Neutral Citation Number: [2023] EWHC 2326 (KB)

Claim No: H53YX699

Appeal No.57 of 2022

IN THE HIGH COURT OF JUSTICE
ON APPEAL FROM THE
COUNTY COURT AT LIVERPOOL

On appeal from Mr Recorder Agnihotri sitting on 27 July 2022

Date: 21/09/2023

Before:

MR JUSTICE FREEDMAN

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Between:

MR CARL NASH	**Claimant/ Appellant**
-and-	
VOLSKWAGEN FINANCIAL SERVICES (UK) LIMITED	**Defendant/ Respondent**

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Mr Frederick Simpson (instructed by **Cheshire Estate & Legal Limited**) for the **Claimants/Respondents**

Ms Ruth Bala (instructed by **Lester Aldridge LLP**) for the **Defendant/Applicant**

Hearing date: **8 June 2023**

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FINAL JUDGMENT

MR JUSTICE FREEDMAN:

I Introduction

1. This is an appeal against a decision of Mr Recorder Agnihotri ("the Recorder") dated 27 July 2022 ("the Judgment") in which he dismissed the Appellant's claim that the vehicle which he had acquired was defective. The vehicle was written off following a fire. The Recorder held that the Appellant failed to discharge the burden of proof in establishing that a vehicle defect was the cause of the fire. At the heart of the appeal is how to deal with questions of causation where there are two competing causes and where there are serious shortcomings about either cause and no obvious other cause. The Appellant's case on appeal is that in determining causation, the Recorder misapplied the relevant legal principles. The Appellant submits that the Court ought to allow the appeal and the claim: in view of the relatively small sums involved, the Appellant invites the Court not to remit the matter, but to decide the matter itself.

2. On 15 December 2022, permission to appeal was refused on paper by Mrs Justice Farbey. On 23 March 2023, permission to appeal was granted on oral reconsideration by Mr Justice Murray in respect of the first three grounds of appeal. The appeal was ably conducted by Mr Frederick Simpson on behalf of the Claimant/Appellant and by Ms Ruth Bala on behalf of the Defendant/Respondent. The Court is grateful to both Counsel for the quality of their oral and written submissions.

II Background

3. The Appellant brought a claim for damages against the Respondent under section 9 of the Consumer Rights Act 2015 alleging that the Respondent failed to provide him with a vehicle of satisfactory quality. On 7 January 2020, the Appellant bought an ex-demonstration SEAT Leon car registration number DG19 NUF ("the Vehicle") from a dealership operating as Johnsons Cars Limited. The Appellant entered into a hire-purchase agreement with the Respondent.

4. A few weeks later on 22 February 2020, the Appellant returned to the dealership as he could hear a noise inside the Vehicle. A member of staff confirmed that they could also hear the noise. The Appellant was asked to return on 26 February 2020 when he would be provided with a courtesy car. On 24 February 2020 in the evening about 60-90 minutes after the Appellant had parked the Vehicle in the driveway of his mother's home, he was alerted by a neighbour that the Vehicle was on fire. The fire brigade extinguished the fire.

5. On 11 March 2020 the Vehicle was inspected by the Respondent as well as loss adjusters instructed by insurers for the Appellant. The Appellant was informed that the Vehicle was deemed to be a total loss and would be written off as being beyond economical repair.

6. The Judge recorded at para. 10 of the Judgment that:
"Both the internal vehicle inspection report from Volkswagen prepared by Martin Clatworthy as well as the report by the Claimant's insurers prepared by Barrington Assessors concluded that the cause of the fire could not be attributed to mechanical defect. Merseyside Fire and Rescue Services, who had attended on the evening of the fire, produced a brief report which states that the source of ignition was "vehicle-only electrical fault."

7. However, this supposed cause was recorded for the purposes of statistical analysis only.

III The Vehicle hypothesis

8. The case of the Appellant is that the Vehicle must have been inherently defective and consequently the Respondent is liable for the losses that he has incurred. He relies upon an expert report prepared by an automotive engineer, Mr John Dabek. Mr Dabek inspected the Vehicle about 8 months after the fire, and prepared a report dated 28 October 2020. The Respondent, then represented by different Counsel, elected not to put any questions to Mr Dabek at the trial.

9. A report was prepared for the Respondent by Dr Stephen Tompsett who did not inspect the vehicle but prepared his report on a desktop basis with the benefit of the Clatworthy and Barrington reports and photographs of Mr Dabek.

