

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **03/02/2006**

HENRY JOSEPH O'KANE

-v-

S DOOEY & COMPANY LIMITED

And

POLYPIPE (ULSTER) LIMITED t/as PREMIER PROFILES

SIR LIAM McCOLLUM

[1] The plaintiff claims damages for breach of a collateral contract of guarantee made in connection with the sale and installation by the defendants of PVC window frames in the plaintiff's new bungalow at Kilrea.

[2] In the County Court he was awarded a decree of £2,250. The defendant issued third party proceedings which stand adjourned pending the outcome of this appeal.

[3] In 1996 the plaintiff, who because of disablement cannot move about very easily, was engaged in having a new dwelling constructed for him.

[4] He engaged the defendant to supply and fit PVC windows, the installation of which was completed in August 1996 and the plaintiff moved into his new home in October 1996.

[5] Within about three years he noticed discolouration of the frames at the back of the house. He sent an undated letter to the defendant informing him of this fact and it was replied on 30 January 2002.

[6] Proceedings were issued on 28 July 2003, more than six years after the installation of the window frames. Following a preliminary hearing before Deputy Judge Brown he held that the plaintiff's claim for breach of contract of sale was statute barred and that decision has not been appealed.

[7] In these proceedings in the County Court the plaintiff relied on a collateral contract of guarantee upon the basis of which he says he entered

into the contract. The court held in his favour and awarded a decree and the defendant brings the matter before this court by way of appeal.

[8] In evidence the plaintiff told me that he had approached the defendant Messrs Dowie in 1996 as he was considering the installation of PVC window frames. He recalled a representative of the firm coming to his house and he had a meeting in his kitchen. A representative had small samples with him and brochures. The plaintiff wanted white PVC window frames.

[9] The representative was called Mr Cairns, he told the plaintiff the window frames would be of low maintenance which was part of the plaintiff's reason for wanting them since he was not fit to paint window frames.

[10] As the plaintiff put it Mr Cairns "put the usual things" they were good quality windows and guaranteed for ten years.

[11] The plaintiff had got other quotations but regarded the defendant's firm as a reputable local firm.

[12] The plaintiff said that he understood that if anything went wrong with the window frames within ten years "it would be sorted out".

[13] There were limited guarantees for other aspects of the window installation in relation to handles and so on and some minor problems arose which were dealt with by the defendants. After about three years the windows at the rear of the house started to go slightly yellow. The plaintiff informed the defendant by telephone and was told that "they would get it sorted".

[14] They said they were negotiating with the manufacturers about this matter and told the plaintiff "to hold on it would be sorted". The colour of the frames turned from yellow to pink and became more noticeable.

[15] He telephoned the defendant on the a number of occasions and got "the same story" to the effect that he was not to do anything that the matter would be sorted.

[16] The plaintiff expected the defendant to replace the window or take some other steps. Eventually he took legal advice and proceedings followed.

[17] In cross-examination he agreed that there was nothing malfunctioning about the windows it was only their appearance that was faulty and this only at the back of the house and not the front. He agreed he had nothing in writing from the representative.

[18] The defendant had a good reputation and his father had dealt with him successfully in relation to mahogany windows.

[19] Mr Cairns did not actually say that the windows would be replaced if any difficulty arose within the ten years.

[20] The plaintiff called as an expert witness Mr McBrinn a consulting engineer he had inspected the windows and taken some photographs.

[21] He is familiar with a process by which windows which have become discoloured can be subjected to a whitening process by the use of a pre-cleaning substance and a cleaning liquid. That process is cheaper than replacement. He felt that it would not be possible to come to a conclusion whether this was a satisfactory way of dealing with the problem.

[22] The process amounts to an accelerated weathering process but Mr McBrinn would have liked to have seen some years pass to see how successful it was in dealing with the problem. Abrasives cannot be used with the frames and the treatment could lead to more problems with the cleaning of the window frames. Mr McBrinn said he found a lot of difficulties with the idea of the whitening process and that the best solution was to get the window frames changed and let someone else act as a guinea pig for the whitening process.

[23] It was put to him in cross-examination that Mr Scott an expert witness for the defendant would say that the whitening process had been used in hundreds of properties and had been problem free. He said that the process had not been offered to him and he had not seen it. He did not know if there were hundreds of examples in Northern Ireland. If abrasives were involved he could not believe that they could properly be used on PVC windows. The cost of replacement of window frames is £2,250. The whitening process would be a good deal cheaper probably £850. It would take about two days to replace the windows. The fault which caused the discolouration was in the extrusion of the PVC and it was a two year batch that caused the problem in Northern Ireland.

[24] For the defendant Mr Scott a civil engineer who specialised in PVC windows for 16 or 20 years gave evidence. He had had knowledge and experience of the process of pinking or discolouration of the frames. It started in the second half of the 1990s after many years of trouble free use and the problem only existed until some time in late 1990s when it did not recur with fresh windows. On the issue of whether replacement is the only viable solution he agreed that there is no evidence yet that any treatment would or would not last. The samples have been exposed but not have deteriorated.

[25] On the defendant's behalf Mr Ferrity submitted that no fault had been shown on the part of the defendant and that the unfortunate outcome was something for which they should not be held liable.

[26] He submitted that in the context of this case the word guarantee was extremely vague and that it went no further than a description of the goods.

[27] The statutory obligation of the seller does not extend beyond six years if there is a defect in the goods and the purchaser has no remedy after that time. The reference to ten years is a mere representation the breach of which if there was one occurred at the time of installation of the windows. He said the guarantee to be effective should be in writing otherwise it was unreasonable that it should extend the limitation period to something like ten years.

[28] Later when replying to submissions on the plaintiff's behalf he submitted that the guarantee, if one was given, could not be regarded as of contractual significance because the plaintiff did not enter into the contract because of the guarantee since other suppliers would have given the same guarantee and that he did not invoke the guarantee in the correspondence with the defendant.

[29] It is well established law that a warranty made during the course of negotiations for a contract may create a binding collateral agreement for which entering into the contract is adequate consideration on the part of the purchaser.

[30] The law has looked with some reserve upon reliance upon such warranty but provided the warranty is clearly established there is no reason why it should not be enforced.

[31] In my view the plaintiff is an honest and reliable witness and his evidence that a ten year guarantee was given is not controverted.

[32] I am satisfied therefore that in good faith Mr Cairns did tell the plaintiff that the windows were guaranteed for a period of ten years.

[33] Moreover I take it that it is an implied term of such a guarantee that if defective the goods will be replaced unless they can be restored to the condition that they would have been in had the defect not occurred.

[34] In this case in my view that requires replacement.

[35] I am not satisfied that the window frames would be in the condition that they would have been in had the defect not manifested itself if they are

now treated to a whitening process about which it is impossible to be sure of the outcome or durability.

[36] There is no anomaly in the fact that the plaintiff may now sue more than six years from the date of installation of the windows. The breach of contract in an agreement for sale occurs when the sale is completed if the goods are defective.

[37] However the breach of warranty of guarantee occurs when the defendant declines to honour the guarantee.

[38] To establish negligence against the defendant it would be necessary to show that he knew or ought to have known of the likelihood that PVC windows would develop the defect which has arisen in this case.

[39] While there is some evidence that the problem became known in the 1990s it does not satisfy me that the defendant knew or ought to have known that the fault was likely to develop in PVC windows supplied by them and I find that the defendant was not guilty of negligence.

[40] However I find that a guarantee with a duration of ten years was given and that the defendant is liable in contract to the plaintiff in damages.

[41] There is no dispute that the appropriate decree is one for £2,250 and I therefore affirm the decree of the County Court judge.