THE HIGH COURT

[2016 No. 3562 P.]

BETWEEN

THOMAS KEEGAN

PLAINTIFF

AND

SLIGO COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 30th day of November, 2017

Introduction

1. Since in or about 2004, the plaintiff has been a tenant to the defendant of the property at No. 1 McNeill Drive, Cranmore, Sligo. The property had been supplied by the defendant to the plaintiff, in their capacity as the housing authority for the relevant area. While the tenancy agreement was not put in evidence before the court, it was accepted by all parties, that the plaintiff, was not entitled to carry out works to the property. Instead, he was instructed to report any complaints or problems that he had with the property to the defendant and they would inspect the property and carry out such remedial works as were deemed necessary.

2. This action arises out of an accident which occurred on 18th November, 2013. It is the plaintiff's case that on returning to his house in the early evening, he was caused to slip on the front porch of his house. The porch itself was an exposed porch. The surface of the porch was made up of mosaic tiles. It was common case between the parties that it had been raining earlier that day.

3. The essential issue in this case is whether the tiles were appropriate for use on an exposed exterior porch. The plaintiff's engineer was of the view, that as these were semi-glazed tiles, they would become slippery and dangerous when wet and as such, were inappropriate and unsafe for use in an exposed exterior porch. The defendant's engineer was of a contrary view. He was of the opinion that these were unglazed tiles and as such were perfectly adequate for use at the house.

4. While the engineers disagreed as to whether the surface of the tiles were glazed or unglazed, there was broad agreement between them that having tested the slip resistance of the surface of the tiles; the tiles posed a low risk of slipping when dry, but were in the range of moderate risk of slipping, when wet. The engineers agreed on the results of the slip alert test values, in particular that the tiles were in the medium or moderate risk of slipping category when wet, but disagreed that this finding made the tiles inappropriate for use at the locus of the accident.

5. There was also a dispute between the parties as to whether any complaints had been made by the plaintiff in relation to the tiles and in particular, in relation to the danger of slipping thereon, prior to the time of the accident. The plaintiff maintained that complaints had been made by him to various members of the defendant's staff. The defendant denied that any such complaints had been made by the plaintiff.

6. The defendant also made the case that having regard to the quantity of alcohol which the plaintiff had consumed on the day in question, which was admitted by the plaintiff to have been some five pints of beer, it was asserted that the plaintiff had failed to take reasonable care for his own safety when entering his property and that this lack of care had led to the accident. It was further put to the plaintiff that having regard to the detailed mechanism of the alleged slipping incident, as given by the plaintiff in evidence, that his account was totally incredible and that the accident simply could not have happened in the manner alleged by the plaintiff.

7. As a result of the accident, the plaintiff suffered a pilon fracture to his left ankle which required surgical fixation. Two plates were inserted into his ankle joint. These were subsequently removed by surgical procedures carried out in November, 2015 and August, 2016. The plaintiff's surgeon is of opinion that he has gone on to develop osteoarthritis in the ankle joint as a result of the injury.

The Evidence on Liability

8. The plaintiff stated he spent most of his working life as a building labourer, doing paving work on roads and footpaths in the U.K. He returned to Ireland in May, 2004. He was allocated the property at 1 McNeill Drive, Cranmore, Sligo by the defendant. He had been unemployed for a number of years prior to the accident.

9. On 18th November, 2013, he left his house in the morning for the purpose of attending a funeral. On exiting the front door, he noted that a rubber backed mat, which he had placed on the porch in front of the hall door, was extremely wet. As was his usual practice, he lifted the mat and brought it to his side gate and hung it over the gate. He then proceeded into Sligo, where he attended the funeral. After the mass and having attended at the burial, he visited three public house, were he consumed a total of five pints. He then went to a supermarket, where he purchased some sandwiches. He ate one of these on his way home.

10. When he arrived at his house, he noted that the mat had been removed from his side gate. He did not know who had removed it, or to where it had been taken. He proceeded down the garden path and came to the tiled porch area in front of his hall door. He stated that it had been raining that day and the tiles were wet. He placed the key into the lock of the front door with his left hand and depressed the handle with his right hand. While moving forward his left foot slipped on the tiles and he fell forward, through the partially opened hall door landing in his hall. He managed to crawl to the kitchen and then made his way to the telephone, from which he phoned for an ambulance. He was taken to Sligo Hospital, where his ankle was x-rayed and placed in a back slab. He was admitted to hospital. On the following day operative treatment was carried out to the ankle by Mr. William Gaine FRCSI, who inserted two plates and screws into the fractured area. The ankle was then placed in a plaster cast. The remainder of the plaintiff's evidence in relation to his injuries and subsequent recovery, will be dealt with later in this judgment.

11. In the course of his evidence, the plaintiff stated that on several occasions prior to the accident, he had gone to the Regeneration Office of the defendant, which was situated close to his house, and had complained about the tiles on his front porch being slippery when wet. He stated that the staff in the office took a note of his request, but he heard nothing from any representative of the defendant. He stated that at some later time, the defendant did arrange for the windows and exterior doors on his property to be changed, as part of the regeneration of the estate generally. The plaintiff stated that he asked the contractor to move the front door forward, so as to close in the porch area, but he was told he could not do that, as the ESB meter, which was situated in the porch area, had to be accessible for inspection. The plaintiff stated that if the front door had been moved forward so

as to enclose the porch area, he would then have raised the interior porch level with concrete, so as to make it flush with the level of the hallway.

12. In cross-examination, the plaintiff was strongly challenged in relation to his alleged complaints concerning the tiles in the porch area. It was put to the plaintiff that whenever complaints were made by any tenants to the defendant, either at the Regeneration Office or elsewhere, those complaints would be logged and an inspection would be carried out and such remedial action as was deemed appropriate would then be sanctioned. It was put to the plaintiff that he had made a large number of complaints, in relation to various aspects concerning his property, but the evidence of the defendant's representatives would be that there were no complaints at all in relation to the tiles in the porch. The plaintiff was adamant that he had made complaints in the Regeneration Office. He stated that sometimes his complaint was put onto a yellow sticker. He stated that he made the complaints to various girls who worked in the office. He could only recall their first names. He recalled making complaints to a woman named Kay and a woman named Sinead. He stated that he had not made any complaints to a lady named Marissa. He stated that he had also made an informal complaint to Mr. Dessie McGarry, the Estate Manager, when he met him one day on the street. He had also asked Mr. Noel Meehan, if his front door could be moved forward, so as to enclose in the porch area.