10. The Judge summarised the respective positions of the experts at paras. 13-14 as follows:

> *"...In his report, Mr Dabek said that on the basis that the vehicle was recently purchased, was relatively new, had not been abused and was parked correctly at the Claimant's home address, it follows that the fire commenced within the vehicle and must have resulted from some sort of defect in that vehicle."*

11. In response to a question from the Court, Mr Dabek changed his position from *"must"* to *"more than probable."* As an alternative, Dr Tompsett considers that *"the most likely explanation for the fire was careless disposal of cigarettes by a passer-by, igniting debris in the corner of the driveway, leading to a fire in this area which then spread to affect the car."*

12. Neither expert identified a specific vehicle defect as the cause of the fire: see Mr Dabek at para. 6.1 of his report and Dr Tompsett at para.5.3 of his report. Dr Tompsett said that the only feasible source of a fire starting in the car was an electrical defect in the wiring of the cooling fans which would have remained live even when the car was parked, but there was no evidence to support the possibility of a fire starting due to this mechanism: see para. 5.4 of his report.

13. The Judge recorded at para. 16 of his judgment that:

> *"Neither expert was able to identify any specific cause of the fire within the engine compartment of the car. Nevertheless, both experts considered that the state of the engine compartment was potentially consistent with the fire having started as a result of an electrical fault therein. However, they differed in opinion on what they considered likely in those circumstances."*

14. The Judgment reflected on different theories of the experts. Mr Dabek's view was that given there is no evidence of any external cause the fire must have started within the engine compartment as a result of a fault therein: see para. 16 of the Judgment.

IV The Cigarette hypothesis

15. Dr Tompsett's view was that the fault was so unlikely that ignition by a carelessly discarded cigarette was a better explanation ("the Cigarette hypothesis"). He said that there was some evidence of some fire damage to the house including severe fire damage to the Telewest Box and evidence of a fire on the ground in the corner between the driveway and the garden wall (para. 3.2 of his report), and the patterns of fire damage were consistent with the fire starting in the debris at that point (para. 4.4 of his report). (The presence of debris was disputed). If the fire started there, it could have spread to the front of the car via burning brands (para. 4.11 of his report). His report was that *"... the most likely explanation for the fire was careless disposal of cigarettes by a passer-by igniting debris in the corner of the driveway leading to a fire in this area which then spread to affect the car"* (para. 5.5).

16. The Judge summarised the evidence of Dr Tompsett at para. 25 of the Judgment as follows:

> *"Whilst there was no fire investigation undertaken of the scene, in Dr Tompsett's opinion it started at a lower level by the redundant Telewest cable box and the brands, as they were described, loose lightweight burning particles made their way to the front of the car so as to catch alight and cause the damage. He described that radiant heat travels and the fact that the uPVC window frame did not melt in its entirety and there is a gap, which is evidenced by the photograph taken, confirms his view that there was a smaller fire by the Telewest box and referenced AIT (autoignition temperature) taking effect to ignite the bumper or the grill at the front of the car."*

17. Against the defect to the Vehicle hypothesis, there were the following points which were made:
    (1) had the fire started within the engine compartment there would have been much more severe damage within that compartment: see Dr Tompsett report para. 4.1;
    (2) the only feasible source of a fire starting in the car was an electrical defect in the wiring to the cooling fans which would have remained 'live' even when the car was parked. There was no evidence to support the possibility of a fire starting due to this mechanism and Dr Tompsett did not consider this a likely explanation for the fire: see Dr Tompsett report para. 5.4;
18. (3) it was "speculation' that the fire was the result of the noise reported to the garage: see the oral evidence of Dr Tompsett at p.142 of the bundle. That connected with para. 9 of the experts' areas of agreement that there was no evidence "whether or not the cause of the fire was related to any defect which might have cause the reported noise." Against the Cigarette hypothesis, there were at least the following reasons:
    (1) there was no evidence of a cigarette or evidence to support the suggestion that the fire resulted from the Telewest Box: see Mr Dabek's report at para. 6.3;
    (2) the distance between the street and the nose of the car was too far for a cigarette to have been simply discarded: it would have to have been thrown a significant distance.

V The Recorder's assessment of the experts

19. The Judge considered the weight which he could give to the two experts. In respect of Mr Dabek, the Judge expressed some concerns for the following reasons, namely
    (1) as noted at paras. 13-14 of the Judgment, Mr Dabek changed his evidence from saying in his report that the fire 'must' have come from a defect in the Vehicle to saying in his oral evidence that it was 'more than probable' to have come from such a defect;

(2) Mr Dabek did not change his written report to reflect his significant qualification to the degree of probability that the cause of the fire was from a defect in the Vehicle;

(3) Mr Dabek agreed in the joint statement that the fire started in front of the engine and not immediately beneath it.

20. The above concerns were criticised by the Appellant on the basis that it was simply a use of language. In my judgment, it was a change in the evidence about a matter at the heart of expert evidence, namely the question of probability in respect of the putative cause of the fire as posited by the expert. In any event, the Judge had the advantage of seeing Dr Tompsett being cross-examined and Mr Dabek, not cross-examined, but answering questions of the Recorder at pp.99-100 of the Bundle. He was in a better position than an appellate court to form a view that this was a significant matter and to allow that to affect his evaluation.

