LORD JUSTICE EVANS:

1. The defendants applied to have this action stayed, on two grounds. First, that under the Civil Jurisdiction and Judgment Acts 1952 which gives effect to the Brussels Convention the English court has no jurisdiction to hear it. Secondly, because each of the contracts under which the plaintiffs sue contains an exclusive jurisdiction clause in favour of a court in Germany.

2. The applications were refused by H.H.Judge McGonigal sitting as a Judge of the High Court in the Mercantile Court at Newcastle-upon-Tyne on 29 January 1998. The defendants appeal by leave of Lord Justice Schiemann.

3. The first and/or second plaintiffs (it is not necessary to distinguish between them) are manufacturers of plastic packaging products. Their works are at S. Lane, Sedgefield, Stockton, in Cleveland. The defendants are manufacturers and suppliers of thermoforming machines which the plaintiffs use in their production processes. The defendants carry on business at Freilassing in Germany.

4. How the machines work was graphically and expertly described to us by Mary Vitoria Q.C., counsel for the plaintiffs. Raw plastic material in what are called ´films' passes through the machines so that it is warmed to the moulding temperature. The temperature must be uniform, or defects will appear in the moulded product. Precise temperatures are maintained by sensitive and sophisticated measuring devices which constantly adjust the heat to which different parts of the material are exposed. Previously, the material used was PVC. The plaintiffs wished to use non-PVC material, specifically a polystyrene known as OPS.

5. It is common ground that between 1989 and 1993 there were eight contracts between the plaintiffs and the defendants for the sale and delivery of eight such machines. The plaintiffs allege that there were express representations made to them by the defendants or their United Kingdom agent, A Plastics Machinery, that the machines would be "suitable for thermoforming OPS on a commercial scale" for the United

Kingdom market, the defendants knowing that the machines were to be installed for this purpose at the plaintiffs' factory at Sedgefield (Statement of Claim, paragraphs 3 and following).The plaintiffs further allege that there were express or implied terms to the effect that the machines would be reasonably suitable for use at their factory in Sedgefield producing moulded OPS products on a commercial scale, and that the machines proved not to be "capable of maintaining the temperature of the OPS film sufficiently constant to produce thermoformed OPS products of acceptable finished quality and commercially acceptable production levels and with a commercially acceptable level of controllable scrap material" (Particulars, Statement of Claim para.17).

6. There is evidence that these deficiencies became apparent soon after the machines were installed, but the defendants' initial response was that their machines were not being properly and skilfully used. The plaintiffs commissioned a report from experts at Durham University and their claim is based on the conclusions in that report. These were that the heat control units in the machines were inadequate for the plaintiffs' purposes. They were replaced by closed loop heat control units, and satisfactory production levels were achieved. The damages claimed exceed £3 million.

The contracts

7. The Statement of Claim alleges that the plaintiffs ordered the first machine in September 1989 following a discussion with A. Plastics Machinery, the defendants' U.K. agent, in April 1989 which had resulted in a quotation from the defendants. It is alleged that the defendants delivered the machine at Sedgefield and "installed and commissioned the said machine in about January 1990" (paragraph 8). A second machine was contracted for in May/June and likewise delivered, installed and commissioned in September/October (paragraphs. 9-10). Six further machines were contracted for in and between April 1991 and October 1992 (paragraph 13) and delivered at the Sedgefield premises (paragraph 14). But the first of these six further contracts was made at the Birmingham Exhibition Centre where the machine in question was being used by the defendants for demonstration purposes (para. 13(I)).

8. The defendants accept that this machine, which I shall call "the Birmingham machine", has to be regarded separately from the other seven, because it was physically delivered to the plaintiffs in England.

The others, they submit, were delivered in Germany, relying upon the standard terms of the defendants' contract documents which were used in every case. In each case, the Confirmation of Order read:- "In accordance with our enclosed terms and conditions we confirm K. - [machine type] suitable for the processing of thermoplastic roll material ...".

9. The terms and conditions included these:-

"Terms of Prices

Our quoted prices are ex works, unpacked, excluding customs clearance, excluding installation and commissioning at customer factory, but including transport insurance.

Time of Delivery : ready for dispatch CW 4/93

Terms of Payment :

1/3 down payment after receipt of order confirmation

1/3 when ready for shipment

1/3 30 days from date of invoice net

Testing material

For testing the machine a sufficient quantity of your original material shall be placed at our disposal free of charge, freight / customs duty paid 6 weeks before the date of machine acceptance.....

Acceptance

The technical acceptance will be effected in the presence of your representatives at our works in Freilassing. The purpose of this

acceptance is to demonstrate the machine function and the realization of the promised performance date. The results of this acceptance will be recorded in a taking over protocol, to be legally signed by both parties, authorizing the shipment of the machine.

Assembly

If you desire, the assembly of the machine will be carried out by our specialised staff and will be calculated according to our current rates. Please consider that in case of incorrect assembly, caused by yourself or other persons, we will be forced to restrict our conditions of guarantee."

There were invoices which recorded “delivery: ex works incl.. insurance dispatch: B. Munich”. In addition, there were “Terms of Delivery and Payment” which include:-

"II Scope of Delivery

Our written confirmation shall be decisive for the scope of delivery ....

