

**THE HIGH COURT**

[2023] IEHC 104

[Record No. 2020/6531P]

**BETWEEN**

**NEVILLE CURLEY**

**PLAINTIFF**

**AND**

**SUMMERHILL CONSTRUCTION COMPANY LIMITED**

**DEFENDANT**

**JUDGMENT of Mr Justice Mark Sanfey delivered on the 6<sup>th</sup> day of March 2023.**

**Introduction**

1. This judgment concerns the plaintiff’s claim for injuries and loss while carrying out painting works in a premises on 24 July 2017 in Dungarvan, County Waterford which was being fitted out by the defendant company as a “Starbucks” cafe. The case was heard at the Kilkenny sessions of the High Court over four days in February 2023. Liability and quantum were both hotly contested, and unfortunately there was a complete conflict of evidence in relation to the central issues of liability which were left for the court to resolve.

**The parties**

2. The plaintiff carries on business as a painting contractor under the name “Midland Painters and Decorators”. He has been in the painting business for 35 years.

He carries out all types of painting, and employs other painters to assist him from time to time. The defendant is a substantial building contractor, a family company which is operated by Dan O'Sullivan and James O'Sullivan, sons of the original owner of the company. The defendant mainly carries out refurbishments and fitouts, which may range from large entities such as warehouses and hospitals to smaller concerns such as shops and restaurants. In recent times, this latter aspect has included work done for chains such as Starbucks and Kylemore cafes.

3. The plaintiff and the defendant developed a working relationship when the plaintiff was recommended to the defendant by a tiling sub-contractor. They had worked together for over three years prior to the incident complained of, and the defendant's witnesses acknowledged that the plaintiff's work had always proved satisfactory in the past. The defendant had in fact previously retained the plaintiff to carry out the painting works for fitouts for – in the estimation of the plaintiff – five or six Starbucks units.

### **The accident**

4. On 24 July 2017, the defendant was the main contractor in charge of the fitout works in a Starbucks unit in Dungarvan, County Waterford. The plaintiff was engaged to carry out painting works in the premises, and in particular the spray painting of walls and ceilings. The plaintiff attended at the premises at 4.30pm, and had a discussion with James O'Sullivan and Jason Twomey, the defendant's foreman for the job, in relation to the work to be done. This discussion, which was also attended by Mr Clint Cummins, an assistant to the plaintiff, was the subject of intense dispute in the evidence as to what instructions or permission were or were not given by the defendant's representatives to the plaintiff as to whether or not the plaintiff could stand on a counter in order to access parts of the ceiling.

5. In any event, the plaintiff and Mr Cummins commenced work at approximately 5pm. The ceiling required to be spray-painted. It did not present a uniform surface; certain objects protruded from the ceiling, such as girders and ducting for electrical conduits, and these were not covered by tiles or such like. As these objects required to be painted on all surfaces, including those facing the roof and thus hidden from common view, the sprayers would require extension poles which could be angled in such a way as to reach surfaces that would otherwise be inaccessible. The operation was therefore not entirely straightforward, as the paint was not solely to be projected on to surfaces that presented as flat and facing towards the painters.

6. The situation was complicated further by the installation of a counter. It emerged in evidence that the counter had arrived about a week earlier, and had been installed together with the counter-top – a quasi-granite substance known as “Corian” – by at latest Friday 21 July. The counter formed the boundary of the working area of the restaurant, and consisted of a broad u-shape projecting out from the back wall of the premises. It was accepted by the defendant that the installation of the counter had occurred somewhat ahead of schedule; however, the evidence on behalf of the defendant was that it should not have presented a problem as regards the plaintiff’s access to the ceiling above the working area. The plaintiff on the other hand maintained that, in each of the previous jobs he had done in Starbucks units for the defendant, he had been presented with an empty shell, in which there were no obstructions or difficulties with access to ceiling areas, and that he had expected a similar situation on this occasion.

7. The plaintiff and Mr Cummins proceeded from the front of the premises towards the back where the working area was, applying primer and spray paint as they

went. A scissors lift provided by the defendant was used in this regard. However, the plaintiff said in evidence that he did not consider there to be a sufficient distance between the extreme right-hand boundary of the counter and the side wall of the premises to approach the counter from that side. It was suggested to him in cross-examination that there was in fact ample room to do this, and that the scissors lift had an extension ramp which could project over the counter and provide a platform whereby the ceiling over the counter area could be reached. The plaintiff gave evidence that, while he was prepared to bring the scissors lift parallel to the counter, he was not prepared to manoeuvre it perpendicular to, or facing, the counter, as he was concerned that an accidental contact with the controls could cause the lift to collide with the counter-top, causing damage to an expensive item.

**8.** As the scissors lift would not fit behind the counter, and as an “A-ladder” could only fit in that space parallel to the back wall and front end of the counter, thereby causing the operative to have to lean sideways to reach parts of the ceiling – an unstable and possibly dangerous manoeuvre – the plaintiff decided to step from the scissors lift onto the counter, with a view to using it as his platform for reaching the ceiling over the counter. He considered that he had been given permission by John O’Sullivan and Jason Twomey to do this – a contention that they strenuously rejected in evidence.

**9.** The plaintiff says that the counter was covered with thick black polythene, taped tightly to present the appearance of a smooth and uniform surface. The plaintiff’s evidence was that, having put his right foot down on the counter, he then put his left foot down, unaware that the polythene at that location in the counter covered an aperture designed to receive a sink. The plaintiff’s foot and leg went through the plastic; the plaintiff struck his left shin heavily, and says that his left knee

also felt an impact. His leg went “all the way to the ground”, and he had to be helped up by Mr Cummins who came to his assistance.

**10.** The plaintiff’s leg was bleeding profusely and Mr Cummins tied his “hi-vis” jacket around the wound. Mr Cummins went out to his van for a phone, and fortuitously encountered an ambulance in the vicinity. The plaintiff was attended to by the ambulance staff, and Mr Cummins drove him to an out of hours GP service, and ultimately to hospital in Nenagh for an x-ray. The plaintiff had the laceration on his skin patched up and was prescribed pain medication.

**11.** The plaintiff is adamant that he was given permission, during the course of his discussion with John O’Sullivan and Mr Twomey, to use the counter as a platform to reach the ceiling above it, and that there was nothing to alert him to the fact that the counter was not solid at all points, or that there was a hole where he ultimately placed his left foot. The defendant’s representatives are equally adamant that the plaintiff was given no such permission, and that the ceiling above the counter could have been relatively easily accessed by use of the extendable platform on the scissors lift, or by use of a podium ladder in the working area behind the counter, rather than an A-ladder, and that a podium ladder was available to the plaintiff.

**Was the plaintiff given permission to use the counter?**

**12.** As the parties are completely at odds as to whether the defendant permitted the plaintiff to use the counter as a platform, and as this issue is central to the issue of liability in this case, it is necessary firstly to analyse carefully the pleadings and evidence of both sides in this regard.

**13.** At para. 4 of the defendant’s notice for particulars of 19 November 2020, the following query is raised: -

“4. State who caused or directed the plaintiff to stand on the countertop as referred to at para. 3(ii) of the Indorsement of Claim.”

The plaintiff’s reply of 8 April 2021 is as follows: -

“4. The plaintiff was instructed by James O’Sullivan of the defendant to manoeuvre around the countertop so as to access the ceiling”.