13. The plaintiff was asked whether he knew Ms. Marissa Morgan, who worked in the Regeneration Office. The plaintiff said that he did. It was put to the plaintiff that Ms. Morgan would state that the record showed that he made 39 complaints since the system was computerised and twelve complaints prior to that, but that none of these related to the tiles on his porch. The plaintiff stated that he might not have made any complaints to Ms. Morgan, but he had made complaints to others in the Regeneration Office. In relation to his request made to Mr. Meehan, in relation to moving the front door, Mr. Meehan would say that there had been requests made by the plaintiff in relation to putting in solid panels into the new front door, rather than glass panels and he had also made certain requests concerning windows in his sitting room. These had been passed on to Mr. McGarry, who subsequently wrote to the plaintiff in relation to his concerns. However, there was no mention of moving the front door forward so as to enclose in the porch. The plaintiff was adamant that he had made such a request of Mr. Meehan, but had been told that it was not possible due to the position of the ESB box.

14. It was put to the plaintiff that in a letter dated 26th February, 2009, Mr. Gary Kelly, the community warden, had written to the plaintiff in relation to a number of repairs that he had requested be carried out to his residence. Attached to that letter was a list of twelve such requests. It was put to the plaintiff that there was no mention of any tiles in that list. The plaintiff stated that there had been a number of faults with his house. When he first moved in, he had been told that he would be moving from the property, as the County Council were going to knock the house. However that was later changed, so he made complaints at that stage. The complaints in 2009 were in relation to his kitchen, the windows and other matters. He accepted that he had made complaints in relation to the various items on the list, but was adamant that he had also mentioned the tiles. It was put to the plaintiff that there was no mention of him having made any complaints, or that these complaints were ignored by the defendant, in the Personal Injury Summons issued on his behalf. The plaintiff stated that he may have forgotten to mention the complaints to his solicitor.

15. The plaintiff was questioned at length in relation to the exact mechanics of the slip and fall. It was put to the plaintiff that if he had managed to insert the key into the key hole with his left hand and was depressing the handle with his right hand, it would not have been possible for him to have been moving at that time and therefore he could not have slipped on any wet tiles in the porch as alleged. The plaintiff stated that he had slipped and fallen forward through the partially opened front door, as a result of his left foot slipping on the wet tiles. It was put to the plaintiff that the accident simply could not have happened in the manner described by him. The plaintiff said that it had happened in that way.

16. It was put to the plaintiff that he had had a considerable quantity of alcohol to drink that day prior to the accident. The plaintiff stated that he had had five pints since returning from the graveyard, but that that had not unduly affected him.

17. Finally, it was put to the plaintiff that he had not been entirely frank with his own doctor, or with the defendant's doctors, in relation to his medical history. In particular, he had failed to mention that on 15th July, 2014, while walking along the public footpath and using a stick, his foot had slipped from the footpath and he had suffered an inversion injury to the left ankle. Nor had he told them that he had attended at hospital, where x-rays had been taken. The plaintiff stated that that had been a very minor incident and that he had only gone to hospital to make sure that he had not caused any further, or additional, damage to his left ankle. X-rays had been taken and he had been reassured by the medical staff that no new damage had been caused. For that reason he had not thought it significant and had not mentioned it to the doctors, or on his P.I.A.B. form.

18. Evidence was given by the Mr. Brendan O'Hara, who is the tenant of No. 2 McNeill Drive, Cranmore, Sligo. He stated that in approximately 2010, he had asked the defendant to replace the tiles in his front porch, due to the fact that there had been a 1.5 inch gap running through the tiles, which was causing an ingress of dampness into the walls of the property and into the hall. The defendant had replaced the mosaic tiles with large black tiles, as shown in photographs Nos. 9 and 10 of the photographs taken by Mr. O'Brien. Mr. O'Hare stated that these tiles were totally unsuitable, as they were particularly slippy when wet. He stated that he had made complaint in relation to the black tiles that had been placed in the porch and that it was some six years later, in or about 2016, that the tiles had been replaced.

19. In cross-examination, it was put to the witness that he had in fact only made complaint in relation to those tiles in November, 2015 and that following an inspection of them, they had been replaced very promptly on or about 6th January, 2016. In these circumstances, it was put to the witness that while it was accepted that the black tiles were unsuitable for using in an exterior porch, as they were interior bathroom tiles, the defendants had reacted promptly to his complaint. The witness did not accept that.

20. The key evidence on liability on behalf of the plaintiff, was given by Mr. Tom O'Brien, consulting engineer. He had inspected the locus in February 2015 and had prepared a booklet of photographs for the court. He noted that the front of the property in question was south/south-west facing. He stated that generally along the western seaboard, the winds generally came from a south-westerly direction. The porch opening was 2110mm high. The width of the tiled area was 1480mm. The depth from the hall door to the front edge of the porch was 850mm. Mr. O'Brien noted that there was a very slight slope in the porch surface running away from the hall door at a gradient at 1/33.

21. Mr. O'Brien stated that the modest slope on the porch, had presumably been put in place to prevent water from lodging on the surface. It was not an unusual feature. He did not criticise the design of the porch on account of the presence of this slope. However, he stated that it was widely known and recognised that a slope reduces the slip resistance of a surface.

22. Mr. O'Brien stated that the tiles in the porch were mosaic tiles which measured 20mm x 20mm. These were shown in close up in photographs No. 7 and 8. From his inspection of the locus, he was satisfied that these were semi-glazed mosaic tiles. This meant that, while they were not fully glazed, such as one might find in an interior bathroom, they did have some level of matt glazing on the

surface. This meant that the tiles would constitute a significant risk of slipping, when wet. Given that this was a south-west facing exterior porch, it was foreseeable that in the weather conditions pertaining in the west of Ireland, the tiles would become wet on a frequent basis. As such it was foreseeable that persons traversing the porch area, would be exposed to a risk of slipping on a frequent basis.

