Neutral Citation Number: [2024] EWCA Civ 630

Case No: CA-2023-001764

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Bright
[2023] EWHC 1964 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2024

Before:

LORD JUSTICE MALES
LORD JUSTICE DINGEMANS
and
LADY JUSTICE FALK

- -

Between:

ETERNITY SKY INVESTMENTS LTD	**Respondent /Claimant**
- and -	
XIAOMIN ZHANG	**Appellant/ Defendant**
- and –	
COMPETITION & MARKETS AUTHORITY	**Intervener**

- -
- -

Jonathan Kirk KC & Lee Finch (instructed by **McDermott Will & Emery (UK) LLP**) for the **Appellant**
David Lewis KC & Gemma Morgan (instructed by **Clifford Chance LLP**) for the **Respondent**
Toby Riley-Smith KC (instructed by the **Competition & Markets Authority**) for the **Intervener**

Hearing dates: 8 & 9 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 10th June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES:

1. The issue on this appeal is whether enforcement of a Hong Kong arbitration award under section 101 of the Arbitration Act 1996, which gives effect to the New York Convention, should have been refused as a matter of public policy. The appellant, Mrs Xiaomin Zhang, says that enforcement should have been refused: she was a 'consumer' within the meaning of the Consumer Rights Act 2015 ('the CRA'); the CRA applied despite the choice of Hong Kong law in the contract of guarantee pursuant to which she was held liable in the arbitration because that contract had a 'close connection' with the United Kingdom; the relevant term of the contract was not 'transparent', so that it fell to be assessed for fairness despite being a term which specified the main subject matter of the contract (what is sometimes called a 'core term'); and that it was unfair, applying the test set out in section 62 of the CRA, and therefore not binding on her.

2. Mr Justice Bright accepted that Mrs Zhang was a consumer, albeit of a very untypical kind, but rejected the submission that her personal guarantee had a close connection with the United Kingdom. That conclusion meant that the CRA did not apply and there was, therefore, no reason why the award should not be enforced. However, the judge went on to consider and reject Mrs Zhang's remaining submissions. He accepted, however, that if the CRA had applied, and if the relevant term had been unfair, it was hard to imagine that the award should nevertheless be enforced as the respondent submitted.

3. Mrs Zhang now appeals on two grounds, with the permission of the judge. An application to widen the scope of one of those grounds was made to us in the course of the hearing of the appeal. The respondent, Eternity Sky Investments Ltd ('Eternity Sky'), supports the judge's reasoning, but also contends, by a respondent's notice, that the judge ought not to have held Mrs Zhang to be a consumer, and in any event that public policy would not have required refusal of enforcement of the award. Other points decided by the judge have fallen away.

4. Mrs Zhang was represented by Mr Jonathan Kirk KC and Mr Lee Finch. Eternity Sky was represented by Mr David Lewis KC and Ms Gemma Morgan. In the spirit of the recent encouragement that junior counsel should have the opportunity to make oral submissions in court, the issue whether Mrs Zhang was a consumer, which is in some ways the most difficult and interesting issue in the case, was addressed by Ms Morgan and Mr Finch. The quality of their submissions demonstrated the value of greater participation by junior counsel in oral advocacy. We also had the benefit of written and oral submissions from Mr Toby Riley-Smith KC on behalf of the Competition & Markets Authority ('the CMA') as Intervener, addressing issues of public interest in its capacity as the body responsible for enforcing consumer protection law and promoting competition for the benefit of consumers, while adopting a neutral position as to how the appeal should be decided.

The background

5. Eternity Sky is incorporated in the BVI but is registered in Hong Kong, where it conducts its business.

6. Its claim against Mrs Zhang was made under a personal guarantee dated 8th May 2016 by which she guaranteed the obligations of a Hong Kong company, now known as Chong Sing Fin Tech Holdings Group Ltd ('Chong Sing'), under a subscription agreement

pursuant to which Chong Sing agreed to issue convertible bonds to Eternity Sky in the aggregate principal amount of HK$500 million (equivalent to about US$64 million).

7. Chong Sing was a Cayman Island company listed on the Hong Kong Stock Exchange. The judge found that it was managed and controlled by Mrs Zhang's husband, although his formal position was that of a non-executive director. It was a holding company for a group of companies principally engaged in providing financial services for small and medium-sized enterprises and individuals in the PRC and Hong Kong. It carried on no business in the United Kingdom.

8. As a listed company, Chong Sing was required by the Hong Kong Securities and Futures Ordinance to publish in its accounts the shareholdings of its directors, as well as substantial shareholdings held by others. In its 2016 accounts, the company disclosed that Mr Zhang was the largest individual shareholder with some 3.8 billion shares held individually and through a corporate entity (about 18% of the company's issued shares), while Mrs Zhang held 90 million shares (about 0.39%). In accordance with the terms of the Ordinance, Mr Zhang was deemed to be interested in the shares held by his wife, and *vice versa*. The combined shareholding, including what was described as the 'family interest', amounted to 18.27% of the company's issued shares. The same information was contained in the information sheet containing the particulars of Chong Sing for the purpose of its listing on the Growth Enterprise Market ('GEM') of the Hong Kong Stock Exchange.

9. Mr Zhang was resident in Hong Kong. Mrs Zhang was and is resident in the United Kingdom, although she had been resident in Hong Kong until 2013, when she moved to London with their daughter. She acquired British citizenship in 2019, at which point she gave up her Chinese citizenship. Between 2013 and 2016 she spent substantial parts of the year, between 78 and 107 days, abroad, almost all of that time in Hong Kong. In 2016 she spoke, in her own words (translated from Mandarin), only 'very basic English, enough at least to take a bus and get a taxi and go shopping, but that is about it'.

10. Mrs Zhang did not have any active involvement in the management of Chong Sing, or in any of the other numerous companies which her husband controlled. However, from time to time he would ask her to sign what was obviously, and what she understood was, a business document. These included, but were not limited to, a number of personal guarantees by which she guaranteed the obligations of her husband's companies. Other documents included documents by which she acquired shareholdings in, or became a director of, such companies, although she played no part in their management, did not attend board meetings, and left all such matters to her husband. Sometimes, as in the case of the personal guarantee in issue in this case, she would be provided with nothing more than the signature page for her to sign.

11. Mrs Zhang signed such documents willingly, generally without reading them. She was an intelligent and educated woman, with a degree in international finance, who trusted her husband without needing to read the documents which she was asked to sign or to understand their detail. However, she did understand that when she signed a document, she was incurring a personal responsibility with potentially serious consequences.

The bond issue and the personal guarantee

12. The bond issue was held in Hong Kong, under the aegis of the Hong Kong Stock Exchange and subject to its GEM Listing Rules. The subscription agreement provided for Chong Sing's performance to be guaranteed by personal guarantees from Mr and Mrs Zhang. It was subject to Hong Kong law and arbitration in Hong Kong administered by the Hong Kong International Arbitration Centre.

13. The recitals to Mrs Zhang's personal guarantee stated that Eternity Sky had agreed to subscribe for convertible bonds in the aggregate principal amount of HK$500 million, that the guarantee was entered into as security for the obligations of Chong Sing under the subscription agreement, and that execution of the guarantee was a condition precedent to Eternity Sky completing the transactions contemplated under the subscription agreement. It was clear, therefore, that the consideration provided for the guarantee by Eternity Sky was the payment of HK$500 million to Chong Sing in Hong Kong.

14. Mrs Zhang's obligation was set out in clause 2 as follows:

> '**2. GUARANTEE**
>
> 2.1 The Guarantor hereby irrevocably, absolutely and unconditionally:
>
> (a) guarantees to the Subscriber the due and punctual observance and performance by each of the Obligors of all of the obligations of, or expressed to be assumed by, any or all of the Obligors under or pursuant to any or all of the Transaction Documents and agrees to pay to the Subscriber from time to time, upon demand by the Subscriber, any and all sums of money which any and all of the Obligors are at any time liable, or expressed to be liable, to pay to the Subscriber under or pursuant to any or all of the Transaction Documents and which have become, or are expressed to have become, due and payable but have not been paid at the time such demand is made as if she was the principal obligor in respect to that amount;
>
> (b) agrees as a primary obligation to indemnify the Subscriber from time to time, upon demand by the Subscriber, from and against any loss incurred by the Subscriber as a result of any of the obligations of or expressed to be assumed by any or all of the Obligors under or pursuant to any or all of the Transaction Documents being or becoming void, voidable, unenforceable or ineffective as against any or all of the Obligors for any reason whatsoever, whether or not known to the Subscriber or any other person, the amount of such loss being the amount which the Subscriber would otherwise have been entitled to recover from any or all of the Obligors; and
>
> (c) agrees with the Subscriber that if, for any reason, any amount claimed by the Subscriber under this Clause 2 is not recoverable from the Guarantor on the basis of a guarantee

> then the Guarantor will be liable as a principal debtor and primary obligor to indemnify the Subscriber in respect of any loss it incurs as a result of any Obligor failing to pay any amount expressed to be payable by it under a Transaction Document on the date when it ought to have been paid. The amount payable by the Guarantor under this Guarantee will not exceed the amount she would have had to pay under this Clause 2 had the amount claimed been recoverable on the basis of a guarantee.
>
> 2.2 This Guarantee and indemnity is a continuing guarantee and indemnity and will extend to the ultimate balance of all sums payable by any Obligor under the Transaction Documents, regardless of any intermediate payment or discharge in whole or in part.'

15. The guarantee was stated to be governed by Hong Kong law and provided for arbitration before a single arbitrator in Hong Kong in accordance with the UNCITRAL Arbitration Rules.

16. The guarantee described Mrs Zhang, accurately, as the holder of a PRC passport, with an address at a residential property in London. It included various representations and warranties given by Mrs Zhang, including that she was a citizen of and domiciled in the PRC, and that she fully understood the contents of the guarantee and had obtained independent legal advice with respect to it. It included also an undertaking that she and her husband would ensure that their combined net worth would continue to be not less than HK$5.4 billion (or the equivalent in other currencies) and that she 'together with parties acting in concert with her' would continue to be the single largest shareholder in Chong Sing. In this regard it should be noted that, although HK$500 million is a large sum of money, it represented only a fraction of the couple's overall wealth at the time.

