Cedar Group Inc. v. Stelco Inc.

Ontario Judgments

Ontario Court of Justice (General Division)

O'Leary J.

Heard: November 6 - 10, 14 - 17, 21 - 24, 27 - 29 and 30, 1995.

Judgment: December 21, 1995.

Court File No. 94-CQ-59170CM

[1995] O.J. No. 3998 | 59 A.C.W.S. (3d) 1096

Between Cedar Group Inc., plaintiff, and Stelco Inc., defendant

(40 pp.)

[Ed. note: A Corrigendum was released by the Court January 2, 1996 and the correction has been made to the text.]

Case Summary

Contracts — Formation of contract — Agreements that are not contracts — Agreements to agree — Sale of shares.

The plaintiff applied for a declaration that it was the owner of seventy five per cent of the common voting shares of SFL. The main issue was whether a letter of intent agreement constituted an enforceable agreement for the sale of the shares by S.
HELD: The plaintiff's claim was dismissed.

The letter of intent contemplated that even if the plaintiff and S negotiated in good faith, they might not be able to agree on all the terms to be covered by the definitive agreements, and that there might eventually be no deal. The letter of intent left to the plaintiff and S the negotiation of the terms of the definitive agreements. It could not be said that the letter of intent left no matters of substance to be negotiated and agreed to by the parties. To the extent that the plaintiff's claim was based on the proposition that the letter of intent gave rise to a contract known to law, the claim failed. The plaintiff also argued that S was obliged to negotiate in good faith to reach a definitive agreement. The court found that S was not so obliged, and was within its rights to terminate negotiation. The plaintiff did not accept all of S's terms. Only when it realized S had withdrawn from the negotiations, did it attempt to accept S's terms. S negotiated in good faith and there was nothing unfair about the manner in which it broke off the negotiations.

Counsel

Alan J. Lenczner, Q.C. and Linda L. Fuerst, for the plaintiff. Burton H. Kellock, Q.C. and J.A. Prestage, for the defendant.

O'LEARY J.

1 Stelco Fasteners Ltd. ("SFL") was incorporated on March 4, 1993. It is a wholly owned subsidiary of Stelco Inc. ("Stelco"). On June 2, 1994, the plaintiff Cedar Group Inc. ("Cedar") and the defendant Stelco signed a letter of intent which "set forth [their] mutual understanding as to the basis on which Stelco ... and Cedar ... propose to consummate" the sale by Stelco to Cedar of "75% of the issued and outstanding common shares in the capital of SFL, with Stelco owning the remaining 25%."

2 The main issue in this action is whether the letter of intent agreement of June 2, 1994, either by itself or in combination with subsequent agreements, constituted an enforceable agreement for the sale by Stelco to Cedar of 75% of the common shares of SFL. If there existed nothing more than a contract to negotiate a contract, then such a contract is not known to the law since it is too uncertain to have any binding force.

3 In Courtney and Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd., [1975] 1 All E.R. 716 at p. 720, Lord Denning M.R. stated:

> ... There is very little guidance in the book about a contract to negotiate. It was touched on by Lord Wright in Hillas & Co. Ltd. v. Arcos Ltd. where he said: 'There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing.' Then he went on:
>
> > '... yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a jury think that the opportunity to negotiate was of some appreciable value to the injured party.'
>
> That tentative opinion by Lord Wright does not seem to me to be well founded. If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through; or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law.

4 In Walford and Others v. Miles and Another, [1992] 2 A.C. 128 (H.L.), Lord Ackner said at p. 138:

> ... Although the cases in the United States did not speak with one voice your Lordships' attention was drawn to the decision of the United States' Court of Appeal, Third Circuit, in Channel Home Centers, Division of Grace Retail Corporation v. Grossman (1986) 795 F. 2d 291 as being 'the clearest example' of the American cases in the appellants' favour. That case raised the issue whether an agreement to negotiate in good faith, if supported by consideration, is an enforceable contract. I do not find the decision of any assistance. While accepting that an agreement to agree is not an enforceable contract, the Court of

> Appeal appears to have proceeded on the basis that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and as the latter is enforceable, so is the former. This appears to me, with respect, to be an unsustainable proposition. The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith.' However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. Mr. Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question - how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an 'agreement?' A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly a bare agreement to negotiate has no legal content.

5 In L.C.D.H. Audio Visual Ltd. v. I.S.T.S. Verbatim Ltd., an unreported decision, Southey J. stated at p. 12:

> ... The general rule is that the law does not recognize a contract to enter into a contract, nor a contract to negotiate. The matter was dealt with by Lord Denning in Courtney and Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd. and another, [1975] 1 All E.R. 716, 720:

6 I accept the law on the point as set out by Lord Denning M.R. in Courtney and by Lord Ackner in Walford and by Southey J. in L.C.D.H..

7 My first task then is to determine whether the parties had a bargain that the law recognizes, or whether there was a fundamental matter or matters yet to be decided.

8 The letter of intent signed by Cedar and Stelco on June 2, 1994 reads:

> The purpose of this letter is to set forth our mutual understanding as to the basis on which Stelco Inc. ("Stelco") and Cedar Group, Inc. ("Cedar") propose to consummate a strategic alliance respecting SFL.

Cedar would invest Cdn. $2 million into the treasury of SFL to be used for working capital purposes, in exchange for 75% of the issued and outstanding common shares in the capital of SFL, with Stelco owning the remaining 25%.

Cedar would cause SFL to secure a credit facility of $10 million for the day-to-day operations of SFL, of which $5 million will be paid to Stelco by SFL to reduce the $20,911,000 note payable due to Stelco.

Stelco will convert the balance of its note payable in the remaining amount of $15,911,000 into Preferred Shares, Series A (the 'Series A Shares') of SFL.

Stelco will convert the equivalent of the operating loss of $4,649,000 for the fiscal year ended April 30, 1994 into Preferred Shares, Series B (the 'Series B Shares') of SFL which will bear no dividend.

Stelco and Cedar mutually agree to a two-year standstill on the payment of dividends, on redemption and on conversion of the Series A Shares. Commencing in the third year of their issuance, the Series A Shares will bear a 6% annual cumulative dividend payable quarterly and be redeemable by SFL at the rate of $1 million cash per year. As an alternative to the redemption, at Stelco's option, it may convert up to a maximum of $2 million of the Series A Shares per year into Cedar common stock at $8.50 per share.

Cedar will have the option at any time to force conversion at Cdn. $8.50 per Cedar share of all or a portion of the outstanding Series A Shares, if Cedar's shares have traded on NASDAQ at a minimum of Cdn. $10 for a continuous period of 30 trading days provided that the Cedar common stock issuable upon conversion is trading at least at Cdn. $8.50 per share at the time of conversion.

