IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Layes v. Macdonald, 2008 NSSC 100

Date: 20080407
Docket: SH-133518
Registry: Halifax

Between:

Kevin J. Layes, of Antigonish, County of Antigonish, Province of Nova Scotia and **Sugarloaf Spring Rain Limited**, a body corporate, incorporated in the laws of Nova Scotia, with head office in Cloverville, Antigonish, in the County of Antigonish, Province of Nova Scotia

Plaintiffs

v.

Joseph A.F. Macdonald, Peter M. S. Bryson and Marcia Brennan

Defendants

Judge:	The Honourable Justice Walter R.E. Goodfellow
Heard:	**Case Management/Chambers Hearings** -September 28, 2006, March 7, April 16, June 1, August 1, September 13, 2007 **Trial Dates -** October 1, 2, 3, 4, 5, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 2007, November 6, 7, 8, 9, 13, 14, 15, 16, 29, 30, 2007 December 3, 4, 2007 in Halifax, Nova Scotia
Written Decision:	April 7, 2008
Counsel:	Kevin J. Layes, self-represented, and on behalf of Sugarloaf Spring Rain Limited, assisted by Carmen Blinn for the plaintiffs Bruce Outhouse, Q.C., R. Lester Jesudason, and Moneesha Sinha for the defendants

Goodfellow, J.:

BACKGROUND

[1] Kevin J. Layes (Layes) was born February 19, 1967. He is the son of John James Layes and Rose L. Layes who owned approximately five hundred acres of land which included a portion of Sugarloaf Mountain, Cloverville, Nova Scotia. In, or about, 1988 Layes came up with the idea of possibly developing a bottled water distribution plant on his parent's property. In 1993 he registered the business name Sugarloaf Spring Rain Water listing himself as the sole proprietor. In May of 1993 his parents conveyed approximately thirty acres of land and a right-of-way for Layes to continue with the possibility of developing a water plant.

[2] Layes was successful in obtaining some financing and in, or about, November of 1993 water production and sales began in the local area. On January the 14th, 1994 he caused the incorporation of Sugarloaf Spring Rain Limited (OldCo) and proceeded to carry on business. In the summer of 1994, he was introduced to Fred George (George) and on, or about, October 18, 1994 an arrangement with George was finalized, whereby, they became partners and directors of OldCo. George and Layes entered into a share/purchase agreement giving George a forty-five percent (45 %) interest in OldCo. I believe George paid

fifty-thousand dollars ($50,000) for this interest. In any event, Layes and George attended the offices of Kent Noseworthy (Noseworthy) to execute a shareholders' agreement which contained the more, or less, standard shotgun clause etc.

[3] Layes conveyed his interest in the land to OldCo and in, or about, January, 1995 Layes entered into a new arrangement with George whereby George secured an additional five percent (5%) of the shares. Layes claims that George did not pay him an alleged agreed price of fifty thousand dollars ($50,000) for these additional shares, however, that is not an issue before this court in this action.

[4] Layes outlines in his pre-trial brief serious health problems during this time frame and he attempted at trial to file medical reports without calling the authors and I ruled that they were not admissible. This did not preclude Layes from outlining, in his own evidence, his health problems and whatever impact they had on the situation, however, Layes chose not to do so in any specific detail.

[5] Layes expresses the growth of the water company in glowing terms, however, the reality of the situation was quite different. George, through his solicitor, Noseworthy, indicated a desire to sell his half interest in OldCo for sixty-

nine thousand dollars ($69,000) and other terms. This offer was made to OldCo. Some effort was made by Layes to have Scotsburn Dairy purchase George's fifty percent (50%) interest in OldCo, however, Scotsburn declined. Noseworthy's evidence, that I accepted, was that OldCo was having difficulty paying its trading debts and on the expiry of the initial offer to OldCo, George executed the shotgun clause on November 10, 1995 with a buyout proposal whereby George would sell his shares in OldCo for twenty-thousand dollars ($20,000) payable by installments without interest and George was to be released of all corporate indebtedness and, if not accepted, Layes could purchase George's fifty percent 50% interest on the same terms.

[6] At about this time, Layes received a telephone call from Donna Boutilier (Boutilier), who I would describe as the executive secretary of Matheson/Glenora Distillers Group. Boutilier had been contacted by Ernie Beno (Beno), a bookkeeper who had learned of the water plant of Layes and conveyed this information to Boutilier. Boutilier's evidence, which I totally discounted, was that Layes, at all times, wanted to retain control of the company and I found from the very outset when Boutilier first contacted Layes on November 8, 1995, Boutilier

advised Layes that certain associates of hers were interested in purchasing a fifty-one percent (51 %) share interest in OldCo but that control was essential.

[7] Layes met Boutilier and her associates the evening of November 9, 1995 at a gravel pit located on Layes' parents land and it was in the evening and dark. Discussions took place whereby Jim Matheson (Matheson), the spokesperson for Glenora Distillers-Investors said that the investors were prepared to assist but would require a controlling interest. The arrangement whereby Layes would have a forty-five percent (45 %) interest and the Matheson/Glenora Investors would have fifty-five percent (55 %) was agreed upon and at all times what transpired moved in the direction of achieving this agreed goal.

[8] Layes engaged Peter Bryson (Bryson) and Marcia Brennan (Brennan) of the law firm McInnes Cooper on the 16th of November, 1995 and Layes met with Brennan and some of Layes' investors/staff on the 17th of November, 1995. The urgent primary engagement was to address George's shotgun offer. At this stage, Joseph A.F. Macdonald (Macdonald) took charge of the file and, as Layes had brought into the picture Matheson/Glenora Investors, Macdonald proceeded first

to consummate the transfer of George's interests in OldCo to Layes and then to put into effect the second stage agreement of Layes and Matheson/Glenora Investors.

[9] The retainer of McInnes Cooper & Robertson lasted until either December 27 or December 28, forty-one or forty-two days. On December 27 Layes attended at the office of Macdonald to sign banking documentation and did not indicate in any way to Macdonald any dissatisfaction with the services of McInnes Cooper, however, before leaving the building in which McInnes Cooper was situate, Layes contacted Noseworthy to ask him to act for him and on December 28, 1995 Noseworthy wrote to Macdonald confirming his retainer and various corporate juggling took place with Noseworthy on instructions of Layes, first taking the position that the shareholders' agreement prepared by McInnes Cooper was not binding and then reversing his position advancing that it was binding.

[10] McInnes Cooper prepared draft pleadings in relation to two actions to be commenced against Layes and OldCo and on January 17 Boutilier instructs Bryson to commence these actions and they are commenced January 18th, 1996. The first is an action by NewCo against Layes for alleged breach of his duties to NewCo and, second, by InvestCo against Layes and OldCo for alleged misrepresentations

and breach of the NewCo shareholders' agreement. On January 18, 1996 Noseworthy alleges McInnes Cooper's in conflict with respect to these actions and requests that McInnes Cooper withdraw as counsel. January 23, 1996 Layes commences an application against NewCo and InvestCo pursuant to the Third Schedule of *The Company's Act* and *The Company's Winding-Up Act*. On January 24, 1996 Bryson advises Noseworthy that McInnes Cooper will withdraw as counsel for NewCo/InvestCo in the actions against Layes and OldCo.

[11] On January 26, 1996 Robert MacKeigan, Q.C., is retained to act for NewCo and InvestCo in the litigation with Layes and OldCo. February 8, 1996 Noseworthy advises that Layes has reversed his position and now considers himself bound by the NewCo shareholders' agreement and on May 17, 1996 NewCo/ InvestCo/ Layes and OldCo enter into a settlement agreement resolving all outstanding litigation issues of dispute amongst them. InvestCo pays OldCo seventy-five thousand ($75,000) for it's forty-five thousand (45,000) shares in NewCo and assumes the outstanding indebtedness of seventeen thousand ($17,000) pursuant to the indebtedness of Layes to George. This settlement resulted in a consent order dismissing the three actions June 5, 1996.

[12] Layes commences this action November 25th, 1996 alleging breach of fiduciary duty, negligence and conflict of interest.

[13] There is much in Layes' representations, for example, his original pre-trial brief filed August 25, 2006 that was not established in evidence, however, there does not appear to be any great disagreement with the background as I have recited it. The brief does contain untruthful statements that were subsequently incorporated in Layes' affidavits. For example, in his initial pre-trial brief he related that George accompanied by Noseworthy attended at his hospital bed for execution of a document relating to their arrangement. As I subsequently state, this is not truthful and did not happen.

[14] Additional background is spelled out in my findings of fact and credibility.

FINDINGS OF FACT - DETERMINATION OF CREDIBILITY (paras. 15 - 180 inclusive)

LAYES' ALLEGATION CARMEN DEGAN EMPLOYED BY MCINNES COOPER

[15] Layes swore under Oath Carmen Degan was employed by McInnes Cooper based on information he knew, or ought to have known, was inaccurate. I am satisfied he invented that conclusion with reckless disregard to its accuracy and truthfulness.

LAYES' ALLEGATION MACDONALD/BRENNAN AND BRYSON RECEIVED REWARD

[16] Before Justice Haliburton Layes advanced unjustifiable and untruthful allegations that Boutilier and Beno suggested some type of reward, probably shares/money from OldCo were given to Macdonald, Brennan and Bryson. This is but another example of his propensity to play loose with people's integrity and reputations by advancing allegations he knew, or ought to have known, had no foundation in fact. At trial Layes did backtrack somewhat by saying he didn't specifically say Peter or Marcia but that he simply put it in the broad scope of things and, to an extent, he backtracked with respect to Macdonald because he admitted, "I don't have anything hard." and then simply said it was people discussing how things worked and how things went on. There is no doubt he was

attacking, without foundation, the character, integrity and reputation of Bryson, Brennan and Macdonald.

LAYES ACTION AGAINST GEORGE

[17] Layes objected to any cross-examination relating to his action against George and the basis of his objection was: “This is a matter that has already been dealt with and it’s already been dismissed by consent with no costs.” I concluded and ruled that cross-examination was permitted. Amongst other things in that litigation Layes alleged that (in his words) the infamous Milton Clyman, also one of Canada’s most notorious white collar criminals, was a known associate of Macdonald. When pressed, he said the connection was that Clyman was a partner of Cassina. Later, while being cross-examined in this area, Layes did acknowledge: “I’m a little embarrassed by some of the things I said.” At the same time, trying to justify such egregious an allegation by saying that George was familiar with McInnes Cooper. Layes referred to George as a deceitful manipulator alleging that he was deceiving the public, the Toronto Stock Exchange etc. and at cross-examination he went on to suggest that they did not consider George to be evil now and that when he made that statement in 2005 he was a little

lost by way of information overload. At one point, Layes even suggested that George had something to do with his illness and that he stated he hadn't suffered any illness or systemic problems since being away from George since 1996. Having essentially made that allegation, he stated in cross-examination that he made that connection simply because what happened to him apparently after George's visits to him in the hospital.

LAYES' ACTION VERSUS SISTER AND BROTHER-IN-LAW FOR DEFAMATION

[18] When Mr. Outhouse commenced his cross-examination on this topic, Layes cried and became very emotional and distressed at it being taken outside the family to the public. My only comment is with respect to his reaction. The issue between he and members of his family is certainly not before the court in this action, nor would it be appropriate for me to make any comment on the action whatsoever, but what I do note is that Layes conveying his upset is in direct conflict with the fact that he placed the family dispute in the public arena himself. Part of the family dispute relates apparently to a Grand Torino motor vehicle and Layes' subsequent

"sale" to his friend, Carmen Blinn, was questioned in contempt proceedings that I will refer to later in this decision.

LAYES' ACTION AGAINST BAILIFFS

[19] Apparently this action was dismissed by summary judgment and one of the allegations advanced by Layes that a lawyer, William L. "Mick" Ryan, in consultation with Macdonald and others at McInnes Cooper, ensured that this ridiculous judgment was obtained. This, apparently, was advanced by Layes in an application to set aside the judgment. Actually, this was probably in relation to the Adventis Judgement which he has satisfied but at that time alleged was another fabrication. Somehow, Layes has himself convinced that McInnes Cooper is the foundation of all his problems, imaginary and otherwise, that somehow McInnes Cooper is the underlying factor in many of his other lawsuits, all of which is sheer fantasy and paranoia on the part of Layes.

CONTEMPT PROCEEDINGS - ADVENTIS JUDGMENT

[20] Under cross-examination Layes acknowledged an execution order was issued on behalf of Adventis against him. A contempt application was taken to set aside the transfer of the Grand Torino motor vehicle which had something to do with his lawsuit against his sister and her husband. Apparently when Layes was discovered in aid of execution, after the execution order was issued, the transfer of the Torino took place between Layes and Ms. Blinn. Layes explanation was that he had sold it to Ms. Blinn with an understanding that he could have it back in the future. There's no doubt from the cross-examination that Layes was misleading in the discovery in aid of execution. Layes said he was mixed up but acknowledged, with respect to the sale "to Ms. Blinn", he was "a couple of months off" and, further, that he acknowledged that he was wrong. His answer under oath on discovery in aid of execution was to blame it on memory and his confusion with respect to the time frame and that explanation doesn't wash.