23. Mr. O'Brien agreed with the results of the slip tests carried out by the defendant's engineer. This showed that the tiles gave a good slip resistance when dry, but were in the category of medium or moderate risk of slipping when wet. When wet and dirty, the slip resistance value was 133. When the tiles were wet and clean, the resistance value went up to 138. Anything over 130 is classed as posing a moderate risk of slipping. Mr. O'Brien stated that given these values, he was of the opinion that these particular tiles were unsuitable for use in an exterior porch. He stated that the defendant should have used unglazed tiles, possibly with ridges or dimples in the tile surface to aid traction and reduce the risk of slipping.

24. Mr. O'Brien stated that he had looked at other houses in the same estate. He had looked at a total of 62 houses, including the plaintiff's house. Most of the porches on the properties, numbering 52 in total, were either enclosed, or had a concrete surface. There were nine porches which were still exposed and had a tiled surface.

25. In cross-examination, it was put to the witness that the defendant's engineer was firmly of the view that these were, in fact, unglazed tiles. During the course of the hearing and by agreement between the parties, both engineers attended at the plaintiff's house on 7th November, 2017, to see if the dispute as to whether the surface of the tiles was glazed or unglazed could be resolved. Unfortunately, it was not possible to resolve the dispute. Both engineers remained of their differing views as to the nature of the surface of the tiles.

26. Mr. O'Brien remained of the view that these were semi-glazed tiles, meaning that there had been a form of glazing applied to the surface of the tiles, albeit with more of a matt finish than a high gloss finish, as would be found on interior tiles. In support of this opinion, he referred to the two photographs that had been taken in the course of the further inspection of the locus. In photograph No. 2, the middle tile had been damaged such that the surface had been chipped away. The surface of that tile was rougher and appeared untreated, in contrast to the surface of the other tiles, which were clearly shown in the photograph. He stated that he had reached that opinion, both due to the visual appearance of the broken centre tile and the appearance of the remaining tiles around it, and also by touching the surface of the broken tile and the other tiles. In particular he was of the view that there was a marked difference between the surface of the exposed tile in the centre and the surface of the tile to its left. He did not accept that any difference between the tiles, was simply due to weathering over time.

27. It was put to the witness that in the course of the joint inspection water had been applied to the tiles and that water had been absorbed, indicating that the tiles were untreated. Mr. O'Brien disagreed; he stated that water had not been put on the tiles. Instead, he had licked his finger and rubbed the surface of the tile. It was further put to him that looking at the tile in profile, as could be seen in the broken centre tile in photograph No. 2, that there was no difference between the surface of the other tiles and the material in the broken tile as shown in the first line in photograph No. 2. In other words, that the surface of the tile and the material in the tile itself, as shown in a profile view, were the same. Mr. O'Brien disagreed, he was of the view that there did appear to be a difference between the material in the body of the broken tile and the appearance of the surface of the other tiles.

28. Mr. O'Brien was also of the view that when one looked at the entire porch area, the fact that there was no evidence of specific wear and tear on any particular tiles, other than the broken tiles shown in photograph No. 2 taken on 7th November, 2017, this indicated that the surface of the tiles had been treated in some way. He remained of the view that these tiles were not unglazed, but were semi-glazed tiles, meaning that a dull gloss finish had been applied to the surface of the tiles. He remained of the view that that fact, allied to the fact that when wet, they posed a moderate risk of slipping, rendered them unsuitable for use in an exposed porch.

29. In cross examination, Mr. O'Brien conceded that the small slope in the porch was not unusual and he did not criticise its design on that account. However, its presence would have been a contributing factor in relation to the mechanics of actually slipping, which was something that had been put in issue by the defendant in its cross examination of the plaintiff.

30. He also conceded that small mosaic tiles were preferable to larger tiles, as the grouting between the tiles added to the slip resistance of the general surface.

The Defendant's Evidence

31. Mr. Morgan Duggan, Consulting Engineer, gave evidence on behalf of the defendant. He examined the locus on 17th May, 2017. He carried out a slip alert test and set out the resulting values at appendix A to his report. From these tests he found that when the tiles were wet and dirty, the average STV was 133. This placed it at the lower end of the medium risk category. He stated that this equated with a Pendulum Test Value of 37.9. Under the relevant British standard the total PTV scale was 0-75. 0-24 was a high risk of slipping category, 25-35 was moderate risk and anything of 37 and higher, was in the low risk category. Accordingly, the PTV for these tiles show that it was in the low risk category.

32. In relation to ceramic tiles generally, they present a high risk of slipping. This would be in relation to glazed tiles, which present a high slip risk when wet. However, unglazed tiles have a low to medium risk of slipping. He was of opinion that these were the type of tiles used on the plaintiff's porch. He stated that he had tested the slip resistance with his shoe and found that the tiles on the plaintiff's porch presented good slip resistance to his shoes.

33. Mr. Duggan made the point that the use of unglazed tiles was very common in both the domestic and general urban context. Such tiles are to be found in the entrance to shops and pubs, particularly on O'Connell Street in Sligo and Shop Street in Galway. He stated that tiles were usually chosen because they were aesthetically pleasing, were durable and were easy to clean. While a concrete surface would be in the low slip category, it needed to be maintained, so as to prevent the build up of algae and moss, which would cause the surface to become slippery when wet.

34. Mr. Duggan stated that following the joint inspection on 7th November, 2017, he remained of the view that these were unglazed tiles. He stated that looking at the photographs which had been taken at the time of that inspection, the visual appearance suggested that the surface of the tiles was unglazed. The surface of the tile was rough to touch and where the surface had been broken on one of the tiles, the inner portion of the tile seemed to be of the same material as the surface of the surrounding tiles. He stated that this was clear from the profile of the damaged tile, which was the second tile from the right as shown in the front row of tiles in photograph 2 taken on 7th November, 2017.

35. Mr. Duggan stated that glazing involved the application of a liquid glass compound at very high heat to the surface of the tile. There was no evidence that any such process had been carried out to the tiles in this porch, as there was no evidence of any film of

any nature on the surface of the tiles. He stated that they had carried out a moisture test, by placing a licked finger across the top of the tile and within seconds, the tile had dried, which suggested to him that the surface was an untreated surface, which permitted absorption of moisture. This would not have happened if the surface had been glazed. He further stated that he was not aware of the term "semi-glazed" tiles. As far as he was aware, tiles were either glazed or unglazed. In this situation he was satisfied that the tiles were unglazed.