SFL will redeem, starting in the first year, the Series B Shares at their face value on the basis of 25% of net operating after tax profits less the dividend and capital payable on the Series A Shares referred to above.

We have prepared and based our proposal on the April 30, 1994 fiscal year end draft balance sheet of SFL that you were good enough to provide to us. We confirm our understanding, however, that the said balance sheet will be audited in accordance with generally accepted accounting principles in Canada and appropriate adjustments will be made by the parties based on the updated balance sheet.

Based on our mutual understandings, Stelco and Cedar would also agree to the following:

1. Terms. The terms of this transaction shall be set forth in a more definitive Share Subscription Agreement and in a Shareholders' Agreement (collectively, the 'Definitive Agreements') to be entered into within sixty days after acceptance of this letter agreement by the parties. The Definitive Agreements are to contain representations and warranties customary in a transaction of this nature.
2. Good Faith Negotiations. The parties agree to negotiate in good faith to complete the Definitive Agreements and obtain the required regulatory approvals within the sixty day period. If Definitive Agreements have not been signed or obtained within

the said sixty day period, the parties may mutually agree to extend or terminate the negotiations.

3. Expenses. In the event that the proposed transactions are not able to be completed then the parties agree to bear their own respective legal and due diligence expenses. The parties agree that upon closing SFL will be responsible for the payment of the respective legal, audit and due diligence expenses related to the transactions and the obtaining of all required permits and regulatory approvals.
4. Confidentiality. The confidentiality letter dated May 25, 1994 between Stelco and Cedar is expressly incorporated herein by this reference and the parties agree to be bound by the terms thereof. In addition, no party will disclose to any person the existence of the terms of this letter agreement or any other matter related to the transactions contemplated hereby until the parties have agreed upon and disseminated a joint press release announcing the signing of this agreement, which joint press release shall be agreed upon and disseminated as soon as reasonably possible after the signing hereof and in accordance with applicable regulatory policies.
5. Due Diligence. Upon execution of this letter of intent by the parties, Stelco will permit, and cause their employees and advisors to permit representatives of Cedar and their advisors, including the proposed lender for the $10 million line of credit, reasonable access to SFL to conduct legal, financial, environmental and other appropriate reviews of SFL.
6. Other Proposals. Between the date of this letter and the earlier of the termination of this letter or the signing of the Definitive Agreements, Stelco shall not, and shall use their best efforts to ensure that their respective directors, officers and advisors do not pursue, or enter into any negotiations or agreements contemplating or providing for any merger, acquisition, purchase or sale of SFL or any of its assets, or other business combination involving SFL with any person or entity other than Cedar.

Cedar shall be entitled to appoint one representative who will be advised of any transaction not in the ordinary course of business proposed to be entered into by SFL after the date hereof.

7. Representation. The parties agree to the representation on the Board of Directors of SFL being in accordance with their respective equity interests in SFL. Cedar agrees that a quorum of any meeting of the Board of SFL shall require at least one representative of Stelco and any transaction involving SFL that is not in the ordinary course of business shall require the unanimous approval of the Board of Directors.

As per our discussion, Cedar agrees to provide Stelco including its subsidiaries and associated companies with a right of first refusal to supply SFL with its required steel purchases, subject to prevailing market prices and timely delivery schedules.

> We confirm our understanding that this letter of intent along with Schedule 'A' attached hereto, which forms a part hereof, will form the basis for the transaction and is subject to Cedar obtaining regulatory approval and being satisfied of the financial, legal and environmental conditions respecting SFL following the completion of its due diligence.
>
> We also confirm that the transaction is subject to Stelco obtaining all necessary regulatory approvals; the obtaining of documentation and Definitive Agreements satisfactory to Stelco; and the approval by Stelco's board of directors of the final transaction.
>
> If the foregoing is in accordance with our mutual understandings and constitutes a satisfactory basis for proceeding with the preparation of the Definitive Agreements, please so indicate by signing a copy of this letter of intent in the place indicated below and returning it to the undersigned by 5:00 p.m., Thursday, June 2, 1994.

9 I note in particular the following words taken from the letter just quoted:

> The terms of this transaction shall be set forth in a more definitive Share Subscription Agreement and in a Shareholders' Agreement (collectively, the "Definitive Agreements") to be entered into within sixty days after acceptance of this letter agreement by the parties. The Definitive Agreements are to contain representations and warranties customary in a transaction of this nature.
>
> The parties agree to negotiate in good faith to complete the Definitive Agreements and obtain the required regulatory approvals within the sixty day period. If Definitive Agreements have not been signed or obtained within the said sixty day period, the parties may mutually agree to extend or terminate the negotiations.
>
> We confirm our understandings that this letter of intent along with Schedule 'A'* attached hereto, which forms a part hereof, will form the basis for the transaction and is subject to Cedar obtaining regulatory approval and being satisfied of the financial, legal and environmental conditions respecting SFL following the completion of its due diligence.
>
> We also confirm that the transaction is subject to Stelco obtaining all necessary regulatory approvals; the obtaining of documentation and Definitive Agreements satisfactory to Stelco; and the approval by Stelco's board of directors of the final transaction.
>
> *[The Schedule "A" attached to the June 2, 1994 letter is an SFL balance sheet as of April 30, 1994.]

10 It is obvious then that Cedar did not have to enter into the definitive agreements provided for in the letter of intent, if after exercising its due diligence rights it was not satisfied as to the financial, legal and environmental conditions respecting SFL. Since "being satisfied" is subjective to Cedar, Stelco could not have forced Cedar to sign such definitive agreements.

11 It is likewise obvious that Stelco did not have to sign and Cedar could not have forced Stelco to sign the definitive agreements unless the terms of those definitive agreements were "satisfactory" to Stelco.

12 The letter of intent therefore contemplates that even if Cedar and Stelco negotiated in good faith, they might not be able to agree on all the terms to be covered by the definitive agreements, and that there might eventually be no deal. The letter of intent left to Cedar and Stelco the negotiation of the terms of all definitive agreements. The letter did not appoint an arbitrator or other method of resolving an impasse if the parties could not agree.

13 It cannot be said that the letter of intent left no matters of substance to be agreed to by the parties and that the definitive agreements were simply to record in more formal language that which had been agreed to in the letter of intent. The letter of intent contemplates that the parties might not be able to agree on the terms of the definitive agreements, so it is obvious the parties intended the definitive agreements to cover more than had been specifically outlined in the letter.