GEORGE'S PROMISSORY NOTE $50,000

[21] Layes in his evidence says George, when he wanted to become a fifty-fifty (50/50) partner, agreed that Layes should receive fifty thousand dollars ($50,000) for the additional shares and that George was to pay the fifty thousand dollars

($50,000) into the company by way of cash and Layes was to be paid fifty thousand dollars ($50,000) out from the company. George was dealing with the Hong Kong Bank of Canada and, according to Layes, asked Layes if he would wait for the fifty thousand dollars ($50,000) until he moved accounts to the Royal Bank and Layes says he issued a promissory note for fifty thousand dollars ($50,000) drafted by Noseworthy. Layes refers to his recollection and makes reference to an accountant, Brian Read. Layes says the shareholders' loan is seventy-two thousand dollars ($72,000) and has nothing to do with the promissory note. There is no reference in the notes of Bryson or Brennan of this fifty thousand dollars ($50,000) in the nature of what Layes recollects. Similarly, I note that Layes, in negotiating the satisfactory settlement and dismissal of the three actions, did not specifically have listed in the debts of OldCo any reference to this promissory note.

[22] Noseworthy was asked to comment on Layes' affidavit, in particular paragraphs 65 through 67, where Layes advanced the position that George was acquiring the additional five percent (5 %) share by way of a promissory note of fifty thousand dollars ($50,000) payable to Kevin Layes due on, or about, May 1995. Layes goes on, in his affidavit, to say he never received a single penny of the fifty thousand dollars ($50,000) owed from George. Layes advanced the view

that Macdonald was negligent in not securing the payment by George under the promissory note to Layes at the December 8th, 1995 closing. Layes is adamant that the note was from George to himself. Noseworthy says that he doesn't know if the two things have anything to do with each other and that he thought the note was from the company to Layes. He was then shown Exhibit 138 and acknowledged that the note is from the company and not from George and further he does not recall any money going from George to Layes for the additional shares. Layes in his final submission alleges the failure of McInnes Cooper to recover the fifty thousand dollars ($50,000) from George rendered McInnes Cooper liable and I find there is absolutely no evidence to substantiate Layes' allegations in this regard. Indeed, I prefer and accept the evidence of Noseworthy. The promissory note is clear and unequivocal. It is executed by Sugarloaf Spring Rain Limited and not in any personal capacity by George (Exhibit 138) and, further, it was never brought to the attention of McInnes Cooper as such.

AFFIDAVIT - KEVIN J. LAYES, SWORN MARCH 12, 2003

[23] Mr. Layes was asked about his relationship with his assistant, Carmen Blinn. He was adamant that there was no personal/matrimonial relationship between the

two of them and when he was confronted with his sworn affidavit of the 12th of March, 2003, in the Aventis lawsuit against him, he dismissed his affidavit on this point as simply being an error. The 12th March 2003 affidavit has only ten paragraphs and the first one is the general statement that the deponent is speaking from personal knowledge except where stated to be by way of information and belief, in which case, the deponent believes the facts to be true. Paragraph five of the affidavit reads:

> That I was not served on the morning of August 14, 2002 before 7 a.m. I was home alone with my wife. She was up, I was in bed. I attach as exhibit "C" to my affidavit my wife's confirmation that no such service took place at that time.

Carmen Blinn's confirmation statement dated September 12, 2002 refers to her being with Kevin Layes in our residence and that Layes, when he was purported to have been served at 7:00 a.m. on August 14th, was in "our residence" and sleeping. Ms. Blinn refers to the process server having lied under oath and signs her confirmation "sincerely and very upset". Mr. Layes takes the position that paragraph five of his sworn statement is in error and, to some extent, he attempts to blame it on the solicitor who prepared it on his instructions. Mr. Layes was then shown in cross-examination a very brief affidavit by Carmen Blinn sworn 26

March 2003. This affidavit is only four pages including the introductory personal knowledge paragraph. Paragraph two of that affidavit states:

> That I am the common law wife of the Defendant in this matter.

The affidavit goes on to refer in paragraph three to Kevin Layes and that they were in our residence. Layes at trial again indicated that this was simply an error and post trial the Court received correspondence where initially Layes was going to try and move to strike the sworn statements by himself and Ms. Blinn, and then simply filed further affidavits by himself and Ms. Blinn indicating that they did not review their previous affidavits in any detail and relied on the explanation given by the solicitor who drafted the affidavits. In essence, Layes files his further sworn affidavit claiming his previous sworn affidavit is false.

[24] Layes' relationship with Ms. Blinn is of no relevance to the lawsuit now before the Court, however, the fact that he swore an apparent falsehood under oath, in a very brief affidavit during the course of litigation cannot be excused by simply saying that the brief affidavit was not reviewed in any detail, etc. Accepting Layes' evidence that the provision in his affidavit of the 12th of March 2003 is false weighs, either he committed perjury knowingly, or at the very least, this is yet

another example of his rationalizing and ability to advance whatever he perceives as beneficial to him as the truth, even where he knew such is false.

LAYES AS KEVIN BLINN

[25] During the course of cross-examination, it was suggested to Layes that he had represented himself as Kevin Blinn, in a lawsuit in which Carmen Blinn is a party. During the course of this trial, and probably in one of the case management/chambers conferences, I indicated that whenever particulars are stated in a question, such do not become evidence unless and until such is adopted, or there is evidence to reach such conclusion. This was cross-examination of Layes and there is absolutely no evidence to independently indicate in any way that Kevin J. Layes presented himself as Kevin Blinn. The determination of this matter is not relevant to this action before the Court and, clearly in the absence of any evidence establishing such representation by Layes, the Court pays absolutely no attention to the mere suggestion advanced in cross-examination.

LAYES ACTION AGAINST NOSEWORTHY

[26] Pleadings are simply allegations. The statement of claim represents allegations the party hopes to establish. The allegations are based on information that has been obtained from the client supplemented by evidence of witnesses and documentary material. A statement of claim sets out the facts relied upon to support the plaintiff's cause of action. While a plaintiff may, and often does, fall short of establishing the facts relied upon in the statement of claim, such does not render the pleadings inappropriate. What is totally inappropriate is for a party to an action to advance allegations known by that party to be false. The action, Kevin Layes and Oldco against Kent L Noseworthy and Thomson Noseworthy & Di Constanzo, SAT No. 245038 in the Supreme Court of Nova Scotia commenced the 20th of April 2005 by Layes went far beyond the latitude permitted in pleadings.

[27] In direct examination Layes had Noseworthy confirm that Layes' action against Noseworthy and his law firm was dismissed by consent shortly before this trial . Layes approached Noseworthy to schedule his attendance, on behalf of Layes, as a witness in this trial. Noseworthy's evidence is that out of the blue Layes wanted to apologize for commencing the lawsuit against him and his former firm and that the lawsuit had been a mistake. Layes indicated to Noseworthy that he had been acting on information from some other source that turned out not to be

correct. Noseworthy did not recall any particulars with the information Layes said came from a third party.

[28] The statement of claim contains a number of alleged factual allegations some of which suggest impropriety by Noseworthy and an example is that in paragraph 64 Layes contended that neither Noseworthy, or his firm, suggested independent legal advice should be obtained in relation to the alleged shareholders' agreement stated to have been created by Noseworthy. Noseworthy's evidence was that he would have talked to both gentlemen about getting independent legal advice after preparing their shareholders' agreement. I accept Noseworthy's evidence in this regard and this simply means that paragraph 64, in particular, is in error but one cannot help but conclude that Layes knew it was an error at the time he filed the action.

[29] Another example is contained in paragraphs 84-88 of Layes' claim against Noseworthy. Paragraph 84 reads:

> That upon learning of the Wal*Mart Partnership with Kevin Layes and Sugarloaf Spring Rain Ltd., KENT L NOSEWORTHY made plans to become an exclusive solicitor for Sugarloaf Spring Rain Ltd.

Noseworthy's evidence under oath was that this paragraph was simply not true and he went further to say it was not true at all and that he had no intention of leaving general practice.

[30] Paragraph 90 and 91 of the statement of claim reads:

> The in June, 1995; Doug Langille created a false Wal*Mart contract copied from an agreement Kevin Layes and Sunfresh, an operating Private Label Company of Loblaws
>
> That KENT L NOSEWORTHY assisted Doug Langille in the preparation of this document

This is an allegation of fraudulent misconduct by an officer of the Supreme Court of Nova Scotia. I accept Noseworthy's evidence in denying any such participation I further accept Noseworthy's evidence that paragraph 97 of the statement of claim alleging that Doug Langille was well-known by Noseworthy is untruthful and I accept Noseworthy's evidence when he stated:

> "I don't know Doug Langille"

This type of allegation by Layes goes beyond acceptable pleadings because I find as a fact that Layes knew such an allegation was false when he advanced it.

[31] Of particular significance is the allegation advanced in paragraphs 105 and 106 of Layes' statement of claim :

> "That Fred George also brought his solicitor, Kent Noseworthy to see Kevin Layes at the hospital in an effort to transfer Power of Attorney of the Plaintiff, Kevin Layes' shares to Fred George (of which Kevin Layes refused)
>
> That Kent L Noseworthy had all documents prepared and ready for signature without any discussion with Kevin Layes, the Plaintiff

Noseworthy was asked if there was any truth to the allegations in paragraphs 105 and 106 and he responded:

> A: No truth whatsoever. I never visited Mr. Layes in hospital. There's no truth to that at all. Mr. Layes shared with me when he made a call to schedule my coming here today and in the course of that initial conversation told me that he was going to be discontinuing or dismissing the...Having the lawsuit dismissed against me. Actually it wasn't that.... Sorry, it wasn't that phone call. When he dropped off the file material that you have in that yellow file folder at my office so I would have a chance to look at something before coming, he told me that he apologized that he had me confused with another lawyer. That he recognized now that it wasn't me that went to the hospital and that's what he told me. That was just in the last week.

Q: So, he wasn't relying on some 3rd party for that misinformation?

A: No

[32] It was already indicated that Layes advanced the excuse that he was on painkillers and had mistakenly identified somebody else as Noseworthy. Noseworthy found the suggestion that he visited Layes in the hospital as bizarre and Noseworthy's acceptance of Layes' explanation is far too generous. My finding is that this is yet another example of Layes' propensity to say what he chooses, in a manner he determines is beneficial to himself, irrespective of the truthfulness of such.

[33] Yet another example is paragraph 130 of the statement of claim where amongst others, Layes alleges Noseworthy was fully aware of the shareholders of 1157402 Ontario Ltd., the investing company which has been referred to as InvestCo, not only did Noseworthy deny this, but confirmed that he wasn't asked by Layes to investigate who the actual investors in InvestCo were.

[34] In paragraph 155 of the statement of claim Layes alleges that Noseworthy is part of a conspiracy. Paragraph 155 alleges the following factual situation:

> That Fred George, Kent L. Noseworthy, James F. Matheson and Joseph A. F. Macdonald artificially contrived this meeting where the Plaintiff was led to believe that the Plaintiff was buying out Fred George's shares in the water company (Sugarloaf Spring Rain) when in fact Fred George, Kent Noseworthy, Joseph A. F Macdonald and James F Matheson were all working together to oust the Plaintiff, Kevin Layes from the water company (Sugarloaf Spring Rain).

[35] Noseworthy's response under oath to this was:

> No, Sir there was no such conspiracy. I was representing Mr. George on a straight forward share transfer.

[36] Further:

> Q: You weren't a party to any such conspiracy?
>
> A: No, not at all.

[37] In paragraph 195 through to 200 in the statement of claim Layes alleges Noseworthy: 1) committed gross misrepresentation, 2) breached his fiduciary duty, 3) committed fraud, 4) committed conspiracy, 5) committed conspiracy to commit fraud, and 6) committed contractual interference. Noseworthy especially denied fraud, conspiracy etc..., and I have no reservations in accepting his evidence in this regard.

