The right to cure defective performance

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A defective performance under a contract will not always entitle the aggrieved party to terminate the contract for breach. If the defaulting party can offer a subsequent performance in accordance with the contract within the time permitted for performance and in the absence of an anticipatory repudiation, the aggrieved party is bound to accept it. It will be argued that the nature and scope of the right to cure are determined by the operation of the remedies of defence of refusal to perform and termination. Prior to the expiry of the time for performance under the contract, the remedy or defence of refusal to perform controls the parties' obligations, which are only suspended by a defective performance. The defaulting party has until the end of this period to offer a subsequent tender, unless there has been an earlier repudiation by the defaulting party, or an acceptance of the defective performance by the aggrieved party. This article concludes that English law should not follow the American Uniform Commercial Code provision which extends the right to cure beyond the contract period.

It is often assumed that when a party to a contract tenders a defective performance and that performance is justifiably rejected by the aggrieved party, the contract is thereby terminated for breach. This assumption will not always be true, for the defaulting party is entitled to offer a subsequent tender within the time permitted for performance, which, if it is in accordance with the contract, the aggrieved party is bound to accept. This common law rule, which gives the defaulting party the right to cure defective performance, has been established in England for over a century[1] and has recently been approved by the House of Lords.[2] In no case, however, has the nature of the rule been explained, nor has there been any attempt to articulate

* B.C.L. (Oxon.), LL.M. (Harv.). I wish to thank Professor G. H. Treitel for his many helpful comments in relation to this topic. The following abbreviations are used for the books specified: Benjamin (*Benjamin's Sale of Goods*, 4th edn, London 1992); Chitty (*Chitty on Contracts*, 25th edn, 1983); Goode (Goode, *Commercial Law*, London, 1982); Treitel (*The Law of Contract*, 8th edn, London, 1991); Treitel, *Remedies* (*Remedies for Breach of Contract: A Comparative Account*, Oxford, 1988).

1. The case most often cited in support of the rule is *Borrowman Phillips & Co.* v. *Free & Hollis* (1878) 4 Q.B.D. 500 but there is earlier authority: *Tetley* v. *Shand* (1871) 25 L.T. 658, considered, *infra*, fn. 90. See Benjamin, para. 12–044, fn. 29.

2. *Motor Oil Hellas (Corinth) Refineries S.A.* v. *Shipping Corp. of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391.

the principles from which it is derived. This article will argue that the nature of the right to cure and its scope are determined by the operation of two fundamental contractual remedial principles: the right of the aggrieved party to whom the defective performance is tendered to withhold his or her own performance until a correct performance is tendered, and the right of the aggrieved party to terminate the contract for breach.

The central tenet of this article is that the right to cure is available while the parties are operating under the first principle, but ceases to be available when the second principle is triggered. Part I will analyse the relationship between these two remedies and how that relationship determines the nature and scope of the right to cure. It will be argued that the effect of the defective performance is to suspend the obligations of the aggrieved party, and by this mechanism the defaulting party is given the opportunity to substitute a fresh tender. It will be necessary to examine the operation of the defence of refusal to perform in English law and the effect on the obligations of the parties when the aggrieved party is not justified in relying on the defence.

The right to cure does not extend indefinitely, however. In general, in the absence of repudiatory conduct by the defaulting party, that party has until the time permitted for performance has expired to make good the performance. Part I will therefore consider what this means in respect of various possible time periods in contracts, and whether there are any exceptions to this rule. Finally, Part I will apply the above analysis to the question of whether the aggrieved party can recover damages for consequential loss caused by the original tender, and whether the defaulting party has the right to cure where there has been no rejection of the defective performance by the aggrieved party.

The general rule that the aggrieved party must wait until the expiration of the contract period before terminating the contract is subject to one, and possibly two, exceptions. These will be considered in Part II. The first is where the seller commits an anticipatory breach of the contract. The second is where the original defective tender amounts to a "fundamental breach" of the contract. In certain circumstances this may entitle the buyer to terminate even though the contract period has not expired.

The final part of this article will consider whether the right to cure should be extended beyond the contract period in light of the policy objectives of contract law. The right to cure promotes the performance of contracts and prevents a forfeiture of the contractual rights of the defaulting party following a defective tender. In so doing, however, it deprives the aggrieved party, even if only temporarily, of the powerful self-help remedy of termination, and creates considerable uncertainty for the aggrieved party in the exercise of his or her rights. In this context, it is instructive to take a brief look at the United States Uniform Commercial Code, which expressly permits a seller to cure beyond the contract period in certain circumstances.

For the sake of simplicity, the focus of this article will be on contracts involving goods, and in particular on the seller's rights to cure defective performance. Unless otherwise specified, therefore, the seller will be the defaulting party and the buyer will be the aggrieved party. This does not mean that the right to cure is confined to

sale of goods contracts, nor to sellers. The buyer may be subject to an obligation which is a condition precedent or a concurrent condition to the seller's obligation to perform. For example, under a "classic"[3] f.o.b. contract the buyer must nominate a ship onto which the goods will be loaded by the seller. Where the original nomination, which is not in conformity with the contract, is followed by one which is in conformity with the contract and within the stipulated time, the seller is bound to load in accordance with it.[4] Nomination of a ship under an f.o.b. contract is a particular method of taking delivery undertaken by the buyer in respect of which it has been established that the right to cure is available. There seems no reason in principle why the right to cure should not be available to a buyer in respect of other methods of taking delivery or making payment. For example, if the buyer is required under the contract to open an irrevocable letter of credit in London, but opens one in Geneva instead,[5] he should be entitled to open another irrevocable letter of credit in London, provided he can do so within the contract period.[6] It is suggested therefore that the principles discussed in relation to the seller's right to cure can be applied to the obligations of the buyer under a contract involving goods, provided the relevant conditions are met. Other types of contracts are beyond the scope of this article.

There is one final preliminary point. It is important to understand that the right to cure is a right to substitute a valid tender, or at least one which conforms with those contractual specifications which are conditions. There is no general right of substitution. In *Cargill U.K. Ltd.* v. *Continental U.K. Ltd.*,[7] an f.o.b. contract provided that the buyer give a provisional notice of eight days e.t.a. at loading of the vessel's name and itinerary, and nine running days before the end of the delivery period, such provisional notice to be followed by a definite notice of six running days and a notice of readiness and willingness. The buyer nominated the *Cobetas* and complied with the notice provisions in respect of that ship. When it appeared that the *Cobetas* would be late, the buyers sought to substitute the *Finnbeaver*, giving notice of readiness and willingness in respect of the latter, but failing to comply with the notice provisions for that ship. The buyers claimed that they were only required to satisfy notice requirements in respect of *a* ship, which they had done, and that the sellers were not justified in refusing to load the subsequent ship because notice requirements in respect of that ship had not been satisfied (there was not time to give valid notice) and they relied on "the general right of substitution in all f.o.b. contracts subject only to the substituted vessel being able to load

3. See Benjamin, paras. 20–001 *et seq.*

4. See, e.g., *Agricultores Federados Argentinos Sociedad Cooperativa Lda.* v. *Ampro S.A. Commerciale, Industrielle et Financiere* [1965] 2 Lloyd's Rep. 157; *Modern Transport Co. Ltd.* v. *Ternstrom and Roos* (1924) 19 Ll.L.Rep, 345.

5. This happened in *Enrico Furst & Co.* v. *W. E. Fischer* [1960] 2 Lloyd's Rep. 340, but the buyers in that case did not have to cure the defect because the sellers had treated the credit as valid, and had thereby waived their right to insist on strict compliance under the contract.

6. See *Kronman & Co.* v. *Steinberger* (1922) 10 Ll.L.Rep. 39 (the buyer opened a letter of credit in the wrong currency but, having rectified the mistake within the contract time, the seller's cancellation of the contract was held to be wrongful).

7. [1989] 2 Lloyd's Rep. 290; noted Bennett [1990] LMCLQ 466. See also *S.I.A.T. di dal Fero* v. *Tradax Overseas S.A.* [1980] 1 Lloyd's Rep. 53, where alterations to bills of lading did not cure the defects in the documents which justified their original rejection by the buyers.

within the shipping period".[8] The Court of Appeal rejected this contention; the right to nominate another vessel was only available if the further nomination was itself good under the contract. On the other hand, in *Erg Petroli S.p.A.* v. *Vitol S.A.* (*The Ballenita*),[9] the Commercial Court held that a substitute nomination was good even though it did not satisfy a clause in the contract requiring that the nomination was not to be made later than three London working days before the vessel's expected arrival date. The judge held that the clause was not fundamental to the scheme of the contract and its breach would not have entitled the buyers to reject the nomination and bring the whole contract to an end. It was held that, if breach of the clause resulted in the buyers' not having adequate time for making discharge and other such arrangements, they could be compensated by treating any demurrage that would otherwise accrue while the vessel had to wait at the discharge port as damages caused by the sellers' breach of contract in failing to give the required three days' notice of the vessel's expected arrival. Thus, it seems that, if the second tender, though not perfect, infringes warranties only, and not conditions (as were the notice provisions in *Cargill's* case), then the substitute tender must be accepted, though the seller may be liable for damages for breach of warranty.

I. THE NATURE OF THE RIGHT TO CURE

A. Cure and the relationship between the defence of refusal to perform and the remedy of termination

It may seem to be a curious feature of the right to cure that the aggrieved party in receipt of a defective performance prior to the expiration of the time permitted for performance, is not entitled to exercise the right to terminate for the very same defect which would entitle him or her to exercise that right if the time for performance had expired. The key lies in understanding the fact that a failure in performance by the defaulting party (assume the seller) may entitle the aggrieved party (assume the buyer) to refuse to perform his or her obligations under the contract without bringing the contract to an end. The remedy of withholding performance, or the defence of refusal to perform, is a temporary plea only and can be exercised without recourse to legal proceedings. The right to terminate, or put an end to the future performance of the parties' primary obligations under the contract, arises when the seller's obligations can no longer be performed in accordance with the contract. Beale explains the relationship between the two remedies as follows:[10]

> [The right to withhold performance] does not depend on any right to "terminate" the contract in the sense of justifiably refusing ever to perform it. This may be confusing to a reader familiar with the notion that "a contract may be terminated for breach of condition". It is quite correct that A's unwillingness or failure to perform an obligation when its performance

8. [1989] 2 Lloyd's Rep. 290, 294.
9. [1992] 2 Lloyd's Rep. 455.
10. H. Beale, *Remedies for Breach of Contract* (London, 1980), 20. This statement ignores the possibility of anticipatory breach by the seller, in which case the right to terminate would arise before the time for performance has expired. The effect of anticipatory breach by the seller is considered *infra*, Pt. II.

is a condition may give B the right to terminate, but that right cannot arise until the time for performing the contract has expired.

Under the remedy of withholding performance, the buyer is entitled to withhold his or her own performance for so long as the failure continues:[11] in effect, the buyer's obligations are suspended until the failure is corrected. It is because the buyer's obligations under the contract are only suspended, and not at that point discharged, that the seller has the liberty to cure. If the seller then offers a substitute performance which is in accordance with the contract, the buyer is bound to accept it: once a correct performance has been tendered by the seller, there is no longer any failure in performance justifying the refusal. The buyer's obligations are no longer suspended but are then due, and those obligations include accepting and paying for the goods. The facts of *Borrowman Phillips & Co.* v. *Free & Hollis*[12] illustrate the point. The defendants (buyers) agreed to buy from the plaintiffs (sellers) a cargo of maize. The sellers tendered a cargo to arrive by a vessel called the *Charles Platt* which the buyers refused to take on the ground that the shipping documents had not been tendered with it. When the sellers persisted, the matter was referred to arbitration, and the arbitrator decided that the buyers were not bound to accept the cargo of the *Charles Platt* in performance of the contract. The sellers subsequently, but within the time limited by the contract,offered the cargo of a vessel called the *Maria D*, and the Court of Appeal held that the buyer was bound to accept it.[13]

The aggrieved party is not required to wait indefinitely for the defaulting party to cure the defective performance, however. If the defect is not cured within the time for performance allowed under the contract, the buyer's duty to perform is no longer suspended, but is then discharged, because the condition to that duty can no longer occur within the time limited by the contract. That the seller has the right to cure up until the expiration of the time permitted for performance under the contract is vividly illustrated by *Agricultores Federados Argentinos Sociedad Cooperativa Lda.* v. *Ampro S.A. Commerciale, Industrielle et Financiere.*[14] The buyers under an f.o.b. contract nominated a ship which was expected, at the time of the nomination, to reach her destination within the shipment period. When the ship was subsequently delayed, the buyers took no action on their own initiative because they did not expect the sellers to raise any objection, as the ship would only be one day late. However, the market price had fallen, so the sellers said that they intended to cancel the contract. The buyers then quickly found another vessel at the last minute (a matter of hours before the deadline) and made the substitute arrangements. The sellers nevertheless cancelled, so the buyers were forced to abandon the substitute arrangements. It was held that the sellers had committed an anticipatory repudiation. Widgery, J., expressed the principle in the following terms.[15]

I can see no principle at all to indicate in a case of this kind that when the buyers had nomi-

11. See Treitel, 690.
12. (1878) 4 Q.B.D. 500.
13. *Ibid.*, 506.
14. [1965] 2 Lloyd's Rep. 157. See also *infra*, text to fn. 47.
15. [1965] 2 Lloyd's Rep. 157, 167.

nated the *Owestry Grange* they were in any way inhibited at any time from changing their minds and substituting the *Austral*, provided always, as was the fact here, that the *Austral* was capable of accepting the cargo within the time for shipment stipulated in the contract.

