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Date: 13/08/2019

Claim No: HC-2017-002117

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Before:

HHJ PHILIP KRAMER
(sitting as a Judge of the High Court)

Between:

THE ESTATE OF JOHN WILLIAM SCARLE DECEASED
(by his personal representative Ann Winter)

Claimant

- and -

THE ESTATE OF MARJORIE ANN SCARLE DECEASED
(by her personal representative Deborah Ann Cutler)

Defendant

Amrik Wahiwala (instructed by Sparlings LLP) for the **Claimant**
James Weale (instructed by Law Hurst and Taylor LLP) for the **Defendant**

Hearing dates: 18-19 June 2019

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HH Judge Kramer:

1. On the 11 October 2016 John William Scarle, aged 79, and Marjorie Ann Scarle, a married couple, were found dead at their bungalow, 300 Eastwood Road North, Leigh on Sea, Essex. Mrs Scarle was the younger of the two, aged 69 at the time.

2. This case concerns the question as to which of them died first. The question is relevant as they were joint tenants of 300 Eastwood Road and the holders of a joint bank account with Co-op bank in which was deposited £18,000 at the time of the death. The law governing the ownership of jointly owned assets is that the last in time to die is entitled to the whole of the property and the sums in the account. As they have both died, the house and money will pass to those entitled to their estate, under the will of Mrs Scarle if her husband died first, or to those entitled on Mr Scarle's intestacy if he survived his wife. Central to this question is the operation of section 184 of the Law of Property Act 1925, a provision which, where the order of death is uncertain, creates a presumption that death occurred in order of seniority.

The broad dispute

3. Anna Winter is the only child of Mr Scarle and represents his estate. She is represented by Mr Wahiwala of counsel. Her case is that the presumption in s. 184 is not engaged if she proves on balance of probabilities, who died first. In the face of such proof it can no longer be said that the sequence of death is uncertain. She relies upon evidence which, she says, points to Mrs Scarle having been the first to die.

4. The Defendant, Deborah Ann Cutler, is the daughter of Mrs Scarle and represents her estate. She is represented by Mr Weale, of counsel. Her case is that in order for the presumption not to apply, Ms Winter has to prove that Mrs Scarle died first to a higher standard of proof, somewhere between proof on balance of probabilities, the standard applied in civil proceedings, and beyond a reasonable doubt, the standard applied in criminal proceedings. Mr Weale says that whilst he is not arguing that the criminal standard of proof applies for the purposes of the hearing before me, he wishes to reserve his position on that argument in the event that the case goes further. He adds

that, in any event, the claimant has not proved the sequence of deaths, even to the civil standard, and thus it is to be presumed that Mr Scarle died first.

5. In view of the importance that has been attached to the dispute as to the standard of proof required to avoid the operation of the presumption, it is convenient to look at that issue first.

The Law

6. Section 184 of the Law of Property Act 1925 states as follows:

> **"184. Presumption of survivorship in regard to claims to property.**
>
> In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder."

7. Prior to the enactment of s.184 there was no presumption of law as to survivorship based on age. The onus of proof was on the person asserting the affirmative. The question as to who survived was treated as a *"pure question of fact"* to be proved by a "*clear preponderance of evidence"* to support an inference as to who died first; see *Wing v Angrave* [1860]VIII H.L.C., 183, (1860) 11 E.R. 397 at p.403 per Lord Campbell LC. The standard of proof adopted was the civil standard. In the absence of the presumption, in a case such as the present, in which there were cross-claims as to who was the survivor, if neither side could prove who died first their estate was distributed as if they had died at the same time. This approach produced results which may appear surprising, if not harsh.

8. In *Underwood v Wing* (1855) 4 De G.M.&G 633, (1855) 43 ER 655 and *Wing v Angrave*, the simplified facts are that John and Mary Underwood, a married couple, both made wills with gifts to each other but if their spouse should die in their lifetime to William Wing. On 13th October 1853 the Underwoods and their children set sail for Australia on the Dalhousie. The ship foundered off Beachy Head on 19th October and sank. The only survivor of the wreck, John Reed, described seeing two of the children clinging to their mother, the group enveloped in their father's arms, when a wave swept

them all into the sea. A remaining child, Catherine, had been lashed by a spar but she too perished shortly afterwards. In an action by the next of kin of Mr Underwood, *Underwood v Wing*, it was held that because Mr Wing had failed to prove that the wife had died in the lifetime of the husband, he had no entitlement under the husband's will. In *Wing v Angrave*, the contest was between Mr Wing and those entitled to the gift in Mary's will, a power of appointment over the personal estate of her late father to which they were entitled under the father's will in default of appointment. The House of Lords upheld the decision of the courts below that Mr Wing had no entitlement under Mary's will either as he had failed to prove that she had survived her husband. In *Drummond's Judicial Factor v Lord Advocate* [1944] S.C. 298, a case in Scotland, where a statutory presumption was only introduced in 1964, £250 of War Bonds, representing the life savings of the wife, passed to the Crown instead of members of the family because they were unable to prove the succession of death when the wife, her husband and children were killed in the destruction of their home by wartime bombing .

9. Mr Weale argues that s.184 of the 1925 Act introduced a new code for ascertaining the order of death in cases of uncertainty which demands a higher standard of proof than that generally used in civil proceedings. He says that the use of the word "uncertain" itself indicates that a standard of proof higher than the civil standard is required to render certain that which appears uncertain. In support of his arguments he relies upon *Hickman v Peacey* [1945] A.C. 304, *Re Bate* [1947] 2 All ER 418, *Re Kennedy* [2000] 2 I.R. 571 and the contrast with other statutory presumptions which provide for their rebuttal in terms such as *"unless the contrary is otherwise proved"*, a formulation used in both Section 36 of the Road Traffic Act 1934 and Section 32 of the Mortgage Interest Restriction Act 1923.

