Neutral Citation Number: [2024] EWHC 8 (Ch)

Case No: CH-2023-000170

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

On appeal from the Orders of Master Pester dated 16 June 2023 and 18 July 2023
Business and Property Courts of England and Wales
Business List (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 January 2024

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

Between:

(1) DMITRY LAZARICHEV **(2) PAVEL MATVEEV** **(3) GEORGY SOKOLOV**	**Defendants/ Appellants**
- and -	
TSIMAFEI LYNDOU	**Claimant/ Respondent**

- -

Ian Mill KC and **Tom Cleaver** (instructed by **Morrison Foerster LLP**) for the **Appellants**
Max Mallin KC and **Lee Jia Wei** (instructed by **Harcus Parker Limited**) for the **Respondent**

Hearing date: 23 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC:

Introduction

1. By an order dated 16 June 2023 Master Pester dismissed the defendants' application dated 28 April 2022 for security for costs from the claimant. By a further order dated 18 July 2023 he ordered the defendants to pay the claimant's costs of the application but gave them permission to appeal against the order dated 16 June 2023 and the order for costs. This is my judgment on the appeal.

2. In brief summary, the relevant background is as follows. The proceedings were commenced by the issue of a claim form on 28 May 2021. The claimant[1], a Belarusian national, alleges that, having conceived a business idea, he shared it in confidence with the defendants and entered into a joint venture or partnership with them with a view to developing a business based on the idea, and that the defendants later excluded him from the business. He advances various grounds of claim, including breach of confidence and unlawful means conspiracy, and seeks a declaration that shares in the business are held on trust for him. The allegations and claims are disputed by the defendants. Although the proceedings were commenced some two and a half years ago, a costs and case management conference took place only in October 2023. The parties agree that the likely length of the trial will be about ten days. The defendants estimate that their legal costs of the proceedings will exceed £2,000,000. On the claim form as originally issued, the claimant gave as his address an address in Belarus. By letter dated 28 March 2022 the solicitors then acting for the defendants gave notice of their intention to apply for an order that he give security for costs. By their response dated 11 April 2022 the claimant's solicitors stated that the claimant intended to emigrate to Poland on account of the political climate in Belarus. Nevertheless, the defendants made their application for security for costs on 28 April 2022. On 4 July 2022 the claimant amended the claim form to show as his address an address in Poland. (He subsequently sought further to amend the claim form to show his address as from October 2022 as a different address in Poland. Permission for that amendment was given by Master Pester in the order dated 18 July 2023.) The defendants did not accept that the claimant's move to Poland was either genuine or lawful and they filed evidence in support of their position. After a protracted process of the exchange of evidence, the application for security for costs came on for hearing before Master Pester on 22 March 2023.

3. The application for security for costs was advanced on the basis of the following provisions of CPR r. 25.13:

> "(1) The court may make an order for security for costs under rule 25.12 if –
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) (i) one or more of the conditions in paragraph (2) applies, or …

[1] There was originally a second claimant, the respondent's brother. He discontinued his claim and I shall say no more about him.

> (2) The conditions are –
>
> (a) the claimant is – (i) resident out of the jurisdiction; but (ii) not resident in a State bound by the 2005 Hague Convention, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982;
>
> …
>
> (e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form; …"

As to the condition in r. 25.13(2)(a), the defendants contended that the claimant was resident out of the jurisdiction and in a State not bound by the Hague Convention, namely Belarus. This contention was put in two ways: first, that as a simple question of fact the claimant was resident in Belarus; second, that, even if on a purely factual level the claimant was resident (as he claimed) in Poland, his residence there was unlawful, because he had obtained permission to reside there on a false basis, and condition (a) required lawful residence. As to condition (e), they contended that the Polish address shown by amendment on the claim form was not the claimant's correct address.

4. In his thorough and carefully reasoned judgment, Master Pester rejected these contentions. In short summary, his reasoning was as follows. As a matter of the construction of r. 25.13(2)(a), "resident" should be given its ordinary meaning, signifying "to dwell permanently or for a considerable period of time, to have one's settled or usual abode, to live in or at a particular place". Therefore the question as to where the claimant was resident was a question of fact. The lawfulness of a person's presence in a particular State was not itself the relevant question. It might be relevant to the factual question, because clear evidence that a person was at immediate risk of deportation from a State could lead to the conclusion that he was not in fact resident there; however, save in a very clear case the court should not determine questions of lawfulness itself but should rely on the determination of the immigration authorities of the relevant State. In the present case, the evidence showed that the claimant was habitually and normally residing in Poland, not in Belarus. Although there were serious questions concerning the basis on which the claimant had obtained his temporary residence permit, it was not appropriate to anticipate the view that the Polish immigration authorities might take. Further, even if the finding were justified that the claimant was not resident in Poland, it would not follow that he was resident in Belarus; therefore the jurisdictional gateway would not be established. As for the condition in r. 25.13(2)(e), the totality of the evidence showed that the claimant had given his proper address on the claim form on 4 July 2022. Accordingly, the defendants had not established that jurisdiction existed to make an order for security for costs.

5. There is no appeal against the Master's decision in respect of r. 25.13(2)(e). The grounds of appeal are addressed solely to the decision in respect of r. 25.13(2)(a).

Grounds of Appeal

6. The grounds of appeal may be summarised as follows.

1) The Master ought to have held that in r. 25.13(2)(a) "resident" meant "lawfully resident".

2) Upon his own direction that lawfulness would be relevant where "there was clear evidence that a respondent was at immediate risk of deportation", the Master was required on the evidence to find that there was such clear evidence.

3) The Master was wrong to refuse to permit the defendants to rely on a supplemental expert report, filed and served shortly after the hearing, which would have provided further material support for the conclusion in Ground 2. (In the alternative, the defendants apply for the report to be admitted as fresh evidence on the appeal.)

4) On account of Grounds 1 to 3, the Master was wrong to find that the claimant was resident in Poland.

5) The Master ought to have held that the "wrongdoing principle" prevented the claimant from relying on the existence of his residence permit to establish residence for the purposes of r. 25.13(2)(a).

6) The Master ought to have held that, if the claimant was not resident in Poland, he was not resident in any Convention State: "The court was not required to find that the claimant resided in any specific non-Convention State in order for the rule to be engaged; it sufficed that he had failed to establish residence in a Convention State."

The grounds are all variants on a single theme: that, as the claimant obtained his residence permit to remain in Poland by making a false declaration (which he denies), he cannot satisfy the residence requirement in r. 25.13(2)(a).

7. In granting permission to appeal, Master Pester wrote:

> "The core of the appeal is proposed Grounds 1 and 2. This involves a matter of statutory construction, informed by two decisions of the House of Lords: *R v Barnet London Borough Council, ex p. Nilish Shah* [1983] 2 AC 309 and *Mark v Mark* [2006] 1 AC 98. I consider that the proposed grounds of appeal have real prospects of success, given the interrelationship between:
>
> (a) the extent to which (if at all) questions of lawfulness of a claimant's residence are relevant to an application pursuant to CPR Part 25, r. 25.13(2)(a); and
>
> (b) how the answers to those questions apply to the facts of the present case.
>
> See especially at [56] and [67] – [74] of the Judgment.

> As to the remaining grounds of appeal, they appear to me to be weaker, but nevertheless I cannot say that the prospects are merely fanciful."

8. In his oral submissions to me, Mr Mill KC presented the grounds of appeal in the order 2, 5, 1, 3 and 6; 4 as a compendious ground was given no separate treatment. I shall begin with Ground 1, followed by Ground 5, which is closely related. Then I shall address Grounds 2, 3, 4 and 6 in that order.

Ground 1

9. Ground 1 is that the Master was wrong to find that "resident" did not mean "lawfully resident". The question whether "resident" in r. 25.13(a) means "lawfully resident" is one of statutory construction, albeit not of the construction of primary legislation.

10. "[S]tatutory interpretation is concerned to identify the meaning of the words used by Parliament and …, in ascertaining that meaning, the context and purpose of the provision are important": *R v Luckhurst* [2022] UKSC 23, [2022] 1 WLR 3818, *per* Lord Burrows at [23], citing *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343. However, Lord Neuberger of Abbotsbury PSC sounded a note of caution in *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, at [72]:

> "When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613, 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.'"

11. The Master, having discussed in detail the authorities cited to him (some of which I shall mention below), expressed his conclusions on the issue of statutory construction as follows:

> "56. On the basis of the authorities cited to me, my conclusion is that the following principles apply:
>
> (1) In deciding whether the word 'lawfully' should be implied in the reference to resident in CPR r. 25.13(2)(a), I am engaged in a process of statutory construction: see *Mark v Mark*, at [30].
>
> (2) Resident is an ordinary English word, and should be given its ordinary meaning. The dictionary meaning of the word

means 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place', as pointed out by Lewison J in *HMRC v Grace* [2008] EWHC 2708 (Ch), at [3].