21. In respect of the expert Dr Tompsett, the Judge rejected the criticisms made about him including the following:

(1) lack of relevant expertise: the Recorder found that Dr Tompsett had experience about cars and their mechanics with an expertise in fires and their causes and had provided numerous reports for courts in fire cases (an error about the precise subject of his degree was immaterial, and no permission was granted on that ground): see Judgment para. 22;

(2) failure to inspect the Vehicle: Dr Tompsett's explanation for not having inspected the Vehicle himself was recorded without criticism, namely that there was little to be gained as it was a well-contaminated scene, and there was the possibility that items could dropped off the Vehicle in transit: see Judgment para. 23.

22. The Recorder found that Dr Tompsett arrived at his own independent conclusions and to a large extent he maintained his conclusions, dismissing the possibility of a fuel leak absent a loud bang, noting that the circuit board

and the battery were intact and finding it unlikely that on a February evening the cooling system was running: see Judgment para. 24.

23. The Recorder related the opinion of Dr Tompsett referred to at para. 25 of the Judgment about the fire starting at a lower level by the redundant Telewest cable box and the loose lightweight burning particles making their way towards the front of the car without criticism of the hypothesis.

VI Principles applicable to the appeal

24. The Appellant recognises that there is a considerable hurdle to overcome. He recognises that the challenge in this case is in part to an evaluative decision of a first instance judge, but it is submitted that the applicable principle is as follows (para. 12 of its skeleton argument in support of the appeal). That principle is that the appellant must identify *"some identifiable flaw in the judge's treatment of the question to be decided such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion"* see *Re Sprintroom* [2019] EWCA Civ 932 at [76] and see [72]-[78].

25. The Appellant goes so far as to submit that if the applicable test was that in respect of an appeal on a pure question of fact, namely that it is one which no reasonable judge could have reached (e.g. see *Volpi v Delta Limited* 2022 EWCA Civ 464 at [2]), this test is satisfied in the instant case.

26. At para. 78 in *Re Sprintroom*, there are quoted the oft-cited words of Lewison LJ in *Fage (UK) Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114] as follows:

> *"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United*

Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

VII The approach as a matter of law to disputed factual causation

27. The appeal centres on the correct approach to disputed factual causation, particularly where there are competing explanations. Both parties referred to the case of *Rhesa Shipping Co S.A. v Edmunds (The Popi M)* [1985] 1 WLR 958 as authority for the proposition that where the court is presented with a number of competing explanations for a particular event and finds that one of them is more likely than the others, the court

is not obliged to accept that explanation. It remains open to the Court to find that the claimant has not proved its case.

28. In The Popi M at 951, Lord Brandon said:

"In approaching this question it is important that two matters should be borne constantly in mind. The first matter is that the burden of proving, on a balance of probabilities, that the ship was lost by perils of the sea, is and remains throughout on the shipowners. Although it is open to underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they chose to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case.

The second matter is that it is always open to a court, even after the kind of prolonged inquiry with a mass of expert evidence which took place in this case, to conclude, at the end of the day, that the proximate cause of the ship's loss, even on a balance of probabilities, remains in doubt, with the consequence that the shipowners have failed to discharge the burden of proof which lay upon them. (emphasis added)*"*

29. At pp. 955-956, Lord Brandon stated (emphasis added):

".. the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

….

…the legal concept of proof of a case on balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a Judge concludes, on a whole series of cogent grounds, that the

occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden.

….

In my opinion Bingham J. adopted an erroneous approach to this case by regarding himself as compelled to choose between two theories, both of which he regarded as extremely improbable, or one of which he regarded as extremely improbable and the other of which he regarded as virtually impossible. He should have borne in mind, and considered carefully in his judgment, the third alternative which was open to him, namely, that the evidence left him in doubt as to the cause of the aperture in the ship's hull, and that, in these circumstances, the shipowners had failed to discharge the burden of proof which was on them." (emphasis added)

29. In *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2005] EWCA Civ 1418 per Sedley LJ, he said

> *91. The speech of Lord Brandon is not a mandate to judges who are called upon to choose between two more intrinsically improbable accounts to reject them all. It reflects, and was clearly designed to reflect, the fact that whichever account is the least improbable still has to be evaluated against the surrounding realities.*
>
> *…*
>
> *95. What remains puzzling, if I may say so with the utmost respect, is Lord Brandon's third proposition, upon which Mr Flaux has understandably fastened. On its face it is—if I may paraphrase it—that as a matter of common sense a high degree of improbability that an event will occur defeats an assertion that it has occurred. I cannot believe that Lord Brandon meant that judges either could or should disbelieve evidence that an event has occurred simply because its occurrence was highly improbable. The law, like life, is littered with highly improbable events, many of them defying common sense, which have nevertheless indubitably happened. What Lord Brandon was, in my*

respectful view, considering here was an occurrence which, albeit the least improbable of those canvassed, made little or no intrinsic sense. Such cases may fail for want of sufficient proof. To elevate the third of his propositions to anything higher than this would in my respectful view put it in conflict with his second proposition."