14 A few of the matters Cedar and Stelco made efforts to cover in the definitive agreements, that were not specifically mentioned in the June 2, 1994 letter of intent, are the following:

(1) Anti-dilution protection for the preferred shares in SFL to be issued to Stelco. The June 2, 1994 letter of intent provided that Stelco was to be issued $15,911,000 worth of Preferred Shares, Series A of SFL, with Stelco to have the option after two years to convert yearly $2,000,000 worth of these shares into Cedar common stock at $8.50 per share. Stelco wanted anti-dilution provisions that would prevent Cedar from doing anything that would so dilute the value of its shares that Stelco would not on conversion receive Cedar shares worth $8.50 per share.

(2) Stelco wanted a requirement that SFL change its name and drop the word Stelco.

(3) The use of Stelco's "dog bone" trademark. Stelco, when it caused SFL to be incorporated in March 1993, entered into an agreement with the new company that allowed SFL to use Stelco's "dog bone" trademark. But on the sale of 75% of the common shares of SFL to Cedar, Stelco wanted the Stelco name removed from the name of SFL and an agreement that its "dog bone" trademark would be used by SFL only so long as existing dies bearing the mark were used and provided its steel was used in making the product.

(4) Cedar wanted a non-competition agreement on the part of Stelco .

(5) The "representations and warranties customary in a transaction of this nature." While, generally speaking, the matters to be covered by such representations and warranties may be customary, the terms are not. The period of time to be covered by such representations and warranties and the extent to which Stelco would indemnify SFL and Cedar for losses arising out of the past operations of SFL or Stelco were maters that had to be negotiated.

15 I conclude therefore that the letter of June 2, 1994 left matters of substance to be negotiated and agreed to by the parties.

16 On June 2, 1994, the date of the letter of intent, SFL was attempting to negotiate a new

collective agreement with the union that represented its hourly paid employees. The existing collective agreement was to expire on July 31, 1994. The negotiations were not going well. Because of this, on June 1, 1994, SFL had written Ford Motor Company, General Motors and all its major customers warning them that should work stoppage occur after July 31, SFL would not have on hand enough stock to supply them for sixty days.

17 By June 9, 1994, SFL was no closer to an agreement with the union. Therefore on June 9, 1994, another letter was sent to its major customers warning them it did not have a two-month bank of finished goods, that a work stoppage could occur and for the customers to govern themselves accordingly with respect to their needs after July 31, 1994. On June 10, 1994, SFL gave layoff notices to all its 274 hourly paid employees, the layoff to take effect on or about September 2, 1994, conditional upon business levels at that time.

18 On June 17, 1994, Stelco wrote Cedar, in part, as follows:

> As you know, we have been in negotiations with the United Steelworkers Local 3767 respecting the contract which expires on July 31, 1994. We have made no progress in this regard and as a consequence gave notice to our customers on June 9, 1994 that we would not be able to guarantee their requirements beyond July 31, 1994.
>
> In the near future, sufficient of the major customers will make alternate supply arrangements so that in our view there will no longer be a viable core business for SFL. Stelco wishes to give SFL every possible chance to remain a going concern, therefore we propose that the Cedar Group enter into negotiations immediately with the union in the capacity of majority owner to avoid the permanent closure of SFL.

The letter then went on to propose an immediate interim closing of the transaction to be followed by a final closing on or before August 31, 1994.

19 This letter led to Cedar and Stelco making an arrangement on June 28, 1994 for an interim closing of the transaction. That arrangement is contained in a letter dated June 28, 1994, which reads:

20 Further to our letter of intent dated June 2, 1994.

> Whereas the Cedar Group Inc. (CEDAR) have initiated their due diligence of SFL with a view to completing the transaction contemplated in the letter of intent;
>
> and Whereas both parties recognize that changing circumstances now require amendments to the letter of intent;
>
> and Whereas Stelco Inc. (STELCO) and CEDAR both wish to continue to pursue structuring a mutually acceptable transaction;
>
> The following arrangement to allow for a July 4, 1994 interim closing of the transaction, to be followed by a final closing on or before August 31, 1994 unless extended by mutual agreement, is proposed:
>
> I) CEDAR will provide to STELCO a $2 million cheque to be held in trust by McCarthy Tétrault subject to the terms and conditions of this letter (to evidence

your capacity to complete your obligation to invest $2 million in SFL as set out in our letter of intent), which will be returned to you at any time upon return of the common shares provided you have complied fully with (iii) below.

ii) Upon receipt of the cheque in trust we will immediately transfer to you 75% of the outstanding common shares of SFL to be held in trust by McCarthy Tétrault which are to be returned at any time prior to August 31, 1994, should we agree not to proceed further.

iii) During the interim period between signing of this letter and the execution of closing documents or abandonment of our venture, you will, together with existing management, manage the business of SFL. This will include but not be limited to:

a) Appointing two members to the SFL three person Board of Directors in place of existing directors. All decisions relating to the conduct of the business outside of the normal course shall require unanimous SFL board approval;

b) not withdrawing any funds or compensation from SFL;

c) keeping STELCO fully informed of your actions and proposed actions.

iv) Notwithstanding (iii) above, STELCO agrees that during the 60 day period ending August 31, 1994, CEDAR has the right to propose amendments to its offer set out on the June 2, 1994 letter of intent, based on events transpiring since that date.

In the event that the parties do not agree on the said amendments, CEDAR will return to STELCO the 75% of the outstanding common shares of SFL, and STELCO will return to CEDAR the said $2,000,000 cheque held in trust and both of STELCO and CEDAR will have no further obligations under this agreement.

v) STELCO and SFL undertake to indemnify CEDAR, including its directors and officers, against any liabilities arising out of their involvement with SFL during the 60 day period. Such indemnification shall not include any liabilities resulting from gross negligence or willful misconduct.

vi) Should this transaction not be consummated, the Cedar Group will be paid an amount not to exceed $25,000 per week as fair compensation for time and out-of-pocket expenses, including taxes, reasonably incurred during the 60 day period.

21 The letter of June 28, 1994 makes it even clearer that as of that date the parties do not have a final agreement, that is to say there are still matters yet to be agreed to by Cedar and Stelco. The words "Stelco Inc. (Stelco) and Cedar both wish to continue to pursue structuring a mutually acceptable transaction" recognizes that a mutually acceptable transaction has not yet been reached. The June 28, 1994 letter further provides that the $2,000,000 cheque to be provided by Cedar on the interim closing on July 4, 1994 "will be returned at any time upon return of the common shares ... ." Cedar was not then bound to anything.

