LP 3/00/8C

2867 2157

Urgent by fax : 2509 9055
26 March 2002

Mr Paul Woo,
Clerk to Bills Committee,
Legislative Council Secretariat,
Legislative Council Building,
8 Jackson Road,
Central,
Hong Kong.

Dear Mr Woo,

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001

Meeting on 8 March 2002

I refer to my letter dated 15 March 2002, which was an interim reply to the questions in paragraph 8 of the draft minutes of the meeting of the Bills Committee held on 8 March 2002.

The present letter gives our reply to the question in paragraph 8(b). It also supplements our reply to the question in paragraph 8(c), which was mainly answered in my letter dated 15 March 2002 to Ms Bernice Wong, Assistant Legal Adviser, Legislative Council Secretariat. I noted in the 15 March letter to you that the reply to paragraph 8(b) and (c) required the assembly of detailed and extensive information. I am grateful for your telephoned advice that papers relevant to the questions which were previously sent to the LegCo AJLS Panel need only be identified in the reply, and that this department does not have to further copy the papers for the Bills Committee.

Paragraph 8(b) how Parts V and VII of the Bill had addressed the concerns expressed by respondents in the relevant consultation exercises conducted by the Administration

Part V (marital rape)

On 16 January 2001, the Administration sent an Information Paper to the LegCo AJLS Panel for the Panel's meeting held on 16 January 2001. Annex A to the Information Paper attached a copy of a Consultation Paper issued in October 2000, and Annex B summarised the detailed responses of the consultees together with the Administration's comments on those responses.

On 6 March 2001, the Administration sent a letter to the two legal professional bodies and the two law schools for purposes of further consultation requested by the AJLS Panel at its meeting on 16 January 2001 (a sample letter is copied at **Annex A**). Annex I to that letter was a copy of the Information Paper for the AJLS Panel referred to above (a copy of which is omitted for the reason noted). Annex II to the letter (a copy of which is included) was a Discussion Paper dated March 2001 in which the Administration put its case for the proposed amendments concisely, drawing on the information at Annex I.

For an indication of how the Administration addressed the concerns of the two law schools in this further consultation, see my letter dated 15 March 2002 to Ms Bernice Wong. In respect of the further consultation of the legal profession, attached at **Annex B** is a copy of a letter dated 18 April 2001 from the Hong Kong Bar Association which expressed support in principle for the Administration's proposed legislation. Attached at **Annex C** is a copy of a letter dated 25 April 2001 to the Administration from the Law Society. Attached at **Annex D** is a copy of the Administration's reply dated 26 April 2001 to the Law Society.

Part VII (return of deposit)

The way in which the Administration addressed the concerns of consultees in this matter is dealt with in two papers for the AJLS Panel which were copied at Appendix I (LC Paper No. CB(2)864/00-01(04) – dated February 2001) and Appendix II (LC Paper No. CB(2)1249/00-01(02) – dated March 2001) to the paper dated 15 March 2002 prepared by the Council Business Division 2, LegCo Secretariat (LC Paper No. CB(2)1532/01-02(02)).

As a further indication of the Administration's position regarding the proposed amendment, attached at **Annex E** is a copy of an article by Michael E. Kowalski "Good Faith, Greed and Time of the Essence or How to Make HK$15 Million in 600 Seconds (Reflections of a Canadian

Property Solicitor)" (2001) 30 HKLJ 476-489.

For example, at p.487, the author suggests that, from a public policy perspective, the Privy Council case Union Eagle Ltd v Golden Achievement Ltd [1997] 2 All ER 215 was wrongly decided, on the ground that –

> "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."

At p.488, the author proposes a test to balance "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".

The object of the proposed amendment is to provide the court with an express statutory power which will enable it to use this or other appropriate tests for the purpose of deciding, in all the circumstances, whether it would be just or not for the vendor to retain the deposit or for the deposit to be returned to the purchaser.

Paragraph 8(c) on Part V of the Bill, why no amendments were considered necessary in respect of certain sexual offence provisions in Part XII of the Crimes Ordinance (Cap. 200) where "consent" might be a relevant condition for defence (e.g. offences specified in sections 118A, 122, 123 and 125 of the Ordinance)?

For the Administration's current position on this question, see my letter dated 15 March 2002 to Ms Bernice Wong.