(3) Residence in a place connotes some degree of permanence, some degree of continuity or some expectation of continuity: *HMRC v Grace*, ibid.

(4) The question as to where a particular respondent resides on an application for security for costs is a factual one. However, that does not mean that questions of lawfulness are wholly irrelevant. If there was clear evidence that a respondent was at immediate risk of deportation, that could very well lead to the conclusion that the respondent was not, in fact, resident in a particular jurisdiction: see the comments of Baroness Hale in *Mark v Mark*, at [36], giving the example of a person who was 'on the run' after a deportation order or removal directions. Compare Lord Hope's conclusion in *Mark v Mark*, at [13], that '… illegality is relevant to the question whether the person intended to reside in a country with the intention of remaining there indefinitely, but not to the question whether the person is present here.'

(5) Counsel for the Defendants emphasised the carve-out or caveat suggested by Baroness Hale, to the effect that other statutory provisions 'in particular those conferring entitlement to some benefit from the state' would make it proper to imply a requirement that residence be lawful. However, it is difficult to see how that applies in the context of an application for security for costs. There is no question of Mr Lyndou claiming benefits from the United Kingdom in the usual sense of that term. The suggestion that, by claiming residence in Poland, Mr Lyndou was in some way claiming a 'benefit' in the sense that he would not be ordered to provide security for costs is, in my view, forced and artificial.

(6) On an application for security for costs, the court should be cautious about entering into questions of the lawfulness of a person's residence in another country. It will be a rare case where the evidence is sufficiently clear to reach a conclusion with any confidence. Immigration law is notoriously complex. I note that Moore-Bick J in *Aoun v Bahri* declined to reach a decision where what was involved was whether Mr Aoun was lawfully resident in the UK, indicating that this was a matter best left to the Home Office. How much more caution is justified where what is in issue is a question of the lawfulness of a person's residence in a foreign state.

(7) The other matter to which one ought to be alive is what Baroness Hale termed 'the shifting nature of immigration

> status': *Mark v Mark*, at [48]. The example given was that of an asylum seeker, who may commit a criminal offence in entering this country illegally, but who upon making his claim to the authorities, may be granted temporary admission. Again, I appreciate that the remarks were made in the context of considering UK immigration and asylum law, but the position is even more difficult when what the court is being asked to consider involve questions of foreign immigration law.
>
> (8) If submissions about the lawfulness of a person's residence in a foreign state became routine on applications for security for costs, then that would inevitably require expert evidence, and possibly cross-examination of the parties' respective experts. Applications for security for costs are interim applications, which ought to be decided in a proportionate way and without the need to examine complex factual or legal questions."

12. I respectfully agree both with the Master's conclusions and with his reasons. However, in deference to the submissions advanced before me I shall address the issue myself.

13. The Civil Procedure Rules do not contain a definition of "residence" for the purposes of Part 25. It was common ground before the Master and before me that there was no binding authority on the question whether in r. 25.13(2)(a) "resident" meant "lawfully resident". The only judicial dictum on the point to which either the Master or I was referred was that of Henshaw J in *Pisante v Logothetis* [2020] EWHC 3332 (Comm), [2020] Costs LR 1815, at [22]:

> "The question of a person's residence for the purposes of CPR 25.13(2)(a) is one of fact and degree. A person is resident in a place for these purposes if they habitually and normally reside lawfully in that place from choice, and for a settled purpose, apart from temporary or occasional absences, even if their permanent residence or 'real home' is elsewhere: see note 25.13.2 in the White Book citing inter alia *R v Barnet LBC, ex parte Shah (Nilish)* [1983] 2 AC 309, 343G, 349. The Court of Appeal applied the dicta in *Shah* to a security application under the previous rules of court (RSC Order 23 rule 1) in *Parkinson v Myer Wolff & Manley* (23 April 1985, unreported, CA)."

However, lawfulness was not in issue in *Pisante v Logothetis* and Henshaw J was simply adopting language used in the notes to the White Book and, in a different context, by the House of Lords in a case I shall discuss below. I was referred only in passing to the decision of the Court of Appeal in *Parkinson v Myer Wolff & Manley*, but in fact that case, which concerned the meaning of "ordinarily resident" in RSC Ord. 23 r. 1(a), had nothing to do with unlawfulness, and the simple conclusion stated by Kerr LJ was that the authorities

> "clearly show that the words 'ordinary residence' and 'ordinarily resident' are to be given their natural and ordinary

> meaning and are not to be equated with the concept of 'domicile' or with the concept of what a person's 'real home' is. They also show that whether or not a person is ordinarily resident somewhere is a question of fact and degree depending upon the circumstances of each case."

14. The natural and ordinary meaning of residence was explained by Lewison J in *The Commissioners for Her Majesty's Revenue & Customs v Grace* [2008] EWHC 2708 (Ch), [2009] STC 213, (a tax case), at [3]:

> "(i) The word 'reside' is a familiar English word which means 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place': *Levene v Commissioners of Inland Revenue* (1928) 13 TC 486, 505. This is the definition taken from the Oxford English Dictionary in 1928, and is still the definition in the current on-line edition;
>
> (ii) Physical presence in a particular place does not necessarily amount to residence in that place where, for example, a person's physical presence there is no more than a stop gap measure: *Goodwin v Curtis* (1998) 70 TC 478, 510;
>
> (iii) In considering whether a person's presence in a particular place amounts to residence there, one must consider the amount of time that he spends in that place, the nature of his presence there and his connection with that place: *Commissioners of Inland Revenue v Zorab* (1926) 11 TC 289, 291;
>
> (iv) Residence in a place connotes some degree of permanence, some degree of continuity or some expectation of continuity: *Fox v Stirk* [1970] 2 QB 463, 477; *Goodwin v Curtis* (1998) 70 TC 478, 510;
>
> (v) However, short but regular periods of physical presence may amount to residence, especially if they stem from performance of a continuous obligation (such as business obligations) and the sequence of visits excludes the elements of chance and of occasion: *Lysaght v Commissioners of Inland Revenue* (1928) 13 TC 511, 529;
>
> (vi) Although a person can have only one domicile at a time, he may simultaneously reside in more than one place, or in more than one country: *Levene v Commissioners of Inland Revenue* (1928) 13 TC 486, 505;
>
> (vii) 'Ordinarily resident' refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life,

> whether of short or long duration: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 343;
>
> (viii) Just as a person may be resident in two countries at the same time, he may be ordinarily resident in two countries at the same time: *Re Norris* (1888) 4 TLR 452; *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 342;
>
> (ix) It is wrong to conduct a search for the place where a person has his permanent base or centre adopted for general purposes; or, in other words to look for his 'real home': *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 345 and 348;
>
> (x) There are only two respects in which a person's state of mind is relevant in determining ordinary residence. First, the residence must be voluntarily adopted; and second, there must be a degree of settled purpose: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 344;
>
> (xi) Although residence must be voluntarily adopted, a residence dictated by the exigencies of business will count as voluntary residence: *Lysaght v Commissioners of Inland Revenue* (1928) 13 TC 511, 535;
>
> (xii) The purpose, while settled, may be for a limited period; and the relevant purposes may include education, business or profession as well as a love of a place: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 344;
>
> (xiii) Where a person has had his sole residence in the United Kingdom he is unlikely to be held to have ceased to reside in the United Kingdom (or to have 'left' the United Kingdom) unless there has been a definite break in his pattern of life: *Re Combe* (1932) 17 TC 405, 411."

15. Three points may be noted here about Lewison J's discussion. First, he gives the words their ordinary meaning, not some special or peculiarly legalistic meaning. Second, the ramifications of that ordinary meaning are expounded from authorities concerning different areas of law: the meaning will generally be the same, whether the context is tax or something different. (This point is exemplified in and confirmed by the *ex parte Shah* case, which is discussed below.) Third, consistently with the conclusion in *Parkinson v Myer Wolff & Manley* and with the gravamen of Henshaw J's dictum in *Pisante v Logothetis*, and as required by the meaning given to the words, the enquiry as to residence is a factual question.

16. On the issue of construction, I was principally referred to two authorities: the decisions of the House of Lords in *R. v Barnet London Borough Council, ex parte Shah* [1983] 2 AC 309 ("*Shah"*) and in *Mark v Mark* [2005] UKHL 42, [2006] 1 AC 98 ("*Mark*").