17. The guarantee provided for any notice or demand to be made by sending or delivering to Mrs Zhang's London address.

18. Payment under the guarantee was to be made 'to such account in such jurisdiction with such bank as [Eternity Sky] specifies from time to time'.

19. However, Mrs Zhang did not read any of these terms and had not in fact obtained any legal advice before signing. The circumstances in which she signed were that she was provided by her husband's PA with the signature page alone, together with the explanation that Chong Sing was issuing bonds and that the 'majority shareholder couple' were required to provide a guarantee. She signed this signature page, which was witnessed by a friend, while on holiday in Spain. The signature page made clear that the document being signed was a guarantee and Mrs Zhang understood this.

20. The signature page was then taken to London where it was attached to the remaining pages of the guarantee and in due course was provided to Eternity Sky so that the bond issue could go ahead.

Chong Sing's default

21. Unfortunately Chong Sing's business did not go well and on 20th May 2019, three years after the date of the guarantee, it failed to redeem the bonds, thereby defaulting under the subscription agreement. Shortly after this it suspended trading amid allegations of financial irregularities and embezzlement.

22. Mr Zhang died on 18th September 2019, leaving Mrs Zhang as the sole living guarantor. On 19th December 2019, Eternity Sky served a statutory demand on Chong Sing, followed on 17th June 2020 by a winding up petition in the Cayman Islands. Chong Sing was ordered to be wound up, and liquidators were appointed, on 14th September 2020.

23. On 6th May 2020 Eternity Sky demanded payment from Mrs Zhang under the guarantee.

The arbitration

24. Mrs Zhang did not pay the amount demanded. Instead, on 19th June 2020, she took the initiative by commencing arbitration in Hong Kong against Eternity Sky, invoking the arbitration clause in the personal guarantee. She claimed declarations (a) that the arbitration agreement, alternatively the guarantee as a whole, was not valid or binding for lack of agreement and intention to be legally bound; alternatively (b) that the guarantee was rescinded on grounds of undue influence; or (c) that the guarantee was rescinded as an unconscionable bargain. Her Statement of Claim in the arbitration expressly stated that she 'submits to the jurisdiction of the Tribunal to determine its own jurisdiction, at present reserving her right as to any ongoing jurisdiction of the Tribunal should the Tribunal determine that there was no valid arbitration agreement.' Eternity Sky counterclaimed the sum due under the guarantee.

25. The arbitration took place in Hong Kong, with a remote hearing in November 2021. Mrs Zhang was represented by Squire Patton Boggs (both the London office and the Hong Kong office) and by English leading counsel. She attended remotely and gave oral evidence in Mandarin.

26. The sole arbitrator issued his award on 22 August 2022. He found that Mrs Zhang had a good understanding of what a bond issue was and that she had known that she was signing a personal guarantee, understood its purpose (i.e. to enable the bond issue to take place) and understood the implications of signing. He quoted her evidence:

> 'I knew that when I signed my name I certainly should have some responsibility because I signed my name.'

27. In the light of these findings, the arbitrator concluded that Mrs Zhang had intended to enter into legal relations and to provide the security necessary to secure the bond issuance. He rejected her case that there had been undue influence and that the guarantee constituted an unconscionable bargain, observing that there was no evidence whatever of any undue influence, and that she had deliberately and carelessly chosen to sign without even requesting a full copy of the guarantee, knowing and understanding the risks. It is notable that although the arbitrator applied Hong Kong law in reaching these conclusions, the Hong Kong law in question was based upon and not materially different from English law. His finding was that:

> 'I find, upon consideration of the evidence, that Mrs. Zhang was aware of what she was signing and its purpose. She knew

> that by signing the signature page of the Personal Guarantee that certain risks and obligations attached to her actions, but she nevertheless chose not to request a copy of the Personal Guarantee or to ask anything about the specific terms, obligations or consequences of being bound by the Personal Guarantee.'

28. Having rejected Mrs Zhang's claims, the arbitrator found that the personal guarantee was binding on her and that Eternity Sky's counterclaim succeeded. He ordered Mrs Zhang to pay HK$500 million, together with interest and costs. So far as interest was concerned, however, he rejected Eternity Sky's claim for interest at the default rate under the subscription agreement of 15% *per annum* and instead awarded interest at the rate of 7% *per annum*.

The enforcement proceedings

29. On 18th October 2022 Eternity Sky issued an arbitration claim seeking to enforce the award pursuant to section 101 of the Arbitration Act 1996. An order giving permission for such enforcement was made by Mr Justice Bryan without notice to Mrs Zhang on 27th October 2022. On 14th November 2022 Mrs Zhang applied for that order to be set aside.

30. Because the award is a New York Convention award, the only grounds on which recognition or enforcement may be refused are those set out in section 103 of the 1996 Act. Mrs Zhang relied on the public policy ground in section 103(3), invoking her status as a 'consumer'. This provides:

> 'Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.'

The Consumer Rights Act

31. The relevant provisions of United Kingdom consumer rights law are contained in the CRA, which was enacted in order, among other things, to update the Unfair Terms in Consumer Contracts Regulations 1999 ('the 1999 Regulations'), which gave effect in UK law to Council Directive 93/13/EEC of 5th April 1993 on Unfair Terms in Consumer Contracts ('the Directive'). The CRA applies to contracts entered into on or after 1st October 2015 between a trader and a consumer.

32. These terms are defined in section 2:

> '(2) "Trader" means a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.
>
> (3) "Consumer" means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.'

33. The definition of 'consumer' is deliberately wider than the definition contained in the Directive, which in Article 2(b) defines a consumer as:

> 'any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession.'

34. Under the CRA, therefore, an individual will be a consumer if they act for both business and private purposes, provided that the private purposes predominate.

35. The burden is on the trader to prove that an individual is not a consumer: section 2(4) of the CRA.

36. A 'consumer contract' is defined by section 61 of the CRA as 'a contract between a trader and a consumer.'

37. The CRA operates by invalidating unfair terms of a consumer contract, unless the consumer chooses to rely on them. Section 62 provides:

> '**Requirement for contract terms and notices to be fair**
>
> (1) An unfair term of a consumer contract is not binding on the consumer.
>
> (2) An unfair consumer notice is not binding on the consumer.
>
> (3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.
>
> (4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
>
> (5) Whether a term is fair is to be determined—
>
> (a) taking into account the nature of the subject matter of the contract, and
>
> (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends. …'

38. However, there are some terms which are excluded from the operation of section 62. These include terms which specify the main subject matter of the contract, sometimes referred to as the 'core terms'. But the exclusion only applies if the core term in question is 'transparent and prominent'. Thus section 64 provides:

> '**Exclusion from assessment of fairness**
>
> (1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—

> (a) it specifies the main subject matter of the contract, or
>
> (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.
>
> (2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.
>
> (3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.
>
> (4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.
>
> (5) In subsection (4) "average consumer" means a consumer who is reasonably well-informed, observant and circumspect.
>
> (6) This section does not apply to a term of the contract listed in Part 1 of Schedule 2.'

39. Leaving aside Part 1 of Schedule 2, this means that in the case of a core term, it is necessary to consider whether the term is transparent and prominent, applying the tests stated in subsections (3) and (4) and the standard of the 'average consumer'. Although subsection (5) suggests that this concept is only relevant for the purposes of assessing prominence, it is established and not disputed that the 'average consumer' standard is equally relevant for the purpose of assessing transparency: *Kasler v OTP Jelzálogbank Zrt* [2014] Bus LR 664 at [74].

40. If the core term in question is both transparent and prominent, it must be given effect, subject always to other principles which may apply such as the equitable doctrine of undue influence, but with no further assessment of its fairness under section 62. However, if it is not transparent, or is not prominent, it must be assessed for fairness applying the test set out in section 62.

41. The legislature recognised the risk that a trader might stipulate for the application of a foreign law in order to deprive the consumer of the protection afforded by the CRA. This was dealt with by section 74, which provides for the Act to apply despite such a choice of law provided that the contract has a close connection with the United Kingdom. The section provides:

> '74 **Contracts applying law of non-EEA State**[1]
>
> (1) If—

[1] I have set out the heading and terms of section 74 as at the date of the guarantee. Since the UK's withdrawal from the EU, the heading has been amended and is now 'Contracts applying law of a country other than the UK', while the reference in subsection (1) to 'an EEA State' has been amended to refer to 'the United Kingdom or any part of the United Kingdom'. Words have also been inserted into subsection (2) to clarify that Regulation (EC) No. 593/2008 forms part of retained direct EU legislation. The amendments make no practical difference in the present case.

> (a) the law of a country or territory other than an EEA State is chosen by the parties to be applicable to a consumer contract, but
>
> (b) the consumer contract has a close connection with the United Kingdom,
>
> this Part applies despite that choice.
>
> (2) For cases where the law applicable has not been chosen …, see Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.'

42. The provisions of the CRA which I have set out are derived from the Directive and should be interpreted in accordance with its purposes, which include the effective protection of consumers against unfair trade practices. In *London Borough of Newham v Khatun* [2004] EWCA Civ 55, [2005] QB 37, a case concerned with the 1999 Regulations, the question arose whether the Regulations applied to a contract for the grant or transfer of an interest in land. Lord Justice Laws explained how this question should be approached:

> '77. The starting point for the resolution of this question is in my judgment the nature of the Directive's dominant purpose: as I have already said, that of consumer protection. In particular I have in mind the terms of article 100A(3) of the Treaty, "The commission … will take as a base a high level of protection". It is plainly to be assumed that in framing the Directive the Community legislator intended to carry this purpose into effect. On this basis, one would expect transactions in land to fall within the Directive's scope. … I am unable to perceive any rationale for the exclusion of land transactions from the Directive's scope. Such an exclusion would cut across the grain of the legislation's aim to provide "a high level of protection"…'

43. Effective consumer protection in accordance with the provisions of the CRA is an important aspect of public policy. As the CJEU explained in *Asturcom Telecomunicaciones SL v Nogueira* [2012] 1 CMLR 34 by reference to the equivalent provisions of the Directive:

> '51. As pointed out at [30] above, Article 6(1) of Directive 93/13 is a mandatory provision. It should also be noted that, according to the Court's case law, that directive as a whole constitutes, in accordance with Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the European Community and, in particular, to raising the standard of living and the quality of life throughout the community (*Mostaza Claro* [2007] 1 CMLR 22 at [37]).
>
> 52. Accordingly, in view of the nature and importance of the public interest underlying the protection which Directive 93/13

> confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.'