[38] These unfounded, known by Layes to be untruthful, allegations represent, once again, the propensity of Layes to attack the character and reputation of anyone in the mistaken belief that somehow this could be beneficial to him. Noseworthy's concern and acknowledgment that Layes' allegations were completely unfounded and amounted to nothing more than wild reckless allegations as shown in Noseworthy's response to the last questions posed to him in cross-examination:

> Q: But, nonetheless, he's accused you in this public document of fraud, sir.
>
> A: He has and when I read this document after I, you know, went through it and caught my breath, I was quite alarmed which is why I contacted a liability claims fund immediately and this caused me, I meant the allegations in here caused me some amount of distress as one can imagine. Not to mention the fact that I was serving as a director on a publicly traded company about this time and these allegations are of a nature that I had to discuss it with corporate counsel as to what type of disclosure. This caused me a great deal of.. You know, difficulty.
>
> Q: Would you agree with me and I recognize that maybe it's a self serving answer but would you agree with me that the allegations contained in this statement of claim against you are completely unfounded and amount to what are nothing more than wild, reckless allegations?
>
> A: I would agree with that characterization because when Mr. Layes & I worked together on the settlement and the matter was settled back in the spring of '96, I ... He, to me he was happy with the settlement. And I found.. Felt it was a reasonable settlement. Let him get on with his life. I thought the dollar amount and the obligations that were being assumed were reasonable. Sometime after that, he wanted to pursue the present action against McInnes Cooper and came to me and I said that I would draft the pleadings but I would not handle the litigation. I felt that that was going to be extremely time consuming and my practice wouldn't allow me to, in my opinion concentrate that much on that file and I made a

> recommendation that he go to Boyne Clarke. But he never, until he dropped the bomb, if you will, until he launched this lawsuit I did not know that Kevin Layes thought I was involved in any kind of conspiracy or that I had ever acted except in his best interests. This was a complete surprise.

FROM WHOM DID BRYSON TAKE INSTRUCTIONS RELATING TO NEWCO?

[39] I will address specifically the credibility of Donna Boutilier, however, with respect to the matter of instructions, there is a wealth of evidence confirming that Donna M. Boutilier, in her employment capacity, was the contact person for Bryson. Bryson's letter of January 8th to the Hardman group specifically commences:

> "At the request of the company's secretary, Donna Boutilier,....."

[40] Bryson's further letter to the Hardman group dated January 8th, is copied to Boutilier and Bryson, sent by courier, a detailed reporting letter covering a number of areas of concerns with Layes' commences:

> "Dear Donna.."

> " As requested by you today..."

[41] There are also fax sheets in her own handwriting and records of telephone conferences of Bryson with Boutilier. As a matter of fact, Bryson was taking his instructions from Boutilier. Boutilier probably acted mostly on instructions from Matheson, however, Boutilier was the contact person for Bryson and I accept Bryson's evidence in this regard.

DID MCINNES COOPER RECEIVE CONFIDENTIAL INFORMATION?

[42] Bryson, in his evidence, referred to the meeting at the warehouse outlet in Dartmouth when Layes' solicitor Noseworthy said something to the effect that you have confidential information with respect to Layes and Bryson's response was to ask, what confidential information and he received no specific response from Noseworthy.

[43] Layes called Noseworthy as one of his witnesses and at the outset Noseworthy raised the issue of solicitor and client privilege between himself and Layes. Layes waived the solicitor and client privilege between himself and Noseworthy.

[44] Noseworthy indicated his first relationship with Layes occurred in the late summer or fall of 1994 when George, an existing client of his, introduced Layes to him because George was interested in making an investment in the water business. Layes had already incorporated Sugarloaf Spring Rain Ltd. ("OldCo.") which company's share registry indicates an issue of 82 shares to George, October 24th, 1994. Layes asked Noseworthy about George's business situation and experience in 1994 and earlier and Noseworthy noted that George had not waived solicitor and client privilege so that he had to talk in general terms and Layes elicited a response from Noseworthy:

> Q. Now, Mr. George, what can you tell me about his business prior, at this time, not today but back in 1994, just in general terms with your relationship with him?
>
> A. Yeah, I can only talk in general Terms because Mr. George has not waived solicitor/client privilege so I would have to be careful of that.
>
> Q. I understand that.
>
> A. But in general terms he was a business man.
>
> Q. Uh, hum.
>
> A. That had some other businesses in town.
>
> Q. Ok. And suffice to say that he had knowledge in the business areas, various business areas?

A. I think he was a knowledgeable business man, yeah.

[45] The second share certificate in George's name for 18 shares is dated January 16th, 1995. Noseworthy's recollection was that in the fall of 1994 George acquired a forty-five percent (45%) interest in OldCo for an investment which might have been fifty-thousand dollars ($50,000.00) which was used to pay off trade debts of OldCo. The shares were issued from Treasury and not a transfer from Layes. George made his final investment in OldCo in January 1995 when he acquired additional shares making him an equal shareholder in OldCo with Layes. Noseworthy recommended to George that there be a shareholders' agreement and his evidence is that he took instructions from both George and Layes dealing with the four main areas:

(1) Management;

(2) How an offer from a third party would be dealt with;

(3) Death of either Layes or George; and

(4) A Mexican standoff.

[46] The shareholders' agreement was basically standard and Noseworthy stated specifically that he didn't recreate the wheel each and every time, but the first page in particular referring to share structure etc., would have been customized for the

particular business at hand. The shareholders' agreement provided that in the event either wished to sell, the company is given the first option to buy and then the other shareholder, if the company declines. Noseworthy's recollection is that subsequently a letter was generated by George indicating that he wanted to be bought out and subsequently this transaction closed December 8th, 1995. When the exercise of the shotgun clause arose, Noseworthy advised George and Layes that he couldn't represent both of them on the transaction. Layes consented to Noseworthy acting for George and Layes engaged McInnes Cooper.

[47] Noseworthy gave evidence of the November 3rd,1995 letter by George to OldCo. This is the offer by George to sell his shares to the company for sixty-nine thousand dollars ($69,000.00). This offer was not accepted by the company. George then made an offer pursuant to the shotgun clause of their shareholders' agreement and his offer was to sell all his shares in OldCo for twenty-thousand dollars ($20, 000) with a number of terms and conditions which are relatively standard. George waived re-payment of a shareholders' loan in the amount of forty-thousand dollars ($40,000) and offered terms for the payment of the twenty-thousand dollars ($20,000), namely, three thousand dollars ($3,000) upon closing and a promissory note for payments of the balance ($17,000) at $3,000.00 per

month with the last cheque being for the differential. The notes were without interest. Layes, at one point, stated that he was advised by Coven at the Royal Bank that when George withdrew his forty thousand dollar ($40,000) shareholders' loan, it put the business into an overdraft. One of the few occasions where I am included to accept Layes' evidence is his explanation, for the purpose of this action, only that the reason George waived his forty thousand dollar ($40,000) shareholders' loan was that George obtained his forty thousand dollars ($40,000) from the credit line at the Royal Bank. Noseworthy confirms he took instructions from George. Noseworthy indicated from his recollection that OldCo had trade debts which were mounting. Noseworthy has a recollection of the limited personal guarantees and the small business loans, which it was his understanding, the guarantee was limited to twenty-five percent (25%) if the borrowers had incorporated. Layes and George clearly were making a clean break and when Noseworthy met Macdonald each prepared documents and Noseworthy indicated it was quite standard, but as Layes and George were parting company with Layes acquiring George's interest, releases should come from Layes personally. Noseworthy's recollection is that the closing between George and Layes was a mostly friendly parting of the ways.

[48] Layes, despite the clear wording of George's offer to sell his shares and mounting debts of OldCo, disagreements between himself and George, maintained that George's exercise of the shotgun was really an intention by George to buy out Layes' shares. Layes' conclusion in this regard is totally without foundation. George's offer and position represented a salvage operation on his part related to George's view of the value of his fifty percent (50 %) interest in OldCo.

[49] The timing of George's presentation of the shotgun is of interest. Layes and George attended the offices of Walmart in Bentonville, Arkansas around the 22nd of October. Layes also gave extensive evidence of how active George was in their water business and it is not without significance that within days of visiting Walmart George decided to get out of the water business by utilizing the shotgun. Layes extolled at length George's business connections. They would provide a great number of opportunities for sales etc. and yet this astute businessman's valuation of his interest in the business was available to Layes for twenty thousand dollars ($20,000) payable by installments carrying no interest and relief from any obligation towards indebtedness.

CONFLICT OF INTEREST WHEN ADVANCED?

[50] My review of Noseworthy's evidence indicates that at no time between December 27th and January the 5th does he make any reference to Layes alleging a conflict of interest. Bryson does give evidence that Noseworthy mentioned it in a general sense on January 5th, 1996 for the first time.

[51] Noseworthy commenting on the settlement eventually entered into stated:

> Q: Uh, hum, but ultimately those all ended with a consent order of dismissal sometime in
>
> A: Well, after the lawsuits my recollection is we took the position that McInnes Cooper was in the conflict of interest and they eventually accepted, well, I don't think it took all that long and they accepted that there was an argument to be made there and Peter MacKeigan took over the file on behalf of Newco & Invesco.

(Noseworthy acknowledged that the reference should be to Robbie MacKeigan) The first serious advancement by Noseworthy that McInnes Cooper could be in a conflict of interest position was advanced by Noseworthy January 18, 1996 when he called upon McInnes Cooper to withdraw and on January 24th, 1996 Bryson advised Noseworthy that they were withdrawing and on January 26th, 1996 Robert MacKeigan, Q.C. took over the conduct of the litigation and files resulting in the May of 1996 in a settlement that Noseworthy indicates was satisfactory and in

Layes best interests. I want to make it clear that the law does not require a complaint that a solicitor is in a conflict of interest position for such to arise.

[52] I find as a fact that Layes introduced the investors Matheson/Glenora to McInnes Cooper and provided direct to Matheson/Glenora investors financial and management disclosure and did not at any time provide McInnes Cooper with any confidential information.

ALLEGATION NOSEWORTHY VISITED LAYES IN HOSPITAL

[53] Layes did ask Noseworthy in direct examination if he knew Layes has been hospitalised and while he recalled that he was at some point he stated clearly

> A: I never visited Mr. Layes in the hospital ever

EVIDENCE OF STEPHEN LOCKYER

[54] Lockyer was called by Layes and nowhere in the direct evidence was it disclosed that the initial contact to have Lockyer consider the purchase of the water company at Antigonish was by Layes. Lockyer, a chartered accountant, describes himself appropriately as an entrepreneur. Lockyer met Boutilier in, or about, August, 1996 long after Ms. Boutilier's relationship with Matheson, Glenora Distillers and others had concluded. Boutilier is the wife of Lockyer and through her he met Layes. Layes suggested to Lockyear that he was interested in purchasing, possibly with Lockyer, the water company then operating at Cloverville Antigonish County. When asked if Layes wanted the financial information on the water company, he indicated that he would leave his response at being advised that the water company was available and he can't specifically remember if Layes wanted financial information on the water company.

[55] Lockyer made inquiries through his company, Cornwallis Financial, of a Jim Enman who operated under Enterprise Brokerage Inc. essentially marketing businesses etc. The only person that contacted Lockyer in relation to the possible acquisition of the Water Company was Layes and Lockyer asked Enman for the financial statements of the water company. He did not mention Mr. Layes and his evidence was to the effect that Enman never asked and he never told that Layes

would get the financial information. Before receiving the financial information, Lockyer was required to execute a Confidentiality Agreement and the fax he sent after executing such contains the following in his handwriting:

> Jim. My wife has had a previous (long time ago) relationship with Jim Matheson. I would like to keep my involvement confidential from them for the time being. Thank you.

[56] Enman provided the financial information after receiving the Confidentiality Agreement and, at some point, Lockyer provided it to Layes. Lockyer admitted that if Matheson knew it was Lockyer seeking the financial information, he may not have provided it because of the prior relationship between his now wife and Matheson. He acknowledged that there were disagreements between his wife and Matheson and that his wife was accusing Matheson of stealing $100,000 from her. Lockyer confirmed that at no time did he disclose to Enman or Matheson that Layes was involved and when asked if it was reasonable to conclude that Matheson didn't want Layes to have the financial information, he responded possibly, yes, and then agreed that it probably did cross his mind, that is that Matheson didn't want Layes to have such confidential, financial information.

[57] It was suggested in cross-examination that Lockyer advised Enman that the investors were Asian investors and having observed Lockyer on the stand, I accept his evidence on this point. I conclude that Lockyer never used the terminology Asian investors and that such was not in his vocabulary and that he does not tell at stage one of possible acquisition of a business, where his investors come from. Lockyer did a measure of due diligence including visiting a water plant in Ontario etc. and also it appears he visited the water company's plant in Antigonish. Lockyer concluded that it was not an investment for him and acknowledged that he described the water company location in Antigonish as a well with a shed over it and that the receiving and shipping was not coordinated and there was no bottling facility as he had observed in a modern plant.

[58] Lockyer was reminded of his discovery evidence given June 27th, 2007 under oath where essentially he referred to the water company as a mom and pop set up and that it couldn't compete because it had a little shed with a well. Additionally, he made the observation on the water company's financials as being below industry standards. Lockyer's evidence is of some assistance dealing with the viability of the water company, particularly where Layes contests vigorously that it effectively went out of business.

[59] Another feature of his evidence is that at no time in the direct examination did Layes inquire as to the possible responsibility of Lockyer's company for an account for which Layes and his parents have been sued relating to drill testing.

[60] In cross-examination Lockyear acknowledged, "we did drill testing". He was not sure if it was Phil Graham but that Kevin organized it and Kevin would have made arrangements for paying. It was put to Lockyer that if Layes says it is not paid because he was working for Lockyer's company, Lockyer denied that and said, no, we didn't retain anybody. It is doubtful to me that Layes has ever disclosed his attempt in the Graham lawsuit to shift whatever responsibility may exist for payment to Lockyer's company. The responsibilities for the Graham well drilling account if any is not an issue before me.