36. He did not agree that from the photographs taken at the time of the joint inspection, the inner material in the tile was of a lighter colour than the surface of the surrounding tiles. Insofar as there may have been a difference in colour, he thought that that may have been due to weathering over time, as the tiles had been placed in situ when the house was built circa 1977. In relation to the point made by Mr. O'Brien that the tiles appeared to have been very durable and in particular the surface thereof appeared durable, suggesting that they had been treated; he stated that tiles were manufactured and designed to be durable. The application of glazing to the surface was purely for aesthetics, rather than for durability of the tile.

37. In cross examination, Mr. Duggan accepted that the tiles had been placed on a porch which was south south-west facing. He accepted that the porch would become wet whenever it was raining from the prevailing winds coming in a south westerly direction. He agreed that on an external porch, ideally the surface thereof should not be slippy when wet. It was put to the witness that it was not appropriate to provide a surface which had a medium risk of slipping when wet. Mr. Duggan agreed that the surface should have a low/medium risk of slipping when wet. He accepted that in the plaintiff's case, the tiles provided a medium bordering on low risk of slipping. He accepted that it was in the medium range.

38. Mr. Duggan further accepted that while he had estimated a PTV, which put the tiles in the low risk category, he had not done a pendulum test. He had done a Slip Alert Test, which put the tiles in the medium category, but on the cusp of the low category. He accepted that if the area was wet, but clean, it would have an SAT of 138. When wet and dirty, the tiles had a value of 133 and on this account he had given an average value of 134 when wet. However, he stated that even at 138, this was at the lower range of medium. Mr. Duggan was asked as to whether a medium risk surface when wet, was acceptable for use on an exposed porch. He stated that in his opinion the tiles were acceptable for use in such an area, given that they had an average SAT of 134.

39. It was put to the witness that if an unglazed tile would have a low risk category when wet, the test findings in this case indicated that the tiles were probably glazed, or at least semi-glazed. Mr. Duggan did not agree with that assertion. He stated that an unglazed tile would give a low, or a medium/low risk of slipping when wet. When asked as to what unglazed tile would actually give a medium reading when wet, the witness stated that this would depend on the amount of wear on the surface of the tile, but they would be in the medium/low category when wet. It was put to the witness that if the tiles were unglazed as alleged by him and were mosaic tiles, then they should be in the low risk category when wet. Mr. Duggan stated that a mosaic tile, due to its size and the number of joints, would provide better slip resistance than larger tiles. Mr. Duggan accepted that some unglazed tiles would be in the low risk category when wet. However, he disagreed with the assertion that because these were unglazed tiles and were mosaic tiles, then they should be in the low category when wet. He stated that he would expect such tiles to be in the low or medium/low risk category, due to the fact that tiles which are worn over time, could have a lower slip resistance value. Here the tiles had been in situ approximately 40 years, so they would have disimproved in terms of slip resistance over time. He thought that if they had been tested 40 years ago, they would probably have been in the low category when wet.

40. It was put to the witness that there was no evidence of any wear on the surface of the tiles from the photographs taken on 17th November, 2017. The witness stated that there was some evidence of wear, as one would get uniform wear over the entire surface. It was inevitable that there would be some wear over 40 years. When asked to point out where on the photographs, there was evidence of wear, he stated it was uniform over the entire surface, rather than being evident in certain areas. Pedestrian traffic would cause the surface to wear. It would not be at the same places each time. One would have uniform wear over the entire surface of the tiles. It was put to the witness that if there had been wear over the years, one would have expected it to lead to and from the hall door, but there was no evidence of that in the photographs. The witness agreed, but stated that the wear was uniform, in that there was no pattern of wear. There would also be wear caused by cleaning of the tiles and by general weathering. It was put to the witness that the fact that there was very little wear visible on the surface of the tiles, suggested they had been treated. Mr. Duggan did not agree with this assertion.

41. Mr. Duggan did not accept that the tiles in question were semi-glazed. He stated there was no such thing as a semi-glazed tile. They were either glazed or they were not. There was no evidence of a film on the surface of the tiles.

42. It was put to the witness that from the photographs taken at the joint inspection, it was clear that on the broken tile, the interior piece of the tile was different to the surface of the broken tile. Mr. Duggan stated that the underlying part was of a lighter colour, because it was not subjected to the same amount of weathering, as the surface had been. He agreed that there was a slight difference between the two portions of the tile. The difference in texture was due to the fact that in ceramic tiles, when they are broken, they will have rougher edges on the broken surface. It was put to the witness that there was a difference in colour and texture shown in the photographs. Mr. Duggan agreed with that assertion. He stated that one would expect such a difference with a broken surface, but the material on both the surface and the inner portion of the tile was the same.

43. Mr. Duggan accepted that a concrete path would constitute a low risk of slipping when wet or dry, as long as there had not been a build up of algae or moss.

44. Evidence was given on behalf of the defendant by Ms. Marissa Moran, who was a community worker employed by the defendant. She had been part of its Estate Management Team in Cranmore since 2008. She stated that if a tenant had a complaint, they would come to the regeneration office in the estate, which was situated across the road from the plaintiff's house and would make their complaint there. The complaint would be logged and sent forward for further action. Up to 2010, the complaints were mainly recorded on paper. Since that time, they were recorded on the computer system. From that system, she was able to tell that since 2010, the plaintiff had made 39 complaints in relation to various aspects concerning his property. There had been no complaints in relation to the tiles. He had also made complaints prior to that time, but again there was no record of any complaints in relation to tiles. She was not aware personally of any complaint from him in relation to the tiles.

45. Ms. Moran stated that as part of the regeneration project, 67 houses had been knocked down in 2008, and more had been demolished in 2009. They had also carried out refurbishment of a number of houses in the estate. They had never replaced tiles on the porches, except for the tiles, in Mr. O'Hara's house. She stated that the decision not to replace the tiles but instead to higher the level of the porch with a concrete surface, was done so as to enable disabled access to the front door and hall. She stated that they had never moved the front door of the property forward to the edge of the porch area, as this was considered to constitute a trip hazard. Those houses where the hall door had been moved forward, were generally in private ownership.