**14.** At paras 10 and 11 of the defendant’s notice for particulars of 19 November 2020, the defendant raised the following queries: -

“10. Identify the person who the Plaintiff alleges put the covering on the worktop.

11(i) State the type of covering which the Plaintiff alleges was on the worktop and specify the type of material from which the covering was made.

(ii) State the dimensions of the covering.”

**15.** The responses in the replies to particulars of 8 April 2021 were as follows: -

“10. As far as the Plaintiff is aware Jason Toomey [sic] arranged for the covering to be placed on the worktop.

11(i) Black polythene plastic was placed on the countertop.

(ii) The countertop was covered from surface to the floor level.”

**16.** At para. 3 of the defence, the Defendant set out the “grounds upon which the defendant claims it is not liable for any injuries allegedly suffered by the plaintiff...”.

Specifically, among fifteen particulars set out, the defendant pleaded as follows: -

“(f) The defendant did not cover the alleged or any countertop and same was covered by the Plaintiff to protect the works from the painting he was carrying out.

(g) The Plaintiff did not have permission to stand on the alleged or any countertop given the damage that would be occasioned by same.

(h) If the countertop was covered in the manner alleged, the sink or other opening would still have been visible to the plaintiff, if he paid adequate attention.”

**17.** All of the relevant participants on each side gave evidence at the trial. What follows is a brief and non-exhaustive synopsis of the main points of the evidence of the various witnesses. I have consulted the digital audio recording where it was necessary to clarify my notes of the evidence.

### **The plaintiff**

**18.** In his evidence, Mr Curley stated that he was told by Mr O’Sullivan and Mr Twomey that everything was ready for the spray painting to commence. Mr Curley stated that he had not been expecting the counter to be in situ, and that this raised a problem as he did not consider that the scissors lift could be used to access the area immediately above the counter. His evidence was that Mr O’Sullivan and Mr Twomey told him not to worry about the countertop, that they had covered it with black polythene plastic, and that it would be secure to walk on if he needed to do so in order to access the ceiling. He considered that stepping on to the counter was his only option for access to that particular part of the ceiling, and this was why he raised the topic with Mr O’Sullivan and Mr Twomey. He said that the tiles on the back wall behind the counter were also covered with black polythene.

**19.** At the trial, there was an issue in relation to photographs which were produced by the defendant and which they proposed to use in evidence. Notwithstanding expert engineers having produced reports for both the plaintiff and the defendant, the plaintiff’s legal team was not made aware of these photographs until the day before the hearing. In fact, on that day the plaintiff’s team was shown four photographs which had been taken by Mr Dan O’Sullivan on his phone some two days after the

accident. On the morning of the trial, Mr O’Sullivan had discovered numerous further photographs on his phone, mainly from 26 July 2017, two days after the accident, which the defendant proposed to adduce in evidence. Mr O’Sullivan was in a position to prove the photographs by reference to his phone, which set out the date on which the photographs were taken. Although the plaintiff’s team complained about the lateness of the introduction of these photographs, it was not suggested that they should not be admitted to evidence.

**20.** Accordingly, the plaintiff was shown a number of photographs of the *locus in quo*, mostly taken two days after the accident. One photograph in particular – “photograph number ten” – showed the counter area loosely draped in clear polythene plastic. The scissors lift is to the right of the photo, draped in similar clear plastic. It is very difficult to say from the photo what condition the plastic covering is in, as the clear plastic is draped over the black Corian covering on the top of the counter, and the light-coloured wooden panelling on the side of the counter is clearly visible through the covering. The tiles along the back wall are covered with clear transparent plastic covering, once again somewhat loosely. Although the spray painting of the ceiling is by that stage complete, there does not appear to be any significant staining on the plastic covering the tiled walls behind the counter, or the side of the counter covering the light wooden counter itself.

**21.** There are two workmen in the background. Mr Twomey identified himself as the workman on the left. It appears that they are installing wooden panelling along the righthand wall of the restaurant. Notwithstanding that the detail on the counter itself is difficult to make out, it appears that taps have been installed at the sink along the back wall and at the location in which the plaintiff suffered his accident, suggesting that a



plumber had carried out installation works subsequent to the accident but before photograph number ten was taken.

22. The plaintiff strenuously denied covering anything, and said that he did not use clear plastic on this occasion. He said that he had been told by Mr John O'Sullivan and Mr Twomey that they had covered the countertop prior to Mr Curley commencing his works. He adverted to the nature of spray painting, in which it is difficult to ensure that the sprayed paint only covers the surface intended to be painted. His evidence was that he would not have used the clear plastic because it would be too light, and the pressure or air generated by the spray-painting tools would lift the lightly draped clear plastic covering up and destroy it. He made this point specifically in relation to a plastic covering over the windows to the front of the building featured in "photograph number twelve".

23. Mr Curley denied that a podium ladder was suggested in the conversation prior to commencing work by the defendant's representatives. It was suggested that a podium ladder could have been installed within the counter area, and that this would have enabled Mr Curley to reach the surfaces above the countertop.

### **Mr Cummins**

24. Mr Cummins is a plumber and occasional spray painter who assists Mr Curley from time to time. He gave evidence that he was present at the meeting with John O'Sullivan and Jason Twomey. He said that there was a discussion of the countertop, which had been tightly taped up with black polythene plastic. Mr Cummins says that Mr Curley did raise the possibility that the plaintiff might have to stand on the countertop in order to reach the ceiling above it. His evidence is that Mr O'Sullivan said something to the effect of "that's okay, work away, that is safe". He gave evidence that the tiles on the back wall were also covered in black polythene plastic,

and were securely taped to the wall. He says that he did not remember any platform on the scissors lift which could have extended over the counter.

**25.** After the accident, Mr Cummins saw to Mr Curley, and later returned to the premises to finish off the spray-painting, so that the job was in fact completed on the night of 24 July 2017. His evidence was that the black plastic was taken down, as the paint which adheres to the plastic gets hard and flaky, and it is advisable to remove the plastic as soon as the job is complete, and before it dries. He speculated that the panelling being erected against the wall, which could be seen in photograph number ten, would create a lot of dust, which in his opinion might explain the clear plastic. However, he was adamant that the clear plastic shown in Dan O’Sullivan’s photographs was not put up by the plaintiff or his workmen, and stated that there was no overspray to be seen on the clear plastic in the photos: if the clear plastic had been used, the coverings “would be black”.

**26.** Mr Cummins was questioned closely about whether or not clear plastic covering had been put on the windows at the front of the building. It was suggested that these showed overspray which was clearly from the spray-painting activities. The photographs suggested that there was some slight staining at the top of the sheets covering the front windows, suggesting that it was in fact clear polythene that had been used to protect against spray painting. Mr Cummins rejected this theory: a wall adjacent and perpendicular to the windows, seen in photograph number twelve, had spray paint extending from the ceiling one-third of the way down the wall. Mr Cummins’ evidence was that there would be far more extensive overspray on the plastic sheets resulting from the spray painting of this wall if the clear plastic had been in situ at the time the spray painting took place.

**Dan O'Sullivan**

27. Mr Dan O'Sullivan is a director of the defendant and has been involved with the company for eighteen years. He stated that he was more involved in the business side of the defendant, whereas his brother James O'Sullivan was more involved in the operational side.