It follows from this anlaysis that a rejection of a tender of goods or other performance under the contract does not in itself amount to a rescission which brings the contract to an end. In English law, if the time for performance has expired, a rejection of the seller's performance will generally amount to a termination of the contract. If the time for performance has not expired, however, rejection of goods will merely suspend the obligations under the contract, so that the seller will be given the opportunity to cure the defective performance,—in the absence, that is, of repudiatory conduct. In *Kwei Tek Chao* v. *British Traders and Shippers Ltd.*,[16] Devlin, J., said that "[a] right to reject is merely a particular form of the right to rescind . . . ; and a rightful rejection of [a tender of goods or documents] is a rescission which brings the contract to an end". In the context of that case, the statement was true. Cure was not available as the time for performance had already expired; thus rejection could only signify rescission.

B. The defence of refusal to perform

Thus far I have argued that the right to cure is available while the parties are operating under the defence of refusal to perform, but ceases to be available when the principle of termination is triggered. It is necessary to take a closer look at the nature of the defence of refusal to perform and to ascertain when that remedy comes into operation: it is not every failure in performance which will entitle an aggrieved party to withhold performance. Whether or not the buyer is justified in relying on the defence of refusal to perform will have a crucial impact on liability. Where the buyer refuses to perform his or her obligations under the contract without being entitled to do so, the refusal to perform will generally[17] amount to a repudiation of the contract by the buyer. The effect of the buyer's repudiation is to relieve the seller of any further obligations under the contract, so that, if the seller does not cure (i.e., accepts the buyer's repudiation), the seller will not be in breach; whereas, if the buyer is justified in rejecting the goods and refusing to perform, and the seller does not cure, the *seller* will be in breach. Thus, it is important to determine which failures in performance justify the remedy of withholding performance.

In English law, the operation of the remedy of refusal to perform is determined by reference to whether the parties' obligations are classified as conditions precedent, concurrent conditions or independent obligations.[18] A condition in this sense is sometimes called a "promissory condition,",[19] being an actual promise, the

16. [1954] 2 Q.B. 459, 480.
17. Unless the refusal is a minor one: see the principles discussed, *infra*, text to fnn. 44–45.
18. Treitel, *Remedies*, 225.
19. This term is usually contrasted with "contingent condition" (see Chitty, para. 796), although the terminology has been criticized because it confuses a true promise with a condition: see Reynolds, *infra*, fn. 20.

performance of which is a condition of the liability of the other party.[20] When performance by one party, A, is a condition precedent to the liability of the other party, B, the latter's liability to perform does not arise until A has performed. When the promises are concurrent conditions, the performances of the parties are to be exchanged simultaneously: the obligation of each party depends on the readiness and willingness to perform of the other party.[21] When promises are independent, each party can enforce the other's promise without performing his own. Whether a promise will be construed as a condition precedent, concurrent condition or independent promise depends on the "intention and meaning of the parties as it appears on the instrument itself, and by the application of common sense to each particular case".[22]

It is easier, in English law, to apply the defence of refusal to perform to cases where the seller fails to perform at all than to cases where the seller performs defectively. The reason for the difficulty in applying the defence of refusal to perform to defective performance is that it is commonly assumed that a refusal by one party to perform on the ground that the other party's performance is defective is an aspect of the remedy of termination.[23] From an historical perspective, the courts in the 18th and 19th centuries tended to fuse manner and order of performance together, referring to "conditions precedent" as terms the non-performance of which would go to the "whole root and consideration"[24] of the contract, and which would entitle the other party to refuse to perform.[25] For example, *Boone* v. *Eyre*,[26] often considered to establish the requirement of substantial failure in performance for the remedy of termination,[27] involved a refusal to perform in response to a partial performance by the other party. The plaintiff conveyed to the defendant a plantation in the West Indies, together with the slaves on it, in consideration for £500 down plus an annuity of £160 per year, and covenanted that he had good title to the plantation and was lawfully possessed of the slaves. Some time later the defendant discovered that the plaintiff had no title to the slaves and stopped paying the annuity. The court held that the defendant was liable to pay the annuity, though it would be different "if the plaintiff had no title at all to the plantation itself".[28] Lord Mansfield held that the defendant was not justified in refusing to perform his promise because the failure went only to part of the consideration and just compensation could be made by the payment of money damages. In other words, an aggrieved party will only be justified in withholding performance if the other party's

20. F. M. B. Reynolds, "Warranty, Condition and Fundamental Term" (1963) 79 L.Q.R. 534, 537; Chitty, para. 795.

21. The Sale of Goods Act, 1979, s. 28 provides that delivery and payment are concurrent conditions.

22. *Stavers* v. *Curling* (1836) 3 Bing. N.C. 355, 368; 132 E.R. 447, 452. See also *Bentson* v. *Taylor, Sons & Co.* [1893] 2 Q.B. 274, 281.

23. Treitel, *Remedies*, 300.

24. *Davidson* v. *Gwynne* (1810) 12 East. 381, 389; 104 E.R. 149, 152.

25. E.g., *Kingston* v. *Preston* (1773) cited in *Jones* v. *Barkley* (1781) 2 Dougl. 684, 689; 99 E.R. 434, 437; *Bentson* v. *Taylor, Sons & Co.* [1893] 2 Q.B. 274, 281.

26. (1789) 1 Hy. Bl. 273n.; 126 E.R. 160. There was no satisfactory record of the case until Lord Kenyon produced a manuscript note of it: see *Campbell* v. *Jones* (1796) 6 T.R. 570, 573; 101 E.R. 708, 710, and *Glazebrook* v. *Woodrow* (1799) 8 T.R. 366, 373; 101 E.R. 1436, 1440.

27. Treitel, 671.

28. 8 T.R. 366, 374; 101 E.R. 1436, 1441.

failure in performing the condition precedent or concurrent condition is sufficiently serious.[29]

It is not clear from *Boone* v. *Eyre* what degree of seriousness of failure in performance must be reached before the aggrieved party can refuse to perform. Other than the general statements of principle enunciated by Lord Mansfield, the report does not indicate whether there was any enquiry into the degree of the failure.[30] The question then is what amounts to a failure going to the "whole of the consideration". This criterion has been worked out more fully in the cases involving the remedy of termination. It has already been said that English law does not draw a sharp distinction between the remedy of refusal to perform and the remedy of termination; consequently it if often assumed that the same degree of seriousness of default is required for both remedies.[31] The defence of refusal to perform is a less drastic remedy than the remedy of termination: the former suspends the obligations under the contract, the latter discharges them. It is submitted therefore that the buyer can at least[32] refuse to perform on account of those defects which would entitle the buyer to terminate if the time permitted for performance had expired. Briefly stated,[33] the aggrieved party is entitled to withhold performance where the failure in performance by the defaulting party would amount to either a breach of a condition or a breach of an intermediate term where the breach gives rise to an event which deprives the party not in default of "substantially the whole benefit which it was intended that he should obtain from the contract",[34] if the time for performance had expired.

A detailed analysis of the principles determining when a party is entitled to terminate a contract for breach when the time for performance has expired, is beyond the scope of this article. A few points about the application of these principles to the defence of refusal to perform warrant mentioning however. The first is in relation to the test for an intermediate term. Whether breach of an intermediate term will give rise to the right to terminate will depend on the nature and consequences of the breach. This test may give rise to difficulties when applied to the defence of refusal to perform and the right to cure. When the buyer is withholding performance under the defence of refusal to perform, the full consequences of breach may not be apparent because the obligations under the contract are held in suspension only. In particular, it may not be known whether or not the seller will in fact cure the defect. If the seller cures the defect, then there may be no prejudice caused to the buyer by the original breach, because it has been cured. Does this mean that, retrospectively, the buyer was not entitled to refuse to perform because in the end

29. Exceptionally, if the obligation is "entire", complete performance is required and any failure justifies a refusal to perform.

30. There is no mention of the number of slaves with respect to whom the defendant had no title.

31. Treitel, *Remedies*, 305.

32. See *infra*, text to fnn. 38 *et seq*, for the argument that a defect less serious than that required for termination may in some cases be sufficient for the buyer to rely on the defence of refusal to perform.

33. It will be assumed in the discussion that follows that the seller's obligation are conditions precedent or concurrent conditions to the buyer's obligations.

34. *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* (*The Hongkong Fir*) [1962] 2 Q.B. 26, 70. An alternative formulation of the principle is whether the breach goes to the root of the contract: see *Cehave N.V.* v. *Bremer Handelsgesellschaft m.b.H. (The Hansa Nord)* [1976] Q.B. 44, 60, 61, 73, 84.

the buyer was not caused any prejudice? Perhaps a variant of the test in *Embiricos* v. *Sydney Reid & Co.*[35] could be used to solve this problem. The issue in that case was whether the defendants were justified in treating a charterparty as frustrated by a war breaking out between Turkey and Greece, in which Turkish authorities were seizing Greek ships. After the defendants' cancellation of the contract, the Turkish Government unexpectedly allowed Greek ships to pass the Dardanelles, so that the contract could in fact have been completed. Scrutton, J., held that, if there was a reasonable likelihood that the initial restraint would frustrate the contract, the fact that unexpectedly the restraint is removed for a short time does not mean that the parties should have foreseen this unexpected event. He said that "[c]ommercial men . . . must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds".[36] Applying this criterion to the problem of whether the buyer can refuse to perform for breach of an intermediate term, the issue would be whether it was reasonable at the time of the defective tender to regard its effects, if uncured, as likely to be serious.