The judgment

Consumer

44. Mr Justice Bright dealt first with the question whether Mrs Zhang was a 'consumer', it being common ground that Eternity Sky was a 'trader'. He said that she had no trade, craft or profession, and was not in employment or actively running a business. Since her marriage, she had occupied herself as wife, mother and home-maker, leaving the making of all business decisions to her husband. It was common ground before the judge that whether a guarantor providing a personal guarantee in support of a company is a 'consumer' depends on the test first formulated by the CJEU in *Tarcău v Banca Comercială Intesa Sanpaolo România SA* (Case C-74/14):

> '… whether that person acted for purposes related to his trade, business or profession or because of functional links he has with that company, such as a directorship or a non-negligible shareholding, or whether he acted for purposes of a private nature.'

45. The judge appears to have proceeded in two stages. First, he held that Mrs Zhang had acted 'for purposes of a private nature – fundamentally, her marriage', signing documents at her husband's request out of love and as part of her affectionate duty as a wife. Having already reached this conclusion, he went on to consider whether her shareholding (by which he referred only to the 90 million shares in her name) amounted to a 'non-negligible shareholding' so as to constitute a 'functional link' with Chong Sing as described in *Tarcău*. Here the argument appears to have focused on whether a shareholding was to be regarded as 'non-negligible' by reference to its value or by reference to the percentage of the company's capital which it represented. The judge concluded in favour of the latter, ignoring Mr Zhang's shareholding and adding that:

> '85. I have no doubt Mrs Zhang would have entered into the Personal Guarantee even if she had held no shares at all in her own name. Her essential reason for doing so was because of her husband's involvement in the company. The effect of her own shareholding on her decision-making could only ever have been marginal.'

46. For these reasons the judge concluded that Mrs Zhang was a consumer within the meaning of the CRA.

Close connection

47. The next question was whether the personal guarantee had a close connection with the United Kingdom. The judge contrasted this test with the test which applies under Article 4(3) of the Rome I Regulation, whether a contract 'is manifestly more closely connected with a country other than' the country indicated by Article 4(1) or 4(2) which contain the

primary rules for determining the applicable law in the absence of a choice by the parties. Article 4(3) displaces those primary rules when the 'manifestly more closely connected' test is satisfied. As the judge stated:

> '95. … there could be cases where a contract has a close connection with the UK, even though it is more closely connected, or manifestly more closely connected, or most closely connected, with another country.'

48. Applying *Commission v Kingdom of Spain* (Case C-70/03), the judge held that the residence of the consumer could not be treated as automatically satisfying the test of 'close connection' and that it was necessary to look at all the circumstances of the case. He said that he did not need to decide whether developments after the date of the contract should be taken into account in determining whether the 'close connection' test was satisfied.

49. The judge said that although Mrs Zhang's residence in London was an obvious connection between the personal guarantee and the United Kingdom, the guarantee was much more closely connected with Hong Kong, being issued in support of and as a condition precedent to the subscription agreement between what were in reality two Hong Kong companies, and as an integral part of a bond issue regulated under the Rules of the Hong Kong Stock Exchange. In contrast, the guarantee's one connection with the United Kingdom (i.e. Mrs Zhang's residence) was 'essentially incidental' because:

> '127. … Unlike the position in many consumer contracts, Eternity Sky conducts no business in the UK, does not seek customers or guarantors here and did not contract with Mrs Zhang because she happened to be resident in the UK. It contracted with her for an entirely non-UK related reason: namely, because she was married to Mr Zhang.'

50. In those circumstances the judge concluded that:

> '128. The Personal Guarantee's connections to Hong Kong were so great as to be overwhelming. It undoubtedly was also connected to the UK, but whether that connection to the UK is assessed relative to the connections to Hong Kong, or purposively, or by comparison to the typical consumer contract, it cannot be characterised as "close" within the meaning of s. 74(1) of the Consumer Rights Act 2015.'

51. In reaching that conclusion, the judge found it helpful to consider what the position would be if the parties had made no choice of governing law at all. In that event section 74(2) of the CRA would have led to the application of Hong Kong law, applying the 'most closely connected' test in Article 4(3) of the Rome I Regulation, with the result that the CRA would not have applied. It would therefore have been paradoxical if an express choice of Hong Kong law to govern the guarantee might lead to the conclusion that the CRA applied, applying the test of 'close connection' under section 74(1) of the CRA, when the CRA would not have applied in the absence of any express choice of law.

52. The judge's conclusion that there was no 'close connection' meant that the CRA did not apply and that the award should be enforced. The judge went on, nevertheless, to determine the other questions that had been argued.

Transparency and prominence

53. The next issue addressed by the judge was whether clause 2 of the personal guarantee was unfair. Because this was a 'core term', it was necessary first to consider whether it was transparent and prominent within the meaning of section 64.

54. The judge noted that transparency requires not only that the term in question is formally and grammatically intelligible, but also that an average consumer who is reasonably well-informed, observant and circumspect is in a position to evaluate the potentially significant economic consequences of such a term for his or her financial obligations (*BNP Paribas Personal Finance SA v VE* [2022] 1 CMLR 3 at [42] and [43]). This requirement had to be satisfied by reference to the average consumer, but the characteristics of the average consumer would depend on the nature of the consumer contract in question (*OFT v Ashbourne Management Services Ltd* [2011] EWHC (Ch), [2011] ECC 31, 472 at [128] and [155]). The judge continued:

> '145. It follows from *OFT v Ashbourne* that I should not have in mind the average consumer who might enter into any typical consumer contract (i.e., any member of the public). What I should have in mind is the average consumer who might enter into a consumer contract of this particular type. I must do so bearing in mind both the nature of the transaction (a personal guarantee for obligations under a Subscription Agreement for a very substantial bonds issue) and the context (which was essentially corporate, involving a company listed in Hong Kong and the major subscriber to the Hong Kong bonds issue). It is not only different from a typical consumer contract, in that the consumer is providing a guarantee, rather than contracting to obtain goods, services or digital content; it is even different from a typical personal guarantee, because of the corporate, Hong Kong context.'

55. The judge said that the relevant average consumer for a transaction of this nature would have had a good understanding of what a personal guarantee is and what a bonds issue is, and (unlike a consumer in many different contexts) would have taken the trouble to read the terms of the guarantee. Had they done so, they would inevitably have read clause 2, which was sufficiently prominent and a normal term for a guarantee which, 'with or without the benefit of legal advice', she would have found neither surprising nor objectionable (cf. *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 AC 481 at [54]; and *Aziz v Caixa d'Estalvis de Catalunya* [2013] 3 CMLR 5 at [69]). In practice, any relevant average consumer who read the guarantee, including the warranty about taking legal advice, would contact a lawyer for advice. However, legal advice was not needed in order to understand the essentials. The judge made these important findings:

> '162. In any event, while the details of the obligations being guaranteed might be obscure without access to further documents and legal advice, their broad effect was not.
>
> i) It was obvious from the circumstances that the guarantee was for a major bonds issue (and Mrs Zhang was specifically told this). I note the arbitrator's finding that Mrs Zhang was aware of what she was signing and its purpose. The hypothetical average consumer within the relevant class in this case would have shared that awareness.
>
> ii) While the potential amounts at stake under the Personal Guarantee are not set out within its four corners, it would have been obvious to anyone with Mrs Zhang's awareness (or that of the relevant average consumer) that she could potentially be asked to pay the sum subscribed by Eternity Sky, plus interest. This is precisely what has happened.
>
> iii) It was not necessary to consider any further documents, nor to take legal advice, in order to appreciate that this was a possible outcome.
>
> 163. In all the circumstances, the essence of cl. 2 was intelligible to the relevant average consumer.'

56. Accordingly clause 2 satisfied the requirements of transparency and prominence, and therefore did not need to be assessed for fairness under section 62 of the CRA.

Fairness

57. The judge added, however, that:

> '164. … In any event, it [clause 2] was not unfair, especially applying the test of Lord Millett in *Director General of Fair Trading v First National Bank* / the CJEU in *Aziz*.'

The choice of Hong Kong law and arbitration

58. Further issues arose in the court below whether the choice of Hong Kong law and arbitration in the guarantee was itself unfair. The judge decided these issues against Mrs Zhang and his decision has not been challenged on appeal.

Public policy under section 103(3)

59. Eternity Sky recognised that there is a public policy of consumer protection under the CRA, but submitted that this needed to be weighed in each individual case against the public policy of giving effect to arbitration awards, and that the latter should prevail, at any rate in the circumstances of the present case. The judge did not need to decide this issue, but commented that, if there had been an infringement of Mrs Zhang's rights under the CRA, he could not readily conceive how the award should nevertheless be enforced.

The issues on appeal

60. Mrs Zhang now appeals on two grounds, with the permission of the judge:

    (1) the judge was wrong to conclude that the personal guarantee did not have a close connection with the United Kingdom; and

    (2) the judge was wrong to conclude that clause 2 of the guarantee was transparent and prominent.

61. During the hearing of the appeal Mr Kirk sought permission to expand this second ground so as to contend that, because clause 2 was not transparent, it was therefore unfair.

62. By a respondent's notice, Eternity Sky contends that:

    (1) the judge was wrong to find that Mrs Zhang was acting as a consumer when entering into the guarantee; and

    (2) even if the guarantee had infringed the CRA, enforcement of the award should not have been refused on public policy grounds.

