

FCMC 807 /2022

[2026] HKFC 7

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MATRIMONIAL CAUSES
NUMBER 807 OF 2022**

BETWEEN

DC

Petitioner

and

AS

Respondent

Coram: His Honour Judge I. Wong in Court

Dates of Hearing: 14 October 2024 and 5 March 2025

Date of the Petitioner's Closing Submissions: 9 April 2025

Date of the Respondent's Closing Submissions: 9 April 2025

Date of Judgment: 12 January 2026

JUDGMENT

(Nullity)

1. The issue at this trial is a rarity these days. The petitioner husband seeks to have his marriage with the wife annulled on the ground

that the marriage was not consummated owing to the wilful refusal of the wife to consummate it. In response, the wife's main defence is that the marriage was consummated on the second day of their marriage.

2. For the ease of reference, I shall refer to the petitioner as "H", and the respondent as "W".

Background Facts

3. H is a local Chinese, and used to practise as a litigation solicitor. He is now aged 54. H retired early shortly after his wedding to W.

4. W, now aged 32, came to Hong Kong from Europe on a series of short-term work model visas until she obtained a dependant visa (through H) immediately after the wedding.

5. The parties met in 2016, soon started a romantic relationship and became engaged in July 2019, and began cohabiting at the beginning of 2020 when they lived together in H's flat in South Hong Kong Island. They then moved into an apartment in the Western District (i.e. the "FMH") shortly before the wedding in January 2021. H says the cohabitation was about 1 year and 2 months before the marriage, but W says it was much longer. Be that as it may, both agree that they had regular sexual intercourse before marriage.

6. The parties were married at the City Hall Marriage Registry in the morning of 6 March 2021 in the presence of a group of about 28 friends. It is to be recalled that it was during the Covid-19 days.

Thereafter, the wedding party immediately began to drink and celebrate, at first outside of the City Hall, before proceeding to Central Pier 9 and thereafter onto H's boat. The wedding party continued to drink, first on the boat and then during the voyage to and arrival in West Kowloon, and inside a suite in a 5-star hotel ("**the Hotel**"), where the parties had booked the suite for the wedding. The wedding celebrations consisting of food, music and karaoke did not end until the small hours of the following day, 7 March 2021, after 2:00 a.m.

7. The parties stayed at the Hotel for a total of 2 nights (the nights of 6 March and 7 March 2021) and checked out on 8 March 2021. They returned to their FMH.

8. In the evening of 8 March 2021, the couple had dinner at a restaurant on Staunton Street in the Central where they had a heated argument. H says it was about their plans for children, and W expressed her disagreement. W slightly disagrees and says this topic was briefly touched upon only. Anyway, both agreed that it was a heated argument. I shall refer to this incident as "**the Staunton Incident**".

9. From 11 March to 12 March 2021, H and W argued over trivial matters of household chores. The dispute was resolved after H had proposed to hire a helper and the parties' relationship improved.

10. On 17 March 2021, W applied for a dependent visa to the Immigration Department, with H being her sponsor.

11. On 19 March 2021, W and H had dinner with friends at a private club. There is a divergence as to what happened. H says W informed him of her decision to leave him. On the other hand, W says she only made suggestion that they should stay apart for a while to attempt to resolve their differences, being instigated by H's perennial unreasonable behaviour towards W.

12. H says W left the FWH on 20 March 2021 and never returned; hence, this was just a 14 day long marriage during which their marriage was never consummated.

13. While W agrees she left the FMH on 20 March 2021 and stayed in a hotel, she maintains they had sexual intercourse in the morning of 7 March 2021 (ie the day following their marriage). She also disputes the date of leaving. She says it was 25 March 2021; and she moved out was for a 6-month "cooling off" period and H agreed to it.

14. In January 2022, H petitioned for the annulment of his marriage pursuant to section 20(2)(b) of the Matrimonial Causes Ordinance (Cap 179) ("MCO").

The Law

15. The relevant part of section 20, MCO states,

"(2) A marriage which takes place after 30 June 1972 shall, subject to subsection (3), be voidable on any of the following grounds only—

...

(b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it;

...

(3) The court shall not, in proceedings instituted after 30 June 1972, grant a decree of nullity on the ground that a marriage is voidable (whether the marriage took place before or after 1 July 1972) if the respondent satisfies the court—

(a) that the petitioner, with knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so; and
(b) that it would be unjust to the respondent to grant the decree.

(4) Without prejudice to subsection (3), the court shall not grant a decree of nullity on the grounds mentioned in subsection (2)(c), (d), (e) or (f) unless the court is satisfied that the proceedings were instituted within 3 years from the date of the marriage.”

(emphasis added)

16. The petition was taken out in January 2022; hence, the bar under sub-section (4) does not apply. At trial, contrary to what he had mentioned in his Opening Submissions, Mr Chow, counsel for W, conceded that W is not relying on the defence under sub-section (3). In any event, it was not so pleaded in her Re-Amended Answer.

Parties' Pleadings and Affidavits

17. I need to say a few words on the parties' pleadings before I deal with their respective case.

18. When this case first came before me, it was already for trial. I must say both parties' preparation for the case left much to be desired. Right at the beginning of the trial, I expressed my dissatisfaction over the state of the parties' pleadings which, as I see it, is the root of their problems. It is not an exaggeration to say that the pleadings are in hopeless shape. Leaving aside the fact that their pleadings were repeatedly amended, the trouble was both parties, or to be more precise,

their legal representatives, failed to state the issues; and worst still they chose to plead unnecessary and irrelevant matters, substantial evidence, and even submissions at length in a liberal manner. The consequence is the parties were out of focus. This had the spiral effect of prompting parties to have filed unnecessary affidavits, again, without focusing on the real issues.