28. Mr O'Sullivan stated that he was not present on the day of the accident, and said that he did not know who had put up the clear plastic. He denied that he would have directed the countertop to be covered. He did not accept that the clear plastic which was used to cover the countertop and window and which was in situ on Wednesday 26th July was such that it would be blown off if used in proximity with a spray painting gun. He accepted that spray-painting was a "filthy" activity, and that covers would have to be removed after an operation had been completed. He did not however accept that the photographs which he took on 26<sup>th</sup> July did not show overspray on the clear plastic covering the counter.

29. Mr O'Sullivan was cross-examined at length about why his photographs had made such a late appearance in the litigation, and was also examined in relation to the method statement and safety and health plan which the defendant had provided, and which a contractor is obliged to produce for works. In relation to the method statement it was suggested that there was in fact no mention of painting at all: the sequence of operations consisted of a "general" section, a section in relation to the erection of stud partitions, "ceiling work" and "2<sup>nd</sup> fix carpentry". The method statement was unsigned, and Mr O'Sullivan was unable to attribute a date to it. It made no mention of a scissors lift. It was suggested to Mr O'Sullivan that the ceiling work was to be done prior to the counter being installed, given that there was no reference to painting, and that the installation of the counter would presumably be part

of “2<sup>nd</sup> fix carpentry”. Mr O’Sullivan did not accept this proposition, and emphasised that the method statement is a “working document” which may be amended by instructions given by the project supervisor.

**Mr James O’Sullivan**

30. Mr James O’Sullivan confirmed that he was the managing director of the company with operational responsibility for the various projects. He would call in “every second day”, with Mr Twomey acting as foreman. He squarely denied that he had given Mr Curley any permission to stand on the countertop. He said that a scissors lift was available, and A-frame and podium ladders would also have been available, and that “on any view” this would be sufficient to carry out the job. He said that he was satisfied that Mr Curley knew the correct manner in which to carry out the job. He would have been concerned at any suggestion that Mr Curley stand on the countertop, due to the danger of falling off, damaging the countertop, and generally the fact that, in a countertop such as this, there would be apertures and holes.

31. Mr O’Sullivan was adamant that the defendant did not cover the countertop, with black polythene or anything else. He said specifically in his evidence that he told Mr Curley to use the scissors lift and extension. On cross-examination, it was put to him that there was no reference to his having done so in a statement which he had given some four weeks after the accident, and which was made available to the court. Mr O’Sullivan stated that there would have been no need to cover the countertop or windows or tiles after the spray-painting finished, because any of the other activities would only give rise to dust, which could easily be cleaned off surfaces.

**Jason Twomey**

32. Mr Twomey gave evidence of having worked for the defendant for seven years. He had been a working foreman since 2016. He said that he had got on very

well with Mr Curley in the past, and that Mr Curley's work had been satisfactory. He said that the installation of the counter and worktop had been complete by the Friday before the accident (21<sup>st</sup> July).

**33.** Mr Twomey said that Mr James O'Sullivan had showed Mr Curley the scissors lift, and mentioned that an A-frame ladder was to be used in the counter area. He said that the defendant "had nothing to do with the countertop"; however, he also said in evidence that he could not remember whether there was any cover on the countertop before spraying took place. He stated that he could not remember how the covering in clear plastic on the wall tiles behind the counter came to be in place, but said that he and the other worker dealing with the wall panelling on 26<sup>th</sup> July did not cover the tiles. He said that he did not know who had covered the tiles. He reiterated that "we didn't cover that counter", but stated that he couldn't be sure who had done it, but he could not see why it would be anybody other than the plaintiff or his workmen who had covered the counter in clear plastic.

**34.** Mr Twomey had written a statement by hand some four days after the accident which was made available to the court. In the course of that statement, he says as follows:

"...[T]he counter and worktop was fitted and covered and Neveille [sic] was also aware he had to work around this".

**35.** Mr Twomey was cross-examined about this sentence in particular. It was put to him that the sentence suggested that it was the defendant rather than the plaintiff who had "covered" the worktop, and that it was this "fitted and covered" worktop that Mr Curley had "to work around". Mr Twomey's response was that he had "no recollection of covering that worktop". Counsel for the plaintiff put to him that the sequence of work had changed, in that the countertop had been installed before rather

than after the painting, and that it was a new situation which had not been envisaged, and that Mr Curley was therefore permitted to have access to the countertop to reach the ceiling. Mr Twomey was adamant that he did not give any permission to Mr Curley to get up on the counter.

### **Conclusions on use of countertop issue**

**36.** Each of the four witnesses who gave evidence in relation to the issue of whether or not the defendant was made aware by the plaintiff of the issue as regards access to the ceiling and gave permission to the plaintiff to stand on the counter was cross-examined comprehensively in that regard. It is fair to say that there was complete conflict between the evidence of the plaintiff's and defendant's witnesses. That evidence must be weighed and judged on the balance of probabilities, and is informed by my close observation of the witnesses and impressions formed while they gave their evidence.

**37.** There was no disagreement between the parties that previous Starbucks units for which the plaintiff had carried out painting works had been presented to him as a "shell", *i.e.*, with no obvious impediments obstructing his access to the ceiling. It was also clear that the countertop in the Dungarvan unit had arrived earlier than expected, and had been installed together with the "Corian" countertop by, at latest, Friday 21 July 2017. In the normal course therefore, the plaintiff would have expected to be able to use the scissors lift or an appropriate ladder to spray-paint the area immediately above what was to be the counter area. The counter being in place by the time the spray-painting was to start was thus an impediment to spray-painting immediately above the counter.

**38.** The plaintiff's evidence therefore was that, when he arrived at 4.30pm on Monday 24 July, he was faced with the situation which he did not expect. His

evidence was that the counter was covered tightly with black polythene, presenting what looked like a smooth uniform surface. Given the restrictions on movement within the counter area, the scissors lift could not be used inside the counter, and a ladder likewise would not be suitable in that area. He says that he raised with Mr James O'Sullivan and Jason Twomey the possibility of standing on the counter to access the ceiling, and was told that would be "no problem". His evidence is corroborated in general terms by Clint Cummins.

**39.** James O'Sullivan strongly denied that any permission was given to use the countertop. He says that he told Mr Curley to use the scissors lift and its extension ramp. He said that he was satisfied that Mr Curley knew what to do, and would not have advised him to get up on a counter, as he might fall off or damage it. He pointed out that Mr Curley had encountered a number of similar counters in Starbucks units, and was aware that they would have openings in them at various points.

**40.** In relation to the covering of the countertop, Mr O'Sullivan stated in his written statement, completed some four weeks after the accident, that "...I warned Neville to ensure to cover the counters as the Corian worktop was fitted and not to get paint on it...". Mr O'Sullivan said that neither he nor his workmen covered the counter at all. He went on to state unequivocally that photo number ten, which shows clear plastic covering the countertop, shows how the counter appeared when Mr Curley began his work; he said "that's the way they covered it" [15.09.30 on the digital audio recording in response to examination-in-chief]. He denied that there had ever been black polythene plastic covering the counter. He said that he was not on the premises again until three or four days later, and could not recall whether there was at that stage "over-spray" on the clear plastic.