46. In relation to the complaint made by Mr. O'Hara concerning the large black tiles which had been placed on his porch, she stated that the complaint was logged on 27th November, 2015. Following that the locus was inspected and in January 2016, the tiles had been replaced with cement.

47. In cross examination, Ms. Moran accepted that in all the refurbished houses the tiles had been removed and had not been replaced, but, as stated, that was due to the requirement for providing disabled access to the property. If the plaintiff requested replacement of his tiles, the porch area would be inspected and a decision would be made following such inspection. She was not able to say what decision would have been reached. She could not say what would have happened if he had requested a closed in porch, as they did not put in such porches due to them being seen as a trip hazard.

48. Ms. Moran stated that she would always log all requests or complaints made by tenants, even though the Council may go back to them and say that they were not going to carry out the work requested by the tenant.

49. Evidence was by Mr. Noel McMahon, who was employed by the defendant as an Estate Officer in the Cranmore Estate. Previously he had been the clerk of works attached to the Capital Projects Department up to 2014. On 27th April, 2011, he had done a survey of the doors and windows in the plaintiff's property. This had been done for the purpose of an upgrade of the doors and windows to double glazed PVC windows and doors. The plaintiff asked him could one of the sitting room windows be blocked up, as he had concerns about anti-social behaviour in the area. He also made a request in relation to solid panels in the hall door. Mr. Meehan stated that he referred these requests to Mr. McGarry, who was the Estate Officer at that time.

50. Mr. Meehan stated that the plaintiff did not ask him to move the front door out to the edge of the exterior porch. On 26th October, 2011, a contractor was due to start work on the doors and windows of the plaintiff's property. The plaintiff had a number of requests in relation to sashes on certain windows and solid panels in the front door. Mr. Meehan forwarded these on to Mr. McGarry. As far as he was aware, Mr. McGarry wrote back to the plaintiff.

51. He recalled that at that time, the plaintiff had refused to allow the new windows to be inserted, notwithstanding that they were on site. The plaintiff was asked to attend a meeting, but the witness did not think that he attended the meeting. On the following day he met the plaintiff and it was agreed that they would fit a solid front door, but only some of the sashes on the windows. An agreement was reached that the works could be carried out. He met the plaintiff a number of times on the street after that. He never mentioned the tiles or the porch to him.

52. In cross examination Mr. Meehan stated that he had had a number of contacts with the plaintiff in relation to the upgrade of the windows and doors. He had first met him when carrying out his survey. He also met him when the windows and doors were being measured and he met him at the time that the windows were fitted. He conveyed the plaintiff's requests in relation to the doors and windows verbally to Mr. McGarry. He denied that any request had been made by the plaintiff that he would move the door forwards to close in the porch. If such a request had been made of him, he would have forwarded it on in the usual way. He accepted that the ESB meter would have to be moved, if the front door was moved forward. The tiles would also have been removed so as to enable damp proofing to be laid.

53. Mr. Meehan confirmed that when the contractors had been on site on the plaintiff's property, the plaintiff had the concerns as set out in Mr. McGarry's letter dated 26th October, 2011. The witness confirmed that if the plaintiff had asked him in relation to relocation of the front door, he would have pointed out the difficulty in relation to the location of the ESB meter.

Legal Submissions on Liability.

54. At the conclusion of the case, Mr. Finlay S.C. made a number of submissions on behalf of the plaintiff. Firstly, he submitted that under the Occupiers Liability Act, 1995, the defendant was the occupier of the property under the Act, because the defendant had retained a sufficient level of control over the property, such that it was appropriate to impose a duty on them towards entrants onto the property. In this case, the plaintiff was not permitted to alter the floor in the porch, only the defendant could do that. In such circumstances the defendant was the "occupier" of the property within the meaning of the 1995 Act. The plaintiff was a visitor on the property and as such was owed the common duty of care by the defendant. It was submitted that for the defendant to provide a tiled surface on the exterior porch, which had a moderate risk of slipping when wet, established that the defendant had not complied with its statutory duty owed to the plaintiff under the 1995 Act.

55. Secondly, the plaintiff relied on the decisions in *Siney v. Dublin Corporation* [1980] IR 400 and *Burke v. Dublin Corporation* [1991] 1 IR 341. It was submitted that these decisions established that when a local authority made housing available under the Housing Act, 1966, there was an implied covenant that the property would be and would remain, fit for human habitation. It had been pointed out in the Burke case that although the Housing Act had set out in the second schedule thereto, twelve considerations as to the fitness of a premises for human habitation, the Court was not confined to those twelve considerations when considering if the house was fit for human habitation and whether there had been compliance with that implied covenant.

56. In particular, item 3 on the list in the second schedule was relevant. It provided:-

> "Second Schedule
>
> Matters to which a Housing Authority are to have regard in considering whether a house is unfit for human habitation….
>
> 3. Safety of staircases and common passageways including the state of paving in any yard or open space appurtenant to the house."

57. It was submitted that this clause would include the plaintiff's exterior porch. It was submitted that the plaintiff's house was not fit for human habitation if there was an unacceptable hazard of slipping on the porch surface when wet.

58. It was further submitted that the obligation on the defendant under the covenant was absolute. It was not dependant on any complaints having been made by the tenant. The obligation to provide accommodation which was fit for human habitation rested on the defendant both at the commencement of the tenancy and during the tenancy. It was submitted that the test carried out by the defendant's engineer had recorded a moderate slip risk on the tiles when wet, which meant that the house was not fit for human habitation at the time of the accident.

59. Thirdly, Mr. Finlay stated that the plaintiff also framed his action in negligence. However, he rested his submissions primarily on the first and second grounds set out above. If the plaintiff succeeded under grounds one or two above, then he would succeed under

ground three as well. However, complaints may be relevant to the third ground. If the Court accepted that complaints had been made, this would increase the plaintiff's cause of action in negligence against the defendant. However the making, of complaints, or their absence, would not effect the issue of liability under grounds one or two above.

60. In response, Mr. Bland S.C. on behalf of the defendant submitted that this was a case in relation to occupier's liability. The law governing the liability of an occupier, was contained in the Occupier's Liability Act, 1995. The old duties owed at common law to various categories of entrant, no longer applied. Counsel accepted that there could be more than one occupier and that the defendant could be classed as an occupier of the property. It all depended on the extent of control exercised over the property. The landlord and the tenant could both be occupiers of the property.

