Neutral Citation Number: [2023] EWHC 1487 (Ch)

Case No: BL-2021-000877

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Business List (ChD)

Rolls Building
Fetter Lane, London EC4N 1NL

Date: 16 June 2023

Before :

MASTER PESTER

- -

Between :

(1) MR TSIMAFEI LYNDOU	**Claimants**
~~**(2) MR ANDREI LYNDOU**~~	
- and -	
(1) MR DMITRY LAZARICHEV	**Defendant**
(2) MR PAVEL MATVEEV	
(3) MR GEORGY SOKOLOV	

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- -

MAX MALLIN KC and LEE JIA WEI (instructed by **Harcus Parker Ltd**) for the **First Claimant**
IAN MILL KC and LUKA KRSLJANIN (instructed by **Morrison Foerster**) for the **Defendants**

Hearing date: 22nd March 2023

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties or their representatives by email. The date and time for hand-down is deemed to be 2.30pm on 16 June 2023.

MASTER PESTER:

Introduction

1. This is an application by the Defendants for security for costs in respect of the First Claimant's claim. The Second Claimant has discontinued his claim against the Defendants, and is no longer a party to the proceedings. The Defendants say that they are entitled to security for costs on two bases.

2. First, under CPR Part 25, r. 25.13(2)(a), the Defendants allege that the Claimant ("Mr Lyndou") is resident out of the jurisdiction but not resident in a State bound by the 2005 Hague Convention. The Defendants submit that Mr Lyndou is not resident in Poland, as he maintains, but is (or is to be regarded as being) resident in a non-Hague convention state, namely Belarus. The Defendants invite the Court to conclude that Mr Lyndou has misled, or sought to mislead, both this Court and the Polish immigration authorities in order to be able to assert that he is lawfully resident in Poland, so as to avoid having to provide security for costs.

3. Second, pursuant to CPR Part 25, r. 25.13(2)(e), the Defendants submit that the Claimant gave an incorrect address in the claim form. These proceedings were issued by claim form dated 28 May 2021. When the claim form was first issued, Mr Lyndou gave his address on the claim form as "Metropol hotel, Room 210, Kamsamoĺskaja St 6, Mogilev, 212030 Belarus." Mr Lyndou subsequently (on 4 July 2022) amended the address on the claim form to give his address as "Aleja Rzeczypspolitej 20/74 Warsaw 02-972 Poland" ("the First Polish Address"), and then sought (in October 2022) to amend it to "No. 225 Grzybowska Warsaw 00-131 Poland" ("the Second Polish Address"). The

Defendants submit that surveillance evidence obtained by them demonstrates that Mr Lyndou was not living at the First Polish Address in July 2022. The Defendants say, in effect, that Mr Lyndou changed his account to seek to further amend his claim form to what he now asserts to be the "correct" address, namely the address that he was seen using in the surveillance evidence.

The proceedings

4. Mr Lyndou claims that he conceived a business idea to create a multi-currency pre-payment card which would allow users to exchange fiat currency for cryptocurrency. He says he shared this business idea in confidence with the Defendants, and together they entered into a joint venture/partnership to develop it. Mr Lyndou alleges that despite an agreement as to the proportions in which each of them would own this business, he was excluded from it in or around mid-2015. Mr Lyndou therefore makes various claims, including for breach of confidence, for a declaration that shares in the business (known as "Wirex") are held on trust for him, and that the Defendants engaged in an unlawful means conspiracy to exclude him from the business.

5. The Defendants are three businessmen resident in the United Kingdom. They say that Mr Lyndou did not develop the business idea as alleged by Mr Lyndou, and there is no basis for any claim by Mr Lyndou against them for any of the causes of action alleged. They deny entering into any agreement with Mr Lyndou as alleged. They deny unlawfully excluding Mr Lyndou from a shareholding in the crypto-currency business owned and operated by the Defendants.

6. The claim involves significant disputes of fact and law. The parties agree that the trial will last approximately 10 days. Substantial costs have already been incurred by the Defendants in the action. The Defendants estimate that their legal costs in relation to the claim are likely to be in excess of £2,000,000. Indeed, the Defendants have incurred over £300,000 in relation to the security for costs application alone.

Procedural history

7. Although these proceedings were begun in May 2021, over two years ago, no case management conference has yet been held. In effect, the parties have spent the last year exchanging multiple rounds of evidence in relation to the security for costs application.

8. Mr Lyndou's position is that, when the claim was issued, he was resident in Belarus. The Defendants' solicitors at the time, Brown Rudnick LLP, gave notice of their intention to apply for security for costs by letter dated 28 March 2022. Mr Lyndou's solicitors responded by 11 April 2022, making clear that Mr Lyndou intended to emigrate to Poland in light of the political climate in Belarus and concluding "for the avoidance of doubt" that Mr Lyndou's emigration was unconnected with the threatened application.

9. Notwithstanding the indication that Mr Lyndou intended to move to Poland, the Defendants issued the current application. The application was originally listed to be heard on 15 September 2022.

10. By further letter dated 2 June 2022, Mr Lyndou's solicitors wrote providing details of his move to Poland, including a copy of his Polish visa, his tenancy

agreement (initially in a redacted form), and various WhatsApp messages showing, on Mr Lyndou's case, that he was moving to Poland to better run his business.

11. Mr Lyndou served his first witness statement on 22 July 2022. In this first witness statement, Mr Lyndou said that he was applying for a temporary residence permit to allow him to remain in Poland for a further 1 – 3 years. By letter dated 4 July 2022, the Defendants indicated that they would need until 12 August 2022 to serve their further evidence in reply.

12. In the event, the Defendants' reply evidence was not served until 30 August 2022, two weeks before the original hearing date. Further, on 9 September 2022 (a Friday), three working days before the original listing of the application, the Defendants served another witness statement from their solicitor, this time exhibiting two undated surveillance reports ("the Surveillance Reports") prepared by a firm of private investigators called Sure Step Ltd ("Sure Step"). The Surveillance Reports purportedly show that, between 3 August 2022 and 7 September 2022, Mr Lyndou was not seen at the residential address given in the re-amended claim form, but instead he was spotted at a different address in Warsaw, as well as boarding a bus to Belarus on 1 September 2022. Relying on this material, the Defendants allege that Mr Lyndou has given an incorrect address on his claim form.