17. *Shah* concerned the refusal by a number of local education authorities to make awards under the Education Acts to several students to enable them to pursue courses of further education. The students in question were lawfully present in the United Kingdom, but their leave to remain was conditional on them leaving the United Kingdom once they had completed their education[2]. The local education authorities had refused their applications for awards under the Acts on the grounds that they had failed to prove that they were ordinarily resident in the United Kingdom throughout the three years preceding the first year of the course in question, as required by the legislation; the essence of the argument was that temporary residence for a limited, namely educational, purpose, was not "ordinary residence". The principal issue for the House of Lords concerned the meaning to be given in the context of the Education Acts to the words "ordinarily resident in the United Kingdom". Lord Scarman, with whose speech the other members of the Appellate Committee agreed, analysed the issue by reference to two questions: first, what is the natural and ordinary meaning of the words? second, does the statute in the context of the relevant law against the background of which it was enacted, or in the circumstances of today, compel one to adopt a different meaning? See 340E.

18. As to the first question, Lord Scarman said that the natural and ordinary meaning of the words "ordinary residence" and "ordinarily resident", as words of common usage in the English language, had been authoritatively determined by the House of Lords in two tax cases: see 340F and 341H. At 342D he said:

> "I agree with Lord Denning M.R. [in the Court of Appeal in *Shah*] that in their natural and ordinary meaning the words mean 'that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration.' The significance of the adverb 'habitually' is that it recalls two necessary features mentioned by Viscount Sumner in *Lysaght's* case, namely residence adopted voluntarily and for settled purposes."

At 343G – 344B Lord Scarman continued:

> "Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.
>
> There is, of course, one important exception. If a man's presence in a particular place or country is unlawful, e.g. in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence … There is, indeed, express provision to this effect in the Act of 1971, section 33(2)[3]. But even without this guidance I would conclude that it was wrong in principle that a man could rely on

[2] In fact, one student, Mr Shah himself, had indefinite leave to remain. His case raised issues that are not directly relevant to the present appeal.

> his own unlawful act to secure an advantage which could have been obtained if he had acted lawfully."

19. As to the second question, Lord Scarman found nothing in the legislation to justify a departure from the natural and ordinary meaning of the words. After discussing complications that would arise from such a departure, he said at 345H – 346A:

> "I would add one further comment. By giving the words their natural and ordinary meaning one helps to prevent the growth and multiplication of refined and subtle distinctions in the law's use of common English words. Nothing is more confusing and more likely to bring the statute law into disrepute than a proliferation by judicial interpretation of special meanings, when Parliament has not expressly enacted any."

I respectfully think that this comment merits careful attention. Lord Scarman rejected the local education authorities' contention that "ordinarily resident" ought to be construed either as referring to a student's "real home" (meaning, essentially, the place from which the student had come and to which he would presumably return after completing his education) or as requiring a purpose to settle permanently and not merely for some temporary purpose such as education. He made clear that the "immigration status" of the student could not be decisive, as the Divisional Court and the Court of Appeal had treated it, "unless [as was not the case in *Shah*] the residence is itself a breach of the terms of his leave, in which event his residence, being unlawful, could not be ordinary": see 348D-E and 349E. At 348B he said:

> "The way in which they [the Divisional Court and the Court of Appeal] used policy was, in my judgment, an impermissible approach to the interpretation of statutory language. Judges may not interpret statutes in the light of their own views as to policy. They may, of course, adopt a purposive interpretation if they can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy. But that is not this case."

20. *Mark* considered *Shah* when dealing with an entirely different situation. The wife, a Nigerian national, who was an illegal overstayer in the United Kingdom after the expiry of her leave to remain, petitioned in England for divorce from her husband, who resided in Nigeria. The question was whether the English court had jurisdiction to entertain her petition. The court had jurisdiction only if one or other of the parties (a) was domiciled in England and Wales on the date when the proceedings were begun or (b) was habitually resident in England and Wales throughout the period of one year ending with that date: section 5(2) of the Domicile and Matrimonial Proceedings Act 1973. Upholding the decision of the judge and of the Court of Appeal, the House of Lords held that the English court did have jurisdiction. The discussion of the meaning of habitual residence (which was agreed to mean the same

[3] Section 33(2) of the Immigration Act 1971 provides: "It is hereby declared that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom or in any of the Islands at a time when he is there in breach of the immigration laws."

as ordinary residence[4]: see [32]) is relevant to the present appeal. (I need not refer to the discussion of domicile, subject to one point mentioned later.) On that question, the speech of Baroness Hale of Richmond met with the agreement of all other members of the Appellate Committee.

21. Baroness Hale referred to passages from Lord Scarman's speech in *Shah* and noted that he regarded "ordinary residence" as "ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind": at [28], citing *Shah* at 344. She observed that Lord Scarman's "unlawfulness" exception was strictly *obiter* and continued in terms that show the close connection between Ground 1 and Ground 5 in the present appeal:

> "30. In the Court of Appeal, there was much debate about whether the principle was one of statutory construction - implying the word 'lawfully' before 'ordinarily resident' - or whether it was one of public policy - under which a person is unable to benefit from his own illegal act. But the policy reasons for denying the benefit might be the same as those leading to the conclusion that Parliament did or did not intend that the residence be lawful in the particular statute under consideration. Thus, for example, in a statute which confers jurisdiction where either party is habitually resident in this country, there seems no good reason to deny the petitioner the benefit (if such it be) of bringing proceedings here on the basis of the respondent's habitual residence even if that residence is unlawful. The petitioner is not to be blamed for that. Ultimately, however, the Court of Appeal concluded that the principle stated in *Shah* could not be an absolute rule in the light of the Human Rights Act 1998, and the right of access to a court guaranteed by article 6 of the European Convention on Human Rights.
>
> 31. My Lords, I do not consider that there is any need to found our decision upon the Human Rights Act. It is quite clear that Lord Scarman regarded the question he was answering as one of statutory construction. On the meaning of 'ordinary residence' he relied upon the earlier tax cases. Yet it is also quite clear that the legality of a person's residence is completely irrelevant for tax purposes. A person who has taxable income or assets here is liable to United Kingdom tax irrespective of his immigration status. The two cases cited by Lord Scarman in support of the proposition that residence must be lawful were both immigration cases. In *Re Abdul Manan* [1971] 1 WLR 859 the applicant was a Pakistani seaman who had deserted from his ship and so his presence here was

[4] CPR r. 25.13(2)(a) as originally written referred to "ordinary residence". Mr Mill submitted that, for the purposes of the construction of r. 25.13, there was no material difference between "resident" and "ordinarily resident". That is also the opinion of the editors of *Civil Procedure,* who remark: "It appears unlikely that this change was intended to change the scope of ground (a)" (paragraph 15.13.3). In my judgment, that is correct. Mr Mallin initially advanced a contrary position but, as I understood it, he did not maintain that position as the argument progressed.

> unlawful under the Commonwealth Immigrants Act 1962. He nevertheless claimed to be entitled to enter and remain as a person who had been ordinarily resident here for two years. In rejecting that claim, Lord Denning MR said this, at p 861:
>
> > 'The point turns on the meaning of "ordinarily resident" in these statutes. If this were an income tax case he would, I expect, be held to be ordinarily resident here. But it is not an income tax case. It is an immigration case. In these statutes "ordinarily resident" means lawfully ordinarily resident here. The word "lawfully" is often read into a statute: see, for instance, *Adlam v Law Society* [1968] 1 WLR 6. It should be read into these statutes.'
>
> 32. Indeed, it is scarcely surprising that, in giving immigration rights to people ordinarily resident here, Parliament should exclude those who were here in breach of immigration control. …"

22. At [33] Baroness Hale turned to the issue before the House:

> "33. It is common ground that habitual residence and ordinary residence are interchangeable concepts: see *Ikimi v Ikimi* [2002] Fam 72. The question is whether the word 'lawfully' should be implied into section 5(2) of the 1973 Act. I see no reason to do so. The purpose of the 1973 Act was to provide an answer to the question 'when is the connection with this country of the parties and their marriage sufficiently close to make it desirable that our courts should have jurisdiction to dissolve the marriage?' …"

Baroness Hale considered that the purpose did not require that habitual residence in this country should be lawful, and that the question whether residence was habitual was a factual one to be answered by applying the test in *Shah.* At [36] she remarked:

> "It is possible that the legality of a person's residence here might be relevant to the factual question of whether that residence is 'habitual'. A person who was on the run after a deportation order or removal directions might find it hard to establish a habitual residence here. But such cases will be rare, compared with the large numbers of people who have remained here leading perfectly ordinary lives here for long periods, despite having no permission to do so. … There will, however, be other statutory provisions, in particular those conferring entitlement to some benefit from the state, where it would be proper to imply a requirement that the residence be lawful."