The second difficulty arises in the area of warranties. While it is generally accepted that a buyer may not terminate the contract if the term broken is a warranty only,[37] it is not so clear whether the buyer can refuse to perform on account of a defect which amounts to a breach of warranty. It has been said that the defence of refusal to perform is a less drastic remedy than the remedy of termination.[38] This fact might support the view that the buyer can refuse to perform for a less serious defect than would entitle the buyer to terminate if the time for performance had expired. There are *dicta* in some of the cases which suggest that if a defect, which would not entitle the buyer to terminate the contract if the time for performance were up, is discovered prior to that time, the buyer can refuse to accept the goods, and insist that the defect be remedied; and if the seller refuses to remedy the defect within the time for performance, then the buyer is entitled to treat the contract as at an end.[39] In *The Hongkong Fir*,[40] Sellers, L.J., suggested that, if the charterers had known of the deficiency in the engine room staff at the time of delivery of the ship, they could have refused to take the ship in that condition, even though the charterers could not, as it turned out, terminate for breach of that term. If the shipowner refused to remedy the defect, such refusal would have amounted to a repudiation of the charterparty and entitled the charterers to accept it and treat the

35. [1914] 3 K.B. 45.
36. *Ibid*, 54.
37. There is an alternative view that the aggrieved party may be entitled to terminate the contract for a breach of warranty if the effect of the breach is sufficiently serious. This view is based on a two-fold classification of terms into conditions and other terms: in other words, what was a "warranty" has been submerged in the concept of "intermediate term". There is some support for this view in *The Hansa Nord*, *supra*, fn. 34, at p. 60, and see F. M. B. Reynolds, "Discharge of Contract by Breach' (1981) 97 L.Q.R. 541, 548–549; but the weight of authority is against it: see Treitel, 698, fnn. 59–60.
38. *Supra*, text to fn. 32.
39. See also A. L. Corbin, *Corbin on Contracts* (Minneapolis, 1960), vol. 3A, s. 702, fn. 10, at pp. 316–317: " . . . for a small defect in title to land transferred, the buyer had a right to damages but not a right to restitution of the price paid . . . This may be true even though the defect, if noted before conveyance would have entitled the buyer in refusing to pay."
40. *Supra*, fn. 34, at p. 56.

contract as at an end.[41] Similarly, in *Mantovani* v. *Carapelli S.p.A.*,[42] it was held that the buyers were not entitled to treat the sellers' failure to tender a weight certificate under an f.o.b. contract as a breach going to the root of the contract, "unless this failure was persisted in and amounted to a refusal".[43] The judge found, however, that the buyers never asked for a weight certificate and one could and would have been provided by the sellers if the buyers had done so. In other words, in certain cases, the buyer can insist that the seller cure a defect, which amounts to a breach of warranty, and if the seller refuses to do so, the seller may be held to have repudiated the contract. It is the repudiation, rather than the defect, which gives rise to the right to terminate. Nevertheless, the result is that the original refusal to perform on account of a defect which amounted to a breach of warranty only is subsequently justified by the seller's conduct. The circumstances in which the seller will be found to have repudiated must be exceptional, however. Otherwise, a buyer could refuse to perform on account of a breach of warranty in the hope that the seller will refuse to perform, and effectively be given the opportunity to escape the contract for a breach of warranty. It is submitted, however, that this is unlikely to be the result. The seller must still be guilty of a repudiation; and a minor breach, though deliberate and persisted in, will not necessarily amount to a repudiation.[44] There must be an absolute refusal to perform, or an intention wholly to abandon the contract.[45] In determining whether the seller no longer intends to be bound, factors such as the reasonableness of the request to put the defect right and whether the defect can easily be remedied by the seller must be relevant in determining whether the seller, in refusing to remedy the defect, has repudiated the contract. A test similar to that laid down in *Maple Flock Co. Ltd.* v. *Universal Furniture Products (Wembly) Ltd.*[46] might usefully be adopted to protect the seller's interests. In determining whether the seller's conduct amounts to a repudiation, the court should consider, first, the ratio quantitatively which the breach bears to the contract as a whole and, secondly, the degree of probability or improbability that such a breach will be repeated.

C. The remedy of termination: when is the right to cure lost?

The general rule stated above was that, in the absence of repudiatory conduct by the defaulting party, that party has up until the expiration of the period of time permitted for performance under the contract to cure the original defective perfor-

41. Sellers, L.J., made a similar point in *Bowmakers (Commercial) Ltd.* v. *Smith* [1965] 1 W.L.R. 855, 859, where a term in an indemnity agreement entitling the dealer to certain benefits from a finance company if the dealer paid the loss suffered was held not to be a condition precedent to payment; nevertheless, Sellers, L.J., said, obiter, that in an extreme case the agreement might be held to be repudiated by the finance company where, instead of complying with this stipulation, the company indicates that it will "defy it".

42. [1978] 2 Lloyd's Rep. 63; aff'd [1980] 1 Lloyd's Rep. 375 (C.A.). The effect of the seller's refusal to cure defective performance is considered *infra*, Pt. II.

43. [1978] 2 Lloyd's Rep. 63, 72. See also *Associated Newspapers Ltd.* v. *Bancks* (1951) 83 C.L.R. 322, where a refusal to perform in accordance with the contract was held to amount to a repudiation even though the term breached was only a warranty and not a condition.

44. *Rhymney Ry* v. *Brecon and Merthyr Tydfil Junction Ry* (1900) 69 L.J. Ch. 813, 819.

45. *Freeth* v. *Burr* (1874) L.R. 9 C.P. 208, 213, 214.

46. [1934] 2 K.B. 148, 157.

mance. This rule applies whether or not time is specified in the contract. In *S.I.A.T. di dal Ferro* v. *Tradax Overseas S.A.*,[47] a case involving the tender of defective documents under a c.i.f. contract, Megaw, L.J., stated:

> . . . the law, in the absence of a contractual term to the contrary, allows a seller who has presented defective documents to re-present, tendering correct documents, so long as he does so before the last permissible date provided by the terms of the contract, or, in the absence of contractual terms, the date for presentation provided by the term which in those circumstances is implied by law.

The question of how long the defaulting party has to cure the defective performance turns therefore on the terms of the contract relating to the time for performance. There are several possibilities. Where time is of the essence, strict compliance with the time for performance is a condition of the contract, any breach of which will entitle the innocent party to elect to terminate the contract, no matter how trivial, or whether it causes any loss.[48] This means that performance by the seller of his obligations *within* the time allowed is a condition precedent to the buyer's liability, which is not fulfilled if the obligations are performed *after* that date.[49] A failure to substitute a fresh tender within the time period discharges the buyer's obligations at that point, because the condition precedent to the buyer's liability (namely, performance within the specified time) can no longer occur. It follows that the seller is deprived of the right to cure, in the sense that the seller cannot insist that the buyer accept a substitute performance the moment the circumstances giving rise to the right to terminate for breach have arisen (i.e., the moment the time for performance has expired), even though the contract is not automatically terminated at this point,[50] and the aggrieved party merely has a right to elect to affirm the contract or to terminate it.[51]

Where time is not of the essence, a failure by the defaulting party to perform by the specified date will not entitle the aggrieved party to terminate the contract at that date, although the latter will be entitled to damages for delay beyond the specified date.[52] The question is whether the seller has only a "reasonable time" after the date specified within which to make good the default, or the seller has until such time as the delay amounts to a substantial failure in performance,[53] or the delay goes to the root of the contract.[54] There is a difference between these two time periods: the defaulting party may perform after a time which is regarded as reasonable, having regard to the obligations which remain unperformed and to how hard

47. *Supra*, fn. 7, at p. 63. See also *The Kanchenjunga*, *supra*, fn. 2, at p. 399.

48. *Bowes* v. *Shand* (1877) 2 App. Cas. 455 (where shipment prior to a stipulated period justified termination, even though the buyers suffered no damage as a result of the breach).

49. *Bunge Corp.* v. *Tradax Export S.A.* [1980] 1 Lloyd's Rep. 294 (C.A.); [1981] 1 W.L.R. 711 (H.L.).

50. Insurance contracts may be an exception to this rule: see, e.g., *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Good Luck)* [1992] 1 A.C. 233.

51. If, instead of terminating the contract, the aggrieved party acepts the goods and affirms the contract, there is an acceptance under the principles discussed *infra*, Part I(F); if the aggrieved party rejects the goods but wishes to hold the contract on foot, there has been a waiver under the principles discussed *infra*, part I(D)(1).

52. *Raineri* v. *Miles* [1981] A.C. 1050.

53. Treitel, 724.

54. *Universal Cargo Carriers Corp.* v. *Citati* [1957] 2 Q.B. 401, 426.

the aggrieved party has pressed for performance,[55] yet unreasonable delay may not deprive the aggrieved party of substantially the whole benefit of the contract.[56] The strongest authority for the former time period is *McDougall* v. *Aeromarine of Emsworth Ltd.*[57] A clause in a contract to build a yacht provided that the seller would use "best endeavours" to complete by a certain date, but such delivery date could not be guaranteed. Diplock, J., held that such a clause placed on the seller a duty to deliver within a reasonable time of the specified date, and the obligation to deliver within a reasonable time was a condition. Thus, the seller had a reasonable time within which to remedy any defects in the original tender, because the buyer could terminate after a reasonable time had lapsed. The case may be distinguishable on two bases from a case where there is simply a specified date, which is not of the essence. First, the contract in *McDougall* placed a "best endeavours" qualification on the time clause. Second, on the facts, it is fair to say that the buyer terminated at a time when he could be said to have been deprived of substantially the whole benefit of the contract: the yacht was bought for the purpose of sailing during the yachting season, and by the time the defects could have been remedied (if at all) the yachting season would have been almost over.

Other cases support the view that the aggrieved party can only rescind when the delay becomes so long as to go to the root of the contract and amount to a repudiation of it. In *Universal Cargo Carriers Corp.* v. *Citati*,[58] the obligation on the charterer to complete loading by 21 July was held not to be a condition, so that its breach did not entitle the owner to rescind, but gave rise to a claim for damages only.[59] Devlin, J., said that a reasonable time was something less than the period required for the delay to "frustrate the charterparty", and therefore did not amount to a delay long enough to justify rescission.[60] In *The Hongkong Fir*, where it was held that the obligation to provide a seaworthy vessel by a specified date was an intermediate term only, the charterer was not entitled to rescind the contract because the delays caused by the breakdowns and repairs were not so great as to frustrate the commercial purpose of the charterparty. In *Stanton* v. *Richardson*,[61] the shipowner failed to provide a seaworthy ship for the particular cargo agreed upon,[62] so the charterer refused to reload the ship. At the trial, the jury found that the ship could not have been made seaworthy, not only within a reasonable time, but within such time as would not entirely frustrate the whole adventure. Bress, J., held that the charterer was absolved altogether.[63] Although the jury finding meant that the court did not need to decide whether a failure to cure within a reasonable

55. *Charles Rickards Ltd.* v. *Oppenhaim* [1950] 1 K.B. 617, 624.
56. *Supra*, fn. 54, at pp. 430, 432.
57. [1958] 1 W.L.R. 1126.
58. *Supra*, fn. 54.
59. Note that *Citati* does not consider whether the obligation was an intermediate term because it was decided before that terminology was introduced in *The Hongkong Fir*, *supra*, fn. 34.
60. *Supra*, fn. 54, at pp. 434–435.
61. (1872) L.R. 7 C.P. 421, 437.
62. Although the ship would have been seaworthy for ordinary purposes, it was found that it was not seaworthy for the particular cargo, with the result that the cargo had to be unloaded.
63. In fact the charterer did not have to wait until the end of that period, the impossibility of the shipowner's performance amounting to an anticipatory repudiation under the principles discussed *infra*, Pt. III.

time would have absolved the charterer, it may be said that the court did not seem to suggest that the question left to the jury by the trial judge was inappropriate.

On the other hand, it might be argued that these cases should be limited to their facts. In *Citati*, it was clearly a part of Devlin, J.'s reasoning that the term as to loading within the lay days was not a condition of the contract. It does not necessarily follow that, where a term in a sale of goods contract as to quality is not a condition, for example, a breach of such a term, if not remedied within a "frustrating time", will entitle the buyer to terminate. In a sale of goods case, if the defect in the original performance amounts to a breach of warranty only, or a breach of an intermediate term which does not deprive the buyer of substantially the whole benefit of the contract, the buyer cannot terminate for the failure in performance; nor is the buyer generally entitled to refuse to perform and insist that the seller cure the defect.[64] *The Hongkong Fir* and *Stanton* v. *Richardson* involved time charterparties and the breach was not having the ship ready for a part of the bargained for period.[65] It is arguable that a case involving a contract under which the amount of performance is measured by time, is not directly applicable to other types of contract where performance is not so measured, such as in sale of goods cases, where performance is primarily concerned with the quality of goods. Nevertheless, it is submitted, albeit tentatively, that the weight of authority is in support of the view that, where the buyer justifiably refuses to accept goods in the condition in which they are originally tendered, the buyer will only be entitled to terminate if the delay in remedying the defect would deprive the buyer of substantially the whole benefit which it was intended he or she should receive from the contract.[66]

Where no time is specified in the contract, the court will imply a term that performance must be made within a reasonable time.[67] A failure by the seller to cure a defect within a reasonable time in such a case will amount to a breach of contract, entitling the buyer to damages. The question is whether failure to cure the defect within a reasonable time amounts to a repudiatory breach. It is stated in *Benjamin* that a "failure to deliver the goods within a reasonable time may amount to a breach which entitles the buyer to treat himself as discharged from further liability under the contract of sale".[68] It is submitted that this proposition is misleading. There may well be cases where special circumstances indicate that a failure to perform within a reasonable time is to be regarded as a breach of condition entitling the buyer to terminate,[69] but in the absence of such special circumstances it seems strange that, where no time is specified, the parties could have intended that time would be of the essence. Moreover, if a failure to deliver within a reasonable time does entitle the buyer to terminate the contract, then this would produce the ano-

64. This is subject to the discussion, *supra*, text to fnn. 38 *et seq*.

65. The consequences of the breach were lessened by the fact that there was an off-hire clause in the charterparty so that the charterer did not pay for the period during which the ship was not operational.

