PILL LJ: This is an appeal from a decision of His Honour Judge David Wilcox, sitting in the Official Referees' Court, on 26 August 1998. On a preliminary point the judge held that the English court did not have jurisdiction over the plaintiffs' claim and that the proceedings should be set aside.

The plaintiffs, M. Limited, claim damages for breach of contract. They were subcontractors to W. Ltd on work at 'Q' Block at G., and they made a subcontract with the defendants for the design, manufacture, supply and delivery of rainscreen panels for G.. These panels were supplied by the defendants but found to be faulty. The problems arose from defective design or manufacture rather than any subsequent defects or failures in transit or storage.

The defendants are domiciled in Germany and the plaintiffs are the English subsidiary of a German company. For the purposes of the application before the judge, it was accepted that English law governed the contract and the question was whether the action could be heard in the English courts. This turned upon the construction of Articles 2 and 5(1) of the Brussels Convention. Article 2 provides that:

"Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State."

There are exceptions to that principle. One of these is set out in Article 5, which, as an exception, is agreed should be interpreted restrictively:

"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; (...)"

The present case turns upon what is the obligation in question, within the meaning of that Article, upon the facts of the case.

In Ets A de Bloos SPRL v Societe en commandite par actions Bouyer, Case 14/76, [1976] ECR 1497, a judgment of the European Court of Justice of 6 October 1976, the court held:

"11 (...) the word 'obligation' in the article refers to the contractual obligation forming the basis of the legal proceedings.

12. This interpretation is, moreover, clearly confirmed by the Italian and German versions of the article.

13. It follows that for the purposes of determining the place of performance within the meaning of Article 5, quoted above, the obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based.

14. In a case where the plaintiff asserts the right to be paid damages or seeks a dissolution of the contract on the ground of the wrongful conduct of the other party, the obligation referred to in Article 5(1) is still that which arises under the contract and the non-performance of which is relied upon to support such claims."

The effect of that decision was considered by the court in Custom Made Commercial Ltd v Stawa Metallbau GmbH, Case C288/92, [1994] ECR 2913, doubt having been cast in an earlier case upon the effect of the judgment in de Bloos. The court stated in its judgment:

"13. Article 5(1) provides in particular that a defendant may, in matters relating to a contract, be sued in the courts 'for the place of performance of the obligation in question'. That place usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it and explains why that court has jurisdiction in contractual matters (see Case 266/85 Shenavai v Kreischer [1987] ECR 239, paragraph 18).

14. Although the connecting factor is the reason which led to the adoption of Article 5(1) of the Convention, the criterion employed in that provision is not the connection with the court seised but, rather, only the place of performance of the obligation which forms the basis of the legal proceedings.

15. The place of performance of the obligation was chosen as the criterion of jurisdiction because, being precise and clear, it fits into the general aim of the Convention, which is to establish rules guaranteeing certainty as to the allocation of jurisdiction among the various national courts before which proceedings in matters relating to a contract may be brought."

In this case the plaintiffs issued to the defendants on 5 December 1994 a 'Purchase Order'. It is in printed form with handwritten additions. The printed form provides:

"Please supply the goods specified below subject to our conditions of order set out overleaf and any special instructions and conditions stated below."

There is then added in handwriting:

"To supply and deliver rainscreen panels all in accordance with our drawing nos. 1083/03/MF53 to MF56 inclusive."

At the foot of the same first page of the Purchase Order the printed words 'Deliver to' appear, with a gap for the appropriate place to be inserted. The words 'M.' have been inserted, with a delivery date given as the week ending 6 January 1995. That address is in England.

The 'Conditions of Purchase' accompanied the page to which I have referred. In the definition paragraph the 'Supplier' is said to be:

"any person, firm or company with whom the company contracts for the supply of goods, work or work and materials."

Paragraph 3 provides that:

"All goods, work or work and materials supplied or used in pursuance of the Contact shall be of the highest quality and suitable in every respect for the purpose for which they are required and shall correspond in every respect with any sample, patent, specification, description or drawing relating thereto (...)"

Paragraphs 4 and 5 deal with approval and acceptance of:

"All goods and materials supplied (...)"

Provision is made that the goods may be inspected at the place of production, but that approval by the company of the goods:

"(...) shall not be deemed to be acceptance of the same for the purposes of the preceding Condition (...)"