**41.** The plaintiff's case was that the counter was wrapped in black polythene, and that this was not done by the plaintiff or his workmen. Mr Curley and Mr Cummins were adamant on that score. While Mr O'Sullivan denied that black plastic had been used by the defendant's workmen to cover the counter, and that it was in fact covered on 24<sup>th</sup> July by the clear plastic visible in the photographs on 26<sup>th</sup> July, this is not consistent with the statement in writing made by him subsequently that he had "warned Neville to ensure to cover the counters as the Corian worktop was fitted and not to get paint on it". This, if true, would suggest that the counter was not covered when Mr Curley arrived at the premises at 4.30pm, that Mr Curley proceeded to cover the counter with black plastic, and then climbed on top of it, putting his foot through a hole covered by plastic he himself had installed. Still less in my view is it likely that Mr Curley, if he had covered the counter in clear plastic, would have failed to notice a clearly visible aperture in the counter which he proposed to mount.

**42.** Mr Twomey's evidence in relation to the covering of the counter was somewhat equivocal. He had "no recollection" of covering the worktop, but also could not recall who had erected the clear plastic covering on the tiles on the back wall behind the counter. It should be noted that photograph number ten does not show any evidence of "overspray" from the spray painting on the clear plastic covering the tiles on 26<sup>th</sup> July, nor is there convincing evidence in the same photograph of overspray on the clear plastic covering the counter. Other work of a plumbing nature at least has clearly by that stage taken place, as evidenced by the installation of taps – and presumably sinks – in the counter, and photograph number ten suggests that wall panelling adjacent to the counter was being installed by, *inter alios*, Mr Twomey when the photo was being taken. Other photographs show pallets of floor tiles and



Whiterock wall cladding which may have been in the process of installation – or the installation of which may have been imminent – by that time.

**43.** On the balance of probabilities, I accept that, by the time Mr Curley arrived to commence his work at 4.30pm on Monday 24<sup>th</sup> July, the counter was in situ and covered in tightly wrapped black polythene. I should point out that there is some photographic corroboration of this: photograph number seventeen of Dan O’Sullivan’s photos taken on 26<sup>th</sup> July appears to show black polythene covering the end of the counter furthest from where the accident took place. I also accept the evidence of Mr Cummins that, after seeing to Mr Curley’s injuries and returning to the premises to finish the job, he removed the black polythene, by now covered in “overspray”, as would be normal at the end of a spray-painting job. I do not consider that the minimal quantity of overspray to be seen at the top of the plastic covering the windows at the front of the premises in photograph number twelve suggests that clear plastic was used by the plaintiff to cover all surfaces prior to the spray-painting taking place.

**44.** The second main controversy is as to whether the topic of Mr Curley using the counter as a platform was mentioned at all to James O’Sullivan and Jason Twomey, and if so, whether they expressly or impliedly gave permission to Mr Curley to do so.

**45.** Mr Curley is a very experienced painting contractor, who had carried out several similar jobs in Starbucks units for the same client. I accept his evidence that, when he arrived at the premises, he was faced with an obstacle to access to the ceiling he had not expected or encountered before, and that, due to the dimensions of the site and the placement of the counter, he foresaw considerable difficulty in reaching the ceiling above the counter, particularly given his reluctance, for reasons he explained, to approach too close to the counter with the scissors lift. Accordingly, as a matter of

probability, I think it is likely that he did raise the issue with Mr O’Sullivan and Mr Twomey. This may have been done in a relatively casual way, perhaps in the context of a general discussion about methodology, scissors lifts, ladders *etc.* Mr O’Sullivan knew that Mr Curley was a competent and experienced contractor, who he did not consider needed to be supervised closely. It may be that he trusted Mr Curley to do the job safely and to take all appropriate precautions, no matter what methodology was adopted. However, my conclusion is that Mr Curley probably did raise the issue of standing on the counter, and, as was suggested to Mr O’Sullivan in cross-examination and denied by him, he replied in a relatively casual and off-hand manner with “no problem”, or words to that effect. Mr Cummins stated that Mr O’Sullivan and Mr Twomey had said something to the effect of “yeah, work away and get the job done”, and was clear that he and Mr Curley had effectively been authorised to stand on the counter, if that was deemed necessary.

**46.** Accordingly, on the balance of probabilities, I conclude that:

- The counter was covered in tightly-wrapped black polythene plastic when the spray-painting commenced;
- This covering was not put in place by the plaintiff or his workmen;
- Either explicit or implicit authorisation was given by the defendant to the plaintiff to carry out the work in the manner he saw fit, to include standing on the worktop if the plaintiff considered it necessary.

#### **The expert engineer’s reports**

**47.** Mr Michael Fogarty, a Chartered Engineer, conducted an inspection of the premises on 24 June 2022 in the company of the plaintiff, Dan O’Sullivan, and Mr Brian Carroll, an expert engineer appointed to represent the defendant. By that stage of course, the premises was completely fitted out and functioning as a Starbucks café.

Mr Fogarty submitted a report, in which he set out his instructions and his factual findings in terms of dimensions. He also appended a number of helpful photographs. Mr Fogarty set out a number of conclusions based on his instructions, most notably that the ope for the sink created a hidden danger for the plaintiff, and that the defendant should have ensured that the sink was covered with plywood before it was covered with heavy duty plastic. He did express the view that "...it would be normal practice for counters such as this to be covered for protection until the works had been completed". He pointed out the need to obtain discovery of the defendant's accident report form, the defendant's risk assessment, "...any photographs taken of the scene in the aftermath of the accident...", the counter fitter's method statement and the safety plan prepared "by the Project Supervisor Construction Stage, which is likely to be Summerhill Construction".

**48.** In his oral evidence, Mr Fogarty pointed out that the project supervisor – in this case, the defendant – has responsibility for safety on site, and drew attention to the provisions of the "Guidelines on the Procurement, Design and Management requirements of the Safety Health and Welfare at Work (Construction) Regulations 2013" in this regard. Among the summarised duties of the "project supervisor construction stage" referred to at para. 5.1 of that document is the need to "co-ordinate the checking of safe working procedures" and "monitor the compliance of contractors and others and take corrective action where necessary...".

**49.** Mr Fogarty also draws attention to Regulation 16 of the Safety, Health and Welfare at Work (Construction) Regulations 2013 ("**the 2013 Regulations**") which refers to the duties of the "project supervisor construction stage" in relation to the Safety and Health Plan. This requires, *inter alia*, that

“16. The project supervisor for the construction stage shall - ... (b) make adjustments to the [Safety and Health Plan] where required to take account of the progress of the work and any changes which occur, ... (d) include in the plan specific measures concerning work which involves a particular risk, including but not limited to any risk referred to in schedule 1...”.

**50.** Mr Fogarty gave evidence that the project supervisor would normally provide a method statement, particularly where there was a job which involved “working at height”. The defendant had in fact produced a Safety and Health Plan, which at section 5 included certain “site rules” which related to the duties on all site personnel to take care for their own safety. There was also a Method Statement, the purpose of which was to set out the method and sequence of how the job was to take place. The method statement identified “working at height” as one of its hazards; however, the sequence of operations made no reference at all to painting. There was a specific section on “ceiling work”: while this did state that “...all high-level works will be completed with a tower scaffolding until internal works reach a completion level in which a podium ladder will be used...”, it made no reference to painting. It appeared to envisage a tiled ceiling rather than a painted ceiling.

**51.** Mr Fogarty considered that the project supervisor should have procured a method statement which provided for the changed circumstances of the new counter and working method, as required by Regulation 16, but this did not appear to have been done.

