

Neutral Citation Number: [2019] EWHC 429 (QB)

Case No: D90BM228

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**BIRMINGHAM DISTRICT REGISTRY**

Birmingham Civil Justice Centre  
33 Bull Street, Birmingham B4 6DS

Date: 7<sup>th</sup> March 2019

**Before:**

**HIS HONOUR JUDGE MCKENNA**  
**(sitting as a Deputy High Court Judge)**

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**Between:**

(1) MASTER ZAYYAAN AL-IQRA (BY HIS **Claimant**  
LITIGATION FRIEND MS FARIDA  
BEGUM)

(2) MASTER ZEESHAAN AL-IGRA (BY HIS  
LITIGATION FRIEND MS FARIDA  
BEGUM)

- and -

**DSG RETAIL LIMITED** **Defendant**

**Andrew Prynne QC and Dominic Adamson Counsel** (instructed by **Thompsons Solicitors LLP**) for the **Claimant**

**Geoffrey Brown Counsel** (instructed by **Weightmans Solicitors LLP**) for the **Defendant**

Hearing date: 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> January 2019  
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**JUDGMENT**

**HHJ McKenna:**

**Introduction**

1. This case arises out of a fire at a domestic property at 20 Charnwood Road, Great Barr, Birmingham ('the Property') which occurred on the morning of Sunday 14<sup>th</sup> August 2011.
2. The Claimants, who are minors, bring claims for damages by their Mother and Litigation Friend Ms Begum in respect of serious and life changing injuries which they suffered. At the time, the first Claimant, Zayyaan, who was born on 31<sup>st</sup> October 2006, was 5 years 10 months old and the second Claimant, Zeeshaan, who was born on 27<sup>th</sup> January 2008, was 2 years 7 months old.
3. DSG Retail Limited, the Defendant, imported, supplied and retailed Matsui appliances, including in particular, the Matsui MRHE 1800 Tower Oscillating Fan Heater ('The Heater') which was sold to Ms Begum in or about 22<sup>nd</sup> October 2009 at its retail premises, known as Curry's Electrical Shop, Highgate, Birmingham.
4. The claims are brought under the no fault provisions of the Consumer Protection Act 1987 ('The Act'). Under the Act the Defendant is deemed liable for injury or damage caused by any defect in the Heater.
5. This is the trial of liability only. The primary issue is whether the Heater was the source of the fire with a secondary issue being whether, if it was the source, it ignited by reason of a defect.

**The Law**

6. The following provisions of the Act are material:

**2 Liability for defective products**

*(1) Subject to the following provisions of this Part, where any damage is caused wholly or partly by a defect in a product, every person to whom subsection 2 below applies shall be liable for the damage.*

*(2): This sub-section applies to-*

*(a) the producer of the product;*

*(b) any person who, by putting his name on the product or using a trade mark or any distinguishing mark in relation to the product, has held himself out to be the producer of the product;*

*(c) any person who has imported the product into a member State from a place outside the member State in order, in the cause of any business of his, to supply it to another.*

7. It is common ground that in relation to the Heater, the Defendant is a person falling within subsection 2(2)(a) and (c) of the Act.

8. Defect is defined as follows in subsection 3(1) of the Act:

*“Subject to the following provisions of this section, there is a defect in a product for the purposes of this Part, if the safety of the product is not such as persons generally are entitled to expect; and for those purposes ‘safety’, in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury.”*

*(2) In determining for the purposes of subsection (1) above what persons generally are entitled to expect in relation to a product all the circumstances shall be taken into account, including-*

*(a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instruction for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product:*

*(b) what might reasonably be expected to be done with or in relation to the product and:*

*(c) the time when the product was supplied by its producer to another:*

*and nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question.”*

**9.** There are certain statutory defences that are set out at section 4 of the Act, none of which are relied upon by the Defendant whose case essentially is that the Heater was simply not defective.