Paragraph 8 of the Conditions of Purchase provides:

"RISKS AND TITLE

Unless otherwise agreed in writing, the Supplier shall bear the risk of loss, destruction or damage to the goods, work and materials until, in the case of goods, delivery is effected in accordance with Condition 9 hereof, at the place of delivery specified in the Order or otherwise as directed by the Company on delivery thereof or upon completion of the work as the case may be."

Paragraph 9 provides:

"DELIVERY

Time shall be of the essence of each and every Contract and delivery or performance must be effected within the time specified in the Order failing which the Company reserves the right to rescind the Contract and recover from the Supplier any direct or consequential loss thereby incurred. Delivery to site shall only be effected under the Contract when the goods or work are received on site by the Company's duly authorised representative and the signature of such representative on the Supplier's delivery advice note only shall be evidence of such delivery."

The standard form refers, as will have been seen, to work done as well as goods supplied, but this contract is concerned only with the supply of goods.

It is not in dispute that the Purchase Order to which I have referred was accepted by the defendants and a binding contract was thereby made. However, for the defendants, Mr Manzoni also draws attention to a letter written by the defendants before the contract was made.

On 12 March 1994 the defendants, during pre-contract negotiations, had written a letter to the plaintiffs in which they stated:

"The price for the complete supply of the panels is £ 112,649.70 plus £ 2,892.45 for packing and shipment in two containers."

That price was subsequently modified. The modification is not claimed to be material for present purposes.

The contract was for the supply of 531 panels. A delivery in England of 83 panels was rejected by the plaintiffs. They then exercised their right to inspect a further 62 panels in Germany and rejected those. The balance of the 531 was subsequently delivered at the appropriate address in England. They were alleged to be defective and a claim for damages has been made.

Having considered Article 5 of the Convention and the facts of the case, the judge concluded:

"Such express terms as are relied upon and those derived from specifications allegedly agreed all relate to design and manufacturing quality. The breaches relied upon are all breaches of design and manufacturing obligations. The particulars of those breaches condescend to very great detail and are set out extensively making reference to each sheet of cladding in the schedules annexed to the Statement of Claim.

In my judgment the primary obligation under the contract terms asserted by the plaintiff essentially relate to the design and manufacture and

supply of the panels. Those are all obligations that would be performed in Germany.

It is right that the written confirmatory purchase form makes reference to delivery. It distinguishes supply from delivery. The delivery in this context clearly relates to the carriage obligation of the defendants under the contract(...).

In my judgment the place of performance of the principal obligation within the meaning of Article 5 is Germany. In consequence Article 5(1) does not give the English Court jurisdiction over the claim and the proceedings should therefore be set aside."

For the plaintiffs, Mr Schaff QC submits that the contract was for the supply of goods delivered and not ex-works. At the heart of the appeal, he submits, is the characterisation of the contract. The fact that design and manufacture took place in Germany should not obscure the fact that the primary obligation under the contract was to be performed by supply in England. He submits that the defendants confuse, on the one hand, the nature of the obligation breached and the place at which that obligation was to be performed with, on the other hand, the acts and omissions of the defendant which caused the breach of that obligation. They confuse, he submits, what is the breach of the obligation with why that obligation is in breach. The obligation breached was the failure to supply goods conforming with the specification at the place of delivery in England. The obligation of the defendants was to supply goods of the required specification at the place of delivery. It is upon that obligation that the plaintiffs have sued.

For the defendants, Mr Manzoni, in seeking to uphold the decision of the judge, takes two points. The first is upon the wording of the contract and the addition of handwritten words to the standard form. The words 'supply and deliver' have been added below the printed words 'supply the goods specified'. The effect, Mr Manzoni submits, is that if the obligation to supply is the principal obligation, in this particular contract it means to design, manufacture and make available in Germany. There is then a separate obligation to deliver in England. If the primary obligation is to supply, that obligation, by reason of the added words, is discharged in Germany. He submits that the earlier letter of the defendants, in which cost of delivery is put on a separate basis from the cost of supply, supports that construction of the contract. He accepts that, subject to his second point, the supply under the printed form of words would take place in England. He submits that the effect of the addition of the expression 'and deliver' is to modify the contract, so that its effect is to require supply in Germany followed by delivery in England. Under this

form of wording, the obligation to supply is the primary obligation and it is discharged by making the goods available in Germany.