H's Re-re-amended Petition

19. H says the marriage is voidable by virtue of the fact that the marriage has not been consummated owing to the wilful refusal of W to consummate it. For the sake of completeness, I set out the relevant part of his pleadings in full.

8. The marriage is voidable by virtue of the fact that the marriage has not been consummated owing to the wilful refusal of the Respondent to consummate it during the 14 day period they cohabited after the marriage, **and** since her desertion of the Petitioner on 20 March 2021, despite the Petitioner's proposals to the Respondent to consummate the marriage.

Particulars

- (a) On 6 March 2021, after the registration of the marriage at City Hall Marriage Registry in Central, the Petitioner and the Respondent celebrated their marriage with a group of friends in a hotel suite at the (name of hotel) Hotel in West Kowloon Hong Kong. The party included food, music and karaoke and did not end until the early hours of the following day, 7 March 2021. The Petitioner and the Respondent stayed an additional night at the hotel, before checking out on 8 March 2021 **to return home. The Petitioner and Respondent did not consummate their marriage during the two nights they stayed at the hotel.**
- (b) On the evening of 8 March 2021, the Petitioner and Respondent had dinner at (deleted) restaurant (name of restaurant) at Staunton Street, Central. During dinner, the Petitioner and the Respondent had a heated argument over the timing and number of children they would have together. The subject of having children – down to the details of how many children they would have, under differing scenarios of how many were boys and girls, and indeed the names to be given to each – was a matter which the Petitioner and Respondent had previously discussed many, many times (indeed on many occasions,

in the company of their mutual friends) and one on which they had reached full agreement prior to the marriage. But the Respondent changed her stance on these issues during their discussion at the dinner, dismissing the prospects of having children altogether, before telling the Petitioner that she did not wish to discuss the matter any further. This led to a heated and protracted argument between the Petitioner and the Respondent at the restaurant.

(c) In the days which followed the dinner at (Staunton Street) on 8 March 2022, the Respondent began to cite additional other grievances and complaints which she had about her marriage to the Petitioner and about the Petitioner himself. These grievances and complaints had hitherto not arisen between the Petitioner and the Respondent and led to further arguments and disagreements between them in the days which followed.

(d) On or around 17 March 2021, the Respondent asked the Petitioner to complete various forms and sign related documents which she needed to submit to the Hong Kong Immigration Department in support of her application of a Dependent Visa. The Petitioner agreed, and at or around 1:30 pm on 17 March 2021, the Respondent attended at the office of the Petitioner (who was then still employed) to obtain the Petitioner's signature on the relevant documents. Later in the afternoon on 17 March 2021 the Petitioner submitted her application for Dependent Visa to the Immigration Department.

(e) On Friday, 19 March 2021, two days later, the Respondent informed the Petitioner that she had decided she would discontinue cohabitation with the Petitioner citing health issues, her dissatisfaction with the marriage and her unhappiness with the Petitioner. The next day, on 20 March 2021, the Respondent moved out of the (FMH). The Respondent returned briefly to the apartment at or around 9:40 a.m. on 25 March 2021 to pack the rest of her clothes and personal belongings. The Petitioner and Respondent have not cohabited since 20 March 2021. Their marriage on fourteen days earlier – has never been consummated. (emphasis added)

20. Hence, as far as “wilful refusal” is concerned, it was (1) during the 14 day period they cohabited after the marriage, *and* (2) since her desertion of the Petitioner on 20 March 2021.

21. Pausing here, it is important to bear in mind that H, in order to succeed under this ground, has to **prove not only there has not been consummation of the marriage, but also that it has not been consummated**

owing to the wilful refusal of W to consummate it and there must have been proposal made by H for the consummation. The question is, where are the pleading of H's proposal, wilful refusal and their particulars?

22. Mr Marwah initially indicated that H relied on both express and implied proposal. When being pointed out by this court that express proposal was not pleaded, Mr Marwah conceded and changed to say H relied upon implied proposal only.

23. Mr Marwah referred to paragraph (a) of the Particulars where it was pleaded that on 8 March 2021 after checking out the Hotel, the parties returned home. He submitted that the key words being "return home" – H provided a matrimonial home to share and this was an implied proposal. I will deal with this point in the latter part of this Judgment.

W's Re-amended Answer

24. In the same fashion as that of H, much of the matters pleaded in W's Re-amended Answer are irrelevant and unnecessary.

25. Paragraph 3 is in response to paragraph 2 of the Re-re-Amended Petition that W deserted H on 20 March 2021 by moving out of the FMH and that the parties had not cohabited since 20 March 2021. In response, W pleaded 9 sub-paragraphs setting out at length what happened from 26 February 2021 to 23 April 2021 in order to rebut the allegation of desertion.

26. In response to H's Re-re-amended Petition that the parties had executed a prenuptial agreement on 16 January 2021, W chose to

plead at paragraph 6 that W should not be bound by the terms of the Agreement. There followed by 21 lengthy paragraphs setting out her grounds. Many matters so pleaded were just evidence and should not have been pleaded at all.