23. For the purposes of this appeal, a few simple conclusions may be drawn from the authorities.

1) As a matter of ordinary usage, the question of a person's residence is a factual question. A person is resident in the place where he dwells permanently or for a considerable period of time—where he has his settled or usual abode.

2) The natural and ordinary meaning of the words ("resident", "resides", etc) is to be accepted as the correct construction of a statutory provision, unless a different meaning has been expressly enacted or is required by a purposive interpretation of the instrument read as a whole, if necessary with reference to admissible aids to interpretation. The introduction of "refined and subtle distinctions in the law's use of common English words …, when Parliament has not expressly enacted any", is generally undesirable.

3) It follows (as made clear by *Shah*) that, unless good reason exists to the contrary, ordinary English words should be given the same meaning even in different contexts (e.g. tax and education); though, of course, as Baroness Hale observed in *Mark* at [15] and [30], the same words may nevertheless have a different meaning in different legislative provisions according to their context and purpose.

4) Where the ordinary meaning applies, the question of fact is not determined by the lawfulness or otherwise of the residence.

5) However, the fact that a person's presence in a particular place is unlawful might be relevant to the factual question, because it might mean that such presence is insufficiently settled for the label "residence" to be justified.

6) The question whether in a particular legislative provision there should be implied a requirement that the residence be lawful will depend on the purpose of the provision. Typically, the implication is likely to be justified where the provision confers an entitlement to some benefit from the state.

24. These conclusions are materially the same as those expressed by the Master in paragraph 56(1)-(4) of his judgment.

25. The facts of this case give rise to a preliminary difficulty with Ground 1, because the Master made two findings against which there is no appeal. First, he found that the claimant was in fact residing in Poland:

> "64. Taken as a whole, therefore, I find that the evidence shows that Mr Lyndou is not living in Belarus, but that he is habitually and normally residing in Poland. There is no evidence at the moment that Mr Lyndou is residing in Belarus."

Second, he found that the defendant's residence in Poland was lawful:

> "66. The starting point for my analysis is that Mr Lyndou has been granted a Polish temporary residence permit. On that basis, Mr Lyndou is in fact lawfully resident in Poland. What the Defendants invite me to do is to look behind this and conclude that there is clear evidence of unlawful conduct, and

> that the court should infer that the temporary residence permit was both obtained unlawfully and is now liable to be set aside."

26. The finding that the claimant's residence in Poland is lawful is not challenged and indeed is plainly correct, as the claimant resides in Poland pursuant to a temporary residence permit issued by the Polish authorities. It follows that the construction advanced in Ground 1, according to its plain meaning ("the Literal Proposed Construction"), cannot assist the defendants. In these circumstances, the defendants' case on Ground 1 requires that the words "lawfully resident" be given some meaning ("the Extended Proposed Construction") that excludes both (i) unlawful residence and (ii) lawful residence where the legal entitlement was procured by unlawful means. However, this distinction, though adverted to by Mr Mallin for the claimant in responding to the appeal, was skated over by Mr Mill, with the result that what I call the Extended Proposed Construction was never developed and remains to me opaque. Would any and all unlawful means deny the respondent the necessary residence? Or only unlawful means that were criminal (according to the law of the relevant state)? Or only unlawful means that could (or would?) result in revocation of the lawful permission to reside? And would it make any difference if the respondent could demonstrate that, although his actual permission to reside had been obtained by unlawful means, he had lawful grounds for establishing a right to reside? In short, the defendants have not advanced any proposal that could form the basis of an implication in the construction of r. 25.13(2)(a).

27. However, if these difficulties were put aside, I should still consider that the Master was right to reject the submission that in r. 25.13(2)(a) "resident" meant "lawfully resident".

28. First, absent good reason, "resident" ought to be given its ordinary and natural meaning, not some special meaning. The possibility that context and purpose might indicate some different meaning does not detract from the importance of Lord Scarman's dictum in *Shah* at 345-346 or Lord Neuberger's dictum in *Williams v Central Bank of Nigeria* at [72].

29. Second, the rule does not say "lawfully resident", though it could easily have done so. Although it might nevertheless be possible to imply the word that could have been but has not been used, one ought to be cautious before making such an implication.

30. Third, the purpose of the provision does not necessitate the implication of "lawfully". Mr Mill submitted, to the contrary, that the very purpose of the rule would be undermined unless a requirement of lawfulness were implied (cf. skeleton argument, paragraph 7). That purpose, he said, was to protect a defendant (who is an involuntary party to litigation) against the risk of being unable to enforce any costs order he may later obtain. The argument was most clearly stated in paragraphs 23 and 24 of the skeleton argument of Mr Mill and Mr Krsljanin:

> "23. Where a claimant is unlawfully resident in a particular State, it is inherently likely that it would be more difficult or expensive to enforce any award of costs against them: their unlawful residence makes it inherently unlikely that they would (or would continue to) hold assets lawfully in the jurisdiction against which enforcement might be effected; on the contrary,

> it would suggest that they would be very much more likely to be deported or otherwise leave the State in question (which intentionally or not would increase the prospect of evading enforcement); and, further, it might afford them the ability to contest jurisdiction in the event of any enforcement proceedings.
>
> 24. In those circumstances, and for the reasons set out further below, it is submitted that 'residence' in the Rule must connote 'lawful residence' if it is to serve the policy and purpose of that provision."

31. To my mind this is an unconvincing argument for implying a word ("lawfully") that has not been used in the drafting of the rule and for giving the word that has been used ("resident") a meaning different from that which it ordinarily bears. It may be granted that the purpose of r. 25.13 is that stated by Mr Mill. However, it does not at all follow that an implication is justified because it would tend to make the achievement of the purpose more likely in a specific case. The rule does not operate by reference to the likelihood of being able to enforce a costs order—a potentially wide-ranging enquiry—but by identifying certain prerequisite conditions that can be examined and applied easily and proportionately. The fact, if it be such, that enforcement against a person lawfully resident in a place might be easier than enforcement against a person unlawfully resident there just does not show that "resident" ought to be read as "lawfully resident". Further, as Mr Mallin observed, there is only so much that a rule can do. Despite the terms of Mr Mill's submissions (above), r. 25.13(2)(a) has nothing to do with the location of the respondent's assets, which may or may not be where he is resident. Again, as Mr Mallin submitted, it is the fact of residence within a Convention State that is relevant to the ease of enforcement, not the lawfulness or unlawfulness of that residence. The rule does not and cannot control the ability of a litigant to change his place of residence. Further, the situation is not unknown for a person to be unlawfully resident in a country and yet for it to be impossible for that country to remove him, usually because no other country can be identified that will receive him.

32. Fourth, I reject the defendants' contention that it is necessary to imply "lawfully" in order to prevent a claimant obtaining a benefit by his own wrongdoing. Mr Mill advanced the argument on the basis of Lord Scarman's speech in *Shah*, especially the passage at 343-344 (paragraph 18 above), and the recognition by Baroness Hale in *Mark* that such an implication might in some circumstances be justified by the context and purpose of the provision in question. Again, the submission appears most clearly from the skeleton argument:

> "29. There is no reason why a different approach [viz. from that in the passage in *Shah*] should be adopted in the context of Security for Costs: as a matter of principle, per Lord Scarman's analysis, it would be wrong in principle for a claimant to be able to rely on his own unlawful act to secure an 'advantage', namely the ability to evade an order obliging them to provide Security for Costs.
>
> …

> 37. … [T]he Judge ought to have concluded that the Rule did in fact confer a benefit, or something equivalent to it: if a claimant is found to be resident in a Hague Convention State within the meaning of the Rule, they are put in a more advantageous position than a claimant who is found not so to reside. The latter claimant, as the 'price' of litigating13, must pay into Court substantial sums of money, failing which their claim will be stayed. It is an advantage, or benefit, for a party not to be required to make such a payment or face the choice between payment and a stay of their claim. As Green J has put it, in *Ras Al Khaimah Investment Authority v Farhad Azima* [2022] EWHC 1295 (Ch), at ¶34:
>
> > 'In my view there is a substantial qualitative difference between being ordered to pay a sum of money or costs as the price of continuing with the litigation and being willing to pay an adverse costs order at the end of the proceedings, having lost.'"

