

HONG KONG / JUDGMENT

X v. W**[2018] HKFC 162****COURT**

Family Court

DECIDED

26 September 2018

CASE / FILE NUMBER

FCMC5552/2017

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bjbj FCMC 5552/2017

**[2018] HKFC 162 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NUMBER 5552 OF 2017**

BETWEEN X Petitioner and W Respondent

Coram : Deputy District Judge David Cheung in Chambers (not open to public) Date of hearing :
10th September 2018 Date of handing down decision : 26th September 2018**RULING**

(Leave to file answer out of time)

Introduction

There are two summonses both taken out by the respondent husband (hereinafter called the husband) presently before me. The first is the summons dated 22nd December 2017 seeking an order that inter alia he be granted leave to file and serve his Answer out of time, and he also asked that the decree nisi hearing fixed for 2nd January 2018 be vacated. The second is the summons dated 30th January 2018 seeking an order that the certificate of the registrar dated 28th November 2017 be set aside and this cause be removed from the special procedure list. In fact, by order of the court dated 2nd January 2018, the pronouncement of the decree nisi was vacated and postponed to 2nd March 2018 and further postponed to the present hearing pending the determination of the husband s aforesaid 2 summonses. Thus there is only one outstanding issue to be determined namely whether or not the husband s application for leave should be granted.

Background

The parties were married in June 2014 in Hong Kong, and there is no child of the marriage. The petitioner wife (hereinafter called the wife) is a director of a company and lives in Hong Kong and the husband is a manager and lives in mainland China. The husband is 55 and the wife is 46 years of age. On 5th May 2017 the wife issued a petition based on two years separation. The husband stated that he received the petition on or around 16th June 2017 at his place of residence in mainland China. The husband filed an Acknowledgement of Service form on 14th August 2017 (hereinafter called Form 4) by his former solicitors and indicated that he intended to defend the case but no answer had been filed by the husband so far. According to rule 18(1) of the Matrimonial Causes Rules Cap 179A (hereinafter called), the husband shall, within 21 days after the expiration of the time limited for giving notice of intention to defend, file an answer to the petition. The time limited for giving notice of intention to defend is 8 days after the service of the document, inclusive of the day of service according to rule 15(2) of MCR. If service is to be effected outside the jurisdiction, the time limit for filing the Form 4 is extended to 28 days after the service of the document pursuant to RHC Order 11 r.4. When rule 18(1) of MCR and RHC Order 11 rule 4 are read together, the effect is that an answer must be filed within 21 days starting 28 days after the service of the Petition, i.e. 49 days in all. In the present case, the husband stated in Form 4 that the service of the document was 16th June 2017, so an answer should be filed on or before 4th August 2017. By virtue of 18(2) of MCR, an answer may be filed at any time before directions have been given for the trial of the cause, notwithstanding that the time for filing the answer has expired or that the person filing the answer has not given notice of intention to defend. The directions for trial was given on 28th November 2017. The husband only took out a summons for leave to file his answer on 22nd December 2017, and the husband has not filed a draft answer up till now. The law The solicitors for the husband referred me to a number of cases on this issue including the Court of Appeal decision - YSP and HFF, HA, CACV 235 of 2003 (unreported). In YSP and HFF, HA the relevant principles were identified as follows:

13. The following are the relevant principles gleaned from the authorities on how the court should deal with the delay and extension of time by a party in filing an answer to the petition. The starting point is that under the special procedure the registrar has certified that the petitioner has proved the contents of the petition and is entitled to a decree: *Day v Day* [1979]2 WLR 681. This being the position an application for extension of time to file the answer should be dealt with by analogy to the principle governing the former procedure of an application for re-hearing after decree nisi: *Day v Day*. This principle is that the application should have been refused unless there were substantial grounds for the belief that the decree would have been obtained contrary to the justice of the case : *Owen v. Owen* [1964] P.277. Each case has to be dealt with on its own facts: *Rogers v Rogers* [1974]1 WLR 709. Broadly speaking, the cases may be divided into two types. This division is not exhaustive: Where the applicant was not served at all and the proceedings took place without his knowledge. He would get a re-hearing almost immediately. The applicant knew of the proceedings but chose not to defend. He then changed his mind again and asked for time. He had to satisfy the court that it was more probable that the decree was obtained