27. When it comes to the core of the matter, it is W's contention that sexual intercourse did take place after the celebration of marriage, ie in the morning of 7 March 2021. For completeness, I set out the paragraph in its entirety:

As to paragraph 8, the Respondent denies that the marriage has not been consummated owing to her refusal to do so whether wilful or otherwise as alleged or at all. The Respondent further denies that the Petitioner made proposals to the Respondent to consummate the marriage but the Respondent refused to do so whether wilful or otherwise as alleged. The Respondent avers that the parties had sexual intercourse on 7 March 2021 in the morning in (the Hotel) in West Kowloon Hong Kong. The Respondent thereby avers that the marriage between the parties was and is a valid and subsisting marriage

28. It appeared that W has 2 cases. The first and primary case is the parties did consummate the marriage in the morning of 7 March 2021 and the second and alternative case is W denies that H had made proposals to her to consummate the marriage.

29. What followed were not the particulars in support of her assertion that sexual intercourse had taken place as claimed. Instead, what followed were pleading of 9 paragraphs of irrelevant matters including W's claim that their relationship lasted for 5 years prior to the marriage, that they had had discussions about raising a family, and that it was the unreasonable behaviour of H that had led to the breakdown of the

relationship. There is, thus, a total absence of W's particulars in support of her assertion that the marriage was consummated as alleged.

Hs Re-amended Reply

30. In his Re-amended Reply, H's case is simply that sexual intercourse did not take place as alleged because he had drank too much the night before. He was simply too intoxicated and was feeling so unwell that "... he would not have been able to engage in sexual intercourse": paragraph 4. One would have thought that this should be succinctly good enough for the purpose. However, H filed a 14-paragraph Re-amended Reply pleading much of the irrelevant matters and, worst still, much were evidence in support of his contention that W's case "*is incredible, and not only should not be believed but is incapable of belief.*"

31. H even pleaded that W's true motive for the registration of the marriage was for her dependant visa. In his own words, "*The marriage was a sham, orchestrated by the Petitioner (ie H) to enable her to obtain a Dependent's Visa*". Her marriage with H was for an ulterior motive. As I read it, essentially H was saying he had defrauded the Immigration Department. This part of pleadings was only removed as a result of the court's inquiry in the afternoon of the first day of trial. This resulted in H's Re-amended Reply.

32. As a result of clarifications sought from the court, Mr Marwah confirmed that the pleading of "desertion" on the part of W was not used in the legal sense but in its ordinary meaning. What H meant

was while W had cut-off cohabitation and abandoned the relationship, they still had communication and met each other.

33. Mr Marwah confirmed that H's case is:

1. There was no consummation of marriage in the morning of 7 March 2021;
2. H made implied proposal for the consummation of the marriage; and
3. W wilfully refused to consummate without just excuse by leaving cohabitation on 20 March 2021 before parties had the opportunity to consummate.

34. On the part of W, Mr Chow initially submitted that one of the issues of W was if H had proposed, she would not refuse. When being pointed out by this court that it was not so pleaded, Mr Chow withdrew from the position. He then narrowed down W's case to (1) there was consummation of marriage in the morning of 7 March 2021; and if that fails, (2) H did not propose to consummate the marriage, not even impliedly.

Was the marriage consummated in the morning of 7 March 2021?

35. The core issue is if the marriage was consummated in the morning of 7 March 2021, if this question is answered in the affirmative, this would be the end of the matter. The standard of proof is on the balance of probabilities.

36. The legal principles on consummation of marriage are well settled.

37. Consummation means ordinary and complete sexual intercourse, i.e. full and complete penile-vaginal penetration: *W (Otherwise K) v W* [1967] 1 WLR 1554, at 1555C.

38. Consummation must be post-marital. Pre-marital sex does not constitute consummation: Rayden & Jackson on Relationships Breakdown, Finances and Children (2023, Issue 26) (“**Rayden**”) at [5.237].

H’s Evidence

39. H said in his 4th Affidavit dated 17 April 2023 that during the course of the wedding celebration, the party consumed approximately 18 bottles of champagne, 48 bottles of wine, four bottles of whisky and two bottles of vodka. On his part, he consumed approximately one bottle of champagne, 3 to 4 bottles of wines and approximately 321 millilitres of spirits. He was sick and vomited multiple times throughout the night.

40. H woke up, feeling sick with severe stomach cramps, dizziness and a large headache on 7 March 2021, about 8 hours later at approximately 10:30 a.m. He struggled to get into the shower, and then dressed so that he could start work on packing up for checking out the next day. He was exhausted from the amount of packing and tidying he had to do while bearing a full-sized “hangover”. He did not have sexual intercourse with W. He was simply not in the sort of physical condition that morning which would have permitted it.

41. H added that during the course of the years of their relationship before marriage, as their relationship progressed, he and W had settled into a routine for physical intimacy. They typically would have sexual intercourse in the late afternoon, between 3:00 pm and 5:00 pm, on Saturday and/or Sunday. Their preference was usually to brush their teeth, take a shower, etc before intimacy. There was little departure from this routine except during some overseas trips.

