



Neutral Citation Number: [2020] EWHC 43 (Fam)

Case No: ZC14D00753

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/01/2020

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

Between :

IBTISSAM ALI CHRISTOFOROU

Applicant

- and -

CHRISTAKIS CHRISTOFOROU

Respondent

(Alleged Removal of Trees from the Applicant's land: "the tree issue")

Mr Jonathan Southgate QC (instructed by **Withers LLP**) for the Applicant
The Respondent did not appear and was not represented

Hearing date: 12 November 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mrs Justice Roberts :

The issue for determination

1. This judgment records my findings in relation to a discrete aspect of the implementation of a financial remedy application decided as long ago as May 2017 by Moylan J (as he then was). As part of a lengthy court order, the judge determined that two particular plots of land in Cyprus should be transferred to the applicant. The issue for determination is whether or not, prior to the completion of that transfer, the respondent was responsible (personally or through instructions given to others) for the removal of a number of olive and other trees which were formerly planted on that land.
2. In order to set in context the circumstances in which this fact finding hearing has been conducted, I can do no better than to repeat what I said in the earlier judgment I delivered on 6 March 2019 in the context of the respondent's application for permission to appeal my decision to allow the applicant to establish whether or not he was liable for removing her trees.
 - “2. The issue which lies at the heart of this satellite litigation (“the tree issue”) can be simply stated. At the conclusion of long-running and highly acrimonious financial litigation flowing from divorce proceedings, Moylan J (as he then was) ordered the respondent husband to transfer to the applicant wife a small estate of land in Cyprus on which stood many mature olive trees. That transfer of property was but one small part of a wholesale reorganisation of their matrimonial property situate in this jurisdiction and elsewhere. The value of the matrimonial property was substantial (in excess of £60 million) and, as a result of the trial judge's order, the applicant wife received shares in a number of valuable commercial property companies. The extraction and implementation process has been long and complex. Moylan J made his order on 15 May 2017. We are now almost two years further on in this process but many of the issues surrounding implementation of the mainframe order continue to separate these parties and take up valuable court time.
3. In relation to the discrete issue of the olive trees and the transfer of the Cyprus property to the applicant, the respondent has felt particularly aggrieved. He sought to appeal that decision but lost in the Court of Appeal. Moylan J was highly disparaging about certain aspects of the respondent's litigation conduct in the financial remedy proceedings. Notwithstanding that these were essentially private proceedings which were subject to the implied duty of confidentiality, his Lordship reflected his disapproval and censure of that litigation conduct in a public open judgment.
4. The divorce and the litigation which flowed from it has drawn the wider family members (including the two adult children of these parties) into diverse litigation which is proceeding both in the Family Division and in the Queen's Bench and Chancery Divisions. Mr Troman, who represents

the respondent today, is instructed in relation to at least one of these sets of proceedings.

The mutual waiver of confidentiality clause

5. The order made by Moylan J on 15 May 2017 is long and complex. It runs to 63 separate paragraphs over 27 pages. By paragraph 57, he specifically released the parties from their implied duty of confidentiality in relation to six identified issues. Four of those issues concerned ongoing or potential litigation in relation to matters arising from, or in connection with, the operation of various companies in which the parties had an interest during their marriage. Two of the issues related to the tax affairs of the parties and/or the companies which each was to retain and the ordinary course of their business dealings in relation to those companies. In other words, in the context of advancing or defending positions in any litigation which was, or might be, ongoing in relation to these corporate entities, each of the applicant and respondent was no longer to be bound by any confidentiality owed to the other or the court in the context of that litigation.

The background to the tree issue

6. When the applicant recovered the property in Cyprus in accordance with the court's mainframe order, she discovered that a significant number of the mature olive trees planted on the property had been removed. Given the size of the trees, this would not have been an insignificant operation. She discovered that the trees appeared to have been re-planted on another property in Cyprus (Plot B). The applicant commenced enforcement proceedings in which she sought reinstatement of those trees on her land and/or damages in respect of any trees which had died or otherwise not survived the transplantation process.
7. Initially the respondent denied having played any part in the alleged removal of the trees from the applicant's land. He later accepted that his employees had removed certain plants from the land but maintained that they were not olive trees but "windbreakers". He was adamant that he had played no part in removing any olive trees from his former wife's land. She was subsequently able to produce drone footage showing exactly what trees had been growing on the area where the trees originally stood delineated on a map and in still photographs (Plot A). The drone footage had been taken before there was any issue of removal. As long ago as March 2018 when the issue of the trees was before me for case management, I had viewed this drone footage and expressed a provisional and preliminary view that it was tolerably clear that what I was observing on that video footage was a collection of mature and well-established olive trees.
8. The respondent then sought to challenge the veracity or authenticity of the drone footage itself. The applicant produced two separate expert reports confirming that the footage was genuine. The respondent wanted a further report from a single joint expert.