LAYES AFFIDAVIT SWORN BEFORE NOSEWORTHY JANUARY 19, 1996 AND FILED IN LAYES' APPLICATION SH-124244 PURSUANT TO THE COMPANIES ACT AND SEEKING THE WINDING UP OF NEWCO

[61] This affidavit was identified by Noseworthy and acknowledged by Layes. Noseworthy's evidence as to it's execution and contents is as follows:

Q: And you swore, you took Mr. Layes' affidavit on the 19th of Jan 1996?

A: Yes

Q: And I presume that the information, the factual information that's contained in this affidavit was provided to you by Mr. Layes?

A: Absolutely

Q: And I take it that you reviewed this affidavit with him before he signed it?

A: Of course

Q: And I take it that he swore to the truth of everything in that affidavit?

A: I.. I.. Yes, otherwise we would have changed it.

Q: So, as far as you were concerned this was a...He understood this was a factual document and he was under an obligation to tell the truth?

A: Yeah

EVIDENCE OF DONNA BOUTILIER

[62] Ms. Boutilier is a highly educated, intelligent individual. She has a Masters Degree in business administration (M.B.A.)and met Layes at Cloverville, Antigonish in 1995 and then speaks of meeting him again in late October 2003. The latter meeting came about by Layes contacting her with respect to lawsuits and this one in particular. I want to state at the outset that Ms. Boutilier was not an independent witness at any time. Her total lack of objectivity and crusade to

malign Matheson and others including the defendants was at times vehement and irrational.

[63] She started out her direct evidence relating her first association with Matheson when she took employment with one of his companies called Castle Capital. She indicated that she only stayed with that company for approximately two months and left because she felt uncomfortable. She described it as a boiler room operation a stock market scam and that the people were a bad crowd. When she left that company she went to the Workers Compensation Board for a year then she had her own company. It is interesting how she encouraged Layes to go after Matheson. She gave evidence that in their meeting in 2003 Layes was shocked to learn what Boutilier knew or purported to know about Matheson. Boutilier's first knowledge of Matheson was when she prepared her paper for acquiring her MBA. The second time she did some research which came across Matheson relates to an article apparently by Dianne Francis about "The Boy from Cape Breton". Boutilier conveyed to Layes a picture of Matheson that she had gained at that stage, 2003, from her research and employment for the two month period at Castle Capital. She outlined her understanding of Matheson's background and stated that Matheson had a criminal record. The character of Matheson is not an issue before

me in this lawsuit. It is noted that although Layes listed Matheson as one of his witnesses, Matheson was not called, nor was he present to address the allegations advanced against him. Layes advanced his belief “to Matheson’s alleged character”. There was a total lack of evidence to substantiate his “beliefs” and in particular, total lack of evidence that establishes in any way knowledge by Macdonald of Layes’ allegations to support his unfounded claim Macdonald knew of the alleged criminal character etc. of Matheson and failed to advise Layes of such. Boutilier readily describes Matheson as a person with a criminal record when in fact the only person it has been established in this lawsuit who has a criminal record is Layes. Ms. Boutilier was speaking of and labelled as a criminal record an apparent stock trading ban by the Alberta Securities commission and as Matheson was not before me in this lawsuit I cannot conclude Matheson has a criminal record. I will not place on record what Ms. Boutilier relayed through her research. In addition, Ms. Boutilier was prepared and did name a former RCMP officer as this reputable person by using phrases in her evidence such as: “word had it”, “ under a cloud”.

[64] With all this background information that Ms. Boutilier had about Matheson starting with the article she read in her preparation for her MBA paper and her

description of why she left the employment in Matheson's company Castle Capital after only two months what she does is interesting in that she receives telephone calls from Matheson and **self interest** prevails in that she takes employment with Matheson/ Glenora. When asked why she went back to work with Matheson her only answer was that it was a "good question" and when Matheson called her he was always friendly. She claims that she would not have anything to do with the company going public and she did want to be involved in the selling of shares. At the same time, early on, it was indicated to her that quite possibly Glenora would go public. Self interest indeed prevailed. ($)

[65] I need not recite all of her evidence surrounding her initial re-engagement with Matheson except to say that at the end of the day she apparently takes a position that Matheson has defrauded her out of $100 000. I repeat that Matheson is not a party to this action and her evidence as relating to the defendants in this action on a credibility scale of 1 to 10 would be a minus. Totally unreliable.

INITIAL CONTACT LAYES WITH MATHESON/GLENORA INVESTORS

[66] The evidence of Boutilier is that in early November 1995 she received a call from Beno indicating that there was a water company in Antigonish and this guy was looking for a new partner. Beno had a relationship with Matheson/Glenora as a book keeper and in fact at one point Ms. Boutilier said, at the suggestion of Matheson, Beno became her book keeper. Boutilier operated her own company called Deltmark limited, Beno called Boutilier at Glenora because he knew of her involvement. Beno conveyed to her that it was a situation of one owner buying out the other partner. Boutilier reported this telephone conference with Beno to Matheson and his instructions to Boutilier were clear that he "can't do anything unless I get 51%" Boutilier was to get directions and arrange a meeting and in fact the next night Boutilier, Matheson, and Murdock met Layes for the first time in his parent's gravel pit adjacent to the water facility. Layes made much of the point that the meeting did not take place in the gravel pit but on the road beside the gravel pit.

[67] The first conversation included talking about the water, the quality and volume and the shareholders' agreement Layes had with George. Layes says Matheson indicated to the effect that he would take care of the George buy out and expressed the view that Layes had more time then Layes understood to address the acquisition of George's shares. The issue of the small business loans came up in

their first discussions in a sense that it was recognized George had to be released from the small business loans. Boutilier says that in the initial discussion the land was not going to be part of the deal and the investors were just described as investors. Boutilier is simply wrong in suggesting that the land, at any point, was not going to be part of the deal and Layes' evidence in that regard is clear.

Question:	No, I was just talking the land that was in Sugarloaf.
Answer:	(Layes) Yeah, twenty-nine (29) acres.
Question:	Yeah, you've never complained about that?
Answer:	(Layes) It was my understanding from the moment I incorporated the company in '94 that it was considered part of the company.

[68] Boutilier acknowledges that the initial agreement was that if Matheson/Glenora became part of it they would receive fifty-one percent (51 %) **control**. There is a fax November 16th where Ms. Boutilier acknowledges it was her writing but doesn't recall it.

[69] At the time of the gravel pit meeting Boutilier did not know any of the defendants, Macdonald, Bryson or Brennan. They were introduced by Layes or more correctly at the first meeting the introductions were handled by Murdock.

Ms. Boutilier's evidence is that prior to the relationship with Layes it was fun working for the Glenora group but from that moment on there was hostility. She mentions on one occasion Layes coming into their office and a confrontation between Matheson and Layes where by Matheson wanted Layes to sign two promissary notes totalling $40, 000. These notes may have been related to the position Matheson was apparently taking as being investments already made into the water business but on the other hand Boutilier recalls Layes indicating that he didn't know anything about the $40, 000 and Boutilier goes on to declare she believed Layes' "innocence". Subsequently, at one point Boutilier says she advised Matheson to forget the $40, 000 and walk away.

[70] Boutilier's evidence is significant in that she describes the first meeting with McInnes Cooper as dealing with the taking out of George. At that meeting was Ms. Boutilier, Marsha Brennan, Wayne Beno, Tom Murdock, Kevin Layes for at least part of the meeting and Jim Matheson at some point. They then were taken by Murdock to meet Macdonald, Boutilier didn't understand Macdonald's role at the time and confirmed that the meeting with Marsha Brennan had the purpose of addressing the small business loans and how George was to be released. Beno's

role was he was an active participant to look after the small business loan situation and when the meeting ended they went back to Burnside and Boutilier said :

> "we were going to Royal Bank to get Fred off the loans"

She wasn't really knowledgeable of the actual relationship between Layes and George but believed they were 50/50 partners.

BOUTILIER'S FURTHER EVIDENCE AS TO WHAT TRANSPIRED AT GRAVEL PIT MEETING.

[71] It is interesting that in her evidence Boutilier talked of the hostility between Matheson et al and Layes following the gravel pit meeting. She described it as very hostile and it got from bad to worse. Layes' asked her why? Her response was:

> " that's a good question, I couldn't figure it out at first."

She then indicated that she did figure it out by hindsight. This hindsight coloured dramatically by her hatred of Matheson clearly impacted on her credibility or more

appropriately, lack of credibility. In her evidence after dealing extensively with the presentation to the Royal Bank and the level of her involvement with Beno she was asked by Layes to return to the gravel pit meeting and her evidence at this point brought a notation from me in my notes " far reaching unreliable". Her evidence was that Layes was proposing Matheson take George's place bearing in mind that George and Layes were equal partners. She said that Matheson's group would take 51% that is but reached out and said that Layes' position at the time was not to lose control. She was pressed by Layes as to what he was to receive for the 1% and had no recollection except to go on and say that although Matheson/Glenora Investors were to receive 51% Layes didn't want to give up control and further that Layes didn't want to be bought out again. She says that Layes didn't want a shotgun clause and that Layes wanted to maintain control through a shareholders agreement she has no recollection of the discussion of money and can't recollect the discussion of what was required by George and she says that Matheson agreed to all these control advances made by Layes. It is obvious in my observation of her during her evidence in this regard that she was utilizing her hindsight and what she believes took place and is not at all capable of any direct recollection in this area. Indeed when you go back to the initial telephone call made by Boutilier she made it clear following Matheson's instructions that the new group <u>were not interested</u>

unless they had control. I am not at all satisfied that any of the comments relayed by Boutilier attributed by her to Layes were actually made and certainly such has not been established as a fact.

[72] She proceeded to be asked about the restructing and the development of a new company and was quick to side with what she perceived to be Layes' position but in fairness she did indicate that any restructuring etc... was out of her scope.

EXECUTION OF ASSET/SALE AGREEMENT - EXECUTION OF SHAREHOLDERS' AGREEMENT

[73] On December 11, 1995 Layes attended at Macdonald's office where he signed the asset/sale agreement conveying the assets and liabilities of OldCo to NewCo. Macdonald then faxes the agreement to Matheson. Layes is also presented, at that time, with the final version of the shareholders' agreement and Macdonald reviews it with him. Layes indicates he wants more time to study it as well as to discuss a couple of points with Matheson.

[74] Layes does, however, sign the necessary share certificates so the shares in NewCo could be issued to both OldCo and InvestCo. There is a conflict as to how long Layes had the shareholders' agreement before he contacts Brennan on December 18 indicating an urgency to meet with her. In any event, I am satisfied that he had the shareholders' agreement for several days, if not a full week, and when he met Brennan he made an inquiry about the dilution, shotgun, and death provisions in the shareholders' agreement and they were explained to him by Brennan which he accepted. It is also noted that Layes was familiar with such terms in that they were in the shareholders' agreement between Layes and George. Layes asked Brennan to print out clean copies of the shareholders' agreement so that he could sign it and he then proceeds to sign. Layes then mentions to Brennan that he was thinking of exercising the shotgun clause after Christmas and Brennan advised Layes that since McInnes Cooper is representing both him and InvestCo the firm could not give advise on this matter and that if he was going to exercise the shotgun clause, he should consult independent counsel. I completely accept and prefer the evidence of Brennan wherever it is in the slightest conflict with the evidence of Layes.

DID LAYES ENGAGE MCINNES COPPER TO INVESTIGATE AND DETERMINE PRECISELY WHO THE INVESTORS WERE?

[75] One interesting part of Boutilier's evidence is that she relayed that Layes insisted as to who where the shareholders and who were the investors and again with all due respect this is pure hindsight and not an accurate recollection. It is interesting that she did say:

> "I knew all along who the shareholders and investors were Matheson and Cassina"

[76] The question I ask is if in fact Layes did insist in this regard then why wouldn't she have told him? There is nothing on record to indicate any explanation in that regard and I find her evidence on hindsight to be totally unreliable.

[77] My recollection is that Layes did, in conversation with Ms. Brennan, inquire along the lines of who were the investors but I find as a fact that the determination of who the investors specifically were was not as alleged by Layes part of the retainer of McInnes Cooper.

[78] Noseworthy's evidence that such an investigation and determination was not part of his retainer is consistent with my conclusion that such was not a part of Layes' retainer with McInnes Cooper. Layes and OldCo were in a desperate situation financially. Layes' engagement of McInnes Cooper was to take advantage of George's salvage position and through Layes introduction of the investors as an attempt to make the water business viable. McInnes Cooper had acted for Matheson/Glenora on other matters in the past but with regard to this matter it was Layes who involved them and accepted McInnes Cooper was to act for both parties in relation to the second stage.