42. At trial, H was asked by this court on what happened in the morning of 7 March 2021. He testified that when he woke up, W had already woken up and was lying beside him and might have been checking her phone. W would have said “Good morning, honey”, and he would have said “Good morning, darling”, but he could not remember if they had kissed. If they had, it would have been a morning-greeting kiss. H believed the very first thing he did might have been going into the toilet. He then walked into the dining area. He would have been checking the room and looking at the extent to which they would need to tidy up and pack.

43. When being cross-examined by Mr Chow, H explained why he did not have intimacy with W was he was “hungover”; he simply did not feel well. Further, it was not their routine to have sex in the morning.

44. When his stomach settled, H went out for lunch later in the afternoon for a bowl of noodles. He had lunch alone because by then W had gone out for something else. He did not recall if they had exited the room together.

W's Evidence

45. I have mentioned that W failed to particularize her assertion that the marriage was consummated as claimed in her Re-Amended Answer.

46. In her 68-paragraph long Affidavit dated 27 March 2023 (being W's 4th Affidavit) that was ordered to be filed in support of her claim, there was only one sentence at paragraph at 48, "*On 7 March 2021 in the morning, the Petitioner had sexual intercourse with me in our hotel suite at (name of hotel)*". She then went on to say at paragraph 49 that H "*has exaggerated the amount of alcohol that he consumed and the effect on him. As a matter of fact, the Petitioner did have sexual intercourse with me on 7 March 2021 in the morning*". She also mentioned that all the times she had been taking oral contraceptive pill and H had never worn condom when he had sexual intercourse with her; and on 7 March 2021, she was still taking oral contraceptive pill. This is the total sum of her "evidence". The rest of the affidavit was on detailing their relationship from 2016 up to end of 2021, on events leading to the breakdown of the relationship, on her case that consummation of a marriage is for pleasure and not for procreation of children.

47. W's oral testimony is that while she agreed that H had drunk a lot and was tipsy, he was still conscious and fine. Both went to bed together at around 2:30 am of 7 March 2021 and were too tired to have sex.

48. She thought both woke up at around 9:00 am. She did not recall who woke up first nor did H say anything. Both were happy that morning and H was a little bit tired, They were just hugging, then started kissing, and then both went to brush their teeth. After that, they returned to bed, started kissing and touching each other and had sex. H did not use condom and they used the same usual lubricant. H was on the top and performed normal, there was nothing usual. H had orgasm, she did not. The process lasted around 20 to 30 minutes. When finished, it was about 10:00 am.

Discussion

49. This is a “one to one” contest. As rightly pointed out by both counsel, it hinges on the credibility of the witness.

50. It is right for Mr Marwah to have pointed out that W’s pleaded case of actual consummation is tellingly and fatally brief. What was pleaded was just a bare allegation unsupported by any particulars. Save for this allegation that sex between them was unprotected on 7 March 2021, W did not state in her pleadings the circumstances, eg the time, what happened before or afterwards, whether the parties engaged in foreplay, who initiated intimacy, whether it was aided by personal lubricant, or whether either party achieved orgasm, etc.

51. By the time W filed her affidavit on 27 March 2023, H had already filed his Reply (Amended Reply) where he deposed to what were his activities that morning. W must have realized the core of the dispute was what had happened in that morning; specifically, whether there was

any sexual intercourse, but her affidavit was totally devoid of particulars in rebuttal.

52. W was at times evasive, argumentative and avoided giving a direct answer when being cornered. Under cross-examination, W initially said she did not think the particulars were relevant. She then agreed these were important matters to mention, but gave the excuse that she was just following her lawyers. She was not the one who drafted the affidavit. She also gave the excuse that it was embarrassing. In my assessment, W was all along being legally represented, she could not simply explain it away on the excuse of embarrassment. The absence of these essential particulars is no doubt telling. W had had ample opportunities to have her version known prior to the trial but this part of evidence only came out from the witness box, particularly after she had already heard H's oral testimony.

53. Thus analysed, W's evidence on this issue must be scrutinized with extreme caution.

54. W's evidence is that both were tired and that substantial alcohol had been consumed and only went to bed at around 2:30 am. Both of them must have been exhausted. On balance, it is improbable that they would have woken up at 9:00 am as alleged by W.

55. The parties had lived together for more than a year, plus having been in relationship for a number of years prior to the marriage. W accepted H's version that they had a somewhat settled routine for intimacy. They would normally have sex in the afternoon or evening of

weekends. It is not the case where the parties had never had sex with each other before and hence, normally would eager to have intimacy as soon as possible. Seen in this light, H's version is more believable.

56. The WhatsApp messages exchanged between the parties as early as on 25 March 2021 (the date when W packed her belongings) is telling. On that day in the afternoon (at 1:26:20 pm), H raised for the first time the annulment of their marriage. W's responses were (at 1:42:55 pm to 1.43:06 pm), "*I'll read about the difference between annulment and divorce*" and "*Need to know my legal rights*".¹ W spoke good English and competently gave her evidence in English. She must have understood the ordinary meaning of "annulment" and "divorce" when she wrote the message, though it was highly unlikely that she knew the legal intricacies involved. If the parties had sexual intercourse on 7 March 2021 as claimed, I believe W's response should have been a different one, such as a response saying that the parties could only choose the divorce path and not the annulment path.

57. I acknowledge it is pertinent for Mr Chow to have pointed out that when H said he was very drunk the night before and had serious hangover the next morning when he woke up, it is hard to believe that he was able to recall with precision how much alcohol he had consumed. Further, it is difficult to understand why he had to check his items as soon as he got up when the parties had already decided to check out the Hotel the next day (ie 8 March 2021).