30. The Appellant placed emphasis on a case (*Lexus Financial Services v Russell, conjoined with Ide v ATB Sales Ltd* [2008] EWCA Civ 424) where a Lexus motor car went on fire, and the Court considered the competing explanations of arson, the condition of the garage and the vehicle itself. The Judge in that case concluded that the cause of the fire was a defect in the vehicle. It was alleged on appeal that that cause was too improbable to satisfy the burden of proof. The Court of Appeal found that an electrical defect in the vehicle was not so improbable that it ought to be rejected. The evidence in that case was that there could have been a fault with the wiring or energised electrical components served by the wiring this could have happened by a short circuit resulting from a positive cable touching a component bonded electrically to the chassis through chafing of the cable. In that case, Thomas LJ (as he then was) said:

"4… The Popi M was a very unusual case and as these two appeals demonstrate, the difficulties identified in that case will not normally arise. In the vast majority of cases where the judge has before him the issue of causation of a particular event, the parties will put before the judges two or more competing explanations as to how the event occurred, which though they may be uncommon, are not improbable. In such cases, it is, as was accepted before us by the appellants, a permissible and logical train of reasoning for a judge, having eliminated all of the causes of the loss but one, to ask himself whether, on the balance of probabilities, that one cause was the cause of the event. What is impermissible is for a judge to conclude in the case of a series of improbable causes that the least improbable or least unlikely is nonetheless the cause of the event; such cases are those where there may be very real uncertainty about the relevant factual background (as where a vessel was at the bottom of the sea) or the evidence might be highly unsatisfactory. In that type of case the process of

> *elimination can result in arriving at the least improbable cause and not the probable cause.*
>
> *…*
>
> *6. As a matter of common sense it will usually be safe for a judge to conclude, where there are two competing theories before him neither of which is improbable, that having rejected one it is logical to accept the other as being the cause on the balance of probabilities. It was accepted in the course of argument on behalf of the appellant that, as a matter of principle, if there were only three possible causes of an event, then it was permissible for a judge to approach the matter by analysing each of those causes. If he ranked those causes in terms of probability and concluded that one was more probable than the others, then, provided those were the only three possible causes, he was entitled to conclude that the one he considered most probable, was the probable cause of the event provided it was not improbable."*

31. The Appellant referred to two later parts of the judgment *in Lexus* as follows:

"41. The judge then posed himself the question, given that electrical faults setting buildings and cars alight were both uncommon, but such things did happen, was there sufficient material for him to conclude on the balance of probabilities that it was more likely that the Lexus set itself alight than that the garage wiring caused the fire? He then set out a number of reasons for his conclusion that, on a balance of probabilities, the cause of the fire was an internal electrical fault in the Lexus rather than a fault in the wiring or electrical units of the garage."

"45.…the judge was then left with the issue as to whether the cause had been the wiring or units in the garage or the electrics in the Lexus. No other alternative was put forward. Although both of these causes were uncommon, both could have been a cause; neither was improbable. The findings made by the judge simply do not support the contention advanced by the manufacturers that either of these causes was improbable. This was therefore not a Popi M case. It was therefore necessary to analyse as between the two which was the stronger probability."

32. Mr Simpson for the Appellant was commendably careful to point out that any similarity in the facts of this case and the *Lexus* case must be treated with caution because the comments do not have the force of binding precedent.

VIII The Appellant's submissions

33. The Appellant submitted that although the Judge identified the correct principles, he failed to apply them. The principles were applied at para. 15 of the Judgment where the Recorder said:

> *"15. We then have the issue of causation to be considered. The case of Ayannuga & Ors v One Shot Products Ltd [2022] EWHC 590 (QB) at paragraph 24 provides a summary of the principles when considering repeating causes. This case referenced Graves v Brouwer [2015] EWCA Civ 595 from paragraphs 24 to 27 (inaudible). For the Claimant to prove his case, he must convince the Court that his version of events is more likely than not to have been the cause of the fire. This requires him to show that it is both: (1) more likely than any competing version of events; and (2) that it is not so inherently improbable that even if it is preferable to a competing version of events, it is still not enough to discharge the burden of proof."*