We also have a copy of a letter dated 24 March 2002 to the Bills Committee from Mr Sin Wai Man, Lecturer, School of Law, City University of Hong Kong, concerning this question. The Administration commented on several of the detailed submissions in Mr Sin's letter in the correspondence copied with my letter dated 15 March 2002 to Ms Bernice Wong. I will write to you again after we have considered the further

submissions in Mr Sin's letter.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

Enc.

#49346

Annex A

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法律政策科

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電話號碼 Tel. No.: 2867 2157

6 March 2001

Herbert H K Tsoi Esq,
President,
The Law society of Hong Kong,
3/F wing On House,
71 Des Voeux Road,
Central,
Hong Kong.

Dear Mr Tsoi,

Proposed amendments to the Crimes Ordinance (Cap.200)
Marital rape and related sexual offences
LegCo Panel on Administration of Justice and Legal Services

Please find enclosed at Annex I a copy of the Administration's Information Paper on the above matter which was submitted for the meeting of the LegCo Panel on Administration of Justice and Legal Services held on 16 January 2001. Attached to the Information Paper are copies of -

- the Administration's Consultation paper on Marital Rape and Related Sexual Offences (Annex A);
- a summary of and a reply by the Administration to the more detailed responses of consultees (Annex B); and
- copies of the responses (replied to in Annex B) from the Bar Association, the Law Society, the City University of Hong Kong, and the University of Hong Kong.

At its meeting on 16 January 2001, the Panel noted that the issues were highly technical and that the Bar Association, the Law Society and the two law schools would at that stage have had insufficient time to consider the Administration's preferred approach as evinced in the Information Paper and its annexes. The Panel therefore requested the Administration to liaise with the professional bodies and the law schools in order, if possible, to reach a consensus view before returning to the Panel (it is proposed to return to the Panel on 24 April 2001, for which purpose the Administration is required to provide a finalised paper by 17 April).

The discussion at the Panel meeting centred on the Administration's twin recommendation that -

(a) section 118 of the Crimes Ordinance (Cap.200) be amended to make it clear that marital rape is an offence and delete "unlawful" from that section; and
(b) in respect of the other sexual offences, "unlawful" be defined non-exhaustively under section 117 to include non-consensual marital intercourse.

One member of the Panel suggested that if "unlawful" is defined as proposed under section 117 that may also suffice to clarify the term under section 118 without having to delete it. The Panel also requested the Administration to prepare draft amendments to sections 117 and 118 to allow consideration of how the recommendations would appear in legislative form. A working draft of the proposed amendments is being prepared and will be sent to you as soon as it is ready.

For the purpose of the liaision requested by the Panel and addressing the above and associated issues, a Discussion Paper is attached at Annex II. We would be grateful for any comments the Law Society may wish to make on the Discussion Paper, Annex B to the Information Paper and the working draft (including whether it supports the Administration's proposed approach in principle), if possible by 26 March 2001. Please let me know if you would wish to meet and discuss the issues with representatives of the Administration.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

Annex II

Discussion Paper

Proposed amendments to the Crimes Ordinance (Cap. 200)
Marital rape and related sexual offences

Purpose

The aim of this paper is to summarise the Administration's proposals – and their context – for limited amendments to be made reasonably quickly to the Crimes Ordinance (Cap. 200) to make a clear and unequivocal statement that marital rape is an offence while avoiding unintended consequences in respect of other sexual offences. The paper also addresses an ancillary matter regarding some extra small amendments to two marital defences provided under sections 124 and 146 of the Ordinance respectively which it is considered should be made in the interests of child protection and to maintain consistency with the principle that a marital relationship does not negate the requirement for consent in the sexual context.

Object

2. The object which the Administration is seeking to achieve in the current exercise is -

(1) to amend Part XII of the Crimes Ordinance to ensure beyond doubt that marital rape is an offence; and

(2) to achieve that object without –

(a) the delay that would be incurred by a wide-ranging review of sexual offences; or

(b) inadvertently altering the scope of other sexual offences before a wider review can be undertaken.