**10.** I was also referred to the decision of the Court of Appeal in *Ide – v – ATB Sales and Lexus Financial Services t/a Toyota Financial Services (UK) Plc – v – Russell* [2008] EWCA Civ 424, where the single judgment of Thomas LJ, as he then was, with whom the other members of the court agreed, was given in two conjoined appeals which raised the same issues and in which useful guidance was given.

**11.** In Ide’s case, where the Claimant alleged that the handlebars of a mountain bike had fractured, Thomas LJ addressed the proper approach to causation in a claim under the Act at paragraphs 19 to 21 as follows:

19. *“This was a case where there were only two possible causes – either Mr Ide lost control and the handlebar fractured as suggested by Dr Chinn or it was defective. No other cause was suggested. Neither was improbable. This was not a case which raised the difficulties identified in The Popi M. Moreover, as this was a claim under the Consumer Protection Act, it was, in my view, unnecessary to ascertain the cause of the defect. The issue was simply was the fall caused on the basis of Dr Chinn's theory or was there a defect.*
20. *Dr Chinn's theory was rejected as most unlikely to be right. The judge had found that the bicycle had been regularly maintained and there was no suggestion of misuse or damage; the judge was entitled to infer, as the handlebar had failed in normal use for a bike of this type, that it was defective within the meaning of the Act. This was not a process of reasoning that led the judge to conclude that the defect was the cause because it was the least improbable of the two; once the other cause had been eliminated, all the evidence pointed to a defect in the handlebar. The judge was entitled to conclude that the defect was on the evidence the probable cause of the loss of control of the bike and the fall.*
21. *It was not necessary for him to go any further than that. Nor did the evidence as to the maximum loading of 32kg make any difference. If the handlebar was weakened either because of a manufacturing fault or fatigue, then it would follow that it could well fracture under that amount of load as Dr Morgan contended. The fact that it needed a load of 110 kg to cause the right hand side of the handlebar to fracture did not mean that a similar load was necessary on the left hand side; as Dr Morgan had said in his evidence and as the judge found, the clear inference was that the left hand side was weaker.”*

**12.** The Lexus appeal concerned fire damage to a Lexus motor car which ignited whilst in the Claimant’s garage so as to cause a fire and the issue was whether the fire was initiated by some other extraneous cause such as a faulty electrical installation in the garage or arson. Thomas LJ found although both the competing causes were uncommon neither was improbable so as to make the judge fall foul of the Popi M case.

**13.** At paragraph 47 he concluded as follows:

*“For those reasons, therefore, I cannot accept that the judge in this case followed the impermissible approach which Lord Brandon of Oakbrook identified in The Popi M. The judge did not fall into the trap of eliminating the other causes and reaching the conclusion that the least unlikely cause was the cause of the fire. He did not reach a conclusion that the electrics of the Lexus was the least unlikely cause of the fire. His analysis was one which was in accordance with the way such a case should be approached, as I have endeavoured to state at the outset of this judgment. He was considering a case where the competing causes were not improbable. His reasoning, supported as it was by the eye witness accounts and the evidence of the fire damage, led him to the correct conclusion that the probable cause of the fire was a defect in the electrics of the Lexus.”*

**14.** In *Gee & others – v – Depuy International Limited* 2018 EWAC 1208 (QB), Mrs Justice Andrews, when addressing the test for establishing a defect under section 3 of the Act, said as follows at paragraph 99:

*“In order to prove the defect, a claimant must establish what it is about the state or behaviour of the product or the risks that it posed that led it to fall below the level of safety that persons generally were entitled to expect at the time the product entered the market, although he need not prove the precise mechanism by which it came to fall below the yardstick. The fact that a product fails following normal use and in circumstances in which a standard product would not have failed may suffice for the Court to draw the inference that it is defective, see eg *Ide v ATB Sales and Another* [2008] EWCA Civ 424. Thus, for example, if an electrical appliance bursts into flames if left plugged in, or a fridge explodes, it plainly does not meet the standard of*

*safety that persons generally are entitled to expect, and it is unnecessary for the claimant to establish what caused it to catch fire or explode.”*

### **The Heater**

- 15.** The Heater was CE marked and was certified to conform to applicable European Community requirements under Annex 1 to EC directive 2006/95/EC. Such requirements included that it was designed and manufactured in such a way as to ensure that protection was assured against hazards by way of temperature or radiation, and persons were adequately protected against non-electrical dangers, that it met the expected mechanical requirements in such a way that persons were not endangered, and that it was resistant to non-mechanical requirements in expected environmental conditions in such a way that persons were not endangered.
  