34. In the skeleton argument on behalf of the Appellant at para. 20, the Appellant described the application of these two questions as *"a practical way of applying the…principles"*. At para. 21, the Appellant characterised these two questions *as "effectively a way of breaking down the master question, which is whether the court is satisfied that the suggested explanation is more likely than not to be correct".*

35. The Appellant submitted that this required a rigorous analysis of the competing causes and for the Judge to consider, analyse and weigh all the evidence including the competing explanations advanced by the parties. Adopting the approach of Sedley LJ in *Lexus*, having found which explanation is the more likely, in the vast majority of

cases, this will be the end of the analysis. The Court will only reject the explanation as not proven, according to para. 21.3 of the Appellant's submission, where it is so intrinsically extremely improbable that it may be appropriate still to reject it.

36. The Appellant submitted that in this case there was no rigorous analysis or weighing up of the competing explanations. The result of this was as follows:
    (1) there was no analysis or evaluation as to which of the competing explanations of the experts was the more likely, that is the defect in the Vehicle or the Cigarette hypothesis whether by reference to their internal cogency, inherent likelihood or how well the experts dealt with the evidence before the Court or the evidence supporting them;
    (2) there was no choice between the defect in the Vehicle explanation and the Cigarette hypothesis;
    (3) despite stating the two-question approach at para. 15 of the Judgment, there was in the end an answer to a different question at paras. 28 - 29, that is a single question about the balance of probabilities;
    (4) the Judge failed to consider whether either hypothesis was so intrinsically improbable that it might be that the case should fail on the burden of proof. There was no evaluation as to how likely was the Cigarette hypothesis;
    (5) in reaching the conclusion that the Appellant had not proven the case on the balance of probabilities, there was no discussion as to why it was unable to do so.

37. The Appellant submitted that on the contrary, the conclusion that the Appellant failed on causation was unreasoned or insufficiently reasoned. The Recorder said the following at para. 29:

    "So is there sufficient material for me to conclude on the balance of probabilities that it was more likely that the SEAT set itself alight due to an internal fault rather than the floating burning brands from the Telewest cable box? I accept that the case law, including Dana v Freudenberg, suggests that the Court does not need to identify a specific fault. However, it does still require the Court to find that it is more likely than not that the fire was caused by a fault, albeit unknown, in the vehicle. I am unable to do that on the evidence before the Court."

38. In this regard, the Appellant invoked the line of cases where experts have given evidence and the Court has failed to give reasons explaining why the evidence has been rejected or why other evidence has been preferred: see *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 381B-382C, as explained in *English v Emery Reimbold & Strick Limited* [2002] EWCA Civ 605 at [6], [15]-[21], [118]. The Judge *"must enter into the issues canvassed before him and explain why he prefers one case over the other":* Flannery at 382B and English at para. 6. In particular, *"a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal"*: *Flannery* at 381E and *English* at para. 20. The Appellant submitted that the Judge did not indicate whether he preferred the evidence of one expert over the other.

39. The Appellant submitted that the Cigarette hypothesis was thoroughly improbable, particularly that a discarded cigarette would travel around 6 meters and end up in a small gap between the front of the Vehicle and the front of the house and the garden wall. The Judge should have found that the evidence of Mr Dabek was more probable, particularly in that his evidence was not challenged and there was nothing improbable about an electrical fault in a vehicle. If it was so improbable, he should have set out his reasons for such a view. The fact that no specific defect could be identified was not a decisive factor: there is no obligation to identify one and there was no reason to expect that such evidence would be available following a fire.

IX The Respondent's submissions

40. This was not a case with a paucity of reasoning. The Recorder set out fully the nature of the case and the issue to decide. The Recorder set out at para. 15 of the Judgment a legal test which the Appellant recognises as appropriate. Having set out a correct legal test, the Respondent submits that an appellate court ought then to be slow to conclude that these principles were not applied. It should only do so generally *"where it is clear from the language used that a different principle has been applied to the facts found"*: see *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672. The appeal has been brought on the basis that the Recorder failed to apply the principles identified. It is said that instead of answering the two questions identified at para. 15 of the Judgment identified

above, the Recorder has impermissibly conflated the two questions into one and thereby answered neither of the two questions.

41. The Respondent responded to the submission that the Recorder failed to "choose between" the electric failure of the Vehicle and the Cigarette hypothesis. It is correct that the Recorder did not make a choice. The Respondent submitted that is not an error of law because the Recorder was not required to do so. The Recorder gage two reasons for this, namely
    (1) the Judgment does not suggest that the Vehicle hypothesis was more probable than the Cigarette hypothesis, and therefore the Appellant was not required to assess whether it was so inherently improbable that it could not be accepted, even on the case of the Appellant; alternatively
    (2) the two questions are no more than an elaboration of the simple question which the Recorder did answer: had the Appellant discharged the burden of establishing that the Vehicle hypothesis was more probable than not?