10. Mr Wahiwala says that what was said in *Hickman* as to the standard of proof was not consistent between the speeches and was, in any event, obiter. *Re Bate* does not support Mr Weale's argument and *Re Kennedy* was incorrectly decided and is not binding. He referred me to a number of Commonwealth cases which deal with wording similar to s. 184, *Re Plaister* [1934] 34 NSW 547, *Re Comfort* [1947] V.L.R. 237 and *Adare v Fairplay* [1956] 2 D.L.R. 67, *Re Zappullo* [1966 VicRp 55 and the Scottish case of *Lamb v Lord*

Advocate and others [1976] S.C. 110 in all of which the civil standard was applied and in some of which the court considered *Hickman* and *Bate*.

11. In total, counsels' researches have produced 22 cases and 6 practitioner texts said to be relevant to the issue of the standard of proof.

<u>Discussion</u>

12. In view of Mr Weale's reliance on *Hickman*, the discussion of this case in the authorities, and the cursory approach to this issue reflected in some of the practitioner texts to which I have been referred, it is necessary to look at the facts of the case and the course which it took through the courts in a little detail. The deaths in that case took place at the height of the Blitz. The testators, two brothers, were sheltering with others in 5 Cheyne Walk, London when it was struck by a bomb which demolished the entire premises and killed the occupants. The order of their death affected the distribution of their estates.

13. At first instance, Cohen J held that he was not satisfied that all in the house had died at the same time and applied the presumption. The decision was overturned on appeal; *In re Grosvenor* [1944] 1 Ch 138. In the Court of Appeal, Luxmoore LJ, at p. 150, felt it improper to interfere with Cohen J's judgement, albeit he thought it *"not improbable"* that following a bomb blast in which one person was blown to pieces and another lost limbs the latter survived the former, but without expert evidence as to the effects of bomb blast he would not feel justified in coming to a conclusion that they died at the same moment. The Master of the Rolls and Goddard LJ considered that the inference that they were killed at the same time was overwhelming. The Master of the Rolls said, at p. 146, that this was a *"question of fact to be decided in accordance with the usual method of dealing with questions of fact"*; Goddard LJ said that "*it is undoubted law that in civil proceedings a finding can, and may be, rested on the probabilities of the case."* Thus, the majority found that, on balance, there was no uncertainty to trigger the application of the presumption.

14. The House of Lords reversed the Court of Appeal by a majority; the case is reported as *Hickman v Peacey* [1945] A.C. 304. The minority, Viscount Simon L.C. and Lord Wright, sought to uphold the decision below on the basis that there was no room for the application of the presumption as the

finding of simultaneous death removed the uncertainty referred to in s. 184. In so doing they endorsed the proposition that such findings were to be made to the civil standard; see Viscount Simon LC at p. 318/319 and Lord Wright at p. 327/328.

15. The majority decided that the s. 184 presumption was invoked because on a proper construction of the section *" it proceeds on the footing that the proof of simultaneous death is impossible, or in other words upon that footing that, if survivorship is not proved the only alternative is uncertainty"* per Lord Simonds at p. 345. See also Lord Porter, at p. 337, where he said "*...the section itself is so framed to exclude the possibility of simultaneous death from ever being recognised as a certainty and to include it amongst the uncertainties"* and Lord Macmillan at p. 322 where he favoured the construction that "*...when the circumstances are such that it cannot be ascertained that one of the deceased survived the other the uncertainty which the section postulates exists and the statutory presumption applies."*

16. The decision in *Hickman* did not turn on the standard of proof but the construction of s. 184. Thus, what was said as to the former was obiter. The minority supported the civil standard as, to some extent did Lord Porter, although he thought the matter should be left open, see p. 339/340, and Lord Simonds at p. 346. Lord Macmillan, at p. 324, said the use of the word "uncertain" was used "*in its ordinary acceptation as denoting a reasonable element of doubt."* He drew the contrast between a decision on balance of probabilities which, he said, provided finality but not certainty. On any view, Hickman cannot be regarded as binding authority for the proposition that proof of the order of death must be to a standard higher than the balance of probabilities, the argument advanced by Mr Weale, or to the criminal standard, his reserved position. Further, I do not gain any assistance from *Re Kennedy*, a first instance decision of the High Court in Northern Ireland, which relied heavily on the dicta in the speech of Lord Macmillan without reference to the other speeches and proposed a burden even higher than the criminal standard, which finds no expression in *Hickman* or any of the other authorities to which I have been referred.

17. Mr Weale's argument for the adoption of some intermediate standard of proof, somewhere between the civil and criminal standards is said to be founded on *Re Bate* [1947] 2 All ER 418, a decision which, on the authority

of *Willers v Joyce (No. 2)* [2018] A.C. 8**43** he says I should follow *"unless there is a powerful reason for not doing so"* per Lord Neuberger PSC at [9].