- 16.** It was also certificated as conforming to the applicable European standard for electric room heaters for household and similar purposes, EN60335-2-30. This standard includes requirements in relation to heating/temperature rise, abnormal operation and resistance to heat and fire. In addition, it appears that the Heater incorporated various significant design features so that, for example, the heating elements were ceramic, and incorporated positive co-efficient resistors of a type to enable the generation of heat to be controlled. In addition, it was fitted with both direct sensing thermostatic controls and a thermal fuse fitted to the heating element and a bi-metallic thermostat.

17. The Instruction Manual for the Heater included the following:

***‘Safety first’***

*“Avoid the use of an extension cables as they may overheat and create a potential fire risk.*

*Always position the appliance with the mains plug in an accessible position; Never position the appliance below a mains socket;*

*In order to avoid overheating, do not cover the appliance.*

*The appliance must have clear place on both sides and at the back and a minimum of 1 metre clearance in front of the air outlet so that both air inlet and outlet are not blocked.*

*Do not use in very dusty areas as dust may accumulate on the hearing elements and cause overheating.”*

***‘Cleaning’:***

*“Your heater should be cleaned regularly to stop dirt and dust building up which will affect its performance. Ensure the air inlet opening and the air outlet grille are not blocked. This can be done with a vacuum cleaner, using the brush attachment.”*

***‘Using your heater’***

*“It is normal when the heater to emit some smell and fumes when it is turned on for the first time or when it is turned on after not being used for a long period of time.*

*This smell will disappear when the heater has been turned on for a short while.”*

**Smoke Alarm**

18. The Property did have the benefit of a smoke alarm. Unfortunately, it was found not to be working on the morning of the fire, by reason of the battery having been



removed and not replaced. Had the smoke alarm been operational, it is likely the injuries suffered by the Claimants would have been avoided.

**19.** Ms Begum rented the Property, having previously lived with her parents and having relied on them regarding such matters, and she explained that one the problems which she encountered when she first moved into the Property was that the smoke alarm which was fitted above the door in the hallway was beeping. She reported this problem to the landlord who told her that it needed a new battery. She assumed, wrongly as things turned out, that the landlord or more accurately the landlord's husband had inserted a new battery. I accept the substance of this explanation. The landlord's failure to ensure the replacement of the battery has had serious consequences for the Claimants.

### **The Evidence**

**20.** The Court heard oral factual evidence from Ms Begum and, on behalf of the Defendant, from Mr Nolan, its Head of Group Technical Division. The court has also had the opportunity of reading a written statement from a former Station Officer, Mr Pitt, in respect of which a Civil Act Notice was served by the Claimants' solicitors.

**21.** In terms of expert evidence, the Court heard from John Galvin who was instructed on the Claimants' behalf and from Michael Jones who was instructed on the Defendant's behalf.

**22.** The Court has also had the benefit of reading a number of contemporaneous documents. These included a transcript of Ms Begum's telephone call to the

emergency services on the morning of 14<sup>th</sup> August, the Police Log and Police Crime Report as well as a document entitled ‘Incident Report’ produced by the West Midlands Fire and Rescue Service.

**23.** The Heater is no longer supplied by the Defendant who was unable to produce a new model for consideration by the experts and/or the court. However, the experts have had the opportunity to examine such (incomplete) remnants of the Heater as were collected and retained and a used version which was helpfully sourced by Mr Galvin through eBay.