63. I shall address the issues in the following order:

    (1) Was Mrs Zhang a consumer?

    (2) Did the personal guarantee have a close connection with the United Kingdom?

    (3) Was clause 2 of the guarantee transparent and prominent?

    (4) Was clause 2 of the guarantee unfair?

    (5) If so, should the award nevertheless be enforced?

64. In order for this appeal to succeed, Mrs Zhang needs to win on all five issues.

(1) Was Mrs Zhang a consumer?

Submissions

65. Ms Morgan for Eternity Sky submitted, in outline, that an individual guarantor does not act as a consumer if they provide a guarantee because of a functional link, such as a non-negligible shareholding, with the company whose contractual performance is being guaranteed (*Tarcău*); that there was such a functional link in this case because of Mrs Zhang's non-negligible shareholding in Chong Sing, for which purpose it is appropriate to take account of her husband's shares as well as her own in circumstances where she was treated publicly and for the purpose of the applicable regulatory rules as having a beneficial interest in that combined shareholding; that in any event the value of the shares held in her own name was itself such as to qualify as a non-negligible shareholding; and that as a matter of fact it was because of her shareholding, as one half of the 'majority shareholder couple', that Mrs Zhang provided the guarantee.

66. Mr Finch for Mrs Zhang submitted, again in outline, that Mrs Zhang had no trade, business, craft or profession and was not acting for any such purpose; that her shareholding in Chong Sing was negligible for the purpose of the functional link test and

that no such link existed; that it would be wrong to take account of the combined shareholding of Mr and Mrs Zhang in considering whether there was such a link; that it was irrelevant that Mrs Zhang might have had a financial interest because of her shareholding in the success of the company, and therefore in the bond issue; that for the purpose of the definition of a consumer, the individual's motivation in entering into the contract is relevant; and that, as the judge found, Mrs Zhang entered into the personal guarantee because of, or at least primarily because of, her marriage to Mr Zhang, a private and personal purpose.

Analysis

67. Whether Mrs Zhang is to be regarded as a consumer depends on whether, in entering into the guarantee, she acted 'for purposes that are wholly or mainly outside [her] trade, business, craft or profession'. It is not suggested that she had a relevant trade, craft or profession, so the question is whether she acted for purposes wholly or mainly outside her business. There is, therefore, a distinction between business purposes on the one hand and private purposes on the other.

68. The judge appears to have dismissed the idea that Mrs Zhang acted for business purposes because she was not in employment or actively running a business. No doubt that was true, in the sense that she had no role in the management and direction of her husband's companies, other than to sign documents (including personal guarantees) from time to time when requested to do so. But that begs the question whether, when she did sign such documents, and in particular the personal guarantee in issue in the present case, she was acting wholly or mainly for business purposes.

69. The judge considered that Mrs Zhang 'acted for purposes of a private nature – fundamentally, her marriage'. However, it seems to me that this confuses motive and purpose, which are not the same. No doubt Mrs Zhang was motivated to sign the personal guarantee because she loved and trusted her husband but, as I shall explain, the question whether she acted for business purposes is objective.

70. The judge then went on to address separately the question whether there was a 'functional link' between Mrs Zhang and Chong Sing as a result of Mrs Zhang's shareholding. No doubt this approach reflected the way that the case was argued, but in my judgment the question whether there was a functional link is not a separate or independent question, but a factor to be considered in applying the test of whether an individual is acting for purposes wholly or mainly outside their business. This must be so, as the definition of 'consumer' in section 2 of the CRA (and for that matter in Article 2(b) of the Directive) makes no mention of any 'functional link' test.

71. The approach to be followed in deciding whether a person is a consumer within the meaning of Article 2(b) of the Directive, which (save for the addition of the words 'wholly or mainly') is in materially the same terms as section 2 of the CRA, was explained by the CJEU in *Costea v SC Volksbank România SC* (Case C-110/14), [2016] 1 WLR 814. The issue was whether a borrower under a credit agreement, who was also a lawyer, qualified as a consumer in circumstances where he had a high level of technical knowledge regarding the obligations undertaken. The CJEU held that whether a person was a consumer was an objective question, not dependent on the knowledge or information which the particular individual might have, but on all the circumstances, including in particular the terms of the contract and the nature of the goods or services

which are covered by it. Accordingly, if the contract was not linked to the exercise of the lawyer's profession, the individual in question could be regarded as a consumer for the purpose of the Directive.

72. Advocate General Cruz Villalón discussed the concept of a consumer in his Opinion in these terms:

> '24. The central element of the notion of consumer, as defined in the Directive, is an element which can be clearly circumscribed: the position held by the contracting party in the legal transaction in question. In that connection, as pointed out in *Asbeek Brusse v Jahani BV* (Case C-488/11) [2013] HLR 38, para 30, it is necessary to take into consideration the fact that "it is … by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, that the Directive defines the contracts to which it applies".
>
> 25. The emphasis on the sphere of activity in which the transaction concerned takes place as a factor determining the status of consumer is also confirmed by the case law of the Court on other instruments relating to consumer protection, which contain definitions of the term "consumer" similar to that in article 2(b) of the Directive. Thus, in *French Republic v Di Pinto* (Case C-361/89) [1991] ECR 1-1189, with regard to the interpretation of the concept of consumer in the context of Directive 85/577/EEC, the Court pointed out that the criterion for the application of protection lay in the connection between the transactions which were the subject of the canvassing of traders – aimed at inducing the conclusion of an advertising contract concerning the sale of a business – and the professional activity of the trader concerned, so that the latter could claim that the Directive was applicable only if the transaction in respect of which he was canvassed lay outside his trade or profession: *Di Pinto's* case, para 15.
>
> 26. Thus, the wording of the Directive and the case law interpreting that instrument and Directive 85/577 appear to opt for a concept of consumer which is both objective and functional; therefore, as regards a specific person, it is not an inherent, unalterable category, but is, on the contrary, a quality which may be assessed by reference to a person's status in relation to a particular legal transaction or operation, among the many which he may carry out in his daily life. As Advocate General Mischo observed in *Di Pinto's* case EU:C:1990:462, point 19, as regards the concept of consumer in the context of Article 2 of Directive 85/577, the persons referred to in that provision "are not defined *in abstracto*, but rather according to what they do *in concreto*", so that the same person, in different circumstances may be sometimes a consumer and sometimes a seller or supplier.

> 27. That conception of a consumer as an actor in a specific legal transaction, which entails both objective and functional elements as the case may be, is also confirmed in the context of the Brussels Convention, a context in which the Court has also interpreted the term "consumer"; however, as I shall point out below, the analogy must be qualified when interpreting the Directive, taking account of the different objectives of the two measures. Thus, in *Benincasa v Dentalkit Srl* (Case C-269/95) [1997] ECR 1-3767; [1998] All ER (EC) 135, para 16, the Court held that, in order to determine whether a person has the capacity of a consumer,
>
> > "reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned … the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others."
>
> 28. In short, this is an *objective* and *functional* definition which is satisfied on the basis of a *single criterion:* the legal transaction in particular must form part of activities which are outside a person's trade, business or profession. …'

73. This reasoning was endorsed by the Court in its judgment:

> '21. The concept of "consumer", within the meaning of article 2(b) of Directive 93/13, is, as Advocate General Cruz Villalón observes in points 28-33 of his opinion, objective in nature and is distinct from the concrete knowledge the person in question may have, or from the information that person actually has.
>
> 22. A national court before which an action relating to a contract which may be covered by that Directive has been brought is required to determine, taking into account all the evidence and in particular the terms of that contract, whether the purchaser may be categorised as a consumer within the meaning of that Directive: see, by analogy, *Faber v Autobedrijf Hazet Ochten BV* (Case C-497/13) [2015] 3 CMLR 43, para 48.
>
> 23. In order to do that, the national court must take into account all the circumstances of the case, particularly the nature of the goods or service covered by the contract in question, capable of showing the purpose for which those goods or that service is being acquired.'

74. In the present case, therefore, the question whether Mrs Zhang was a consumer must be determined objectively, taking account of the 'sphere of activity' in which the transaction concerned, that is to say the personal guarantee, took place. It depends on Mrs Zhang's status in relation to that particular transaction, and not on her status in relation to other

aspects of her daily life. A person may be a consumer for some or even most purposes, but not for the particular transaction in issue. Accordingly it is not decisive that, apart from her signature of the personal guarantee and other documents, Mrs Zhang played no active part in the activities of her husband's companies.

75. It is in accordance with principle that the question whether a person is a consumer should be determined objectively. The counterparty needs to know whether it is dealing with a consumer or (in the terms of the CRA) another trader. If it is dealing with a consumer, it needs to ensure that its terms satisfy the requirement of fairness, and that the core terms of any contract are transparent and prominent, but these requirements do not apply if it is dealing with another trader. If the question whether a person is a consumer depends on subjective considerations such as an individual's motivation, the counterparty may be unable to tell whether or not it has entered into a contract subject to these requirements. Conversely, there should be no difficulty for a person entering into a contract with a trader to tell, from the objective nature of the transaction, whether it is a contract entered into for purposes wholly or mainly outside that person's business.