18. *Re Bate* was a case in which a husband and wife were found dead in their kitchen, the victims of carbon monoxide poisoning. There was evidence before the court as to the circumstances in which they were found and medical evidence as to who died first based on the relative levels of carbon monoxide found in their blood at post-mortem. Jenkins J, having noted the absence of unanimity as to the requisite degree of proof in *Hickman* said, at p. 421:

> *…"I think all would have agreed that LORD SIMON did not put it too high when he spoke of "evidence leading to a defined and warranted conclusion."*
>
> *Applying that as the test, am I, as a reasonable tribunal of fact,* <u>on this evidence</u> (my emphasis), *warranted in coming to a definite conclusion that the testator survived the wife? To do that, I think, I must be able to do something more than merely conclude that a reasonable explanation of the circumstances was that the testator survived his wife, or indeed, that on the whole the more reasonable conclusion is that he survived her. I think I must be able to come to a conclusion of fact on grounds which so far outweigh any grounds for a contrary conclusion that I can ignore the latter. It seems to me that, on the evidence in this case, I cannot do anything of the kind"*

19. Mr Weale says that the requirement to find grounds which so far outweigh other grounds has been adopted in New Zealand and Canada respectively in *Re Pechar (Deceased)* [1969] N.Z.L.R. 574 and *Re Lay Estates* (1961) 36 W.W.R 414, and is to be understood as being the application of a hybrid standard of proof.

20. Without seeking, in any way, to undervalue the impressive research and helpful submissions by Mr Wahiwala, I do not need to examine the many authorities to which I have been referred to deal with Mr Weale's argument on this point, with which I do not agree. In deference to his research, I record that the Commonwealth and Scottish authorities to which he referred are persuasive authorities which support the conclusion I have reached as to the adoption of the civil standard in these cases.

21. The starting point is that there is one standard of proof in civil cases and that is the civil standard; *Re B* [2009] 1 A.C. 11. In *Francis Wanjiku v Secretary of State for the Home Department* [2011] EWCA Civ 264, Moore-Bick LJ, at [20] put it this way:

"In my view the Immigration Judge was right to proceed on the basis that proof on the balance of probabilities was all that was required. As Lord Hoffmann made clear in Re B, that is the standard which applies in all civil proceedings. What evidence will be sufficient to justify a finding of fact on the balance of probabilities may depend on the nature of the issue before the court. Thus, the court may be more reluctant to find that a person has acted dishonestly than it would be to find that he has acted honestly and may require more cogent evidence before reaching that conclusion. However, such questions are concerned with whether there is evidence capable of supporting a particular finding, not with the standard of proof as such."

22. *Re Bate* is consistent with *Re B*. Jenkins J, when referring to conclusions of fact on grounds which so outweigh others that they can be ignored, was talking about the inferences which can be drawn from the evidence in order to discharge the burden of proof and not the standard of proof itself. So much is evident from (a) the extract from the speech of Viscount Simon relied upon by Jenkins J must be read in the context that the former affirmed what had been said by the Master of the Rolls and Goddard LJ as to the application of the civil standard, (b) the reference is clearly directed at the evidence needed to discharge the burden; the uncertainty is that *"which is not removed by evidence leading to a defined and warranted conclusion"* per Viscount Simon L.C in *Hickman* and (c) Jenkins J , at p. 421, asked himself the question whether he could *"on this evidence"* come to a definite conclusion. He was unable to do so because, as we see from the judgment, the medical evidence was contradictory, an absence of evidence as to the time at which the gas jet was turned on put paid to any inference to be drawn from the fact that it was the wife's practice to be in the kitchen before the husband and the inference that the wife must have died first because the husband's body was found on top of that of his wife was said by Jenkins J, at 421D "*a possible-perhaps probable explanation of the position of the bodies it is by no means the only explanation"* and he went on to identify other plausible explanations.

23. The decision in *Re Bate*, the above extract from the speech of Viscount Simon, *Re B* and *Wanjiku*, highlight the fact the circumstances of the case will determine the extent and quality of evidence required, and what inferences that can be drawn from such evidence, in order to discharge the burden of proof. The relevant circumstances in this case, and many if not most s. 184 cases, is that very little is known as to the immediate events surrounding the death. The court, therefore, has to be careful to ensure that it is safe to draw inferences from such evidence as is available, which, if the court had the full picture, may not be justified. The practical effect of this approach here is that where the court is faced with different inferences that could be drawn from a given set of facts it cannot conclude which is the most probable without having some evidential basis for rejecting the others. This does not produce the hybrid standard of proof put forward by the defendant. Nor, lest it be suggested, does this alter the ordinary passing of the burden of proof. In order to pass an evidential burden to the other party, the asserting party who relies on an inference must prove the fact(s) upon which it is premised. The discharge of the ultimate burden on that party requires proof of facts which provide grounds for rejecting alternative, not improbable, inferences. Of course, the court has to be sensitive to the need to avoid allowing suggestions of fanciful inferences making the burden of proof incapable of discharge.

24. Finally, there is Mr Weale's argument that s.184 is a new code and therefore a break with the previous law as to the standard of proof. I disagree. The mischief which s.184 was designed to cure was to remove practical difficulties in the administration of estates where it was not possible to ascertain the succession of deaths; see *Hickman* per Lords Porter at p. 337/8, Simonds at p. 342, MacMillan at p. 321 and Viscount Simon LC at p. 316. There was no need to change the standard of proof previously adopted to achieve that end, nor does the language of the section indicate such a change. The contrast between the wording of s. 184 and other statutes which create a presumption and, in terms, provide for its rebuttal is no indication as to the standard of proof to be adopted in s. 184 cases. The section does not create a presumption which may be rebutted. The presumption only arises when the sequence of death is uncertain. If the order of death is proved, the presumption does not arise, hence there is no need to recite, *"unless the contrary is proved"* or some similar formula.