66. See Benjamin, para. 8–025, fn. 13.

67. *Charles Rickards Ltd.* v. *Oppenhaim*, *supra*, fn. 55, at p. 622. This is also the position under the Sale of Goods Act 1979: see s. 29(3).

68. Para. 8–033. Contrast Lord Devlin, "The Treatment of Breach of Contract" [1966] C.L.J. 192, 208, where the author states that, where there is no time for delivery, the contract continues until its purpose is frustrated.

69. See, e.g., *McDougall* v. *Aeromarine of Emsworth Ltd.*, *supra*, fn. 57.

maly that, where a time is specified under the contract, and time is not of the essence, the seller will be entitled to cure the defect until such time as the buyer would be deprived of substantially the whole benefit under the contract; but, where the contract is silent on the time for performance, the seller will have only a reasonable time within which to cure. The author of *Benjamin* relies on *Thomas Borthwick (Glasgow) Ltd.* v. *Bunge & Co. Ltd.*[70] In that case, a c.i.f. contract stipulated that shipment was to be made "*per Bristol City*, expected to load 3rd/5th January, 1968, or substitute". The *Bristol City* was delayed, so the selers substituted another ship, which loaded within a reasonable time. Browne, J., said that the words "or substitute" made it impossible to hold that the contract was for delivery on any fixed date, and therefore no time for sending the goods was fixed under the contract. Browne, J., held that the sellers were bound to deliver within a reasonable time, and, furthermore, that a breach of the provision to deliver within a reasonable time was a condition which would entitle the buyers to cancel the contract. The point is not considered in detail, however, and the case may be explained on the basis that, though Browne, J., held that there was no time specified for delivery, the fact that the contract specified the date for the original ship indicated that the seller should only be allowed to make a substitute tender within a reasonable time. In any event, it is submitted that the better view is that, where no time is specified in the contract, the buyer should, in the absence of special circumstances indicating otherwise, only be entitled to terminate the contract if the delay is such as to deprive the buyer of substantially the whole benefit under the contract.

D. Can the seller ever cure beyond the contract period?

There are two possible exceptions to the general rule that the defaulting party cannot cure beyond the time permitted for performance under the original contract:

(1) where the aggrieved party has waived the time for performance;
(2) where the court will grant relief against forfeiture.

(1) Waiver

If a buyer agrees to accept a later delivery, or if a seller at the request of a buyer delivers late, the buyer cannot refuse to accept on the ground that the delivery was not made by the time specified in the original contract, because the buyer will have waived his or her rights in respect of prompt delivery.[71] It is submitted that, if the buyer waives the time for the performance in this sense,[72] the seller can cure a

70. [1969] 1 Lloyd's Rep. 17.
71. *Levey & Co. Ltd.* v. *Goldberg* [1922] 1 K.B. 688 (forbearance by the seller at the request of the buyer to deliver within the defined period; buyer refused to accept delivery; seller entitled to damages for non-acceptance).
72. In some cases this type of waiver has been based on the principle in *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130: see *The Kanchenjunga*, *supra*, fn. 2, at p. 399, and *Charles Rickards Ltd.* v. *Oppenhaim*, *supra*, fn. 55, at p. 623. In other cases it has been based on the Sale of Goods Act 1979, s. 11(2): see McCardie, J., in *Hartley* v. *Hymans* [1920] 3 K.B. 475, and Diplock, J., in *Enrico Furst & Co.* v. *W. E. Fischer*, *supra*, fn. 5. For the requirements of this type of waiver, see Treitel, 98 *et seq*.

defective performance within the extended time period, and the buyer is bound to accept the substitute performance. Support for this proposition may be derived from *Enrico Furst & Co.* v. *W. E. Fischer*.[73] The contract called for an irrevocable letter of credit to be opened by Westminster Bank Ltd. in London, but the credit was opened in Geneva instead. The sellers called for an amendment of the credit in another respect, but did not complain about the fact that it was opened in the wrong place. It was held that the sellers had waived their right to insist on the credit's complying strictly with the contract. Since this type of waiver is not a variation of the contract, however, the seller could have given the buyers reasonable notice of their intention to treat the buyers' failure to tender a correct credit as a breach of condition. Before a reasonable time had lapsed, however, the sellers wrongfully repudiated the contract, and the buyers accepted the repudiation. Consequently, there was no need for the buyer to cure the original defect. Nevertheless, it is submitted that, where the aggrieved party waives his or her right to insist on prompt performance under the contract, the defaulting party has additional time within which to cure the original defect. The aggrieved party cannot terminate on the expiration of the time originally permitted for performance under the contract. If, however, the aggrieved party again makes time of the essence by fixing a further time for delivery which is reasonable[74] in all the circumstances, and the defaulting party fails to cure the defective performance within that additional time, the aggrieved party is then entitled to terminate the contract.[75]

(2) Relief against forfeiture

There is an inherent jurisdiction in Equity to grant relief against forfeiture of a lessee's interests where the lease entitles the landlord to terminate for breach of a covenant under the lease.[76] The defaulting lessee is given a period within which to make good the default: in effect, the lessee is given the opportunity to cure the default after the right to terminate has arisen under the contract.[77] The question is whether relief against forfeiture will be available in other contexts to give the defaulting party the liberty to cure after the right to terminate has arisen.

The jurisdiction is not confined to leases, or to interests in land,[78] but there are several limitations on its operation which indicate that it will rarely be available in sale of goods contracts or perhaps in commercial contracts generally. Forfeiture tends to be invoked when the contract contains an express clause for termination upon a minor breach by the defaulting party, indicating that there may have been a

73. *Supra*, fn. 5.

74. Contrast the case where the aggrieved party merely extends the time for performance by fixed periods, in which case the reasonableness of the extensions of time is irrelevant: *Buckland* v. *Farmar & Moody* [1979] 1 W.L.R. 221; *Nichimen Corp.* v. *Gatoil Overseas Inc.* [1987] 2 Lloyd's Rep. 46, 53.

75. *Charles Rickards Ltd* v. *Oppenhaim*, *supra*, fn. 55.

76. *Shiloh Spinners Ltd.* v. *Harding* [1973] A.C. 691, 723.

77. There are now statutory provisions allowing relief against forfeiture of leases and requiring formal machinery for termination, the effect of which is to allow the defaulting party to cure: see, e.g., Law of Property Act 1925, s. 146.

78. See *Shiloh Spinners Ltd.* v. *Harding*, *supra*, fn. 76, where Lord Wilberforce said that there were two heads of jurisdiction (p. 723) and Lord Simon said that equity "has an unlimited and unfettered jurisdiction to relieve against contractual forfeitures and penalties" (p. 726). This statement must be read in the light of the more recent case of *The Scaptrade*, *infra*, fn. 79. See also the Consumer Credit Act 1974, ss. 88–89, requiring formal notice of termination and giving the hirer at least seven days to make good his or her default.

disparity of bargaining power between the parties.[79] It is not so clear, therefore, that relief will be granted simply where the right to terminate has arisen because the time for performance has expired. Furthermore, it has been held by the Privy Council that relief will not be granted to a purchaser in default under a sale of land contract because specific performance will not be granted where time is expressed to be of the essence.[80] Arguably, therefore, the jurisdiction does not apply where time is of the essence, or perhaps it will not apply to sale of goods contracts at all, because generally specific performance will not be granted in sale of goods contracts. Moreover, the jurisdiction will rarely be invoked in the context of commercial agreements where the parties have bargained on equal terms.[81] In England, it has been held that the jurisdiction is limited to relief against loss of proprietary or possessory interests, and does not extend to relief against loss of purely contractual interests.[82] On the other hand, it has been held that it extends to relieve against forfeiture of proprietary and possessory interests in personal property, including intangibles such as patents,[83] although it is difficult to see why relief is granted against forfeiture of personal property, which includes a chose in action, when it is denied to contractual rights.[84] These restrictions on relief against forfeiture have been justified on the ground that to extend the jurisdiction too far would create uncertainty, and in commercial transactions, it "is of the utmost importance" that parties "should know where they stand".[85] The right to cure runs against this policy as it creates uncertainty for the aggrieved party who may not know or believe that the defaulting party will tender a substitute performance in accordance with the contract. It is submitted therefore that it is unlikely that the right to cure will be extended under the jurisdiction to grant relief against forfeiture.

E. Is there a right to damages for consequential loss from the original tender?

The question considered here is whether a seller who cures a defective performance within the time permitted for performance is liable to the buyer for any consequential loss caused by the original tender. In order to answer this question, it is submitted that it is necessary to take a closer look at the effect of the original defective

79. See *Scandinavian Trading Tanker Co. A.B.* v. *Flota Petrolera Ecuatorina (The Scaptrade)* [1983] Q.B. 529, 539–540, *per* Goff L.J.; aff'd [1983] 2 A.C. 694 (H.L.).

80. *Steedman* v. *Drinkle* [1916] 1 A.C. 275, although relief was given in an earlier case where time was of the essence: *J. H. Klimer* v. *British Columbia Orchard Lands Ltd.* [1913] A.C. 319. In Australia relief has been granted to a defaulting purchaser where time was of the essence: *Legione* v. *Hateley* (1983) 152 C.L.R. 406. However, the High Court stressed the exceptional nature of the circumstances in that case, relying on the unconscionable behaviour of the vendors. Consequently, in *Ciavarela* v. *Balmer* (1983) 153 C.L.R. 438 the High Court refused relief where there was no evidence of unconscionability, and emphasized that relief will be granted only in rare cases. Contrast *Stern* v. *McArthur* (1988) 165 C.L.R. 489.

81. *The Scaptrade*, *supra*, fn. 79. Contrast *B.I.C.C. Plc* v. *Bundy Corp.*, *infra.*, fn. 83.

82. *The Scaptrade*, supra, fn, 79, (relief denied against the operation of a withdrawal clause in a time charterparty upon accidental failure to comply with obligations as to payment of hiring fees). See also *Sport Internationaal Bussum B.V.* v. *Inter-Footwear Ltd.* [1984] 1 W.L.R. 776: relief denied to a mere contractual right (licence) to use certain trade marks.

83. *B.I.C.C. Plc.* v. *Bundy Corp.* [1985] Ch. 232.

84. *B.I.C.C.* v. *Bundy*, *ibid.*, may be reconciled with the cases in fn. 80 on the basis that it inolved an actual assignment of a patent, which is a transfer of property. But see Treitel, 682.

85. *The Scaptrade*, *supra*, fn. 79, at p. 541, *per* Goff L.J.

tender on the obligations of the parties. It has been argued so far that, in the absence of repudiatory conduct by the seller, the right to terminate the contract for defective performance only *arises* at the moment that the time for performance has expired. Does this mean that the seller commits no breach of contract in making an initial defective tender if that tender is subsequently cured, with the result that the seller avoids liability in damages?

On one view, the mere fact of defective performance does not put the seller in breach: the seller only becomes in breach if the defective performance remains uncured at the time performance is due. There is no breach because the duty of the seller is to tender a correct performance by the contract date. The argument may be illustrated by a variation of the facts of *The Hongkong Fir*.[86] The charterer sought to rescind for breach of a seaworthiness clause because the ship had been provided with incompetent engine-room staff, causing him to have breakdowns. In the Court of Appeal, Sellers, L.J., pointed out[87] that, if the charterer had known at the time of the tender of the inefficiency of the engine-room staff making the ship unseaworthy, he could have refused to take her in that condition. Commenting on this point extra-judicially, Lord Devlin has said:[88]

> This does not mean that he would have had a right to rescind. A tender of a ship (or of goods under a contract for the sale of goods) in a condition that does not comply with the terms of the contract is not a breach of contract. What creates the breach in such a case is the failure to tender within the contract time a ship in a condition which *does* comply with the contract.

Thus, when a seller tenders a defective performance which is rejected, the seller is treated as if he or she had not tendered delivery at all.[89] There is support for this view in *Tetley* v. *Shand*.[90] The relevant facts are that, under a contract for the sale of 500 bales of cotton, the defendant accepted the first instalment of 300 bales but rejected the second instalment of 200 bales on the ground that it was not a proper shipment. After the defendant refused to accept the 200 bales, the plaintiffs tendered, within the time permitted for performance, another 200 bales which answered the description in the contract. The Court of Common Pleas held[91] that, since the plaintiffs had immediately rectified their mistake, the contract had been "performed". Brett, J., said that, once it was discovered that the plaintiffs had delivered cotton which was not in accordance with the contract:[92]

> . . . the defendants were entitled either to reject the cotton or to accept it . . . They elected to reject the cotton, and by so doing put the vendors back in the same position as if they had not offered to deliver the cotton.