III Failing special agreement, all prices cover delivery ex works, excluding packing, freight and insurance."

Finally, the ´Venue’ clause relied upon by the defendants in their alternative (contractual) claim reads as follows:-

"XI VENUE

"In all disputes arising out of the contract, provided the buyer is a merchant who has been entered in the Commercial Register, or a public law entity, or a separate estate under public law, action shall be brought at the court having venue over the principal place of the manufacturing works. We shall also be authorized to institute legal proceedings at the

buyer’s principal place of business. It is herewith agreed that this contract and all future transactions shall be governed by and construed according to the law of the Federal Republic of Germany.”

Jurisdiction

10. Three further matters should be noted. First, the plaintiffs placed their orders, not with the defendants (apart possibly from the Birmingham machine), but with the defendants’ U.K. agents, A. Plastics Machinery (hereinafter “A.”), who forwarded them to the defendants in Germany. Similarly, the defendants’ Order Confirmations and subsequent invoices were addressed and sent to A. and forwarded by them to the plaintiffs. It is common ground, however, that sales contracts incorporating the defendants’ Terms and Conditions were made between the plaintiffs and defendants in this way.

11. Secondly, the plaintiffs allege in the Statement of Claim that the machines were installed at the plaintiffs’ Sedgefield factory by A. as agents for the defendants. The defendants’ Terms and Conditions provide that the machines may be installed at the customers premises by their specialised staff (see “Assembly” above). We have no evidence of the contractual arrangements under which this was done, but it is not suggested on behalf of the plaintiffs that the express terms as to delivery ex works in Germany were modified by whatever was agreed.

12. Finally, there is evidence that six of the machines were tested before delivery at the defendants’ works in the presence of representatives of the plaintiffs, who on each of these occasions signed a “Certificate of Satisfaction” as required by the “Acceptance” term. It seems, however, that this is not relevant to the present dispute. The plaintiffs accept that the machines were manufactured to the contractual specification and complied with it. They contend that the machines as delivered were unsuitable for the purpose of producing mouldings in commercial quantities, meaning without excessive waste and at commercially acceptable rates, in their Sedgefield works. These deficiencies were due to the specification being inadequate and they would not be exposed by the acceptance tests or before the machines were installed and operated in commercial conditions at their own works.

13. Thus the claim as pleaded is that express representations were made by the defendants and by A. on their behalf before any of the orders were placed, and that there was in consequence an "express and/or implied term of each of the contracts that each said machine and its associated equipment would be reasonably fit for the stated purpose" (Statement of Claim, paragraph 16). Although a separate claim is made in paragraph 19 for loss and damage caused by the falsity of such representations, Miss Vitoria acknowledged that this is no more than a variant of the contractual claim, and in particular that no claim is made under the Misrepresentation Act 1967 or otherwise in tort.

The proceedings

14. The plaintiffs' solicitors sought leave on their behalf to serve the Writ on the defendants in Germany under Order 11 Rule 1(1)(d) of the Rules of the Supreme Court, on the ground that the contracts are governed by English law. This was because the contracts were thought to incorporate different terms and conditions from those which the plaintiffs now accept.

15. The defendants' Summons, dated 6 June 1997, was for an order setting aside the Writ by reference to the ´Venue' (exclusive jurisdiction) clause alone (see the defendants' solicitor's affidavit, paragraph 12). The plaintiffs' solicitor responded, claiming inter alia that the appropriate jurisdiction is in the English courts (paragraph 11), again on Order 11 grounds, but he correctly identified the central issue as follows:-

"13. The fundamental issue in the action is whether or not the thermoforming machines and associated equipment supplied by the Defendant were fit for the purpose of commercial production in the United Kingdom of plastic packaging products made by thermoforming from non-pvc film and, particularly, OPS films to a commercially acceptable quality and in commercially acceptable quantities and with a commercially acceptable quantity and with a commercially acceptable level of controllable scrap material"

16. The defendants' solicitor then produced an opinion from their German lawyer, Gerd Burck, in connection with the venue (exclusive jurisdiction) clause. The plaintiffs obtained an opinion from their expert, Andreas

Klug. This prompted the defendants to obtain a further opinion from Gerd Burck, dated 23rd October 1997, in which he raised for the first time the contention that the English Courts are precluded from exercising jurisdiction under the Brussels Convention, specifically Arts. 2 and 5(1). Both grounds therefore were argued when the Summons was heard on 29 January 1998.

17. The defendants of course are domiciled in Germany. They are entitled therefore to be sued in Germany under Article 2 of the Brussels Convention unless the English court has jurisdiction under Article 5(1):-

"A person domiciled in a Contracting State may, in another Contracting State be sued:

1. In matters relating to a contract, in the courts for the place of performance of the obligation in question .....".

18. The defendants' case is straightforward. Their relevant obligation was to supply machines under contracts which provided for delivery "ex works" in Germany. If there was a breach of contract with regard to the suitability of the machines for a particular purpose, then the breach occurred when and at the place where the machines were delivered. The goods then were prospectively unfit for the intended purpose.

19. The judge rejected this submission. He held that, as a matter of impression, "the place of performance is in England, which is where the machines should have worked or been made to work properly so that they were suitable for the processing of thermoplastic roll material" (judgment page 3D).