**24.** It was Ms Begum’s evidence that she had purchased the Heater at Curry’s along with a lot of other electrical equipment on the 22<sup>nd</sup> October 2009. She had kept the receipt which evidences the purchase of the Heater at the price of £29.84 out of a total purchase price for all the items purchased of £2,230.00. It was a new, but ex-display, model and the last remaining such Heater in the store. It did not have a box so it was handed to her in a plastic bag. It did not have an instruction manual so she was not aware of the various instructions and warnings included in such a manual which would normally be expected to be supplied with such equipment.

**25.** Ms Begum kept the Heater in the living room of the Property. Although the Property was centrally-heated, she explained that she needed to use the Heater from time to time to provide additional heat because the lounge tended to be cold as a result of its laminate flooring. It was used without incident prior to the morning of 14<sup>th</sup> August 2011. Notwithstanding the absence of an instruction manual, Ms Begum readily

agreed that she knew not to cover it and not to place it close to furniture and, she said, she did not cover it nor was it located too close to any furniture.

**26.** So far as other electrical appliances were concerned, Mrs Begum confirmed that the Heater was plugged into a 4-gang extension lead in to which the television was also plugged but not the home cinema system which came as part of the package and was not used. The television itself was not switched on nor was the overhead light. In addition, there was a fish tank, the transformer for which was plugged into a wall socket.

**27.** So far as the events of Sunday 14<sup>th</sup> August 2011 are concerned, she frankly could not remember specifically switching the Heater on but was sure that it would have been switched on when she first went downstairs in order to warm up the lounge because although it was August, the room tended to be cold. She then went upstairs whilst the children went downstairs to find toys. When the children came back upstairs her attention was drawn to something being wrong with Zayyaan using words such as ‘smoke’ and ‘spark’ and Zeeshaan making a ‘sssss’ noise. She was not sure what they were trying to tell her but she went downstairs immediately. Her recollection was that there was no smoke on the stairs. She could not remember whether there was black smoke in the hall. The lounge door was partly open, enough for her to see the wall mounted television and to gain entry. As she entered the room, she saw smoke and fire coming out of the Heater and, as she put it, that was when she panicked. Within a few seconds she saw fire from the Heater catching on a throw on the nearby sofa. She realised that it was serious and not something she could deal with on her own so she immediately grabbed her mobile telephone which was on a

stool close to the open door. Meanwhile the room very quickly filled with black smoke.

**28.** She made an emergency call and whilst doing so she opened the front door to the house which made the smoke generation worse. She sought help from her neighbours while waiting for the fire service to attend. They attempted to gain access to the Property to rescue the two boys who remained upstairs but were driven back by the heat and smoke.

**29.** Ms Begum was adamant that she was not and never had been a smoker.

**30.** What happened after the fire service and the police were alerted is reasonably well documented. The Police Log records that by 09.34 both boys had been rescued from the house and by 09.37 one boy was being taken to Sandwell Hospital and by 09.39 the other boy was being taken to The Birmingham Children’s Hospital. At 09.47 the fire service Watch Commander, Mr Dakin is recorded as saying “*seat of fire is living room area further damage caused by fire rising and is mainly heat and smoke damage*”. At 09.48 there is an entry “*For FSI (Fire Service Investigator) please*”. At 10.01 it is recorded that “*FIT (Fire Investigation Team) have been requested*”. At 14.21 the following entry appears: “*Re scene examination based up information passed from FSI ..... The cause of the fire appears to be an electrical fault on a fan that was located in the living room. This is consistent with the account by the mother. The actual cause of the fire appears to be accidental*”. At 14.22 there is another entry “*R21 ..... From FIT ..... on initial investigation this appears to have been started from an electrical fault*”.