In a development of that submission, Mr Manzoni challenges Mr Schaff's submission in his skeleton argument that the plaintiffs would have had no cause of action until the failure to supply in England occurred. Mr Manzoni submits that, upon defective manufacturing in Germany, the plaintiffs would have a cause of action in Germany. He has referred to building contracts in which it has been held that the building owner has a cause of action in certain circumstances upon defective work done by the building contractor, even though the time by which the work is to be done has not elapsed. Even if there is the possibility of such an action before the supply in England in this case (and, on the present facts, I am far from satisfied that there could be any such action), it would not, in my judgment, affect the nature of the action in fact brought in this case. It is an action for failure to supply goods of the required specification. In my judgment the possibility of another cause of action does not weaken what in the event is the cause of action espoused in this case.

In his second point Mr Manzoni makes a frontal attack, relying upon the judge's findings, upon Mr Schaff's submission as to what is the contractual obligation forming the basis of the legal proceedings, within the meaning of de Bloos. Mr Manzoni refers to the statement of claim in the action and the detailed allegations of manufacturing defects in Germany. This is a contract, he submits, to manufacture goods and then to supply them. The breach in this case is of the obligation to manufacture correctly. The breach is of the manufacturing obligation in Germany and not the subsequently arising supply obligation in England.

I add that Mr Manzoni submits that in the paragraphs of the judgment to which I have referred the learned judge was adopting both his submissions, though I have to express some doubt as to whether the judge had both of them in mind in his formulation. Nothing, however, turns on that point.

I accept the submissions of Mr Schaff. In the context of this contract, the addition of the words 'and deliver' does not convert a contract for supply in England into two separate contracts, one for supply in Germany and one for subsequent delivery in England. It might have been better if the words 'and deliver' had been left out, the obligation to deliver already appearing in a different part of the same page of the document. The emphasis in the contract remains, however, on supply, which is something different from manufacture, and the unnecessary repetition in handwriting of the word 'deliver' does not have the effect of transforming this contract into something quite different. That is supported by the standard terms, to which I have referred, dealing with risks, title and delivery. Mr Manzoni

goes as far as to submit that the effect of adding the words 'and deliver' in handwriting transforms clause 8, so that the risk would pass not, as the standard term contemplates, upon delivery in England, but upon the making available of the goods in Germany.

I am quite unable to conclude that the addition of the handwritten words, which are repetitious, have the dramatic effect for which Mr Manzoni contends. The effect of the words 'supply and deliver' is, in the context of this contract, 'to supply by delivery'. This remained a contract for supply by delivery in England. I have already expressed my conclusion upon the elaboration of that point on behalf of the defendants by reference to the possible existence in Germany of a cause of action before delivery in England.

As to the second of Mr Manzoni's points, in my judgment the contractual right on which the plaintiffs' action is based is the right to sue for a failure to supply goods conforming with the contractual specification. To put it the other way round, the obligation forming the basis of the legal proceedings is the obligation to supply goods conforming with that specification. The place of performance of that obligation is England. It is, in my judgment, immaterial that the acts and omissions which led to the failure to supply appropriate goods in England occurred in Germany. The statement of claim does, for present purposes (and no pleading point is taken), sufficiently allege a contractual obligation to supply goods and a breach of that obligation. The detailed pleading as to the circumstances in which the obligation was not performed does not detract from the nature of the right which the plaintiffs are asserting.

In my judgment Article 5(1) does apply and the defendants may be sued upon this claim in England. For those reasons I would allow this appeal.

ALDOUS LJ: I agree. But, as we are differing from the judge, I will add a few words.

Article 5(1) of the Convention enables suit to be brought in matters relating to a contract in the courts for the place of performance of the obligation in question. The European Court of Justice has made it clear that:

"14 (...) the criterion employed in that provision is not the connection with the court seised but, rather, only the place of performance of the obligation which forms the basis of the legal proceedings.

15. The place of performance of the obligation was chosen as the criterion of jurisdiction because, being precise and clear, it fits into the general aim of the Convention, which is to establish rules guaranteeing certainty as

to the allocation of jurisdiction among the various national courts before which proceedings in matters relating to a contract may be brought."

Per the European Court of Justice in Custom Made Commercial Ltd v Stawa Metallbau GmbH, Case C288/92.