13. The late service of the evidence on behalf of the Defendants prompted Mr Lyndou to seek an adjournment of the upcoming hearing. The parties eventually agreed to adjourn the hearing of 15 September 2022, which was relisted to 22 March 2023. In the meantime, Mr Lyndou served his second witness statement,

as well as further statements from each of Anatol Burankou (who describes himself as a close friend and business partner of Mr Lyndou), Pawel Grabowski (Mr Lyndou's Polish landlord) and the original Second Claimant, Andrei Lyndou (Mr Lyndou's brother).

14. Mr Lyndou's position is that he has successfully obtained a new temporary residence permit, which is valid for one year until 18 October 2023. Shortly before the hearing, Mr Lyndou filed a third witness statement in order, he says, to update the Court on his current residence status in Poland.

The evidence

15. The evidence before the court on this application is all in the form of written documents, including witness statements. The evidence is voluminous, and raises several contested issues, of both fact and law. No application was made by the Defendants for permission to cross-examine Mr Lyndou.

16. The initial witness statement filed in support of the application was from Steven James, a Partner in Brown Rudnick LLP, the firm which originally acted for the Defendants. The witness statement made two simple points. The first was that Mr Lyndou resided out of the jurisdiction, namely, in Belarus (referring to a number of documents to show that this was so, quite apart from the fact that Mr Lyndou had provided an address in Belarus in the claim form). The second was that there was a real risk that the Defendants would not be able to enforce any final costs order against Mr Lyndou in Belarus, due to the absence of any bilateral or multilateral enforcement treaty between the UK and Belarus, the absence of any precedent for the enforcement of such an order in Belarus, and the current political tensions between the two countries. Mr James also explains

that the Defendants' current estimated costs of the proceedings were £2,085,911.21.

17. Accompanying the witness statement was what was described as expert evidence, set out in a report from a Mr Aleksey Korochkin, a Belarussian lawyer. Mr Korochkin concludes that it was "very likely" that a Belarussian court would refuse to enforce any costs order of the courts of England and Wales.

18. Mr Korochkin's evidence is expert evidence. The Defendants require the Court's permission to be able to rely upon it, pursuant to CPR Part 35, r. 35.14. However, Mr Lyndou consents to the Defendants' reliance on the Korochkin evidence, and its central conclusion, that it is "very likely" that an English costs judgment could not be enforced in Belarus, was not challenged.

19. In his first witness statement in response to the application, Mr Lyndou gives his address as Aleja Rzeczypspolitej 20/75, Warsaw, 02-972, Poland, that is, the First Polish Address. He explains that he was born in Belarus, but that between May 2006 until December 2019 he lived in London. In December 2019, he decided to immigrate to Dubai for business, but before doing so, he travelled to Belarus to visit his parents for three weeks, having not seen them for 14 years. He then fell ill with what he suspects might have been COVID-19, which delayed his move to Dubai until March 2020. In the midst of the pandemic, he moved back to Belarus in July 2020, when he started living in a hotel owned by family friends, as it was "very cheap and convenient". He further states that he lived there from around July 2020 to 10 May 2022 when he immigrated to Poland. He applied for a Polish visa in April 2022, which he obtained. On 12

May 2022, Mr Lyndou applied for a temporary residence permit, which is issued for a maximum of three years.

20. Mr Lyndou rejects the Defendants' suggestion that his decision to immigrate to Poland was connected with the security for costs application, stating that this "is absolutely untrue". He says that the reason for his move to Poland was connected with his business in a company called Oats Technologies Ltd ("OTL"), a company incorporated in England and Wales. OTL's business is "currently in development and is intended to be a new generation e-commerce platform, combining banks, social networks and e-commerce". Mr Lyndou is a shareholder in OTL. Mr Lyndou says that, as a result of Russia's invasion of Ukraine, and the ensuing sanctions regime which was imposed, OTL's investors and business partners became increasingly unwilling to work with a business whose majority shareholder was resident in Belarus. Mr Lyndou states that he intends to settle in Poland with a view to overseeing the Polish operation of OTL. In June 2022, an application was made to open a Polish subsidiary of OTL, called Oats Creative Sp. z.o.o. ("Oats Creative").

21. Turning to the evidence in reply, Mr James' second witness statement seeks to rely on an expert report on Polish immigration law, prepared by Magdalena Świtajska ("the Świtajska Report"), a Polish attorney with expertise in immigration and employment law. The key point made is that the visa disclosed by Mr Lyndou bears the code "05A", which indicates that Mr Lyndou applied for it on the basis that he had secured employment with a third-party Polish employer. That cannot have been either OTL or the newly incorporated Oats Creative. Instead, Mr Lyndou would have relied on a separate document, a

declaration, a type of document registered by a prospective employer based in Poland authorising a foreigner to work in Poland as an employee. The Świtajska Report makes the further point that Mr Lyndou's right to stay in Poland, upon expiry of his current visa, would depend on whether he obtains a new visa or temporary residence permit. Ms Świtajska notes that the documents disclosed by Mr Lyndou were insufficient to determine the basis of his application, or to assess the prospects of his obtaining the temporary residence permit.

22. The Defendants then filed a third witness statement from Mr James, very shortly before the original listing of the Defendants' application. They had no permission to file this further evidence. The witness statement explained that Sure Step, the firm of private investigators, had been hired to "verify that the First Claimant is living at the Polish apartment, as he has asserted". Surveillance of the First Polish Address was carried out over the period from 3 August 2022 to 7 September 2022. Mr Lyndou was not seen at the First Polish Address at any time during the period of over one month during which surveillance was conducted. Moreover, Mr Lyndou was seen leaving for Belarus on a long distance bus on 1 September 2022.

23. Mr James' witness statement also exhibits Mr Lyndou's declaration for the temporary visa permit, which the Defendants had requested and which Mr Lyndou's solicitors had supplied under cover of a letter dated 8 September 2022. There are a number of odd features of the Declaration, which (picking up points made in Mr James' third witness statement) were stressed by the Defendants' Counsel:

(1) The document, headed (in English translation) "Declaration of Employment Given to an Alien", states that the employer is "Sfera Bit Limited Liability Company" ("Sfera Bit").

(2) The position and type of work is "Cleaner". The place of employment is the Polish city of Łodz, which is over 100 miles from Warsaw.

(3) The gross salary given is stated to be Polish Zloty 19.70 per hour, which is apparently the Polish minimum wage.

