York Court of Appeals) 330 it was held that the 'maxim can only apply to imperfections in title so slight that the court can say of them, the parties to the action did not have such defects in contemplation, and if they had they would have disregarded them' (at 332). In this case an easement for telephone services was held not to be *de minimis*.
29 See *Nashville Contractors Ltd* v *Middleton* [1983] 19 ACWS (2d) 411 where a purchaser was required to close a transaction for the purchase of 2.5 acres where it was found that the property contained only 1.8 acres. The court determined that acreage was not a factor in the purchaser's decision to purchase and that he had previously inspected the property and found it to be acceptable.
30 Ibid at 411.

read so as to give it business efficacy, would allow a 'grace' period of a few minutes, except in those cases where damage will result if the contract is not performed in absolute strictness. In business, parties expect that a bargain which was negotiated will be completed. Anyone familiar with the world of commerce will confirm that minor delays are an inevitable part of business. However, it is not expected that one party will seize upon an immaterial and trivial delay in order to resile from a bargain.

What time is it?

The Privy Council in *Union Eagle* refrained from addressing the minor nature of the breach and stipulated that the rule should apply to all delays, even a delay of less than a minute; and therein lies its defect. Commerce cannot operate effectively if everyone is busy synchronizing his or her watches and counting the seconds to closing. When it comes to the exact timing for transactions which take place in a solicitor's office and not at a government office (whose clock is arguably the governing time) 'time' becomes very imprecise. Imagine a situation in which the purchaser's solicitor's timepiece is a few minutes slow while the vendor's solicitor's timepiece is a few minutes fast. In such a situation, 'does anyone really know what time it is?'[31]

Union Eagle also fails to consider the effect of unavoidable delays. Let's assume that a transaction required the transfer documents to be delivered to the vendor's solicitor's office (located at the top floor of the Cheung Kong Centre) at or before 5:00 pm. In such a case it is possible for there to be an elevator power failure in the Cheung Kong Centre which prevents the closing or that the Cheung Kong Centre could be evacuated and closed due to fire (or fire alarm) or even a bomb threat. According to *Union Eagle*, the vendor could rely upon the 'time of the essence' provision, repudiate the deal, and keep the deposit. According to *Union Eagle* equity amends no man's bargain and therefore the courts cannot create an extension for unavoidable delays or acts of God unless the contract specifically contemplated the situation (which most don't). This is a commercially unacceptable and unjust result.

Public policy

One could also evaluate the *Union Eagle* decision from a public policy perspective. Practically speaking, the application of 'time of the essence' is only used in aid of a person extricating him or her self from a contract. It is reasonable to conclude that the only reason for the vendor in *Union Eagle* (or any vendor for that matter) not to close this transaction was that there was a severely rising

31 And, as a practical commercial matter, should anyone really care?

market. It is inconceivable that the vendor in *Union Eagle* would have taken such an avaricious position in a falling market or even in a stable market where a replacement purchaser would not be easy to find. As a result, by strictly interpreting the 'time of the essence' provision of the contract in *Union Eagle*, the courts in effect, determined that the vendor's right to be greedy outweighed the purchaser's right to fair play. Unfortunately, they went even further by rewarding the vendor for its greed by allowing it to retain the deposit of HK$420,000. A cynic might cite this case as evidence that in Hong Kong and in England 'greed' really *is* 'good'. But is it to be preferred over decency and fair play? I am unaware of any public policy rationale which would support this notion. I suggest that from a public policy perspective *Union Eagle* is wrongly decided. A strict interpretation of 'time of the essence' for trivial breaches thereof does nothing more than promote and assist greed in business. In my view, the courts should neither encourage nor reward such behaviour.

Towards a workable solution

Fortunately, as previously mentioned, some Canadian courts have taken a kinder, gentler and more practical approach to the issue of 'time of the essence'. In *Salama Enterprises (1988) Inc* v *Grewal* [32] for instance, the court dealt with the applicability of 'time of the essence' to an extension coupled with a situation where the vendor still had outstanding obligations. The court in *Salama* followed the comments of Madam Justice Hetherington in *Landbank Minerals Ltd* v *Wesgo Enterprises Ltd*,[33] in stating that 'If there are circumstances which make it unjust or inequitable for a party to insist that time is of the essence, the Court may refuse to give effect to this provision in the agreement.' As such there appears to be some precedents in Canada that suggests there are instances where 'time of the essence' will not be enforced. However there is no test set forth by the courts in order to determine those instances in which 'time of the essence' will not be enforced.

Is it possible then to construct a workable test which would allow equity to provide relief to plaintiffs who are unjustly punished by the strictness of the common law rules while still providing certainty to commercial contracts? To do so would require a balance to be struck between the concerns of the courts in *Union Eagle* (being the need for certainty in the time of completion of the contract), the comments of Godfrey JA, Madam Justice Hetherington and the court in *Legione* (being the need to review the triviality or materiality of the breach and the lack of substantive impact upon the other party), the current law regarding trivial irregularities and the need to follow public policy. I suggest

[32] (1992) 90 DLR (4th) 146.
[33] (1981) 21 RPR 220.

that the proper test for both Hong Kong and Canada is that equity *may* intervene to alleviate the harsh result of a strict interpretation of 'time of the essence' where:

1. neither party had, prior to the closing date, advised the other of the importance of the exact closing time;
2. the time breach was unintentional or unavoidable;
3. the time breach was trivial or immaterial; and
4. the non-breaching party did not suffer any harm or detriment as a result of the time breach.

Provided that a plaintiff is able to establish all of these conditions, equity should intervene to complete the contract in accordance with all of its other terms as there would not be any commercial reason to allow the vendor to resile from the bargain. This test balances the need for certainty in commercial contracts with the realities of day-to-day life and the actual impact upon the non-breaching party. It also requires a vendor wishing to resile from an agreement of purchase and sale to use common sense and commercial decency in accepting an apparent repudiation, as its decision will be evaluated against the actual damages caused by a trivial delay. Finally, the test avoids the unjust enrichment of a vendor who suffered no damage by a trivial delay and thereby requires agreements of purchase and sale to be read with business efficacy so as to promote the enforcement of bargains honestly made. By applying this test in *Union Eagle* one would have found that,

(i) the vendor at no time advised the purchaser of the importance of the 5:00 pm closing time;
(ii) the purchaser's time breach was quite unintentional (in fact the vendor had been repeatedly advised that the purchaser would complete the transaction on the closing date);
(iii) the ten minute delay in completion was exceedingly trivial; and
(iv) the vendor provided no evidence of any damage to it resulting from the 600-second delay.

As such the purchaser in *Union Eagle* would have been successful and global commerce would still have survived.[34]

[34] *Union Eagle* also raises a number of points that the reader may wish to ponder in his or her own mind. Should the vendor's solicitor's clerk have even telephoned for instructions when the messenger was standing before her with all necessary documents and money at just ten minutes past the appointed time? Did this call prod the vendor into choosing not to close? Did the vendor interpret this call to be its solicitor's advice not to close?

The Privy Council had a wonderful opportunity to bring the law squarely within community standards of commercial decency, fairness, reasonableness and the realities of 21st century life. It failed to take advantage of this opportunity. It is hoped that this case will never be followed in Canada and that Hong Kong's Court of Final Appeal[35] will one day be given the chance to rehabilitate the law in this area.

35 The international makeup of the Court of Final Appeal, together with the growing interconnectedness of the world, should create a broader and more modern approach to the law in Hong Kong. It should also result in decisions from other common law countries being carefully considered in order to arrive at a 'just' result, rather than being dismissed as inapplicable on a jurisdictional basis.