In other words, a defective performance is assimilated to a case of non-performance and, as Kelly, C.B., recognized in *Frost* v. *Knight*,[93] there can be no

86. [1962] 2 Q.B. 26.
87. *Ibid.*, 56.
88. Lord Devlin, *supra*, fn. 68, at p. 194.
89. Goode, 298.
90. (1871) 25 L.T. 658.
91. There were two points decided on appeal; the discussion of the second point, which is relevant to this here, can be found only in 20 W.R. 206, 207.
92. *Ibid.*, 207.
93. (1872) L.R. 7 Ex. 111.

actual breach of contract by reason only of a non-performance, so long as the time for the performance has not yet expired. On appeal to the Exchequer Chamber, Cockburn, C.J., said:[94]

The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract.

This analysis causes a problem for recovery of any consequential loss which may be caused by the original tender in a case of cure: if there is no breach of contract, how can there be a cause of action for damages? In *E. E. & Brian Smith (1928) Ltd.* v. *Wheatsheaf Mills Ltd.*,[95] it was held that there could not be one. Under a contract for the sale of Chinese white peas, the buyers complained that the peas were not according to contract. The question whether they were entitled to reject the shipment was referred to arbitration, and the award was in the buyers' favour. The buyers then put forward a claim for damages, being the difference between the contract price of the peas and the price which they had had to pay in the market to replace them. Branson, J., approved the decision of the Appeal Committee of the London Corn Trade Association, which held that at the time of the first award the sellers were not in breach of their contract, because they might put themselves right by making another tender which was a proper one, and until there was a breach the buyers had no cause of action for damages. Branson, J., said that, where a seller tenders an invoice which the buyer rejects, it does not prevent the seller, if he has time within which to do so, from tendering another parcel of goods, which, if they accord with the contract, the buyer must accept and pay for. Branson, J., continued:[96]

In my view, the position of the parties to such a contract is such that when the seller tenders documents which he says are a fulfilment of the contract, the seller does not become in breach. All that the buyer has said is: "You have not yet fulfilled your contract." That is all he can say, because it cannot be predicated in any particular case that, if the first tender is not a proper tender, there may not yet be another tender which is a proper tender. It cannot be said that the seller becomes in breach the moment he tenders goods which, for some reason or other (it may be some purely formal reason with regard to the documents), the buyer can say are not in fulfilment of the contract, and that the seller cannot put himself right by making a subsequent tender.

There was however no tender in substitution for the rejected tender, with the result that the sellers did become in breach.[97] Until there was that breach, the buyers had no cause of action for damages.

Branson, J., did not have to consider the case where the first delivery causes loss to the buyer, and a subsequent tender which is in accordance with the contract is actually made. A delivery may cause loss, for example, where the buyer acts in reliance on the seller's intimation that goods will be delivered on a certain date by paying for storage room for the goods: if the seller is entitled to withdraw the ten-

94. *Ibid.*, 114.
95. [1939] 2 K.B. 302.
96. *Ibid.*, 314.
97. Branson, J., does not say when they actually became in breach: presumably it was when the time for performance had expired under the contract.

der and substitute another one, the buyer will have to pay the extra storage costs. Another example, involving the converse situation in which loss is suffered by the seller,[98] was given by Lord Hewart, C.J., in *J. & J. Cunningham Ltd.* v. *Robert A. Munro & Co. Ltd.*[99] A buyer under an f.o.b. contract for the sale of a perishable cargo of fresh vegetables nominates a ship and informs the seller that it will be at the docks in a few days time, and the seller arranges for the cargo of vegetables to be at the docks on that day; the nominated ship does not arrive for a fortnight, during which time the vegetables go bad. Is the buyer entitled to reject the goods if they have so deteriorated? If the buyer can reject the seller's goods, can the seller be compensated for the loss sustained? Lord Hewart, C.J., thought that the goods could be rejected, and that the seller could be compensated for the loss sustained, but under "another legal principle":[100]

> It is not exactly an estoppel which prevents the purchasers from rejecting, but it is the doctrine that where one person makes a statement to another, meaning that statement to be relied upon by that other, if the other suffers damage by so relying and acting upon it, he is entitled to recover such damage from the person making the statement.

This principle is analogous to that laid down in *Hughes* v. *Metropolitan Railway*[101] but differs in two important respects.[102] First, the English rule is defensive in nature and cannot give rise to new rights,[103] whereas Lord Hewart, C.J.'s principle gives rise to a cause of action. Secondly, the equitable doctrine can operate even where the promisee has not incurred expenditure or "detriment" as a result of the representation,[104] whereas Lord Hewart, C.J.'s principle requires the additional element of the plaintiff's suffering damage. A proper analysis of whether such a principle is consistent with the modern developments of promissory estoppel in this country or elsewhere is beyond the scope of this article. It may be said, however, that the differences make the operation of the principle uncertain under English law.

It might be argued that the problem of consequential loss would be avoided if the seller's liberty to cure were confined to cases where the first tender causes no loss to the buyer, or confined to cases where the buyer does not act in reliance on the seller's original tender.[105] In other words, the seller should be estopped from making a subsequent tender where the buyer incurs expenditure in reliance on the original tender. However, this would result in the right to cure being excluded in every case where the aggrieved party suffers any loss, no matter how trivial, and whether or not such loss could easily be compensated in damages. For example, if reliance included expenses incurred in examining and rejecting the goods, cure

98. I.e., a case involving the buyer's right to cure.
99. (1922) 28 Com. Cas. 42, 46.
100. *Ibid.*, 46.
101. (1877) 2 App. Cas. 439.
102. Benjamin, para. 20–049, fn. 22.
103. Treitel, 109. In Australia, the principle of promissory estoppel may give rise to a cause of action, see, e.g., *Walton Stores (Interstate) Ltd.* v. *Maher* (1988) 164 C.L.R. 387.
104. *W. J. Alan & Co. Ltd.* v. *El Nasr Export & Import Co.* [1972] 2 Q.B. 189, 213.
105. See Benjamin, para. 20–049, where it is doubted whether a buyer under an f.o.b. contract would be entitled to make a substitute nomination where the seller had acted in reliance on the original nomination.

would rarely be available to the seller. *The Ballenita and BP Energy*[106] stands against the proposition that this sort of reliance would deprive the seller of the right to cure. Under a c.i.f. contract for the sale of gasoil, it was argued that the sellers were estopped from making a substitute nomination of a ship when it turned out that the first nomination was bad, because the buyers had acted in reliance on the nomination. The estoppel argument was rejected, primarily because it was found that the original nomination did not amount to a representation that the sellers would not exercise their right to substitute another vessel, which was a right expressly conferred under the contract. The judge went on to say that, even if there had been a representation, there was little evidence that the buyers had acted in reliance on the nomination "save in making purely administrative arrangements such as designating the tanks into which the cargo was to be put, reserving a berth and completing Customs formalities".[107] It was held that these acts, by themselves, were not sufficient acts of reliance to render it inequitable for the sellers to exercise a right of substitution given by the contract. Nor was the fact that the buyers had made alternative arrangements to purchase gasoil elsewhere, because they anticipated that the sellers might not be able to deliver contractual goods, a sufficient act of reliance to render it inequitable for the sellers to nominate another vessel. In other words, the cure will not be defeated by acts in reliance on the original tender, at least where they are trivial and can be compensated in damages. If this were not so, the very object which cure seeks to promote, namely, the performance of contracts, would be defeated.

The preferable solution would be to allow the defaulting party the right to cure in these situations, but to compensate the buyer for consequential loss flowing from the seller's original tender. Professor Goode has suggested another basis on which this might be achieved. He argues that the buyer can recover expenses incurred with the abortive tender because:[108]

> . . . the seller, in addition to his positive delivery obligation . . . , owes an implied collateral duty not to make an invalid tender, and that accordingly the buyer would be entitled to be compensated for expenses necessarily incurred in arrangements to collect goods which upon subsequent tender he lawfully rejects.

It is true that this proposal solves the issue of consequential loss, but it is submitted that the aggrieved party can recover damages for consequential loss caused by the original tender without relying on an implied collateral duty. This is because the above analysis of the effect of a defective tender which holds that a defective performance is the same as a non-performance is flawed. The analysis does not acknowledge that, in the words of Devlin, J., in *Compania Naviera Maropan S.A.* v. *Bowaters Lloyd Pulp and Paper Mills Ltd.* (*The Stork*),[109] "there *is* a difference between a contractor who does not discharge his obligation at all and one who does

106. [1992] 2 Lloyd's Rep. 455.
107. *Ibid.*, 460.
108. Goode, 301.
109. [1955] 2 Q.B. 68, 76. The issue in the case was whether, upon the nomination of an unsafe port under a charterparty, the parties' duties, rights and remedies were the same as if no port had been nominated at all. It was held that they were not, and that the defendants were liable for damage suffered by the ship as a result of the nomination of an unsafe port.

so imperfectly. In the latter case, the contract gives the other party the right to elect to treat the imperfect performance as if it were a fulfilment of the contract (even if he knows that in fact it is not), and to claim damages if any result from the imperfection". The difference arises from the fact that, when the seller tenders a defective performance, the buyer has an option to accept or reject if. If the buyer accepts the tender, it is not open to the seller to say: "My tender was a bad one; it is just the same as if I had never tendered at all; I am still within the contract time and I now propose to make a good delivery." Nor, as Devlin, J., points out, could the seller contend that the measure of damages was that appropriate on non-delivery. While it is true that a term in a contract must be either fulfilled or broken, "and that an unsuccessful attempt to fulfil it is as much a breach as refraining from any attempt at all",[110] the degree of imperfection is not irrelevant in determining the damages for breach.

It is submitted therefore that the appropriate analysis of the effect of a defective tender is that an unsuccessful attempt to fulfil a contractual obligation can only be treated as if there were no attempt to perform at all for *some* purposes. The original defective tender may be treated as a breach of contract for the purpose of assessing any loss to the buyer caused by the first tender and for the purpose of assessing damages when the buyer accepts the defective performance; but the breach itself is not repudiatory, so that, in the absence of other repudiatory conduct by the seller, the right to terminate the contract does not arise until the time for performance has expired, and until that time the seller has the right to cure the defective tender. It is further submitted that this view of the effect of an imperfect tender can be accommodated under the Sale of Goods Act 1979. Section 11(3) of the Act does not state that a breach of condition automatically gives rise to the right to treat the contract as repudiated, but rather that if *may* do so. As is pointed out in *Benjamin*,[111] on one view, the word "may" indicates that:

> . . . not every breach of condition gives rise to the right to treat the contract as repudiated in recognition of the fact that in some cases it is possible for the seller to correct the misperformance, as by making a fresh tender of conforming goods if this can be done within any relevant time limit.

F. Is rejection necessary?

In the usual course of events, the defaulting party attempts to substitute a fresh tender following a rejection by the aggrieved party of the original tender. If there has been no rejection by the aggrieved party, there are two possible states. The first is that the buyer has accepted the goods, electing to affirm the contract. The second is that the buyer has not had time to react at all.[112] These two situations will be considered in turn.

110. *Ibid.*, 75.
111. Benjamin, para. 10–028.
112. It is assumed here that the buyer cannot be deemed to have accepted the goods under the Sale of Goods Act 1979, s. 35; see Goode, 304.

(1) Affirmation

Once the performance has been accepted by the buyer, the buyer cannot revoke that acceptance[113] and reject the goods, nor can the defence or refusal to perform be invoked, with the result that the seller no longer has the right to cure. It may be that, if the seller offers to cure in such a situation, and the buyer refuses to accept the offer, the buyer will be held to have failed to act reasonably in mitigation of damages, but the buyer is not bound to accept a substitute performance under the principles discussed in this article. Alternatively, if the buyer seeks to reject and the seller allows the buyer to do so, agreeing to repair the goods, the parties may be held to this agreement under some other principle, such as estoppel, or subsequent collateral agreement, but not because the seller still has the right to cure. This limit on the right to cure does not defeat the primary purpose of the right to cure: to promote the performance of contracts and prevent forfeiture of the seller's contractual rights. There is no danger of forfeiture in this case, because acceptance means that the buyer cannot terminate the contract.