61. However, it was submitted that the tiles, which on testing were shown to have a moderate/low slip risk when wet, did not constitute a breach of the common duty of care owed by the defendant to the plaintiff under the 1995 Act. Counsel accepted that the defendant was the person in his capacity as landlord, who exercised control over this premises. He accepted that the plaintiff could not effect any structural changes to the premises without the defendant's consent.

62. Counsel submitted that the plaintiff had to establish three matters in evidence. Firstly, he had to establish the mechanism of the accident. It was submitted that the plaintiff's account as to how the accident occurred was totally implausible. It was submitted that his account that he had walked up to the front door, negotiated the key into the lock with his left hand and depressed the handle with his right hand and then slipped and fell forward into the hall, was totally implausible. It was submitted that that could not have happened in the manner described by the plaintiff. It was submitted that it was not possible to put the key into the lock, turn the key and depress the handle and slip and fall through the door. If the Court was satisfied that the accident could not have happened in the manner described by the plaintiff, that was the end of the case.

63. Secondly it was submitted that the plaintiff's evidence in relation to the making of complaints, had been totally refuted by the strong evidence of the defendant's witnesses. In the circumstances, it was submitted that the plaintiff had given false and misleading evidence in a material respect i.e. in relation to the making of complaints and as such his case should be dismissed.

64. Thirdly, it was submitted that the locus did not present a danger. It was submitted that the evidence of Mr. O'Brien had been that the tiles constituted a danger if they were glazed, or semi-glazed. It was submitted that the court must therefore hold that the tiles were glazed in order to impose liability on the defendant. Mr. O'Brien had stated that the defendant should have supplied unglazed tiles. It was submitted that the court should accept the evidence of the defendant's engineer, to the effect that the tiles were unglazed. If this evidence was accepted, the finding on liability should be in favour of the defendant.

65. It was submitted that as the tiles had an average STV of 134, they did not constitute a danger in a small exterior porch, which the plaintiff had negotiated thousands of times over the years. Such tiles were ubiquitous in commercial and residential premises in Sligo and Galway. While the defendant could have put in a concrete surface, that would have been at the expense of aesthetics and concrete would have posed a danger due to dirt and moss.

66. It was submitted that the duty under s. 3 of the 1995 Act was not mechanical. It was a duty to take such care as was reasonable in all the circumstances, having regard to the care which it was reasonable to expect that the visitor would take for their own safety while on the premises. It was submitted that given the large area of the housing estate under control of the local authority, the issue of complaints in relation to the tiles was relevant. The defendant could not inspect all areas in the estate on a constant basis. The question of the plaintiff making complaints was relevant. It was submitted that the defendant's evidence concerning this aspect was strong and that the court should find that no such complaints were made by the plaintiff. It was submitted that one had to look at the realities of life and at the burdens placed on the defendant in its capacity as the local authority and at the responsibility of the tenant to take reasonable care for his own safety. It was submitted that an STV on 134 was appropriate for use in an exterior porch. If these tiles were found dangerous, similar tiles would have to be removed from many shop and public house premises throughout the country.

67. In replying submissions, Mr. Finlay S.C. submitted that it had not been put to the plaintiff that he did not slip on the tiles as alleged by him. If the defendant had wished to make the case that he had met with his accident elsewhere, or in some other circumstances, they should have put that case squarely to the plaintiff. Secondly, Mr. O'Brien's evidence did not rest on the question of the tiles being semi-glazed. His evidence was, that when the tiles had a medium or moderate slip risk when wet, such tiles were inappropriate for use in an external south west facing porch.

Conclusions on Liability

68. A lot of time in this case was taken up with an exploration of the issue as to whether the plaintiff had in fact made complaints to the defendant prior to the time of the accident, in relation to the slippery nature of the tiles on his front porch. While the plaintiff made the case, that he had made such complaints in the regeneration office and in particular to two women by the names of Kay and Sinead, this was hotly disputed by the defendants. Ms. Moran gave strong evidence that she had worked in the regeneration office for a considerable period and that no such complaints had ever been made to her personally. She further gave evidence that whenever a tenant made a complaint, it would be recorded prior to 2010 in manual form and subsequent to that date, on the computer. It would be forwarded on for further evaluation and action as necessary. She stated that having regard to the records available to the defendant, while the plaintiff had made a large number of complaints over the years, there were no recorded complaints in relation to the tiles on his front porch.

69. The plaintiff had also stated in evidence that he had made a request to have the front door on his porch brought forward to the exterior edge of the porch, so as to enclose in the porch. Again, this was denied by the defendant. However, Mr. Meehan did concede in cross-examination, that if the plaintiff had asked him about moving the front door forward, he would have indicated that that was not possible due to the fact that the ESB meter had to be accessible. This was exactly the reason that the plaintiff had stated that he was given by other persons, when declining his request to move the front door.

70. I do not think it is necessary to resolve this issue in order to reach a conclusion on liability in this case. While the defendant's evidence was reasonably strong, the defendant did not submit in evidence any records either from the computer, or otherwise, to establish that the plaintiff had, in fact, made complaints, but had never mentioned the tiles. Nor did they call either of the two women identified by the plaintiff. However, I do not think the making of complaints is relevant, for the simple reason that these tiles were either safe for use in an exterior porch on a property that was facing in a south westerly direction, or they were not. The fact that the plaintiff may not have made any complaints about them, did not turn them into safe tiles, if they were otherwise unsafe for use in that location. The converse is also true, even if the plaintiff had made complaints about the tiles, due to the fact that he felt that they were slippery when wet, would not have rendered them unsafe, if in fact the tiles were perfectly safe for use in an exterior porch. Accordingly, I am not going to make any finding as to whether or not complaints of either a formal, or informal, nature were

made by the plaintiff in relation to the tiles on his porch prior to the time of the accident.

71. Considerable time was also spent analysing the minutiae of the mechanism of the slip, as described by the plaintiff in evidence. Mr. Bland, S.C., submitted that it was simply implausible for the plaintiff to suggest that he had managed to insert the key into the lock with his left hand, had depressed the handle with his right hand and was moving through the partially open door towards the hall, when his left foot slipped causing him to fall through the doorway and into the hall. It was suggested that this was all the more implausible, due to the fact that there was a slight slope on the porch leading from the hall door to the concrete path beyond the porch itself. I do not think that it is possible to break down the mechanics of a slip and fall into neat sequences which lawyers, or others, may think convenient, at a considerable remove from the time of the accident. It would have been different if there had been medical evidence to the effect that such an injury could not have happened from the circumstances of the accident as described by the plaintiff. However, there was no such evidence.