24. Sfera Bit was registered with the National Court Register in January 2022. It is not registered for VAT, which may mean that Sfera Bit is not conducting any trading activity or that its activity in 2022 generated turnover lower than Polish Zloty 200,000 per calendar year. The information given in the National Court Register, in the box "business category" states "storage and warehousing not classified elsewhere", with a further box "subsidiary activity" giving a wide variety of business operations. Mr James concludes by suggesting that Sfera Bit itself may not be genuine.

25. In response to the evidence from the surveillance firm, and in relation to the points about his declaration, Mr Lyndou filed his second witness statement, dated 4 October 2022. In summary, Mr Lyndou addresses four topics: his residence at the First Polish Address, his residence in Poland more generally (including some, but certainly not all, points made by Ms Świtajska), Oats Creative's registered address, and the development of OTL's business. One of the points which Ms Świtajska made in her report was that Mr Lyndou was required to report in person at the Mazowicecki Voivodship Office in Warsaw as part of the process of applying for a temporary residence permit, and that Mr

Lyndou did not appear to have done that. Mr Lyndou explains that he did attend, in person, at the relevant office on 29 July 2022.

26. At the same time, Mr Lyndou also filed witness statements from his brother, Andrei Lyndou (the original Second Claimant in the proceedings), a close friend and business partner, Mr Burankou, and his landlord at the First Polish Address, Mr Grabowski. As to these:

(1) Mr Andrei Lyndou refers to the wedding of a close friend's daughter on 3 September 2022. He confirms that Mr Lyndou was in Belarus from 1 September to 4 September 2022 to attend that event.

(2) Mr Burankou says that he, together with Mr Lyndou and two others, are shareholders in OTL. Mr Burankou lives in the UK, but he explains that following Mr Lyndou's move to Poland, he planned to visit him in Warsaw frequently. Before his first visit to Mr Lyndou in June 2022, he messaged Mr Lyndou asking for his residential address in Warsaw. In response, Mr Lyndou provided the First Polish Address. Mr Burankou further explains that Mr Lyndou rented out another apartment in Warsaw, where Oats Creative was registered.

(3) Mr Grabowski describes himself as businessman and landlord, and also a close friend and business associate of Mr Andrei Lyndou, Mr Lyndou's brother. Broadly speaking, his witness statement corroborates Mr Lyndou's case that Mr Lyndou has been living at the First Polish Address since Mr Lyndou's arrival in Poland on or around 12 May 2022. Mr Grabowski accepts one of the points made by Mr James, which is that the rent charged for the First Polish Address is below market rate. However, he explains that

Mr Lyndou is a friend and he did not think it right to charge the full market rate. He concludes by stating that Mr James is wrong to say that Mr Lyndou does not live at the First Polish Address. Further, Mr Grabowski makes the point that he was "extremely disturbed" to find out that the Defendants had conducted surveillance at the First Polish Address, and complains that this is an intrusion into his privacy, and that he is concerned about other tactics or surveillance the Defendants may be undertaking. He then states that he has decided to terminate the lease of the Polish Apartment, as Mr Lyndou's case against the Defendants is affecting Mr Grabowski personally and the surveillance and investigations "have been extremely unpleasant".

27. Following the service of these supplemental witness statements on behalf of Mr Lyndou, the Defendants' solicitors by letter dated 12 October 2022 wrote, requesting various documents, including the contract of employment relied upon for the temporary residency permit application, and a complete copy of the original temporary residence permit application together with the documents submitted by Mr Lyndou's Polish lawyer in support of the application.

28. Mr Lyndou's solicitors responded stating that the Defendants had no entitlement to the documents sought, and the requests were disproportionate, "in circumstances in which a first instance decision on our client's temporary residence permit application is expected before your clients' security for costs application is heard". The letter went on to state:

> *"It is apparent from the evidence you have filed to date that your clients hope to advance a case that our client is not legally resident in Poland. You will appreciate that the current evidence does not support that case. Our client remains confident that when your clients' application is heard he will have a temporary residence permit, which will extend the period for which*

> *he is legally entitled to reside in Poland. Please confirm that once our client obtains his temporary residence permit, you will concede the argument that our client is not resident in a state which is bound by the 2005 Hague Convention."*

29. The Defendants' solicitors replied to that paragraph, by letter dated 27 October 2022, as follows:

> *"Our clients do not accept that, if your client obtains his temporary residence permit, the consequence is that he is not resident in a state that is bound by the 2005 Hague Convention. The report of Ms. Magda Świtajska, which your client has had since 30 August 2022, makes clear the numerous concerns that she has with the basis on which your client appears to have sought the temporary residence permit. Your client has been invited, and has refused, to provide documentary evidence that would be relevant to those concerns. Absent that evidence and in the light of your client's decision not to provide it, we will invite the Court to infer that your client's application to the Polish authorities was made on a false basis, in consequence of which any permit that may be granted to your client is liable to be set aside."*

30. There followed further chasing letters from the Defendants' solicitors, seeking an update as to the progress of Mr Lyndou's application for a temporary residence permit.

31. The next important step in the correspondence is Mr Lyndou's solicitors' letter dated 9 January 2023. That letter announced that Mr Lyndou was issued a temporary residence permit on 10 November 2022, enclosing a copy. In response, the Defendants' solicitors pointed out, by letter of 12 January 2023, that they were still waiting for certain evidence in relation to the application for the temporary residence permit, and that in the absence of such evidence, the Court would be invited to infer that Mr Lyndou's application to the Polish authorities was made on a false basis, and that any permit granted would therefore be liable to be revoked. That letter also requested that Mr Lyndou provide (a) the complete copy of the ID card provided as evidence of the temporary residence permit (the copy provided only contained the front, but not

the back of the ID card) and (b) a copy of the temporary residence permit decision, which it is said would have been provided to Mr Lyndou at the latest when he received the ID card.

32. Mr Lyndou's solicitors responded substantively by letter dated 22 February 2023 (there were again several chasing letters in the interim period). The letter asserted that (a) Mr Lyndou was not in possession of the covering letter which enclosed his temporary residence permit, as "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" and (b) he did not retain a copy of his original application for a temporary residence permit or the documents submitted in response to the summons. However, a copy of Mr Lyndou's contract of employment with his current employer, Oats Creative, was enclosed, as well as a photocopy of the back page of the ID card.