The crucial difference between the parties turns upon where that place was. Mr Manzoni, who appeared for the respondents, submitted that the contract was for the supply of the panels in Germany, with the result that the property passed in Germany. There was under the contract a separate obligation to deliver. That, he submitted, was the conclusion that the judge reached. I believe that he was right that that was the conclusion that the judge reached. The judge drew attention to five points of guidance which he derived from the speech of Lord Goff in Kleinwort Benson Ltd v City of Glasgow [1999] AC 153, [1997] 4 All ER 641. He then turned to the statement of claim and came to the conclusion that the result was:

"In my judgment the primary obligation under the contract terms asserted by the plaintiff essentially relate to the design and manufacture and supply of the panels. Those are all obligations that would be performed in Germany."

In my view the judge wrongly understood the obligation which would found the basis of the claim. It was an obligation to supply in England by delivery to the required address. I need not set out the terms of the contractual documents, which have been read by my Lord. In my view the obligation was clear. It was to supply the panels in England. I reject the submission of Mr Manzoni to the contrary for four reasons. First, there is nothing in the documents which suggests that the supply was to be in Germany. There is no mention of Germany in the contractual documents and the words used in them are to the contrary. Secondly, there is nothing in the contractual documents which appears to alter the standard conditions of purchase set out on the back of the order, in particular the provisions in clauses 4, 5, 8 and 9, which my Lord has read. They negative the submission that the property in the goods should pass in Germany as they make it clear that supply was to take place in England and it was in England that the property should pass. Thirdly, Mr Manzoni's submission leads to uncertainty. What does supply involve if the supply is to be in Germany? There was no provision for making anything available in Germany, nor how that would happen, although there was provision for inspection if the plaintiffs wished. If the contract is to have certainty, then the supply had to take place in England where there would be delivery. Fourthly, on the facts, the contract was operated in that way. The panels were supplied in England and it was at that stage that the contract was deemed to be complete.

I turn to the second way in which Mr Manzoni puts his case. He says that, even if the contract was for the supply in England, the principal obligation was to manufacture the panels in an appropriate way. In my view that submission can be demonstrated to be misconceived by considering two cases: first, where the panels were delivered in England but were damaged in transit, and second, where delivery took place in England but the damage took place during manufacture. If Mr Manzoni is right, then the principal obligation would be broken in one case in one country and in the other in another country, depending upon where the damage took place. The contract was for the supply in England. That was the principal obligation. It mattered not to the plaintiffs how the goods came to be defective. What they ordered and what they required was panels made to the appropriate specification and that is the reason why they complain in the statement of claim of breach of the obligation to supply in England. They allege that they did not obtain that which they contracted to acquire. Based upon the pleading and upon the contract, it is clear that the principal obligation occurred in this country.

I therefore, for those reasons and those given by my Lord, would allow this appeal.

WARD LJ: This was a contract to supply and deliver certain cladding panels to the factory in Birmingham. Panels were duly supplied and delivered by the defendants. They were said to be defective. So the plaintiffs brought this action for damages and for an indemnity, and the question which arises is this (adopting the language in paragraph 14 of Shenavai v Kreischer, Case 266/85, [1987] ECR 239): what was the contractual obligation whose performance is sought in the judicial proceedings? The appellant says the contractual obligation is the obligation to supply and deliver conforming panels. The respondent submits that there are separate obligations: that there is the first obligation to supply (that is to say, to make available) which involves design and manufacture of the panels, which is performed in Germany, and the second obligation to deliver, which is performed by carriage to England.

In my judgment they are not separate obligations, though they may be separate parts of a composite obligation. It is composite because, if there has been no delivery at all, then the goods cannot have been supplied. One can have a contract to supply without delivery to the purchaser's place of business, which is performed by furnishing the goods and making them available at the supplier's place of business. But if the contract is, as it is here, to supply and deliver to the purchaser's place of business, then the contract is not performed unless and until that delivery has taken place, and the breach of performance occurs in England.

The alternative submission is that the primary contractual obligation was to manufacture the goods which conformed to the specification. As I understand the submission, Mr Manzoni relies on the allegations in the statement of claim that the relevant breaches were breaches of design and manufacture and it is in respect of those breaches that complaint is made and so the failure to conform with the specification would then have taken place in Germany. The error there seems to me to confuse what he is in breach of with the reasons for the breach.

In my judgment the respondent is in error, an error made clear by Custom Made Commercial Ltd v Stawa Metallbau GmbH, Case 288/92, in characterising the nature of the contract and not the contractual obligation founding the action. What the plaintiff complains of in this case is quite clear: 'That which you delivered to me was defective.' The breach of performance, therefore, occurred in this country.

I also would allow the appeal.