9. In parallel case management directions, an expert arboriculturist, Mr Cocking, had been instructed to carry out a site inspection in order to determine whether the trees which then stood on Plot B were the same trees as those which had formerly stood on Plot A. The respondent's case at that stage, in summary, was that, whilst he accepted he had removed eight palm trees from the applicant's land, he was not responsible for removing and re-planting the olive trees which were not, in any event, the same trees. Mr Cocking concluded that, in his expert opinion, the newly-planted olive trees which he inspected on Plot B (all about 50 years old) were the same trees as those which had been removed from Plot A. His report is dated 23 November 2018.
 10. On 19 December 2018, there was a further hearing following the publication of Mr Cocking's report. The respondent instructed a different counsel on that occasion (not Mr Troman); Mr Southgate QC was unable to appear and negotiations took place outside court between different counsel with a view to resolving all outstanding matters in relation to the tree issue. Whilst the parties appeared to be making progress, it was plain from the correspondence which was exchanged after the conclusion of the hearing that the parties had been unsuccessful in settling this aspect of the litigation although the respondent was by now offering to reinstate the trees and pay the applicant's costs of the exercise.
 11. The matter comes back before me today (i.e. 6 March 2019). The respondent continues to make no admissions in relation to liability notwithstanding that these matters have absorbed several days of court time and an enormous amount of the lawyers' time with the inevitable expense which that has entailed. The applicant's costs alone are now approaching c. £500,000 on this one issue alone.
 12. The issue which separates the parties today is the absence of any admission from the respondent that he did indeed remove the olive trees, or cause them to be removed, from the applicant's land. In circumstances where Mr Troman now accepts that his client will be responsible for her indemnity costs and for the costs of the transplantation exercise which will hopefully result in the reinstatement of the olive trees on her land, he asks why his client should be fixed with formal liability in respect of the wrongful removal of those trees. He maintains that to permit Mr Southgate QC to cross-examine his client with a view to establishing liability on the evidence is an abuse of the process in circumstances where there is no further relief which the applicant could obtain from her original application.
 13. In circumstances where the respondent's current instructions are that he will not admit liability and/or that he has played any part in removing the olive trees, Mr Troman submits that it would be wrong as a matter of law to embark on this process where its only purpose would be to allow the applicant to use a judgment or finding of this court for a purpose other than the tree issue. ...".
3. For reasons which I gave in my earlier judgment, I disagreed with Mr Troman's submission in relation to the need for a determination of the respondent's liability for

removing the trees. The respondent renewed his application for permission to appeal that decision (which I had refused) to the Court of Appeal. On 11 July 2019, Lady Justice King refused permission to appeal on the basis that there was no prospect of success in any substantive appeal were permission to have been granted. Her Ladyship recorded in her order that:

“The judge gave a substantial judgment in support of her case management decision. In her judgment, the judge gave detailed consideration both to the submissions of both parties and the relevant legal principles. She had in mind the issue as to whether the proposed hearing was proportionate in all the circumstances.”

4. I do not propose to rehearse in this judgment my reasons for allowing the applicant to establish the facts in relation to the discrete aspect of the tree issue. They are clearly set out in my earlier judgment of 6 March 2019 in paragraphs 14 to 28.

The evidence before the court and the law in relation to the burden and standard of proof

5. Thus, for present purposes I turn now to the written and oral evidence which is before the court in relation to the tree issue. I remind myself that, since it is the applicant who makes these allegations against the respondent, it is she who bears the burden of proof. In other words, the burden of proving a fact rests on the person who asserts it. Since these are essentially civil proceedings, she must satisfy me that, on the balance of probabilities, it is more likely than not that the event occurred. Here, the applicant must establish that it was more likely than not that it was the respondent who removed, or caused the removal, of the olive and other trees from her land. In this context neither the seriousness of the allegation, nor the seriousness of the consequences, nor the inherent probability of the allegations alter the standard of proof. Each piece of evidence has to be considered in the context of the whole.
6. In this context, I have written sworn statements from the applicant and the respondent.
 - (i) In the context of her application for enforcement issued on 6 December 2017, the applicant sought reinstatement on her land of all the trees of which the respondent had allegedly procured the removal. In the alternative she sought the cost of replacing the trees and making good the damage which had been caused to her property as a result of the alleged wrongful removal. In support of that application, she swore a detailed written statement dated 16 February 2018. Exhibited to that statement was a run of solicitors’ correspondence generated as a result of the alleged removal of the trees.
 - (ii) By way of response, the respondent made a statement which was sworn on 10 April 2018.

7. Whilst the applicant has attended court for the purposes of this hearing and has confirmed on oath the truth of her written evidence, the respondent has elected not to attend the hearing and/or to submit himself to cross-examination in relation to these matters. On 10 October 2019 he issued a further application whereby he sought to have this hearing vacated. In support of that application, he swore a further written statement dated 9 October 2019. In that statement, he said this:
- *“The proceedings in relation to the trees issue have taken a considerable toll on my physical and mental health. Over the course of the last three years I have frequently suffered from sleepless nights and I have been told by my doctors that I am suffering from depression. I cannot countenance placing myself under yet further strain by attending court on 12 November to give evidence.”* (paragraph 2)
 - *“The prospect of attending court to give evidence in relation to the tree issue, now that the trees have already been taken from my land and planted on Betty’s land and having already paid the costs, is a prospect which fills me with anxiety. This is because I am extremely concerned about the misuse by [the applicant and the adult children of the family] of any findings made by the court [in relation to other ongoing litigation].”* (paragraph 17)
 - *“The reality of the order which was made by the court on 6 March 2019 is that the vast majority of the trees moved from my land to [the applicant’s] land have now died..... The outcome of the trees issue has been profoundly depressing and I wish to move on and get on with my life without incurring further costs or involvement of the court.”* (paragraph 27)
 - *“Having given careful consideration to the matter I have therefore concluded that it is the right thing for the sake of my own mental and physical health that I do not attend court to answer any questions in relation to the tree issue. Were I to attend court I would rely upon the privilege against self-incrimination (about which I have been advised) to decline to answer questions and it would, therefore, be a waste of the court’s time and both parties’ costs.”* (paragraph 28)
8. The respondent did not produce any medical evidence in support of this narrative in relation to his health. As I indicated, whilst noting what he said, I regarded this application as a further attempt both to circumvent the ruling I made on 6 March 2019 and to secure the relief which he was denied by the Court of Appeal. To the extent that he believes that I have already predetermined the facts in this case, he is wrong. During the course of several case management hearings relating (in part) to the tree issue, and in particular on receipt of the single joint experts’ reports in relation to the authenticity of the drone footage and the identification of the trees inspected on the respondent’s land as being those removed from the applicant’s land, I have indeed expressed a provisional view on the basis of what I have seen and observed. I have done so in pursuit of several attempts to persuade these parties to settle all outstanding issues. To the extent that the respondent believes I have already made up my mind, I

have canvassed whether he intended, or wished, to make an application for my recusal. He has made no such application and thus I have proceeded to deal with the matter on the basis that none of his written evidence has yet been tested in cross-examination. I base my conclusions which follow on the evidence which is before the court.