(2) No action

If the buyer has not had time to react to the original defective tender, the question is whether a seller who has become aware of the defect can withdraw the original performance, and effectively avoid liability in damages, subject to any consequential loss caused by the original tender which cannot be remedied. There is little authority on this issue. In at least two cases the statements of principle suggest that a withdrawal of the defective tender is within the rule,[114] but in both cases there was some form of rejection on the facts. Following the analysis in this article, the effect of a withdrawal would be to place the seller (for some purposes at least) in the same position as if the seller had not delivered at all, and the buyer's obligation to perform would not arise until the seller substitutes a conforming tender. On the other hand, it is difficult to see how a buyer can rely on the defence of refusal to perform if the buyer never intimates such reliance by a rejection of the original performance. In addition, allowing the seller to withdraw a defective tender may be unfair to a buyer who would prefer to accept the nonconforming tender and sue for damages. Consequently, the issue must be regarded as an open one.

II. WHEN THE RIGHT TO CURE IS LOST BEFORE THE TIME FOR PERFORMANCE HAS EXPIRED

The right to cure is not an absolute right, and can be lost before the time for performance has expired in at least one, and possibly in two, cases.[115] The first is when

113. There is no concept of revocation of acceptance in English law. Contrast the U.S. Uniform Commercial Code, s.2–608.

114. *Borrowman Phillips & Co.* v. *Free & Hollis*, *supra*, fn. 1, at p. 503; *Agricultores*, *supra*, fn. 4, at p. 167. Contrast the *dicta* in *Tetley* v. *Shand*, quoted *supra*, text to fn. 92.

115. There may be a third exception: where the contract expressly provides for termination upon a certain event such as delivery of a defective tender, in which case the liberty to cure may be excluded by the contract. Termination clauses are not considered here.

the seller renounces, or disables himself or herself from performing, the contract prior to the time when performance is due, in which case the buyer is entitled to terminate on account of the seller's anticipatory breach. The second possible situation turns on whether the defaulting party can cure a "fundamental breach". If the defaulting party is not allowed to cure a defect which amounts to a "fundamental breach", the aggrieved party can terminate because of the nature of the defect whether or not the time for performance is up.

A. Anticipatory breach

An anticipatory breach of contract occurs when a party either renounces his or her obligations under the contract or, by his or her own act,[116] disables himself or herself from performing the contract in some essential respect prior to the time for performance. Where the seller commits an anticipatory breach of contract, the buyer is entitled to terminate the contract and sue for damages forthwith,[117] on the principle that the buyer is entitled to anticipate an inevitable event and is not obliged to wait until it happens.[118] Once the buyer terminates, the seller is deprived of the right to cure, even if the time for performance has not yet expired. This is consistent with the analysis in Part I because the condition precedent or concurrent condition to the buyer's obligation to perform can no longer occur: in the case of a renunciation, the condition can no longer occur because the law states that, when a party evinces an intention not to go on with the contract, that party will be held to his or her word;[119] and in the case of disablement, the condition can no longer occur because, by definition, the defaulting party's inability prevents him or her from performing or curing the defective tender. The question which must now be considered is what amounts to a renunciation or disablement in the context of the right to cure.

(i) Renunciation by the seller

As stated above, a renunciation occurs when one party evinces an intention, either by words or by conduct, not to perform, or expressly declares that he or she is or will be unable to perform, his or her obligations under the contract in some essential respect.[120] If the seller has made a defective performance, the question is whether the seller has indicated that the defect in the original tender will not be remedied. The seller will be deprived of the liberty to cure if in making the defective tender the seller indicates that he or she will perform only in that way, and the buyer accepts such a refusal as an anticipatory repudiation of the contract.

Similarly, if the seller indicates *after* the buyer has justifiably rejected the original tender that he or she will not perform in any other way (that is, the seller refuses to cure), the buyer can accept the repudiation as terminating the contract, and the

116. For the effect that frustration has on the right to cure, see *Empresa Exportadora de Azucar* v. *Industria Azcuarera Nacional S.A.* [1983] 2 Lloyd's Rep. 171.
117. Chitty para. 1716.
118. *Citati, supra*, fn. 54, at p. 438.
119. *Hochster* v. *De la Tour* (1853) 2 E. & B. 678; 118 E.R. 922; *Citati, supra*, fn. 54, at p. 437.
120. Chitty, para. 1711.

seller will no longer be entitled to cure. For example, in *Ashmore & Son.* v. *S. C. Cox & Co.*[121] the defendants sold to the plaintiffs 250 bales of hemp. The defendants made a declaration of shipment which the plaintiffs returned to the defendants on the ground that it was not in accordance with the contract. The defendants subsequently wrote to the plaintiffs stating that it was the only declaration that they were in a position to make. Lord Russel of Killowen, C.J., held that the subsequent indication by the defendants that they would not make another declaration was a repudiation of the contract which was accepted by the buyers, and they were entitled to damages in the amount of the difference between the contract price and the market price on the date the defendant wrote and refused to substitute a fresh declaration. Up until that time the defendants could have substituted another shipment conforming with the contract and amended their original declaration. The position would have been otherwise if the original declaration of shipment had been accompanied by a statement from the defendants that it was the only declaration they could make. In that case the original tender would have been a repudiation, which, if accepted would have deprived the defendants of the right to cure, and damages would have been computable as the difference between the contract price and the market price on that date.

It is submitted that the mere fact of a defective tender is not sufficient to evince an intention no longer to be bound by the contract: if it were, the seller would never be entitled to cure. The seller must evince an intention wholly to abandon the contract,[122] and it has been said that a "repudiation of a contract is a serious matter not lightly to be found or inferred".[123] Nor does the mere fact of contesting whether a cure is necessary amount to an indication to abandon the contract or a refusal to cure. In *Atkion Maritime Corp. of Liberia* v. *S. Kasmas & Bros Ltd. (The Atkion)*,[124] a case involving the sale of a ship, the seller delivered the ship to the buyer prior to the time the ship was due under the contract, and the buyer claimed that there were certain defects which needed to be repaired. The seller contended that none of these matters affected the contractual deliverability of the ship but, after further discussions with the buyer, agreed to repair the defects. When the seller had repaired all but one defect, the buyer cancelled the contract. The buyer claimed that the seller had repudiated the contract by refusing to remedy the alleged defects. The judge held that the conduct of the seller in contesting the defects was not repudiatory, as the seller had clearly indicated he would make the repairs, and ensure fulfilment of the contract. Furthermore, it follows from *Woodar Investment Development Ltd.* v. *Wimpey Constructions U.K. Ltd.*[125] that, even if the seller deliberately refuses to cure a defective performance, insisting that the original tender is in conformity with the contract, this may not amount to an intention to abandon the contract if the seller acts in good faith, honestly but mis-

121. [1899] 1 Q.B. 436.
122. *Freeth* v. *Burr* (1874) L.R. 9 C.P. 208, 213, 214.
123. *Woodar Investment Development Ltd.* v. *Wimpey Constructions U.K. Ltd.* [1980] 1 W.L.R. 277, 283.
124. [1987] 1 Lloyd's Rep. 283.
125. *Supra*, fn. 123.

takenly believing that the terms of the contract justify the refusal,[126] at least where the seller makes it clear throughout that, if he or she is wrong in his or her interpretation, he or she will perform in accordance with the correct interpretation of the contract.[127]

Exceptionally, however, the circumstances of the case may be such that the buyer is justified in treating the original tender as a repudiation. Where there is, as Professor Goode states, "a justifiable los in confidence in the seller resulting from the initial defective tender",[128] the buyer may be entitled to treat the contract as at an end. In *Texaco Ltd.* v. *Eurogulf Shipping Co. Ltd. (The Texaco)*,[129] the buyer under an f.o.b. contract had to provide a vessel for loading at Milford Haven between 6 and 13 February. On 5 February the buyer orally nominated the *Giray*; he confirmed this on 7 February. The sellers discovered on 10 February that the vessel was nowhere near Milford Haven, as it was trading in the Eastern Mediterranean, and consequently the seller sold the cargo elsewhere. The sellers argued that the buyers made a "manifestly false" nomination, i.e., a nomination manifestly incapable of fulfilment because of the position of the vessel. The buyer argued that this nomination was not a repudiation because it was good on its face, and it was not known at the time by either side to be otherwise. The buyer further argued, relying on *Agricultores*,[130] that a buyer has a right to withdraw a nominated vessel and substitute a different one so long as the substitute can be tendered in accordance with the contract, i.e., right up to the end of the shipment period. Hirst, J., rejected this argument, distinguishing *Agricultores* on the basis that it involved a "true and proper nomination of vessel A, which was unfortunately slightly but critically delayed, and then a real, actual and potentially effective substitution of vessel B". In *Texaco*, the nomination was manifestly false in the sense that it could never possibly be fulfilled, and the fact that the parties only discovered this subsequently to the actual making of the nomination was irrelevant. Moreover, the notion of a substitute vessel was, on the facts of the case, "wholly artificial and fanciful, and without any conceivable reality".[131] Consequently, the original nomination amounted to a repudiation.

Lack of success in several attempts at cure by the seller may also cause a justifiable lack of confidence in the seller, such that the buyer is entitled to treat the seller's conduct as a repudiation, and bring the contract to an end. Just how many attempts the seller can make before being held to have repudiated the contract will depend on factors such as the nature of the defect and the effort made by the seller in correcting the performance. The test in such a case is whether the conduct of the seller would lead a reasonable buyer to conclude that the seller no longer intends to be bound by the contract.[132] If the conduct of the seller does not amount to a repudiation of the contract, however, and the time for performance has not yet expired,

126. Note that the fact that the seller's conduct is not a repudiation does not mean that the defective performance is not a breach, however much the party in good faith thinks it is not.
127. *Cf. Mersey Steel & Iron Co. Ltd.* v. *Naylor Benzon & Co.* (1884) 9 App. Cas. 434.
128. Goode, 300, fn. 32.
129. [1987] 2 Lloyd's Rep. 541.
130. *Supra*, fn. 4.
131. [1987] 2 Lloyd's Rep. 541, 545.
132. *Citati, supra*, fn. 54, at p. 436.

the seller is entitled to offer a subsequent performance before the expiry of the time period. If, in such a case, the buyer erroneously believes that the seller's conduct amounts to a repudiation[133] and purports to terminate the contract on account of the defect in the seller's original performance, or if the buyer indicates unequivocally that he or she will refuse to accept any further tender which the seller might make, the buyer will be guilty of a repudiation of the contract. The seller can then accept the buyer's repudiation, in which case the seller will be relieved of the obligation to cure the defective performance and can sue for breach of contract.

(2) Impossibility created by the seller's own act

Where the defaulting party has, by his or her own act, whether deliberately or not,[134] disabled himself or herself from performing the contract, the aggrieved party will be entitled to terminate the contract forthwith, and need not wait until the time for performance has expired, provided the failure in performance amounts to a breach of a condition or would deprive the aggrieved party of substantially the whole benefit of the contract.[135] In terms of the right to cure, if the seller tenders a defective performance and thereby, or subsequently thereto, incapacitates himself or herself from curing the defect, the buyer will be entitled to terminate the contract. However, the impossibility must be proved "in fact and not in supposition",[136] although "the law never requires absolute certainty and does not take account of bare possibilities".[137] Thus, the buyer is only justified in treating the contract as discharged if the seller is in fact unable to perform within the contract period, and it is not sufficient if the buyer had reasonable grounds for believing that the seller would be unable to do so.[138] Furthermore, if the seller has a choice under the contract as to the method of performance, he will not incapacitate himself merely by declaring to perform in a way that is impossible.[139] In *Waren Import Gesellschaft Krohn & Co.* v. *Alfred C. Toepfer (The Vladimir Ilich)*[140] the seller gave a notice of appropriation under the contract that the goods would be shipped on board a ship called *Vladimir* when in fact they were in the *Vladimir Ilich*. The buyers having rejected the notice, Donaldson, J., held that the sellers were entitled to substitute for the original appropriation, performance of which had become impossible, an appropriation which the sellers could perform.