72. Furthermore, as pointed out by Mr. Finlay, S.C., in submissions, no case had ever been put to the plaintiff, to the effect that his accident could not have happened in the manner alleged by him and therefore, must have happened at some other location, or in some other manner. In the absence of any evidence at all that this accident may have happened, either in some other way, or in some other location, I decline to make any finding that the plaintiff has put forward a fraudulent claim, or has given false and misleading evidence in this regard.

73. The plaintiff was also cross examined in relation to the amount of alcohol that he had consumed on the day in question. He candidly admitted that he had had five pints of beer prior to returning home. Having regard to the fact that this is a man who has worked in manual labouring jobs all his life, I decline to make any adverse finding against him having regard to the level of alcohol consumed by him that day.

74. The central issue is whether these tiles were appropriate for use in an external porch. On this issue, I prefer the evidence of Mr. O'Brien to that given by Mr. Duggan. It seems to me that having regard to the appearance of the tiles as shown in the close up photographs, taken at the time of the joint inspection on 7th November, 2017, there appears to be a difference between the surface of the surrounding tiles and the inner profile of the broken tile, shown in the front row of the tiles in photograph No. 2. It seems to be agreed between the engineers that there is a difference in colour and texture, between the interior of the broken tile and the surface of the surrounding tiles. I prefer Mr. O'Brien's evidence that this was due to some form of glazing on the surface of the tiles, rather than being due to the effects of weathering, subsequent to the breakage of the second tile as shown in the photograph.

75. Furthermore, I accept the evidence of Mr. O'Brien that given that these are mosaic tiles and that they have an STV of 138 when wet and clean, and an STV of 133 when wet and dirty, thereby placing them in the moderate category of slip risk, this supports the contention that the tiles are probably glazed or semi-glazed as described by Mr. O'Brien.

76. Furthermore, the fact that there is very little, or no wear and tear evident on the surface of the tiles, either caused by pedestrian traffic, cleaning or weathering, seems to indicate that the surface of the tiles has probably been treated with some form of glazing.

77. Even leaving aside the issue as to whether these are unglazed or glazed tiles, I accept the evidence of Mr. O'Brien that providing tiles on an exterior south-west facing porch, which have an average STV of 134 when wet, is inappropriate for use in such circumstances. It seems to me that if tiles were to be used in such a location, they should have been unglazed tiles, which had ridges or dimples thereon. While these tiles may have been thought suitable when the houses were constructed in 1977, it is clear that their use has all but disappeared in the estate. Mr. O'Brien found only nine houses out of a total of 62 inspected, with such tiles. I appreciate that Ms. Moran stated that this was due to the fact that when the houses were refurbished, the porch area was raised and a concrete surface was used so as to enable disabled access to the property. Nevertheless, it seems to me that current safety requirements, mandate that these tiles are inappropriate for used in an exposed porch.

78. The evidence of Mr. O'Hara was also interesting. While the defendants concentrated on the fact that when he made complaint about the tiles on his property, they were quickly replaced with a more suitable surface. This ignored the fact that when the original mosaic tiles had been replaced in or about 2010, the defendant had put in tiles which, even on their own admission, were totally unsuitable, as they were tiles for use in an interior bathroom. Thus, it would appear that whoever directed that these tiles be put into his house in 2010, did not have any appreciation as to the correct tiles to use in an exterior location. This must raise the inference that perhaps those who had charge of the estate at or about that time, did not have a proper appreciation as to what type of tiles were adequate for use in exposed porches.

79. I am satisfied that in all the circumstances, these tiles were inappropriate for use in an exterior porch. Having regard to the terms of the tenancy agreement entered into between the plaintiff and the defendant, whereby the defendant retained complete control over the premises and in particular in relation to making any alterations thereto, the defendant has to be seen as the occupier of the premises within the meaning of the Occupier's Liability Act 1995. The plaintiff, as tenant to the defendant under such terms, was a visitor on the property within the meaning of the 1995 Act. I am satisfied that the use of these tiles at this location, constituted a breach of the common duty of care owed by the defendant to the plaintiff under the 1995 Act.

80. I am further satisfied that the use of these tiles also rendered the house unfit for human habitation and as such the defendant was in breach of the implied covenant in such tenancy agreements, as found in the decisions in *Siney v. Dublin Corporation* and *Burke v. Dublin Corporation.* In these circumstances, the defendant is liable to the plaintiff for the injuries sustained in this accident.

81. Finally, there was a plea of contributory negligence, to the effect that the plaintiff had been negligent in removing the mat from the porch on the morning of the accident. I accept the plaintiff's evidence that on leaving the property in the morning, he noticed that the mat was very wet and on that account, he took it up and placed it on his side gate to dry. I accept his evidence that when he returned home, someone had removed the mat from his gate and for that reason he proceeded onto the porch, without there being any mat thereon. I do not think that he can be held guilty of contributory negligence in these circumstances.

Evidence on Quantum

82. The plaintiff stated that on the day after the accident, he underwent an operation wherein plates and screws were inserted into his left ankle joint. The ankle was placed in a plaster cast. He was discharged from hospital a few days later. He went to his daughter's house in Manorhamilton to recuperate. After a few weeks, he returned home. He was essentially house bound for the initial period. He stated that the pain was very bad during that time and he required a number of painkillers. The wound at the surgical site became infected, necessitating that he return to hospital to have dressings changed on a frequent basis.

83. The plaintiff stated that in or about July 2014, he had been walking on the footpath with a walking stick, when his left foot slipped off the path and he turned on his ankle. His ankle was quite sore. He was worried that he may have caused further damage to

the ankle, so he attended at the hospital, where an x-ray was taken. He was reassured that there was no bony injury and no additional damage to the ankle.

84. The plaintiff stated that prior to the accident he enjoyed walking and doing D.I.Y., such as painting and decorating around the house. He was not able to do that after the accident. By May 2015, he still had pain in the ankle. Some of the metal work was removed from his ankle in November 2015 and further metal work was removed in August 2016. The removal of the metal plates did help somewhat. There was some improvement in his pain.