Conclusion

25.

a. Where the order of death is uncertain, the burden of proof is on the party seeking to establish otherwise.

b. Such proof is to the civil standard, the balance of probabilities.

c. Where the events surrounding the death are capable of giving rise to different inferences which are not in themselves improbable, the court should not reject one inference in favour of another unless there is some evidence upon which it can safely conclude that it be rejected. Otherwise, it cannot be satisfied that the inferences it draws are justified and do not result from an absence of information, which is a characteristic of s. 184 cases.

The facts of this case

26. The factual evidence in this case is in the form of witness statements from Anna Winter, Deborah Cutler and Jacqueline Wright, Mrs Scarle's sister. In addition, there are documents from the Essex Police investigation into the deaths and medical records. I have also been provided with the pathology reports from Dr Swift on his post-mortem examinations of both of the deceased and expert reports from forensic pathologists instructed by the parties, Dr Calder and Dr Rouse, for the Claimant and Dr Fegan-Earl for the Defendant. There are two expert reports from the Claimant as Dr Calder suffered a stroke following preparation of his report and was unable to continue to act. The lay evidence was taken as read. I have heard oral evidence from Drs Rouse and Fegan-Earl as there is a significant dispute between the experts.

27. I have also seen an agreed plan of the layout of the bungalow and some photographs, as well as the title plan which shows that the rear of the property faces South South-East. Both counsel placed reliance on the layout of the property during the hearing so it is necessary to give a description. At the rear of the property is a conservatory leading onto a garden. The conservatory has glass sky lights and glazed sliding doors to the garden. To the north of the conservatory are the kitchen, to the left and the lounge to the

right; the lounge backs onto a bedroom to the north and the party wall between the property and the adjacent bungalow to the east. Each is connected to the conservatory by a door. In addition, there is a double-glazed opening window between the kitchen and conservatory. A doorway, though without a door, leads from the kitchen into a hall, where there is a corridor running north. Immediately to the right of the north side of the kitchen door is the entrance to the lounge. About a door's width further on, and to the left, is the door to the toilet. Running along the length of the west side of the property is a room which must have been converted from a garage. It has doors at either end and its roof is glazed along its centre, although the nature of the glazing material was not in evidence. There is a window from the toilet into this room with which it has a common wall. The boiler is situated in the room, adjacent to this wall, behind a third bedroom which is the next room to the north of the toilet. Dr Swift said in the post-mortem report that the boiler was found to be switched off.

<u>The period surrounding the death</u>

28. Mr and Mrs Scarle were found by PC Daniels shortly after 6.35pm on 11th October 2016. He found Mrs Scarle first. She was lying on the floor around the toilet. She was wearing a top but had nothing on her bottom half. Her lower body, including her legs, looked unclean and bloody. He recalls that her skin looked very yellow. A paramedic confirmed that she was dead. PC Daniels says he opened the door to the lounge. There he found Mr Scarle. He was lying on the floor face down wearing pyjamas. He describes him as *"also in rigor mortis"* and very yellow in colour; Dr Rouse said that PC Daniels was mistaken if he thought Mrs Scarle had shown signs of rigor mortis. A paramedic confirmed that he was dead. PC Kateley, who was with PC Daniels, gives a similar description of the scene. When the police attended they found the conservatory door open. The door between the lounge and the conservatory was locked. There was a window into the kitchen which was open but not big enough for the police officer to get through. The outer pain of the double glazing to the window was smashed. One of the conservatory windows had also been smashed and there was a rock lying on the conservatory floor.

29. The police case summary records that an informant has said that the *"place has been turned upside down"*, that Mr Scarle was found in *"the foetal*

position" and that Mrs Scarle was wearing only a night dress. Police photographs of the scene show Mr Scarle lying on the floor of the lounge on his right side in what might be described as the recovery position wearing just a tracksuit bottom which is pulled down to his thighs. There are chair cushions scattered on the floor. In front of him is Mrs Scarle's wheelchair in the collapsed position and lying on the floor behind him is her walking frame. Mrs Scarle is shown with her head lying on the floor between the toilet bowl and the wall. In Mrs Scarle's bedroom a draw has been pulled out, its contents seemingly scattered and a chair tipped over.

30. The ascertainment of the date of death is not necessary in order to decide the issue before me. Indeed, on the medical and lay evidence it is not possible to establish the date. Death occurred in the period 4th October to 9th October. I draw that inference from the evidence of Fiona Rutherford, a neighbour who recalls speaking to Mr Scarle at about 1.00pm on 3rd or 4th October 2016. He was getting the car ready to take himself and Mrs Scarle to lunch, something which the couple did routinely. She saw Mrs Scarle in the car as they were leaving and they exchanged waives. It is common ground, on the medical evidence that they had died at least 48 hours before their discovery.

31. There is evidence of behaviour which was out of the ordinary or a lack of reaction to events within that period. Fiona Rutherford noticed that the car had not been moved from 5th October and the following morning the kitchen and lounge lights were on at 6.30 am, although her experience was that the Scarles were not early risers. On 8th October a neighbour, Mary Dunn, heard an unusual boom noise from the back of their property. Another neighbour reported very loud music being played from a car in the field at the back of the house at about 10.00pm. None of this resulted in a response from the Scarles. On Sunday 9th October 2016, Catherine O'Hara, an immediate neighbour, heard a commotion from the back of the house. On discovery she found a group of children in the Scarles' garden who ran away when challenged. She telephoned the Scarles but there was no reply. The Scarles' had a landline, and only one telephone which was situated in the kitchen; they did not have a working mobile at this time. These events may indicate that they had become incapable of responding, chose not to respond, or that they were already dead.