22 The June 28, 1994 letter also provides:

> ... Cedar has the right to propose amendments to its offer set out on the June 2, 1994 letter of intent based on events transpiring since that date. In the event that the parties do not agree on the said amendments, Cedar will return to Stelco the 75% of the outstanding

> common shares of SFL, and Stelco will return to Cedar the said $2,000,000 cheque held in trust ..... ."

It is apparent therefore that there were matters yet to be decided, in addition to the matters that remained to be agreed upon as of the June 2, 1994 letter of intent.

23 The interim closing provided for in the letter of June 28, 1994 took place on July 4, 1994. On July 4, 1994, a further letter agreement was entered into by Cedar and Stelco. That letter reads as follows:

> Further to our Letter of Intent dated June 2, 1994, and our letter dated June 28, 1994, the following provisions will apply to the trust arrangement with McCarthy Tétrault with respect to the $2,000,000 cheque and the shares of Stelco Fasteners Ltd.:
>
> 1. The shares and $2,000,000 cheque are to be held pending the final closing on or before August 31, 1994 unless extended by mutual agreement or until abandoned.
> 2. If either Cedar Group Inc. or Stelco Inc. deems the project abandoned, it shall so advise McCarthy Tétrault who is directed forthwith thereafter to deliver the $2,000,000 cheque to the Cedar Group and the SFL shares to Stelco.
> 3. Upon such abandonment the Directors nominated by Cedar Group Inc. shall resign as Directors and Stelco Inc. shall refund the $10.00 paid for the SFL shares.

24 The July 4, 1994 letter made clear, if there had previously been any doubt about the matter, that if thereafter Cedar or Stelco deemed the project abandoned, then that was the end of it. That, in my view, was the situation prior to July 4, 1994 in any event. If there is only an agreement to negotiate an agreement and one party decides it does not wish to pursue the matter further, then there never will be that further agreement. The paragraph numbered 2 in the letter of July 4, 1994 simply acknowledges that reality.

25 On August 29, 1994, Cedar and Stelco signed a further letter agreement which reads:

> Further to our letter of intent dated June 2, 1994, as amended by our letters dated June 28, 1994 and July 4, 1994 (the "Letter of Intent").
>
> WHEREAS Stelco Inc. ("Stelco") and Cedar Group Inc. ("Cedar") continue to pursue in good faith the completion of the transaction as contemplated in the Letter of Intent;
>
> AND WHEREAS McCarthy Tétrault holds in trust a cheque for $2,000,000 drawn on Cedar's bank account, $10 cash and 8,250,075 Common Shares of SFL transferred by Stelco to Cedar on July 4, 1994 pursuant to the Letter of Intent;
>
> AND WHEREAS the Letter of Intent contemplates a final closing date of August 31, 1994;
>
> AND WHEREAS both parties wish to continue to structure a mutually acceptable transaction and recognize that an extension of the final closing date set out in the Letter of Intent is required.

26 The following arrangement is proposed:

I) Cedar and Stelco shall continue to be bound by the terms of the Letter of Intent to the extent that they are currently bound;

ii) Notwithstanding I) above,

a) the final closing date of the transaction contemplated by the Letter of Intent shall be extended to September 30, 1994; and

b) the 60 day period referred to in paragraphs (iv), (v) and (vi) of the June 29, 1994 letter shall be read as a 90 day period ending September 30, 1994.

The words "WHEREAS both parties wish to continue to structure a mutually acceptable transaction," contained in the letter of August 29, 1994, once again recognize that an acceptable agreement has not yet been achieved.

27 While by the letter of August 29, 1994 the final closing date of the transaction was extended to September 30, 1994, no closing took place on September 30, 1994, though the parties continued to negotiate thereafter. Finally, at about 8.00 a.m. on December 12, 1994, Stelco informed Cedar by a letter sent by facsimile that Stelco had concluded it was not possible to reach an agreement with Cedar and that Stelco deemed the proposed transaction to be abandoned. Stelco also so informed the trustee holding the $2,000,000 cheque and 75% of the common shares of SFL and the interim closing of July 4, 1994 was reversed.

28 Cedar claims a declaration that it is the owner of 75% of the common voting shares of SFL.

29 I conclude that to the extent Cedar's claim is based on the proposition that it advances that the letter of intent of June 2, 1994, the letter agreement of June 28, 1994, the letter agreement of July 4, 1994, and the letter agreement of August 29, 1994, either together or individually, gave rise to a contract known to the law, such claim fails. Those agreements are but a contract to negotiate a contract. As was stated by Lord Ackner in Walford, " ... [E]ither party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw."

30 But Cedar rests its claim on another ground, namely: By the letter of intent of June 2, 1994, "the parties agree[d] to negotiate in good faith to complete the Definitive Agreements"; Stelco, by letters dated November 4, 1994, December 9, 1994 and December 15, 1994, advised Cedar that the Definitive Agreements had to be agreed to and signed by December 15, 1994; Stelco terminated the transaction at 8.00 a.m. on December 15, 1994; Cedar was prepared to accept and conveyed its willingness to accept on December 15, 1994 all of Stelco's requirements in regard to the Definitive Agreements; Stelco is bound by Cedar's acceptance of Stelco's requirements as to the terms of the Definitive Agreement and thus there exists a binding bargain for the sale by Stelco to Cedar of 75% of the common shares of SFL.

31 In dealing with this argument, it must be remembered that prior to the letter of November 4, 1994, just mentioned, Stelco and Cedar were entitled to withdraw from the negotiations at any time, for any reason. Cedar could not have complained if on November 4, 1994 Stelco had informed it that the negotiating and so the transaction was at an end. Did the letter of November

4, 1994 bind Stelco to keep negotiating, and keep the transaction alive until the last minute of December 15, 1994? Even if the letter of November 4, 1994 can be said to constitute a promise by Stelco, and there be consideration by Cedar that binds that promise (and I can find none), surely at best the November 4, 1994 letter gave rise only to a contract to negotiate a contract and such a contract, as we have already seen, is not known to the law.

32 Likewise, the letters of December 9, 1994 and December 12, 1994 could at best have given rise only to contracts to negotiate a contract, contracts the law does not recognize. Accordingly, this alternate argument, which, if valid, would have denied Stelco the right to terminate on the morning of December 15, 1994, fails.

33 While I have thus disposed of Cedar's claim, Stelco is anxious, perhaps understandably, to deny any suggestion that it negotiated in bad faith, or that its termination of the transaction at 8.00 a.m. on December 15, 1994 was unfair. I therefore pursue those matters.