20. The correct approach to the interpretation of Article 5(1)(c) is set out in the speeches in the House of Lords in Kleinwort Benson Ltd v. City of Glasgow D.C. [1997] 3 W.L.R. 923. We were referred to previous judgments of the European Court and of the Court of Appeal, but not to the authoritative summary of their effect which is found in the speech of Lord Goff. The following paragraphs are directly relevant to the present case:-

"(3) Next in considering the function of the various provisions of Article 5, it is to be remembered that these provisions exist “because of the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings”: see the Martin Peters case at p.1002 (par.11). In the case Article 5(1), the relevant court is specified as being the court “for the place of performance of the obligation in question” which is described in the Jenard Report as the court of the place of performance of the obligation on which the claim is based. It is between the dispute and that court that a particular close connecting factor is recognised to exist. "

"(4) It follows that, in order to identify the relevant court, it is necessary first to identify the obligation in question. This was made plain in the case of de Bloos v. Bouyer (Ets A. de Bloos S.P.R.L v. Society en commandite par action Bouyer Case 14/76 [1976] E.C.R. 1497, in which the European Court of Justice held that the word “obligation” in Article 5(1) refers to “the contractual obligation forming the basis of the legal proceedings” (see page 1508, para 11). The Court of Justice subsequently affirmed that “the obligation” cannot be interpreted as referring to any obligation whatsoever arising under the contract in question, but is rather that which corresponds to the contractual right on which the plaintiff’s action is based”: see Custom Made Commercial Ltd. v. Stawa Metallbau GmbH Case C-288/92 [1994] E.C.R. I-2913, 2957 (para. 23).

After quoting from the judgment of the European Court in Shenevai v. Kreischer Case 266/85 [1987] E.C.R. 239 Lord Goff said this:-

"I have taken the unusual course of quoting these paragraphs in full, because they demonstrate that the Court of Justice has returned to, and indeed has reinforced, the reasoning and conclusion in de Bloos v. Bouyer that the “obligation” in Article 45(1) is the contractual obligation on which the claim is based. It is the courts of the place of performance of that obligation in which jurisdiction is vested under Article 5(1).

Finally, in Kalfelis v. Schroder Case 189/97 [1988] E.C.R. 5565 the Court held that the scope of Article 5(3) (“matters relating to tort, delict or quasi-delict”) must be regarded as an independent concept from Article

5(1), and stressed that the special jurisdiction in Articles 5 and 6 must be interpreted restrictively; and further stressed (see para.20) that, while disadvantages may arise from different aspects of the same dispute being adjudicated upon by different courts, the plaintiff is always entitled to bring his action in its entirety before the courts of the defendant's domicile.

21. In the present case, Mr Julian Flaux Q.C. for the defendants submitted that jurisdiction may only be exercised under Article 5(1)(c) when the obligation in question, meaning the contractual obligation which the defendant is alleged to have broken or failed to perform, fell for performance in England. If more than one obligation is involved, then it is the principal obligation which determines the issue (cf. Union Transport Plc v. Continental Lines S.A. [1992] 1 W.L.R. (H.L.)). Miss Vitoria for the plaintiffs did not challenge these submissions, which in my view were clearly justified by the previous authorities and have now been endorsed by the speeches in Kleinwort Benson Ltd . The issue is whether the place for performance of the relevant obligation was in England rather than Germany, and this makes it necessary to identify the obligation, or if relevant the principal obligation, upon which the plaintiffs rely.

22. The "obligation in question" was defined by Mr Flaux in his skeleton argument as "the Defendant's obligation to supply machines which were suitable [i.e. reasonably fit] for their purpose .... . By the terms of the contracts, the place for performance of that obligation was at the Defendant's works in Germany, not in England...". After referring to the contractual terms which identify the defendant's works in Germany as the place for delivery and acceptance, the written submission concludes "The subsequent installation of the machines in England after delivery cannot alter the nature of the obligation or the place for its performance .... the obligation is one which crystallises upon delivery ....".

23. Miss Vitoria for the plaintiffs submits, first, that the relevant contractual obligation arises under "a warranty that the machines would be suitable for processing OPS" and that "the place where the obligation was in substance to be performed was England". Notwithstanding the restrictive interpretation which should be given to Article 5(1)(c), there should not be a technical (meaning a legalistic) analysis of where delivery under the contract took place; the underlying purpose was to give to the court having a close connecting factor with the dispute the jurisdiction to

resolve it. This submission, or at least the latter part of it, is supported by paragraph (3) of Lord Goff's summary which I have quoted above.

24. Alternatively, Miss Vitoria submitted that the implied warranty for fitness under what is now section 14(3) of the Sale of Goods Act, 1979, is a continuing warranty which continues for the commercial life of the machine, citing Leximead (Basingstoke) Ltd v. Lewis [1982] A.C. 225 per Lord Diplock at 276E, and Cullinane v. British "Rema" Manufacturing Co. Ltd [1954] 1 Q.B. 292.