Earlier findings made by Moylan J (as he then was) in the mainframe proceedings in 2016

9. In this context, I bear well in mind, as I must, that findings of previous attempts to mislead the court, or of outright lies found to have been told to the court, are not in themselves evidence that the respondent is necessarily lying to the court in the context of “the tree issue”. In his earlier judgment, reported as *Christoforou v Christoforou* [2016] EWHC 2988 (Fam), Moylan J made a number of clear findings against the respondent. He found, in terms, that he was a dishonest and unreliable witness. In paragraph 26, his Lordship said this:

“When assessing his evidence I have, of course, considered the extent to which it is based, for example, on faulty or mistaken recollection or the absence of documents. I have come to the clear conclusion that his evidence, when dealing with contentious issues, was largely based on an indifference to the truth and was motivated by what he seeks to achieve in these proceedings rather than on his true recollection of events. I am satisfied, from the way in which significant elements of the husband’s factual case have mutated during the course of these proceedings and from the way in which he gave his evidence, that this has to a significant extent been deliberate.”

10. Moylan J went on to point out a number of separate instances where he found the respondent to have given a dishonest account and to have provided the court with deliberately misleading evidence in relation to various aspects of his financial presentation to the English court. In the context of any resonance with the present issue which I am trying (the tree issue), one such instance was his attempt to persuade the court that property in Cyprus with a gross value of almost £3.4 million should be excluded from the applicant’s sharing claim on the basis that it was non-matrimonial property. That claim was roundly rejected by the judge: see paragraphs 101 to 149 for the judge’s analysis and conclusions in relation to the section of his judgment headed “*Cypriot Properties*”. It was one of the issues which the respondent subsequently sought, unsuccessfully, to appeal.
11. Unlike Moylan J, I did not have the benefit of hearing oral evidence from the respondent on the tree issue. However, I have had the benefit of reading a very detailed written statement which he has put before the court setting out his narrative in relation to the allegation that he has removed, or caused to be removed, a number of trees from the land which has since been transferred to the applicant. Insofar as it is necessary in these circumstances, I have clearly in mind the warning which is derived from the criminal case of *R v Lucas* [1981] QB 720. A Lucas direction is frequently given in criminal cases to warn the jury that a lie cannot automatically be taken as support for the prosecution case against a defendant. Its relevance in the context of a family case was discussed in *Re H-C (Children)* [2016] EWCA 139. At paragraph 23 of that judgment, Peter Jackson J (as he then was) reiterated that, in a family case, the effect of *R v Lucas* is that where a person is found to have told a deliberate, relevant

lie, this *can* support the truth of an allegation against him. However, it cannot *of itself* prove the allegation. The court must bear in mind that an innocent person may lie for other reasons and, where lies have been told, it is necessary to consider all the possibilities before reaching a conclusion about their significance.

12. In addition to the parties' written statements, I have the following expert evidence:-
- (i) a report from Jonathan Cocking, a chartered arboriculturist with some 39 years' experience and a former President of the European Arboricultural Council. That report is dated 23 November 2018 and was commissioned on the basis of joint instructions from Withers LLP and Hughes Fowler Carruthers, the parties' solicitors; and
 - (ii) a report from Christopher Hatfield dated 16 November 2018. Mr Hatfield is a senior director in the Technology department of FTI Consulting and has 18 years of experience in the field of forensic technology and information security. He has a Masters degree in Computer Security and Forensics and is a Certified Information Systems Security Professional. He was instructed to prepare a report on the veracity of the drone footage which showed the olive trees in situ on the land in Cyprus which was to be transferred to the applicant. For the purposes of his report, Mr Hatfield examined both the drone itself and the MicroSD cards which were either built, or subsequently inserted, into the drone. He has analysed the forensic data captured on the cards. He has provided his professional opinion that (i) the drone footage is genuine; and (ii) there are no credible forensic artefacts or other evidence in the data or devices provided to him which indicate that the drone footage has been modified.
13. Thus I turn now to the parties' respective accounts of the background to, and their involvement in, events which provide the evidential platform for the determination of the tree issue. Whilst their respective written statements are long and detailed and cover a multiplicity of issues, I confine my analysis of the asserted facts to those which are necessary for the purposes of this judgment.

The background

14. The respondent and his family lived for many years in a village in Cyprus called Silikou. He maintains that he has always had a wish to retire to live in what he describes in one of his statements as "my ancestral village". A map included within the bundle reveals that the land and property in Cyprus which were the subject of the orders for transfer made by Moylan J at the conclusion of the financial remedy proceedings in May 2017 have been identified as "Plot 1339" (referred to as 'Alexander's House') and Plot 1232/1255 (referred to as 'Nicholas' House'). These plots are contiguous and there are dwelling houses on each. A further plot, (Plot 19/172 referred to as 'Christakis' Land') lies some 200 metres away across a roadway. By his order, Moylan J ordered the respondent to transfer to the applicant Plots 1339 and Plots 1232/1255. He was to retain Plot 19/172 as one of the parcels of land which he owned in or around the village.
15. He maintains that Plot 1339, the larger property, was developed with the intention that it would provide him with a home in Cyprus both during his working life based in

London and in retirement. On Plot 1232/1255 were four water wells which the respondent used to irrigate all the land he owned in the immediate vicinity (some 22 plots in all). The respondent appears to have been particularly aggrieved by the fact that Moylan J required him to transfer this particular plot in circumstances where the Cypriot government was no longer approving applications for drilling permits for agricultural irrigation. Thus he maintains he was deprived of the source of water he had used for many years to irrigate his olive trees on a day to day basis. The respondent maintains that, as the most significant landowners in the area, he and his father acquired a certain status and social standing in the local area. He appears to believe that his status has been diminished as a result of the orders made by the English court in the divorce proceedings. He says in his statement dated 9 October 2019 that “*Villagers now look at me with pity to see that I have lost my home, water supply and everything which was built up by my family*” (paragraph 11). He speaks of his “*devastation*” by the loss of these properties given the love and care which had been put into their development over many years. He explains that his feelings of devastation extended to the loss of the olive trees growing on the plots.