contrary to the justice of the case. The husband's case It was submitted that the date given for receipt of the Petition in Form 4 is 16th June 2017 and the first letter sent by the solicitors for the husband was dated 22nd June 2017 in which it was made clear that the date of separation given in the Petition was not acceptable to the husband, so this was not a case of the husband choosing to remain passive or changing his mind about whether he would defend the Petition. It was further submitted that the delay in filing the answer is not due to the fault of the husband but due to the fault of his former solicitors. The husband stated that the wife purchased properties in her name and her sister's name in 2016. He believed that the wife had an ulterior motive in choosing to state April 2015 as the date for the separation so that the said purchase of properties would be after the alleged date of separation. He believed that if he was not granted leave to file the answer to challenge the date of separation, he could be put at an unfair disadvantage in the ancillary relief proceedings. The wife's case It was submitted that there was a serious delay of 5 months and 15 days, and the husband did not offer any reason for his delay in filing his answer even though he had all along been legally represented since 21st June 2017. It was further submitted that it was a waste of time and costs of all the parties to grant the husband to file an answer as the husband agreed to a divorce save and except the date of separation in which the date he did not remember. Discussion At paragraph 5 and 6 of the husband's affirmation, he stated that his former solicitors seemed unsure as to how to proceed and seemed to think the best course was to allow the wife further time to amend the petition and that the husband therefore decided to change solicitors. The husband further stated at paragraph 8 of his affirmation that had the wife's solicitors expressly rejected his proposal, he would have had a better idea of what to do. The complaint of the husband is that the wife's solicitors should reply to the last letter from his former solicitors. In the letter dated 23rd June 2017 by the husband's former solicitors to the wife's solicitors, it was stated that the husband proposed to the wife to change the ground of her petition to 1 year's separation and the husband had no objection to divorcing the wife, and that the husband did not agree the parties had separated for 2 years. The wife's solicitors replied by a letter dated 26th June 2017 and maintained that the parties had separated for 2 years before the petition, and the husband was asked to confirm the date of separation if he alleged the separation was less than 2 years. By a letter dated 27th June 2017, the former solicitors of the husband replied that the husband did not remember the specific date of separation and asked the wife to revise the petition and give the specific date of separation. By a letter dated 21st July 2017 (the last letter), the former solicitors of the husband stated that if they did not receive the reply within the next 7 days, they would take instructions from the husband about defending the case. Given the above, the wife had clearly stated that they maintained their stance of 2 years separation. Also, the former solicitor of the husband had clearly stated that they would take instruction to defend the case if they did not hear from the wife. Under these circumstances, I cannot see any reason why the wife needed to reply to the last letter. I also did not accept the argument put forward by the husband that the delay in filing the answer is due to the fault of the husband's former solicitors. The fact is that nothing had been done by the husband by the expiry of the 7-day deadline and the delay cannot be explained in a

reasonable manner. My view is that this case falls into category of subsection (2) i.e. the husband clearly knew of the proceedings, but chose not to defend. Consequently, the husband has to satisfy the court that there are substantial grounds for the belief that the granting of a decree nisi would be contrary to the justice of the case. Are there substantial grounds for the belief that a decree nisi would be contrary to the interests of justice? At paragraph 9 of the husband's affirmation, he stated that the date given for separation by the wife was inaccurate and that the date for separation was connected with the ancillary matters, and he would be put at an unfair disadvantage in the ancillary proceedings if he was not allowed to file an answer. In the letter from the husband's former solicitors dated 23rd June 2017, the husband agreed to 1 year's separation and they asked the wife to amend the petition. The date of petition is 5th May 2017 and the date of separation stated by the wife is April 2015. Since the husband agreed to 1 year's separation in the said letter and asked the wife to amend the petition to 1 year's separation, the husband's case of the date of separation should be any date between May 2015 to May 2016. Would the husband be put at an unfair disadvantage in the ancillary proceedings if the date of separation is any date between May 2015 to May 2016? The husband's argument is that the date of separation was connected with the purchase of properties in the wife's and that of her sister's name in 2016. What the husband's worry is that the assets obtained pre-separation and post-separation may be relevant to the determination of the matrimonial asset, therefore the date of separation is important. For the present case, the date of marriage is June 2014 and this is a childless marriage and the marriage is short. In LKW and DD at para 93-94, the relevant principles were identified as follows:

93. So where it is a short marriage, the court may well be inclined to regard as excludable non-matrimonial property, assets acquired by one of the parties before the marriage or acquired in the course of the marriage from some wholly external source
94. Where one of the parties acquires certain assets after separation without any help or contribution from the other, the court may well exercise its discretion to exclude such property from an equal division. However, if at Step 2, an endeavor to meet the parties financial needs is the sole or paramount concern, its acquisition after the separation may not prevent such property from being included in the award. My view is that based on the aforesaid, the source of assets will be a material factor in the present case instead of the date of separation. Under these circumstances, I am of the view that there is no substantial grounds for the belief that a decree nisi would be contrary to the interests of justice. Certainly I have not been taken to anything which would lead me to believe that the husband had a reasonable chance of lodging a successful defence. Consequently, the husband's application under the aforesaid two summonses shall be dismissed. Given the circumstances I can see no reason why the wife should not have her costs. Costs will therefore follow the event in the normal way. Order Accordingly, I will make the following order : the summonses dated 22nd December 2017 and 30th January 2018 be dismissed; a Decree Nisi for dissolution of the marriage be granted; the First Appointment hearing shall be restored; the wife's costs of and incidental to the hearing of the summonses dated 22nd

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