25. Partly because this alternative submission, which was challenged by Mr Flaux, involved reference to the statutory implied term under section 14(3), formerly section 14(1), of the Sale of Goods Act, the arguments before us centred upon that term as being the relevant contractual obligation in the present case. So regarded, Mr Flaux's contentions have obvious force. The goods as supplied are unfit for the purpose for which they are acquired, notwithstanding that the fact of their unfitness does not and maybe cannot become apparent until some later time and at some other place. The breach occurs for limitation purposes when they are supplied in that defective state, and it follows, he submits, that the obligation to supply fit rather than unfit goods has to be performed at the place where they are supplied. Lord Diplock's reference to a continuing warranty, he submits, does not imply that there is a continuing obligation for performance wherever the goods may happen to be, until the warranty expires. If Lord Diplock did mean that, then Mr Flaux respectfully submits that he was wrong.

26. These are difficult questions and of considerable general importance. But in my judgment they do not have to be decided in the present case. This is because the plaintiffs base their claim on what they allege was an express undertaking by the defendants, or by their U.K. agent A. Line Ltd. on their behalf, that machines manufactured by the defendant, to the specification which was later incorporated in the contracts, would achieve certain results when they were put into use at the Sedgefield factory. That promise, if it was made, could only be performed there; conversely, it could only be broken when the alleged failures occurred in production conditions.

27. There is a conceptual difficulty in ascribing a place of performance to an obligation which does not require any act of performance by the

contracting party, but is rather an acceptance of responsibility upon the occurrence or non-occurrence of an event. But this has to be done for the purposes of Article 5(1)(c), and in my judgment the alleged undertaking by the defendants that their machines would achieve certain production levels and efficiencies at the plaintiffs' factory in England can properly be regarded as a contractual obligation whose place of performance was in England . It is akin to a performance guarantee which in my judgment is "performed" or broken where the subject-matter is situated at the relevant time.

28. The plaintiffs rely in the alternative on an implied term, which it was assumed before us corresponds to the statutory term as regards fitness for purposes implied by section 14(3) when the necessary conditions are satisfied. (The appellants objected inter alia that any such term is precluded by the express terms of the contracts.) As stated above, the argument centred on the question whether this implied term imposed an obligation on the defendant for performance in England, within Article 5(1)(c). But that issue does not arise if the express term which is also alleged is the principal obligation relied upon, and in my judgment it is. The essential part of the plaintiffs' case is that the defendants undertook that machines built to the agreed specification would achieve certain results in practice. If no such undertaking was given, then it is difficult to see how the defendants could be in breach of the statutory implied term as to fitness for use by the plaintiffs at their factory. It is not alleged that the machines were unfit, except by reference to what the plaintiffs alleged was an agreed standard.

29. The matter can be tested in this way. If the plaintiffs alleged an undertaking by the defendant that the machines would achieve a certain output - so many pieces per hour, if that is the appropriate standard - then it would be clear in my judgment that the place for performance of that obligation was England rather than Germany where the machines were supplied. The plaintiffs do not allege a fixed or easily measured standard, but it has not been suggested that the term on which they rely is insufficiently certain to be given contractual effect.

30. For these reasons, I agree with the judge's conclusion (quoted in paragraph 19 above) although his was expressed in rather wider terms. In my judgment, the English court has jurisdiction in this case because the principal contractual obligation, which the plaintiffs allege was broken,

had its place for performance in England, for the purposes of Article 5(1)(c).

31. I do not dissent from Chadwick L.J.'s analysis of what the position would be if the sole or principal obligation was the statutory implied term under section 14(3) or, strictly, its equivalent under German law. The key issue, in my judgment, is whether the express promise alleged by the plaintiffs gave rise to an obligation which was for performance in England. If there was a performance guarantee, then subject to the conceptual difficulty to which I have referred, the position in my judgment would clear. The guarantee, if performance fell below the agreed standard, would be broken in England. Similarly with a guarantee against defects not necessarily present in the machines as delivered. There is such a guarantee in these contracts (clause VII), although it is not relied upon because, as I understand the position, the stringent time-limit was not complied with. If there was such a claim, then it would be artificial, in my view, to regard that obligation as being performed or broken in England, whilst an undertaking that the machines would perform to an acceptable commercial standard in the actual conditions encountered in the plaintiffs factory in England was not. For these reasons, in my judgment the alleged express term was complied with or broken in England. The proof of the pudding was in the eating. Whether the machines would so perform could not be determined at the time and place of delivery in Germany, but only when they were installed and operated in England. I agree with the Judge's common-sense view (para.19 above).

VENUE

32. The clause upon which the defendants rely is quoted above (paragraph 9). They contend that properly construed it is an exclusive jurisdiction clause to which the court should give effect under Article 17 of the Brussels Convention.

33. The arguments owe much to the way in which the issue arose and was developed by the parties' respective German law advisers (see paragraph 16). In brief, Mr Klug suggested three possible meanings of the requirement "provided the buyer is a merchant who has been entered in the Commercial Register". The first is that the words mean what they say: if the buyer is not entered in the appropriate German register, which he identifies as one which excludes "small traders" (which the plaintiffs are

not, and therefore if they were German companies they would be required to be entered in the Register), then the jurisdiction clause does not apply. Secondly, "Commercial Register" may mean the appropriate foreign Register when the contracting party is not German. Here, the plaintiffs of course are entered in the English Register. Thirdly, the clause applies when the foreign party would, if a German company, be required to be entered in the German Register; again, this would include the plaintiffs.