The seller's incapacity to cure the defective performance may also justify a repudiation by the buyer which is made for the wrong reason, provided the seller's incapacity existed at the time of the buyer's repudiation, and was not caused by the repudiation. The mere fact that a seller has tendered a defective shipment, however, is not sufficient to establish the seller's incapacity to perform. The seller might

133. This is subject to the principle in *Woodar* v. *Wimpey*, *supra*, fn. 123, that if the buyer acts in good faith in refusing to accept the seller's performance, honestly believing that she was justified in the refusal, the court may not regard the buyer's conduct as a repudiation.
134. *Citati*, *supra*, fn. 54, at p. 441.
135. *Afovos Shipping Co. S.A.* v. *Romano Pagnan and Pietro Pagnan* [1983] 1 W.L.R. 195, 203.
136. *Citati*, *supra*, fn. 54, at p. 449.
137. *Ibid.*, 438: *Cf. Embiricos* v. *Sydney Reid & Co.*, *supra*, fn. 35, at p. 59.
138. *Agricultores*, *supra*, fn. 4.
139. Treitel, 733.
140. [1975] 1 Lloyd's Rep. 322.

still be able to tender a conforming shipment within the contract period. In *British and Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.*[141] the buyers agreed to buy from the sellers crops of tea to be delivered in London, but the contracts did not bind the sellers to deliver by any particular date. The ships carrying the tea were directed by the Shipping Controller to various outports in England and Scotland. The buyers repudiated the contract on the ground that a reasonable time for delivery under those contracts had expired. The arbitrator found that a reasonable time had not expired, with the result that the buyers were guilty of an anticipatory repudiation. The House of Lords upheld the decision of the arbitrator. The main point of the decision was that the sellers, having accepted the repudiation, were not bound to prove that they were ready and willing to deliver the tea at the date of the repudiation.[142] However, Lord Sumner pointed out that, if at the time of the repudiation, the sellers had become "wholly and finally disabled from performing essential terms of the contract", the buyers could have relied on this fact to justify their repudiation.[143] That was not the case here because it was not found that the sellers could not have forwarded the tea to London, or that the tea, when so forwarded, would not have been such as the contract provided for.

In *British and Beningtons* the buyer would have succeeded if, though the reason that he gave for his refusal was a bad one, another valid ground for rejection in fact existed. However, while a party who refuses to perform a contract, giving a wrong reason, does not thereby deprive himself or herself of a justification which in fact existed, whether aware of it or not, at the time of the repudiation,[144] that principle cannot be relied upon when the point not taken was one which "if taken could have been put right".[145] The reason is that the seller might have been able to cure the defect by making a subsequent tender within the contract time and, by failing to raise the true objection, the buyer will have deprived the seller of the opportunity to cure the defect.[146] This problem does not arise when the seller is disabled from performing at the time of the repudiation, because the defect is one which, by definition, cannot be put right. *Braithwaite* v. *Foreign Hardwood Co.*[147] may be explained on this basis. At the time when the buyers under a c.i.f. contract for the sale of rosewood repudiated the contract for the wrong reason, the sellers had already shipped an instalment under the contract which was only subsequently found to be defective. This fact alone could not justify the buyer's repudiation since the mere fact of a defective shipment is not a repudiatory breach,[148] nor is a defective performance sufficient to establish disablement on the part of the seller. As Lord Sumner pointed out in *British and Beningtons*,[149] it does not appear anywhere in *Braithwaite's* case that, even if the instalement might rightly have been rejected,

141. [1923] A.C. 48.
142. *Ibid*, 63.
143. *Ibid.*, 72.
144. *Taylor* v. *Oakes, Rocoroni & Co.* (1922) 38 T.L.R. 349, 351.
145. *Heisler* v. *Anglo-Dal Ltd.* [1954] 1 W.L.R. 1273, 1278.
146. *Andre & Cie* v. *Cook Industries Inc.* [1987] 2 Lloyd's Rep. 463, 469.
147. [1905] 2 K.B. 543.
148. See *supra*, Part I(E).
149. *Supra*, fn. 141, at p. 71. It is interesting to note that Lord Sumner, as Hamilton, K.C., acted as counsel for the buyers in *Braithwaite's* case.

the seller could not have found another exactly conforming with the contract which he might have duly tendered and so have put himself right.

These cases also illustrate the point that the buyer cannot rely on the *subsequent* disability of the seller to cure the defect where the failure to cure is due to the buyer's wrongful repudiation. Thus, in *British and Beningtons*, acceptance by the seller of the buyer's anticipatory repudiation relieved the seller of any further performance under the contract, so that the fact that the seller subsequently became incapable of curing the defect by the due date could not justify the buyer's repudiation.[150] Where the seller does not accept the buyer's repudiation, the general principle is that contract will be kept alive, with the result that the seller will remain subject to the obligation to perform.[151] If, therefore, a seller who has tendered a defective performance elects not to treat a repudiation by the buyer as discharging the contract, the seller will commit an anticipatory breach if the seller subsequently becomes, by his or her own act, disabled from curing the defective performance within the contract period. Exceptionally, where the buyer persists in the refusal to perform the contract, as where the buyer indicates that he or she will refuse to accept any further tender which the seller might make, or intimates to the seller that the seller need not perform an obligation which is a condition precedent to the buyer's performance,[152] and the buyer does not retract that intimation in time to give the seller an opportunity to cure the defective performance, the seller may be excused from actual performance of the condition precedent, even where the seller has not rescinded the contract.[153] However, in England at least,[154] there must be some conduct on the part of the buyer which would induce the seller not to cure the defective performance: the mere fact of anticipatory repudiation would not be sufficient to take the case out of the general principle that the seller will only be discharged from performing if he or she elects to rescind the contract.

B. Fundamental breach

The issue considered here is whether the right to cure is excluded for particularly serious breaches. It has already been established that, where the defect in the seller's original tender amounts to a breach of condition, the seller is entitled to

150. The same may be said for *Braithwaite's* case,if the view that the sellers in *Braithwaite* accepted the buyers' repudiation is accepted: see *Fercometal S.a.r.l* v. *M.S.C. Mediterranean Shipping Co. (The Simona)* [1989] A.C. 788, 803 (H.L.). For a full analysis of the controversies surrounding *Braithwaite's* case, see Benjamin, paras. 9–010 *et seq.*, 19–146 *et seq*. See also Carter [1989] LMCLQ 81.

151. *The Simona, supra*, fn. 150 at p. 805.

152. This may be an alternative explanation for *Braithwaite's* case: Collins, M.R., with whom Cozens-Hardy, L.J., agreed, held that, by adhering to their original repudiation of the contract, the buyers had waived performance by the seller of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract.

153. *E.g.*, *Peter Turnbull & Co. Pty. Ltd.* v. *Mundus Trading Co. (Australasia) Pty. Ltd.* (1954) 90 C.L.R. 235. *Foran* v. *Wight* (1989) 168 C.L.R. 385 may also be explained on this ground, *viz*, that the purchaser's failure to obtain finance was induced by the wrongful conduct of the seller.

154. In *The Simona*, *supra*, fn. 150, at p. 243, Parker, L.J., in the Court of Appeal thought that the principles in *Peter Turnbull*, *supra*, fn. 153, had to be read in the light of the special facts of that case, and could not be applied to the facts in *The Simona*; contrast the approach of Brennan, J., in *Foran* v. *Wight*, *supra*, fn. 153, at pp. 421–422, which would suggest that an anticipatory repudiation by the buyer might of itself relieve the buyer from complying with conditions precedent to the buyer's performance. See Benjamin, para. 9–018.

cure the defective tender within the time permitted for performance. Thus, the question is whether the seller is deprived of the right to cure at an earlier stage for a breach more serious than a breach of condition, that is, a breach of a "fundamental term" or a "fundamental breach".[155] These terms have caused considerable controversy in relation to the application of exclusion clauses, where the House of Lords has abolished what used to be thought of as a rule of substantive law that it was impossible to exclude liability for a "fundamental breach",[156] but it does not follow from that development that the distinction between a breach of condition and breach of fundamental term has disappeared for all purposes.

A fundamental term has been described as one which is "narrower than a condition of the contract",[157] or a term, breach of which "destroys the whole purpose of the contract",[158] and a fundamental breach has been said to be a "shorthand expression for saying that a particular breach or breaches of a contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract".[159] One of the clearest illustrations of a fundamental breach is where the seller delivers a completely different article,[160] something not merely different in quality, but different in kind, from that contracted for. But even in these cases, the distinction between merely defective performance and a wholly different performance is a matter on which opinions differ,[161] and is ultimately a question of construction of the contract.[162]

It is submitted that the right to cure should not be excluded on account of the nature of the defect alone for the following reasons. First, there seems to be no good reason why a seller should be denied the right to cure in the case where the seller delivers beans instead of peas, if the seller is entitled to cure in the case where the seller delivers peas of a different quality. In both cases the seller will have to make a substitute tender to fulfil his or her obligations under the contract, and it is difficult to see that it makes any difference to the buyer if the buyer ultimately gets

155. It has been held that these two mean different things: *Suisse Atlantique Societe d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 421: Contrast Lord Devlin, *supra*, fn. 68, at p. 204.

156. *Suisse Atlantique*, *supra*, fn. 155; *Photo Production Ltd.* v. *Securior Transport Ltd.* [1980] A.C. 827; *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] 2 A.C. 803 (H.L.).

157. *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co. (No. 1)* [1953] 1 W.L.R. 1468, 1470.

158. Lord Devlin, *supra*, fn. 68, at p. 203; although it seems difficult to distinguish such a term from a breach of condition as described by Fletcher Moulton, L.J., in *Wallis, Son & Wells* v. *Pratt & Haynes* [1910] 2 K.B. 1003, 1012, where he said that a condition is a term so essential to the very nature of the contract that its non-performance may fairly be considered by the other party as "a substantial failure to perform the contract at all".

159. *Suisse Atlantique*, *supra*, fn. 155, at pp. 421–422.

160. See, e.g., *Chanter* v. *Hopkins* (1838) 4 M. & W. 399; 150 E.R. 1484 (beans for peas); *Bowes* v. *Chaleyer* (1923) 32 C.L.R. 159 (sheepskins for pigskins); *U.G.S. Finance Ltd.* v. *National Mortgage Bank of Greece and National Bank of Greece S.A.* [1964] 1 Lloyd's Rep. 446 (chalk for cheese). In the case of substances which contain admixtures of other substances the question is whether the admixture is sufficiently significant to make the basic substance lose its identity from a commercial point of view: *Pinnock Bros* v. *Lewis and Peat Ltd.* [1923] 1 K.B. 690 (copra cake containing castor seed held not to be copra cake).

161. E.g., compare the opinions of the Court of Appeal and House of Lords in *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] 1 Q.B. 284 (C.A.); [1983] 2 A.C. 803 H.L.

162. See Lord Devlin, *supra*, fn. 68, at p. 212.

what he or she contracted for. The second reason for not excluding cure in the case of fundamental breach simply because of the nature of the breach is that it will create uncertainty: a buyer seeking to terminate for breach prior to the time for performance must first determine whether the breach is fundamental, which may not be an easy task. Finally, it may be artificial, in determining whether the breach is or is not fundamental, to ignore the fact that the seller may cure. In other words, the fact that the seller can cure may affect the assessment of whether the breach is serious. If it is accepted that a breach is only fundamental if it cannot be cured, then the relevant principles in determining whether the seller has the right to cure do not depend on the nature of the breach, but whether cure is possible, and whether the seller has either renounced the contract or disabled himself or herself from performing. Thus, where the nature of the defect contributes to a "justifiable loss in confidence" in the seller,[163] or the seller performs in a manner which is so seriously defective that the buyer is justified in believing that the seller intends no longer to be bound by the contract, the buyer may terminate the contract forthwith.

In terms of authority, *S.I.A.T. di dal Ferro* v. *Tradax Overseas S.A.*[164] suggests that a fundamental breach will not automatically deprive the seller of the right to cure. A seller under a c.i.f. contract tendered defective documents which the buyers were entitled to reject. The Court of Appeal held that sellers were entitled to cure the defective performance, but had failed to do so because the alterations made to the documents did not in fact cure the defect. The relevant point for these purposes is that the court accepted that the sellers were entitled to cure, even though some of the documents in the original tender "failed to comply with a requirement of the contract which can properly be described as fundamental to a c.i.f. contract".[165] Therefore, it is submitted both on principle and authority that the right to cure is not excluded by the mere fact that the defect in the original tender amounts to a fundamental breach, unless it also amounts to an anticipatory breach of contract under the principles discussed in Part II(A) above.