¹ Page 351 of Bundle D

58. I also notice many answers given by H on details of what happened on 7 March 2021 were in uncertain terms, with qualifications such as, “*I believe*” or “*I would have been*” etc being used. H’s evidence that he consumed considerable amount of alcohol was not challenged. On evidence, I believe it was due to H’s then physical condition that he actually did not have much recollection on the details of his activities in that morning. In my judgment, H could have testified in more certain terms if he wanted to but he did not do so. On balance, I believe H’s version is closer to the truth. I find that the physical state he was in was consistent with his claim that he was unable to have sexual intercourse with W. I find that when he woke up, H still had hangover and his stomach was unsettled. Not only that he was not in the mood of having sex with W, he in fact did not have sexual intercourse with her.

Did H have the intention to consummate the marriage and did H make proposal to consummate?

59. A finding against W that consummation of the marriage did not occur on 7 March 2021 is not the end of the matter. It has to be recalled that the parties checked out the Hotel on 8 March 2021 and returned to their FMH. W then moved out on 20 March 2021. It is H’s case that W failed to consummate the marriage during the 14 day period they cohabited after the marriage, **and** since her desertion of the Petitioner on 20 March 2021. It is therefore necessary to examine if H had the intention to consummate the marriage and made proposal to consummate during the relevant time.

60. Mr Marwah set out the relevant legal principles:

61. The petitioner must have the intention to consummate the marriage or he will be barred from seeking relief under this ground: see *WN v XJX* [2018] 2 HKLRD 627 at [22].

62. The petitioner must propose consummation with such “*tact, persuasion and encouragement as an ordinary spouse would use in such circumstances*”. Such proposal may be implied by words or conduct (and may come through a third party); for example, a proposal to consummate may be implied by an offer to share a matrimonial home: see Rayden at [5.238], *Ford v Ford* (1987) 17 Fam Law 232; *Kaur v Singh* [1972] 1 WLR 105; and *Jodla v Jodla* [1960] 1 WLR 236, 239.

63. *Ford v Ford* is a case where the wife had married the husband while the latter was in prison. The husband was granted a home visit on the condition that he had to reside for the period in question with the wife. The wife duly met him from prison. The husband was extremely unpleasant to her and at his insistence the wife drove the husband to the home of his former girl-friend.

64. *Kaur v Singh* and *Jodla v Jodla* are similar cases. In each of these cases, the respondent refused to arrange a religious marriage ceremony (which was a pre-condition for consummation) after civil registration despite being repeatedly requested by the wife.

65. As I have already referred to at [33] above, Mr Marwah relied upon “implied proposal” only.

66. Relying on these cases, Mr Marwah submitted that a proposal to consummate may be implied by an offer to share a matrimonial home. In the present case, it was pleaded in Paragraph 8(a) of the Petition that, "... *The Petitioner and the Respondent stayed an additional night at the hotel, before checking out on 8 March 2021 to return home.*" Hence, so argued by Mr Marwah, H had impliedly made proposal to consummate by offering to share a matrimonial home.

67. Mr Chow did not seek to argue the otherwise.

68. I accept it is sufficient for the pleader to state the material facts, it is not necessary to specifically use the term "implied proposal".

69. It is not in dispute that the parties did return to FMH home on 8 March 2021. On this fact, I accept H did impliedly propose to consummate the marriage. This, however, would not assist H, the reason being that W did return home with H on 8 March 2021. In other words, there was no refusal on her part.

70. The evidence is clear that it was only after the Staunton Incident that the parties saw a slump in their relationship. The question then is, did H make any proposal after the Staunton Incident?

71. I have not been able to find any materials pleaded on the Re-re-amended Petition where H's implied proposal could be inferred. The only relevant part that can be found is at paragraph 9 of his Re-amended Reply where it states,

The Petitioner strenuously denies that he agreed with the Respondent to a cooling-off period for up to 6 months as averred by the Respondent in her Answer. The Petitioner **pleaded with the Respondent on many, many occasions not to leave. On 25 March 2021 (Thursday), when the Respondent returned to the Sai Ying Pun Apartment to pack the rest of her belongings, the Petitioner returned home from his office in Wanchai to implore the Respondent not to leave him, begging her to stay. The Respondent steadfastly refused.** She informed that Petitioner she wanted to be left alone to pack. The Petitioner acceded to the 6-month cooling off period because he had no say in the matter. He did not agree to it. (emphasis added)

72. The fact that H pleaded W to stay was not in dispute. In evidence, W admitted that on 20 March 2021 (a Saturday), W left H and stayed at a hotel. She agreed that H pleaded her to give him a chance and pleaded her not to leave him. H begged in his WhatsApp, “*Give me a chance to show you (name of W). Please don’t leave me. I love you. I will be better. I promise.*” Despite this, W did leave H and only returned on 25 March 2021 to pack her things. She never returned.

73. Considering their terrible relationship at the time, I find that, on evidence, H had used such “*tact, persuasion and encouragement as an ordinary spouse would use in such circumstances*” to plead her to stay and this was his implied proposal. I therefore find that H did intend to consummate the marriage and on 25 March 2021, H did make the proposal to W.

Did W wilfully refuse?