**52.** There was some debate with Mr Fogarty in cross-examination as to whether Mr Curley himself was required to produce a method statement, rather than the defendant. Mr Fogarty pointed out that the plaintiff had drawn the difficulty to the

attention of the project supervisor. He accepted that stepping onto the counter was “not a safe solution”, particularly as the aperture for the sink would have to be covered. There was also a difficulty with lack of edge protection required for working on any platform. Mr Fogarty accepted that a scissors lift such as was available to the plaintiff on the day in question was extendable by about one metre. It was put to him that the job could have been completed by means of the scissors lift; Mr Fogarty referenced the plaintiff’s concerns with damaging the counter, and noted his instructions that the plaintiff was permitted to step on the counter. Mr Fogarty accepted that a podium ladder inserted within the counter area, rather than an “A-ladder”, would likely have been suitable.

**53.** Mr Carroll also reported on his observations on the same day, *i.e.*, 24 June 2022. He set out his instructions, and his inspection findings which did not differ in any material respect from the findings of Mr Fogarty. He also provided some helpful photographs. His opinion, as expressed in the report, was that there was no requirement to access the counter in order to spray the ceiling above the counter, and that all areas “could be most appropriately accessed from either the scissors lift or platform ladder”. He very fairly pointed out that the plaintiff’s allegation regarding having received approval to use the countertops for access would have to be discussed with Mr O’Sullivan and Mr Twomey, and also the allegation that the defendants in fact provided the covering to the countertop. However, he was firm in his conclusion that access to the countertops was not necessary given the equipment provided, and further pointed out that, “...even with the presence of a sheeting covering [the countertop], it would not have appeared as a flat usable surface to those considering its use, regardless of the covering”.

54. In his oral evidence, Mr Carroll was adamant that the countertop should not have been used, and that a scissors lift and a podium ladder would have been satisfactory. In relation to the HSA Guidelines, he drew attention to the contractor's duties at section 6 and the "general duties of contractors and others" referenced at Regulation 24 of the Safety, Health and Welfare at Work (Construction) Regulations 2013 (SI 291 of 2013), and in particular Regulation 24(1)(c), which is as follows: -

"The contractor shall – (c) provide promptly to the project supervisor for the construction stage any site-specific information, including any relevant extract from their safety statement prepared under section 20 of the Act that:

- (i) is likely to affect the safety, health or welfare of any person at work on the construction site, or
- (ii) might justify a review of the safety and health Plan."

55. Mr Carroll expressed the view that the Regulation 24 obligations applied to both the main contractor and subcontractors such as the plaintiff. He also was of the view that directions given in discussion between the contractor and the subcontractor would supercede what is set out in the method statement.

### **The plaintiff's submissions**

56. Counsel for the plaintiff commenced his submissions with the proposition that "everybody agrees" that the plaintiff should not have been permitted to get on to the counter, and that whoever covered the plastic should have covered up the aperture through which the plaintiff fell. It was submitted that the plaintiff was entitled to succeed due to the defendant's permission or tolerance for what was effectively an unsafe system of work and a breach of statutory duty.

57. In this latter regard, counsel referred to s.12 of the Safety, Health and Welfare at Work Act 2005 which is as follows: -

“12. Every employer shall manage and conduct his or her undertaking in such a way as to ensure, so far as is reasonably practicable, that in the course of the work being carried on, individuals at the place of work (not being his or her employees) are not exposed to risks to their safety, health or welfare.”

**58.** Counsel submitted that s.12 finds expression in Article 30 of the Safety, Health and Welfare at Work (Construction) Regulations 2013 (SI No. 291 of 2013), which is as follows: -

“Site safety and access to construction sites

30. (1) A contractor responsible for a construction site shall take all appropriate precautions, so far as is reasonably practicable, to ensure that the site is safe and without risk of injury to the safety, health and welfare of persons at work, taking into account these Regulations.

(2) A contractor responsible for a construction site shall ensure for that site that—

(a) the surroundings and the perimeter are laid out so as to be clearly visible and identifiable and have appropriate signboards,

(b) safe means of access to and egress from are—

(i) provided and maintained, and

(ii) indicated where appropriate, and

(c) appropriate precautions are taken to protect persons present, at or in the vicinity of the site, from risks which may arise from such site, for example, by the provision of appropriate barriers, where necessary, to prevent unauthorised entry.”

**59.** Counsel emphasised the use of the phrases “shall take all appropriate precautions” and “to ensure” in Article 30(1). It was contended that the defendant did

not ensure that the site was “without risk of injury” to the safety, health and welfare of persons at work. Counsel also referred to Article 34 of the 2013 Regulations, which imposes obligations on “a contractor responsible for a construction site” to “ensure for that site” conditions of stability and solidity in relation to materials, equipment and components which require to be “stabilised in an appropriate and safe manner”, and in particular those which “are not intrinsically stable...”.

**60.** Counsel drew attention to Article 12 of the Regulations, which relates to the duties of the project supervisor for the design process, in particular in relation to the preparation of a written safety and health plan. The regulation sets out a number of matters which must be included in such a plan. Reference was also made in this regard to Regulation 16, which concerns the duties of the project supervisor for the construction stage in relation to the safety and health plan, and particular reference was made to Regulation 16(b), which requires the project supervisor for the construction stage to “make adjustments to the plan where required to take account of the progress of the work and any changes which occur”.

**61.** Counsel also referred to Regulation 17, which relates to the “duties of the project supervisor for the construction stage, coordination and cooperation”.

Regulation 17(1)(c) is as follows: -

“17(1) If more than one contractor is engaged in a project, the project supervisor for the construction stage shall –

...(c) organise cooperation between contractors (including successive contractors on the same site) and others and the co-ordination of their activities in relation to a project with a view to protecting persons at work and preventing accidents and injury to health and monitor such co-operation and coordination,...”.



**62.** It was also submitted that Regulations 17(1)(g) and (h) were relevant in that they required the project supervisor for the construction stage to

“(g) coordinate arrangements for checking the implementation of safe working procedures and monitor the implementation of those arrangements, and

(h) coordinate measures to permit authorised persons only onto the construction site and monitor such coordination”.

**63.** It was submitted that the defendant was also in breach of Regulation 48 of the 2013 Regulations, which relates to “freedom of movement at the workstation”, and is as follows: -

“48. A contractor responsible for a construction site shall ensure that the floor area at a workstation on the site allows persons sufficient freedom of movement to perform their work, taking account of any necessary equipment or appliances present.”

**64.** Counsel for the plaintiff was also severely critical of the safety and health plan generated by the defendant. Although the title page directly referenced the “Starbucks Dungarvan Shopping Centre, Co. Waterford” job, counsel criticised the plan as “generic”, and pointed out that, despite what was on its contents page, it had no “Appendix C”, which was to be a “health and safety statement”. The method statement produced by the defendant was criticised as having no mention at all of painting. The “2<sup>nd</sup> fix carpentry” section was after the “ceiling” section in terms of sequence, which suggested that, although painting was not mentioned, any ceiling work was to be done prior to the installation of fittings such as a counter. The “risk assessment guide” in the method statement did refer to “working at height”, identifying that as a risk of “serious injury to construction personnel”. It was pointed

out that the risks identified in respect of “working at height” included “edge protection to be in place at all times”, “fall arrest systems to be put in place for each personnel working at height if edge protection is not present” and “safe access and egress in place at all times”. It was submitted that the defendant was thus in breach of the risks it itself had identified, and that this was indicative of a generally relaxed attitude to safety on the part of the defendant.