32. Deborah Cutler says she spoke to her mother, Mrs Scarle, on about 3rd

October and she sent a card for their wedding anniversary which fell on 7th October 2016. She attempted to call the Scarles on 7th October between 6.00pm and 7.00pm but got no response. She assumed this was due to them being out at the Chinese Takeaway, which they always did on their anniversary. There is police evidence that the card had been opened. Ms Cutler concludes they must have been alive on 7th October as they would open the card on their anniversary. There is no evidence as to when the card was sent or received, and on this evidence I could not find that they were alive on 7th October, particularly given the absence of response to the phone call and the fact that the neighbour had not seen the car move since 5th October.

33. Anna Winter and Deborah Cutler have produced evidence directed at demonstrating that the deceased whose estate they do not represent was declining physically. In the light of the expert evidence I have received this evidence does not help me to establish who died first. What is clear, however, from both their statements, and is supported by the statement from Jacqueline Wright, is that Mrs Scarle has suffered a brain haemorrhage in 1998-99 and a stroke. This affected her mobility to the extent that she needed a walking aid to move around the home and a wheelchair outside of the house. She relied upon Mr Scarle to act as her carer. Anna Winter has produced letters from Mr Scarle from September 2015, in which he says that his wife's health had deteriorated as she was falling over a number of times a week and he had to be on hand to pick her off the floor. In a letter dated 1st August 2016 he said that she was not stable on her feet and had been falling out of bed. He had put pillow kerbs around her bed and set up a commode by the bed and would give her any assistance she needed at night. This account is echoed in Fiona Rutherford's statement to the police in which she said that Mr Scarle had said that his wife was getting up several times in the night and he found this exhausting. I have no reason to doubt what is said by these witnesses and in the letters and accept that it is accurate. For many years prior to their death Mrs Scarle was dependant upon her husband for care and her mobility was limited as described.

34. Mr Scarle also appears to have declined in the 2 months prior to his death. The neighbour Natalie Williams says his health had deteriorated in those months and he looked gaunt. She noticed that the garden looked neglected. Jacqueline Wright, Mrs Scarle's sister, last saw Mr Scarle and her sister on

18th September 2016. She thought her sister looked better than before but Mr Scarle had lost weight. She knew that Mr Scarle had leg ulcers. Following seeing Mr Scarle she spoke to Deborah Cutler about him but Ms Cutler said that she had advised John to see a Doctor but he had refused. Dr Swift noted that Mr Scarle had ulceration around each of the ankles and these were covered in dirty and soiled dressings. Again, I have no reason to doubt this evidence, which I accept.

The expert evidence

35. The post-mortem on Mr Scarle was carried out on 13.10.16 by Dr Swift. He gave the cause of death as hypothermia. He found that the deceased was wearing soiled and dirty jogging trousers/pyjamas and heavily dirt soiled underwear worn inside out and soiled with urine. He noted that there were soiled dressings on the right and left ankles with the presence of ulceration. There was a blackened pressure sore on the right hip, rigor mortis was diminished in all joints though still present in the upper arms, an early green discoloration on the upper abdomen and skin slippage to the right outer chest, lower inner right calf and back of the left hand. The bladder was markedly distended by at least 1.5 litres of straw coloured urine and the prostate was enlarged. Toxicological analyses showed ketoacidosis, an indication that Mr Scarle had suffered a period of neglect or poor nutrition prior to death; the condition arises when the body goes from burning carbohydrate for energy to burning fat. Dr Swift could not find any underlying medical condition which could place Mr Scarle at increased risk of developing hypothermia.

36. Dr Swift performed the post-mortem on Mrs Scarle on the same day. He found the cause of death to be hypothermia. He identified a medical history of brainstem haemorrhage and aneurysm, epilepsy, hypertension, hypercholesterolemia, tinnitus and a fractured femur. His examination showed the skin of the hands was mummified at the fingertips. The abdomen was scaphoid. There was bloodstained fluid which had purged from the lower orifices and post-mortem dry changes on the inner right thigh. Rigor mortis was absent. There was confluent green discolouration of the abdomen, early skin slip to the feet and hair was easily pulled from the scalp. The bladder contained odorous turbid urine. Ischaemic heart disease was

also identified. Dr Swift concluded that Mrs Scarle had several underlying conditions which may have caused her to collapse and thereby succumb to hypothermia.

37. As between Mr and Mrs Scarle, Dr Swift thought that the changes of decomposition were less advanced in the former that than latter which may suggest that Mr Scarle died a period of time after his wife, possibly a period of days.

38. Dr Calder was also of the view that Mrs Scarle is more likely to have been first to die based upon the more advanced state of decomposition, her underlying pathologies, which could have brought about sudden death, and the fact that Mr Scarle's bladder being distended by urine might suggest a significant period of basic body systems function. He states at the beginning of his conclusion that from the description of the property given by the Coroner's Officer, the environment within the property has to be similar and from metorological evidence would have been about 10 degrees centigrade.

39. Dr Rouse and Dr Fegan-Earl agreed that Mr and Mrs Scarle died of hypothermia. Dr Rouse told me, and this is unchallenged, that this is a condition in which the core temperature of the body falls below 35°C as a result of body heat loss exceeding heat production. The likelihood of death proceeds in a logarithmic fashion. At 33°C the survival rate is 50%, reducing to 5% at 30°C. Of its nature, the condition does not cause instantaneous death and the temperature at which the victim succumbs can vary.