42. The conclusion of the Judgment at paras. 29-30 is that the Claimant's case, which is the Vehicle hypothesis, had not been proven on the balance of probabilities. This was in accord with the approach summarised in *The Popi M* at p.951 by Lord Brandon as follows:

    "In approaching this question it is important that two matters should be borne constantly in mind… it is always open to a court, even after the kind of prolonged inquiry with a mass of expert evidence which took place in this case, to conclude, at the end of the day, that the proximate cause of the ship's loss, even on a balance of probabilities, remains in doubt, with the consequence that the shipowners have failed to discharge the burden of proof which lay upon them (emphasis added)."

43. The Respondent relied on the judgment of *The Popi M* at pp.955-956 quoted above to the effect that the Judge is not bound to make a finding one way or the other and can decide in an appropriate case that the party on whom the burden of proof lies has failed to discharge the burden. The Judge can do this even where there are competing theories without being bound to choose between the theories and can at the end of the day say that the evidence has left the Court in too much doubt to be able to accept that the claimant has discharged the burden of proof.

44. That there was one ultimate question of the kind asked by the Recorder at para. 29 was recognised by the Court in *Graves v Brouwer* [2015] EWCA Civ 595 per Tomlinson LJ in the following terms:

"It follows that the process of reasoning which led the judge to conclude that the Claimant succeeded on causation was fatally flawed. The judge did not stand back and ask herself the ultimate question whether she was satisfied that the suggested explanation was more likely than not to be true. She did not have regard to the significant gaps in the court's knowledge brought about by the lack of any adequate forensic investigation in the immediate aftermath of the fire. She did not ask herself whether the case for believing that the fire was caused in this way was stronger than the case for not coming to that belief, always bearing in mind that she was not obliged to come to a conclusion at all, and that a permissible outcome was that the inadequacy of the investigation conducted on the Claimant's behalf gave rise to a situation in which the Claimant was unable to prove on the balance of probabilities what had caused the house fire. (emphasis added"

45. In *Ayannuga v One Shot Products Ltd* [2022] EWHC 590 (QB), Yip J explained at [24]:

"I must approach the issue of causation, applying common sense and looking at the whole evidential picture. The expert evidence forms part of that evidential picture, but it is just a part and I must have regard to all the evidence in the case. I should also bear in mind any gaps in what is known, and the reasons for those gaps. I note that, at first sight, both sides' explanations appear improbable. It is always possible that there is an unknown explanation, but the experts have given anxious consideration to what else might have caused the gas and can suggest nothing. I should consider each side's theory and test it against the evidence. In doing so, I will bear in mind that I am not bound to find one way or another, although the reality in this case may be that analysis of the competing explanations will lead to the answer. Ultimately, having analysed the evidence, I must (as the Court of Appeal in Graves suggest) stand back and ask myself whether I am satisfied that the claimants' explanation is more likely than not to be right. (emphasis added)"

X Discussion

46. I shall now consider the three grounds of appeal.

> *Ground 1: The learned Judge erred in law and/or misdirected himself by failing to adopt the correct approach to disputed causation. The learned Judge identified the correct approach (in that he needed to (1) consider the competing explanations and choose between them, and then (2) stand back and check that the explanation he was left with was not still so inherently improbable that it could not be said to be more likely than not) but then failed to follow it. He did not attempt to critically assess or choose between the two competing theories before him, and he did not ask himself whether the 'defect theory' was so inherently improbable it could not be accepted.*

47. I reject the analysis that the Recorder was bound to form a judgment as to which of the competing explanations he accepted. In my judgment, the Recorder was entitled to ask himself and answer the unitary question which he did at para. 29 of the Judgment. It will be recalled that para. 29 of the Judgment started by considering whether there was sufficient material to conclude on the balance of probabilities that it was more likely that the SEAT set itself alight due to an internal fault ("the Vehicle hypothesis") rather than the floating burning brands from the Telewest cable box ("the Cigarette hypothesis"). The Recorder did not answer the question. On the contrary, he went on to say that although there was no need to identify a specific fault, it was still necessary for the Court to find that it was more likely than not that the fire was caused by a fault, albeit unknown, in the Vehicle.

48. The Recorder could have gone through the two stages of asking himself which of the two competing causes was the more likely and then considered, if it was the Vehicle hypothesis, whether it was more likely than not that the Vehicle caused the fire. I accept that it is a usual route for a court to adopt where there are competing causes, and that the Appellant is right to draw attention to the fact that the Judgment appears to have proposed it as the route for the analysis at para. 15 of the Judgment, and then to have deviated from it, apparently deliberately, at para. 29.