Background

3. In a letter dated 17 May 2000 to the Department of Justice, the Hon Margaret Ng, Chairman of the Legislative Council Panel on Administration of Justice and Legal Services, noted that there was doubt whether the term "unlawful sexual intercourse" in section 118 of the Ordinance covered marital rape and considered that an amendment is necessary to make the law clear. At the meeting of the Panel on 20 June 2000, the Chairman suggested that the amendment take the form of the deletion of "unlawful" from section 118 and an express declaration that the crime of rape covered marital rape. Similarly, the United Nations Committee on the Elimination of Discrimination against Women commented in 1999 and 2000 that the term "unlawful" may create ambiguities and expressed concern that marital rape is not considered a criminal offence in Hong Kong.

Problem

4. The problem with the current law related to marital rape may be summarised as follows –

(1) section 118 makes non-consensual "unlawful sexual intercourse" an offence (rape);

(2) under the traditional common law meaning of "unlawful", with certain exceptions, a wife could not withdraw her consent to marital intercourse and "unlawful" was defined as outside marriage;

(3) in Reg v R [1991] 1 WLR 767 the House of Lords held that it is clearly unlawful to have intercourse with any woman, married or not, without her consent, and "unlawful" is therefore surplusage in the offence of rape. This approach was adopted by the Administration;

(4) however, it is arguable that Reg v R was contrary to the intention of the legislature, or may not be good law in the Hong Kong Special Administration Region after 30 June 1997 despite the continuity of the common law provided for under Article 8 of the Basic Law and strong obiter approval by the Hong Kong Court of Appeal in HKSAR v Chan Wing Hung [1997] 3 HKC 472, a case under section 119 (procurement of unlawful sexual act by threats or intimidation) rather that section 118;

(5) accordingly, amendment of Part XII is desirable to make the matter clear.

Definitions

(1) "unlawful"

5. At common law, "unlawful" in respect of rape and related sexual offences means either outside marriage or (under Reg v R and Chan Wing Hung) within marriage where the wife does not consent to marital intercourse (hence making "unlawful" surplusage in section 118).

(2) "unlawful sexual act"

6. Section 117(1A) of the Ordinance defines "unlawful sexual act" as –

(a) unlawful sexual intercourse;

(b) buggery or an act of gross indecency with a person of the opposite sex with whom a person may not have lawful sexual intercourse; or

(c) buggery or an act of gross indecency with a person of the same sex.

7. In the Administration's view of "unlawful" under the present common law (to be clearly reflected under the proposed amendments), of the definition of :unlawful sexual act" in section 117(1A) -

(1) subparagraph (a) would apply to unmarried parties ("unlawful" as outside marriage) or to a husband and wife where the wife did not consent to marital intercourse (Reg v R: it is clearly "unlawful" to have intercourse with any woman without her consent);

(2) subparagraph (b) would only apply to unmarried parties since a husband and wife, being bound by matrimony, may have "lawful" sexual intercourse with each other. (Note that non-consensual buggery with any person is an offence under section 118A.); and

(3) subsection (c) would only apply to unmarried parties (same sex marriage not being valid under Hong Kong law).

Consultation

8. The Administration canvassed three options for amendment in its Consultation Paper (paragraphs 18 to 32) –

Option 1 : maintain the status quo, relying on Reg v R.

Option 2 : make it clear in section 118 that marital rape is an offence, and delete "unlawful" from the section.

Option 3 : clarify the meaning of "unlawful" in "unlawful sexual intercourse" and "unlawful sexual act" to ensure that in the other sexual offence sections

the term means outside marriage, or within marriage in any circumstances where the wife does not consent.

9. As noted at paragraph 6 of the Administration's Information Paper dated January 2001 to the Panel, only one respondent supported Option 1. Six respondents supported Option 2 alone, and seven respondents supported Option 3 alone. Seven respondents supported a combination of Option 2 and Option 3.

Recommendation

10. Following consultation, for the reasons given in Annex B to the Information Paper and more briefly in this paper, the Administration recommended (Information Paper, paragraph 4) the adoption of a combination of Option 2 and Option 3 to the effect that rape and other sexual offences should be clarified by -

(1) deleting "unlawful" from section 118 and adding an express provision that a marital relationship is immaterial to the offence of rape (Option 2); and

(2) in respect of other sexual offence sections, defining "unlawful" non-exhaustively under section 117 to include non-consensual marital intercourse (Option 3).