31. The log ran into the following days and was finally terminated on the 19<sup>th</sup> August when at 09.14 there is the following entry *“It would seem that there are no suspicious circumstances in terms of the fire – the seat of the blaze is an electrical fault. A non-crime number has been generated for the two children ..... Log can be closed.”*
32. Other contemporaneous records generated by the police included a Crime Report which, under the heading MO, had an entry *“Log 917 14/8/2011 AMBO called to address to a domestic fire, possibly caused by faulty electric heater.”* A document entitled *Modus Operandi & Report*” included a similar entry.
33. There is also a West Midlands Police document headed FPU Action which appears to document investigations, the primary purpose of which was a consideration of whether or not foul play was involved. It included an entry dated 30<sup>th</sup> September 2011 in the following terms:
- “Investigation*
- Sigwit statement has been obtained from Farida Begum. She describes how on the day of the fire she was at home with the two children. They were all upstairs. The children go downstairs and return telling her there “spark” and “smoke”. She goes downstairs and see that there is thick black smoke in the hallway. She goes to the lounge and can see a black electric fan heater is on fire and it is very hot. She grabs her mobile phone and dials 999, whilst opening the house to cool it down. This results in more black smoke filling the hallway and stairs. The children are now trapped on the stairs. Neighbours try and rescue the children but are unsuccessful. The fire service arrives and they are taken from the house with fire related injuries.”*

**34.** Under the heading ‘Recommendations’ there is an entry which reads as follows:

*“I have liaised with the fire investigation team and we are both of the opinion is that the fire was accidental and caused by the electric fan igniting in the lounge. There is no evidence of accelerants or other foul play and Farida is unable to offer any reason for persons to set fire to the house whilst she and the children are inside it deliberately...*

*I have reviewed this matter – the children’s mother has provided a statement which covers the incident in its entirety. There is no reason to suspect that this is anything other than a tragic accident....*

*Reviewed this matter has been proportionately investigated and there appears to be nothing more than a tragic accident. The mother’s account has remained consistent and completely plausible and there is no indication that this was a deliberate act or that she acted in a manner that could be considered neglectful.”*

**35.** The Fire Service’s Investigation Officer was David Pitt. He is now retired and attempts to trace his whereabouts have apparently failed. In his statement it is recorded that at the time of the fire he held the rank of Station Officer and was attached to the Fire Research and Investigation Section and had completed 25 years of service. His primary role was the investigation of the causes of all types of fire. He arrived at the Property at 10.26 and was briefed by Mr Dakin, a Watch Commander from the Handsworth Fire Station who himself arrived at the Property at 09.27 and had witnessed smoke and flames emanating from the open front entrance door and from a ground floor bay window at the front of the Property.

**36.** Mr Pitt referred to being told by Sergeant Morrin that Police Forensic Scene Manager (FSM) had been requested to attend the incident and he provided him with information relating to Ms Begum based on which he said in his statement:

*“I was therefore aware the two boys had informed their mother that a heater in the through lounge had started to smoke. Mrs Begum who was in her bedroom went downstairs to investigate where upon she discovered the fire in the through lounge.”*

**37.** Mr Pitt reported that the Forensic Scene Manager (FSM) Mr Steele of Ladywood Police Station arrived at 11.05 and he accommodated Mr Pitt during the examination of the Property and took numerous photographs.

**38.** It is plain from Mr Pitt’s statement that the fire and its causes were the subject of a detailed examination by Mr Steele and Mr Pitt sets out the details of his examination and his findings in his statement. That examination took four hours and having been through the entire house they focussed on the area to the right of the door to the lounge where there were remains of a settee *“which had almost been consumed by the fire, with only the timber frame remaining. Close scrutiny of the fire and heat indicators within the room revealed that the seat of the fire involved the settee which was located at the front location of the through lounge.”*

**39.** In his statement Mr Pitt explained how he began to excavate the fire debris in the locale of the settee. The full extent of the debris and of the effects of the fire-fighting operations can be seen from a number of photographs which were taken by Mr Steele. There is a good overhead shot showing the proximity of the metal remains of the

Heater and the charred frame of the sofa. Mr Pitt measured the distance of the remains of the Heater from the sofa at about 20cm and went on to say as follows:

*“Close examination of the frame of the settee revealed that the part of the timber frame which was closest to the remains of the heater has sustained greater thermal damage than other parts of the frame”* He then went on: *The remains of the heater were seized by FSM A Steele for possible future forensic analysis. During the remaining excavation of this area no other possible sources of ignition were encountered.”*