33. The response from the Defendants' solicitors, dated 6 March 2023, noted the failure to provide various documents requested. The letter stated:

> *"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 resident 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."*

34. The letter again made the point that that the Defendants would be inviting the Court to draw adverse inferences from Mr Lyndou's failure to retain the

temporary permit decision documentation, and his failure to produce a copy of the same. In relation to Mr Lyndou's employment position, the letter points out that the employment contract with Oats Creative is dated 31 January 2023, which is of course after the date when the temporary residence permit was granted in November 2022. Again, the Defendants' solicitors put Mr Lyndou on notice that the Court would be invited to draw inferences "from the apparent change of position" in relation to the identity of Mr Lyndou's employer.

35. Shortly before the hearing, Mr Lyndou served his third witness statement, dated 15 March 2023. In summary, he states that the reason he moved to Poland was to advance his business, OTL, that he facilitated the incorporation of Oats Creative for that purpose and that on 31 January 2023 he signed an employment contract with Oats Creative. He states that he has been advised, by his Polish legal advisor, that he must update the Polish immigration authorities when he enters into a new contract of employment, which he has done, and that this is a formality which does not constitute a new application.

36. Among other things, Mr Lyndou refers to the Defendants' letter dated 6 March 2023. At paragraph 19 of his third witness statement, Mr Lyndou states that:

> *"I provided all the documents they asked for ahead of the adjourned hearing in October last year, and also provided them with further explanation and context in my Second Witness Statement. So at this point, I believe I have done as much as I reasonably can be expected to prove that I am genuinely residing in Poland. But despite this, the Defendants have not discontinued their application."*

Applicable principles

37. The conditions that must be satisfied for an award of security for costs pursuant to CPR Part 25, r. 25.13 are well-known. The Court must be satisfied that,

having regard to all the circumstances of the case, it is just to make the order (the discretionary test) and that one or more of the specified conditions, commonly referred to as gateways, in r. 25.13(2) apply.

38. The burden falls on the Defendants to prove to the Court, on the balance of probabilities, that one or more of these gateways is established. See *Dr Morteza Rajabieslami v Tariverdi and others* [2023] EWHC 455 (Comm) at [31]:

> *"The court's power under CPR 25.12 to order security may be exercised only if one or more of the conditions in paragraph 2 of CPR 25.13 applies. Before an applicant for security can invite the court to consider whether it is just to make an order, the applicant must first prove to the court on the balance of probabilities that one of these conditions is made out. As Nugee LJ observed in Infinity Distribution Ltd v Khan Partnership LLP [2021] 1 WLR 4630 at [30]:*
>
> > *'The pre-conditions or gateways in rule 25.13(2) are not questions for the court's discretion: they are matters of fact on which the court needs to be satisfied.'"*

39. Thus, the court's approach on applications for security involves two stages. The first question is whether one or more of the conditions in paragraph 2 of CPR 25.13 applies. If not, the court has no power to make an order. If at least one condition is satisfied, the court has a discretion to make an order. It has been held that paragraph 2 "should generally be given a broader rather than a narrower construction": see *Aoun v Bahri* [2002] CLC 776, at [18]. Once at least one gateway is made out, the court decides whether it is just to order security based on the balancing of the injustice to the claimant if an order were made against the injustice to the defendant if one were refused.

40. On an application for security for costs, the court should not attempt to assess the merits of the respective parties' case, unless it can be demonstrably shown, one way or another, that there is a high degree of probability of success or

failure: *Danilina v Chernukhin* [2019] 1 WLR 758, CA. Neither party in this case sought to suggest that this was the case.

CPR 25.13(2)(a) – Residence in a non-Hague Convention State

41. The first gateway on which the Defendants rely is CPR r. 25.13(2)(a):

> *"(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 1983."*

42. In determining what is meant by "resident", a useful starting point is the decision of Lewison J (as he then was) in *HMRC v Grace* [2008] EWHC 2708, at [3]. This was not a case dealing with an application for security for costs, but in his customary lapidary style, Lewison J identified a number of considerations as to the meaning of "residence", as follows (with the references omitted):

> *"(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": .. 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: .. ;*
> *(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: … ;*
> *(iv) Residence in a place connotes some degree of permanence, some degree of continuity or some expectation of continuity:..;*
> *(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: … ;*
> *(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: … which he has adopted voluntarily and for settled purposes as part of the regular order of his life, whether of short or long duration: … ;*
> *(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: …;*

> *(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"…;*
> *(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: … ;*
> *(xi) Although residence must be voluntarily adopted, a residence dictated by the exigencies of business will count as voluntary residence: …;*
> *(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: … ;*
> *(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: …"*

43. The factors identified by Lewison J in *HMRC v Grace* are directed at questions of fact. However, it is a central part of the Defendants' submissions to me that the reference to "resident" in r. 25.13(2)(a) must be read as though it said "lawfully resident". The Defendants submitted that where it is established that a respondent's current residence is the result of "misleading conduct", then the only proper conclusion is that he resides in a state with which he does in fact have a lawful recent connection. This is not accepted by Mr Lyndou, whose position was that the question of where a respondent to the application is resident is solely a question of fact. In developing their respective submissions, Counsel cited a number of authorities.

44. In *Pisante v Logethetis* [2020] Costs LR 1815, Henshaw J said that:

> *"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, 249. …"* (at [22])

However, while Henshaw J referred there to a person residing "lawfully", the issue of lawfulness was not itself at issue in that case. All Henshaw J was doing

was citing the notes to the White Book, which in turn cited the decision of the House of Lords in *R v Barnet, ex parte Shah*.

45. Turning to *R v Barnet LBC* itself, this was concerned with the interpretation of the requirement in the Local Education Authority Award Regulation 1979 (SI 1979/889), regulation 12 which provides that, in order to qualify for a mandatory student grant, an applicant had to have been "ordinarily resident" in the United Kingdom for the previous three years. The five applicants had lived here for at least three years, while attending school or college. In each of the first four cases, the applicants had entered the United Kingdom as a student, with limited leave to enter, the limited leave including a condition that on completion of his studies he would leave the country; in the fifth case the student had entered with his family for settlement and obtained indefinite leave to remain. In each case, the local authority refused the student's application. The students applied for judicial review.