**65.** Counsel contended that the regulations “were there for a reason”, and that they required rigorous and strict application and were of mandatory effect.

**66.** Counsel for the plaintiff was also severely critical of the manner in which the defence had been conducted. He referred to the decision of Collins J in *Morgan v Electricity Supply Board* [2021] IECA 29, and in particular paras. 5 to 7 of that judgment, in which the court emphasised the “need for clarity and specificity” required by s.10(2) and s.13(1)(a) of the Civil Liability and Courts Act 2004 regarding pleadings in personal injuries actions, with the corresponding obligations imposed on defendants by ss. 12 and 13(1)(b) of that Act. At para. 6 of the judgment, Collins J referred to his own judgment in *Crean v Harty* [2020] IECA 364, in which he stated at para. 23 that “...the provisions of sections 10-13 of the Act are clearly intended to ensure that parties (including defendants) plead with greater precision and particularity so that, in advance of trial, the actual issues between the parties will be clearly identified...”.

**67.** Counsel submitted that the grounds advanced at para. 3 of the defence did not refer to some of the issues relied upon by the defendant in evidence, such as James O’Sullivan’s assertion that he had showed Mr Curley how to use the scissors lift and the extension ramp in particular. Photos had been produced “out of the blue”, with a large number of photographs taken by Dan O’Sullivan two days after the accident

shown to the plaintiff's legal team only on the morning of the commencement of the trial. It was submitted that these matters should influence the court's evaluation of the weight of that evidence, even if it were deemed admissible.

### **The defendant's submissions**

**68.** Counsel for the defendant dealt with the latter point on behalf of the plaintiff by pointing out that objections to evidence had been made continually through the course of the trial, and that the court had ruled on those objections. If evidence was not ruled inadmissible, the weight to be accorded to such evidence was entirely a matter for the court.

**69.** Counsel submitted that the plaintiff was in the position of a sub-contractor, who employed his own assistants. It was contended that the plaintiff was in fact in the same position in statutory terms as the defendant, with the same duties under the construction regulations, and thus was not entirely dependent on the defendant to supervise him or control the manner in which he carried out his work. The plaintiff was an independent contractor and thus also subject to duties under the regulations.

**70.** While counsel urged that I find on the facts that the defendant had not given permission to the plaintiff to access the counter for the purpose of painting the ceiling, he submitted that if I did find that the defendant had given such permission, the statutory regime would have to be considered in terms of the responsibility of the parties. It was accepted by counsel that the main contractor had a duty to consult with the plaintiff in relation to methodology to ensure that the work was carried out safely; it was contended however that the defendant had complied with its duties in this regard by instructing Mr Curley in relation to the proper use of the scissors lift, and ensuring that both the scissors lift and appropriate ladders were available to the plaintiff. Counsel referred to Regulation 24(1)(a) of the 2013 Regulations, which

requires that a contractor shall “comply with parts 3 to 14” of the Regulations, which include the “general duties of contractors and others” [part 3] and “general safety provisions” [part 4]. It was suggested that the subcontractor had obligations of consultation and cooperation with the project supervisor for the construction stage, and was “entitled to set conditions for the job”, which he could refuse if he considered that it was too dangerous.

**71.** Counsel emphasised that s.12 of the 2005 Act, while expressed in mandatory terms, was qualified by the phrase “so far as is reasonably practicable”. It was also suggested that use of the word “ensure” in Article 30 of the 2013 regulations did not comprise a guarantee of the contractor’s obligations in that article; counsel referred to the dicta of Dunne J in *Thompson v Dublin Bus* [2016] 2 IR 156 in this regard, and in particular the statement by the court at para. 63 of that judgement that the obligations under the Safety, Health and Welfare at Work (General Application) Regulations 1993 “...do not, in my view, impose absolute liability on the employer”.

**72.** Counsel referred to Regulation 24(1)(j), which imposes a duty on a contractor to “...apply, where appropriate, the general principles of prevention in a consistent manner, in particular in relation to the matters specified in schedule 2, in order to protect the safety, health and welfare of persons at work...”. Schedule 2 to the Regulations provides a “non-exhaustive list of matters to be considered in particular as regards the application of the general principles of prevention to construction work under these regulations”. Counsel submitted that the schedule 2 matters applied as much to the plaintiff as they did to the defendant, and imposed obligations on the plaintiff to ensure the safety of his own working conditions. In this regard, counsel referred to the acknowledgement by Mr Fogarty that a podium ladder could have been used from the area inside the counter.

### **Conclusions on liability**

**73.** The findings which I have summarised at para. 46 above bring sharply into focus the issue of whether the defendant, as project supervisor, observed its duties under the 2005 Act and the 2013 Regulations. In this regard, on the basis of all of the evidence before the court, I would make the following observations: -

- The primary responsibility for ensuring that the design and construction of the project is conducted in a safe manner is that of the project supervisor – in this case, the defendant – whose responsibility it is to compose a safety plan which in particular must address the risks to safety, health and welfare of persons at work;
- Adjustments are required to be made to the plan which take account of any danger in the work process;
- The project supervisor must coordinate the activities of contractors and make arrangements for the checking of the implementation of safe procedures.

**74.** I do accept the defendant's contention that a contractor responsible for a construction site is not under an absolute duty to ensure that the site is safe and without risk of injury. Article 30 of the 2013 Regulations makes it clear that this duty applies "so far as is reasonably practicable". I also accept, in general terms, that the method statement generated by the project supervisor must on occasion yield to specific instructions given on site when unforeseen circumstances arise. Ideally, any amendments to a method statement, such as those necessitated by a counter being installed at an earlier stage of the process than envisaged, would be duly agreed and minuted so that the safety plan and method statement could be amended accordingly. While this may be difficult to implement in a dynamic and fast-moving construction

process where there is a succession of contractors performing different tasks in sequence, a failure to pay attention to and record changes which have safety implications causes exactly the sort of difficulties for the project supervisor in justifying its actions as the defendant has encountered in the present proceedings.

**75.** There is no doubt that the safety and health plan and the method statement prepared by the defendant were deficient in their consideration of the plaintiff's part in the construction process. The former document is particularly vulnerable to the accusation that it is a generic document which is not targeted to the particular risks of the project. The method statement, while somewhat more specific, omits any mention of painting at all, although it does refer, in the section entitled "ceiling work", to the need to use a podium ladder.

**76.** A method statement which included ceiling painting and gave directions as to use of equipment and requirements for covering units or furniture, and which accurately set out the sequence in which the works were to be carried out would, if presented to the plaintiff in advance, have left both parties in no doubt as to exactly what was expected of them. The precise problems presented by the early installation of the counter would have brought the methodology into strong focus, and resulted in a more targeted and specific conversation between the plaintiff and the defendant prior to commencement of the works.

**77.** Where the safety and health plan and method statement are deficient in some way, it is in my view all the more incumbent on the project supervisor to ensure that instructions which address these deficiencies are crystal clear and understood by the parties to whom they are addressed. I consider that Mr Curley did raise the possibility of standing on the counter to access the ceiling, and that the response of Mr O'Sullivan and Mr Twomey was most likely a casual acquiescence to whatever Mr

Curley – who the defendant regarded as a competent and hitherto reliable subcontractor – considered appropriate. I do not believe that firm instructions were given not to stand on the counter, or that having received such instructions, Mr Curley chose to ignore them. Mr Curley considered that he had a “green light” for his proposition, which was only for a small inaccessible section of the ceiling, on what he thought was a solid smooth surface.