**40.** Mr Pitt then went on to discount the presence of any volatile hydrocarbons and discounted any gas appliances and noted that there were no signs of any smoking materials and therefore discounted them as potential sources of the fire and he concluded as follows:

*“No other accidental ignition sources were encountered within the lounge during scene examination.*

*The electrical fan heater was positioned approximately 20cm from the settee and while it is possible that the position of the electrical fan heater whilst it was in use caused the fabric of the settee to reach its ignition temperature, it is highly unlikely; therefore, it is logical to assume that there was a fault within the heater developing a short circuit and so caused a fire to start within the confined of the electrical fan heater.*

*With the information currently available to me it is my considered opinion that the fire in the property was a result of a defect with the electrical fan heater which caused a short circuit to occur within the electrical fan heater, this defect resulted in a fire*



*developing in the confines of the electrical fan heater which radiated heat ignited the fabric of the settee.”*

41. For the sake of completeness, I should record that there is one further piece of contemporaneous or near contemporaneous material. That is the West Midlands Fire Service Incident Report from its Incident Reporting System. It identified the source of the ignited fire as follows: *“Heating Equipment – Heating/Fire”* and the main cause of the fire as: *“Negligent use of equipment or appliance (heat source).”*

As leading Counsel for the Claimants observed, this is a curious statement without any explanation and is plainly not consistent with the views expressed by Mr Pitt.

42. Mr Nolan in his evidence explained that he was responsible for overseeing the Technical and Safety Department of the Defendant based in Stevenage. He maintained that the Defendant has a strong philosophy of ensuring that products that it sold were as safe as possible and set out in some detail the various checks which were made as well as the procedure for monitoring products. He explained that as far as the Matsui heaters similar to the Heater were concerned, he carried out a search of the Defendant’s returns and dangerous products database and could find no reference on either database to any return for a fire or heat related problem. He also explained that a total of some 16,352 units had been sold and 436 returned (a rate of 2.67% which was below the category average in 2011 which was 4%). Somewhat surprisingly, however, he was unable to provide any information as to the nature of the reasons for the returns. He also had to admit that notwithstanding a detailed letter of claim sent 6 months or so after the fire implicating the Heater as the cause of the

fire, the matter had not been referred to him or his department and, as a result, no investigation had been undertaken by him or anyone in his department. He conceded that that was a regrettable state of affairs and, it has to be said, it casts some considerable doubt on the quality of the Defendant's monitoring processes.

43. Mr Nolan also conceded during the course of cross examination that, from time to time, products had to be recalled because they were found not to be as safe as they ought to have been, notwithstanding that they conformed to the applicable European Community standards. An example of one such recall was the Matsui radiator recall where the recall document included a statement that it had been discovered that a component in the radiator might pose a potential safety hazard, that hazard being that it could overheat and might lead to a fire, albeit that Mr Nolan sought to understate its significance by saying that such strong language was adopted as a matter of policy to persuade what experience showed to be otherwise reluctant consumers to return the product in question.

### **Expert Evidence**

44. The expert evidence in this case has been extensive. There are a large number of reports taking up the best part of a lever arch file. However, neither of the experts actually visited the Property. Their opinions derive from a review of a substantial volume of photographs of the scene, an inspection of the limited remains of the Heater and an examination of a second-hand example of this particular type of heater.

45. Mr Galvin's final substantive report is dated 13<sup>th</sup> August 2017 whilst Mr Jones' report is dated 19<sup>th</sup> June 2018 to which Mr Galvin responded in a further report of 23<sup>rd</sup> August 2018. They produced a joint statement dated 27<sup>th</sup> September 2018.

46. In essence, Mr Galvin, although he was unable definitively to determine the exact mechanism that led to the ignition as a result, he said, of not all the component parts of the Heater having been recovered, concluded on the basis of his technical assessment arising from his examination, that the Heater was the source of the fire and that the likely cause was the ignition of fluff that had accumulated within it. He discounted all other possible causes.