34 After the interim closing of July 4, 1994, Cedar was able to negotiate a new three-year collective agreement between SFL and the union representing SFL's hourly paid employees. But it remained uncertain how much future business had been lost because of SFL's letters to its customers on June 1, 1994 and June 9, 1994 advising them supplies could not be guaranteed after July 31, 1994 because of the possibility of work stoppage. Until the amount of such loss could be determined, Cedar could not know whether SFL was worth buying and, if still worth buying, what price reduction it should ask for to compensate for the loss of business. As a result, a final agreement could not be worked out before August 31, 1994 and the parties entered into the further letter agreement of August 29, 1994, that is set out in full above, which extended the closing date to September 30, 1994. Eventually, it was determined that approximately $19,900,000 worth of sales had been lost which equated to a 30.7% loss, using the 1994 projected total sales number of $64,655,000. That does not mean, of course, that the total loss would occur in 1994, or that some of the loss could not be made up by sales elsewhere.

35 In September 1994, Cedar and Stelco negotiated (subject to final agreement and signing) new sale terms, which, in effect, reduced the sale price by $4,000,000. Whereas the June 2, 1994 letter of intent required Cedar to arrange a $10,000,000 line of credit for SFL, from which $5,000,000 was to be paid by SFL to Stelco to reduce SFL's debt to Stelco, the new terms required Cedar to arrange only a $5,000,000 line of credit from which Stelco would be paid $1,000,000. The terms to be attached to the $15,911,000 worth of Series A preferred shares of SFL that Stelco was to receive under the June 2, 1994 letter of intent were changed somewhat so as to reduce from two years to six months the standstill period required, before conversion of the preferred shares into Cedar common shares.

36 On September 27, 1994, by facsimile, Bliss White of Blake, Cassels and Graydon, solicitors for Stelco, sent to Dan Sooley of Smith, Lyons, Torrance, Stevenson & Mayer, solicitors for Cedar, draft Definitive Agreements, filling some 80 pages, in preparation for the September 30, 1994 anticipated closing. An earlier draft of these documents had been sent to Cedar on August 22, 1994 in anticipation of an August 31, 1994 closing. On September 27, 1994, Chris Theodoropoulos of Smith, Lyons, Torrance, Stevenson & Mayer, a solicitor who worked closely

with Cedar, wrote to Roger Fulton, in-house counsel for Stelco, enclosing a draft letter agreement between Cedar, Stelco and SFL, suggesting that this new letter agreement "replace all prior agreements and clarify the business deal." He also enclosed by way of a draft Schedule "A" to the proposed letter agreement, a long list of representations and warranties by Stelco with respect to SFL. The proposed new letter agreement was dated September 28, 1994 and reads in part:

> ... This Letter Agreement amends and supersedes the letter of intent dated June 2, 1994, as amended by Letter Agreement dated June 28, 1994 (collectively the 'Letter of Intent') and the Letter Agreement dated July 4, 1994 (the 'Trust Agreement').
>
> ...
>
> 3. Stelco and SFL jointly and severally represent, warrant and covenant to Cedar and acknowledge that Cedar is relying on such representations, warranties and covenants in connection with the terms and conditions of this Letter Agreement, which representations, warranties and covenants are set out in Schedule 'A' attached hereto.

The draft Schedule "A" reads in part:

> 27. Employee Plans: ... the Letter Agreement identifies each retirement, pension ... medical, hospital ... or other compensation plan ... or other employee benefit that is maintained ... by SFL for the benefit of employees or former employees of SFL ... .
>
> ...
>
> (h) All of the Pension Plans are fully funded on a going concern basis, a solvency basis and an accounting basis, in accordance with the provisions of such Pension Plans, Applicable Legislation, generally accepted accounting rules and generally accepted actuarial practice; ...

37 I point out that, at least in regard to the pension plans, the representations and warranties Stelco was being asked to sign would relieve Cedar from any failure on its part to make a proper due diligence search, but even more significantly would avoid having to bargain with Stelco as to what, if any, price reduction Cedar should be given because of any under funding of the pension plans. In fact, the plan covering the hourly paid employees was under funded to the extent of approximately $6,000,000. This information was in the hands of Cedar long before September 28, 1994.

38 Stelco was not prepared to close the transaction on the basis of the draft letter agreement proposed by Theodoropoulos. On September 28, 1994, Stelco so informed Cedar by a letter facsimile that reads, in part:

> We have just received a fax of a 'letter agreement' from Chris Theodoropoulos. It purports to cover the items and issues agreed upon between ourselves and close this transaction. In our view it does not do so ... . We therefore have accordingly made the changes to the base closing documents used in the negotiations. ... It is this documentation that Stelco believes represented the agreement between ourselves throughout the negotiations and does so now.

> We therefore request that you confirm your willingness to close this transaction on the basis of the documentation prepared (and reviewed by Chris Theodoropoulos and yourselves) and not on the basis of the 'letter agreement' sent by Mr. Theodoropoulos.

39 Cedar purported to abandon Theodoropoulos' suggestion and said that it would close on the basis of the Stelco draft documents. But at closing on September 30, 1994, Cedar asked whether the Pension Plans were fully funded. Stelco refused to give such a warranty but said Cedar could talk to Stelco's actuary and placed a telephone call to the actuary. The actuary confirmed the $6,000,000 under funding liability and Cedar professed to be shocked by the revelation and refused to close.

40 A few days following the aborted closing, those at Stelco responsible for the conduct of negotiations with Cedar, including Stelco's in-house counsel, Roger Fulton, held a post mortem to determine why Cedar had aborted the closing. They could not come up with an answer, being satisfied Cedar knew, or ought to have known, about the pension plan under funding long before September 30, 1994. Nevertheless, Stelco was intent on completing the sale to Cedar and decided to continue negotiations.

41 Cedar complains that Stelco, prior to September 30, 1994, kept it in the dark as to the pension plan under funding. I conclude that complaint is not well founded. About August 25, 1994, SFL sent to Nicolas Matossian, president of Cedar and at that time following the July 4, 1994 interim closing also president of SFL, a draft actuarial report prepared by Stelco's actuary which showed that as of December 31, 1993, the SFL bargaining unit pension plan was under funded to the extent of $5,817,000. On September 8, 1994, Matossian was sent draft actuarial reports showing the under funding as of April 1, 1993 to be $6,519,000 and as of December 31, 1993 to be $6,593,000. On September 13, 1994 or earlier, Matossian was sent an actuarial report that showed a surplus in the SFL pension plan for salaried employees of $412,000 as of December 31, 1993. When the surplus in the salaried employees' plan is offset against the under funding in the bargaining unit plan, there is still a shortfall of $6,181,000.