16. He is now in the course of constructing a new home for himself on one of his retained parcels of land. In paragraph 13 of his most recent statement, he says this:

“It has not been easy to build a property of the kind I would like due to the restrictions on the land. I have still not been granted the planning consent required and have no ready access to water to sustain the trees and plants there. I had been using water from a metered supply of drinking water to irrigate the trees on the land but have been asked by the village committee to stop as there is insufficient water available for that purpose.”

17. The applicant’s case for retaining the two plots in question was driven by her expressed wish to preserve them for the benefit of the parties’ two adult sons, Alexander and Nicholas. She maintains that they had been referred to as ‘Alexander’s House’ and ‘Nicholas’ House’ within the family over a number of years with this intention (and thus they are marked on the plan to which I have already referred). It is common ground that relationships within the family have now broken down completely and both Nicholas and Alexander are now involved to one extent or another in the plethora of litigation involving the respondent which has survived the conclusion of the financial remedy proceedings flowing from their parents’ divorce. I have previously described this as ‘ongoing internecine warfare’ between these family members and it is a description from which I do not shrink for the purposes of this judgment.

18. In relation to the origins of ‘the tree issue’, the applicant’s case is that during the period leading up to the transfer of the two plots in Cyprus in October 2017, the respondent removed over fifty trees from the land, including olive and palm trees with a value in excess of £150,000. That allegation first appeared in a letter from her solicitors dated 8 November 2017. It continued, “... *our client understands that your client has re-planted the trees in Plots 19/172, where he seeks to build another house*”. With that letter came two sets of coloured aerial photographs taken respectively on 28 August and 1 November 2017 (the ‘before’ and ‘after’ photographs). These show two separate strips of land on the terraces around the house and the adjoining swimming pool, both of which appear in the subsequent photograph to have been denuded of the trees which are clearly in situ in the earlier photograph.

The second set shows an aerial photograph of a driveway leading to the caretaker's house on Plot 1339. In the 'before' photographs a line of tall trees can be seen on each side of the driveway leading up to the building. In subsequent photographs taken on 1 November 2017, there are no trees flanking the two sides of the driveway.

The respondent's response through his solicitors in correspondence

19. The response from the respondent's solicitors on 10 November 2017 immediately called into question the authenticity of the photographic images. His substantive response in correspondence came in a letter dated 21 November 2017 in which his solicitors stated that he had recently planted 52 olive trees on the plot where he was then building a property. The letter continued,

“The trees planted by our client are young trees, some taken from his other plots and others bought from local nurseries. They are approximately 3 – 5 years old. We understand that a tree aged 25 – 30 years would not be capable of replanting.”

20. With that correspondence, the respondent produced a series of photographs which he said had been taken between 1997 and 1999 and which purportedly supported his case that there were no olive trees in the soil during this period. The letter (no doubt written on instruction) continued thus:

“Our client believes that the photographs provided with your letter dated 8 November have been retouched and are not an accurate representation of the current state of the land. He does not accept that they were taken on the dates stated. ... Our client believes that [Nicholas and Alexander] have doctored the pictures in the hope that doing so will lead to some financial gain for your client. It would not be possible for 52 mature trees (25 – 30 years old) to be planted within the two areas marked on the photographs. There would not be sufficient space as trees of that age would have a diameter of over five meters and the length of the two strips identified is approximately 140 – 150 meters. Olive trees are planted at 10 meter intervals and with 14 per row there could only be a maximum of 28 trees including those shown *[sic]* in the photographs.”

The respondent's evidence in his statement dated 10 April 2018

21. In paragraph 5 of his written statement, the respondent confirms, for the avoidance of any doubt, that the only trees he had removed from the two plots in question (i.e. the applicant's land) and taken to his retained land were eight potted palm trees. He specifically denied removing 'over 50 olive trees'. He sought permission to instruct an independent person to visit Plot 1339 in order to prepare a schedule of trees currently standing on the land. To his statement he exhibited copies (with translations) of the documents submitted to the local authority responsible for collating information used in connection with EU farming subsidies. These forms, he contended, revealed the history of the number and presence of olive trees on the land in question.
22. In relation to the representation made in his solicitors' letter of 21 November 2017 that he had recently planted 52 olive trees on Plot 19/172 where he was building his

new home, he sought to make a correction in terms of the provenance of those trees. He said that they had been purchased from the nurseries of a local supplier, T N Theodorides Nurseries Ltd, over the period from September 2017 to February 2018. He provided a lengthy explanation as to how a number of different trees (some 178 in total, including 48 olive trees) had been planted on various plots on his land. In support of this explanation he provided various photographs and a report which had been prepared by a local garden nursery supplier following a site visit to Plot 19/172 in December 2017. That report states that there were 61 olive trees on the plot together with various other fruit trees. He accepts that the report has overstated the number of olive trees by one because of a ‘miscalculation’. He has produced a further report from a local horticulturalist dated 30 March 2018 following a site visit by that individual to Plot 19/172 in mid-March 2018. She records 49 healthy olive trees and seven dead trees present on site as at the date of her inspection.