76. In *Ang v Reliantco Investments Ltd* [2019] EWHC 879 (Comm), [2020] QB 582 Mr Justice Andrew Baker discussed the question whether entering into certain kinds of contract was inherently a business activity, so that an individual entering into such a contract could not be a consumer. That discussion arose in the context of the Brussels Recast Regulation (Council Regulation EU 1215/2012), where the claimant was a wealthy individual who invested in bitcoin futures through a Cypriot company's online trading platform. Mr Justice Andrew Baker held that speculative investment in bitcoin was not necessarily a business activity. Whether it was a business activity in any given case depended on the facts and, in Ms Ang's case, her investment had been for private purposes rather than as part of a business. Mr Justice Andrew Baker suggested, however, that there were some activities which were inherently of a business nature and would generally be so regarded:

> '64. The question is where, if at all, to draw the line. Take private equity investment made with a view to generating a return on capital (venture capitalism). I should have thought the making of such investments would be regarded, generally, as by nature a business activity; and no less so if for the venture capitalist in question that activity was not her primary occupation but a sideline through which to invest some or all of her wealth generated in some other way (e.g. out of earnings, inheritance or gifts). On the other hand, an individual shopping around the retail market for a better interest rate on a large lump sum she is happy to lock away for a year or two, because it is surplus to any shorter-term need for access to capital, or choosing with a view to a better return to invest in a FTSE 100 tracker fund instead, would surely be regarded as a consumer, applying faithfully all that the ECJ/CJEU has said on the point.
>
> 65. I therefore agree, in general, with the observation of Popplewell J in *AMT v Marzillier*, para 58, quoted at para 40 above, although I would add this amplification, namely that the spread, regularity and value of investment activity cannot (I think) *determine* the issue, as that would replace the test of non-

> business purposes set by the language of the Brussels (Recast) (as it now is). It may be, on the facts of any given case, that widespread, regular and high-value trading will encourage a conclusion that the putative consumer was engaged in investing as a business, so that the contract in question had a business purpose. But that question of purpose is the question to be asked, and it must be considered upon all of the evidence available to the court and not by reference to any one part of that evidence in isolation.'

77. The passage from Mr Justice Popplewell's judgment in *AMT Futures Ltd v Marzillier* [2014] EWHC 1085 (Comm), [2015] QB 699 to which Mr Justice Andrew Baker referred was as follows:

> '40. Wherever the dividing line is to be drawn in the case of investors, the result is likely to be heavily dependent on the circumstances of each individual and the nature and pattern of investment. At one end of the scale may be the retired dentist who makes a single investment for a modest amount by way of pension provision. At the other may be an investment banker or asset manager who plays the markets widely, regularly and for substantial amounts, for his own account. In between there are many factors which might influence the result, including the profile of the investor, the nature and extent of the investment activity, and the tax treatment of any profits or losses. The issue is fact-specific.'

78. These judgments, and the statements which they contain, were concerned with investment activity. We are concerned with a personal guarantee. Such guarantees may vary widely in their scope, context and amount, and it was not suggested that the giving of a guarantee is itself inherently a business activity. For example, a guarantee given by a parent to a landlord, guaranteeing their student child's obligations under a tenancy agreement, is a very different creature from the guarantee in issue in the present case.

79. In the present case, the sphere of activity in which Mrs Zhang's personal guarantee was entered into was a corporate convertible bond issue for the raising of a very substantial amount of money. The provision of that money to Chong Sing was the consideration for the personal guarantee – or, in the words of the CJEU in *Costea* at [23], that was 'the nature of the … service covered by the contract in question, capable of showing the purpose for which … that service is being acquired'. Without the guarantee, the funding would not have been provided. Mrs Zhang did understand that (or would have done so if she had bothered to ask to see the guarantee) and, more importantly as the test is objective, so would any reasonable person in her position. This certainly looks like a transaction of a business and not a private nature.

80. Indeed, as Ms Morgan pointed out, the judge essentially recognised this in a later section of his judgment dealing with transparency (see [145], quoted at [54] above).

81. It is in the context of personal guarantees of the obligations of a company that the concept of a 'functional link' has been developed. It appears that this was first referred to by the Court in *Tarcău v Banca Comercială Intesa Sanpaolo România SA* (Case C-74/14),

where the parents of the sole shareholder and director of a company guaranteed the company's obligations under a credit agreement. The question was whether, in doing so, they acted as consumers, in circumstances where they played no part in the activity of the company.

82. The CJEU held as follows:

> '23. It is therefore by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, that the directive defines the contracts to which it applies (see judgments in *Asbeek Brusse and de Man Garabito,* C-488/11, EU:C:2013:341, paragraph 30, and Š*iba*, C-537/13, EU:C:2015:14, paragraph 21).
>
> 24. That criterion corresponds to the idea on which the system of protection implemented by the directive is based, namely that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (see judgments in *Asbeek Bruuse and de Man Garabito*, C-488/11, EU:C:2013:341, paragraph 31, and *Šiba*, C-537/13, EU:C:2015:14, paragraph 22).
>
> 25. That protection is particularly important in the case of a contract providing security or a contract of guarantee concluded between a banking institution and a consumer. Such a contract is based on a personal commitment of the surety or guarantor to pay a contractual debt owed by a third party. That commitment involves onerous obligations for the person entering into it, the effect of which is to subject that person's own property to a financial risk which is often difficult to quantify.
>
> 26. As to whether a natural person who agrees to secure the contractual obligations owed by a commercial company to a banking institution under a credit agreement can be regarded as a 'consumer' within the meaning of Article 2(b) of Directive 93/13, it should be observed that while a contract providing security or a contract of guarantee can be described, with regard to its purpose, as a contract which is ancillary to the principal contract which gives rise to the debt it secures (see, in the context of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p.31) judgment in *Dietzinger*, C-45/96, EU:C:1998:111, paragraph 18), from the point of view of the contracting parties it presents itself as a distinct contract, as it is concluded between persons other than the parties to the principal contract. It is therefore as parties to

> the contract providing security or contract of guarantee that the capacity in which those parties acted must be assessed.
>
> 27. In that regard, it should be observed that the concept of 'consumer', with the meaning of Article 2(b) of Directive 93/13, is objective in nature (see judgment in *Costea*, C-110/14, EU:C:2015:538, paragraph 21). It must be assessed by reference to a functional criterion, consisting in an assessment of whether the contractual relation at issue has arisen in the course of activities outside a trade, business or profession.
>
> 28. The national court before which an action relating to a contract which may be covered by that directive has been brought is required to determine, taking into account all the circumstances of the case and all of the evidence, whether the contracting party in question may be categorised as a 'consumer' within the meaning of that directive (see, to that effect, judgment in *Costea* C-110/14, EU:C:2015:538, paragraphs 22 and 23).
>
> 29. In the case of a natural person who has given security for the performance of the obligations of a commercial company, it is therefore for the national court to establish whether that person acted for purposes relating to his trade, business or profession or because of functional links he has with that company, such as a directorship or a non-negligible shareholding, or whether he acted for purposes of a private nature.
>
> 30. In those circumstances, the questions referred should be answered to the effect that Article 1(1) and 2(b) of Directive 93/13 must be interpreted as meaning that that directive can apply to a contract of guarantee or a contract providing security concluded between a natural person and a credit institution in order to secure contractual obligations owed by the commercial company to the credit institution under a credit agreement, where that natural person acted for purposes outside his trade, business or profession and has no link of a functional nature with that company.'

83. Four points are worth noting. First, the CJEU reiterated that the concept of a 'consumer' is objective in nature, following *Costea*. This was described as 'a functional criterion, consisting in an assessment of whether the contractual relation in issue has arisen in the course of activities outside of trade, business or profession'. Second, importance was attached to the 'capacity' in which the person acted. Third, the CJEU contrasted business and private purposes. Fourth, although the concept of a 'functional link' with the company was unexplained, the CJEU gave two examples (a directorship and a non-negligible shareholding) where it might be satisfied. These examples cast light on what the CJEU had in mind.

84. The example of a directorship is straightforward. A director has a formal role in the activity of the company, so the 'functional link' will be readily established. A personal guarantee given by a director in that capacity will, at least typically, be given for a business purpose. No doubt the same reasoning would apply to shadow or *de facto* directors or others who in practice control the activity of the company. That is the context for the reference to a non-negligible shareholding. It refers to a shareholding which confers a degree of control, or at least influence, over the company. It does not, in my judgment, refer to value alone: it is possible to have a shareholding in many companies which is valuable in money terms but which represents a tiny fraction of the issued share capital and which confers no influence at all over the activity of the company.

85. The decision in *Tarcău* was followed in *Dumitraş v BRD Groupe Société Générale* (Case C-534/15). In this case the personal guarantees were given by the director and sole shareholder of the borrower company under a loan agreement and his wife. The CJEU confirmed at [28] that what mattered was 'the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession'; repeated at [32] that the concept of 'consumer' is objective in nature; and reiterated the 'functional link' test at [34] in the same terms as in *Tarcău*. However, the CJEU went further than it had in *Tarcău* in suggesting how this test should be applied to the facts of the case, albeit recognising that this was ultimately a matter for the national court. Thus it suggested that a functional link would have existed in the case of Mr Dumitraş when the guarantee was first given because of his directorship and shareholding in the borrower company, but not when the loan was novated some years later to a new company in which he was neither a director nor a shareholder. It said nothing either way about the position of Mrs Dumitraş.

86. When all the circumstances of the present case are considered objectively, it seems to me that Eternity Sky has discharged the burden of showing that Mrs Zhang acted wholly or mainly for business purposes when she entered into the personal guarantee. It was a contract of a business nature, entered into in order to obtain funding of HK$500 million as part of a corporate convertible bond issue. Although Mrs Zhang's own shareholding could not readily be regarded as 'non-negligible', she and her husband together were the principal shareholders in Chong Sing and were listed as such in Chong Sing's accounts and in the listing information provided to the Hong Kong Stock Exchange in order to comply with the applicable regulatory requirements. It is legitimate to view their shareholdings together in view of the fact that, under the regulatory regime to which the company was subject, Mrs Zhang was regarded as beneficially interested in the shares held in her husband's name. Moreover, the personal guarantee treated Mr and Mrs Zhang together for the purpose of ensuring that their combined net worth did not fall below HK$5.4 billion and that they would remain, together, the single largest shareholder in Chong Sing. In contrast with the position in cases such as *Tarcău* and *Dumitraş*, it was in her capacity as one half of the 'majority shareholding couple' under the applicable regulatory regime that Mrs Zhang was requested to and did in fact sign the personal guarantee. In my judgment this is sufficient to satisfy the requirement of a 'functional link' with Chong Sing. Moreover, the giving of a personal guarantee in the present case was not a one-off event but formed part of a regular pattern of Mrs Zhang signing business documents, including personal guarantees, at her husband's request. In these circumstances it is fair to conclude that Mrs Zhang had a practice of signing business documents when requested to do so, to support what was, in effect, a business enterprise

in which she was involved together with her husband; and that she signed the personal guarantee for that purpose.