42 Matossian did indeed receive on July 29, 1994 from Stelco a brief status report on the salaried and bargaining unit pension plans prepared by Stelco's actuary. In that report, the actuary states:

> Please find enclosed a brief summary of the results of our realistic going-concern valuation for the Stelco Fasteners Ltd. pension plans.

In the report itself, we find the following:

> Valuation of liabilities is on a realistic going concern basis consistent with Stelco practice for divestiture transactions.

The last page of the report states that based on a "realistic going concern valuation," the salaried plan has a surplus of $3,321,000 while the bargaining unit plan has an unfunded liability of $1,403,000, based on the following:

> Assumptions and Methods

Asset value	:	31/12/93 market value less 10% reflects estimated loss on investments to June 30
Interest Rate	:	9.75% reflects available yield on long term Provincial bonds at June 30
Salary Increase:		5% per annum (Salaried Plan)

43 Based on the methods employed in producing the status report, the report shows a net surplus, when the two plans are taken together, of $1,918,000. But Nicolas Matossian is a sophisticated businessman, with an MBA from Harvard and a PhD from McGill. He had to know there are different methods of valuing the assets and liabilities in a pension plan. I note that the representation and warranty suggested by Theodoropoulos on September 28, 1994 reads: "All of the Pension Plans are fully funded on a going concern basis, a solvency basis and an accounting basis." Theodoropoulos was obviously not interested in a realistic going concern valuation and one has to wonder how much reliance Matossian would put on such a valuation, especially when it is said that such valuation is "consistent with Stelco practice for divestiture transactions." Any comfort Matossian took from the status report must surely have been disabused when he received in August and September the draft actuarial reports, I have already referred to, showing a pension shortfall of $6,181,000. It seems obvious that the status report using a "realistic going concern" approach was intended only to support an argument by Stelco that the pension assets were in fact more valuable than they seemed when valued by methods required by law.

44 In any event, Stelco had to expect that Cedar would have its own actuary and pension experts review the SFL pension plans as part of Cedar's "due diligence" rights granted to it by the letter of intent of June 2, 1994, which reads in part:

> 5. Due Diligence. Upon execution of this letter of intent by the parties, Stelco will permit, and cause their employees and advisors to permit representatives of Cedar and their advisors, including the proposed lender for the $10 million line of credit, reasonable access to SFL to conduct legal, financial, environmental and other appropriate reviews of SFL.

45 Cedar also says that Stelco was slow in disclosing that it was paying on behalf of SFL about $50,000 a month in Post Employment Medical Benefits to which former employees were entitled, benefits that were and would continue to be SFL's responsibility after a final closing of the transaction. It was said that this made SFL's financial statements look better than they should have. I find there is no merit to this allegation. This information was given to Cedar's representatives when they attended at SFL's premises on June 6 and 7, 1994. In any event, the

fact Stelco had been paying for these benefits was a matter taken into account when the sale price was reduced by $4,000,000 in mid September 1994.

46 So even if there had been merit (and I find none) to the complaints regarding the Post Employment Medical Benefits, or the pension plan under funding, no harm resulted to Cedar thereby. The former was settled in mid September 1994 and the latter was the subject of negotiations following the aborted closing of September 30, 1994. Those negotiations dragged on but with considerable success. On November 4, 1994, in a letter I have already referred to, Stelco wrote Cedar, in part, as follows:

> ... The purpose of this letter is to outline Stelco's final proposal for a transaction. ...
>
> ... Stelco proposes the following basis for concluding this transaction:
>
> [Then follows a list of terms.]
>
> We would request that you respond in writing by November 16, 1994, indicating your acceptance of these arrangements, and commit to finalizing and executing all documentation by December 15, 1994. Should this timetable not be met, Stelco and Cedar shall immediately initiate the necessary steps to unwind the interim closing ... .

47 Cedar did not accept the proposal. Rather, on November 10, 1994, Matossian sent a lengthy letter to Stelco setting out changes to that proposal that Cedar required and suggesting a further meeting. That meeting took place November 14 to 16, 1994. On December 2, 1994, Roger Fulton, who had by this point become Stelco's sole negotiator, spoke by telephone to Matossian and advised him Stelco was prepared to fund the pension deficit to a limited extent by paying SFL $2.45 million over three years, and if after three years there was still a deficit, then Stelwire Ltd., a Stelco subsidiary, would pay SFL a rebate of $10.00 a ton on all steel purchased from it during the fourth year and likewise after four years if a deficit still remained, Stelwire would give a $10.00 a ton rebate on steel purchased during the fifth year; but that everything else was to remain as discussed and captured in the documents that had already been delivered.

48 Draft Definitive documents, thought by Stelco to be in accord with the letters of intent and subsequent discussions between the parties prior to the date of drafting had already been sent to Cedar or its solicitors on August 22, 1994 for signing at the August 31, 1994 closing; on September 27, 1994 for signing at the September 30, 1994 closing; on November 4, 1994 with the letter of that date to which I have already referred. On December 2, 1994, new draft documents were sent by Blake, Cassels and Graydon, Stelco's solicitors, to Cedar, by courier, and to Cedar's solicitors, Daniel Sooley (by messenger), and Chris Theodoropoulos (by facsimile). The documents sent on December 2, 1994 were not all the documents Stelco was to prepare by agreement between the parties, but it was the bulk of them. Sooley, whose office was in Toronto, and Theodoropoulos, whose office was in Vancouver, would have received the documents on the same day they were sent, namely December 2, 1994. Cedar, whose offices were in Montreal, would have received them a day or so later.

49 Shortly after the December 2 documents were sent out, Fulton spoke to Theodoropoulos and was told Theodoropoulos would be in Montreal the week of December 5, 1994. Fulton had trouble contacting Theodoropoulos in Montreal but finally reached him on December 8 or 9 only

to learn that Theodoropoulos had been too busy on another matter to give much attention to the documents and the transaction. Fulton had concerns that Cedar was leaving matters too late for the transaction to close on December 15, 1994.