47. Mr Jones, on the other hand, concluded that the physical evidence was insufficient to determine precisely where in the lounge the fire had started or how it was caused and that there was no evidence of any defect in the Heater having caused the fire. Although he could not completely exclude the possibility of the fire starting as a consequence of a fault in the Heater, he considered that the condition of the remains of the Heater were more indicative of a fire starting to its rear and causing the failure of glass items before the Heater itself collapsed making it highly likely that the Heater was not the source of the fire. He put forward a number of other possible causes of the fire which he maintained could not be excluded ranging from the children having gained access to a source of naked flame from the gas hob in the kitchen to other possible sources of energy in the lounge such as a four gang extension lead, an overhead lamp, possibly failed bulbs and a transformer used in connection with a fish tank.

- 48.** He was critical of Mr Pitt's investigation and pointed out that, contrary to Mr Pitt's observation, the greatest damage to the fabric of the sofa was on a diagonal section and not on the nearest part of the sofa.
- 49.** He was unconvinced by Mr Galvin's theory as to the ignition of accumulated fluff because it would have produced an acrid smell which would have been noticeable and in any event, would have not have been able to ignite the plastic casing of the Heater. Moreover, when the eBay procured heater was examined there was no evidence of any sustained fire, only some charring of burnt fluff on the grill and even when a blow torch was applied to the casing, a sustained fire did not result.
- 50.** I am afraid that I have not found the evidence of either expert helpful in this case. Although both experts gave their evidence with apparent confidence and some plausibility, they were both deeply unsatisfactory witnesses. Mr Galvin, it seems to me, lacked balance and his adherence to the theory that fluff was the likely cause was difficult to reconcile with the lack of any carpeting in the lounge and Mrs Begum's own evidence as to the clean and tidy state of the lounge as well as the evidence derived from the experts' attempts to set fire to the specimen heater using a blow torch as well as the condition of the grill of that heater.
- 51.** As for Mr Jones, he was in my judgment plainly partisan in his approach. He was anxious to leave open as many possible causes of the fire as possible, however, remote, such as, for example, arson or accidental human agency and he was equally anxious to promote other possible causes. He was prone to be disparaging about Mr Galvin, in a manner wholly unbecoming in an expert whose role it is to assist the

court with the benefit of his experience, and regularly misquoted from documentation. He seemed unwilling to give any credence to the eye witness evidence of Ms Begum and sought to undermine the competence of the investigations carried out at the scene by Mr Pitt and Mr Steele. His questioning of the description of the extent of the Claimants' injuries, albeit that he withdrew that section of his report, was particularly unsatisfactory as was his questioning of Ms. Begum's movements.

### **Discussion and conclusions**

- 52.** The principal issue in this case is whether the Claimants can prove on the balance of probability that the Heater was the source of the fire. The Defendant for its part submits that the Claimants cannot and indeed goes further to suggest that such evidence as there is points the other way. Thus, it is said that there is no evidence that the Heater was even switched on at the material time, that it was self-regulating with two temperature control devices and conformed to various EU standards and despite over 16,000 having been sold, there was no evidence of any such heaters been implicated in any other fire so that if the Heater was in same way implicated, it must have been as a result of misuse rather than any defect. In short, there was nothing to indicate or suggest that the Heater was in any way unusual still less defective. Nor, it was submitted, was there any plausible explanation for how the fire would have started in the Heater whilst there were other plausible explanations such as the extension lead and the transformer used in connection with the fish tank.
- 53.** For my part, I am not persuaded by the submissions made on the Defendant's behalf. The fact that there have been no previously reported cases is plainly not

determinative any more than the fact that the Heater has various safety features and conformed to various EU standards. Still less am I persuaded by the blatant advocacy of Mr Jones.

**54.** To my mind, the key to the issue of liability in this case is not to be found in the opinions of the experts but rather from an assessment of the factual evidence regarding what was witnessed at the time of the fire and what was discovered by those investigating the origins of the fire in its immediate aftermath. The evidence of Ms Begum is absolutely crucial in this case. That evidence has been consistent throughout and is corroborated independently by those who investigated the cause of the fire on the day.