Reasons for adoption both Options 2 and 3

11. Reasons not to adopt Option 2 alone include -

(1) to avoid the effect of the expressio unius rule of statutory interpretaion (to include the one is to exclude the other) and pre-empt any suggestion that, by selectively deleting "unlawful" from section 118, the legislature intended that the term should take its traditional common law meaning in the other sexual offence sections (see Smith and Hogan Criminal law 7th Ed., p.475, as cited in paragraph 7.03 of Annex B to the Information Paper);

(2) to ensure that the supplementary common law meaning of "unlawful" definable from Reg v R and Chan Wing Hung, of within marriage but without consent remains applicable as appropriate to the circumstances of the case in the other sexual offence sections. It is as important that the interests of spouses be protected, as applicable, under the other sexual offence sections as under section 118;

(3) to make it clear that, where one of the elements of the offence is non-consensual marital intercourse, the prosecution would have charging options, under other sexual offence sections, in addition to marital rape under section 118 (see Archbold 2000, para. 20-14, as cited in paragraph 6.08 of Annex B to the Information Paper); and

(4) to take advantage of the usefulness of the inclusive or non-exhaustive definition as a means of providing both certainty and any required flexibility in the law. Stipulating that "unlawful" includes non-consensual marital intercourse would make it certain that marital rape can feature under the other sexual offence sections while allowing the court to apply such other meaning as may be appropriate in the circumstances of the case. For example, outside marriage in the case of unmarried parties under section 119, as in Chan Wing Hung, or under section 127 (abduction of unmarried girl under 18 for unlawful sexual intercourse: R v Chapman [1959] 1 QB 100).

12. Reasons not to adopt Option 3 alone include –

(1) taking into account the views of the Panel and the UN Committee on the Elimination of Discrimination against Women noted in paragraph 3 above, the Administration considers that the Crimes Ordinance should be amended

to make it clear beyond doubt - to the layman as much as to the lawyer - that marital rape is a crime;

(2) such unequivocal clarity cannot be achieved if "unlawful", with its ambiguity under the common law, is retained in section 118. Even if "unlawful" is defined in section 117 as proposed under Option 3, it will be necessary to read two sections (117 and 118) together before the scope of that term in section 118 becomes clear; and

(3) the need for clarity in both section 118 and the other sexual offence sections was the principal theme not only of the Administration's discussions with the Panel but also of the Consultation Paper and was supported by most consultees who responded.

Summary of the case for combined amendments

13. As may be noted from this paper and its associated papers, the Administration has proposed the combined amendments to sections 117 and 118 to ensure that the deletion of "unlawful" from section 118 does not lead to unintended results in respect of the other sexual offence sections in which "unlawful" is to e retained pending a wider ranging review that is beyond the scope of the current exercise.

14. Further the combined amendments will make it certain that the modern common law principle evinced in Reg v R and Chan Wing Hung (namely, that it is unlawful to have intercourse with any woman without her consent) is clearly reflected in the Crimes Ordinance. The proposed amendment to section 118 will provide the intended unequivocally clear statement that marital rape is an offence. The proposed non-exhaustive definition of "unlawful" in section 117 will overcome the expressio unius rule and ensure that marital rape can, according to the circumstances, feature in the other sexual offence sections and provide the prosecution with charging options for the protection of spouses in addition to section 118.

Ancillary amendments to sections 124(2) and 146(3)

15. The Administration has prepared proposed ancillary amendments to the marital defences in sections 124(2) and 146(3) further to paragraphs 7.06 and 7.07 of Annex B to the Information Paper -

(1) under section 124(2) it is a defence for a man to have unlawful sexual intercourse with a girl under 16 if he believed, and had reasonable cause to believe, a woman to be his wife despite the invalidity of the marriage under Hong Kong law. Consistently with the objects of protecting children and ensuring that intercourse with any woman without her consent is unlawful, the Administration considers that section 124(2) should be amended to make it plain that the defence does not apply to non-consensual intercourse; and

(2) under section 146(3) person who commits an act of gross indecency with or towards a child under 16 or who incites a child to commit such as towards him or her is not guilty of an offence under the section if that person is, or believes on reasonable ground that he or she is, married to the child. For similar reasons, this defence too should be expressly qualified so that it does not apply where the child does not consent.