34. Mr Burck for the defendants was firmly of the view that the first suggested meaning "cannot be correct in the case of an international business transaction such as the present" (Appellants' Skeleton Argument para. 19). He prefers the second of Mr Klug's suggested meanings; the Registrar referred to is the appropriate one for a foreign company in its own country. This would turn the clause on its head if the party was a foreign company which, if German, would fall within the "small trader" exception. It would be bound to submit to the jurisdiction of the defendants' local court, even though a corresponding German company would not.

35. The judge rejected this submission for the above among other reasons, and I agree with him. There are many practical objections to both the second and the third suggested meanings. The first meaning gives effect to the express words of the clause. There are good practical reasons why the clause should apply between German companies and why jurisdiction in the case of a foreign (European) purchaser from the defendant should be established by the Brussels Convention, independently of the clause. I therefore would uphold the judge's conclusion on this issue also.

Conclusion

36. I would dismiss the appeal.

LORD JUSTICE MORRITT:

1. I agree with Evans L.J. that the Venue clause on which P. K. relies is not an exclusive jurisdiction clause within Article 17 of the Brussels

Convention. Thus the fate of this appeal depends on the proper construction and application of Article 5(1) of the Convention to the facts of this case. Evans LJ has set out those facts in detail and I need not repeat them.

2. Article 5(1) provides that

"A person domiciled in a Contracting State may, in another Contracting State, be sued -

.....

1. In matters relating to a contract in the courts for the place of performance of the obligation in question;"

Thus it is necessary too ascertain “the obligation in question” and “the place of performance” of that obligation.

3. The obligation in question is that averred in paragraph 16 of the Statement of Claim, supplemented as necessary by paragraph 15, namely:

“a term that each machine (and its associated equipment) would be reasonably fit for the purpose of the commercial production in the United Kingdom of plastics packaging products ... to a commercially acceptable quality and/or in commercially acceptable quantities and with a commercially acceptable level of controllable scrap material."

That term reflected the express undertaking to which Evans LJ has referred and which is averred in paragraph 12 of the Statement of Claim. It is clear from paragraphs 17 and 18 that it is for the alleged breach of that term that V. sues for damages.

4. I agree with Evans LJ that regarded in isolation it is difficult, if not impossible, to ascribe any place for the performance of that obligation

for, in isolation, it does not require P. K. to do anything. But if no place for performance can be ascertained then Article 5(1) does not provide for any jurisdiction alternative to that of the domicil of the defendant and the appeal should be allowed on that ground alone.

5. For my part I do not think that it is appropriate to analyse the obligation in isolation from the other terms of the contract. The term on which V. relies is one of the terms of a series of contracts for the sale and delivery of machinery by P. K. to V.. Thus the reference in paragraph 16 of the Statement of Claim to "each machine" must be read as each machine to be sold and delivered in accordance with the contractual provisions previously referred to. This necessary implication at once clarifies the nature of the obligation sued on and denotes the place of its performance.

6. I agree with Chadwick LJ, whose judgment I have read in draft, that the place of performance must be the place of delivery and that, in the case of seven out of the eight machines, that place was Germany. For these and the other reasons given by Chadwick LJ, with which I agree, I would allow the appeal and strike out these proceedings for want of jurisdiction save in respect of machine 34.22/153.

LORD JUSTICE CHADWICK:

1. Article 2 of the 1968 Convention on jurisdiction and the enforcement of rights in civil and commercial matters (the Brussels Convention) requires that, subject to the provisions of the Convention, persons domiciled in a Contracting State shall be sued in the courts of that State. Article 3 of the Convention provides that persons domiciled in a Contracting State may be sued in the courts of another Contacting State only by virtue of the rules set out in Sections 2 to 6 of Title 1 of the Convention. The United Kingdom is a Contracting State for the purposes of the Convention by reason of the Accession Convention signed in 1978. Section 2(1) of the Civil Jurisdiction and Judgments Act 1982 gives to the Brussels Convention the force of law in the United Kingdom.

2. The defendant to these proceedings, P. K. GmbH, is a German corporation domiciled in Germany. Germany is a Contracting State for the purposes of the Brussels Convention, having been one of the original parties to that Convention. It follows that, unless there is some provision in the Convention which permits the plaintiffs to bring this claim against

this defendant in the English courts, these proceedings must be struck out for want of jurisdiction.

3. The provision upon which the plaintiffs rely is found in Article 5, in Section 2 of Title 1 of the Convention:

"Article 5

A person domiciled in a Contracting State may, in another Contracting State, be sued -

1 In matters relating to a contract, in the courts for the place of performance of the obligation in question;

4. That provision is, itself, subject to Article 17, in Section 6 of Title 1:

"Article 17

If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such agreement shall be . . . - (a) in writing or evidenced in writing, . . . "

5. The defendant submits that Article 17 is applicable in the present case, to the exclusion of Article 5(1). In support of that submission the defendant relies upon the jurisdiction and choice of law clause in its standard terms of delivery and payment:

"XI. VENUE

In all disputes arising out of the contract, provided the buyer is a merchant who has been entered in the Commercial Register, or a public law entity, or a separate estate under public law, action shall

be brought at the court having venue over the principal place of the manufacturing works. . . . It is hereby agreed that this contract and all future transactions shall be governed by and construed according to the law of the Federal Republic of Germany.