74. I have already referred to the concession made by Mr Chow at the beginning of the trial (see [34] above). However, I must confess that I do not quite understand what her final stance is. All I can say is her

final stance is confusing. At paragraph 6 of his Closing Submissions, Mr Chow said if the court does not find the marriage having been consummated on 7 March 2021, then W would invite the court to find that she had a just excuse to leave cohabitation – and therefore, had a just excuse to refuse to have sex after she had left the FMH for cooling off. However, at paragraph 40(c) of the same document, Mr Chow stated that W’s case is, “*if the court finds H to have impliedly proposed consummation, then W’s refusal was not wilful*”. None of these grounds could be found in W’s Re-amended Answer. I am compelled to emphasize once again that the issues are defined by the pleadings but not by Mr Chow’s Submissions, not least by his Closing Submissions.

75. There are provisions in the Matrimonial Causes Rules (Cap 179A) (“**MCR**”) on pleadings, such as Rule 9 (Cause to be begun by petition or originating application), especially Rule 9(11) and Rule 21 (Contents of answer and subsequent pleadings), MCR. Rule 3, MCR also provides that the Rules of the High Court “*shall apply with the necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in the matrimonial proceedings pending in the Court of First Instance or in the District Court*”.

76. Order 18, rule 12(1) of the Rules of the High Court provides that every pleading must contain the necessary particulars of any claim, defence or other matter pleaded. Paragraph 18/12/1 of the Hong Kong Civil Procedure (2026) states,

Effect of rule—The requirement to give particulars reflects the overriding principle that the litigation between the parties, and

particularly the trial, should be conducted fairly, openly, without surprises and, as far as possible, so as to minimise costs. In *Aktieselskabet Dansk Skibsfinansiering v. Wheelock Marden & Co. Ltd* [1994] 2 H.K.C. 264 Bokhary J.A. said at 269E-270E that the functions of properly particularised pleadings are as follows:

- (1) to inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved;
- (2) to prevent the other side from being taken by surprise at the trial;
- (3) to enable the other side to know with what evidence they ought to be prepared and to prepare for trial;
- (4) to limit the generality of the pleadings, the claim and the evidence;
- (5) to limit and define the issues to be tried, and as to which discovery is required;
- (6) to tie the hands of the party so that he cannot without leave go into any matters not included (although if the opponent omits to ask for particulars, evidence may be given which supports any material allegation in the pleadings).

...

Care must be taken to plead issues clearly, and not draft pleadings either vaguely or ambiguously perhaps in the hope that the other side might not readily or easily understand a party's real case. **While vaguely or ambiguously drawn pleadings may enable a party to escape a strike out application (since striking out is only for plain and obvious cases), this is not to say that where a court has to decide whether or not an issue is to be permitted to be run, it will smile kindly on such types of pleading** (*Wing Hang Bank Ltd v. Crystal Jet International Ltd* [2005] 2 H.K.L.R.D. 795 , para.6(2)).

...

(emphasis added)

77. In a case such as the present one where both parties had been equally incompetent, the court is ultimately guided by what is fair and just in the circumstances: *Wing Hang Bank Ltd v Crystal Jet International Ltd* [2005] 2 HKLRD 795. In this regard, I give some consideration to the fact both parties conducted the trial by examining the other side on these unpleaded issues. It seems to me what is fair and just

in the circumstances is to take the exceptional course to deal with these issues in this Judgment.

78. I have already found that H did intend to consummate the marriage and on 25 March 2021 he did make the proposal to W. W left and never returned. The question is, did W wilfully refuse?

79. It is established that wilful refusal to consummate requires a “settled and definite decision come to without just excuse”: per Lord Jowitt LC in *Horton v Horton* [1947] 2 All ER 871, at 874. Although there is no direct refusal to have sexual intercourse, a course of conduct which inevitably prevents it taking place, such as a refusal to comply with a collateral agreement that a register office ceremony will be followed by a religious ceremony, will amount to wilful refusal. The same will be true of a refusal to cohabit after the ceremony”: see *Kaur v Singh*, supra, *Jodla v Jodla*, supra, and Butterworths Family Law Service, at [1546].

80. *Ponticelli v Ponticelli (otherwise Giglio)* [1958] P 204 is a case where both parties were Italian. The husband was domiciled in the UK and the wife was domiciled in Italy. Their marriage in Italy was arranged by their families. Notwithstanding they were married in Italy, they never lived together. As a matter of fact, they did not know each other before the arrangement. By the time the wife arrived in the UK for the purpose of joining the husband, she considered that she had been forced by her relatives into the marriage. She gave the husband nothing in the form of a greeting. The wife manifested a firm intention to go back to Italy and refused to return to the intended matrimonial home in Bedford. The wife made clear that first, she did not want the husband as

her husband, secondly, she considered that she had been forced into the marriage, and thirdly, she was going back to Italy. The husband was successful in having his marriage annulled.

81. As referred to above, “refusal” must be arrived at without just excuse: *Horton v Horton*, supra. As pointed out by the learned authors of Butterworth’s Family Law Service, “*Just excuse has not yet been fully defined but it may well have a relationship with matters which would excuse desertion*”: at [1547], citing *Re Mills Trusts* (1888) 40 Ch D 14, 60 LT 442. In this regard, it is certainly not W’s case that she was deserted by H.

82. In determining whether there was a refusal to consummate, the court should have regard to the whole context or history of the marriage: *Horton v Horton*, supra, at 874A-B.