23. The respondent provides a further narrative account of how his workmen would periodically clear or cut back plants used as windbreakers as part and parcel of their day to day work on the land which was subsequently transferred to the applicant. He explained that in the course of their work, *“windbreakers such as hedges are cleared away regularly and new plants put in their place. Hedges are cleared when the young trees that they have been planted to protect are strong enough to no longer need the protection of the hedges. At that point the trees are often transported to other areas of the farm or to other plots.”*
24. Whilst the respondent accepts that windbreakers had been cut back and some plants removed, he nonetheless continued to maintain in his written evidence that no olive trees were removed by him or by his workmen on his instruction. He said that he had been too embarrassed to tell his workers that the two plots in question on which they had continued to work were to be transferred into the ownership of the applicant since he did not wish to ‘lose face’. He stated in clear terms, *‘I have not removed olive trees from the farm’* and he continued to maintain that the photographs exhibited to the applicant’s statement and the images taken by the drone had been tampered with or doctored in some way. Whilst he did not accuse her directly of interfering with the material, the clear suggestion was that Nicholas and/or Alexander had *‘produced and enhanced’* the images, presumably at her behest or in order to provide her with some further financial benefit at his expense.
25. In relation to the palm trees which were positioned along the driveway on Plot 1339, the respondent’s written evidence is that they had been arranged along the pathway leading up to the caretaker’s house and had been planted part way into the ground in their pots. He maintained that the eight palm trees could only be planted so close to the edge of the pathway without damaging it if their roots were contained in the pots at the time they were planted. He explained that the trees were planted in their pots for the specific purposes of enabling them to be moved at a later date since his intention had always been for them to be moved to Plot 19/172 (the land which he retained pursuant to the order of Moylan J). He confirmed that the palm trees had subsequently been planted in the ground on Plot 19/172.
26. Of the olive trees planted at Nicholas’ House on Plot 1232/1255, the respondent denied removing any such trees. He disputed that all of the trees which the applicant claimed to have been removed were in fact olive trees. He argued that some of the

trees were either still present on the land or were, for example, an almond tree which he had removed at the request of an adjoining land owner.

27. As to the issue of replanting the trees on his own land, the respondent said this:

“[70] When I received Withers’ letter of 8 November accusing me of stealing over 50 trees from Plot 1339 I spoke to a local nursery about whether it would be possible to uproot and replant mature trees. I was told that it would not be possible as their roots would be cut in the process and would wither and die. I therefore said in my solicitors’ letter of 10 November 2017 ... that it would not be possible. I have since spoken with other nurseries who have told me that, whilst it is possible to transplant mature trees, there is only around a 60% success rate in replanting mature trees of 25 years age or more. I have nurtured the trees on Plot 1339 for many years and I would not take the risk of uprooting and transplanting them if doing so was likely to kill or harm them. I continued to nurture and maintain the farm at great expense even after my application for permission to appeal was refused to ensure that it was transferred in a healthy condition. The Agriplanat valuation which I have obtained in respect of the trees located on Plot 19/172 confirms that the possibility of loss in the case of uprooting and replanting the trees would be around 40%. Ms Theophilou places the chances of loss of trees in transplanting at around 20 – 30% in her report. As I have said above, none of the seven trees which my workmen initially transported from Plot 713 survived. The trees I purchased for Plot 19/172 from third party suppliers were in pots and could therefore be easily transported and planted without causing damage to the trees.

[71] As I have set out above, with the exception of the palm trees all of the trees which have been planted on Plot 19/172 have been taken from other plots which I have retained or purchased from local nurseries.

[72] [The applicant] claims that the same number of trees have been planted on my land as she says have been removed from hers. She has however provided no evidence to support her claim that over 50 trees have been removed. I believe that her claim is based on having visited the site I am developing and counting how many trees I have planted, she has then accused me of having stolen a similar number from her land. As I have said above, that is not the case.....”.

28. On 20 April 2018 the respondent’s solicitors produced an enlarged colour photograph of the palm trees on site at Plot 19/172. From an initial inspection of that photograph none of the trees appear to be planted in the ground within their pots, a point taken up by the applicant’s solicitors in a letter of the same date.
29. That somewhat impenetrable narrative explanation and the challenge to the authenticity of the photographic images and drone footage relied on by the applicant resulted in the directions which were made on 2 and 9 August 2018 for a single joint expert’s report in relation to both the removal and replanting of the olive trees and the drone footage.

The Arboricultural Report produced by Mr Jonathan Cocking on 23 November 2018

30. As the jointly instructed ‘tree’ expert, Mr Cocking was supplied with all relevant written material including the parties’ written statements. He also conducted a site visit locally in Cyprus over two days in November 2018. In his ‘Summary of the Case’ at section 2 of his report, Mr Cocking encapsulates the issues he has been asked to consider in this way:
- “2.1 It is alleged that at some point during the month of October 2017, [the respondent] removed around 50 Olive trees from Plot 1339 and relocated them to Plot 19/172.
 - 2.2 [The respondent] denies the relocation of the Olive trees but accepts that he did move 8 Palm trees and relocate them to Plot 19/172.
 - 2.3 It is further alleged that during the same period in 2017 [the respondent] removed several mature Olive trees from the open area of Plot 1232/1255 and relocated these to Plot 19/172.
 - 2.4 [The respondent] denies moving any trees from plot 1232/1255 and replanting them on Plot 19/172.
 - 2.5 [The respondent] states that the newly planted trees on his Plot 19/172 were in the main purchased from a specialist nursery in Limassol but that also some trees were sourced from Plot 713 and Plot 210.”
31. Mr Cocking’s report is a long and detailed document. In relation to each of the issues he was asked to address, he has provided a comprehensive and reasoned response. There is a detailed breakdown on each and every compartment and zone he inspected and a precise identification of the number of trees planted in each. He concludes that there were, in all, 57 olive trees removed from Plots 1232/1255 and 1339. He has explained in detail the methodology he used to establish the ages of the trees and the manner in which the core samples he took were treated and tested. He has concluded that the trees were old and established olive trees which were likely to have been planted when they were between 5 and 10 years old. Their average ages were now c. 49.5 years with a possibility of having been planted between 39 and 44 years ago. Mr Cocking concludes that, at the time of his inspection, there were a total of 56 olive trees on Plot 19/172 (the respondent’s retained land), all of which were newly planted in the soil in which they stood. These consisted of 52 semi-mature trees, 2 large dead or dying specimens and 2 medium aged specimens. The newly planted trees at Plot 19/172 had been ‘hard pruned’ and were showing regrowth that was about a year old suggesting that the trees had been prepared for transport and planting about 1 year previously.
32. In addition to the 56 olive trees which he counted on the respondent’s land, there were 8 palm trees, one of which had died. A further olive tree was considered to be dying with little chance of recovery and Mr Cocking considered this to be due to ‘transplant shock’, a common phenomenon when planting older trees that are less resilient to the procedure of transplant. As he records in his report, this provided him with further evidence that these trees did not exist on the site prior to November 2017.
33. Whilst out in Cyprus for the purposes of his site visit, Mr Cocking visited a number of garden nurseries with a view to establishing the cost of replacing the trees which had