40. There is a large measure of agreement between these experts. They agree that Mr and Mrs Scarle were in the early stage of decomposition but that the latter was at a more advanced stage. In consequence, if the temperature and environmental conditions within the two rooms, i.e. the lounge and the toilet, were equivalent, it may be concluded that it is more likely than not that Mrs Scarle died before her husband. The importance of temperature and environmental conditions is that heat accelerates decomposition and moisture can act as a coolant through evaporation, thereby slowing decomposition, or assist bacteria to grow and thus speed decomposition. Both experts accept that within one property there can be microclimates with different temperatures and environmental conditions.

41. There was much cross-examination about the features of decomposition, and

comparing those that developed in Mrs Scarle with those of her husband, but it is not necessary to deal with these in view of the experts' agreement on the significance of such differences. There is also agreement that the disarray in the bungalow, which, on the evidence was unusual in that household, and the removal and lack of clothing could be due to confusion brought on by hypothermia.

42. Dr Rouse and Dr Fegan-Earl agree that pathologists are reluctant to form a view as to the time of death based on the level of decomposition in individual cases and Dr Rouse gave an example of being wildly out when he had attempted to do so, as did Dr Fegan-Earl. Dr Rouse accepted that there are variations between individuals as to the rate at which they decompose. Even people who die at the same time and in the same circumstances may not decompose at the same rate.

43. The key difference between Dr Rouse and Dr Fegan-Earl, in their reports and oral evidence, is as to whether it should be accepted that the temperature and environmental conditions in which the Scarles were found were equivalent. Dr Rouse considers that it should, Dr Fegan-Earl disagrees.

44. Dr Rouse said that, where there are two individuals in a fairly small property, such as this bungalow, *" one can sort of be comfortable"* in forming a view that whilst there may be variations in the micro-climate, in the circumstances of this case such variations are not so significant to detract from the conclusion that, on balance, Mrs Scarle died first. When asked whether the glazed roof over a room adjoining the toilet could have an impact on the temperature of the toilet area he said that this was outwith his expertise. It is notable, that in his report he had said:

> *"It is not possible to say beyond reasonable doubt which of the two decedants died first. The processes of decomposition are highly variable and minor differences in the micro-environment (i.e. within two rooms in the same building) can significantly affect the rate of decomposition."*

45. Dr Fegan-Earl said in his report that one could not say with certainty who died first because of the variables, which he listed as temperature, build. clothing and sepsis. Whilst he talked of "*certainty*" in that part of his report, he concluded that no percentage assessment could be provided as to the order of death. When cross-examined, he accepted that clothing, sepsis and

build were not influential on the facts of this case. He said that temperature was the single most important factor and in the absence of any evidence as to the relative temperatures in the lounge and toilet he could not assume they were equivalent and thus he cannot reliably determine who died first.

46. The evidence as to temperature in the premises is limited. Dr Calder suggests in his report that from meteorological evidence the temperature would have been about 10°C. There are also produced records from Southend on Sea airport for the period from 6th October 2016. These show that on 6th October the temperature was between 15 and 11°C with passing clouds and on 7th October the temperature was between 14 and 13°C and partly sunny. The forecast for the 8th and 9th showed highs of 16°C at midday and lows of 7°C at midnight.

The contentions

47. Mr Wahiwala argues that I should accept Dr Rouse's view as to the lack of significant variation in the micro-climate. He says, as a matter of common sense, the lounge must have been as warm or warmer than the toilet because of the layout of the premises. Mrs Scarle's degree of decomposition relative to her husband is in keeping with Dr Rouse's conclusion she died first. If the lounge was warmer, this would have accelerated Mr Scarle's decomposition and his lesser decomposition would indicate that he must have died substantially later than his wife. By reference to the plan he says that the lounge was liable to be heated by the effect of the sun on the conservatory and the glazing of the lounge door. He points to the fact that PC Daniels talks of opening the door to the lounge before finding Mr Scarle. Thus, he says, any heat in that room must have been trapped. In contrast, Mrs Scarle was found in the toilet with the door open. There would be a current of air in the hall from the open conservatory door via the open kitchen window which would, if anything, have produced cooler surroundings than the enclosed lounge. Even if it was not cooler, there are no other factors to suggest that the toilet area would be warmer than the lounge. He suggests that Dr Fegan-Earl has applied too high a standard to his level of enquiry as to the relative temperature in the lounge and toilet alleging that he requires scientific certainty, or to be 99.5% certain, as to whether the temperatures were sufficiently close to lack significance.

48. As to factors other than the extent of decomposition, Mr Wahiwala places

reliance on the evidence which both of the experts acknowledge indicate that Mr Scarle was alive on the floor for some time before death namely, a pressure sore on the right hip and the continued production of urine. In contrast, he points to Mrs Scarle's pre-existing conditions, which the experts accept may have led to a collapse followed by the development of hypothermia. He also places reliance upon the presence of ketoacidosis on toxicological examination of Mr Scarle's blood and its absence in that of Mrs Scarle. As the medical evidence explains, the condition is the result of malnutrition. He argues it was more likely brought on whilst he was lying on the floor incapable rather than the result of a lack of self-care prior thereto for, it were the latter, one would have expected that Mrs Scarle, for whom he was the carer, would also have been malnourished. To reinforce the point, Mr Wahiwala refers to photographs produced by Anna Winter showing the deceased at School Reunions in August 2015 and 2016 which, he says, evidence that Mr Scarle was not neglecting himself.

49. Mr Weale says that all the experts have to go on is the rate of decomposition. One cannot draw any reliable inference from the fact that one decedent was more decomposed than the other given Mr Rouse's acceptance that decomposition is a very unreliable method of identifying the time of death and the extent of decomposition can be variable amongst people who die at the same place and time. He reminds me that Dr Rouse said in his first report that even minor differences in the microclimate can make a significant difference to the rate of decomposition.