83. It is important to bear in mind that each family case is fact-sensitive, in particular when it comes to the consummation of marriage. It is evident that the facts of the present case are rather unique; as such, the judicial decisions are at best for guidance or reference only.

84. Mr Chow submitted that W had not refused as she was in a non-decision condition. He submitted that a refusal in the context of non-consummation implies a conscious act of volition. “*Mere neglect to comply with a request is not necessarily the same as a refusal. A refusal implies a conscious act of volition; neglect may be no more than a failure or an omission to do that which has been suggested*”: *S v S (otherwise C)* [1954] 3 All ER 736, at 744. Hence, a neglect to the proposal or

suggestion to consummate will not constitute a refusal within the legal definition.

85. Further, in the alternative, W did have a just excuse to refuse due to her fears of H. Mr Chow urged the court to look at the parties' marriage as a whole, with specific regard to the cause behind the breakdown of the marriage, being H's unreasonable behaviour, specially ill-treatment of W. W was not resolute to leave the marriage on 25 March 2021, her act of moving was more consistent with a state of indecision rather than a settled or definite decision. W feared H's aggressive behaviours and was afraid that H would physically harm her. Their relationship was littered with emotional abuse and manipulation and threats, which continued into their marriage and up until H petitioned for nullity. Mr Chow invited this court to find that W had a just excuse to leave cohabitation - and therefore, had a just excuse to refuse to have sex after W had left the matrimonial home for cooling off.

86. I shall deal with the "unreasonable behaviour", ie the just excuse, point first.

87. To start with, H's unreasonable behaviour was never particularised or clearly identified in W's Re-amended Answer.

88. At paragraph 9(f) of W's Re-amended Answer, it was pleaded that,

"... (H) had on numerous occasions admitted that it was his unreasonable behaviours that had caused problem to the marriage and that he by his WhatsApp message to (W) on 18 July 2021 asserting that

nothing had happened between 6 to 25 March 2021 causing her to leave”.

89. At paragraph 10 of her Re-amended Answer, W pleaded that,

“... it is (H) who has on numerous occasions admitted that it is his unreasonable behaviours that has caused problem to the marriage. Those admissions include but not limited to the ones made by (H) by his Whatsapp message to (W) on 20 March 2021, 21 March 2021, 25 March 2021, 27 March 2021, 28 March 2021, 2 April 2021, 10 June 2021, 10 July 2021 and 14 August 2021”.

90. There are no particulars on what these unreasonable behaviours were.

91. In her supporting Affidavit dated 27 March 2023, there was only a slight reference at paragraph at 58 where W said H had not appreciated what she did and sacrificed for him, and he had been disrespectful and dominating on her, thereby causing her to experience tremendous stress and anxiety.

92. Under cross-examination, W said for the very first time that every time they had argument H threw things at or in front of her; specifically on the night of 8 March 2021 after the Staunton Incident, H broke a coffee table in front of her. When it was suggested to her that she never said H had thrown things before, her explanation was H threatened her and she was scared.

93. This is no doubt a serious allegation. There was however not a single reference about “throwing things” whether in W’s pleadings or in her affidavits. That being the case, one has to exercise utmost caution if this allegation is to be accepted. W has been legally represented

A
B all along, there is simply no reason why W did not disclose this allegation
C any time before the trial. It is unbelievable that W would have missed it.
D It has to be reminded that the burden of proof in relation to unreasonable
E behaviour is on W. I am conscious that Mr Chow referred me to some
F WhatsApp messages by H where he made confessions, but these have to
be seen in light of H's desperate imploration for her return.

G 94. I have to reject W's allegations regarding H's unreasonable
H behaviour. As I have said, I do not find her to be a credible witness. She
I was just making up stories when being cornered. There was no just
excuse.

J 95. The final question is, was W in a non-decision situation at
K the time? W testified to the following.

L 96. After the Staunton Incident of 8 March 2021, she did not
M want to have sex with H and she was not comfortable staying near H for
N long.

O 97. Probably in the first weekend following their marriage (ie 13
P March 2021), H wanted to spend time alone with her and wanted to be
intimate with her.

Q 98. The following day, Sunday, 14 March 2021, W chose to stay
R away from home that afternoon. She admitted that she chose to be away
S for whatever reason and that by choosing to be away in those afternoon,
T in effect, she was choosing not to be intimate with H.
U
V

99. On 20 March 2021, despite H's desperate plead to W not to leave, she left FMH. On the same day, W wrote to H, "*I wasn't thinking about leaving you until recently. And March 8 I had a big realization that I don't like whom I've become and I don't want to be that person*". She agreed that at that moment she probably regretted getting married.

100. On 22 March 2021, W said "... you will be having little baby boys and girls (I know you want girls) just a bit later than we both thought. And I guess mother of the kids will be different". She agreed that at that moment she did not want to have kids with H nor to have sex with him.

101. On 25 March 2021, when W returned to FWH to pack her things, she left her credit card and the club's membership card. I have already referred to W's response when H raised the issue of annulment on 25 March 2021 at [56], I am not going to repeat myself. I regard what happened on 25 March 2021 is significant in showing W's intention.

102. After 25 March 2021, H repeatedly asked her to return to live with him but she refused.

103. Meanwhile, Mr Chow referred me to the following facts in support of W's non-decision:

1. After W had left FMH on 25 March 2021, she still returned to FMH from time to time, sometimes when H was also there.
2. On 13 April 2021, W gave H some sleep time tea, after learning of his insomnia showing her care of H.