46. The Divisional Court of the Queen's Bench division refused the students' application in the first four cases, and allowed the application in respect of the fifth. The Court of Appeal affirmed the decision of the Divisional Court. The House of Lords held that the natural and ordinary meaning of "ordinary residence" had been settled by two tax cases, *Levene v Inland Revenue Comrs* [1928] AC 217 and *Inland Revenue Comrs v Lysaght* [1928] AC 234. Lord Scarman, with whose speech all the other members of the committee agreed, said, at p. 343;

> *"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 long duration."*

47. Lord Scarman continued that this was "ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind" (p. 344). The lower courts had erred in attaching decisive significance to the immigration status of the five students. Whilst it might throw light upon the question, it would be "of little weight when put into the balance against the fact of continued residence over the prescribed period" (p. 349).

48. However, Lord Scarman recognised an exception to this straightforward factual inquiry, at pp. 343 – 344:

> *"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 (even though in a tax case the Crown may be able to do so): In re Abdul Manan [1971] 1 WLR 859 and R v Secretary of State for the Home Department, Ex p Marguerite [1982] 2 WLR 953, CA. There is, indeed, express provision to this effect in the Act of 1971, section 33(2). But even without this guidance I would conclude that it was wrong in principle that a man could rely on his own unlawful act to secure an advantage which could have been obtained if he had acted lawfully."*

49. *R v Barnet LBC* has been subject to close scrutiny by the House of Lords in *Mark v Mark* [2006] 1 AC 98. The issue there was whether a person can be either habitually resident or domiciled in England and Wales if their presence in the United Kingdom was a criminal offence under the Immigration Act 1971. The immediate context was whether the UK courts had jurisdiction, under s. 5(2) of the Domicile and Matrimonial Proceedings Act 1973, to entertain the petitioner's divorce petition. The House of Lords held that habitual residence was an expression used in a variety of statutes for a variety of purposes and

could have a different meaning according to the statutory context. A person can have only one domicile, but a person might be habitually resident in more than one place at a time, or might have no habitual residence at all. The purpose of section 5(2) of the 1973 Act had been to provide an answer to the question of whether the parties and their marriage had a sufficiently close connection to the United Kingdom to make it desirable that the UK Courts should have jurisdiction to dissolve the marriage. The ultimate conclusion was that residence for the purpose of section 5(2) of the 1973 Act did not need to be lawful residence, and the question as to whether the residence was habitual was ultimately a question of fact, although the legality of a person's residence in England might possibly be relevant to answering that factual question.

50. Lord Hope said this, at [13]:

> *"In my opinion 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 of whether the person is present here. Evidence that the person intended to reside there indefinitely despite the illegality would need to be carefully scrutinised. But the question whether a person is physically present in the country is not affected one way or the other by the question whether he has entered the country legally or illegally. If the court finds that the requisite intention has been established by credible and reliable evidence, it would seem to be contrary to principle to decline to give effect to it by recognising that a domicile of choice has been acquired, as Lord Westbury put in Bell v Kennedy (1868) LR 1 Sc & Div 307, 320, immediately upon the person's arrival in that country."*

51. Baroness Hale, who gave the leading judgment in *Mark v Mark*, pointed out, when considering what Lord Scarman had said in *R v Barnet LBC*, that as none of the student applicants in the earlier case were unlawfully present, Lord Scarman's words, establishing an exception to the straightforward factual question on the grounds of unlawful residency, were strictly obiter dicta (at [29]). She went on to say that it was quite clear that Lord Scarman regarded the

question he was answering as one of statutory construction. The two cases which Lord Scarman cited in support of the proposition that residence must be lawful were both immigration cases (*In re Abdul Mahnan* and *Ex p Marguerite*). Baroness Hale indicated that "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" (at [32]). She then concluded that:

> *"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. ..."* (at [33])
>
> And
>
> *"I conclude, therefore, that residence for the purpose of section 5(2) of the 1973 Act need not be lawful residence. The question of whether residence is habitual is a factual one which should be answered by applying the test, derived from the 1928 tax cases, laid down by Lord Scarman in Ex p Nilish Shah [1983] 2 AC 309. 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. The husband's first reaction, to admit that his wife was habitually resident here for the purpose of these proceedings, was obviously correct on the facts of this case. 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."* (at [36])

52. Both *R v Barnet LBC* and *Mark v Mark* involved very different issues from an application for security for costs. There have been two cases considering applications for security for costs where the lawfulness of the respondent's residence was touched on by the court. In *Aoun v Bahri* [2002] CLC 776, the claimant was a businessman who was born in Lebanon and was a Lebanese citizen. He subsequently, following his marriage, went to live in Australia where

he acquired Australian citizenship. Since then he had lived in Dubai and Greece, and more recently he had lived in the UK. On the defendants' application for security for costs, counsel for the applicants submitted that Mr Aoun could not be regarded as ordinarily resident[1] for the purposes of r. 25.13(2)(a) because he was not here lawfully. Reliance was placed on Lord Scarman's speech in *R v Barnet LBC*, at pp. 343H – 344A, which I have quoted above. It was submitted that although Mr Aoun had permission to remain in the UK as a visitor, he had obtained that permission by misleading the immigration authorities when he entered the country. In dealing with that submission, Moore-Bick J said this, at [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 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 …"*

53. Moore-Bick J went on to say that he had jurisdiction to make an order for security for costs under r. 25.13(2)(g), so it was unnecessary to decide the question of the lawfulness of Mr Aoun's residence in the UK.

54. In *Ontulmus v Collett* [2014] EWHC 294 (QB), it was common ground that the claimant, Mr Ontulmus, was resident outside England and Wales. The defendants, who again had applied for security for costs, had to establish that

[1] At the time, r. 25.13(2)(a) used the expression "ordinarily resident"; the word "ordinarily" has since been removed.

Mr Ontulmus was not resident in a Brussels contracting State. The issue was whether Mr Ontulmus was resident in Germany, or in Turkey. Mr Ontulmus gave an address in Turkey on his claim form. However, he had also had a German residence card, said to establish that he was resident in Germany.

55. The basis of the application for security for costs was that Mr Ontulmus had been anything but clear as to where he actually was resident. Tugendhat J found that the address given in the claim form was not a false address, in that he accepted that it was an address at which a document sent to him would reach him, and that on the evidence Mr Ontulmus was resident in both Turkey and Germany. The Judge concluded, at [35], that:

> *"In so far as Mr Ontulmus has been inconsistent and evasive, I think that what he has in view may well be a concern not to disclose anything that might cast doubt on whether he has complied with the 180 day requirement under German law if he is to be entitled to retain his residence permit. But residence for 180 days is not a requirement of CPR r.25. And it would be inappropriate for this court to attempt to make findings as to whether Mr Ontulmus has complied with the requirements of a German residence permit, even if there were before the court the evidence of relevant German law (which is not the case)."*

Tugendhat J therefore declined to make an order for security for costs in that case.