87. I would therefore hold that Mrs Zhang was not a consumer. The remaining sections of this judgment, however, proceed on the basis that she was.

(2) Did the guarantee have a close connection with the United Kingdom?

Submissions

88. Mrs Zhang's grounds of appeal identify three reasons why it is said that the judge was wrong to conclude that the personal guarantee did not have a close connection to the United Kingdom for the purpose of section 74(1) of the CRA:

    (1) The judge wrongly applied a test of 'closest connection', rather than 'close connection'.

    (2) The judge failed to give sufficient weight to the fact that Mrs Zhang was at all times resident in the United Kingdom, a factor of 'paramount importance'.

    (3) The judge wrongly failed to consider events occurring after the personal guarantee was entered into, in particular that Eternity Sky had sought to enforce the personal guarantee in the United Kingdom.

89. On behalf of Mrs Zhang, Mr Kirk submitted that 'close' means 'not distant or remote'; that the relevant connection is between the particular consumer contract, here the personal guarantee, and the United Kingdom; that other commercial relationships, such as (in this case) the subscription agreement for the issue of convertible bonds in Hong Kong, are essentially ancillary and irrelevant; and that there may be a close connection with the United Kingdom even if the closest connection is with another country. In this case, Mrs Zhang was a United Kingdom resident; the guarantee provided for any notice or demand to be given by sending to her London address; and enforcement was likely to take place here.

90. Mr Kirk submitted also that in considering the question of close connection, it is relevant to take account of matters occurring after the conclusion of the contract. The matters which he identified as reinforcing the strength of the guarantee's connection with the United Kingdom were the fact that Mrs Zhang acquired citizenship in 2019 and that enforcement of the guarantee is in fact taking place in this jurisdiction, where there are also legal proceedings against the estate of Mr Zhang to which Mrs Zhang is a party.

91. On behalf of Eternity Sky, Mr Lewis submitted that the existence or otherwise of a close connection is a matter of fact and degree, with residence being neither necessary nor sufficient to establish the required connection; that the judge was right to use the Rome I Regulation as a sense check; and that closeness is an inherently relative concept so that, if a contract is manifestly more closely connected with one country, it is unlikely to have a close connection with another country. In the present case, the judge was right to say that the personal guarantee had an overwhelming connection with Hong Kong and insufficient connection with the United Kingdom to qualify as a close connection. He submitted also that post-contractual events are irrelevant to this issue.

Analysis

92. The issue is whether the contract (i.e. the personal guarantee) had a close connection with the United Kingdom (CRA section 74(1), giving effect to Article 6(2) of the Directive). Two points are apparent at the outset. The first is that the relevant connection must be between the contract and the United Kingdom, not between the consumer and the United Kingdom. The second is that the search is for a close connection, which is not necessarily the closest connection. I do not find it helpful to paraphrase this as 'not distant or remote'. Either that would add nothing to the meaning of 'close connection' or it would represent an unnecessary gloss.

93. It is common ground that a consumer's residence in the United Kingdom is a relevant connection. However, it is not decisive or even, as Mr Kirk submitted, 'paramount'. The significance to be attached to a consumer's residence was considered by the CJEU in *Commission v Kingdom of Spain* (Case C-70/03). In that case the Commission brought proceedings against Spain for failing correctly to transpose the Directive into Spanish law. The relevant Spanish legislation afforded protection to consumers who entered into contracts subject to foreign law, but only when the consumer gave consent to be bound on Spanish territory and was habitually resident there. The CJEU held as follows:

> '32. As regards ties with the Community, Article 6(2) of the directive merely states that the contract is to have 'a close connection with the territory of the Member States'. That general expression seeks to make it possible to take account of various ties depending on the circumstances of the case.
>
> 33. Although concrete effect may be given to the deliberately vague term 'close connection' chosen by the Community legislature by means of presumptions, it cannot, on the other hand, be circumscribed by a combination of predetermined criteria for ties such as the cumulative conditions as to residence and conclusion of the contract referred to in Article 5 of the Rome Convention.
>
> 34. By referring to the latter provision, expressly as regards Article 10a of amended Law 26/1984 and, by implication, as regards Article 3(2) of Law 7/1998, the provisions of the Spanish legal system supposedly transposing Article 6(2) of the directive thus introduce a restriction incompatible with the level of protection laid down therein.
>
> 35. It follows that the second plea is also well-founded.
>
> 36. In those circumstances it must be held that, by failing correctly to transpose into national law Articles 5 and 6(2) of the directive, the Kingdom of Spain has failed to fulfil its obligations under that directive.'

94. I would note four points. First, the term 'close connection' is 'deliberately vague'. It must therefore be interpreted flexibly. Second, when considering whether a close connection exists, it is necessary to take account of 'various ties depending on the circumstances of the case', which are not circumscribed by 'predetermined criteria'. From this it follows, as it seems to me, that the connections which will be relevant, and the weight to be given

to them, will vary according to the circumstances of the case. One such circumstance is the nature of the contract in question. Third, there may be cases where a close connection exists even though the consumer is not resident in Spain (or in our case, in the United Kingdom) and the contract is not concluded there. Fourth, the opposite is also true. In some circumstances residence and conclusion of the contract may not be enough to establish a close connection.

95. Although residence in the United Kingdom is treated as a connection between the contract and the United Kingdom, it is more accurately regarded as a connection between the consumer and the United Kingdom. It is therefore necessary to consider why such residence is regarded as a relevant connection with the contract for the purpose of the Directive, and therefore the CRA. I would suggest that it is because of the nature and characteristic performance of a typical consumer contract. The consumer buys goods or services which are generally to be provided to them for their use or enjoyment (i.e. to be 'consumed') in the country where they are resident. The trader will generally be pursuing its trading activities in the country where the consumer is resident or directing its activities to that country. Even in the case of goods ordered online where the trader is not directing its activities specifically to a particular country, the consumer will generally order the goods from, and for delivery to, the country where they are resident.

96. But this will not always be so and it is possible to envisage circumstances where the consumer's residence is largely immaterial. A United Kingdom resident goes abroad and buys goods in the United States under a contract governed by US law, which is performed by delivery of the goods there. Other things being equal, the contract does not have a close connection with the United Kingdom despite the consumer's residence here. Or a US resident comes here and buys goods under a contract which is subject to Hong Kong law. The contract is concluded here and performed here by delivery of the goods. The fact of the consumer's residence in the US does not preclude a finding that the contract has a close connection with United Kingdom and such a finding is likely to be made if (despite the contractual choice of Hong Kong law) the trader is carrying on business here.

97. So far I have been considering what might be regarded as typical consumer contracts for the supply of goods or services. The personal guarantee was not of that nature. It was a contract for the provision of funding to a Hong Kong company, which was performed when the funds were made available to the company in Hong Kong. Unlike the typical consumer contract, Eternity Sky did not direct its activities to the United Kingdom or carry on any business in the United Kingdom and no part of its performance took place here.

98. Nor was the contract concluded in the United Kingdom. Mrs Zhang signed the signature page in Spain, which was then attached to the rest of the guarantee, probably in the United Kingdom, and provided to Eternity Sky in Hong Kong. In those circumstances, which sound like the facts of a students' moot, the contract was probably concluded in Hong Kong. Although Mrs Zhang was resident in the United Kingdom, her residence here was largely immaterial to the conclusion of the contract. She spent a considerable part of the year in Hong Kong and might equally have signed the guarantee there if the bond issue had happened to coincide with one of her visits.

99. Moreover, if the guarantee was to be called upon, a demand would be made to Mrs Zhang's residence in London, but the demand was likely to be for payment to Eternity Sky's bank account in Hong Kong where it traded. If it is relevant to consider the

consumer's likely performance of the contract, therefore, that performance would take place in Hong Kong. There was no reason to think that Eternity Sky had a bank account in London and in all probability it did not. If Mrs Zhang failed to pay when a demand was made, the contract would be enforced by arbitration in Hong Kong, as in the event it was. Mr Kirk accepted in the course of the hearing that for the purpose of considering the issue of close connection, it should be assumed that a consumer would comply with their obligations rather than the reverse. Once Mrs Zhang lost the arbitration, it was therefore to be expected that she would liquidate assets in order to pay the award, but those assets would not necessarily be in the United Kingdom (it will be recalled that the guarantee was for a fraction of Mr and Mrs Zhang's overall wealth), and payment would be in Hong Kong, at the creditor's bank or place of business.

100. Accordingly the connection with the United Kingdom represented by Mrs Zhang's residence here was relatively weak. The judge was entitled, in my view, to conclude that the connection between the guarantee and United Kingdom was not a close one. I agree with his reasoning at [127] and [128] which I have set out at [49] and [50] above. This does not involve substituting a relative test of closest connection for the statutory test of close connection. Rather it requires a focus on the nature and strength (or otherwise) of the connection between the contract and the United Kingdom. The fact that so many other potential connecting factors are with Hong Kong merely demonstrates the absence of a close connection with the United Kingdom.

101. I agree with the judge that on the facts of this case it does not make much difference whether the test of close connection has to be considered only at the date of the contract or whether, as Mr Kirk submitted, it is relevant also to take account of later events. The fact that Mrs Zhang acquired British citizenship in 2019 may mean that she now has a closer connection with the United Kingdom than she did at the date of the personal guarantee, but does not mean that the guarantee was then more closely connected with the United Kingdom. The other development on which Mr Kirk relied was the fact that the guarantee is now being enforced against Mrs Zhang in the United Kingdom, but it is far more significant that the determination of Mrs Zhang's liability took place in the arbitration in Hong Kong which she herself commenced.