FURTHER EVIDENCE OF DONNA BOUTILIER

[79] I have already commented on Boutilier's use of hindsight and during the course of her evidence she made she statements such as:

> "Didn't realize at the time"
>
> "Didn't clue in until after"

" I didn't know what was happening at the time"

[80] She went on to say that it was later when she clearly saw what was going on or what was happening. There's a letter written by Macdonald to Noseworthy dated the 30th of December, 1995 which refers to Ms. Boutilier advising him:

"She told me that on Friday"

[81] Initially, Ms Boutilier took the position that she wasn't in the country on that Friday and then she had returned from her holiday which she went on with her mother December 19th and came back on the 30th or the 31st of December. She did at one point admit that it could have been the 28th, 29th and 30th and agreed:

" I could have been back on the 29th, sorry about that"

[82] She does proceed to say that she never saw that letter until her discovery and yet the letter is clearly marked as a copy to her. She became extremely emotional and indicated that it was very infuriating and blurted out :

"Why harbour this criminal?"

[83] When asked who she referred to, she initially said Macdonald then Macdonald and Bryson and then Jim Matheson. She went on to acknowledge that she signed the notices, exhibit 110 containing her signature but she explains that this was probably a cut and paste job which was part of the continuing deception in her office when she was working for Matheson/Glenora after the share acquisition. Harold Blakley (Blakley) was a consultant from time to time engaged by Matheson/Glenora Investors and when he became chairman indicated that there were occasions when his signature would be applied by the practice of cutting and pasting and, in this regard, I note that Blakley was not in Halifax very often and was either out of the country or in Ontario for most of his time whereas Boutilier was on the job throughout in Nova Scotia, and, particularly, Dartmouth. I conclude that her conclusion is a product of her hindsight which is overwhelmed by her hatred of Matheson.

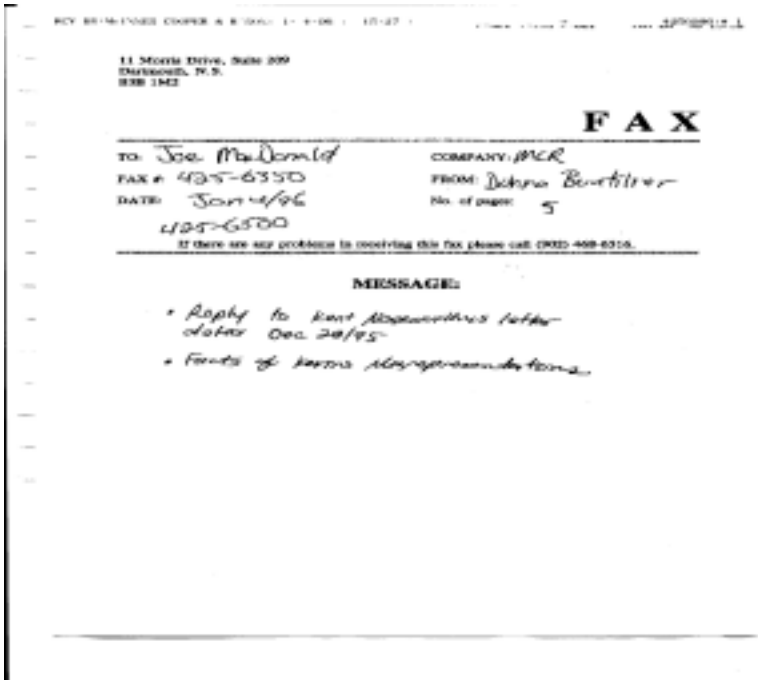
BOUTILIER'S SIGNATURE?

[84] Repeatedly Boutilier denied her signature on exhibit 109 and others. Ms. Boutilier was adamant that she did not receive a copy of Macdonald's letter to

Noseworthy of the 30th of December, 1995 and then after adamantly swearing twice that she did not receive such stated:

" I don't recall receiving it"

[85] Exhibit 110 the agenda for the January 4th director's meeting contains her signature on the draft notice and on the letter to Noseworthy. Ms Boutilier says that it's my signature on the letter but I didn't put my signature there. My note taken at the time she gave this evidence simply says, " I do not believe her". Ms. Boutilier went on to say that she would sign anything without reading it and that Matheson and the others would do many manoeuvres to get her signature. Ms. Boutilier does acknowledge delivering a copy of the notice of the director's meeting. Her denials are in the face of a number of documents which she admits are in her own handwriting three examples are as follows:



FAX

TO: Joe MacDonald
COMPANY: MCR
FAX #: 425-6350
FROM: Debra Boutilier
DATE: Jan 4/96
No. of pages: 5
425-6500

MESSAGE:

- Reply to Kent Noseworthy's letter dated Dec. 28/95
- Points of various discussions

1 Morris Drive, Suite 209
Dartmouth, N.S.
B3B 1M2

FAX

TO: Kent Underhay — COMPANY:
FAX #: 420-2098 — FROM: Donna Boutilier
DATE: Jan 8/95 — No. of pages: 2

If there are any problems in receiving this fax please call (902) 468-6516.

MESSAGE:

As per your request:

Sugarloaf Spring Rain International Ltd
Agenda for directors meeting

1 Morris Drive, Suite 209
Dartmouth, N.S.
B3B 1M2

Sugarloaf Spring Rain International Ltd **FAX**

TO: Peter Bryson — COMPANY:
FAX #: 425-6350 — FROM: Donna Boutilier
DATE: Jan 9/96 — No. of pages: 3

If there are any problems in receiving this fax please call (902) 468-6516.

MESSAGE:

I sent this letter to Wilson Fitt of the Hardman Group as per Jim Matthesons instructions.

Please phone me.

Thank you
Donna

[86] I'm conscious of the seriousness of concluding a witness lacks credibility, however that is the only conclusion one can come to from observing Ms. Boutilier and reviewing the evidence. She went so far in her hatred of Matheson to reach back and make conclusions on hindsight over events she now wrongly categorizes. A good example of this is when she said:

> "Joe Macdonald, he manipulated me big time and that I didn't know at the time but afterwards, looking back at this.."

[87] I do not intend to review further aspects of Ms. Boutilier's evidence. She is an intelligent, strong willed person and has such hatred for Matheson that it has destroyed any credibility she might have otherwise presented. I prefer and accept the evidence of Macdonald, Bryson and Brennan at all times when it conflicts with the evidence of Boutilier.

CROSS-EXAMINATION OF BOUTILIER CONFLICTS BETWEEN BOUTILIER AND LAYES' EVIDENCE.

[88] A number of portions of Layes' discovery evidence were put to Ms. Boutilier during cross examination and when she didn't quite agree with Layes' discovery evidence she tried to rationalize but on other occasions she was forced to deny the evidence of Layes.

[89] One example is Layes' discovery where he states Boutilier attended meetings involving the defendants and asked for protection against litigation for disclosure information, Boutilier denied that such ever took place.

[90] It's clear also that Boutilier was much more expressive and expansive at trial then at her discovery even though she was asked to recall for example if there was anything further with respect to the initial gravel pit meeting. At trial she certainly added a great number of specifics that she did not relate on discovery. She was specifically asked at trial:

> "Q: Why was your memory or your recollection of that meeting so much better today?
>
> A: Probably because I've just had more time to think about it"

[91] Once again this is a product of her hindsight coloured by her attitude and desire to help Layes at every turn to get at Matheson in any way possible. Boutilier's attempts to be very supportive of Layes at all times and with respect to the so called WalMart contract she suggests that it was understood at the time it was likely exclusive and for a specific term etc....etc.... Boutilier acknowledged that Layes represented to her the company had a contract with Walmart and the following is taken from her cross examination:

> Q: I said if Ms. Duncan testified that the so called contract was a vendor agreement with no provisions for quantity, no provisions for volumes, no provisions for price and could be cancelled at any times is that at all consistent with what Mr. Layes represented to you?
>
> A: I would say no, that's not consistent with my understanding of it.

[92] It was put to Boutilier in cross examination that she was the third party who provided information for Layes, the false allegations in Layes' law suit against Noseworthy and she denied being such. I prefer and accept her evidence over that of Layes and conclude that Layes was in fact the author of the falsehoods in his lawsuit against Noseworthy.

[93] Layes in his allegation as to what transpired on January 5th, 1996 set out in his amended statement of claim that he was physically assaulted by being thrown against a wall and head butted into unconsciousness and received a concussion. This description was put to Boutilier who was there during this event, she stated:

> " is not what I witnessed
>
> Q: it's a gross mis-characterization of what you witnessed is it not?
>
> A: err..yes."

Again, I accept her evidence in preference to the allegation advanced by Layes.

[94] Ms. Boutilier acknowledged that she never heard Bryson tell her or any of the other group members to misinform or lie to the police as to whether an assault occurred. Ms. Boutilier's response was:

> " I would agree with that"

Layes advances a contrary view (a falsehood) in his pleadings that Bryson had an extra duty to correct the untruth he told the police officers on January the 5th, 1996 namely that Bryson told the investor group to tell the police it never happened.

[95] What did happen is that Boutilier made her own decision to lie to the police. Her falsehood that occurred had nothing to do with Bryson and Boutilier finally acknowledged that to be the case. Boutilier confessed to the police a couple of weeks after the event that she had lied as to what she observed.

[96] It is significant also that Boutilier acknowledges that there isn't a single piece of correspondence where she advances or expresses a view that Layes is being unfairly treated. Boutilier acknowledges that there's not a single piece of correspondence making accusations against Macdonald, Bryson or Brennan.

[97] In cross-examination, it was put to Boutilier that Layes had a criminal record for fraud and her response was to the effect "wow", and that "she would have to think about that". She certainly didn't think about it and continued to consider and advance her view that Layes was a honest, straight forward victim, which couldn't be further from the truth.

[98] Boutilier was consistent in her vendetta against Matheson whenever something was presented to her from Darrin Campbell who was apparently

Matheson's son she immediately went on the offensive and labelled everything so advanced as unworthy.

EVIDENCE OF JEANNIE DUNCAN - WALMART

Layes called Duncan as a witness and unfortunately he did not get her to outline her job description areas of responsibility etc... while she was in the employ of Walmart. She was however, with Walmart from the time frame of 1995 to 2001 and had responsibility for their water category. It's her evidence that in 1995 this was a new area and in fact Walmart relied on Loblaws as a middle man to help with the Walmart supercenters. In fact Walmart had Loblaws employees in their office.

[99] Duncan was able to identify what appears to have been the first Walmart purchase from OldCo an order, 16th November 1995 for delivery the 24th of November 1995. It is to be remembered that this is the same time frame where George was willing to sell 50% of OldCo for very little and the reason in substantial part was his concern for the accumulating trade debts of OldCo. It is clear and I find from Ms. Duncan's evidence that there was a possibility of

substantial business but there is not any real track record of supplying by OldCo to Walmart and they did not enter into a contract per se but a vendor partners agreement, which essentially left complete control in the hands of Walmart. It is clear and I find from Duncan's evidence that there was not a binding contractual relationship but merely an arrangement between Walmart and it's suppliers. The arrangements effectively left control in the hands of Walmart. As indicated there's not much of a track record and subsequently in the evidence advanced by Layes it is clear that the transportation costs of OldCo's plant in Cloverville Antigonish County to Walmart centres is prohibitive and rendered future deliveries substantially unprofitable. It was put to Duncan that when Layes speaks of a contract with Walmart he is speaking of the vendors agreement and Duncan said yes.

[100] It was also put to her:

Q: I do not find price stipulation in the contract can you find one?

A: No

Q: I do not find a duration clause in the agreement

A: Duncan: not to my knowledge.

Similarly she was asked with respect to volume and responded there was no provision to her knowledge and that to her knowledge the vendor agreement was not exclusive.

[101] She agreed that it was up to Walmart to determine how much would be ordered and when. It's clear that Walmart sets the price and Duncan acknowledged that in the vendor partnership agreement the supplier partner wasn't permitted to undercut by selling to anyone else. She agreed they were not allowed to supply to anyone else at a cheaper rate and said that was the standard rule. It was put to Duncan that Layes in his lawsuit against Noseworthy alleged that OldCo had a multi billon dollar contract with Walmart and when asked if she negotiated that Duncan replied :

" No sir"

[102] Paragraph 37 of Layes' affidavit sworn the 19th of January, 1996 which reads as follows:

> "That in July, 1995, Oldco obtained exlusive rights to supply drinking water, spring water and distilled water under the "Great Value" private label to Wal*Mart for the entire states of Vermont, Kentucky, and Georgia; Thereafter, Wal*Mart offered Oldco the opportunity to supply their stores in thirteen (13) states on the Eastern Sea Board with two and one-half (2 ½) gallon size spring water and a six (6) pack format of sixteen (16) ounce bottles;"

Duncan was asked if she had any knowledge of that and she responded:

> "No sir"

[103] Paragraph 38 of the same affidavit which reads:

> " That the exclusive contract with Wal*Mart resulted from telephone negotiations between Kevin Layes and Jeannie Duncan of Wal*Mart in Bentonville, Arkansas, U.S.A.;"

Was put to Duncan and her immediate answer was :

> "Not exclusive"

But she went on to explain that if you had three private warehouses and he had the contract for each of those they would then be exclusive. However, pressed further in cross examination she acknowledged that if a supplier came up with a lower price Walmart, if need be, would set the lower price if the original supplier

wouldn't drop their price to match. I conclude that the attempt by Layes to convey an exclusive contract in the normal sense was clearly misleading. The scenario of the vendor's agreement with Walmart did not lend itself to any creditable projection because there is too much uncertainty, no capacity to enforce and legal and ultimate control rested in the hands of Walmart.