49. It does not follow that the Recorder was therefore wrong to adopt the approach which he did. I am satisfied that the Recorder was not bound to do that and was entitled to ask himself the single unitary question, namely whether the Claimant had established on the balance of probabilities that it was more likely than not that the fire was caused by reason of the Vehicle hypothesis.

50. I accept the analysis that the case law allows for this approach in an appropriate case. I derive it from the citations above of Lord Brandon in *The Popi M* at 951 and 955-956, a large part of which I have underlined by way of emphasis.

51. It is right to say that it is often the case that a judge will simply choose between two or more competing explanations: see *Datec Electronic Holdings Ltd v United Parcels Service Ltd* above. A judge will often take the two-stage approach (referred to at para. 15 of the Judgment). That might be an appropriate way of conducting the analysis. At the same time, the Court must be alert to the danger of not choosing the least improbable explanation rather than one which satisfies the balance of probabilities: see *The Popi M* above. It must have in mind that the Court is always considering ultimately the question as to whether the particular cause alleged against a defendant has on the balance of probabilities caused the damage.

52. I accept the submissions of the Respondent as to authority which is supportive of this conclusion, and in particular the citations in respect of the Respondent's submissions from the cases of *The Popi M* at p.951, the citation from *Graves v Brouwer* per Tomlinson LJ at para.30 referring to *"the ultimate question"* which is the same as the single unitary question, and the citation from *Ayannuga v One Shot Products Ltd* per Yip J at para. 24 again asking whether the court is *"satisfied that the claimants' explanation is more likely than not to be right."* Yip J referred to the task of the Court in each case as being to "*approach the issue of causation, applying common sense and looking at the whole evidential picture."*

53. In considering causation, whatever the route adopted, it is important not to allow the simple question of whether a court is satisfied that the damage has been caused by a particular cause to become over-complicated or technical. In an appropriate case, it is

sufficient to ask the single unitary question and decide the case accordingly without having selected which of competing explanations is the more probable. On the facts of this case, and without making this a mantle applicable to any other case, I am satisfied that the Recorder adopted an unexceptionable approach.

54. In my judgment, the Recorder did enough in this case to justify the finding and gave sufficient reasons for doing so. In particular it is apparent from the judgment that:

(1) He had significant concerns about the expert for the Appellant, Mr Dabek, which affected the extent to which the Court could rely on him, particularly his retreat in his evidence and his failure to qualify his written report (Judgment paras. 26-27).

(2) In applying the law to the facts, the Recorder took into consideration that Mr Dabek:
   (a) was unable to identify any specific cause of the fire within the engine compartment of the car;
   (b) could not identify a defect in the electrical components or wiring;
   (c) agreed that he had not seen any evidence that there was a defect which had caused the reported noise;
   (d) agreed that whatever caused the fire may have been destroyed or concealed by the effects of the fire;
   (e) changed his assessment of whether or not the fire "must" have been caused by a defect in the car as referred to above.

(3) The Recorder did not have such concerns about the expert for the Respondent, Dr Tompsett. The Recorder had little doubt about his experience and expertise (the error as to the subject matter of Dr Tompsett's degree is immaterial): see Judgment para. 22. The reasons for Dr Tompsett not inspecting the Vehicle were mentioned without criticism (Judgment para. 23).

(4) The Recorder expressly accepted that Dr Tompsett reached independent conclusions and recited parts of his evidence without criticism. That included the evidence of Dr Tompsett (Judgment at para. 24) that the possibility of a fuel leak

could be dismissed, the circuit board and the battery of the Vehicle were intact and there was no cable defect, and it was unlikely that cooling fans had been running (in February).

55. Whilst the Recorder did not evaluate expressly the degree of probability of the Cigarette hypothesis, he did not discount it as wholly improbable. He did recount the evidence of Dr Tompsett at para. 25 about the fire starting at a lower level than the engine by the redundant Telewest cable box and the brands. There was no criticism about this. It was a feature that he took into account in coming to the overall conclusion. The experts' joint statement (para. 12) was that the fire started in front of the engine and not immediately beneath it.

56. The Recorder was entitled to conclude that there could have been an unknown explanation as he reminded himself at para. 27 of the Judgment, whilst at the same time not descending into some inadmissible speculation about a cause not advanced by the parties.

57. The approach of the Recorder is not susceptible to criticism of the kind referred to in the *Re Sprintroom* case referred to above. There was not a gap in logic or a lack of consistency or a failure to take into account a material factor undermining the cogency of the conclusion. There is no reason to interfere with the evaluation of the facts in this case. The evaluation that the case had not been proven on the balance of probabilities was an assessment on the basis of the evidence as a whole with all the advantages available to the trial Judge over and above the snapshot approach of the appellate court (or what Lewison LJ referred to in *Fage* as "island hopping") without the advantage of seeing the witnesses (in the case of Mr Dabek to the extent set out in para. 20 above) or watching the case as a whole unfold.