6. It is not suggested that the plaintiffs or either of them, as buyers under the relevant contracts, are public law entities or separate estates under public law. It is common ground that the plaintiffs have not, in fact, been entered in the relevant Commercial Register in Germany. I agree with Lord Justice Evans, for the reasons which he gives, that, in the context of a provision which (on the evidence of German lawyers) clearly derives from the German Commercial Code, the phrase "the Commercial Register" cannot be taken to mean some comparable register in England - even if such a register could be identified. I agree, also, that the provision does not require an investigation into the question whether a foreign buyer would, if it were a German entity, be entered in the relevant German Commercial Register. There is no reason to give the words used in clause XI any extended meaning beyond that which they naturally bear. If, as is the case, the plaintiffs are not entered in the relevant Commercial Register, the exclusive jurisdiction provision in that clause has no application; and the parties are not to be taken to have excluded, by agreement, the jurisdiction of a foreign court which would otherwise have jurisdiction under the Brussels Convention.

7. The question in this appeal turns, therefore, on the existence or otherwise of special jurisdiction under Article 5(1) of the Convention. It is accepted that the matters in dispute relate to a contract or contracts. What then, in the context of these proceedings, is "the obligation in question"; and where is the place of performance of that obligation? Those questions have to be approached in the light of the guidance given by Lord Goff in Kleinwort Benson Ltd v City of Glasgow Council [1997] 3 WLR 923, at page 928B-F, to which Lord Justice Evans has referred. The obligation is the contractual obligation on which the claim is based. In order to identify the obligation on which the claim is based it is necessary, first, to examine the plaintiffs' pleaded case.

8. The writ, issued on 2 May 1996, seeks (i) damages for breach of eight contacts made between 25 September 1989 and 7 October 1992 - each for the supply of a single K.-Automatic Thermoforming Machine - on the basis that the machines were not fit for their purpose and (ii) damages for misrepresentations that the machines were capable of processing non-

PVC films - in particular, biaxial oriented polystyrene ("OPS") films - for the commercial production of packaging products. The statement of claim was served on 10 March 1997. It is alleged (and it is not in dispute) that the plaintiffs carried on the business of manufacturing plastics packaging products at Sedgefield, Cleveland and that the defendant was at all material times the manufacturer and supplier of thermoforming machines. It is alleged that there were discussions between the first named plaintiff and the defendant's United Kingdom agent, in or about April 1989, as to that plaintiff's requirements for thermoforming machines for operation at its premises in the commercial production of plastic packaging products made from OPS films. It is further alleged that the plaintiff was told by the defendant's agent - and subsequently by the defendant - that two of the machines manufactured by the defendant, under specifications KL 1SH/50 and KL 2SH/76, were suitable for thermoforming OPS on a commercial scale; and that the relevant specifications and quotations were provided. It is alleged that the representations were made for the purpose of inducing the plaintiff to purchase machines from the defendant; and that, in reliance on the representations the plaintiff entered into a contract on 25 September 1989 for sale and supply by the defendant of a K.-Automatic Thermoforming Machine Type KL 1SH/50. A further machine was supplied, under a second contract, in or about September 1990.

9. Paragraph 12 of the statement of claim is in these terms:

"12. In the premises there was a continuing representation by the Defendant throughout 1990 to 1993 that the K.-Automatic Thermoforming Machines and associated equipment supplied and\or to be supplied by the Defendant to the First and\or Second Plaintiff was\would be suitable for producing OPS thermoformed products to a commercially acceptable quality and\or in commercially acceptable quantities and with a commercially acceptable level of controllable scrap material."

10. Six further machines were supplied to the second plaintiff between May 1991 and October 1992, each under a separate contract. Each of the contracts was for the sale and supply by the defendant of a machine and associated equipment as specified in the defendant's Order Confirmation.

11. Paragraphs 15, 16 and 17 of the statement of claim are in these terms

"15. At the time of each of the said contracts the First or Second Plaintiffs as the case may be expressly and/or by implication made known to the Defendant as aforesaid that each said machine and its associated equipment was bought for the purpose of the commercial production in the United Kingdom of plastics packaging products made by thermoforming from non-PVC films and in particular from OPS films and in particular for the production of OPS thermoformed products to a commercially acceptable quality and/or in commercially acceptable quantities and with a commercially acceptable level of controllable scrap material.

16. In the premises it was an express and\or implied term of each of the said contracts that each said machine and its associated equipment would be reasonably fit for the said purpose.

17. In breach of the aforesaid term the goods were not suitable or fit for the purposes set out in paragraph 15 above.

PARTICULARS

None of the said machines and its associated equipment was capable of maintaining the temperature of the OPS film sufficiently constant to produce thermoformed OPS products of acceptable finished quality at commercially acceptable production levels and with a commercially acceptable level of controllable scrap material.

The plaintiffs' claim for damage, in respect of which particulars are given under paragraph 18, is in an amount in excess of £3.5 million.