III. POLICY ISSUES AND PROPOSALS FOR REFORM

The right to cure furthers several of the objectives of contract law. It promotes the performance of contracts: in giving the seller a second chance at performance, there is a greater likelihood that the contract will be performed than if the buyer were entitled terminate the contract at the moment of the defective performance. The right to cure reduces the possibility of the buyer's escaping the contract for an ulterior motive, such as a fall in market prices. As Lord Roskill said in *The Hansa Nord*, "contracts are made to be performed and not to be avoided according to the whims of market fluctuation . . . ".[166] If the buyer rejects the goods on a technical

163. For example, in the American case *Zabriskie Chevrolet Inc.* v. *Smith* (1968) 240 A.2d 195 (N.J.S.C.), where a consumer was sold a car so defective that it could barely be driven, it was held that the consumer's "faith [was] shaken", and the seller lost the right to cure under UCC s. 2–508: see *infra*, Part III.

164. [1980] 1 Lloyd's Rep. 53.

165. *Ibid.*, 63.

166. *Supra*, fn. 34, at p. 71.

ground in an attempt to escape a bad bargain, the seller will be able to prevent the buyer from escaping the contract if the seller can cure within the relevant time period.

Cure minimizes the economic waste which would ensue if the contract were terminated. If the buyer is entitled to terminate and put an end to further performance on both sides, the seller may lose any benefit expected from the performance of the buyer's obligations; and if the seller has incurred any expenditure in preparing to perform his or her obligations, that expenditure may be wasted if the seller is not entitled to cure. If the seller cures the defective performance, the buyer is adequately compensated by the recovery of all the damages that could not be avoided; and, since the buyer gets what he or she contracted for, the expectations of both parties are fulfilled. It has also been said that the right to cure accords with "commercial practice", in that a "typical buyer" who rejects the goods will hold the contract open for a fresh tender.[167] This may not be the buyer's preferred course of action if the market price of the goods has fallen, but in that case the justification for right to cure would be as stated above, namely, preventing the buyer from escaping a bad bargain.

The right to cure protects the seller against the forfeiture of his or her contractual rights which would otherwise result on a defective tender. Of course, the seller's rights under the contract (such as the right to demand payment) will be forfeited if the seller fails to cure the defective performance; but, in the absence of repudiatory conduct by the seller, the seller has the full amount of the time permitted for performance under the contract to prevent this from happening.

Cure gives a very limited coercive power, or self-help remedy, to the buyer to secure correct performance by the seller. This is because by justifiably withholding his or her performance the buyer throws the risk of the contract back onto the seller: the seller must cure if the seller wants to avoid the remedy of termination. The effectiveness of the buyer's power of coercion increases as the seller performs the contract, because the seller has more to lose if the contract is terminated by the buyer. But the buyer cannot force the seller to cure the defective performance (just as a buyer cannot force a seller to perform at all); and, if the seller refuses to cure, the buyer will be left with the remedy of termination and damages. On the other hand, the fact that the seller has the right to cure deprives the buyer, at least temporarily, of an even stronger self-help remedy: namely, the right to terminate the contract for breach.

These advantages of the right to cure come at a cost, however. There is considerable uncertainty surrounding the operation of the right to cure. This uncertainty creates several risks for the buyer in exercising his or her contractual rights. If, for example, the buyer is mistaken in his or her assessment of whether he or she is justified in refusing to perform following the seller's original tender, the buyer will be guilty of an anticipatory repudiation of the contract.[168] Alternatively, if the buyer erroneously interprets the seller's conduct as an anticipatory repudiation, the buyer

167. Goode, 298.

168. Arguably the buyer would have to decide this in any event in order to determine whether he or she is entitled to terminate the contract, although a buyer may be entitled to refuse to perform for a less serious defect than would entitle the buyer to terminate if the time for performance has expired.

may again be liable. Furthermore, the concept of suspension of obligations and the defence of refusal to perform may create difficulty in particular cases. English law tends to run the remedies of withholding performance and termination together, with the result that it is not always obvious whether an obligation is merely suspended. Thus, even where the buyer is justified in refusing to perform temporarily on account of the seller's defective performance, the seller may interpret the buyer's conduct as a permanent refusal to perform, i.e. a repudiation of the contract, and the seller may purport to terminate the contract on account of the buyer's refusal. If this happens, the object of the right to cure in promoting the performance of the contract is defeated.[169]

It is the uncertainty surrounding the right to cure which explains the limitation in English law that cure be confined to the contract period, at least in commercial transactions.[170] Some of these difficulties may be avoided by appropriate notice procedures however. It is useful to compare the provisions of the U.S. Uniform Commercial Code ("UCC") in this context. Section 2–508 expressly provides for the seller's right to cure in contracts for the sale of goods:

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

This section allows the seller to cure not only within the contract period but, in certain circumstances, beyond that period. In both cases, however, the right to cure is subject to the seller's providing notice to the buyer of his or her intention to cure. If the seller does not give "seasonable notification' to the buyer of the seller's intention to cure, and the buyer acts on the assumption that no substitute tender will be forthcoming, the buyer will not be held to have repudiated the contract. In addition to the specific notice provisions of s. 2–508, there is also a "right to adequate assurance of performance" under s. 2–609 of the Code. Under s. 2–609, the buyer, upon showing reasonable grounds for insecurity, may demand that the seller supply adequate assurance of due performance. Section 2–609(4) provides that a "failure to provide within a reasonable time not exceeding thirty days such assurance of due performance" constitutes a "repudiation of the contract". Until such assurance is received, the buyer may suspend his or her own performance. If the assurance is not received, the seller's right to cure is lost and the buyer may sue immediately for breach of contract. It is submitted that similar notice procedures, if adopted in English law, would remove much uncertainty surrounding the operation of the right to cure within the contract period. Even in the

169. Although this time it is not at the expense of the buyer, who is not in breach if he or she is justified in refusing to perform.

170. For a consideration of the issues pertinent to consumer transactions, see the recommendations made by the Law Commission and the Scottish Law Commission in their joint Report on the *Sale and Supply of Goods*, Law Com. No. 160, Scot, Law Com. No. 104 (1987). See now the Sale and Supply of Goods Act 1994.

absence of such provisions, notice by the defaulting party of his or her intention to cure would be prudent, as it might avoid many of the difficulties encountered by the parties, especially in relation to the application of the doctrine of anticipatory repudiation, discussed in Part II.

It has been suggested that s. 2–508(2) could usefully be adopted in England because it goes beyond the common law position in that it allows the seller to re-tender within a reaonsable time after the time for performance has expired.[171] There are, however, certain features of the UCC which make adoption of s. 2–508 inappropriate for English law, at least in its current form. It is important to understand s. 2–508 in the context of Art. 2 as a whole. Section 2–508 is one of several provisions limiting the perfect tender rule in s. 2–601.[172] Section 2–601 confers on the buyer the right to reject the seller's tender if the goods fail "in any respect" to conform with the contract. In English law, the buyer is only entitled to reject for any nonconformity in respect of the *quantity* of goods delivered. In respect of a defect in the *quality* of the goods, the buyer is only entitled to reject if the defect amounts to a breach of condition or a breach of an intermediate term, the effect of which deprives the buyer of substantially the whole benefit it was intended that he would obtain under the contract. The difference means that the risk of forfeiture of contractual rights is much greater under s. 2–601 than under English law, and the buyer's coercive power in throwing the risk of the contract back onto the seller is much greater under s. 2–601. If the seller fails to perform in a minor way, which would amount to a breach of warranty under English law, the buyer would be entitled to reject the tender under s. 2–601, but not under English law. Thus, there is a greater need for cure to mitigate the consequences of a rejection by the buyer under the UCC than under English law. A provision which ignores this subtlety in English law may create considerable confusion.

Furthermore, the authorities on s. 2–508(2) have revealed some ambiguities in its language. Subsection (2) allows a seller a reasonable time to cure beyond the time for performance stated in the contract only if: (i) the seller had reasonable grounds to believe that a nonconforming tender would be acceptable (ii) the seller seasonably notifies the buyer of his or her intention to cure; and (iii) he or she cures within a "further reasonable time". This section goes beyond the English position, but it is not as far reaching as it might at first appear, and it is submitted that in many respects it takes the law no further than the position at common law. The following limitations in subsection (2) have this effect.

The first limitation is that the seller must have "reasonable grounds to believe" that the original tender would be acceptable. Comment 2 to s. 2–508 indicates that:

> Such reasonable grounds lie in prior course of dealing, course of performance or usage of trade as well as in particular circumstances surrounding the making of the contract. The seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract as, for example, strict conformity of documents in an overseas shipment or the sale of precision parts or chemicals for use in manufacture . . .

171. Goode, 299.
172. See, e.g., ss. 2–602, 2–606.

The underlying policy objective of the section is the avoidance of "the injustice to the seller by reason of a surprise rejection by the buyer".[173] I thas been argued that this limitation means that the section can never apply to documentary contracts because sellers know that these contracts require strict compliance with time specifications and, given that a seller is charged with "commercial knowledge", a seller would have a difficult time establishing "surprise" at rejection of nonconforming documents.[174] If this argument is correct, then it could also be argued that the right to cure beyond the contract period would be excluded in any case where precedent has shown that the courts insist on strict compliance with time stipulations. Yet it is when time is of the essence that a provision extending the right to cure beyond the contract period is of most significance. Thus, a provision in the terms of s. 2–508(2) may not provide a solution to the problem of balancing the buyer's interest in certainty when time is of the essence, and the seller's interest in avoiding forfeiture of contractual rights.

There has also been some suggestion that the right to cure may not be available under s. 2–508(2) where the defect in the original tender is a serious one. The reason is that the magnitude of the defect will be a relevant, though not a conclusive, factor in determining whether the seller has "reasonable grounds" for believing that a nonconforming tender would be acceptable. While it is true that s. 2–508(2) does not specifically distinguish between degrees of nonconformity, it has generally been assumed that the seller would only be entitled to cure under that subsection in cases of insubstantial "technical" deviations in the original tender, and the courts have been reluctant to allow a seller to rely on the subsection when the defect in the original tender is serious.[175] Again, it is difficult to see how a seller can be "surprised" if the nonconformity of the original tender fails substantially to conform to the contract specifications. One commentator has suggested that a seller should be able to cure a major defect if it is easily cured and for one reason or another he or she did not know the defect existed at the time of tender.[176] Another test, suggested by the District Court in *Wilson* v. *Scampoli*,[177] is that the seller has the right to cure whenever the seller can do so "without subjecting the buyer to any great inconvenience or loss". On one view, the test in *Wilson* restricts s. 2–508(2) to minor defects because only these can be cured without "great inconvenience to the buyer".[178] In any event, it seems that some qualification to the right to cure relating to nature or size of the defect will be made under subsection (2), and it is submitted that this introduces further unnecessary complications in the application of the section.

In conclusion, while the notice provisions of s. 2–508 may reduce the uncertainty as to whether or not the seller will cure the defective performance, there is still con-

173. Comment 2 to s. 2–508.

174. E. A. Peters, "Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two" (1963) 73 Yale L.J. 199, 213–215.

175. *Ibid.*, 211, fn. 42.

176. W. M. Newman, "Uniform Commercial Code—Rejection and Revocation—Seller's Right to Cure a Nonconforming Tender" (1969) 15 Wayne L.R. 938.

177. (1967) 228 A.2d. 848 (D.C. Ct.App.).

178. D. J. Whaley, "Tender, Acceptance, Rejection and Revocation—The UCC's 'TARR'-Baby" (1974) 24 Drake L.R. 52, 58.

siderable uncertainty surrounding the actual operation of s. 2–508(2). For these reasons it should not be adopted in English law. The question remains as to whether English law should extend the right to cure beyond the contract period by a more carefully drafted provision, assuming the difficulties encountered in s. 2–508 could be avoided. It is submitted that the right to cure should not be extended beyond the contract period for the following reasons. Where time is of the essence, at least one of the parties has indicated that prompt performance is important. To allow the defaulting party a right to cure beyond the originally specified date would not only alter the existing agreement between the parties, but it would also create an unwarranted degree of uncertainty for the aggrieved party who has specified that certainty is paramount. If the defaulting party attempts to substitute a correct performance after the expiration of the time period, in a manner that causes no inconvenience to the aggrieved party, a refusal to accept the substitute performance may amount to failure by the aggrieved party to act reasonably in mitigation of damages, but that is wholly different from allowing the defaulting party a right to cure. Where time is not of the essence, it has been argued in this article that the defaulting party already has, under the common law, until such time as the object of the contract would be frustrated to make a substitute tender. It is suggested that to allow the defaulting party further time within which to cure would be unfair to the aggrieved party. Again, if the defaulting party indicates that he or she intends to cure following this period, the rules of mitigation should determine whether it would be reasonable for the aggrieved party to accept that substitute performance.