50 It was bad enough that the draft documents Stelco sent out on December 2 were to have been sent out by Stelco ten days earlier. Their preparation had been delayed because their drafter, Bliss White of Blake, Cassels and Graydon, had the flu. Now they had sat a further week without Theodoropoulos considering them. Also the documents Cedar was to prepare had not been delivered. Cedar was to prepare a Registration Rights Agreement to be filed in the United States where Cedar's shares were traded so Stelco would be able to exercise its rights to convert SFL preferred shares into Cedar's common shares. Cedar was also to prepare the anti-dilution language, referred to earlier, needed to protect the value of Cedar's shares. On December 5, 1994, Theodoropoulos had sent Fulton a copy of a Registration Rights Agreement that Cedar had entered into when it bought Dominion Bridge Inc. from United Dominion Industries Limited, relating to the preferred shares of Dominion Bridge Inc. that were by the terms of that transaction convertible into common shares of Cedar. Fulton telephoned Theodoropoulos and told him that a bare precedent was of no use to Stelco - what was needed was one adopted to the specific transaction Cedar and Stelco had made. He did not want Stelco's solicitors to waste time on a document that was not going to be the document that would be signed. Theodoropoulos had had the drafting responsibility for this document and the anti-dilution language since October 1994. A draft Registration Rights Agreement and draft anti-dilution language adapted to the terms of this transaction had not been delivered to Stelco by December 9, 1994.

51 On December 9, 1994, Fulton wrote to Theodoropoulos as follows:

> Further to our discussions of yesterday and today, wherein I expressed my concerns over the rate of progress in finalizing the documentation for this transaction, I am writing to confirm that it is Stelco's position that the transaction must be finally documented and entered into in all respects by Thursday, December 15, 1994.
>
> If it is not, Stelco intends to exercise its rights to reverse the July 4, 1994 share purchase in accordance with the July 4, 1994 Trust Agreement and related agreements dated June 2, 1994 and June 28, 1994.

52 That letter should have been a clear warning to Cedar that Stelco's patience was running out and that if it did not approve of Stelco's draft documents and quickly deliver the drafts, Cedar was responsible for there would be no transaction.

53 Later, on December 9, 1994, Fulton had what he described in evidence as a disturbing conversation with Dan Sooley. Schedule "C" to the draft shareholders agreement (one of the Definitive Agreements) prepared by Stelco, contained a list of 26 subject matters that would require unanimous shareholders approval prior to action by SFL. This schedule was, of course, for the protection of Stelco as a minority shareholder of SFL. This Schedule "C" had stood virtually unchanged in the many drafts of the shareholders agreement that had been delivered to Cedar commencing August 22, 1994. In the December 9, 1994 telephone conversation, Sooley requested that 17 out of the 26 subject matters listed in Schedule "C" be removed. Fulton

thought that the list of matters had been settled at the November 14 to 16 meetings and that it was late in the game to be raising those issues. He viewed the matters listed in Schedule "C" to be important for the protection of Stelco as a minority shareholder. He told Sooley the change he requested was not acceptable.

54 Also, later on December 9, 1994, Fulton had a telephone conversation with Theodoropoulos who requested that after closing Cedar be paid an ongoing management fee for running SFL. Fulton told Theodoropoulos such was not acceptable and that it was late in the day to be raising it. Theodoropoulos argued that Stelco was getting one. Fulton corrected him, explaining that Stelco was paid only its costs based on time actually spent for performing treasury and accounting services for SFL.

55 Because of the two telephone calls just mentioned, on December 12, 1994 Fulton wrote Nicolas Matossian, in part, as follows:

> ... I was involved in separate telephone calls with your lawyers, Messrs. Theodoropoulos and Dan Sooley. In those calls, they raised two major new demands of Cedar: that several more items be deleted from the list of matters requiring Stelco's approval under the draft shareholders agreement, and that Cedar be paid a management fee by SFL. Moreover, despite repeated requests, we still have not received from you a draft of the share exchange and Registration Rights Agreement contemplated for this proposed transaction.
>
> In light of these subsequent developments and our experience to date, Stelco has concluded that it will not be possible to settle, document and enter into a mutually agreeable transaction by this Thursday. Accordingly, on Thursday, December 15, 1994, Stelco intends to deem the proposed transaction to be abandoned and to exercise its right to reverse the July 4, 1994 share purchase in accordance with the July 4, 1994 Trust Agreement and related agreements dated June 2, 1994 and June 28, 1994.

56 In spite of this letter, the solicitors for Cedar and Stelco continued to work on the draft Definitive Agreements. Theodoropoulos and Fulton met on December 13, 1994. Fulton delivered to Theodoropoulos a draft of what the parties called The Steel Frame Contract, which document provided for the method of funding the pension plan deficit already outlined.

57 Early on December 13, Fulton received a draft Registration Rights Agreement which had been sent to him by facsimile late on December 12, 1994 by Theodoropoulos from Vancouver, together with a covering letter from Theodoropoulos, which read:

> Further to our telephone discussions on December 9, 1994, please find enclosed a draft of a Registration Rights Agreement, for your review. By copy of this letter we are also sending the Agreement to Cedar's counsel in Philadelphia, for their review.
>
> I look forward to discussing the enclosed with you while in Toronto on December 13, 1994.

58 After his meeting with Theodoropoulos on December 13, 1994, Fulton sent a copy of the Registration Rights Agreement to Stelco's counsel in the U.S. for his comments.

59 Nothing will be gained by my reciting in detail what occurred from December 13 to December 15, 1994. Rather, I will concentrate on some of the things that led Stelco to terminate the transaction. At 3.00 p.m. on December 14, a telephone conversation took place to which Fulton, White, Theodoropoulos and Sooley were parties. In that conversation, Theodoropoulos objected to Cedar having to guarantee the liability of SFL for the period following Cedar's taking over the operation of SFL on July 4, 1994. Fulton said his instructions were to insist on that guarantee. Theodoropoulos said it was a business point that needed clarification and that Sooley was redrafting the guarantee. Theodoropoulos also objected to Stelco's indemnity for product liability claims made against SFL being limited to a two year period. Fulton said Stelco was very concerned about a $5,000,000 restructuring change Cedar intended that SFL should take lest such change would have some adverse effect on Stelco. That matter was supposed to have been checked out by Cedar with one Bakker at Stelco but Cedar had not talked to Bakker about it. Fulton said this was still an open issue.

60 At 4.20 p.m. on December 14, 1994, Sooley returned to Stelco's solicitors, with suggested changes, a copy of the draft Refinancing Agreement (one of the Definitive documents) prepared by Stelco's solicitors. The representations and warranties Stelco was prepared to give lasted for only two years. Sooley suggested, as had Theodoropoulos in the 3.00 p.m. telephone conversation, changes that would remove the two-year limit for litigation, environmental, pension, employees and product matters. Also, Stelco intended its representations and warranties would apply only to matters occurring prior to July 4, 1994 when Cedar took over the management of SFL and that for the period following July 4, 1994 Cedar would give the exact same representations and warranties relating to SFL as Stelco was giving for the period before July 4, 1994. Sooley's suggested changes, again in keeping with the views expressed by Theodoropoulos at 3.00 p.m., did not provide such a representation and warranty by Cedar. But even more significantly, Sooley made changes that would make Stelco responsible for all claims by third parties and not just the specific classes of claims Stelco was agreeable to be responsible for, and without limit as to time. In Fulton's view, and I agree, the changes made by Sooley, of which I have mentioned only some, change profoundly the indemnification portion of the Refinancing Agreement.