33. In agreement with the Master, I regard it as forced and artificial to contend that the claimant is in some way obtaining a benefit or advantage in any relevant sense. In that regard, this case is not materially similar to the situation mentioned obiter in *Shah*. In *Shah* the legislation conferred on persons resident here an entitlement to receive certain financial benefits from the state. It was surely obvious that, quite apart from the express statutory provision to that effect, the entitlement to the benefits should be restricted to those who were lawfully resident. Rule 25.13, by contrast, is not concerned with providing claimants with entitlements to benefits; it is concerned with providing certain protections to defendants who find themselves party to litigation in defined circumstances where there exists a particular risk that enforcement of costs orders will be difficult. The difference between the cases can be seen from, so to speak, both ends of the telescope. It seems to me to be simply wrong to analyse the position in terms of the unlawful obtaining of a benefit by the avoidance of a price one would otherwise have to pay to litigate. (Mr Mallin described the defendants' position in this regard as "absurd", which seems to me to be fair enough.) One might just as well—and just as inaptly, though not more so—say that a person who takes up residence in a Convention State thereby incurs a disbenefit by reason of his exposure to the prospect of easier enforcement. On the other hand, if a requirement of unlawfulness were to be implied for the purpose of depriving a claimant of a supposed benefit derived from his wrongdoing, rather than because it was necessary to give effect to the protective purpose of security for costs, the availability of security for costs would be enlarged for reasons unrelated to the purpose that security for costs serves.

34. In *Mark* Baroness Hale did not regard the petitioner's habitual residence in England and Wales as a benefit, such that she ought not to be permitted to rely on such residence as having been unlawfully enjoyed. That is because the jurisdictional condition in the Domicile and Matrimonial Proceedings Act 1973 was not a matter of conferring a benefit but rather of identifying a sufficiently close connection between the parties and their marriage and this country. To analyse the matter in terms of

benefit would have been to miss the point, just as Ground 1 on this appeal misses the point.

35. Fifth, the construction proposed by the defendants, however it might be formulated, is impractical. The point is made by the Master in paragraph 56(6)-(8) of his judgment, where he supported it by reference to two cases, namely *Aoun v Bahri* [2002] EWHC 29 (Comm) and *Ontulmus v Collett* [2014] EWHC 294 (QB), both of which concerned applications for security for costs. In his *extempore* judgment in *Aoun v Bahri,* Moore-Bick J found that the claimant was "ordinarily resident" in this country (paragraph 32). However, the submission was made, in reliance on Lord Scarman's obiter dictum in *Shah,* that the claimant had obtained his permission to reside here by misleading the immigration authorities and that therefore he could not be considered to be ordinarily resident here because he was not lawfully resident here. Moore-Bick J appears to have thought that the point had, or might have had, merit in principle[5], but he did not find it necessary to reach any decision on the matter, because he found that other grounds existed for making an order for security for costs. Relevant for present purposes is his observation at paragraph 35 that the allegations of wrongdoing raised issues that in his view were "not really suitable to be determined on an application for security for costs". It seems to me that the same observation applies with even greater force when one is concerned with alleged unlawfulness in a foreign country (as was the case in *Ontulmus v Collett*). One of the criticisms made of the Master, particularly under Ground 2, is that he did not perform the necessary task of answering the question whether the claimant had obtained his residence permit by unlawful means. However, the real point is that there is a sound reason for not construing r. 25.13(2) in such a way as to raise the question in the first place. Baroness Hale's remarks in *Mark* at [36] do not give rise to that difficulty, because they concern not the abstract question of legality but the factual question arising from the response of the immigration authorities in the relevant state.

36. Mr Mallin went further and submitted that, in a private law case, it was wrong in principle for the courts of this jurisdiction to concern themselves with questions of illegality under the law of a foreign state. He based this submission on paragraphs 11 to 13 of the judgment of Lord Hope of Craighead in *Mark,* which concerned the relevance of the unlawfulness of a person's presence in a state to the establishing of that person's domicile. (Mr Mallin also referred to *Ontulmus v Collett,* where at [35] Tugendhat J remarked, obiter, that "it would not be appropriate" for the court to attempt to make findings as to whether the claimant had complied with the requirements of his German residence permit.) I do not base my decision on any such broad proposition as to the determination of points of foreign law. The case of domicile is a particular one and does not arise in this case. It would be possible for the rules to make the lawfulness of residence a matter for determination, although I do not believe that they have done so. That said, Lord Hope's view that lawfulness was relevant not in itself but inasmuch as it informed the factual enquiry into the person's intention to reside indefinitely in a place (see paragraph 13 of his judgment) is consistent with the view taken both by the Master and by me regarding the factual question of residence.

Ground 5

[5] He was hearing the case before *Mark* was decided and did not have the benefit of Baroness Hale's remarks on Lord Scarman's obiter dictum in *Shah.*

37. Whereas Ground 1 raises a strict point of construction, Ground 5 is that as a matter of principle the Master ought to have held that a respondent to an application for security for costs cannot rely on his residence in a particular place if that residence has been achieved through his own wrongdoing. The formulation in the Grounds of Appeal states:

> "The submission was and is that, as in the case of estoppel, the common law [wrongdoing principle] operates as an evidential bar. Thus the claimant could not and cannot be heard to rely upon the existence of his residence permit, since to do so would offend against that principle."

38. In my judgment, there is nothing in Ground 5.

39. It is not the case that there is any general rule that a person cannot rely on a situation resulting from his own unlawfulness. *Mark* sufficiently shows this: the petitioner was able to petition in England and Wales because she was resident here; she was not prohibited from relying on her residence here because it was unlawful. Mr Mallin was right to submit that the wrongdoing principle is not so much a proposition of law as a general statement of good public policy that operates as a justification for specific common law rules and canons of construction. Public policy justified the implication of a requirement of lawfulness in *Singh* but did not do so in *Mark*; the distinction lies in the fact that in *Singh* but not in *Mark* the purpose of the statutory provision had a direct relation to the unlawfulness in question.

40. Because *Mark* is sufficient to show that the wrongdoing principle does not constitute a rule of universal application, and because (as I shall mention below) it appeared ultimately to be common ground that it was not such a rule, it is unnecessary to deal here in detail with all of the cases to which I was referred; mention of four further cases will suffice.

41. *Cheall v A.P.E.X.* [1983] 2 AC 180 concerned the ability of a trade union to rely on its own rules to reverse a situation brought about by its own wrongdoing. At 188 Lord Diplock referred to the view of Slade LJ that "A.P.E.X. cannot be heard to say" that it was necessary to expel the member in circumstances where the necessity arose from its own deliberate breach of the Bridlington principles. In words relevant to the formulation of Ground 5 in this case, Lord Diplock said:

> "But this, with respect, is not construction; 'cannot be heard to say' is the language of estoppel; what the learned Lord Justice is really saying is that there is some rule of law that prevents A.P.E.X. from relying on rule 14 as against Cheall."

Lord Diplock proceeded to examine the supposed rule of law. At 188-189 he referred to the decision of the House of Lords in *New Zealand Shipping Co. Ltd. v. Société des Ateliers et Chantiers de France* [1919] AC 1 and said:

> "In the course of the speeches, which are not entirely consistent with one another, reference was made by all their Lordships to the well known rule of construction that, except in the unlikely case that the contract contains clear express provisions to the

> contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end, i.e. as terminating any further primary obligations on his part then remaining unperformed. This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration, is often expressed in broad language as: 'A man cannot be permitted to take advantage of his own wrong.' But this may be misleading if it is adopted without defining the breach of duty to which the pejorative word 'wrong' is intended to refer and the person to whom the duty is owed.
>
> …
>
> To attract the principle, whether it be one of construction or one of law, that a party to a contract is not permitted to take advantage of his own breach of duty, the duty must be one that is owed to the other party under that contract; breach of a duty whether contractual or non-contractual owed to a stranger to the contract does not suffice. I have no hesitation in rejecting the argument based upon the supposed rule of law."

42. *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] UKSC 15 concerned an attempt by the owner of a building to use his own deception to evade enforcement action by the local planning authority. Lord Mance, delivering the lead judgment in the Supreme Court, noted at [53] that "the ultimate question is whether it can have been the intention of the legislator that a person conducting himself like Mr Beesley [the owner] can invoke the benefits of sections 171B and 191(1) [of the Town and Country Planning Act 1990]" (the provisions rendering development immune from enforcement action after a specified lapse of time). He continued:

> "54. Whether conduct will on public policy grounds disentitle a person from relying upon an apparently unqualified statutory provision must be considered in context and with regard to any nexus existing between the conduct and the statutory provision. Here, the four-year statutory periods must have been conceived as periods during which a planning authority would normally be expected to discover an unlawful building operation or use and after which the general interest in proper planning control should yield and the status quo prevail. Positive and deliberately misleading false statements by an owner successfully preventing discovery take the case outside that rationale. …
>
> …
>
> 56. Here, Mr Beesley's conduct, although not identifiably criminal, consisted of positive deception in matters integral to

> the planning process (applying for and obtaining planning permission) and was directly intended to and did undermine the regular operation of that process. Mr Beesley would be profiting directly from this deception if the passing of the normal four-year period for enforcement which he brought about by the deception were to entitle him to resist enforcement. The apparently unqualified statutory language cannot in my opinion contemplate or extend to such a case."