Legal Policy Division
Department of Justice
March 2001

Annex B

LETTERHEAD OF HONG KONG BAR ASSOCIATION

Mr. Michael Scott
Senior Assistant Solicitor General
Department Of Justice
Legal Policy Division
1/F., High Block
Queensway Government Offices
66 Queensway
Hong Kong

Your Ref : L/M (2) to LP 5014/19/1/1C

18th April 2001

Dear

Proposed Amendments to the Crimes Ordinance (Cap. 200)
Marital Rape and related Sexual Offences

The Bar Association has considered both the Administration's 'Discussion Paper' of March 2001 and the 2nd draft of the proposed legislation dated 3rd April 2001. As previously stated we are in favour of legislative amendment to reflect the acceptance in Hong Kong of the decision of the House of Lords in **Regina v. R.** We acknowledge that the differences between the Hong Kong legislation and that of the U.K. in the relevant legislation makes such amendment more difficult. By contrast to the legislative amendments made in the U.K. in consequence of that decision the proposed amendments to the Hong Kong legislation are cumbersome, but perhaps necessarily so. In the result, the Bar Association supports the proposed legislation.

Yours sincerely

Michael Lunn S.C.

Vice Chairman

The

LAW SOCIETY OF HONG KONG
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Criminal
L/M(2) to LP 5014/19/1/1C

BY FAX (28109928) AND BY POST

25 April 2991

Mr. Michael Scott
Senior Assistant Solicitor General
Department of Justice
Legal Policy Division
1/F, High Block
Queensway Government Offices
66 Queensway, Hong Kong

Dear Mr. Scott,

Marital Rape

I refer to the previous correspondence on the subject.

The Society's Criminal Law & Procedure Committee has considered the Administration's proposal and the Second Working Draft of the proposed amendments. I enclose a copy of the society's Submission for your consideration.

For your information, a copy of the Submission has also been sent to the LegCo Panel on Administration of Justice and Legal Services and the Bar Association respectively.

Yours sincerely,

Patrick Moss
Secretary General

Encl.

SUBMISSIONS ON THE PROPOSED AMENDMENTS TO SECTION 118 OF THE CRIMES ORDINANCE (CAP. 200) - MARITAL RAPE

The Law Society has considered the latest position paper of the government dated March 2001, together with their letter dated 3rd April 2001 enclosing the Second Working Draft of the proposed amendments to the Crimes Ordinance dealing with the issue of marital rape. The Law Society has also had the benefit reading the Bar Association's paper dated 15th March 2001, and the letter of the Centre of Comparative and Public Law, HKU, dated 18 April 2001.

We bear in mind that the genesis and purpose of this exercise was to remove possible ambiguities in the law regarding marital rape and to make it clear that a man may be guilty of raping his wife.

The House of Lords held in R v R [1991] 1 WLR 767 that a husband has no immunity to charge of rape because of his marital status. We believe that case correctly reflects the law not only in England but also in Hong Kong. We consider that deletion of the word "unlawful" in Section 118 of Crimes Ordinance (Rape), as proposed in clause 2(a) of the Second Working Draft, would achieve the desired objective of resolving the current ambiguity in the legislation. We do NOT consider it is good drafting practice to state expressly in the Ordinance, that the rape of a woman by her husband in an offence, as proposed in Clause 2(b) of the Second Working Draft. We believe this is a matter for the government to bring to the public's knowledge rather than making express provision in the legislation.

There also appears to be a good case for amending Section 119 (procurement by threats) and 120 (procurement by false pretences) as has been done in England in order to ensure that wives are equally protected in the circumstances covered by those two sections, including where apparent consent was procured by her husband by threats or false pretences, and also where a third party has procured a wife by threats or by false pretences to have intercourse with her husband. In England the relevant sections were amended by deletion the word "unlawful". If the word "unlawful" remained, then neither the husband nor the third party would be guilty of procuring by threats or false pretences where the sexual act procured could be characterized as 'marital rape', at least without further judicial intervention.

The scope of Sections 119 and 120 in the Crimes Ordinance is, however, wider than the English Sexual Offences Act 1956. The English legislation refers to the procurement to have sexual intercourse. The Hong Kong legislation refers to procurement to do "an unlawful sexual act".

Unlawful sexual act is defined in Section 117(1A) as follows:-

"For the purposes of this Part a person does an unlawful sexual act if, and only if, that person-

(a) has unlawful sexual intercourse;
(b) commits buggery or an act of gross indecency with a person of the opposite sex with whom that person may not have lawful sexual intercourse; or
(c) commits buggery or an act of gross indecency with a person of the same sex."