**78.** Given my findings at para. 46 above, and the deficiencies in the safety and health plan and method statement and the manner in which the plaintiff’s query regarding access to the counter was addressed, I am of the view that the defendant was negligent and in breach of statutory duty in contravening s.12 of the 2005 Act and the various regulations to which I have referred above. In particular, I do not consider that the defendant took “all appropriate precautions, so far as is reasonably practicable, to ensure that the site is safe and without risk of injury to the safety, health and welfare of persons at work” as required by Article 30 of the 2013 Regulations.

**79.** However, the issue of liability does not end there. At para. 4 of its defence, the defendant pleaded contributory negligence on the part of the plaintiff on the following grounds: -

- “(a) The Plaintiff failed to watch where he was going.
- (b) The Plaintiff stood on a countertop without permission.
- (c) The Plaintiff covered the sink and then forgot that he had done so.
- (d) The Plaintiff failed to observe.
- (e) The Plaintiff failed to supply adequate equipment for the task.
- (f) The Plaintiff failed to take note of the sink opening despite same being visible through the plastic.

- (g) The Plaintiff was entirely the author of his own alleged misfortune.
- (h) The Plaintiff failed to have any or any adequate regard to his own health and safety.
- (i) The Defendant will rely upon the evidence to be adduced at the trial of the action. The defendant reserves the right to adduce further and better particulars prior to or at the trial of the action.”

**80.** These particulars concentrate on the alleged absence of permission to the plaintiff to stand on the counter, the plaintiff’s negligence in falling through a hole he himself had covered, and the suggestion that clear, rather than black, plastic covered the hole where the accident occurred. While these allegations are not consistent with the findings of this Court, it is clear that the plaintiff has a case to answer in terms of the observance of his own duties. In this regard:

- The plaintiff did not avail of a podium ladder, which could have been placed inside the counter area, and which would not have presented the difficulties with “leaning to one side” presented by use of an A-frame ladder;
- The defendant’s uncontested evidence was that a podium ladder would have been made available to the plaintiff on request;
- There was no edge protection or fall arrest systems on the counter, which the method statement indicated should be in place for “working at height”, nor did the plaintiff use a harness to protect himself in the event of a fall;
- Mr Fogarty gave evidence that, while the role of the project supervisor is to monitor the working procedures of contractors, it would normally ask the contractor to provide a method statement, and this should be



done particularly for a job involving “working at height”. While the defendant might be criticised for not seeking a method statement from the plaintiff, such a statement, if provided by the plaintiff on his own initiative, would have made clear the plaintiff’s requirements and in particular the desirability of an absence of obstructions in the painting area, or the plaintiff’s preferred method of dealing with any such obstructions;

- The point was repeatedly made by the defendant’s witnesses that the plaintiff’s experience of working previously in Starbucks units must have caused him to be aware that a working counter was not a uniform structure and was likely to have apertures or differences in levels which presented a danger to someone mounting the countertop, and that the plaintiff simply did not pay any or any adequate attention to the surface he was mounting.

**81.** There are two overall factors which it seems to me contributed significantly to the accident. Mr Dan O’Sullivan referred in his evidence to a “level of trust” in a subcontractor who has performed to the standard required in many similar units in the past. It seems to me that the defendant took the view that Mr Curley could be trusted to carry out the job satisfactorily, and to make appropriate decisions as to methodology, and in particular whether or not it was safe to stand on the counter. Mr Curley on the other hand regarded the use of the countertop as the easy and obvious solution to getting access to a portion of the ceiling obstructed by the counter. He regarded the use of the scissors lift as involving an unacceptable risk of damage to the expensive countertop, and in my view probably decided that the use of the counter for work which might only take a matter of minutes to address the problematic section of

ceiling was a preferable and simple option, particularly as he considered that this had been authorised by Mr O'Sullivan and Mr Twomey.

**82.** It seems to me however that what the plaintiff did was inherently unsafe, even if he or his workers had not covered the counter. The plaintiff should have requested a podium ladder, and if one was not provided, should have satisfied himself by every precaution that the counter was a safe surface on which to stand. In the event that he was not so satisfied, he should have refused to mount the counter and demanded an alternative safe methodology. His own failure to provide a method statement setting out his own requirements contributed to the somewhat lax attitude to safety which characterised the dealings between the plaintiff and the defendant on this project.

**83.** In the circumstances, while I am satisfied that the defendant caused the loss and damage suffered by the plaintiff, I am also satisfied that the plaintiff contributed significantly to the accident. The defendant had primary responsibility for safety on site, and in my view did not perform its role as project supervisor, as required by the 2013 Regulations, to anything like the required standard. The plaintiff however contributed very significantly to his own downfall, notwithstanding my finding that his actions were authorised, and that the plaintiff was not responsible for covering the counter.

**84.** I am required to allocate degrees of responsibility between the plaintiff and the defendant in circumstances where I find the plaintiff to be contributorily negligent. I find that the defendant was 60% responsible for the accident, with the defendant bearing 40% of the responsibility. The plaintiff's damages will therefore be reduced by the latter percentage.

### **Personal injuries**

**85.** The plaintiff gave evidence that he suffered a severe laceration on his shin, which on the night of the accident was treated in Nenagh Hospital with painkillers. A number of weeks later he was referred to the Regional Hospital in Limerick, where his left shin was x-rayed. He received treatment for an ulcer on the shin, with dressings once a week, in Nenagh Hospital, and was attending a local clinic for six weeks. The ulceration slowly started to heal, but took eight to nine months to heal satisfactorily. The plaintiff wore a compression stocking for six weeks, and took Nurofen Plus for pain. He said that the shin was sensitive, and he has a scar as a result. However, the plaintiff, to his credit, did not make much of this scar.

**86.** The plaintiff stated in his evidence that, at the time of the accident, he was only conscious of the laceration. He did subsequently however become conscious of discomfort in his knee, and some three to four months after the accident, began to experience severe pain in his knee. He was reviewed in July 2018 by Mr Stuart Edwards, a Consultant Orthopaedic Surgeon attached to Aut Even Hospital in Kilkenny. Mr Edwards reviewed an MRI scan which revealed a degenerative meniscal tear but also arthritis in the knee. The plaintiff underwent a local anaesthetic and cortisone and Suplasyn injection. However, on review on 15 September 2018, the plaintiff reported to Mr Edwards that his pain was significant, that his sleep was disturbed and that he could no longer cope. Accordingly, the plaintiff underwent a left total knee replacement on 3 December 2018.

**87.** The plaintiff gave evidence that he took approximately three to four weeks off work after the accident due to the ulceration on his shin. He was very sore, and limping considerably. While he did some painting, he did not go up and down ladders. Both the laceration and the knee replacement appear to have kept him off work for

some time, or limited to light duties. After his knee replacement, he was on crutches for three to four months.