The application of the wrongdoing principle to the facts of the case is unsurprising. However, it is important to note that the Supreme Court did not regard the principle as applying automatically; rather, as Lord Mance said, the matter "must be considered in context and with regard to any nexus existing between the conduct and the statutory provision."

43. *Witkowska v Kaminski* [2006] EWHC 1940 (Ch) is an example of a case where the wrongdoing principle did not apply. The claimant made a claim under the Inheritance (Provision for Family and Dependants) Act 1975 on the grounds *inter alia* that, not being the wife or former wife of the deceased, she had cohabited with the deceased as his wife for the statutorily required period. It was contended, against her, that the claimant could not assert that she was an eligible applicant, because to do so she would have to rely on a period of cohabitation when she was an illegal overstayer in the United Kingdom and so would be "seeking a benefit or advantage in reliance on her own unlawful act" (judgment, at paragraph 41). Blackburne J rejected the contention, relying on the decision in *Mark*. He accepted that, unlike *Mark*, the case before him did not raise any question of jurisdiction, but he said:

> "50. Whilst I accept that *Mark v Mark* was concerned with the court's jurisdiction, I am not persuaded that the approach of the House of Lords to that question does not point the way in this case. The question here is whether during the two years immediately preceding his death the deceased and the claimant lived as husband and wife in the same household. That is a pure question of fact. It is not dependent on whether the claimant is an illegal overstayer. The purpose of the jurisdiction is to recognise the financial claims against a deceased's estate of persons closely related to or financially dependant upon the deceased. In the case of claims by a spouse or former spouse of the deceased, there is a close affinity with the jurisdiction exercised by the court on the break-up of a marriage. See, for example, section 3(2) of the Act. It would be extraordinary if an overseas national who had lived for, say 30 years, in this country as the wife of a man resident and domiciled in this country and who, to the man's knowledge, had originally entered this country illegally and had never regularised her presence here were disabled from advancing any claim out of his estate under the Act by virtue of her unlawful status here but could have made a claim against him if, before his death, she had successfully petitioned for divorce and made a claim for ancillary relief.

> 51. In my judgment, just as the wife's unlawful presence in this country was no bar to her ability in *Mark v Mark* to establish habitual residence and domicile in this country so as to ground jurisdiction in the court under section 5(2) of the Domicile and Matrimonial Proceedings Act 1973, so also was the claimant's unlawful presence in this country no bar to her ability to invoke the court's jurisdiction under the Act to make reasonable financial provision for her out of the deceased's estate."

44. *Patel v Mirza* [2016] UKSC 42, [2017] AC 467, concerns the defence of illegality. For present purposes, it suffices to note that Lord Toulson, with whose judgment a majority of the members of the Court agreed, identified the principle that a person should not be allowed to profit from his own wrongdoing as one of the policy reasons for recognising the defence of illegality (paragraph 99), but that the principle was not regarded as providing a simple and definitive means of applying the defence (see in particular the summary of the approach set out in paragraph 120).

45. Mr Mill accepted that the wrongdoing principle did not necessarily and invariably preclude reliance on a situation brought about by one's own wrongdoing. However, he submitted that it should do so in this case. He said that the difference between his approach and that of the claimant was that the claimant insisted on a nexus between the wrongdoing and the *purpose* of the provision, whereas he submitted that the relevant nexus was between the wrongdoing and the *provision*—that is, not only its purpose but its effect. I cannot say that I find that to be a useful distinction. Baroness Hale in *Mark* analysed the matter in terms of the purpose of the provision. Lord Mance in the *Welwyn Hatfield* case spoke of a nexus between the conduct and the provision. I see no tension between those ways of putting the matter, far less any contradiction. To talk of a nexus between conduct and a provision requires that one have in mind some relevant kind of connection; otherwise the talk is meaningless. In one sense, there was just as much connection between, on the one hand, the unlawfulness posited by Lord Scarman in *Singh* and the provisions considered in that case and, on the other, the unlawfulness that existed in *Mark* and the provision considered there. And simply to point to the *effect* of the unlawfulness is unhelpful. The reason why the effect of the unlawfulness operates differently in the *Singh*-type case from the *Mark*-type case is that in the former but not in the latter to permit a person to rely on a state of affairs brought about by his own unlawfulness is contrary to the purpose or policy appearing from the legislation (or any admissible aids to its interpretation).

46. The present case is relevantly similar to *Mark* but not to the situation mentioned obiter in *Shah,* for reasons already explained. In *Shah* the unlawfulness of residency would subvert the purpose of the legislation, which was to confer on residents an entitlement to receive benefits from the state. In *Mark,* however, the residency requirement was concerned not with conferring a benefit on petitioners but with identifying a relevant connection that made this the appropriate jurisdiction. As already stated, r. 25.13 is concerned not with conferring benefits on some claimants and withholding them from others but with providing to unwilling defendants a measure of protection in defined circumstances.

47. I would add that, if the true construction of r. 25.13 is that "resident" bears its ordinary and natural meaning, such that the word "lawfully" is not to be implied and

the question of residence is a question of fact, the contention that the same outcome can be achieved by the use of some other principle as would have been achieved by implication faces all the greater an uphill task. It is, however, conceivable that this observation presents less of a difficulty where simple construction is inapt to provide a convincing means of giving effect to the relevant policy (as, for example, is the case with what I have called the Extended Proposed Construction, and as was probably the case in the *Welwyn Hatfield* case).

Ground 2

48. Mr Mill began his oral submissions with Ground 2, because it forms the necessary basis both for any chance of success for Grounds 1 and 5 and for the alternative contention that, even on his own understanding of the law as set out in paragraph 56(4) of the judgment (paragraph 11 above), the Master reached the wrong conclusion as to factual residence. Ground 2 is as follows:

> "The Judge in any event erred in failing to apply his own direction that lawfulness would be relevant where 'there was clear evidence that a respondent was at immediate risk of deportation' (¶56(4)). It was not open to a reasonable judge to conclude that there was no such 'clear evidence' in this case, in light of (a) the clear and uncontroverted evidence that the Claimant had obtained his permit by making false and/or misleading representations (J/¶67, 68, 69, 73 and 74) and (b) the wording of the Polish declaration form signed by the Claimant (J/¶67) which provided that a person's permit '<u>shall</u>' be refused or cancelled in the event of a false declaration."

49. At paragraphs 20 to 36 of his judgment, the Master gave a very detailed exposition of the evidence before him, which I shall not repeat. In summary, these are the main points.

- The claimant's evidence in his first witness statement was that he applied for a Polish one-year visa on 26 April 2022, with a view to later applying for a temporary residence permit that would allow him to remain for a further three years. The visa was granted and he moved to Poland on 10 May 2022 with a visa valid until 9 May 2023. The purpose of moving to Poland was to oversee the operations there of a company incorporated in England and Wales called Oats Technologies Ltd, in which he was a shareholder. On 30 June 2022 Oats Technologies applied to open a subsidiary company in Poland with the name Oats Creative Sp. z.o.o., of which the claimant would be a director.

- The defendants relied on expert evidence from a Polish lawyer, Ms Magdalena Świtajska, to the effect that the form of the visa indicated that the claimant must have obtained it by making a declaration that he had secured employment with a Polish employer. That cannot have been Oats Creative, because it did not then exist, and it cannot have been Oats Technologies, which was not a Polish company.

- The claimant then disclosed his declaration for the visa and the application form for the temporary residence permit. The declaration shows that the

Polish employer was Sfera Bit Limited Liability Company in Łódź (more than 100 miles from Warsaw, where the claimant was residing), that the employment was as a cleaner from 6 May 2022 until 4 May 2024, and that the pay was at the minimum wage. The application form answered the question as to the claimant's travels and stays outside Poland within the preceding 5 years: "U.A.E. 2020". The question as to the claimant's means of subsistence was answered: "Contract of employment". The application form ended with a declaration in the following terms:

> "Being aware of criminal liability under Article 233 of the Act of 6 June 1997 – Penal Code (Journal of Laws of 2018, item 1600, with later amendments), I hereby declare that the data and information I provided in the application are correct and truthful.
>
> I am aware that the submission of the application or attachment of documents containing incorrect personal data or false information as well as making false statements, concealing the truth, forging, altering document for the purpose of using it as an authentic one or using such document as an authentic one in the proceedings concerning the temporary residence permit shall result in the refusal or cancellation of the permit.
>
> I hereby declare that I am familiar with the content of Article 233 of the Act of 6 June 1997 – Penal Code [which was set out in a footnote]."