In our view the simplest and preferred method of amending the Hong Kong legislation, to ensure that both Sections 119 and 120 are applicable in the circumstances outlined above, would be to enact an additional subsection to each of Sections 119 and 120 stating that for the purposes of each of these sections an unlawful sexual act would also include sexual intercourse between a husband and wife. We believe that the gist of the offences in Sections 119 and 120 is to criminalise situations in which sexual intercourse is respectively procured by threats or false pretences etc. Historically, these sections applied to situations where consent was arguably given (were it not, then rape would be available as a charge). We believe that the proposed amendment in clause 1 of the Second Working Draft (to add new subsection (1B) to Section 117) is misconceived in attempting non-exhaustively to define 'unlawful sexual act' to include marital sexual intercourse where it is non-consensual on the part of the wife and this is known to the husband or he is reckless as to this. If consent was not given, as this amendment would require, then the conduct in question may amount to rape (and anyone procuring its commission may be liable according to normal criminal principles as an accessory). If consent was purportedly given, then this will prevent liability for rape under Section 118 (subject to arguments about the validity of the consent). If the case is one in which consent is not necessarily vitiated by the circumstances in which it was given, so that rape is not available, but the case involves the use of threats or false pretences etc, to procure the sexual act (including sexual intercourse between a husband and wife), then it is appropriate to consider the use of Sections 119 and 120. That this is so is clear from the discussion of the equivalent English provisions in Smith & Hogan, Criminal Law (9th ed., 1999), at p.462:

'The meaning given to "consent" in rape left a number of cases where consent was in some way imperfect, but which were not crimes at common law. The law has therefore been supplemented by several statutory crimes involving sexual intercourse where consent has been improperly obtained by threats, false pretences or the administration of drugs; or where the woman, though consenting in fact, is deemed by the law to be incompetent to consent on account of age or mental handicap.'

Specifically, in relation to Section 2(1), Sexual Offences Act 1956 (Section 119, Crimes Ordinance), Smith & Hogan state, at 463:

'....there is some uncertainty as to what threats are sufficiently grave to negative consent for the purpose of rape. Whatever the limits in rape, it is possible that less grave threats will suffice for this much less serious offence'

and, in relation to Section 3(1) (Section 120, Crimes Ordinance), at 464:

'There is similar uncertainly about the meaning of false pretences..... It seems likely that it extends to cases where there is no mistake as to the nature of the act. It may be that any false pretence which in fact induces P to give consent which she would not otherwise have given is enough.'

Smith & Hogan add, at 464:

'The CLRC has recommended that these offences should continue in their present wide terms. Although rarely used, they are useful to deal with the occasional case which does not amount to rape but should not be allowed to fall outside the criminal law.'

We believe that the government's proposed amendment to Section 117, by the addition of a new subsection (1B), runs entirely contrary to this, by stipulating that 'unlawful sexual act' includes marital sexual intercourse if it occurs without the wife's consent and this is known to the husband or he is reckless in this regard (i.e. the elements of rape must be present).

Consequently, we do not support Option 3 and the use of non-exhaustive definition the word "unlawful" for the various sections dealing with sexual offences as proposed by the government. We believe that this step is unnecessary in the absence of any general review of the law relating to sexual offences, which clearly is not under consideration at this stage. Further, we strongly believe that this course would involve making the legislation more complex and confusing than is necessary.

The Law Society's Criminal Law & Procedure Committee
25 April 2001

Annex D

L/M (2) to LP 5014/19/1/1C

2867 2157

Urgent By Fax
26 April 2001

Mr Patrick Moss,
Secretary General,
The Law Society of Hong Kong,
3/F Wing On House,
71 Des Voeux Road,
Central,
Hong Kong.
(Fax No.: 2845 0387)

Dear Mr Moss,

Marital Rape

Thank you for your letter dated 25 April 2001 attaching a copy of the Society's Submission of the same date.

Your letter crossed with my letter dated 25 April 2001 to the President of the Law Society attaching copies of a letter dated 23 April 2001 (revised) from Mr Sin Wai Man, a lecturer of the City University of Hong Kong, to the Department of Justice, and my reply dated 25 April 2001 to Mr Sin.