been removed. One of those nurseries was T N Theodorides Nurseries Ltd which the respondent claimed to be the provider of the young olive trees he had planted on his land. Mr Cocking was told during that visit that the nursery did not supply olive trees of a size similar to those which were then planted on Plot 19/172 and only sold much younger and less mature specimens.

34. I do not propose to burden this judgment with an analysis of the full content of Mr Cocking's report. Suffice it to say that it is a thoroughly professional piece of analysis which has never been the subject of any serious challenge from the respondent. There were no Part 25 questions from his advisers following delivery of the completed report. What I will do is to set out the section headed "General Conclusions" in Part 5 of the report. This is what Mr Cocking concluded:

"5. General Conclusions

- 5.1 Taking all available information into account, including the colour and the canopy form from Google imagery, the spacing and the general arrangement of the species within **Plot 1339**, I believe it highly likely that the removed trees were all Olive trees.
- 5.2 The provided video footage, in combination with my site investigations, lead me to the opinion that predominantly Olive trees had been selectively removed from **Plots 1339** and **Plots 1232/1255**.
- 5.3 The total number of Olives removed from **Plot 1232/1255** and **Plot 1339** is **57 trees**.
- 5.4 On average I estimate that the trees removed from **Plot 1339** were in the region of being **49.5 years old** give or take 2 or 3 years on either side, whilst it appears that the newly planted trees on **Plot 19/172** are approximately old **51 to 52 years old** with a similar margin.
- 5.5 In total **238 Olive trees** remain at the two properties referred to as **Plot 1339** and **Plot 1232/1255**.
- 5.6 In total, **56 Olive trees** were found on **Plot 19/172** [the respondent's retained land], all newly planted. These consist of 52 semi-mature trees, 2 large, dead/dying trees and 2 medium sized trees.
- 5.7 Considering all the evidence available to me, and based on my knowledge and experience, it is my opinion that the Olive and Palm trees now located on **Plot 19/172** are the same trees as those removed from **Plot 1339** [Alexander's House] and **Plot 1232/1255** [Nicholas' House], their sizes, species, numbers and ages having remarkable parallels.
- 5.9 [*sic*]I estimate that the cost of bringing **Plot 1339** and **Plot 1232/1255** as close to their original condition with regards to missing trees is in the region of €53,892.00 + taxes."

35. The other piece of evidence available to the court is a sworn statement which has since been obtained from the owner of the nursery which the respondent identified as the supplier of the trees which he had planted on Plot 19/172. Mr Neofytos Theodoridis has made a sworn statement dated 21 November 2018 in which he produced a copy of an invoice of the trees and plants which had been supplied to the respondent. In that statement he has also confirmed and certified that the olive trees in issue (as depicted in photographs shown to him) are not those sold by his company to the respondent and neither are they the trees described in the invoice. His evidence is that the respondent purchased and paid for *‘48 small ornamental olive trees (not for production purposes), of which the oldest one was 6 years old at the most, and which were undoubtedly much smaller compared to those depicted in the photographs’*.

The expert evidence of Mr Christopher Hatfield in relation to the authenticity of the drone footage

36. As I have already recorded in this judgment, Mr Hatfield concluded in his report dated 16 November 2018 that the drone footage was genuine and there was no credible forensic evidence in the drone device itself or in the data to suggest that either had been modified in any way.
37. Mr Hatfield’s report also deals with a significant number of Part 25 questions directed to him on receipt of his initial report. There is no doubt in my mind that these questions have been informed to a significant extent by someone other than the respondent. The questions are highly technical in their nature and content and there is nothing in any of the material before the court to suggest that the respondent possesses the necessary knowledge or skills to have framed these questions himself. Of course there is nothing inherently objectionable in the deployment of a ‘shadow expert’ to test the evidence of a single joint expert but in my judgment it is not without significance that the respondent was prepared to invest time and money in his efforts to discredit this evidence. The applicant has asked a number of questions of her own. Nothing in the responses to those questions has caused Mr Hatfield to revisit his primary conclusions on the reliability of the drone footage which informed to an extent the conclusions reached by Mr Cocking.
38. It might be thought that the cumulative effect of the evidence of these two experts would have provided the opportunity for reflection on the part of the respondent. To an extent it did. The issue of liability for the removal of the trees had been listed for a hearing before me on 19 December 2018. By that stage, whilst not prepared to hold his hands up and admit formally that he bore responsibility for removing and replanting the olive and palm trees on his own land, the respondent had, through his legal representatives, agreed to transfer the trees back to the applicant and to cover all her legal costs on an indemnity basis. As a result, the hearing on 19 December was vacated. However, they were unable to agree the terms of an order and/or the precise mechanics of the re-transplantation process. The latter issue was resolved when it was agreed that the single joint expert, Mr Cocking, would appoint and supervise an independent contractor to move the trees back onto the applicant’s land.
39. In preparation for a further mention on 6 March 2019, the respondent’s counsel, Mr Troman, identified in his written material the principal issue which continued to separate the parties: that was the applicant’s wish for a formal recording of liability in a judgment of the court. In my earlier judgment, upheld on appeal, I explained why I