**55.** Ms Begum was plainly a credible witness (indeed the Defendant, to its credit, did not seek to suggest otherwise, merely that she was mistaken in her recollection with the passage of time and the obvious trauma of the events in question.) To my mind, she gave her evidence in a calm and considered manner and where she could not remember even on key issues such as whether or not she had switched on the Heater that morning, she was prepared to say so. Her account was also internally consistent.

**56.** I have no hesitation in accepting the substance of her evidence and in particular that the Heater would have been switched on as she said in order to warm up the lounge notwithstanding that it was August and that the temperature was at the material time some 15 degrees; that neither the TV nor the overhead light were switched on; that the home cinema was not even plugged in to the mains; that she did not in any way misuse the heater; that it was not located too close to the sofa or indeed any other

item of furniture; that on entering the lounge she did indeed see flames and smoke emanating from the Heater and not from behind the Heater and that she saw the flames from the Heater catch on a throw located on the sofa. Her evidence on this aspect was particularly compelling.

**57.** That evidence, as Mr Jones conceded, if accepted, means that the Heater must have been the source of the fire and it self evidently excludes other possible causes such as the extension lead and the transformer, although, of course, as he pointed out, it does not explain the cause.

**58.** As I have recorded, significant emphasis was placed in the evidence of Mr Jones as to the existence of fragments of glass and the inference that those fragments were on the floor before the Heater fell to the floor implying that the fire was well established by the time the Heater fell which, it is said, relying on Mr Jones' evidence, points against it being likely that the fire started in the Heater and the fact that the photographs suggest that the Heater was not adjacent to the area with greatest damage to the sofa. However, the exact mechanism of the events leading to the presence of the glass is not known and, as Mr Galvin pointed out, might have resulted from movement of debris during fire-fighting activities and, as for the point about the location of the Heater relative to the area with greatest damage to the sofa, the fact of the matter is that the sofa was highly combustible and was substantially destroyed on any view and it is impossible to know whether and to what extent items were moved either during the fire-fighting process or indeed the subsequent investigative process. To my mind, whether taken together or singly, these matters

are not such as to undermine confidence in Ms Begum's recollection of the events in question.

- 59.** Moreover, and importantly, the evidence of Ms Begum is corroborated by those who actually carried out an investigation of the scene of the fire on the day in question. Mr Pitt spent a considerable period of time at the scene. His conclusions, although not tested in cross examination, were based on his investigation of the actual scene of the fire and with the benefit of 25 years of relevant experience, and as such merit serious consideration. Whilst it is unfortunate that his contemporaneous notes are not available, it is reasonable to infer from the work which he undertook, as evidenced by the large number of photographs taken, that he would have considered other possible sources of the fire such as the extension lead and the transformer for the fish tank and the like – indeed the photographs clearly show the extension lead - and it is frankly inconceivable that as an experienced fire investigator he would not have considered them as possible sources of the fire, and it is to be inferred from the conclusions noted contemporaneously and in his statement that he rejected them.
- 60.** If, as I have concluded on the balance of probabilities, the Heater was the source of the fire, then it follows, by necessary inference in the absence of misuse, that it was defective and it matters not on the authorities that the Claimants are unable positively to identify the specific mechanism or cause of the ignition although, as I have recorded, Mr Galvin has put forward a possible theory. Indeed, given the ferocity of the fire and the fact that not all the component parts of the Heater were recovered, it is perhaps not surprising that there has been no definitive identification of the actual defect.



**61.** The Heater was used by Ms Begum in an entirely normal manner and yet it ignited spontaneously in circumstances where it should not have done. It plainly therefore fell below the standard of safety that consumers such as Ms Begum were reasonably entitled to expect and was defective within the meaning of the Act.

**Disposal**

**62.** For all these reasons therefore, I would give judgment in favour of the Claimants with damages to be assessed.

**63.** I trust that the parties will be able to agree the form of an order which reflects the substance of this judgment including the issue of costs.

**64.** Finally, I would like to thank all counsel for their considerable assistance in this case.