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.

57. The question on this application is whether, as a matter of fact, Mr Lyndou is resident in Poland. Questions as to the lawfulness of his residence cannot be, save in a very clear case, a matter for me to determine. That is a matter for the Polish immigration authorities.

58. However, if there were clear evidence that the Polish immigration authorities had determined that Mr Lyndou was not lawfully in the country, then that would be something for the court to take into account, because it would tend to the conclusion that Mr Lyndou did not have a settled right to remain and therefore did not have the necessary degree of permanence or degree of continuity and the "expectation of continuity" to constitute residence (subject, possibly, to any rights of appeal).

59. I will consider this question, in light of the evidence before this court and the inferences which the Defendants invite me to draw, in the following section.

CPR 25.13(2)(e) – Address on claim form

60. The other gateway relied on in this case is sub-section (e), which provides that "the claimant failed to give his address in the claim form, or gave an incorrect address in that form".

61. In *Rajabieslami v Tariverdi*, at [37], the court held that the evidence, even taken at its highest, established no more than a "risk" – in other words, a possibility rather than a probability – that the address given on the claim form may have been incorrect. Therefore, gateway "e" had not been made out.

62. It is also noteworthy that, as far as counsel's researches could determine, there is no reported authority where the court has actually ordered security solely on the basis of this gateway. In *Stunt v Associated Newspapers Limited* [2019] EWHC 511 (QB), Warby J dealt with the position where the claimant, on the claim form, gave the office address of Mr Stunt's then solicitors. The defendant, who had applied for security for costs, maintained that this involved two separate breaches of CPR Part 16 and its Practice Direction, namely a failure to give "his address" and the provision of an "incorrect address". Warby J held that there had not been compliance with the rule and its practice direction, and it was not correct to say that there was no more than a technical breach (at [17]). On the other hand, when it came to the exercise of the court's discretion, Warby J indicated that he did not believe that he would have granted an order for security as a matter of discretion on the basis of this sub-rule (at [47]).

Discussion and analysis

CPR 25.13(2)(a) – Residence in a non-Hague Convention State

63. The burden lies on the Defendants to establish that Mr Lyndou is not resident in a Hague Convention State. There is considerable evidence (including the evidence obtained by the Defendants themselves) which establishes that as a

matter of fact Mr Lyndou has been residing since 10 May 2022 in Poland. The key points are as follows:

(1) At the time when the claim was begun, in 2021, Mr Lyndou was living in Belarus. Mr Lyndou was and continues to be a partner in a business known as Oats Technologies. This was run initially through an English incorporated company, OTL. In late 2021/early 2022, Mr Lyndou and his business partners were planning to open new offices elsewhere in Europe. Whilst the original plan may have been for an office to be opened in Moscow, circumstances changed following Russia's invasion of Ukraine on 22 February 2022, which led to the imposition of wide-ranging sanctions on Russia and its accomplice in that invasion, Belarus.

(2) I accept Mr Lyndou's evidence that Oats Technologies' investors and business partners became increasingly concerned about working with anyone with links to Belarus. There is clear, and unchallenged, evidence in the form of an email dated 22 March 2022 from Wise, a payment transfer system used by Oats Technologies, indicating that Wise was "no longer able to serve business customers domiciled in Belarus, or where at least one majority shareholder, UBO, or ultimate controller resides in Belarus". The email continues that the Wise business account would be closed on 27 May 2022.

(3) Mr Lyndou began the process of moving to Poland on 30 March 2022, contacting an immigration agency. He obtained a Polish visa on 29 April 2022 and immigrated to Poland on 10 May 2022 (the first day that his visa was valid).

(4) Between May to October 2022, Mr Lyndou rented a property in Warsaw on a one-year tenancy. This is the First Polish Address. The Defendants submitted that the fact of entering into a tenancy agreement is not proof that a person resides at the address given in the agreement. While that may be true, I accept that the fact of the tenancy agreement is a good starting point to establish where a person is residing.

(5) Since late October 2022, Mr Lyndou's case is that he has moved from the First Polish Address to the Second Polish Address. Mr Lyndou's position is that this move was triggered by the Defendants' action, in commencing an aggressive surveillance operation which unsettled his landlord, Mr Grabowski, causing him to terminate the original tenancy agreement, but that is not something I need to decide.

(6) Mr Lyndou has registered his address with the Polish authorities.

(7) Mr Lyndou has obtained a temporary residence permit, which allows him to remain in Poland until at least 18 October 2023. I will consider the evidence relating to how that temporary residence permit was obtained further below.

(8) Mr Lyndou's evidence is that he intends to remain in Poland for the long term, and he will apply for an extension on his current temporary residence permit.

(9) He has signed a contract of employment with Oats Creative (the Polish subsidiary) to run the Polish office of Oats Technologies. He has informed the Polish authorities of this new contract of employment.

(10) The Defendants' own surveillance evidence supports the view that, while there is a dispute as to at which Polish address in Warsaw Mr Lyndou was living (a matter to which I return below), he was indeed living in Poland. While Mr Lyndou left for a short trip to Belarus in September 2022, he was back in Poland after a few days. I note that Mr Lyndou indicated, in his first witness statement, that he did not feel safe living in Belarus. It might be said that that statement is at odds with Mr Lyndou's being willing to attend a wedding in Belarus in September 2022. However, there is a difference between living in a country and making a short visit there for personal or family reasons.

(11) There is also the evidence from Mr Grabowski and Mr Burankou, which I cannot simply ignore. Their evidence also supports and is consistent with Mr Lyndou's account. There is even a short statement from a receptionist at a Warsaw gym, who states that he has regularly seen Mr Lyndou at the gym. While I do not place a great deal of weight on this statement, it again tends to corroborate Mr Lyndou's case on residence. It all forms part of the picture as to where Mr Lyndou is currently residing.

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.

65. The real thrust of the submissions before me is that the Defendants say that, as the evidence has developed, two related factual issues have emerged: first, has Mr Lyndou obtained a residence permit permitting him to reside in Poland and second, if so, on what basis did he do so? On the latter question, the Defendants'

position is that it is to be inferred that Mr Lyndou obtained a residence permit on the basis of false and/or misleading representations.

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.