You will note from the reply to Mr Sin that our consideration of this matter has changed in one significant respect to coincide with the major point (if not in respect of the proposed solution) made in the Society's Submission regarding the meaning of "consent" and the non-exhaustive definition of "unlawful sexual intercourse" under the proposed new section 117(1B) of the Crimes Ordinance. See paragraphs 12-17 of the letter dated 25 April 2001 to Mr Sin, which propose the inclusion of a new definition of "consent" and the addition of paragraphs to the definition of "unlawful sexual intercourse" under the proposed new section 117B which would be alternatives to the meaning of "consent" in rape for the purpose of covering cases of "consent" that has been improperly obtained by threats or intimidation, or false pretences or false representations, or the administering of drugs, or that has been invalidated on grounds of age or mental incapacity.

I have the following comments regarding other points made in the Society's Submission.

Clause 2(b) of the 2nd working draft of the Bill

1. There appears to be no disadvantage in making it express in the Ordinance that the rape of a woman by her husband is an offence. The proposed new section 18(3B) will make the matter very clear (when it has hitherto been in doubt because of the ambiguity of "unlawful") to laymen as well as lawyers since the Ordinance is a public document.

The definition of "unlawful sexual act"

2. It appears that the definition of "unlawful sexual act" in section 117(1A) presents no problems for the proposed amendments. For the reasons noted in paragraphs 6 and 7 of the department's discussion paper dated March 2001, only "unlawful sexual intercourse" in paragraph (a) of the definition of "unlawful sexual act" in section 117(1A) can apply in respect of a husband and wife.

Delete "unlawful" and add subsections to sections 119 and 120

3. It appears that the deletion of "unlawful" and the addition of a subsection to each of sections 119 and 120 stating that, for the purpose of the respective sections, "unlawful sexual act" includes sexual intercourse between husband and wife would encounter difficulties with the expressio unius rule. This would give rise to the presumption that the other sexual offence sections which did not have such deletion and express reference were not intended to apply to marital victims. Provided the meaning of "unlawful sexual intercourse" as updated in Reg v R (i.e. it can refer to intercourse outside marriage or intercourse with any woman, married or not, without her consent) is properly reflected in the current amendments there will be no problem with retaining "unlawful" in the Ordinance pending a wider review.

4. As noted in paragraphs 11(1) and 14 of the department's discussion paper dated March 2001, the non-exhaustive definition of "unlawful sexual act" under the proposed new section 117(1B) (modified as indicated in the second main paragraph above) would be preferable to the selective amendment of the sexual offence sections since it will both overcome the expressio unius rule and ensure that marital rape (and the sexual offences involving a different meaning of "consent" than in rape) can feature in the other sexual offence sections and provide the prosecution with charging options for the protection of marital victims in addition to section 118.

5. In the Administration's view, the incorporation of the meaning of "consent" in rape in the proposed new section 117(1B) should be

retained (but now as an alternative as indicated in the second main paragraph above). This would help to ensure the maximum possible protection of marital victims. It would mean, for example, that section 119 and section 120 would apply to a husband procuring his wife to have sexual intercourse with him by threats or intimidation, or false pretences or false representations, notwithstanding that he would almost certainly be committing rape because he surely could not believe that she consented or at least would be reckless as to her consent. Furthermore, it would also mean that another person (a third party) could be charged (under either section 119 or section 120) for procuring the wife to have sexual intercourse (and actually having that sexual intercourse) with her husband without her consent. It would be an unusual fact situation where the husband in that scenario would not believe that his wife consented (so being within the meaning of "consent" in rape incorporated in the proposed new section 117(1B)) even if not impossible.

Attribution

6. In the first paragraph of the Society's Submission there is a reference to "the Bar Association's paper dated 15th March 2001". This paper should in fact have been attributed to Mr Sin Wai Man. The Bar Association advised of its support of the Administration's approach to the proposed amendments in a letter dated 18 April 2001 to the Department of Justice. The Bar Association has been copied with Mr Sin's letter dated 23 April 2001 (revised) and the department's reply dated 25 April 2001 (in which modifications of the proposed amendments have been suggested) to Mr Sin.

Yours sincerely,

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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.

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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 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]

8 [1915] 25 DLR 420.
9 [1913] 10 DLR 172.
10 *Steedman*, note 8 above at 423.

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*[21] 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

[21] 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.'

[22] (1998) 18 RPR (3d) 213, aff'd (2000) 50 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) HCx, MP No 1147 of 1995 and *AJE 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 7.5 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.