had rejected Mr Troman's submission that establishing such liability would amount to an abuse of process. The order which flowed from the hearing on 6 March 2019 made detailed provision for the precise mechanics of transporting and replanting the 56 olive trees and the palm trees as identified in Mr Cocking's report back onto the applicant's retained land. Where individual trees did not survive the re-transplantation process, there was provision for financial compensation for each tree lost. There was an order for the interim preservation of the trees pending that process. Third party contractors were to be instructed for the purposes of carrying out the work.

40. As I began to hear submissions from Mr Southgate QC at the commencement of this hearing on 12 November 2019, there was still no formal admission from the respondent that he had played any part in relation to the removal of the trees prior to the transfer of the land to the applicant in accordance with the orders made by Moylan J. Perhaps of greater significance, there was no attempt on his part to retract any part of his substantive case as set out in some considerable detail in his written statement of 10 April 2018. The only material he put before the court was his (renewed) application to vacate the hearing and thereby avoid any findings on the tree issue. The justification for that application was primarily his inability to 'countenance placing [him]self under yet further strain by attending court on 12 November to give evidence'. At no stage in his statement dated 9 October 2019 did he suggest that he had misled the applicant or the court. He prayed in aid only his voluntary repatriation of the trees and the sum of just under £330,000 which he had paid to the applicant in respect of her indemnity costs relating to this discrete issue. Once again he expressed an anxiety about the use which the applicant and/or either of his two sons might make of a formal judgment in respect of his liability for any involvement in the removal of the trees. I shall return to this shortly in the context of why this judgment has been released as an open judgment.

My conclusions and findings

41. Having carefully reviewed all the evidence which is before the court, I am entirely satisfied that, on the balance of probabilities, the respondent was responsible for the removal of the applicant's trees prior to the formal transfer to her of the plots of land on which they previously stood. If he did not physically assist in the removal of the trees, I am satisfied that he gave instructions to a team of contractors to carry out the removal. It is abundantly clear from the terms of Mr Cocking's report that this operation would have involved a substantial number of man hours and, most probably, a significant amount of heavy lifting equipment to remove and transport the trees. It was, in my judgment, a substantial operation which was motivated by a desire not only to preserve what he could from land which he had fought tooth and nail to preserve in the context of the ongoing matrimonial proceedings: it was also, as I find, an act of pure spite against the applicant.
42. Whilst the respondent admitted removing eight "potted" palm trees, he has maintained throughout that he did not remove any of the missing olive trees as the applicant was alleging. In support of that 'defence' he has sought to construct an elaborate narrative into which he has woven various 'explanations' as to why her allegations are unlikely to be true. He has declined to submit himself for cross-examination in relation to his narrative, aspects of which are patently untrue in the light of the unchallenged expert evidence. I do not accept that the CAPO documents assist me at all in relation to the

tree issue. These were provided to the SJE and found no traction whatsoever in Mr Cocking's report. Further the statement from Mr Theodoridis dated 21 November 2018 confirming his conversation with Mr Cocking confirms specifically that the (transplanted) trees shown in situ on the respondent's retained land identified in various photographs were not sold by his nursery business to the respondent. The statement confirms precisely what was sold to him (i.e. 48 small ornamental olive trees which were not trees designed for the commercial production of olives and none more than 6 years old at the most). The statement from Mr Theodoridis contains a statement of truth and has never been the subject of formal challenge by the respondent. I can only conclude therefore that this aspect of the respondent's narrative account is a pure fabrication. I know not whether he has at any stage planted anywhere on his retained land elsewhere in Cyprus the trees which he describes in paragraph 18 of his April 2018 statement but I am confident on the basis of the undisputed expert evidence that these were not the trees observed by Mr Cocking during his site visit. Thus, I reject in its entirety the detailed description he gave at paragraphs 18 to 20 of how his workmen planted the trees supplied by the nursery over the course of five days and his account of having spoken to those workmen when some of the trees died. I reject entirely his denial of having removed, or caused to be removed, olive trees from the farm and I find his challenge to the authenticity of the drone footage to be part and parcel of the narrative he was constructing in defence of his former wife's allegations. He appears to accept in paragraph 29 of his statement that whatever was removed from the land was removed by his work force on his instruction but he then attempts to pass this off as the 'cutting back of some wind breakers'. In this context, I remind myself about what I saw and observed when I watched the drone footage prior to the instruction of either of the joint experts in this case. There is no doubt in my mind that what I was observing in the earlier footage, taken prior to the removal of the trees in question, was an established row of mature olive trees. It was only the indignation expressed by the respondent through his counsel on that occasion and the strength of his denial of involvement which persuaded me to allow him to proceed with the instruction of a single joint expert in relation to the authenticity of the drone footage and the instruction of Mr Cocking. It follows that I reject the respondent's account at paragraph 65 of his statement in relation to why the drone footage is unlikely to be genuine just as I reject his attempt to pass off what was removed as a 'row of wind breakers' if that was indeed the thrust of his case.