61 At about 4.30 p.m. on December 14, 1994, Fulton had another telephone conversation with Theodoropoulos. I quote a small portion of that conversation. "CT" is Chris Theodoropoulos; "RF" is Roger Fulton.

CT: Nick suggested that one advisor be permitted at meetings [of Directors]

RF: I will take that under advisement.

CT: Outside directors may be paid ten thousand dollars per anum.

RF: We will need a definition of an outside director.

CT: Anyone other than Cedar or Stelco. With regard to 4.05, Nick suggested no right of inspection [of records for shareholders].

RF: That is a substantive change. There are to be no changes made to the deal of a week and a half age. These are my instructions. We will do the deal agreed to a week and a half ago .... . We're prepared to deal with what we've been working under but I cannot deviate from that.

CT: This will back fire.

RF: 6.04 is a major change. [The reference is to section 6.04 of the draft Refinancing Agreement which Sooley had marked so as to remove the provision that Cedar would indemnify Stelco for claims made against SFL for events after July 4, 1994.]

RF: I know this is a contentious issue but it has nonetheless remained constant in the documents.

CT: But it was never agreed to, it was excluded once.

RF: We said put it back in.

CT: I'm telling you they won't accept it. They're at risk to a lawsuit from the shareholders that they are not acting properly as directors.

RF: It's the same thing for Stelco.

CT: But this does not make sense for Milbourne's [President of Stelco] position.

RF: That's his position, those are my instructions.

CT: We'll go to him, Nick or Michel [Michel Marengère, Chairman of Cedar] and say this is our position.

RF: Go ahead.

CT: We will not bend on the Registration Rights and Refinancing Agreements. We didn't do it for UDIL and we won't do it here. We want this to be consistent with UDIL. We won't let them have a priority.

RF: I have no problem with that, but we need the business deal in the Refinancing Agreement to be reflected in the Registration Rights Agreement.

CT: I have an obligation to United Dominion. They are already a shareholder. I will speak to the U.S. guy and make sure they understand it. Then you go to your people once we've got the business points.

RF: No. I've made it clear my instructions are no more business points.

62 Following this telephone conversation with Theodoropoulos, Fulton concluded:

(1) Stelco was not going to get what it wanted in the Registration Rights Agreement;

(2) Cedar was not going to give Stelco the indemnification it required from Cedar for events at SFL following July 4, 1994;

(3) Cedar had not yet even reviewed the Steel Frame Contract;

(4) Cedar was talking about going through Schedule "C" (minority shareholder protection) again.

In general, Fulton concluded that since he had reached loggerheads with Theodoropoulos and Sooley on main points, that there was no way an agreement could be reached. He was also of the view that even if the negotiations kept going and somehow agreement was reached, there would not be time for him to determine that all the documentation was proper, and fit together and that everything was properly covered so he could recommend to Stelco's president, Mr. Milbourne, that he sign the documents.

63 Fulton so advised Mr. Milbourne. Milbourne told Fulton to terminate the negotiations and take the necessary action to take back the shares out of escrow. At about 8.00 a.m. on December 15, 1994, Stelco reversed the tentative closing that had taken place July 4, 1994 and then sent out a letter to Cedar by facsimile, attention Michel L. Marengère, Chairman, which letter reads, in part:

> The purpose of this letter is to advise you that, reluctantly, Stelco has concluded that it is not possible to reach agreement with Cedar Group Inc. as to the terms of a mutually acceptable transaction involving SFL.
>
> ...
>
> Accordingly, Stelco deems the proposed transaction to be abandoned and is exercising its right to reacquire the SFL shares in accordance with the July 4, 1994 Trust Agreement and related agreements dated June 2, 1994 and June 28, 1994 between us.
>
> It is unfortunate that this matter could not be satisfactorily concluded. Of course, Stelco intends to honour its obligations under those letter agreements.

64 The last sentence quoted from the letter refers to the provision in the June 28, 1994 letter agreement which states:

> Should this transaction not be consummated, the Cedar Group will be paid an amount not to exceed $25,000 per week as fair compensation for time and out-of-pocket expenses, including taxes, reasonably incurred during the 60 day period.

65 After receiving the letter, Marengère spoke to Fulton by telephone at around 8.45 a.m. and again around 9.30 a.m. on December 15, 1994. Fulton told him the deal was over and that Stelco had taken back the shares. Marengère stated that in his view there was a deal and there should be a signing ceremony. Fulton told him that there was not a deal and that what had been done was final. I find specifically that Fulton did not tell Marengère that if Cedar accepted all Stelco's terms, Stelco would have to sign the documents.

66 Except for the two telephone calls just mentioned, during the evening of December 14 and during December 15, 1994, Stelco and its solicitors refused to accept telephone calls or respond to facsimiles sent by Cedar and its solicitors. Cedar, nevertheless, decided to accept all of Stelco's terms and so advised Stelco and its solicitors and at about 5:15 p.m. December 15, 1994 tendered as best it could, signed Definitive Agreements on Blake, Cassels and Graydon.

While one could take issue with the letters and documents sent or tendered by Cedar on December 15, 1994 and say they do not demonstrate acceptance of all of Stelco's terms, I am satisfied Cedar was prepared on December 15, 1994 to accept all of Stelco's terms and if Stelco had pointed out that the letters and documents failed to do so, Cedar would have amended them so they would do so.

67 The problem Cedar faces is that it did not accept all of Stelco's terms while they were still available. Only when Cedar realized Stelco had withdrawn from the negotiations did it attempt to accept Stelco's terms. Indeed it is doubtful that Stelco's terms were ever on the table to be accepted. Stelco and Cedar were involved in negotiations that might or might not lead to signed Definitive Agreements. Until such time as the agreements were signed, the proposals of either were only that and until signed by the proper signing officers of each were probably not binding.

68 I find that Stelco did negotiate in good faith and there was nothing unfair about the manner in which it broke off those negotiations on December 14, 1994 at about 5:00 p.m. Cedar's claim is dismissed with costs on a party-and-party basis.

O'LEARY J.