EVIDENCE OF DARRIN CAMPBELL

[104] Darrin Campbell holds a Bachelor of Commerce Degree from St. Mary's University and is the son of Jim Matheson. He first became involved in New Co., as a financial consultant around October/November 1996 and became the president of New Co., in late 1998/1999.

[105] He was shown exhibit 151 which is a fax from Donna Boutilier and the cover sheet is in her own writing to Robert McKeigan, Q.C. who took over the file from McInnes Cooper and the fax had a number of attachments to it. Clearly Donna Boutilier looked upon this document as being unreliable, if not false, because it apparently came from Darrin Campbell. It was already in evidence in this matter as exhibit 151 and Darrin Campbell unequivocally indicated that he had

absolutely nothing to do with the preparation of the attachments and that anyone suggesting that he did was uttering a falsehood etc.... I have no reservation in accepting Campbell's evidence in this regard in preference to the suggestions advanced by Boutilier and the representations made by Layes, particularly that somehow the records of New Co were not reflective of the actual situation. Layes goes much further and does not acknowledge the financial difficulties of NewCo its assets being seized by creditors etc...etc.... In all respects I prefer the evidence of Campbell to the evidence of Layes. Campbell was the president of NewCo and he refers to the financial statements by Doane Raymond for 1996 where the sales for that year were only $639, 000 and there was a loss of $ 972, 000. The major creditor was his father's company Breton limited. Campbell referred to the notes to the financial statements for 1996 and in particular Doane Raymond's comment with respect to bank indebtedness :

> "As of December 31st 1996, the company was not in compliance with certain bank covenants"

This has to do with the requirement of the company maintaining current ratios and they were never met.

[106] The 1997 financial statements for New Co indicated an increase in sales to 1.4 million but this in part was attributable to an internal change of accounting with respect to bottles. The operating loss of the company for 1997 was $631, 000. The financial statement does show a substantial profit but this was gained from a royalty arrangement which secured approximately one million dollars, the funds from which were used in the operations, particularly noting that they had a deficiency in working capital. The 1998 financial statements show an operating loss of $432, 000 and after applying a gain from a sale of shares ended up with a loss of $129, 000. In 1999 the operating loss was $411, 000 with a net loss of $344, 000 and a deficit the 31st of December 1999, of $992, 000. The company's financial difficulties mounted and pressure from creditors such as Scotia Plastic plus the Royal Bank rendered it impossible for the company to continue and the assets of the company were seized and sold. The Royal Bank was paid out, Breton received some of it's indebtedness and the sale was to a Gary MacKenzie and Stuart Wrath plus Breton retained a one third interest in the new company Spring Water Inc which company was operated by Gary MacKenzie. I find nothing untoward and that the financial affairs of NewCo were such that a disaster was inevitable and it occurred. NewCo has been inactive since the assets were seized and sold.

[107] Campbell gave evidence that from 1996 on NewCo's biggest customer was Loblaws and he never saw a contract with Loblaws. He indicated that the business with Loblaws was tenuous and essentially was a week to week arrangement which Loblaws could cancel at any time. This is consistent with my determination that there was no contract in the truest sense with WalMart and that for the purposes of any projection the foundation simply was not there.

EVIDENCE OF WAYNE BENO

[108] Beno is an experienced bookkeeper operating his own business under a franchise called Padgett Business Services. He was doing work for the Matheson/Glenora group and was asked by Matheson to take a look at OldCo. He was involved during part of November/December 1995 and for a short period of time in January and he attempted to perform a statement and a business plan. The records provided to him, he makes it clear were incomplete, but he did have for example the OldCo unaudited year end statement, December 31st, 1994 which apparently was not for the entire year, and the net income was $20, 072. Beno identifies the vendor partnership agreement as a WalMart contract ; I've already

commented on that aspect. Beno refers to exhibit 65 which was his draft and commented with respect to the requirement of the company to have an infusion of capital and note two specifically required $120, 000 shareholders investment and $80, 000 accounts receivable assigned to the company through the issues of shares and shareholder loans. In the comments it is specifically noted no opinion is expressed :

> "Because the projected financial statements are based on assumptions made by management regarding future events which, by their nature, are not susceptible to substantiation"

[109] Beno acknowledges that his draft had the purpose of trying to get management to talk to him. Beno acknowledges that he never did complete financial statements and had recommended that they go to a chartered accounting firm for that purpose. Beno gave evidence that the final document that he prepared was exhibit 66 entitled "Sugarloaf Spring Rain International Inc. vision of the future" and he said he did this to present to management that he wasn't paid for it and that it represented a company, that appeared to him, to be in chaos. The Padgett business services comments page is dated 12th November 1995 but refers to as of 30th November 1996. Beno in his documentation made some projections which were hardly on a solid foundation and he didn't explain where the

information came from including, “other sources”. He did indicate the necessity of reducing costs by 60% to obtain the margins that were sought and he reiterated that he felt that this was a company in chaos. It was brought out from Beno that that he ceased working for the Matheson/Glenora and NewCo in early 1996, Beno’s evidence was that he went in the first week of February to pick up the information to do the monthly bookkeeping for these companies for January and he was dismissed from his employment by George. He confirmed that this took place in the offices of New Co. It’s difficult to fit this in to the claim advanced by Layes. I have no doubt that it had some degree of influence on Beno and doing what he could to at least subconsciously to put Layes’ positions in as favourable a light as possible, however, I’m satisfied that Beno made some effort to give his answers to the best of his recollection.

[110] Layes addressed the earlier evidence of Beno that the company was in chaos and had him state that he was talking of New Co and Beno expressed his view that he did not think the New Co management had the prerequisite expertise . When pushed by Layes and asked specifically if there was chaos with OldCo, there was a very distinct pause before Beno replied. When he first was associated and went into OldCo he didn’t speak to Layes, there was very little assistance, the office

manager didn't show up, and so in that regard with respect to OldCo it appeared at that stage that it was somewhat disruptive or disorganized. He then went on to relay this to the events of the day, the understanding that Layes was sick, that computer disks were all over the place in the office and that this was Langille's mess. When asked specifically if the product was getting to the customer, he said "no", there appeared to be some disruption and he gave an example that he went into a local store and the bottle racks were empty. He put this as of late November, early December but essentially until pressed by Layes to relay all this disruption to the latter part of November I felt strongly that he was in fact primarily talking of his earliest association, earlier in November with OldCo.

CROSS-EXAMINATION OF WAYNE BENO

[111] Beno's evidence tended to indicate that exhibit 66 which has on the cover page New Co, related to NewCo where in fact by way of example the financial information is dated 22nd of November 1995, and New Co was not in existence at that time. Layes did not sign his letter of agreement to incorporate NewCo until November 27th, 1995 and NewCo was actually incorporated November 30th, 1995. Beno acknowledges he was aware of the offer of George to sell his shares in

OldCo and accepted that the meeting with the Royal Bank took place December 6th, 1995 which was before the purchase by Layes on December 8th of George's shares.

[112] Beno I'm satisfied knew as early as the 6th or 7th of November when he first met Layes that there was a problem with the other shareholder (George). Beno proceeded on behalf of the Matheson group to do due diligence and stated :

> "I did my best idea of what they are looking at"

I find as a fact that he is referring to OldCo. Beno acknowledged that he couldn't do due diligence because the OldCo records provided where not complete and he agreed that he was not provided with complete contracts, lists of payables etc..etc.. . When he was asked specifically if he held the opinion in January 1996 that Layes had intentionally withheld financial information from him, he responded "no" in a very soft voice and then quickly said, "let me think". He went on to say:

> "I expressed the view the documents were not complete and somebody better get a handle on things"

He acknowledges that he did not have a complete list of payables of OldCo and again agreed that the OldCo records were inadequate. I find as a fact that much of the entire document of exhibit 66 is referencing OldCo, with New Co to proceed by way of an asset purchase agreement.

[113] Beno was adamant that he had only one meeting with Brennan and that Layes was not in attendance. That meeting took place November 17th, 1995 and I'm satisfied that Beno is not attempting to mislead the court that very clearly the evidence establishes that Layes was in attendance and indeed Layes has sworn an affidavit stating that he was in attendance at the meeting with Brennan.

[114] Beno was cross-examined on the revenue projections in exhibit 66 and acknowledges that the projection the figures for 1994 were in the $400, 000 to $500, 000 range. For 1995, in the $600, 000 to $700, 000 range and he then has a projection for 1996 of $10, 588 100.00 and in 1997 $51, 980, 500.00. These projections are based largely upon a substantial contract with WalMart which he acknowledges he has never seen one reciting volume, price, or term and he's unable to indicate where the volumes and pricing came from and says that it must have been in working papers which he no longer has. He was doing his

projections on the basis of substantial volume and the WalMart price that he is not able to substantiate and the conclusion he operated on was that the WalMart account was very profitable. It was inquired of Beno whether or not he ever produced analysis showing that on the WalMart arrangement that there was a loss of somewhere between $1000 and $2000 on every truckload and initially Beno was unwilling to admit that he prepared such analysis but he remembers discussion on how they could rectify transportation costs etc....

[115] I find his financial projections not only unrealistic but not substantiated on the strength of his own evidence as to the incomplete documentation etc... that he received from OldCo. Lack of contracts, full information on payables, receivables etc., that while Beno did his best these projections are not at all substantiated in the facts as I found them and indeed I conclude that there is no evidence that reasonably supports on a balance of probabilities any such projections rending them useless.

[116] A crucial part of Beno's evidence is his adamant denial and, in fact, he used terminology that he was "absolutely certain" he did not prepare the document entitled **Misrepresentation** attached to Boutilier's letter to Macdonald January 4,

1996. The attachment set out ten paragraphs of alleged misrepresentations by Layes and as I've indicated Beno was adamant that he did not prepare that list however, he was shown a handwritten list, exhibit 152 and was forced to acknowledge that that list headed "misrepresentation" was entirely in his handwriting and was almost word for word identical to the attachment of Boutilier's letter January 4, 1996. I am satisfied that Beno probably attended the director's meeting NewCo earlier that day, January 4th although he cannot recall the meeting. He goes on to say that he didn't know what the list of misrepresentations was for and he is then adamant that he did not talk to Layes but he does not give a satisfactory answer as to where the information came from in the preparation of the list of misrepresentations. Undoubtedly, much of it must have come from documentation by Layes. One is left with the very strongest probability that Beno is again incorrect and that the list of representations was prepared in part from representations to Beno by Layes.

[117] It is also interesting that Beno was asked to review a draft statement of claim at tab 19 of exhibit 1 and he was forced to acknowledge that dealing with paragraph 5 of that draft statement of claim outlining allegations of the following misrepresentations by Layes and Sugarloaf that he had a considerable amount of

handwriting on that page. Paragraph 5(a) of the draft statement of claim corresponds directly to his handwritten list of misrepresentations in relation to accounts payable, namely represented $116, 313.00 actual $343, 566. 00 Paragraph 5(b) of the statement of claim compares directly with his handwritten list of misrepresentations pertaining to equipment which in turn is identical to paragraph 2 of the misrepresentation attachment to Boutilier's letter of January 4th, 1996. Similarly, there is the incorporation of his handwritten note dealing with small business loan application and one of the few slight differences from his handwritten note to the attachment is dealing with the sales levels he had added in his handwriting "BANK FRAUD". This relates to **his** finding that in doing his due diligence there was no mention of the sale of assets ie. coolers/bottles purchased through the SBLA. One interesting misrepresentation noted in his handwriting and identical in the attachment is the represented price of units with WalMart at 1.93US when the actual apparently, was 1.68US. Clearly, Beno was asked to review the draft statement of claim and advance specifics of alleged misrepresentations by Layes. Beno's evidence in this regard substantially undermines his credibility and very much undermines his draft projections stated in exhibit 65. There are a number of conflicts between Beno's evidence and the affidavit of Layes sworn the 19th of January, 1996. I'll just mention paragraph 57,

in that paragraph Layes said that Beno had copies of all the documents and faxed it to Glenora and Beno denies this and I accept his evidence in this regard. Layes says that Beno was fully aware at this time namely November 11, 1995 that rent was in arrears for the Burnside warehouse and I accept Beno's denial that such is factually correct. In addition Layes swears that Beno was given keys and the security system pass code to the Burnside warehouse on November 11, 1995 and I accept Beno's denial of Layes' allegation of this under oath.