3. On 19 and 23 April 2021, H and W attended counselling.
4. On 29 April 2021, W offered to buy some supplements for H.
5. In the afternoon of 29 April 2021, W did the laundry, washed H's masks, and cleaned the toilet, floor and sinks when she returned to the FMH to pick up letters.
6. On 11 May 2021, W offered to order some Omega-3 supplements for H.
7. W never proposed to have the marriage dissolved or annulled.

104. It is not disputed by H that the parties attended counselling. However, I notice that at the relevant time W insisted that counselling would not help their relationship and was solely for H's benefit.

105. It is to be recalled that prior to the marriage, the parties had had a relationship for a number of years, including cohabitation with each other for more than a year. In my assessment, W's conducts were more likely due to the "*emotionally interlocking*" she had towards H, as mentioned by Mr Justice Ribeiro PJ in *WLK v TMC* (2010) 13 HKCFAR 618.

106. It is also to be recalled that W said there was a 6-month cooling off period as from 25 March 2021. I accept H's evidence that he did not agree to the cooling off period but he had no choice. Most importantly, the cooling off period expired on 25 September 2021 and W never returned.

107. It was pointed out by Mr Chow that "wilful refusal" must persist up until the date of petition: *S v S (otherwise C)* [1954] 3 All ER

736, at 733D-E. In this regard, it was certainly not Mr Chow's submissions that W's indecision subsisted up to the date of petition nor was there any evidence suggesting that was the case. Quite to the contrary, W's oral testimony was in the other direction. The "indecision" ground must be rejected.

108. After having heard her oral testimony and considering all evidence in the round, I find that on 25 March 2021, W already made a firm decision not to live with H and saw her marriage with H had come to an end. Similar to the wife in *Ponticelli v Ponticelli (otherwise Giglio)*, for reasons of her own, W repented for having married with H.

Conclusion and Orders

109. For the reasons aforesaid, I find in favour of H. The marriage between H and W has not been consummated owing to W's wilful refusal to consummate it. I grant a decree *nisi* that the marriage is a nullity which may be made absolute at the expiration of 6 weeks.

110. I am satisfied that there are no children of the family to whom section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192) applies and I accordingly make a declaration to this effect.

Costs

111. Parties' legal representatives seemed to have forgotten the cardinal principle that pleadings are to define the issues but not to blur them. They seemed have assumed that the rules of Pleadings under Order 18, Rules of the High Court, have no place in this proceeding. This is incorrect. Parties' case is guided by their pleadings and not by their

A affidavits, and certainly not by counsel's arguments. What we have is a
B vicious cycle here. When one party was out of focus and brought
C irrelevant matters or issues into the dispute, the other party unwittingly
D followed suit and muddled the water further. The upshot of this
E undisciplined approach is that the parties were not able to focus on the
F real issues and unnecessary affidavits were filed. Before me at trial were
G a total of 10 affidavits. It is outrageous that only a few of them were
H relevant or referred to at trial. For all these reasons, this court had to
I spend more than a half day to distil the issues involved out of the
J shambles and to clarify with counsel which affidavits were necessary.
K Much time and costs were wasted. What could have been comfortably
L concluded within one day ended up in 2 days; and the court had to take
M more time than was necessary in its deliberation. In order for the court's
N disapproval of the parties' litigation to have teeth, this has to be reflected
O in costs. It is true that H is the successful party; yet I consider he should
P take a greater responsibility for the disarrays that this litigation was in
Q since H, as the applicant, should have set out his issues clearly and
R succinctly in the Petition for W to make a response. Taking a board
S brush approach, I consider it is just and fair that W is to bear 1/3 of the
T costs of the main suit, to be summarily assessed. I make the following
U directions:

1. H is to lodge and serve his Statement of Costs on or before 26
January 2026;
2. W may lodge and serve her List of Objections on or before 9
February 2026;
3. No further submissions be lodged unless with the leave of the court;
and

4. The summary assessment is to be dealt with by way of paper disposal.

112. The W's own costs are to be taxed in accordance with the Legal Aid Regulations.

113. The costs order is in the form of an order *nisi*.

W's Legal Aid

114. W has been given legal aid in contesting the main suit. Mr Marwah informed the court that H had made his position clear a couple of times before another judge prior to trial that, regardless of how the marriage might come to an end, whether it would be by way of divorce or nullity, there would not be any implication on W's application for ancillary relief even when there was a pre-nuptial agreement in this case. This was not disputed by Mr Chow. I acknowledge that W has the right to defend the petition for nullity. However, it is one thing that she has the right to defend, it is quite another that she has been defending it on public funds when the outcome would make no difference in terms of her ancillary relief claims. This begs the question of why W has been given legal aid in this proceeding. This is a matter entirely within the domain of the Director of Legal Aid. I therefore direct my clerk to cause a copy of this Judgment to be forwarded to the Director of Legal Aid for his attention.

I. Wong
(District Judge)

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Mr Azan MARWAH and Ms Aria CHEUNG, instructed by Wellington
Legal LLP, Solicitors, for the Petitioner

Mr Enzo WH CHOW and Ms Christie LEE, instructed by Cedric & Co.,
assigned by the Director of Legal Aid, for the Respondent

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