67. Mr Lyndou has provided to the Defendants his "application for granting the temporary resident permit to a foreigner", dated 5 May 2022. Part E. of that application, headed "Declaration", states as follows:

> *"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 documents for the purpose of using it as an authentic one or using such documents 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."*

68. Part C, IV of the application, dealing with the "foreigner's travels and stays outside" Poland in the last 5 years, has been completed with the words "UAE 2020". The Defendants submit that this is, on any view, incorrect, as Mr Lyndou on his own evidence in the five years before the application was made lived in the United Kingdom and Belarus. Further, Part V of the application, dealing

with the "foreigner's means of subsistence", simply states "contract of employment". The actual contract of employment relied upon is not before the court, despite Mr Lyndou having been invited, on several occasions, to produce it. However, Mr Lyndou has produced a copy of the declaration which accompanied the application to obtain his temporary residence permit. The Defendants stressed what they said were real questions and concerns about the basis upon which Mr Lyndou obtained his temporary residence permit. The permit appears to have been obtained on the representation that Mr Lyndou was employed by Sfera Bit as a cleaner, on a salary equivalent to the Polish minimum wage, for work at a city over 100 miles from his alleged place of residence in Warsaw, in circumstances where it is not at all clear how Mr Lyndou could have travelled daily to that city. Mr Lyndou does not own a car.

69. Further, the Defendants submitted that there remained "three gaping holes" in Mr Lyndou's evidence, namely a full copy of the bundles of documents submitted to the Polish authorities in support of his application for a temporary residence permit, a copy of the employment contract with Sfera Bit, and a copy of the temporary residence permit decision itself. This last should be a formal document, bearing a seal, stamp and signature, which is different from the copy of the temporary residence permit itself (which Mr Lyndou has produced), and which sets out the basis on which a temporary residence permit is granted.

70. In response, Mr Lyndou makes the point that he does not owe duties of disclosure in relation to an interim application. Moreover, it is said that Mr Lyndou has justifiable fears that the Defendants would seek to turn any

information provided against him. It was said that the Defendants do not have the right to pore over every detail of Mr Lyndou's residence permit application.

71. In this context, the Defendants relied on *Brumder v Motornet Services & Repairs Ltd* [2013] 1 WLR 2783, at [38], [48], to submit that it is a longstanding principle of common law that "a person cannot derive any advantage from his own wrong". That was a very different case. The legal context in which the principle was there being applied was that a person cannot by his own wrongful act impose on his employer the liability to pay damages to him. I do not derive much assistance from that case, when seeking to determine whether Mr Lyndou is, or is not, resident in Poland for the purposes of CPR r. 25.13(2)(a).

72. In closing submission, counsel for the Defendants invoked the principle of estoppel. I do not consider that any estoppel is in play. It is difficult to see what representation or warranty as to a state of affairs was made by Mr Lyndou to the Defendants having regard to his application for a residency permit, nor how the Defendants could be said to have relied on it.

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*.

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.

76. The Defendants are also faced with a further difficulty. At the moment, the evidence does not support the conclusion that Mr Lyndou is living in Belarus. The weight of the evidence establishes that, factually, he is currently residing in Poland, a Hague Convention state. Even if I were to find that his Polish temporary residence permit is at risk of being set aside, that does not mean that he is automatically to be treated as resident in Belarus, a non Hague Convention state.

77. In light of my finding that the Defendants have failed to establish the jurisdictional gateway under CPR Part 23.13(2)(a), I do not need to address how I might have exercised my discretion had I found that Mr Lyndou was not resident in Poland, but was instead resident in Belarus. I will just add a few words about that hypothetical. Given that Mr Lyndou has provided no evidence as to his assets, and the fact that he has not suggested that making an order for security for costs would or might stifle his claim, it seems to me that this would have been a case for exercising the discretion to make an order for security for costs.

78. In the event, that issue does not arise. The Defendants have failed to discharge the burden, which lies on them, to establish that Mr Lyndou is not resident in a Hague Convention state.

CPR 25.13(2)(e) – Address on the claim form

79. In their skeleton argument for the hearing before me, the Defendants initially tried to suggest that the "jurisdictional threshold issue" under r. 25.13(2)(e) was to be determined both "by reference to (i) whether or not Mr Lyndou actually resided at the Metropol Hotel as at 28 May 2021; and/or (ii) whether or not Mr

Lyndou actually resided at the Polish Apartment as at 5 July 2022". Thus, the first point taken in the skeleton argument prepared for the hearing was that when proceedings were first started, Mr Lyndou did not reside at the Metropol Hotel but rather at another address in Belarus.

80. That contention prompted an immediate, and it seems to me justified, complaint on behalf of Mr Lyndou who, quite fairly, pointed out that nowhere in either the voluminous evidence or correspondence exchanged by the parties prior to the exchange of skeleton arguments had this point previously been raised. In any event, it was submitted on behalf of Mr Lyndou in correspondence that this was a clearly bad point, for several reasons.

81. By the start of the hearing, the Defendants had conceded that they would not pursue the point as to whether Mr Lyndou actually resided at the Metropol Hotel in Mogilev, Belarus, at the time when the proceedings were started. Instead, they focussed on the submission that, at the time when the Claim Form was amended in July 2022 to give Mr Lyndou's address as the First Polish Address, he was not in fact living there and that this is confirmed by the surveillance evidence the Defendants obtained.

82. The burden lies on the Defendants to establish that, as of 4 July 2022, the date of the amendment to the claim form, Mr Lyndou was not in fact living at the First Polish Address. Mr Lyndou states that he has always thought of the First Polish Address as his home. He kept his belongings there, and also received his post there. Although Mr Lyndou now wishes to again amend the claim form to give the Second Polish Address as his correct address to reflect the position since October 2022, when his landlord terminated his tenancy at the First Polish

Address, his position is that between July and October 2022 he was indeed living at the First Polish Address.

83. I reject the submission that Mr Lyndou gave an incorrect address on 4 July 2022, and that he was not living at the First Polish Address as at that date. My reasons for reaching this conclusion are as follows.

84. *First*, Mr Lyndou has provided ample documentary evidence in support of his case that he resided at the First Polish Address during the relevant period:

(1) there are invoices from his landlord in respect of rent for May – September 2022;

(2) there is proof of payment of rent.