50. Mr Weale responds to the relative temperature argument by saying that no safe inference can be drawn as to whether the toilet area was warmer, cooler or the same as the lounge. The glazed room on the other side of the toilet wall may have heated up in the day causing heat to have transmitted to the toilet. If air was drawn from the conservatory, through the kitchen and up the hall, it may well have been warm air during the day. It is not known who opened the kitchen window, which may be relevant given the reports of disturbances at the back of the house and the breaking of part of the kitchen window. Whilst PC Daniels says he opened the lounge door, he does not indicate whether it was ajar or shut firm. As to the lounge, there is no evidence as to gaps and drafts between the conservatory and the living room.

51. Mr Weale raises other environmental differences. Mrs Scarle was lying on

a piece of vinyl laid over carpet and, thus, may have been more insulated from the ground than Mr Scarle who was lying on the carpet itself. The area around the toilet may have been more moist than that in the lounge. We just don't know. As regards ketoacidosis, whilst this may indicate poor nutrition prior to death it could be due to self- neglect, the duration of which is unknown. As to the retention of urine in the bladder, this could be due to an enlarged prostate, but in any event the difference between Mr and Mrs Scarle could be that the latter's bladder may have emptied.

52. The circumstances surrounding the death are relied upon by Mr Weale. It is common ground that Mr Scarle was the carer as he was more physically able. Had Mrs Scarle collapsed he could have got help. The fact that he did not should lead to the inference that he collapsed and died leaving Mrs Scarle in difficulty. The unusual features noticed by neighbours, the lights being on in the early hours, the events behind the house which should have provoked a reaction and the failure to take telephone calls on 7th and 9th October show that the person who had been most physically able to respond cannot have been and this too points to Mr Scarle having collapsed and died at an early stage and before his wife. His pressure sores could have been caused over hours or days, all they show is that he was lying on his right hip for a period of time. Mrs Scarle's handbag being found in the hall and the blanket which was underneath her in the toilet may indicate that she had collected those items to assist her collapsed husband. If he had given her the blanket one would have expected it to have been placed over her. The disarray in the house may be the result of the effects of hypothermia, as suggested by the two experts, as may the lack of clothing and lowering of the jogging bottoms. Alternatively, some or all of these two factors may have been the work of an intruder, as whilst the kitchen window was not large enough for the police officer to pass through the photographs show that it was clearly sufficient to allow a slight person entry and there was evidence that the conservatory door was left slightly open for the cat and that a glazed conservatory door was smashed. If there were intruders, we do not know whether the state of the property at the time of death was the same as when the Scarles were discovered. Mr Weale argues that the known facts could point in either direction or that Mr Scarle died first.

Discussion

53. Usually, the process of making a finding of fact is a product of looking at all of the evidence and testing how it compares and fits together to see what picture it paints. In this case the facts surrounding the deaths are equivocal and the picture incomplete even when considered in conjunction with the evidence of the pathologists.

54. The fact that Mrs Scarle's walking frame, upon which she was dependant in order to move around the flat, was lying on the floor by Mr Scarle and she was found in another part of the property, albeit not far, is an indication that he was not able to assist her from the lounge to the toilet and thus he had collapsed by the time she made that journey. Deborah Cutler's explanation for Mr Scarle's position on the floor and the presence of the walking frame is that his wife found him collapsed, lowered herself to place him in the recovery position but was unable to get up and at some stage crawled to the toilet. That would not be an improbable state of affairs, but for the lounge door being shut or possibly ajar, but we do not know if there were intruders who could have moved the door; the fact that substantial quantities of cash was found in Mr and Mrs Scarles' bedrooms and the lounge may point to the absence of intruders. Alternatively, the position of the door may indicate that they took up their final positions without the knowledge of the other, but this would not explain why Mrs Scarle's walking frame was in the lounge. Then there is the point made by Mr Weale, that the fitter partner is likely to become incapacitated first for otherwise they would have gone to the aid of their spouse has force. The fact, however, that Mr Scarle was not in a position to assist his wife, however, does not indicate that he had died. He could have been lying on the floor in a state of hypothermia, or just collapsed. Alternatively, he may have seen her lying collapsed in the toilet but, confused by hypothermia, done nothing to help. The pressure sore and urine are some evidence that he was lying incapable for some time before death but it does not follow that Mrs Scarle had collapsed or died during that period.

55. The presence of ketoacidosis is also equivocal. On the expert evidence the likely cause of the condition was a lack of nutrition but this could have been lacking before he ended up on the floor of the lounge. There is evidence from his sister-in-law and a neighbour that he had lost weight in the last two months and that he looked thin- the neighbour thought gaunt. His

disinclination to see a doctor and the way he treated his ulcers, leaving them in soiled bandages, is an indication that he was not looking after himself. It does not follow that he was also neglecting his wife, indeed the last neighbour to speak to him, Fiona Rutherford, records him telling her his efforts in caring for his wife and how it affected is sleep. Thus, the fact that Mrs Scarle did not have markers for ketoacidosis is not an indication that Mr Scarle only started to suffer whilst lying on the floor.