58. The specific criticisms about not adopting the two-stage approach or analysing and testing the competing hypotheses such as to choose between the two of them are not made out. The Recorder was entitled to consider the single unitary question in this case. He gave more than sufficient reasons for reaching the conclusion which he did on his evaluation of the evidence as a whole. His evaluation was one which he was

entitled to reach and there are no reasons for an appellate court to interfere with his decision.

Ground 2: The learned Judge gave no or no sufficient reasons for dismissing the Appellant's Expert Witness' evidence (and in particular his conclusion as to the cause of the fire) despite that evidence not having been challenged in cross-examination and despite the Respondent's Expert Witness not having expertise in the discipline for which the parties had permission to adduce expert evidence.

59. The Appellant relies on the cases of *Flannery* and *English* as above. In *English*, Lord Phillips MR said the following at [19]:
"It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

60. The argument that there were no or no sufficient reasons for dismissing the evidence of Mr Dabek is rejected. The reasons were apparent from the Judgment of the Recorder. They have been referred to above. The Recorder explained the reservations which he had about Mr Dabek's evidence and was explicit about his reasons for the same. I reject the submission that the Judge did not say whether he preferred one expert to the other. He made negative observations about the evidence of Mr Dabek and positive observations about Dr Tompsett. In the context of what he was to find, his findings about the expert evidence were more than sufficient. The submission that they did not comply with the requirements of the Courts in *Flannery* and *English* is rejected.

61. The absence of challenge in cross-examination of Mr Dabek is a matter to be taken into account, but as accepted properly by the Appellant in the light of *Griffiths v TUI* [2021] EWCA Civ 1442, the Court is not then bound to accept his conclusion. The point made by the Appellant at para. 30.1 of his skeleton argument is that this made it the more important for the Court to give reasons, but as I have found, there were ample reasons given by the Recorder for his conclusions and particularly for his concerns about Mr Dabek's evidence. The deviation from his report on which the Recorder commented at paras. 13 – 14 of his Judgment emerged as a result of a question of the Recorder.

62. The complaint that Dr Tompsett lacked expertise in the field of automotive engineering was taken up at trial with an attempt to exclude Dr Tompsett's evidence. The Recorder made a case management decision to admit the evidence of Dr Tompsett. Unsurprisingly, there has been no application for permission to appeal that case management decision: see Practice Direction 52A para. 4.6. Once Dr Tompsett's evidence was admitted, it is too late to rely on this as a reason that the Recorder should have accepted Mr Dabek's evidence. On the contrary, the Judge heard from Dr Tompsett, and asked questions of Mr Dabek. He was satisfied about the expertise of Dr Tompsett and to the extent set out above and for the reasons given, he preferred the evidence of Dr Tompsett to that of Mr Dabek. The Judge was entitled to come to that conclusion, and there is no basis on appeal to revisit this.

> *Ground 3: The learned Judge put undue weight on the possibility of there having been some further unexplored possible cause of the fire when (1) neither expert suggested that this was likely and (2) it was not put to the Appellant's Expert Witness in cross-examination (and nor did it arise in the course of preparing the joint statement). The Judge also gave no or no sufficient reasons for why he was so concerned about this possibility despite neither expert having suggested it.*

63. This appears to have as its origin para. 27 of the judgment where the Recorder reminded himself of the proper approach to causation including the possibility of an unknown explanation. That was as far as it went. The Recorder did not fasten on a specific explanation which had not been argued by the parties, nor did he place any

emphasis beyond that. To the extent that he did so, he was entitled to do. In the Respondent's skeleton argument, it is stated at para.31 that the Court had the right to remain agnostic in the sense used by Toulson LJ when referring to *The Popi M* in *Milton Keynes BC v Nulty* [2013] 1 WLR 1183 at para. 40 where he said:
"the combined effect of the gaps in the court's knowledge and the cogency of the factors telling against the theory of a collision with a submarine was that the court could not properly be persuaded that the case for believing the submarine theory was stronger than the case for remaining agnostic." [emphasis added]

64. This must have been the extended use of the word *"agnostic"* as referred to by the Oxford English Dictionary to mean being *"not persuaded by or committed to a particular point of view".* An aspect of that is to mention in passing the possibility of an unknown explanation. Neither was that objectionable nor does it render the decision wrong or unfair due to a serious procedural or other irregularity.

XI Conclusion

65. It follows that the appeal is dismissed. Each of the three grounds are rejected. Despite the impressive submissions of Mr Simpson for the Appellant, the decision of the Recorder was neither wrong nor was the decision unfair due to a serious procedural or other irregularity.