(3) there is a certificate showing that Mr Lyndou registered his address as being the First Polish Address with the Polish authorities (the PESEL certificate);

(4) there is correspondence from his bank, addressed to Mr Lyndou at the First Polish Address;

(5) there is a print-out of a Whatsapp conversation, where Mr Lyndou told a friend that his address was the First Polish Address;

(6) there is correspondence with his lawyer, where Mr Lyndou states that his home address was the First Polish Address, whilst the Second Polish Address was the address of his company, Oats Creative.

85. *Second*, Mr Lyndou explains why it was that he took out a lease of the Second Polish Address, initially in his own name, and later in the name of his company,

Oats Creative. Mr Lyndou says that he required a further apartment for work purposes relating to his business in Oats Technologies/Oats Creative (that is the Second Polish Address). The Second Polish Address was an office space from where Mr Lyndou could work, which he also used as a place to entertain friends and guests, occasionally staying there overnight as it was closer to the city centre than the First Polish Address.

86. He addresses Mr James' point that the Second Polish Address is located in a residential building, not a commercial office space. He explains that the apartments located at the Second Polish Address include apartments which are rented as office space, and that this is not unusual in Poland. None of what he says is inherently implausible. It is very difficult to reject what he says about this on an interim hearing.

87. *Third*, Mr Lyndou explains why he has since moved from the First Polish Address to the Second Polish Address. In essence, what he says is that his Polish landlord, Mr Grabowski, felt sufficiently threatened by the Defendants' surveillance that he no longer felt safe with Mr Lyndou as tenant. Mr Lyndou says this:

> *"…. Although we are close friends, he explained to me that, in light of various unusual events which have happened to him following the private surveillance, he does not feel comfortable renting the Apartment [that is, the First Polish Address] to me any longer. Mr Grabowski told me that he is not sure whether the surveillance is still ongoing, the extent to which the surveillance could stretch, and for what purposes the material collected from the surveillance could be used. He told me that he is not happy to expose his life or suffer any damage to his business because of legal proceedings in which he has no involvement. He has therefore asked that we terminate the tenancy agreement for the Apartment, effective 18 October 2022."*

88. That explanation is plausible. It certainly cannot simply be rejected out of hand. The Defendants submit that Mr Lyndou is not to be trusted, and given the concerns they have raised about the basis on which Mr Lyndou has obtained his temporary residence permit in Poland, they submit that his evidence should not simply be accepted. However, Mr Lyndou's account is corroborated by Mr Grabowski. I have no reason to reject Mr Grabowski's evidence at this interim hearing.

89. *Fourth*, a major plank of the Defendants' evidence on this point is based on the surveillance evidence they obtained. However, I accept the submissions made on behalf of Mr Lyndou to the effect that, when examined closely, the surveillance evidence is actually fairly limited as to what it shows. The surveillance began on 3 August and ended on 7 September 2022, but it was not continuous during this period. In August, the surveillance was carried out only for 10 days. What the evidence suggests, at its highest, is that Mr Lyndou was not seen entering or leaving the First Polish Address between 7am and 10pm on the days when the surveillance was carried out. However, Mr Lyndou has provided quite a detailed explanation as to why he was not seen at the First Polish Address during the days in question. Once again, I find his explanation plausible. I do not propose to extend this already lengthy judgment by detailing the minutiae of what Mr Lyndou says about his movements by setting this all out, but I will give one example. From 24 – 27 August 2022, Mr Lyndou's business partner, Mr Burankou, visited Warsaw. Mr Lyndou decided to stay with Mr Burankou at the Second Polish Address during this period, because it made it easier for the two of them to maximise their working time together. Again, this account is corroborated by Mr Burankou.

90. *Fifth*, the Defendants' surveillance evidence records several sightings of Mr Lyndou at the Second Polish Address. This evidence is designed to support the submission that Mr Lyndou was in fact living at the Second Polish Address during the period in question (in this case, 5 August to 7 September 2022). But again, the surveillance evidence here is fairly limited. What the surveillance evidence here shows is that Mr Lyndou was seen entering and leaving the Second Polish Address for 6 days during the period in question, but was not seen at the First Polish Address during the same period. That simply does not establish that Mr Lyndou was living at the Second Polish Address. Moreover, the fact that Mr Lyndou was seen entering and leaving the Second Polish Address is in fact consistent with Mr Lyndou's case that he was using it as office space.

91. Finally, the Defendants also rely upon a letter from Sure Step, dated 26 October 2022. That letter sets out details of a further conversation between an (unidentified) agent of Sure Step with an (unidentified) security guard at the First Polish Address. The security guard is alleged to have told the agent that Mr Grabowski lives alone at the relevant flat (apartment 74) of the First Polish Address. I cannot give this material a great deal of weight. No dates are given as to when it is said that Mr Grabowski was living at the First Polish Address.

92. The test here is not whether there is a risk that the address given is wrong, but that there is a probability of a wrong address: *Rajabieslami v Tariverdi*, at [37]. I am satisfied, on the totality of the evidence before me, that Mr Lyndou did in fact give the proper address on the claim form on 4 July 2022. The Defendants have therefore failed to establish this other gateway under CPR r. 25.13(2)(e).

93. Again, while it does not strictly arise, given the findings that I have already made on this point, even if I had found that Mr Lyndou had given an incorrect address on the claim form, I would not necessarily have ordered security to be provided, had that been the only gateway established. It is noteworthy that, as far as Counsel's researches go, there is no case where the Court ordered security solely on the basis of ground (e). The Defendants submitted that Mr Lyndou has been associated with (on their count) at least five addresses, and therefore he is both difficult to pin down and a moving target. However, that submission does not properly take into account the fact that Mr Lyndou's various moves have been caused, in part, by two unusual and highly disruptive global events, in the form of the Covid-19 pandemic followed by Russia's war on Ukraine. Ultimately, I do not need to decide this point.

94. Since 18 October 2022, Mr Lyndou's solicitors have sought the Defendants' consent to an application to re-re-amend the claim form to update his residential address. The Defendants have not provided their consent. Their position is that they do not admit that Mr Lyndou actually resides, or has resided, at the Second Polish Address. I can deal with the application to re-re-amend at the hearing when I propose to hand down this judgment.

Conclusion

95. I therefore dismiss the Defendants' application for security for costs on both grounds. The Defendants have not established, to the necessary standard, the existence of either gateway on which they rely.

96. I shall hear submissions on the precise form of order and any consequential matters, if this cannot be agreed by the parties in light of my judgment, on a date

to be fixed. Such date should not be more than 28 days from the date of formal handing down of this judgment.

Postscript

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.