102. In principle, however, I would reject the submission that post contractual events are relevant to the issue of 'close connection'. Section 62 of the CRA, which like section 74 uses the present tense ('a term is unfair') makes clear that the determination of the fairness of a contract term is to be 'by reference to all the circumstances existing when the term was agreed'. It would make no sense if the application of the CRA to a contract governed by a foreign system of law had to be determined by reference to post contractual events. That would make it impossible to know at the time of the contract whether, when a dispute arose or a contract came to be enforced, the necessary close connection would exist. Such an interpretation of section 74 would result in uncertainty and unfairness. I would hold, therefore, that the existence or otherwise of a close connection with the contract has to be determined at the time when the contract is concluded.

103. Finally on this issue, I would not attach weight to the apparent paradox identified by the judge that would exist if an express choice of Hong Kong law to govern the guarantee were to lead to the conclusion that the CRA applied, applying the test of 'close connection' under section 74(1) of the CRA, when the CRA would not have applied in the absence of any express choice of law. It seems to me, with respect, that this is an

unnecessary complication in applying the terms of section 74 and that it is better to concentrate on the statutory test of whether a close connection exists. However, as I read the judgment, this was a point which the judge treated as reinforcing the conclusion which he would have reached in any event, rather than a point which was critical to it.

(3) Was clause 2 of the guarantee transparent and prominent?

Submissions

104. On behalf of Mrs Zhang, Mr Kirk submitted that clause 2 of the personal guarantee was not transparent. Transparency requires not only that the term should be expressed in plain and intelligible language, so that it can be understood by the average consumer, but also that the average consumer should be in a position to evaluate the economic consequences of entering into the contract. He referred to the judge's comment at [162] that 'the details of the obligations being guaranteed might be obscure without access to further documents and legal advice' which, he submitted, ought to have meant that clause 2 was not transparent. Instead, the transparency test required the average consumer (not the average consumer's lawyer) to understand the specific functioning of the term in question and the potentially significant economic consequences that might flow from it, without needing to refer to other documents; and the average consumer did not need to be particularly experienced in the area in question. He acknowledged, however, that a reasonably well-informed and circumspect family member providing a guarantee to support the business of another family member would ask the question 'will I lose my home if this goes wrong?' before entering into the contract.

105. In particular, Mr Kirk submitted that there was a duty on Eternity Sky to deal directly with Mrs Zhang, to warn her that this was a high-risk transaction because of the parlous state of Chong Sing's business, and to ensure that she received independent legal advice. He pointed out also that clause 2 guaranteed the performance of Chong Sing's obligations under 'the Transaction Documents', but that these documents were not defined in the guarantee, so that the obligations which Mrs Zhang was being asked to guarantee were not apparent on the face of the document and could only be understood by looking at the subscription agreement, a complex commercial agreement.

106. Mr Lewis for Eternity Sky submitted that the judge was right for the reasons which he gave. Transparency has to be assessed objectively by reference to the standard of the average consumer, that is to say a consumer who is reasonably well-informed, observant and circumspect. The characteristics and conduct to be expected of the average consumer may vary according to the type of transaction in issue. In the present case, the nature of the transaction was that it was a personal guarantee of a HK$500 million convertible bond issue by a Hong Kong listed company. The average consumer providing such a guarantee could be expected to read and understand the relevant documents. While the terms of the bond issue might be complex, the essence of the guarantee was simple and easy to understand: if Chong Sing defaulted, the guarantor would be liable for the HK$500 million plus interest.

Analysis

107. Although the grounds of appeal refer to prominence as well as transparency, Mr Kirk confined his submissions to the issue of transparency.

108. Section 64(3) of the CRA explains that a term is transparent if it is expressed in plain and intelligible language, but the case law indicates that this is not simply a matter of grammar. What must be plain and intelligible includes the economic consequences for the consumer of accepting the clause. As it was put in *Kasler v OTP Jelzálogbank Zrt* [2014] Bus LR 664 at [75], a case of a loan denominated in foreign currency where the lender was entitled to determine the level of monthly repayments by applying its selling rate of exchange in a way which could increase the cost to the consumer, apparently without an upper limit:

> 'the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.'

109. The requirement that the consumer should be 'in a position to evaluate, on the basis of plain, intelligible criteria, the economic consequences for him which derive from' the term in question has been applied in several other cases: *Matei v SC Volksbank România SA* [2015] 1 WLR 2385 (a loan agreement in which the lender could unilaterally alter the interest rate and impose a 'risk charge'); *Van Hove v CNP Assurances SA* [2015] CMLR 31 (an insurance policy where the scope of the cover was ambiguous); and *BNP Paribas Personal Finance SA v VE* [2022] 1 CMLR 3 (a loan denominated in foreign currency where the information provided would wrongly lead the consumer to understand that the exchange rate would remain stable during the period of the loan).

110. Common to all these cases is the factor that the consumer would not be able to tell from the contract, or from other information provided by the trader, what they were actually purchasing or what their liability under the contract might be.

111. The concept of the average consumer is discussed in Guidance dated 31st July 2015 issued by the CMA:

> '2.64 The average consumer is a 'consumer who is reasonably well-informed, observant and circumspect'. Though this is clearly intended to be an objective standard, it is capable of recognising that the average consumer's 'level of attention is likely to vary according to the category of goods or services in question' (citing *El Corte Inglés v Office for Harmonisation in the Internal Market* [2004] ECR II-965 at [68]).'

112. I respectfully agree. Consumer contracts vary widely in their nature and in the economic consequences which they may have for the consumer. The extent to which the average consumer will take the trouble to read and understand detailed contractual terms will vary similarly, depending on the nature of the contract in question. The judge gave the example, at one end of the spectrum, of a consumer making a modest purchase online

who ticks the box confirming agreement to the trader's terms, without reading them. That is often what a consumer who is reasonably well-informed, observant and circumspect will do. *Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237(Ch), [2011] ECC 31 provides another illustration. The case was concerned with a standard form contract for membership of a gym. Mr Justice Kitchin said:

> '128. Where, as in this case, the court is considering a collective challenge to the fairness of the terms in a consumer contract, it is necessary to consider the position of typical parties and the effects of typical relationships between them, as the House of Lords explained in the *First National Bank* case (per Lord Bingham at [20] and Lord Steyn at [33]). The concept of a typical or average consumer is a familiar one in European consumer law extending also into the law of registered trade marks. Such a person is generally assumed to be reasonably well informed and reasonably observant and circumspect, and to read the relevant documents and to seek to understand what is being read. The standard is a variable one and must, I believe, take colour from the context. For example, consumers who are financially sophisticated may be expected to bring to bear a greater understanding of the meaning and implications of the terms of a contract than consumers who are vulnerable as a result of their naivety or credulity. As will be seen, this typical consumer is relevant not only to the assessment of fairness but also the consideration of whether a particular term is expressed in clear intelligible language.'

113. It may be that Mr Justice Kitchin's example of 'consumers who are financially sophisticated' should best be understood as referring to consumers who typically enter into financially sophisticated contracts. If not, the example seems unduly subjective and at odds with the remainder of this passage.

114. When he came to consider the characteristics of the average consumer in the case in question, Mr Justice Kitchin said this:

> '155. The question whether a particular term is expressed in plain intelligible language must be considered from the perspective of an average consumer. Here such a consumer is a member of the public interested in using a gym club which is not a high end facility and who may be attracted by the relatively low monthly subscriptions.'

115. It may be that to distinguish between the average consumer who takes out membership of 'a gym club which is not a high end facility' and one who takes out membership of a more up-market gym involves unnecessary fine tuning, but the principle that the standard of the average consumer is variable and depends on the nature of the transaction and the context in which it is concluded is undoubtedly sound. The average consumer referred to in section 64 of the CRA is an average consumer who enters into contracts of the kind which are in issue. That may present a problem when the contract in question is of a kind into which most consumers would never enter, but the principle nevertheless remains and has to be applied.

116. The judge was therefore right to say at [145] that in assessing the transparency of clause 2 of Mrs Zhang's personal guarantee he was not concerned with any member of the public who might enter into a typical consumer contract, but with the average consumer who might enter into a contract of this particular type. Mr Kirk submitted that the relevant average consumer was a family member asked to sign a personal guarantee for the benefit of another family member's business. In my judgment, however, that is too broad a category. The circumstances and context in which such a guarantee might be requested vary widely.

117. As the judge pointed out, the context here was a personal guarantee of obligations in connection with a substantial corporate transaction involving a listed company. That is by no means a typical consumer contract or even a typical contract of guarantee. It is to be expected that a person entering into such a contract would take the trouble to read it, and would have a good understanding of what a personal guarantee is and what a bonds issue is (as in fact Mrs Zhang had), including an understanding that they were accepting liability to repay the funding advanced in the event of default by the company issuing the bonds. The average consumer who was reasonably well-informed, observant and circumspect would hardly sign their name without at least understanding this.

118. The judge was therefore right to say at [162] that although the detail of the obligations undertaken by Mrs Zhang might be obscure without access to further documents and legal advice, their broad effect was clear. It was obvious on the face of the guarantee that the guarantor was undertaking personal liability in connection with a major bonds issue, and that the aggregate principal amount of the bonds and thus the liability being undertaken was HK$500 million, which the guarantor could potentially be asked to pay together with interest. The reasonably well-informed, observant and circumspect consumer entering into such a guarantee would have understood this without needing to take legal advice. They would therefore understand that, if the company defaulted, they might well lose their home (unless, that is, like Mr and Mrs Zhang, they had other assets sufficient to meet such a liability).

119. Such a consumer who had read the guarantee would also have seen in bold the heading 'Independent Legal Advice'. On reading that clause, the circumspect consumer would have seen that by signing the guarantee, they were acknowledging that they had had an opportunity to obtain legal advice and that they fully understood all the terms of the guarantee and the Transaction Documents. If they were in any doubt, therefore, they would not have signed before obtaining such advice.

120. Mr Kirk did not suggest that the terms of the guarantee were obscure or difficult to understand. His submissions focused on the need for the average consumer to understand from the guarantee itself the serious economic consequences of accepting such liability. But unlike the position in the European cases discussed at [108] to [110] above, which in any event were much more typical consumer contracts, the economic consequences for Mrs Zhang of entering into the guarantee were straightforward for the relevant average consumer to understand.