85. In June 2016, he complained of pain when walking on uneven ground and in cold weather and when ascending steps. He still walked with a stick. He was told by his surgeon that he had developed osteoarthritis in the joint. Removal of the second plate in August 2016, helped his ankle pain, as his ankle was no longer as big as it had been. However, he still had pain in the ankle joint. The ankle would swell in cold weather. There was still stiffness in the ankle with limitation of movement. He has been given one painkilling injection, which had helped. He was awaiting a further injection in the near future. At the present time, he described his ankle as "achy and painful". There was pain when walking up hill, or going up steps, or walking on uneven ground. He had not been able to work since the accident. All his previous work had been physical work.

86. In cross examination, it was put to the plaintiff that he had never mentioned the subsequent accident, when he slipped off the pavement in June 2014, to his own doctor, or to the defendant's doctor, nor had he mentioned it in his P.I.A.B. application form. The plaintiff stated that he had not mentioned it to these people, due to the fact that he had gone to hospital and had his ankle x-rayed and had been told that there was no further damage done to the ankle. He said that in these circumstances, he did not see it as a subsequent injury as such.

87. The plaintiff stated that he continued to use a walking stick when walking on uneven ground, or when ascending steps. In relation to seeking employment, he stated that he had looked at advertisements in the newspaper. He had done that before the accident as well. He was looking for suitable lighter work.

88. Evidence was given on behalf of the plaintiff by Mr. William Gain FRCSI. He first saw the plaintiff on 18th May, 2015. He had a pilon type fracture of the left ankle joint. This was worse than the usual type of fracture, as it involved the tibia and went into the ankle joint itself. The fracture was slightly displaced. Surgical treatment was carried out, which involved the insertion of bilateral plates and screws. The ankle was placed in a cast for ten weeks. There had been wound infection at the surgical site and antibiotics and dressings were applied. The fracture itself united satisfactorily.

89. The plaintiff complained of stiffness and pain especially on uneven ground and when ascending steps and stairs. Due to continuance of his symptoms, one of the plates was removed in November 2015. This did not have a major effect. The plaintiff did note some improvement, but he still complained of pain and stiffness in the ankle. Walking long distances, walking on uneven ground or ascending steps continued to cause pain and discomfort. He continued to have limitation of movement. X-rays showed narrowing of the talotibal joint, which was indicative of osteoarthritis. There were signs of early osteoarthritis in the ankle joint. This was a known risk of this type of injury. His opinion at that time, was that the plaintiff was not fit for heavy work.

90. The plaintiff had a fibula plate removed in August 2016. This had given the plaintiff some improvement in his position, but not very much. When reviewed on 12th October, 2016, the plaintiff stated that he continued to experience pain on uneven ground and on steps. He remained unfit for work as a paving worker. There was slight limitation of movement of the ankle joint. X-rays revealed evidence of osteoarthritis and also evidence of osteopining, which indicated that a person was not fully placing weight on their foot, leading to thinning of the bone.

91. When reviewed on 20th June, 2017, the plaintiff's symptoms were still the same, but the episodes of severe pain were less frequent. He still complained of ankle swelling and pain. Examination revealed that the range of movement of the ankle joint was satisfactory, except for dorisflexion and the sub-talor range of movement was also slightly reduced. There was also tenderness at the joint. In terms of future treatment, Mr. Gain was of the opinion that injection treatment in the form of steroid and/or a lubricant, may give relief for a period. They would also enable the doctors to tell if the pain was coming from the ankle joint itself. He was due to have this injection treatment in the next few months in 2017. In the longer term, if the plaintiff continued to have problems, he may need surgery to fuse the ankle joint due to osteoarthritis. He put the risk of the plaintiff requiring such a fusion operation at 20/30%. If this arises, it will be known in the next two years. In terms of work, he was of opinion that the plaintiff was fit to return to work, but only at less physical jobs.

92. In cross examination, Mr. Gain accepted that the fusion operation would only be a last resort. It was not common treatment. He stated that he had done two in the last 2/3 years.

Conclusions on Quantum

93. The plaintiff in this case is almost 50 years of age, having been born on 27th February, 1968. As a result of the accident on 17th November, 2013, he suffered a pilon fracture to his left ankle. This required surgical fixation. Since that time, he has had two further operations to remove metal work from the ankle joint. While these operations have improved his condition, in particular they have resulted in a reduction in size of the ankle joint itself, the plaintiff continues to experience pain and discomfort in his ankle on a daily basis.

94. I accept the plaintiff's evidence that he continues to experience pain in the ankle joint, in particular when standing for long periods, when walking on uneven ground and when ascending steps and stairs. He is required to use a stick when traversing such areas. In terms of the future, there is evidence that he has developed mild to moderate osteoarthritis in his ankle joint. There is also evidence of osteopenia. It would appear that the onset of arthritis is a permanent feature and there is some risk in the order of 20/30%, that he may require fusion of the ankle joint in the future. However, given the percentage chance of him needing that operation, the court has to conclude that on the balance of probabilities he is not likely to require an ankle fusion operation.

95. Mr. Gain is of the view that the plaintiff will require injection treatment to his ankle on an ongoing basis. This will provide temporary, though not permanent, relief. It will have to be repeated over time. In terms of his capacity for work, it has to be noted that the plaintiff had been unemployed for an unspecified period of time prior to the accident. He has not worked since the accident. Mr. Gain is of the view that while he is fit to return to employment, he is only fit for light duties. There is no specific claim for loss of earnings, either in the past or into the future, but it is something which the court can take into account in its award of general damages. The plaintiff also remains disabled in the recreational aspects of his life, in particular, he is unable to pursue his pre-accident hobbies of walking and D.I.Y.

96. Taking all of these matters into account, having regard to the surgical treatment of the plaintiff's, symptoms and disability to

date, I award the plaintiff €50,000 for general damages to date. Having regard to the plaintiff's age, the onset of arthritis in the ankle joint and his requirement for future injection treatment, I award the plaintiff €55,000 for general damages into the future. To this must be added the agreed sum for special damages of €650, giving an overall judgment in favour of the plaintiff in the sum of €105,650.