43. Further, I reject the respondent's account in paragraph 70 of his statement that, on receiving the initial allegation in November 2017 that he had removed the trees, he had a conversation with a local nursery about the impossibility of such an exercise. If I am wrong and any such conversation took place, it was likely to have been part and parcel of the false narrative which he was seeking to construct for the purposes of his defence to this court. I reject the evidence of Ms Theophilou as assisting one way or the other on the principal issue of the respondent's liability for the removal of the trees. She had been asked to express a view about the likelihood of mature trees surviving the transplantation process and, as is now apparent, some of the re-transplanted trees have not survived the restitution exercise which the respondent agreed to put in place following receipt of both experts' reports.
44. I am driven to conclude, as I find to be implicit from the respondent's own actions and the instructions given to his legal representatives since receipt of those expert

reports, that his written evidence to this court contains a number of highly misleading and untrue representations as to his own involvement in the removal of the trees from the applicant's land. Further, I find that at the time he made those representations, he knew them to be untrue. In this context, I agree with the earlier findings made by Moylan J (now Lord Justice Moylan) that the respondent cannot be considered a reliable witness in terms of the truth of several aspects of his evidence as presented to the English court in the context of this long-running matrimonial litigation and its implementation.

45. He was offered the opportunity by the applicant to admit his role in relation of the removal of the trees. On the basis of such an admission, she was content to rely upon that admission within the restricted terms of paragraph 57 of Moylan J's mainframe order (the confidentiality waiver clause). In other words, the admission would be covered by the implied undertaking and subject to the exceptions set out in paragraph 57. He did not avail himself of that opportunity and she now seeks a public judgment recording his liability including my findings in relation to the untrue evidence which he has put before this court.

46. As I said in paragraph 27 of the judgment I delivered on 6 March 2019,

“It seems to me that *if* the applicant is able to establish that the respondent was indeed involved in an essentially malicious act (i.e. the removal of trees from the property which she had been awarded in matrimonial proceedings) and that he lied to the court about his involvement in that act, she should be entitled to use that finding for the purposes expressly permitted by [paragraph] 57 of the order made by Moylan J. That does not in my judgment amount to a collateral purpose or an abuse of process. If established, it may constitute litigation conduct which demonstrates the lengths to which the respondent is prepared to go in order to put undue pressure on the applicant in a litigation context and/or his indifference to his obligation to present his evidence to the court on the basis of facts which he knows or believes to be true. Just as Moylan J sought to ensure the existence of a level playing field as between these parties for the purposes of the prescribed parallel litigation which continued (and continues) between them, I am equally determined to ensure that neither has an unfair advantage. I would take exactly the same view if the allegations in relation to the responsibility for damage to property owned by the party seeking a remedy were to be levelled against the applicant wife in this case.”

47. On behalf of the applicant, Mr Southgate QC seeks an open judgment on the issue of liability. On balance, I am prepared to accept that the respondent's wholesale rejection of liability both in correspondence and in his written evidence to this court, which case I have found to be a manufactured and untrue defence, is ongoing litigation conduct which must find reflection in an open judgment. His presentation is not the result of a lapse of memory or a misconstruction of actions on his part. It was a deliberate and contumelious attempt to mislead this court and the applicant in what I suspect was a misplaced hope that she would abandon her application in respect of any formal findings of liability when faced with the prospect of an expensive trial of the issue. In a *Lucas* context, I reject any suggestion that he has misled the court out of a sense of shame, panic or a desire to protect others. In my judgment, the stance he has taken in this litigation is part and parcel of the ongoing war of attrition which continues to be waged against the applicant and those family members whom he

views as supportive of her case in these proceedings. It is true that she has to date been given a complete indemnity in relation to her legal costs. However, in my judgment, this litigant has breached his obligations to this court. He has been neither frank nor honest in the account he has given and, as such, he has forfeited any entitlement he might have had to confidentiality. This case has, at the instigation of the respondent, travelled to the Court of Appeal on more than one occasion. As the Court of Appeal confirmed in *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315, [2011] 1 FLR 1427, the court is entitled to publish an un-anonymised judgment in circumstances where there has been what amounts in its essence to a fraud on the court. This is not primarily about assisting a party to secure enforcement of orders which the court has made. In relation to the Cyprus land and the restoration to that land of all that stood upon it prior to the transfer of the legal title to the applicant, that has now been achieved. It is about recognising the consequences to a party who is prepared to deliberately obfuscate and mislead in the context of sworn written evidence put before the English court seized of these matters.

48. In *Norman v Norman* [2017] EWCA Civ 49, [2018] 1 FLR 426, the Court of Appeal has subsequently confirmed that, in the context of balancing a party's Article 6 and 8 rights, any fraudulent conduct involving deception by one party may engage a strong public interest in such matters being reported publicly. I doubt whether the husband's role in the removal of the trees from the applicant's land as I have found it to be remains private or confidential information for these purposes in any event. It seems to me that by his conduct in misrepresenting the position to the court he has sacrificed any confidentiality which arose in the context of these being private financial proceedings between the parties.
49. The respondent has not specifically sought an anonymity order. He was on notice that the applicant would be seeking a public judgment. Were he to have sought such an order in respect of anonymity, for the reasons given above, I would have rejected it.

Costs

50. It follows that the respondent must indemnify the applicant in relation to any costs left unpaid in relation to 'the tree issue'. Mr Southgate QC has submitted costs schedules showing a sum of just under £40,000 remaining outstanding given the substantial contribution which has already been made by the respondent to date on an indemnity basis. I agree that these costs should be assessed on the indemnity basis. At a late stage, and after the conclusion of the hearing, I received written representations from the respondent which suggested that there are aspects of these costs which he would wish to challenge. I am minded to assess costs summarily as I have done on previous occasions in this litigation. It seems to me that there is a tension in the position which the respondent has adopted in relation to his lack of participation in this hearing and his wish to secure the court's indulgence in assessing his liability for costs. Having considered carefully the statement of costs submitted by the applicant's solicitors and the points made in the respondent's email dated 27 November 2019 (sent at 10:38), I propose to order the respondent to pay the applicant's costs in the sum of £39,617. That sum will be paid within 14 days of the drawing of the order which flows from this judgment.

Order accordingly