12. Paragraph 19 of the statement of claim is in these terms:

" 19. Further or in the alternative the Defendant's said representations were false whereby the First and Second Plaintiffs have suffered loss and damage.

PARTICULARS OF FALSITY

"None of the said machines and its associated equipment was capable of maintaining the temperature of the OPS film sufficiently constant to produce thermoformed OPS products of acceptable finished quality at commercially acceptable production levels and with a commercially acceptable level of controllable scrap material.

PARTICULARS OF DAMAGE

The Plaintiffs will rely on the Particulars given under paragraph 18 above."

13. I have set out the pleading more fully than I would otherwise have thought necessary or appropriate because, at first sight, it was not clear (or, at the least, not clear to me) whether the plaintiffs' claim was only in contract, for breach of the contractual obligation alleged in paragraph 16, or was, in addition, in tort (or delict) in respect of misrepresentations inducing contract. If there were a claim in tort then it seemed to me that the relevant special jurisdiction under Article 5 of the Brussels Convention was that conferred by Article 5(3): so that proceedings could be brought in the courts for the place where the harmful event occurred. But if there were a claim in tort, then it was difficult to see what that claim added to the claim in contract, in that the loss said to have been incurred as the result of misrepresentations which induced the plaintiffs to enter into the contracts was the same loss as that said to be recoverable as damages for breach of those contracts. But this apparent difficulty was laid to rest when, in the course of the hearing of this appeal, Dr Vitoria QC, counsel for the plaintiffs, acknowledged that the claim under paragraph 19 of the statement of claim was intended to be no more than a variant of the contractual claim; and in particular that no claim was made under the Misrepresentation Act 1967 or otherwise in tort. In the light of that clarification I have approached the matter on the basis that the only claim with which we are concerned on this appeal is the claim for breach of the contractual term pleaded in paragraph 16; that is to say, for breach of a term (whether express or implied) that each machine and its associated equipment would be reasonable fit for the purpose of commercial production in the United Kingdom of plastic packaging products made by thermoforming from OPS films to a commercially acceptable quality, in commercially acceptable quantities and with a commercially acceptable level of controllable scrap material.

14. It is difficult to find in the contractual documentation any expressed warranty as to fitness to purpose; although, as Lord Justice Evans has pointed out, the machines are described in the defendant's Order Confirmations as "suitable for the processing of thermoplastic roll material by means of compressed air, especially suitable for the production of packaging parts". The language of paragraph 16 of the statement of claim is, of course, closely similar to that in section 14(3) of the Sale of Goods Act 1979:

14(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known - (a) to the seller . . . any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, . . .

15. But it is necessary to keep in mind that the parties have agreed that their contracts shall be governed by German law; and there is no reason to think that the provisions of an English statute would be recognised under that law. Be that as it may, I accept that, for the purposes of this appeal, we must assume that, if this action proceeded to trial, the plaintiffs would establish a contractual obligation in the terms alleged. That, then, is the "obligation in question" for the purposes of Article 5(1) of the Brussels Convention.

16. That leads to the question: in what place is that obligation to be performed? In the absence of authority I would take the view that there is only one answer to that question. The obligation is to supply a machine which is reasonably fit for the known purpose. That obligation has to be performed at the time when the machine is supplied. There is no other opportunity to perform it. The seller has not undertaken an obligation to do whatever is necessary from time to time to ensure that the machine fulfills the purpose for which it has been purchased. That is not alleged. As Lord Justice Evans has pointed out, no reliance is placed on the limited contractual guarantee in clause VII of the standard terms. . The position, as it seems to me, is that the seller is in breach of the obligation to supply a machine fit for the known purpose if the machine fails subsequently because, as supplied, it was not fit for use in commercial production. But the breach is the breach of the obligation to supply a machine fit for the known purpose; there is no other or subsequent breach. A subsequent

failure of the machine in the course of commercial production is evidence of the antecedent breach in supplying a machine which was not fit for such use. If the obligation has to be performed at the time when the machine is supplied, then the place at which it has to be performed is the place of delivery under the contract.

17. Dr Vitoria QC placed reliance on observations of Lord Diplock in Lexmead (Basingstoke) Ltd v Lewis and others [1982] AC 225. The facts of the case, so far as material, may be summarised as follows. The action was brought by the wife and daughter of the driver of a car who (with his son) had been killed in a road accident. The accident had occurred because a trailer, towed by a Land Rover owned by the first defendant and driven by his employee, the second defendant, had become detached from the towing hitch and careered across the road into the car. The defendants to the action were the owner of the Land Rover, his employee, the manufacturers of the towing hitch and the retailers who had supplied and fitted the hitch to the Land Rover. The owner brought third party proceedings against the retailers, alleging that they had supplied a towing hitch which was not fit for the purpose for which it had been supplied. The trial judge held that the manufacturers had made a towing hitch which was faulty in design. But he also held that the owner ought to have noticed that hitch had become damaged (the handle had broken) and ought to have had it inspected or repaired. He apportioned damages in the action between the owner and the manufacturers. In the third party proceedings he held that the retailers had supplied a towing hitch which was not fit for the purpose for which it was to be used; but that the owner's own negligence was an intervening cause which could not have been in contemplation at the time that the contract was made. The Court of Appeal allowed the owner's appeal in the third party proceedings. The retailers appealed to the House of Lords. Lord Diplock, with whose speech the other members of the House agreed, pointed out that the warranty under section 14(1) of the Sale of Goods Act 1893 (now section 14(3) of the 1979 Act) required that the towing hitch should be reasonably fit for towing trailers upon a public highway without danger to other road users. He went on, at page 276E-H:

"The implied warranty of fitness for a particular purpose relates to the goods at the time of delivery under the contract of sale in the state in which they are delivered. I do not doubt that it is a continuing warranty that the goods will continue to be fit for that purpose for a reasonable time after delivery, so long as they remain in the same apparent state as that in which they were delivered, apart from normal wear and tear.

What is a reasonable time will depend upon the nature of the goods but I would accept that in the case of the coupling the warranty was still continuing up to the date, some three to six months before the accident, when it first became known to the farmer that the handle of the locking mechanism was missing. Up to that time the farmer would have had a right to rely upon the dealers' warranty as excusing him from making his own examination of the coupling to see if it were safe; but if the accident had happened before then the farmer would not have been held guilty of any negligence to the plaintiff. After it had become apparent to the farmer that the locking mechanism of the coupling was broken, and consequently that it was no longer in the same state as it was when it was delivered, the only implied warranty which could justify his failure to take the precaution either to get it mended or at least to find out whether it was safe to use it in that condition, would be a warranty that the coupling could continue to be safely used to tow a trailer on a public highway notwithstanding it was in an obviously damaged state. My Lords, any implication of a warranty in these terms needs only to be stated to be rejected. So the farmer's claim against the dealers fails in limine."

18. Dr Vitoria QC points to the phrase "a continuing warranty that the goods will continue to be fit for that purpose". She submits that that phrase is consistent with her contention that the warranty of fitness for purpose continues after delivery, in the sense that seller continues to have obligations to perform. I am not persuaded that that is a fair reading of the phrase in the context of the question which Lord Diplock was addressing. He was not concerned, directly, with the question: when had the breach occurred? It is, I think, reasonably clear, if the passage is read as a whole, that he was assuming that the breach had occurred at the time of delivery. The question to which he was addressing his remarks in that passage was not when the obligation arose, but what was its scope. He pointed out that the obligation was to deliver goods which were fit for the purpose at the time of delivery and which (as delivered) could be relied upon to remain fit for that purpose for a reasonable time thereafter; but he said nothing to suggest that that was an obligation which required the retailer to do anything in relation to the goods once they had been delivered. Indeed, it is difficult to see what the retailer could do in the circumstances. In my view the plaintiffs obtain no assistance from the observations in Lexmead (Basingstoke) Ltd v Lewis.

19. We were referred, also, to the decision of this Court in Cullinane v British "Rema" Manufacturing Co Ltd [1954] 1 QB 292. The only issue in that appeal was as to the calculation of the damages which the plaintiff

was entitled to recover for breach of a warranty as to fitness for purpose - see Lord Justice Jenkins at page 308. Sir Raymond Evershed, Master of the Rolls, expressed the principle at pages 301-2: the plaintiff, who got a machine which in the event failed to live up to the performance warranted, should be put in the same position (so far as that could be done by money) as he would have been in if the machine had been as warranted. The Court held that the plaintiff could not recover both capital expenditure and loss of profits. If he were to claim for loss of profits he had to bear, or give credit for, the capital expenditure which had been, or would have had to be, laid out in order to earn those profits. For my part I find nothing in that decision which assists in the present case.

20. In those circumstances I can no reason to reject the view, already expressed, that the obligation to supply machines which were fit for the known purpose was an obligation which was to be performed, once and for all, at the time of delivery. The plaintiffs submissions, as it seems to me, seek to elevate a warranty as to fitness for purpose into an undertaking to guarantee future performance. I find nothing in the pleaded case which suggests that the plaintiffs seek to rely on a guarantee of future performance; and nothing in the documentation which has been put before us which would justify a conclusion that the plaintiffs have any prospect of establishing that this defendant undertook to guarantee future performance. The obligation relied upon is, in my view, the obligation which arose (if at all) under an implied warranty that the machines would be fit for the known purpose.

21. In relation to the machines supplied under seven of the eight contracts, delivery was to take place at the defendant’s factory in Germany. That was the place at which the obligation was to be performed. But under one of the eight contracts - that made in or about June 1991 for the supply to the second plaintiff of a machine having serial number 34.22/153 - delivery was to be from the National Exhibition Centre in Birmingham. The documentation in relation to that contract appears incomplete; but it is, I think, sufficient to justify the conclusion that, in relation to that machine, the obligation on which the second plaintiff bases its claim fell to be performed at the place of delivery in England.

22. For those reasons I would allow this appeal. I would order that these proceedings be struck out for want of jurisdiction, save in so far as the claim relates to machine 34.22/153.

ORDER: Appeal allowed. Order striking out the Statement of Claim, except as regards one machine, in terms to be agreed with liberty to apply. Appellants awarded 60% of their costs overall. Leave to appeal to the House of Lords refused.

(Order not part of approved judgment)