[118] Beno was shown exhibit 151 which was Boutilier's fax to Robert MacKeigan, Q.C. setting out the response to Layes' affidavit. Beno was shown the attachment indicated to have been a list of creditors received from Layes and the first thing to note is that it totals $116, 313.64, which is the base amount that Beno used in his list of misrepresentations. Beno says he did not prepare that list and the evidence indicated it came from Layes, however he acknowledges that in seven places he put in the word "urgent" and with respect to another account payable he put in:

> "Arrangements made thousand dollars each per month"

[119] When examined as to the meaning of urgent, Beno had to acknowledge that these were accounts that needed to be paid for the company to stay in business. He was asked if Layes had the capacity to pay them and he said he made the assumption that Layes did not have the money to pay them. Layes, in his own evidence, complained that between November 12th and November 21st, 1995 as set out in one of his affidavits, that the investors without his authorization started paying off various trade debts of OldCo. Layes suggests these payments came out of cash flow, however, I find as a fact the evidence is to the contrary and that there were, in fact, substantial payments made by the investors that were essential to keep the company alive. At one point in his evidence, Layes acknowledged "Yes, it was either new investors or I was out." Beno then acknowledged he prepared a draft acknowledgement for Layes which apparently never went to Layes but that draft acknowledgement lists accounts totalling $211, 400.32 and Beno acknowledged it looks like he prepared it and I find as a fact that he did and it's interesting to note that several of the suppliers listed on that summary are in fact listed on Layes' list of accounts payable to which Beno had added urgent.

[120] The final attachment to Exhibit 151 Donna Boutilier's fax to Robert MacKeigan, Q.C. is entitled SUGARLOAF SPRING RAIN INTERNATIONAL

LTD WALMART COST/MARGIN ANALYSIS. This document contains initials PBS and Beno acknowledges that is his firm and acknowledges it contains the fax number he had at the time which he acknowledges January 28, 1996. Beno acknowledges that he is the author of the cost margin analysis and acknowledges using the figures provided to him by Layes that the loss per truck was $1600 and carrying out certain efficiencies a loss per truck would be $1275. Beno was asked if these calculations were accurate and he acknowledges they were accurate based upon the best information available at that time.

[121] Under the cross-examination Beno acknowledged that under his franchise name Padgett Business Services he prepared financial statements of OldCo for the year ending 12-31-95. He acknowledged that he changed the date to 12-13-95 on his understanding that NewCo took over at that time which is in error. The last three pages of exhibit 70, entitled customer balance summary he indicates that it was not his, that it was not his software and he had no knowledge of those three pages. The earlier statements, balance sheet and statement of operations were authored by him. I believe he indicated that they were not complete and constituted something in the nature of preliminary look but in any event he acknowledged that OldCo that a loss for that year of $176, 989.00 taking into

account depreciation and the equity in the company had gone from a positive $157, 727.00 a negative of $19, 262. Beno acknowledged that these calculations and financial statements were produced by him to the best of his ability based on the financial records available and of course they show a company that had been far from successful and the consistent evidence I find that OldCo as clearly indicated by the astute business man George wanting out for next to nothing was in chaos and poor financial shape with mounting trade debts.

SETTLEMENT

[122] In Noseworthy's letter of December the 28th, 1995 Layes' position was that he was withdrawing his acceptance of the shareholders agreement. Layes subsequently reversed this position. In any event, Layes application for relief under *The Company's Act* and further his winding up application was consolidated with the actions of the InvestCo against Layes and OldCo and NewCo's lawsuit against Layes, all of which were consolidated and a detailed settlement agreement entered into between NewCo, OldCo, InvestCo and Layes the 17th of May, 1996.

Settlement was approved by the court, in an order dismissing the 3 proceedings, SH-124173, SH-124174 and SH-124344.

[123] The documentation is extensive and in many respects informative. I will comment later on the list of debts confirmed by Layes and OldCo as outstanding of OldCo as of December 12th, 1995 although some of them would appear to me to have been debts of Newco, nevertheless, the ones that are clearly related to OldCo are confirmatory of the outstanding debts of OldCo which was a cause of concern to both Layes and George in November 1995. Settlement included resolutions and in particular that OldCo transferred all it shares to Newco for $75, 000.00.

[124] Layes in his representations indicated that this settlement did not cover any issues before the court in this action and that it was entered into under " extreme oppression" and essentially he was denying the settlement was binding even with respect to what it covered. Much of the time spent by Layes in cross examining Macdonald relating to resolutions being filed etc... appears to have been particulars incorporated in the settlement.

[125] It is clear that what, if any, cause of action Layes had against Macdonald, Bryson, Brennan, McInnes Cooper, Matheson, George, Noseworthy etc. was not included in this settlement. The settlement provides no *estoppel* or limitation on Layes litigation on matters not addressed in the settlement. What is interesting, however, it is the settlement essentially finalizing that which was the intent from the outset a corporate structure where Layes did not have control and was a minority shareholder holding 45 % of the shares. A number of technical arguments have been advanced with respect to filings with the Registrar of Joint Stock Company etc. and I note that all of those aspects were incorporated in the settlement and, in any event, I have concluded that there is nothing that McInnes Cooper or the defendants individually did or failed to do that constituted negligence or any cause of action.

MACDONALD

[126] Macdonald prepared a letter for Layes signature accepting George's offer, I agree with Macdonald when he assessed the acceptance and the requirements of acceptance as being pretty straight forward. Macdonald had received a telephone call from Matheson around the 23rd of November, indicating that he and some other

investors had had a meeting with Layes. I conclude this is the meeting at McInnes Cooper on the 17th of November. Matheson apparently indicated the investors were going to go into business and had provided financial assistance which assisted Layes to buy out George's interest and then Layes and the investors could continue as owners going forward.

[127] Macdonald spoke to Layes by telephone the 8th of December and co-ordinated the meeting in Noseworthy's office that day. I accept as accurate Macdonald's understanding of the relationship between the investors and Layes. Macdonald represented Layes on December 8th and the second step was to be an asset transfer from OldCo to NewCo and Macdonald was to set it up in accordance with the agreement he understood had been reached between Matheson and Layes. Matheson had mentioned to Macdonald the earlier meeting a week or so earlier, with Layes, Matheson and others in Brennan's office. The go forward arrangement was entirely a second step and Macdonald's description of it was entirely consistent with the instructions Layes had given to both Bryson and Brennan.

[128] I have stated clearly that Boutilier's suggestion Layes constantly spoke of his intention to maintain control of the company was not in accordance with the facts and very clearly from the onset control was to go to the investors group.

[129] Macdonald stated that he saw no apparent conflict between Layes' intentions and the investors intention. They were going forward from the out set within the parameters set out initially at the gravel pit meeting and confirmed by Layes to Bryson and Brennan. At no time did Layes indicate in any manner what-so-ever to Macdonald that any conflict existed or that he opposed primary reporting to the group including Layes was to be through Matheson. I find as a fact and, in particular, that neither Layes or Boutilier conveyed any dissension or conflict between Layes and the investors nor disagreement on the manner of Macdonald reporting to Matheson as the point person for what was understood to be a mutual interest to proceed, hopefully, with a viable and profitable operation of the water business.

[130] A great deal of time was spent on the questions of timing and issuance of shares reporting to the register of joint stock companies etc... and my

understanding is that all of these questions were addressed and resolved in the settlement.

[131] The most significant feature of course is that consistently the arrangement was that Layes was to have a 45% minority interest and the Matheson/Glenora investors 55% majority interest. Macdonald's evidence is that it was his recollection that this was to be effective around December 12th, 1995 and that McInnes Cooper produced two share certificates 45, 000 shares in the name of OldCo and 55, 000 in the name of the numbered company, 1157402 Ontario Inc.

[132] It is Macdonald's recollection that these certificates were signed by Layes and although Macdonald had a recollection of producing them there apparently is no indication of where they may be located subsequently. There was a great deal of juggling and posturing with respect to shares being issued or not issued etc... and I am convinced that this is not of any significance and does not amount in any way to negligence and did not cause any loss or damage to anyone. Layes wasted a considerable amount of time in this area which I find as a fact is in the end result of no consequence. By way of example, Layes did not appreciate the difference between transferring shares and issuing shares.

[133] It is interesting to note that on December 27th , 1995 Layes attended Macdonald's office to sign banking documents and expressed no concern or disagreement but before he left the building in which McInnes Cooper were located he was on the phone to Noseworthy and either saw Noseworthy later that day or at the very least early on December 28th, 1995 resulting in Layes engagement of Noseworthy and Noseworthy's letter December 28th to Macdonald.

RETAINER

[134] Brennan acknowledged that the initial and first retainer was Layes at the November 17th initial meeting (actually it began November 16th with Layes meeting with Bryson) and Layes had brought into the picture Matheson/Investors. Macdonald took over conduct of the file and I accept his understanding, namely, that there were two steps to the retainer: first, Layes buy-out of George and secondly, documenting and putting into effect the agreement reached between Layes and Matheson/investors. To this end Macdonald prepared a term sheet dated November 27, 1995 which is actually a two page letter and he probably sent this to

Matheson for delivery to Layes. This two page letter set out the understanding Macdonald had of their agreement and asked Layes to confirm and, if so, to sign and return a copy of the letter. Layes, in fact, signed and apparently faxed his signed copy of the letter to McInnes Cooper on or about November 29, 1995. Layes suggestions that this did not take place until later in December is not supported by the evidence and I find, as a fact, that he conveyed to McInnes Cooper through Exhibit 28 the fundamentals of the agreement between Layes and Matheson/investors.

[135] The continual retainer by McInnes Cooper was based on the clear understanding that Layes had introduced Matheson/investors and that Layes and the Matheson/investors had agreement on going forward. The evidence overwhelmingly supports this position and I accept Macdonald's evidence that McInnes Cooper concluded there was no difference in interest with respect to Layes buying out George and, Step 2, the Matheson/investors assisting and moving forward in accordance with the fundamentals of the agreement indicated by Layes in his initial interview with Bryson and confirmed in his interview with Brennan and carried forward on a consistent basis.

[136] Macdonald was asked about para. 104 of Layes affidavit sworn the 19th of January, 1996 and I accept and prefer Macdonald's evidence to the contents of para. 104 sworn to by Layes as commented on by Macdonald. I also accept Macdonald's understanding and response to para. 106 of that affidavit.

[137] With respect to the meeting between Layes and Macdonald December the 27th, Layes evidence expressed in an affidavit that he became anxious about the situation I find is not anything that he conveyed or expressed to Macdonald in that meeting of December the 27th, 1995 and I accept and find as fact Macdonald's evidence that Layes did not express any reluctance to sign the debenture agreement and gave absolutely no indication that he was unhappy with and thinking of rescinding the shareholders agreement.

[138] Bryson indicated that in 1995there was no practice whereby McInnes Cooper obtained a written retainer from a client but that subsequently became the practice. I have no doubt, with the benefit of hindsight, that would have been beneficial and, also, with the benefit of hindsight, Macdonald could have done a better job of communicating direct to Layes, however, having said that, I do not deviate from my finding of fact that very clearly Macdonald was entitled to carry

on within the parameters defined by Layes with the primary reporting being to Matheson with respect to the stage 2 operation.

MISCELLANEOUS

[139] There are a number of allegations and arguments that were advanced by Layes and I do not consider it necessary to deal with everything that he raised. For example, he questioned the death clause in the shareholders agreement and I accept Macdonald's evidence that that was primarily for the benefit of Layes. Similarly the shotgun clause and method of valuation of shares appeared to me to be rather straight forward and I recall Layes actually indicating to Brennan, at one point, that he might exercise the shotgun clause against Matheson/investors and that she indicated to him that if he did so he would have to have separate counsel. I also conclude that Layes had the shareholders agreement for some period of time prior to his attendance at the office of Marcia Brennan where he stated his urgency and intention to sign the shareholders agreement without expressing to Brennan <u>any reservations</u>. With respect to the take-out of George, Noseworthy's evidence is clear that Layes was quite satisfied and similarly that Layes was quite happy and satisfied with the settlement negotiated in May of 1996.

LAYES' ADDITIONAL THREATS

[140] The first threat I deal with is that he was cross-examined with respect to his threat, September 25, 2007 to report Mr. Outhouse to the Nova Scotia Barristers' Society. This was after he acknowledged that he tended to explode. That was more so in 1995 and 1996 and that now he tends to try and find out more information before he explodes. After much fencing he acknowledged that he had threatened to report Mr. Outhouse to the Nova Scotia Barristers' Society. He acknowledged under oath when testifying before Justice Haliburton, he used the terminology that Macdonald through the '80s and into the '90s was a partner of Matheson and stated before me that he gave a phrase to that effect based upon his perception of things in 2005. Much of Layes' response in attempting to justify statements for which there is no factual basis is that it represented his "belief". Layes indicated that he never thought of himself as a paranoid person but he says "I believe that I probably was in 2005".

