27.2.95

CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. D. 125/94

BETWEEN:	EMILY MARIE BARNET	PETITIONER
AND:	JASIL BARNET	RESPONDENT

For the petitioner: Mrs. Eileen Nervik
For the respondent: Ms. Sheridan Brooks

HARRE CJ.

RULING

This was a summons by the respondent husband for leave to file an answer and cross-petition out of time in accordance with Rule 11 (c) of the Matrimonial Causes Rules. In fact Rule 11 (c) relates to the granting of leave to give notice of intention to defend rather than leave to file the pleading but for the purpose of this ruling nothing turns on that.

This history of the matter was this. The petition was served on the 2nd November 1994, accompanied by a draft acknowledgment of service in the usual form whereby the respondent was invited to confirm whether or not he intended to oppose the proceedings. That was not completed but on the 7th November appearance by the respondent's attorney was entered on his behalf generally. There then ensued correspondence between the attorneys about settling the ancillary matters. All was

agreed except for the method of dealing with the matrimonial home. A proposal had been put forward on the 7th November. Correspondence ensued but negotiations came to an end on receipt by the respondent's attorney of a letter dated 10th February 1995 from the petitioner's. It read as follows -

> "I acknowledge receipt of your letter dated 7th February 1995. I have spoken with my client in relation to your letter of 9th January 1995. My clients states that at the moment she is not in agreement with the proposals as set forth in particular those in relation to the former matrimonial home.
>
> Unfortunately, it seems like this matter may have to be decided on by the court. If that is the case, the petition which is due to be heard on the 24th February 1995 will only be seeking to have the petition proved but that the pronouncement be deferred pending the resolution of the ancillary matters in chambers".

The respondent complains that because he and his attorney were of the view that the ancillary matters could be settled and completely disposed of on the hearing date 24th February it was set without objection from his side for hearing as an undefended divorce. Now he says that he is afraid that if he allows the petition to go through unchallenged he may be prejudiced in the ancillary matters and he has therefore now decided to contest the contents of the petition. A central allegation in that petition is that he has never held a steady job, and indeed has shown no inclination to do so, and has not contributed to the marriage financially.

The wife's position is that the thread which has run through all the respondent's proposals is the underlying threat that if they were not agreed on his terms he would file an answer and cross-petition in order to prolong the matter.

The granting of leave to file a notice of intention to defend out of time is a discretionary remedy. I was referred to two English cases.

The first is **Collins v. Collins** (1972) 2 ALL. E.R. 658. In that case an agreement had actually been reached on the ancillary matters and in view of those arrangements the wife signed the acknowledgment of service stating that she did not intend to defend the proceedings. The cause was set down in the undefended list but shortly before the hearing date the husband repudiated the agreement. Consequently the wife applied for leave to file an answer out of time containing a cross prayer. The view of the Court of Appeal is succinctly set out in the following passage from the headnote -

> "If the wife were to file an answer and obtain a decree, or a cross-decree, it would make absolutely no difference to her financial position at all; her right to periodical payments or other ancillary relief would be completely preserved if the husband were to be granted a decree. All the controversy which there might be about the circumstances in which the parties had separated could be fully investigated on the wife's claim for periodical payments and other relief."

Davies LJ also observed that the granting of leave might well involve a good deal of extra expense "either to the parties or, if legal aid, comes into this case, which I know nothing about, to public funds". In the present case it is already known that the respondent has applied for legal aid.

The other English case is **Spill and Spill** (1972) 3 ALL.ER. 9. In that case also the respondent in his acknowledgment of service said that he did not intend to defend. He changed his mind after the negotiations on ancillary matters broke down. He took out a summons for leave to file an answer out of time, not supported by an affidavit containing his reasons for a denial of the wife's allegation or a draft answer. The appeal against the judge's refusal of his application was dismissed. The court took the view that the respondent was seeking discretionary relief without showing adequate ground why the court should exercise that discretion in his favour. Once again it was pointed out that the respondent would have ample opportunity to place before the court any submissions that he wished to make if and when

questions arose thereafter as to the distribution or apportionment of property.

The husband in the present case has a better argument in some respects than either of the applicants in **Collins and Collins** and **Spill and Spill**. He has never repudiated any agreement and and he never said in terms that he did not wish to defend. Indeed he now says that it was always his intention to do so if ancillary matters could not be agreed. He has given his reasons for now wishing to defend, and his layman's perception that in view of the allegation in the petition that he had failed to contribute to the marriage financially he might be in some way prejudiced in relation to ancillary matters is perfectly understandable. It is also groundless. He may be sure that, as in the English cases, ample opportunity will be given to him at a separate hearing in Chambers to put his case fully with regard to his financial claims arising out of the division of the matrimonial property. This is the normal and the routine way of dealing with such matters if agreement has not already been reached before the hearing of the petition. If in every such case the petition ought to be defended the courts would be spending a great deal of their time in dealing with battles which would not only be painful to the parties but also completely pointless in cases such as this where both are agreed that the marriage has irretrievably broken down.

It was for these reasons that I refused the respondent's application for leave to file an answer and cross-petition out of time, with costs of the summons in the cause.

Although it was not directly in point, during the course of the hearing a question arose about the meaning of Rule 11 (c) of the Matrimonial Causes Rules. To the extent relevant Rule 11 reads as follows -

> "A notice of intention to defend may be given
> (a) .....
> (b) .....
> (c) at any time, by leave of the court prior to the date fixed for trial".

It is quite clear that leave of the court must be obtained prior to the date fixed for trial and not sought on that date and least of all at the time when the case comes up for hearing undefended. It seems to me to be perfectly sensible as well as being the clear and ambiguous meaning of the text. If leave is given before the date of trial the matter will be taken out of the undefended list and nobody's time will have been wasted.

Dated 27th February 1995

G.E. Harre
Chief Justice