121. I would reject the submission that Eternity Sky had an obligation to point out to Mrs Zhang that Chong Sing's business was failing. The judge made no finding that the business was in fact failing. In the event the default did not occur until some three years after the bonds issue took place. But in any event transparency is concerned with the plainness and intelligibility of the contract terms in question, so that the average

consumer can understand what they mean and the economic consequences of entering into the transaction.

122. In my judgment, and in agreement with the judge, the essence of clause 2 of the guarantee was intelligible to the relevant average consumer and therefore satisfied the requirement of transparency.

(4) Was clause 2 of the guarantee unfair?

123. Although the judge found that clause 2 of the guarantee was not unfair, applying the test of Lord Millett in *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 AC 481 and of the CJEU in *Aziz v Caixa d'Estalvis de Catalunya* [2013] 3 CMLR 5, Mrs Zhang's grounds of appeal did not challenge this finding. Mr Lewis therefore submitted, using the old-fashioned term, that the appeal was 'demurrable', regardless of the issues which I have been considering thus far. I would if necessary have accepted that submission.

124. However, Mr Kirk sought permission during the hearing of the appeal to amend the grounds of appeal so as to argue that clause 2 was transparent and prominent within the meaning of section 64 of the CRA 'and therefore not unfair within section 62'. He confirmed that the case of unfairness was limited to the lack of transparency. Mr Lewis for Eternity Sky resisted the application to amend, principally on the ground that the amendment had no real prospect of success. However, as it was plainly the judge's intention when giving permission to appeal that the case as a whole should be before this court, I would grant permission to amend the grounds of appeal without prejudice to whether the amendment has a real prospect of success. In any event we heard the argument *de bene esse*.

Submissions

125. I have already summarised the parties' submissions on the issue of transparency. Mr Lewis submitted further that the issues of transparency and substantive fairness are distinct: while transparency is one of the elements to be taken into account in the assessment of whether a term is unfair, other elements are also relevant.

Analysis

126. As I have already concluded that the judge was right to find that clause 2 of the personal guarantee was transparent, in one sense the amendment to the grounds of appeal does not assist Mrs Zhang. However, it is worth explaining why in my judgment the judge was right to find that clause 2 was not unfair.

127. The leading case in this jurisdiction on the approach to the assessment of unfairness is *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 AC 481, a decision on the equivalent provisions of the Unfair Terms in Consumer Contracts Regulations 1994, the United Kingdom Regulations which first gave effect to the Directive. The leading speech in the House of Lords was given by Lord Bingham, who explained the position as follows:

> '17. The test laid down by regulation 4(1), deriving as it does from article 3(1) of the Directive, has understandably attracted

much discussion in academic and professional circles and helpful submissions were made to the House on it. It is plain from the recitals to the Directive that one of its objectives was partially to harmonise the law in this important field among all member states of the European Union. The member states have no common concept of fairness or good faith, and the Directive does not purport to state the law of any single member state. It lays down a test to be applied, whatever their pre-existing law, by all member states. If the meaning of the test were doubtful, or vulnerable to the possibility of differing interpretations in differing member states, it might be desirable or necessary to seek a ruling from the European Court of Justice on its interpretation. But the language used in expressing the test, so far as applicable in this case, is in my opinion clear and not reasonably capable of differing interpretations. A term falling within the scope of the Regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the Regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the Regulations seek to address. The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied

> bearing clearly in mind the objective which the Regulations are designed to promote.'

128. Lord Bingham went on to say at [20] that 'In judging the fairness of the term it is necessary to consider the position of typical parties when the contract is made' – meaning, as I understand it, typical parties who enter into the kind of contract in question. He gave the example of a borrower who wanted to borrow a modest sum of money for the purpose of home improvement. In that connection he said that:

> '20. … The essential bargain is that the bank will make funds available to the borrower which the borrower will repay, over a period, with interest. Neither party could suppose that the bank would willingly forgo any part of its principal or interest. If the bank thought that outcome at all likely, it would not lend. If there were any room for doubt about the borrower's obligation to repay the principal in full with interest, that obligation is very clearly and unambiguously expressed in the conditions of contract. There is nothing unbalanced or detrimental to the consumer in that obligation; the absence of such a term would unbalance the contract to the detriment of the lender.'

129. Much the same could be said in the very different context of the present case. The essential bargain was that Eternity Sky would provide substantial funding and, without a personal guarantee from Mrs Zhang, it would not have been prepared to do so. Her obligation to repay the funds advanced in the event of a default by Chong Sing was clearly and unambiguously expressed in clause 2 of the guarantee. The absence of such a term would have unbalanced the contract to the detriment of Eternity Sky.

130. Lord Millett added a concurring speech in which he proposed that a useful check on the fairness of a term is whether, if it were drawn to their attention, the consumer would be surprised by the term or might reasonably be expected to object to it:

> '54. A contractual term in a consumer contract is unfair if "contrary to the requirement of good faith [it] causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer". There can be no one single test of this. It is obviously useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion. The

> list is not necessarily exhaustive; other approaches may sometimes be more appropriate.'

131. European case law has arrived at essentially the same result. In *Aziz v Caixa d'Estalvis de Catalunya* [2013] 3 CMLR 5, the CJEU held that:

> '69. With regard to the question of the circumstances in which such an imbalance arises "contrary to the requirement of good faith", having regard to the sixteenth recital in the preamble to the directive and as stated in essence by the A.G. in point AG74 of her Opinion, the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.'

132. The obligation to pay in the event of a default by the principal debtor is of the essence of a guarantee. The inclusion of such an obligation does not result in a significant imbalance in the parties' rights and obligations under the contract. On the contrary, without such an obligation it is hard to imagine that there could be a guarantee at all. Clause 2 of the personal guarantee in this case was in standard language. The obligation was clearly and unambiguously expressed. The extent of the liability, HK$500 million plus interest, was apparent on the face of the guarantee. It would therefore have been reasonable for Eternity Sky to have assumed that Mrs Zhang would agree to the inclusion of clause 2 in the contract.

133. Accordingly the judge was right to conclude that clause 2 of the guarantee was not unfair.

(5) Should the award nevertheless be enforced?

Submissions

134. Mr Lewis submitted that even if Mrs Zhang succeeded on all of the issues considered so far, the court should still not refuse enforcement on public policy grounds under section 103(3) of the Arbitration Act 1996. He emphasised that this section provides that recognition or enforcement 'may' be refused if it would be contrary to public policy to recognise or enforce the award, so that the court has a discretion even if recognition or enforcement would be contrary to public policy. In exercising that discretion, the court would need to balance two competing public policies, the policy of enforcing arbitration awards on the one hand and the policy of effective consumer protection on the other. How the balance should be struck should depend on the circumstances of each individual case. In the present case, Mrs Zhang's position was lacking in merit in view of the 'technical' nature of her position as a consumer. Mr Lewis submitted further that the European case law permitted such a balancing exercise, provided only that the principles of effectiveness and equivalence were not infringed.

135. Mr Kirk emphasised the importance of consumer protection from unfair terms as a principle of public policy embodied in statute (section 62 of the CRA) which confers no discretion to enforce an unfair term. In contrast, section 103(3) of the Arbitration Act 1996 provides an exception to the more general policy in favour of enforcing arbitration

awards in cases where such enforcement would be contrary to public policy. It therefore constitutes a special rule which should prevail over the general rule of enforcement of awards.

Analysis

136. I can deal with this issue shortly. I would accept that there is a public policy in favour of enforcing arbitration awards in accordance with the New York Convention and that the public policy exception is relatively narrow. For example, in *Deutsche Schachtbau-und Tiefbohr GmbH v Shell International Petroleum Co Ltd* [1990] 1 AC 295, 316, Sir John Donaldson MR in this court said:

> 'Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J remarked in *Richardson v Mellish* (1842) 2 Bing 229, 252, "It is never argued at all, but when other points fail". It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.'

137. Similarly, in *RBRG Trading (UK) Ltd v Sinocore International Co Ltd* [2018] EWCA Civ 838, [2018] 1 CLC 874 at [24] Lord Justice Hamblen cited with approval a statement in *Dicey, Morris & Collins, The Conflict of Laws* (15th ed), para 16-150 that:

> 'English law recognises an important public policy in the enforcement of arbitral awards and the courts will only refuse [enforcement] in a clear case'.

138. He went on to cite what Sir John Donaldson MR had said in the *Deutsche Schachtbau* case, observing that 'the public policy ground should be given a restrictive interpretation'.

139. Nevertheless it is clear, as Mr Lewis accepts and as the CJEU explained in the passage from *Asturcom Telecomunicaciones SL v Nogueira* [2012] 1 CMLR 34 cited at [43] above, that effective consumer protection is an important aspect of public policy.

140. In order for the present issue to arise, Mrs Zhang needs to clear a number of hurdles: that she was a consumer, that the guarantee was therefore a consumer contract, that it has a close connection with the United Kingdom, and that its core term is lacking in transparency and unfair. If she were able to clear those hurdles, contrary to what I have so far decided, section 62 of the CRA provides unequivocally that 'An unfair term of a consumer contract is not binding on the consumer'. That is a principle of public policy which is embodied in primary legislation. To enforce the award would mean, contrary to what section 62 provides, that the personal guarantee is binding on Mrs Zhang.

141. In these circumstances there would be no scope for the kind of balancing exercise for which Mr Lewis contends. Statute provides that the guarantee is not binding and that is an end of the matter. It would be irrelevant whether Mrs Zhang had cleared the various hurdles comfortably to arrive at the conclusion that section 62 applies or had merely

scraped over them at every stage. In any event a balancing exercise whose result depended on whether the consumer's position was 'technical' or 'meritorious' would be highly uncertain and contrary to the wider interests of justice. To require such a balance to be struck according to the particular circumstances of individual cases would draw the consumer into expensive litigation and would subvert the policy of effective consumer protection.

Conclusion

142. For the reasons given under each of issues (1) to (4) I would dismiss the appeal.

LORD JUSTICE DINGEMANS:

143. I agree.

LADY JUSTICE FALK:

144. I also agree.