**88.** The plaintiff continued to experience symptoms with instability and “clicking” from his knee. He said he had difficulty in particular descending stairs or ladders. He experienced medial side pain. He was examined by Mr Fiachra Rowan, a Consultant Orthopaedic Surgeon attached to University Hospital Waterford, and in a report of 2 September 2021, Mr Rowan expressed the view that the plaintiff had “pan flexion instability that can only be recovered by revision knee surgery”. In a report of 3 January 2023, Mr Rowan refers to having performed a revision implant in the knee in February 2022 which was “well seated with no complications”.

**89.** The plaintiff was born in February 1964, and is therefore now 59 years of age. He was 53 years of age at the time of the accident. He is a fit man who before the accident was a proficient golfer, with a handicap of five. However, since his knee difficulties he finds golfing difficult and says he has only played one round of golf. He is hopeful of being able to play more after his knee revision. He was also a keen skier, but says that he is now no longer able to ski. He acknowledges that the revision surgery has improved his knee, although he requires to wear a knee support. He says that he cannot work to the same extent, as his knee gets tired.

**90.** Mr Twomey in his evidence stated that he was alerted to the accident by a security man at about 10am the morning after the accident. The security man who was from the shopping centre asked how Mr Curley was. Mr Twomey’s point was that the accident was not reported directly to him by the plaintiff or any of his workmen. When Mr Curley called to the site later that day (the 25<sup>th</sup>), Mr Twomey says that he asked Mr Curley about the incident, and Mr Curley agreed that he was standing on the covered counter and had fallen through one of the apertures in it. Mr Twomey says

that Mr Curley asked Mr Twomey not to tell James O'Sullivan about the incident.

This account was disputed by Mr Curley, who said that he had no reason not to report the incident or relate exactly how it had happened.

**91.** It was also put to the plaintiff that his knee symptoms were not connected with the accident, as Mr Curley had pre-existing degenerative arthritis. Mr Gerald F. McCoy, a Consultant Orthopaedic Surgeon attached to Waterford Regional Hospital who furnished a medical report on behalf of the defendant expressed the view that this arthritis was rendered symptomatic by the accident. Accordingly, it was suggested to the plaintiff that the accident and his difficulties with his knee were not connected. The plaintiff's answer was that he had never had any problem with his right knee prior to the accident.

**92.** Thankfully, it was not necessary to hear oral evidence from the various doctors involved. Medical reports from the plaintiff's general practitioner of 15 October 2018, the reports from Mr Edwards and Mr Rowan, two reports from Mr McCoy on behalf of the defendant and a report from Professor Martin K. O'Donohoe, Consultant Vascular Surgeon, which was proffered in relation to the laceration on the plaintiff's shin and possible complications in relation to varicose veins, were all agreed at the hearing.

**93.** It is accepted that the laceration on the plaintiff's shin has resolved with some residual symptoms of sensitivity and a scar. Although his general practitioner says that he "may need further varicose vein surgery in the future", it is not suggested that this is related to the accident. There is no significant difference between the orthopaedic experts on either side. They each agree that the plaintiff has mild residual symptoms, but that the revision surgery in February 2022 has been a success.

**94.** I found the plaintiff to be truthful and measured about the effect on him of his accident. He is a fit man who enjoys working and who led a very active life outside work. He has undergone very significant pain and suffering over the last five to six years. His shin ulceration required constant management for eight to nine months, and his knee difficulties were not resolved until his revision surgery in February 2022.

**95.** It was suggested to Mr Curley in cross-examination that, given his pre-existing degenerative arthritis, he would ultimately have needed a total knee replacement in any event. It does not seem to me that this conclusion necessarily follows, and I note that Mr McCoy, while suggesting that the pre-existing arthritis has been rendered symptomatic by the accident, does not suggest that a total knee replacement would have been inevitable. It seems to me, as a matter of probability, that the symptoms to the plaintiff's left knee were caused by the accident, and that there is no reliable indication or evidence that he would have required surgical intervention if the accident had not happened. I therefore take the view that damages for pain and suffering must be awarded to the plaintiff in relation to his knee injury in addition to the shin ulceration.

**96.** In this case, I am required to have regard to the "general guidelines as to the amounts that may be awarded or assessed in personal injury claims", the so-called "Book of Quantum" commissioned and published in accordance with the Personal Injuries Assessment Board 2003. The category in the Book of Quantum which most closely applies to the present situation is the "severe and permanent conditions" category in relation to the knee on p.59 of the book. The category specifically refers to "injuries [which] will have required extensive treatment and surgery and include where a knee replacement has been carried out". The valuation band is €65,700 to €81,600.

**97.** The plaintiff suffered a serious injury to his left knee which required two operations, firstly a full replacement of the knee, and subsequently a full revision of his knee surgery. This latter procedure has been a success, although the plaintiff has been left with residual symptoms. His capacity for work has diminished – although he is perhaps getting to the stage of life when that is to be expected – but his active life outside work has also suffered, with his hobbies of golf and skiing being adversely affected.

**98.** I consider the plaintiff's injuries to be at the higher end of the "severe and permanent conditions" category in relation to the knee in the Book of Quantum. I must also take into account the severe pain and discomfort caused by an ulcerated laceration to the plaintiff's shin. Taking all of the plaintiff's circumstances in the round, I am satisfied that an appropriate valuation of damages in relation to the plaintiff's injuries, both past and future, to include the lacerated shin, is €90,000.

**99.** The parties made every effort to agree a schedule of special damages while the trial was ongoing. This covered matters such as hospital expenses, pharmacy, physiotherapy and GP fees, consultant and radiology fees and various other expenses. While there were accountant and actuarial reports in relation to loss of earnings, this was ultimately agreed at €35,000.

**100.** I was informed that a figure of €76,491.85 had been agreed by the parties in relation to special damages, subject to one proviso. The schedule includes for a figure of "interest on credit union borrowings to date" of €15,961.19. The plaintiff explained in evidence that, as he was not privately insured, he has had to fund the original surgery and his revision surgery from his own resources. As he was unable to do so, he borrowed money from his credit union, and accordingly was charged interest, which appears to have mounted up somewhat alarmingly. The plaintiff also referred to

suffering a loss of work due to his inactivity, and it may be that this contributed to his incurring interest on the credit union loan by an inability to discharge the loan as promptly as he would have liked.

**101.** The defendant's difficulty is that there is a lack of corroboration in relation to this interest figure. I accept that the plaintiff is entitled to recover expenses incurred in relation to the surgery, and I accept his evidence that he was obliged to borrow from the credit union to fund the surgery and incurred interest thereby. Due to the lack of corroboration of the interest claim – which in fairness might be difficult to link to the consequences of the injury – I think it would be fair to the defendant to disallow part of the claim. I will therefore permit the plaintiff to recover €9,000 of his €15,961.19 claim. The special damages figure will therefore be a total of €76,491.85, less €6,961.19, which gives a total of €69,530.66.

### **Conclusion**

**102.** I am therefore awarding a total of €159,530.66 (€90,000 plus €69,530.66) in respect of the plaintiff's general and special damages. In view of my findings of contributory negligence, this will be reduced by 40%. I therefore propose to make an award in favour of the plaintiff in the sum of €95,718.40.

**103.** I will give each of the parties a period of fourteen days from the date of delivery of this judgment to make submissions in relation to the order to be made. I would welcome confirmation from the parties that the figures which I have noted as agreed are indeed agreed and correctly calculated. The submissions should address any questions of costs or other orders which the parties may deem appropriate. I propose to issue my order without further reference to the parties, although I reserve the right to convene a hearing in the event that there is a particular difficulty.