- In a second witness statement, the claimant said that he had not mentioned Sfera Bit in his first witness statement, because when he made it he was not working for that company; he had therefore discussed only his present position, as it pertained to his application for a temporary residence permit. The defendants observed that, although the second witness statement stated that the visa was granted following a declaration from Sfera Bit, it neither exhibited any contract of employment nor even asserted that the claimant had actually been employed by Sfera Bit. They questioned not only the claimant's employment with Sfera Bit but that entity's more than nominal existence.

- The defendants requested disclosure of further documents, including the claimant's employment contract and his application for a temporary residence permit. That request was refused, on the grounds that the defendants had no entitlement to disclosure, that the request was disproportionate, and that by the time of the hearing of the application for security for costs the claimant was likely to have a temporary residence permit. In the event, the temporary residence permit was issued on 10 November 2022. The defendants maintained their request for disclosure and contended that the temporary residence permit was liable to be revoked. The claimant then disclosed some further documents, including a copy of his contract of employment with Oats Creative; however, the covering letter from his solicitors, dated 22 February 2023, stated in part:

> "Mr Lyndou is not in possession of the covering letter which enclosed his temporary residence permit. He regarded that document as of no significance and recalls that it was similar to a letter one would receive with a new bank card or with a new passport. As we have previously explained, he also did not retain a copy of his original application for a temporary residence permit or of the documents submitted in response to the summons. He has, however, provided you with a reproduced copy of the temporary residence permit application."

This brought forth a response from the defendants' solicitors on 6 March 2023:

> "Most recently, your client has refused to provide a copy of his temporary residence permit decision, purportedly because '[h]e regarded that document as of no significance and recalls that it was similar to a letter one would receive with a new bank card or with a new passport.' We enclose a copy of an example permit decision (in Polish; an English translation will be provided as soon as possible). As you can see, this document looks nothing like a new bank card or passport letter. The temporary residence permit decision is a formal document which bears a large red seal, and which records important information such as the basis upon which the permit has been awarded and, if awarded based on employment, the name of the relevant employer, the position held at the employer and the person's salary. These details are important, because the holder of the permit may only work provided that they do so in accordance with those details recorded on the permit."

- The claimant responded with a third witness statement, dated 15 March 2023. He said that he had been continuously resident in Poland since 10 May 2022, that he intended to apply to extend his temporary residence permit and to remain in Poland for the long term (and had been told by his immigration advisers that there was no reason to believe that he would not be able to do so), and that he had not had any issues whatsoever with the Polish immigration authorities. He confirmed various matters set out in his solicitors' earlier correspondence and complained that the defendants had adopted an "increasingly intrusive and aggressive" strategy and were "trying to … unsettle [his] immigration status to suit their ends".

50. The Master analysed the evidence, in the light of the submissions, in paragraphs 65 to 70 of his judgment. His alleged error is said to appear in paragraphs 73 and 74.

> "73. I have already explained earlier in this judgment that, as I read the authorities, the question of residency is primarily a question of fact, but that questions of lawfulness are not entirely irrelevant. In this case, it seems to me that there are real questions as to the basis on which Mr Lyndou obtained his

> temporary residence permit. There does appear, at the very least, to be information missing from his application, in that Mr Lyndou only indicated that he had been resident in the UAE in the five year period preceding his application. Furthermore, what Mr Lyndou has chosen to disclose in relation to the supposed contract with Sfera Bit only raises further questions. I also find the suggestion that Mr Lyndou simply discarded the letter from the Polish immigration authorities, which apparently accompanied the permit itself, surprising.
>
> 74. However, the allegation that Mr Lyndou consciously and deliberately misled the Polish immigration authorities is a very serious one. It is not something that should be decided by this court at an interim hearing on the basis of inferences. Instead, this seems to me a matter that should be left to the Polish immigration authorities. My unwillingness to attempt to determine what course the Polish immigration authorities might take on this interim application accords with the approach adopted in previous decisions, such as *Aoun v Bahri* and *Ontulmus v Collett.*"

The complaint is that the Master failed, first, to make the appropriate findings of primary fact on the evidence before him and, second, to make the consequent finding that the claimant was indeed at immediate risk of deportation.

51. I reject Ground 2. In my respectful view, the Master was right for the reasons he gave.

52. It was neither necessary nor prudent to make findings regarding the allegations raised against the claimant. First, residence is a factual issue, not itself one turning on legal questions; this has already been explained. Second, the defendants' submission that the case falls within Baroness Hale's dictum in *Mark* at [36] is wrong. That dictum was firmly anchored in the analysis of residence in factual terms. Baroness Hale was talking about a situation where the state is taking steps to remove the person and the person is seeking to evade those steps. This case is nothing like that. The claimant had been resident in Poland for more than ten months by the time of the hearing before the Master and for thirteen months by the date of his judgment. (He has been there for some twenty months now.) The evidence before the Master was that the claimant had experienced no issues with the Polish immigration authorities. The expression of legal opinion by a Polish lawyer, be it never so fine, does not unsettle the claimant's residence.

53. Third, in any event, the Master was (with respect) wise to prescind from purporting to decide factual questions concerning the claimant's conduct. He did so for much the same reason that Moore-Bick J gave for taking a similar course in *Aoun v Bahri*. In that case, with reference to the allegations made by the applicant, Moore-Bick J said at [35]:

> "35. These are serious allegations which depend in part on findings as to what took place when Mr Aoun presented himself at immigration control on last entering this country.

> They raise issues which in my view are not really suitable to be determined on an application for security for costs, and even though in this case Mr Aoun has given evidence and so has had an opportunity to respond to the points made against him, I do not think that there has been an opportunity to investigate the matter fully. It would be particularly unfortunate if I were to express any view about Mr Aoun's immigration status on the basis of incomplete evidence that might have an effect, one way or the other, on his application for a residence permit. That is a matter best left to the Home Office to be determined on its merits in the ordinary way."

It is true that Moore-Bick J was concerned with a matter that was within the purview of the immigration authorities of this country. However, I do not see that it is any more attractive to purport to pre-empt or second-guess the possible views of immigration authorities in another country operating with different law. It is also true that Moore-Bick J felt that he did not need to decide the matter, because he was prepared to order security on other grounds. However, it seems to me that the difficulties he adverted to were a sufficient reason to decline to decide the factual issues in any event. Rule 25.13 creates a discretion ("The court may make an order …"). Just because a court *can* do something, it does not mean that it *must* do so. Even if the court had sufficient evidence to enable it to form a confident view on a point, prudence might dictate that it should not express that view, for example, in a matter under active consideration by other authorities, or where a view expressed in this jurisdiction might have serious implications for a person's residency status in another country. In this case, however, the court was not in a position to determine the matter fairly. The information about the claimant's current immigration status and future prospects was limited; the defendants' case rested mainly on inferences, in circumstances where there was no disclosure obligation on the claimant and, though he had responded to at least some of the allegations in written evidence, he had not been cross-examined; and the conclusions sought to be drawn rested on hypothetical rather than actual immigration decisions, no matter with what confidence they were asserted. I add that the inferential case for wrongdoing was, anyway, significantly weaker as regards the temporary residence permit than the earlier and superseded visa.

Ground 3

54. Ground 3 challenges the Master's decision to refuse to admit further expert evidence that would (it is said) have provided further material support for the conclusion that the claimant was at immediate risk of deportation.

55. The procedural context of this ground of appeal is relevant. The hearing before the Master was on 22 March 2023. On the third working day thereafter, 27 March 2023, the defendants filed a supplemental report from their expert witness on Polish law. The report was not accompanied by any application notice but rather by a letter to the Master in the following terms.

> "We write further to the hearing that took place before you on Wednesday, 22 March 2023. During our clients' reply submissions in the afternoon, you commented on the fact that

> they had not filed any follow up report from Ms Magdalena Świtajska, the Polish immigration law specialist, whose report dated 30 August 2022 appeared at HB/C/67. That observation followed submissions by Mr Mallin KC to the effect that (a) there was no evidence of what consequences would follow under Polish law if Mr Lyndou were found to have lied in his TRP [temporary residence permit] application and (b) that our clients might not have 'renewed' Ms Świtajska's evidence because she might have offered an unhelpful opinion as to those consequences. You further observed that the court did not know (in the absence of such a report) whether the Polish authorities enforced the rules in the way suggested by the declaration, upon which we placed reliance.
>
> As submitted by Mr Mill KC in response to your question, the reason why no further report had been obtained from Ms Świtajska was in fact that she (and we) had been awaiting production of the repeatedly requested documents. These were in the event, as you know, not produced despite such requests.
>
> However, in the circumstances, we have asked her whether she might be able to assist the court (without those documents) as to the consequences of Mr Lyndou having lied, in his TRP application and in his response to the Summons, in the way that our clients contend must (as a matter of inference) have occurred. In response, Ms. Świtajska has produced a short supplemental report, which we enclose.
>
> We would respectfully ask that the Court gives consideration to its contents. It goes without saying that our clients accept that Mr Lyndou should be entitled to respond through his Polish immigration lawyer, Mr Michalowski, should there be any point of disagreement with what Ms. Świtajska has written."