56. The evidence from Dr Rouse, which was not challenged, is that one can die from hypothermia at different temperatures down to 26°C when death is inevitable. Not surprisingly, therefore, there was no evidence establishing a time scale over which such a death might occur; Dr Rouse says that a rough rule of thumb is that the core temperature falls at 1°C/hour but it is not an entirely linear process. It has been postulated that Mrs Scarle may have collapsed due to one of her underlying conditions, such as epilepsy, but there is no evidential basis for this other than to say she had a number of conditions. Even if she did suffer a sudden collapse it would have taken her a time to become fatally hypothermic, so her pre-existing conditions are not of particular assistance in determining the order of death. Further, they are in any event counterbalanced by the likelihood that if she had collapsed at a time Mr Scarle was still capable one would expect him to have sought assistance.

57. In the result, the only evidence which has the potential to provide reliable inferences is that produced by the forensic pathologists. The evidence of Drs Swift and Calder is of limited assistance on this point. Dr Swift relies upon the difference in levels of decomposition, but only goes so far as to say that it *"may be suggested that Mr Scarle died a period of time after his wife*." It is clear from Dr Calder's report that he advised on the premise that the environment in the house was similar and the temperature would have been 10°C. Sadly, he could not be questioned about the influence of temperature but Dr Rouse and Dr Fegan-Earl have. Accordingly, I accord their evidence greater weight than that of Drs Swift and Calder on this issue.

58. There is no dispute, and I find, that both Mr and Mrs Scarle were at an early stage of decomposition when found but that Mrs Scarle was substantially further on in that stage. I do not place weight on the evidence that decomposition can be variable even between individuals who died at the

same time and in the same conditions because in the joint statement the experts accept that if the temperature and environmental conditions within the two rooms were found to be equivalent it is more likely than not that Mrs Scarle died before her husband. They did not regard inherent variability of decomposition as a bar to a conclusion based on the different degrees of decomposition.

59. Dr Rouse's evidence, unchallenged and unmodified at trial, was that minor differences in micro-environments, even between two rooms in the same building, can have a significant effect on the rate of decomposition. Whilst this was said in explanation as to why he could not be sure beyond reasonable doubt who died first, if such differences can have a significant effect this evidence begs the questions as to what, if any, were the differences in micro-environment, in this case the temperature, between the two rooms. Before I can draw the inference I am invited to draw by the claimant, I have to question whether I can accept that the temperature of the lounge and toilet were equivalent. Is there a safe evidential basis for reaching that conclusion and rejecting as improbable that it might have been the case that the toilet was warmer and thus productive of faster decomposition; I accept Mr Wahiwala's point that the expert evidence points to Mrs Scarle having been first to die if I am satisfied that the lounge was warmer or as warm as the toilet.

60. Dr Rouse's assertion that he could be *"sort of comfortable"* that in a small property the variability in micro-environment was not so significant to detract from his conclusion was somewhat broad brush given what he said in his report. He accepted he was not qualified to comment on the heat effect which the glazed roof over the room behind the toilet may have upon Mrs Scarle. It seemed to me that despite what he has said in his report, he had not considered whether there were minor differences of which account may need to be taken. There was no evidential basis he put forward for being comfortable in that view other than the size of the house. That is not consistent with the view expressed in his report that minor differences between two rooms in the same building could have a significant effect.

61. I do not accept Mr Wahiwala's submission that Dr Fegan-Earl's disinclination to reach a conclusion as to who died first without evidence as to the difference in temperature was to apply a standard of proof requiring

99.5% certainty, and when cross-examined on this point he did not say so. The point made by Dr Fegan-Earl was that before reaching a conclusion based on a premise it is necessary to ascertain that the premise is correct and he could not see any evidence to support the premise of temperature equivalence. Nor do I accept his argument that to require proof of, at least, equivalence is not legitimate as it places an impossible burden on the claimant. It is to deal with such difficulties that s. 184 was enacted. I therefore have to look at the other evidence to see whether there was the necessary equivalence or, following Mr Wahiwala's argument, that the lounge was warmer.

62. I agree with Mr Weale that it cannot safely be said that the roof glazing to the room adjacent to the toilet did not cause it to heat during the day and it may have done so. For some of that period the weather report indicates there were sunny periods which could have acted on the glass to heat the room. Further, the channel of air from the conservatory to the toilet may well have conducted air warmed by the conservatory glass along the hall. There is no evidence one way or the other on this; the conservatory door was only kept open by about 8" to allow the passage for the cat. By the time the conservatory window was smashed and thus more open to cold air, Mrs Scarle could have been dead for some time and in a state not too dissimilar from that in which she was found. The fact that there was mummification on Mrs Scarle's hand does indicate that there was some air current but Dr Rouse did not regard it as significant. It was not necessarily a cold air current. Similarly, it is not safe to conclude that the lounge was warmer than the toilet because it adjoined the conservatory and had an internal glazed door. It was a much larger room with walls common to a bedroom to the north and the neighbouring property to the east as to the heating of which there has been no evidence. It follows that there are too many variables and unknowns to come to a safe conclusion as to the relative temperatures of the toilet and the lounge.

Conclusion

63. The only evidence which could point unequivocally to the sequence of death is the relative differences in decomposition, but does it? I am left with two not improbable explanations for this effect The first is that Mrs Scarle pre-deceased her husband, the second that the micro-environment of the toilet area was warmer than the lounge. I cannot discount the latter in the absence

of evidence from which I could reliably reach such a conclusion. Accordingly, I cannot fairly draw the inference that it was the former.

64. I can, and do, find that Mr and Mrs Scarle died of hypothermia at some time between 5th and 9th October 2016. The claimant has not satisfied me to the civil standard as to the order of death, it remains uncertain. Accordingly, the presumption of death in s. 184 of the Law of Property Act 1925 applies and Mrs Scarle is presumed to have survived Mr Scarle.