56. Ms Świtajska's further report is said to show three material things. First, if the claimant provided false information in his application for a temporary residence permit, on becoming aware of the fact the Polish authorities would be obliged to cancel his temporary residence permit. Second, it appears that the claimant's work in Poland has been illegal; and, if this came to the attention of the Polish authorities, his temporary residence permit would be cancelled and he would be issued with an order to leave Poland. Third, the claimant would have no prospect of successfully appealing against the cancellation of his temporary residence permit or against an order to leave Poland.

57. On 31 March 2023 the Master responded to the letter from the defendants' solicitor by an email from his clerk:

> "The hearing is over. The Defendants do not have permission to file further evidence. Further, the new material is described as being expert evidence, and no permission has been sought

> (let alone obtained) pursuant to CPR Part 35.4. A judgment will be produced in due course."

58. In his judgment, the Master set out a very detailed procedural history, recording the exchanges of evidence that had taken place. Then he proceeded to address the arguments that had been addressed to him. Having explained in paragraph 74 his unwillingness to anticipate any decision that the Polish immigration authorities might make regarding the basis on which the claimant had obtained his temporary residence permit, he continued:

> "75. Moreover, I have no evidence as to what might be the attitude of the Polish immigration authorities in relation to the matters raised by the Defendants. Mr Lyndou has been advised by a Polish lawyer in the course of obtaining his temporary residency permit. The Defendants have not sought to obtain further evidence from their proposed expert, Ms Świtajska, as to the probable or likely course that the Polish immigration authorities may adopt. The Defendants complain that they could not have obtained a further report from Ms Świtajska earlier, given that Mr Lyndou has still failed to provide a copy of his contract of employment with Sfera Bit, as well as other material documents. However, while Mr Lyndou has not provided this contract, nor has he provided a complete copy of the original temporary residence permit application, with supporting documents, the Defendants have had the application for the temporary residence permit itself and the employer's declaration (the truthfulness of which they now seek to challenge) since I believe September 2022."

In a "Postscript" within the judgment, the Master said:

> "97. A few days after the hearing had ended, the Defendants served what is described as a Supplemental Expert's Report of Ms Świtajska. That report indicated that, assuming that Mr Lyndou had provided false information in his temporary residence permit application or the attachment to it, and this came to the attention of the Polish authorities, then they would be obliged to cancel the permit that Mr Lyndou holds. The report appeared designed to address certain questions which had been raised in the course of the submissions before me.
>
> 98. The Defendants had no permission to rely on this further evidence once the hearing was over. Further, the new evidence is in substance expert evidence, for which permission would need to be obtained. In the covering letter under which the evidence was served, the Defendants indicated that Mr Lyndou should have the opportunity to respond, if necessary by filing evidence from his Polish lawyer if there were any points where Mr Lyndou disagreed with Ms Świtajska.

> 99. I declined the invitation to hold a further hearing to consider the conclusions of the Supplemental Report. It is important that applications for security for costs should be made and opposed in a reasonable and proportionate manner. Moreover, I do not think it right for time to be taken up in a further, no doubt contested, hearing, which could only involve the Court trying to second-guess what the approach of the Polish authorities might be. It would be one thing, were the Polish immigration authorities to revoke Mr Lyndou's temporary residence permit. That might well constitute a material change of circumstances, enabling the Defendants to re-apply to court. However, it is quite another matter for this Court to try and determine, on the basis of competing reports and submissions from the parties, the likelihood (or not) of that occurring."

59. The Master's decision to refuse to admit the further evidence was a case management decision. The principles relating to appeals from case management decisions were stated clearly by Chadwick LJ in *Royal Sun Alliance Insurance plc v T&N Limited* [2002] EWCA Civ 1964, at [38]:

> "I accept, without reservation, that this Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

60. For the defendants it is submitted that the Master's decision not to admit the further report was one which no reasonable judge could or should have reached: skeleton argument, paragraph 57. It is said that the further report provided precisely the material that the Master had said he would have found helpful, and that it was entirely reasonable for the defendants not to have obtained it in advance of the hearing as they had been entitled to suppose that the claimant would provide the further documentation mentioned in paragraph 75 of the judgment.

61. In my view, the Master's decision to refuse to admit the further report was well within the ambit of his discretion. (Indeed, for my part, although it is unnecessary to say so, I would respectfully entirely agree with his decision.) A preliminary matter is that the observations in the Master's email of 31 March 2023 were well made. At no time did the defendants make an application for permission to rely on further evidence—and expert evidence, at that. Anyway, the Master had regard to the relevant matters, beginning with the importance of dealing with applications for security for costs in a reasonable and proportionate manner. In paragraphs 7 to 36 of his judgment he paid close attention to the prolonged procedural history of the application before him, remarking that the parties had in effect "spent the last year exchanging multiple rounds of evidence in relation to the security for costs application" (paragraph 7). Mr Mill's argument that it was reasonable not to obtain the further report before the hearing is in my view either irrelevant or bad. It is certainly reasonable not to obtain

evidence if one does not intend to rely on it. However, if one intends to rely or seek to rely on evidence, it is unreasonable not to obtain it in time for the event for which it is needed, namely the hearing, unless it cannot be obtained in time. The sequence of events shows that the defendants were able to obtain the further report quickly. If the claimant had not produced all the documents they wanted to make their case without expert evidence, they could and should have obtained that evidence in time for the hearing and applied for permission to rely on it. As it was, they obtained it in order to plug holes in their case that had become apparent (or had come to appear significant) in the course of the hearing. That is not an appropriate way to conduct litigation, especially applications of this sort. The Master also very properly had regard to the consequences of admitting the further evidence, in particular the need to give to the claimant a right to respond and the probable need for a further hearing. In addition, for reasons given above and stated by the Master, considerations pertaining to the lawfulness of the claimant's position were relevant only to the factual issue of actual residence. There is a big difference between the existence of a likelihood of imminent deportation (such that one cannot be regarded as having a sufficient presence in a country to be truly resident there) and the existence of legal grounds for mandatory deportation upon which the relevant authorities have not acted.

62. Essentially the same considerations lead me to reject the defendants' alternative application for the further report to be admitted as fresh evidence on this appeal. I find it hard to see how, other perhaps than in the most exceptional case, it could ever be right for the appeal court to admit as fresh evidence on the appeal evidence that it holds to have been rightly excluded by the lower court when it reached its substantive decision. At all events, although the strictly applicable legal principle for determining an application to admit fresh evidence on appeal is probably the overriding objective in CPR Part 1, the courts have accepted that the achievement of the overriding objective will normally require the satisfaction of the criteria set out in *Ladd v Marshall* [1954] 1 WLR 1489. For reasons set out above, I do not accept that the further report could not have been obtained with reasonable diligence for use at the trial. Nor do I accept that the further report would probably have had an important influence on the result of the application for security for costs.

Ground 4

63. Ground 4 is simply that, on account of the matters in Grounds 1, 2 and 3, the Master ought to have found that the claimant was not lawfully resident, and therefore not resident, in Poland. In the light of my decision on Grounds 1, 2 and 3, this ground also fails.

Ground 6

64. The defendants' argument on Ground 6 is that, if the claimant was not resident in Poland (or if the wrongdoing principle precluded him from asserting that he was resident in Poland), there was no evidence that he resided in *any* Convention State. "The court was not required to find that the claimant resided in any specific non-Convention State in order for the rule to be engaged; it sufficed that he had failed to establish residence in a Convention State."

65. This argument fails for two reasons. First, the Master has made a finding of fact that the claimant is factually resident in Poland and, for reasons set out above, that

residence suffices for the purposes of r. 25.13(2)(a). That sufficiently disposes of this ground. Second, it is anyway for the defendants to prove that the claimant is not resident in a Convention State, not for him to prove that he is so resident. Mr Mill responded to this second objection by submitting that it was an "obvious possibility" that the claimant was not resident anywhere. That does not help the defendants: first, if a person is not resident anywhere it is hard to see how he could be "resident out of the jurisdiction", which is the requirement in r. 25.13(2)(a)(i); second, it would still be for the defendants to prove that the requirement in r. 25.13(2)(a)(ii) was satisfied, namely that the claimant was not resident in a Convention State, and the defendants have not discharged that burden.

Conclusion

66. The appeal is dismissed.

67. I shall be grateful if counsel will provide me with a draft order for my consideration. If any matters require my further consideration, I shall deal with them either at a short remote hearing or on paper, whichever may be more convenient.