[141] In another lawsuit (versus Matheson) Layes' alleges Brennan, Bryson and Macdonald committed perjury. When asked why he saw fit to put the allegations of perjury in bold print in a public document, his response was:

Mr. Kevin Layes:	You know, I did horrible things like this. I know that. You know that too, right?
Mr. Bruce Outhouse:	I do, yes.
Mr. Kevin Layes:	And, I believe that that paragraph is no longer in the document.
Mr. Bruce Outhouse:	But that's not through your doing. That's through the court striking it.
Mr. Kevin Layes:	Yeah, but there was also a realization sometimes, you know, I look back at some of this stuff with a little embarrassment myself too so.

[142] Apparently he made the same allegations of perjury in another application or pleadings in Halifax and he made an accusation of wrong doing against the prothonotary, Annette Boucher, which prompted a response from Chief Justice Joseph Kennedy. Layes' response to that was to write and accuse Chief Justice Kennedy of impropriety. When faced with these aspects, his response was:

Mr. Kevin Layes: Yeah, I was making accusations about pretty much everybody that was around.

Mr. Bruce Outhouse: Sure. Filed a complaint with the Judicial Council, did you?

Mr. Kevin Layes: I don't, yes, I think I sent a letter but I never followed up. They asked for information and I started to come out of it, I think, by the fall.

Mr. Bruce Outhouse: But that was your approach to things, right?

Mr. Kevin Layes: Or, I, yes. Yes, it was.

[143] Layes also made allegations of a secret meeting between Matheson, Beno, Boutilier, Murdock in Macdonald's office and I conclude there was no such secret meeting. Layes indicating in cross-examination that his source of information for this was what he was told by a number of people, in particular, an employee. At one point, when asked who is it, he responded, I don't. Layes was asked:

Mr. Bruce Outhouse: Mr. Layes, you recognize these to be extremely serious allegations, didn't you?

Mr. Kevin Layes: I recognized these allegations to be quite extreme and I already said that I'm embarrassed by some of these because I jumped the gun. I put things forward. I probably shouldn't have but there are truths .. there are certain truths too.

Mr. Bruce Outhouse: What are they?

Mr. Kevin Layes: Some of these, there was a meeting. There was a meeting. That's a truth.

[144] And further Layes stated in cross-examination:

Mr. Kevin Layes: I certainly will say that in 2005 with respect to this particular matter I may have been a little bit over aggressive with respect to those conspiracy allegations but they didn't come without a lot of information being thrown at me. A lot of information from a lot of different parties. Not, it wasn't Ms. Boutilier, she's over there somewhere. There was a lot of different people but the getting your head around this and understanding the legal impact of this, I mean that takes time and ..

[145] There is much more but I don't see any useful purpose in filling the record with scurrilous allegations advanced from time to time recklessly by Layes.

INDEBTEDNESS TO CLAYMORE PLASTICS

[146] Layes was confronted with a document reciting invoices showing a total as of November 2nd, 1995 at $27,505.02. I am satisfied that this is the indebtedness that Beno recorded as being outstanding although Beno listed it at $27,000 due to Claymore Plastics.

LAYES ENGAGEMENT OF DELOITTE & TOUCHE

[147] Layes engaged Deloitte & Touche to conduct a review of records and documentation of the water business and Noseworthy, in his evidence, said that they had received full cooperation. Layes in typical fashion does not accept what he received from Deloitte & Touche and claims conspiracy, deception etc. and alleges removal of documentation etc. to the offices of Glenora Distillery and there is no evidence to support the advancement of his belief.

SMALL BUSINESS LOANS

[148] The small business loans were highlighted in the initial interview Layes had with Brennan and it was something that had to be addressed in Layes take-out of George. There were apparently two options: pay them out and take out new ones or Layes becoming the sole owner of OldCo was to take responsibility. With respect to these loans, at one point Layes made a very revealing comment.

> Mr. Bruce Outhouse: Well, Mr. Layes, you say that is how it turned out. Did you ever pay these loans?

Mr. Kevin Layes: These particular loans?

Mr. Bruce Outhouse: Yeah.

Mr. Kevin Layes: The bank was crawling up ...

Mr. Bruce Outhouse: Did you ever ...

Mr. Kevin Layes: I was in my hospital in April and getting phone calls to my wife at home.

Mr. Bruce Outhouse: Mr. Layes, did you ever pay these loans?

Mr. Kevin Layes: No, those were the responsibility of the company.

[149] After further cross-examination Layes at least admitted that he doesn't know what happened with respect to these loans. Then finally he was asked:

Mr. Bruce Outhouse: Who paid the loans?

Mr. Kevin Layes: The company paid the loans.

Mr. Bruce Outhouse: The company being International?

Mr. Kevin Layes: That's right.

Mr. Bruce Outhouse: Okay, that's all I wanted.

LAYES ILLNESS

[150] Layes gave evidence under oath that he told Bryson and Brennan at the outset that he had health problems, had just undergone surgery etc., had weighed only 115 pounds etc. Both Bryson and Brennan testified they had no knowledge whatsoever of his illness. Without reservation I prefer the evidence of Bryson and Brennan. Similarly when there's any conflict between Layes and the evidence of Bryson and Brennan, particularly with respect to their file notes I find Layes has no credibility and accept the evidence of Bryson and Brennan. What is disclosed in the notes of both Bryson and Brennan came, I find as a fact, from Layes. Of particularly strong significance is that from the very outset starting in the meeting next to the gravel pit and continuing through the notes of Brennan and Bryson is the clear, unequivocal intent was that Layes would be a minority shareholder, i.e., forty-five percent (45 %). If I have not stated already, I clearly accept Brennan's evidence as to the date of the meeting with her, that is November 17 and not, as subsequently sworn in an affidavit Layes' suggestion that it occurred November

21, 1995. I also repeat that it was Layes who arranged the meeting of the investors' representatives with Brennan.

REPRESENTATIONS TO ROBERT G. MACKEIGAN, Q.C.

[151] It was put to Layes in cross-examination information provided to MacKeigan was not accurate or correct in that kept creditors, true amounts of payables etc. from the investors. When pressed if these people were misleading MacKeigan, Layes responded:

> Mr. Bruce Outhouse: You're saying if this is what Ms. Boutilier, Mr. Beno, Mr. Matheson and Mr. Mudock were telling Mr. MacKeigan, they were misleading him?
>
> Mr. Kevin Layes: This is a litigation tactic to not have to be ... not have to take responsibility for destroying the Walmart relationship I had.
>
> Mr. Bruce Outhouse: I see.
>
> Mr. Kevin Layes: That's what that is and nothing more.
>
> Mr. Bruce Outhouse: The answer to my question is, if they were telling him ...

Mr. Kevin Layes: Yes, misleading.

Mr. Bruce Outhouse: ... this, they were misleading Mr. MacKeigan, their own lawyer?

Mr. Kevin Layes: Yes, yes, they were saving their butts.

[152] Layes allegations in this regard are totally unfounded and improper.

SHIPMENT BY TRAIN

[153] There was evidence by Boutilier and Layes that it could be feasible to ship from the plant in Cloverville by rail. The arrangements clearly were for shipping of tractor trailer loads and my recollection is that Layes went out and got some train quotes in 2003 and I find, as a fact, that utilizing train was not at all feasible. It would have required loading the product at the plant in Cloverville, taking it to the train, unloading it and reloading it onto the train and then at the point of delivery, unloading it again into trucks to take it to a distribution centre. At the very best this is something that might have been looked into way down the road. It was also interesting that the idea of shipping by train was apparently not mentioned by Layes when he was discovered.

EXECUTION OF SHAREHOLDERS' AGREEMENT

[154] Layes disputes almost everything surrounding his signing of this agreement. I find, as a fact, that on, or about, December 11th he was given the agreement by Macdonald and an opportunity to take it with him for his review and that on the 18th of December he called Brennan with a sense of urgency and attending late that day on Brennan and signed the shareholders' agreement. There is confirmation that he signed it on the 18th of December in Macdonald's letter of December 20th to Matheson.

[155] I specifically accept Brennan's evidence in preference to that of Layes in that she indicated on December 18th Layes never asked her to make any changes, that he wanted to sign the agreement and that Brennan did nothing to encourage Layes to sign the agreement. Layes' suggestions and evidence to the contrary is simply not true. Layes did raise questions about some provisions in the agreement with Brennan and she gave him an explanation with respect to the shotgun clause, the dilution clause and the death clause. I find, as a fact, that Layes was satisfied

and was not under any circumstances pressured by Brennan to sign the shareholders' agreement which he proceeded to do.

MACDONALD'S ATTENDANCE AT BENTONVILLE, ARKANSAS AND CLOVERVILLE, ANTIGONISH COUNTY?

[156] Layes, in his brief, alleges Macdonald attended both of this places and Macdonald swore that he was never in attendance at either place. Layes' evidence to support his allegation is that his mother told him. It appears that Layes seventy-eight year old mother never met Macdonald and I am satisfied that Macdonald's evidence is truthful and accurate. While Layes' mother may well believe what she wants to believe, in fact, if she told her son anything in this regard it was in error.

TRUST ACCOUNT $10,000.00 RE ESCROW

[157] The closing of the take out of George took place at Noseworthy's office on the 8th of December, 1995, however, Noseworthy required that the matter be held in escrow and that security be posted in the trust account of McInnes Cooper in the amount of ten thousand dollars ($10,000.00). Layes advances the view that

somehow or other these funds benefited McInnes Cooper and that they were negligent in their handling of the escrow and, in particular, these funds. The reality is that the funds came from the Royal Bank were held for a very short period of time by McInnes Cooper until Noseworthy released the escrow and McInnes Cooper returned the funds from whence they came. There is absolutely no impropriety or benefit to the conduct of McInnes Cooper and Layes' suggestion that it constituted negligence is simply erroneous and far fetched.

DISTRAINT FOR RENT BY PRUDENTIAL THROUGH THE HARDMAN GROUP

[158] Layes spent a great deal of time on this issue. Bryson indicated that it was news to him that the lease was in the name New Scotland Water Limited. Layes took this to mean that Bryson was wrongly informed by the investors and Bryson clearly indicated that the investors knew the lease was with New Scotland Water Limited although Bryson was not aware of it and that what the investors were not aware of was that New Scotland Water was in arrears of rent. Bryson stated specifically that this was news to my client. On the 5th of January, 1996 again that New Scotland Water paid no rent, that this was news to my client. Moreover Layes

didn't tell the investors about the failure of New Scotland Water to pay rent. Bryson reiterated that the investors group didn't know the rent was outstanding, didn't know that New Scotland Water had not paid any rent and again that Layes didn't tell them no rent had been paid. Layes in submissions suggests if it was in arrears it would have been for a short period of time. In any event, I find as a fact that Layes knew it was at least somewhat in arrears and he failed to disclose this to the investors. There was a discussion with respect to the terms of the New Scotland Water lease and Bryson gave his opinion with respect to the various provisions dealing with notice, the difference between distraint and the re-entry provision etc. In addition, the Hardman Group Ltd. January the 11th, 1996 wrote to Bryson offering to lift the distraint on terms which are stated in that communication.

[159] All of this discussion with respect to the distraint is not an issue for me to decide in this lawsuit. What I do have is evidence of the position taken by the investors, namely, that Layes had deliberately failed to advise them that there was rental arrears, and on a balance of probabilities the Investor's position I find is factually correct.

[160] Noseworthy in his evidence referring to the January 5, 1996 situation at the warehouse stated:

> I don't think there was a dispute that the rent was in arrears at that point"

CONFLICT OF INTEREST RE HARDMAN GROUP?

[161] Layes takes this as a clear conflict of interest, however, I conclude it was not a conflict of interest. First of all, whatever work McInnes Cooper did for the Hardman Group in the past has not been identified and secondly, in January 1996 McInnes Cooper were acting for NewCo. Layes since December the 27th, 1995 had changed solicitors and was being represented by Kent Noseworthy. Bryson's evidence, which I accept, is that he was in January, 1996 acting for NewCo and receiving his instructions from the designated person, Donna Boutilier, a Director and Officer of NewCo.

[162] I accept Bryson's evidence that on January the 5th he took instructions from people he was satisfied had authority to give instructions on behalf of NewCo. He had been so advised by Macdonald and he understood the executive authority for NewCo rested in the persons from whom he was receiving instructions, namely,

Blakley, Boutilier and Murdoch. Layes indicated to the court during the cross-examination that he was the client because he owned NewCo or at the very least had a minority interest (forty-five percent). Bryson responded correctly that Layes was not then the client. The client was NewCo and despite the best efforts of Layes solicitor, Kent Noseworthy, Layes was at this time a shareholder and director at best and Bryson was taking instructions from two of the three directors of the company.

[163] Eventually a solution took place between Hardman Group on behalf of the landlord, Prudential and NewCo and Bryson, I conclude, is correct that in acting for a company the instructions do not come from a shareholder and must come from the persons who had the executive authority.

CRIMINAL RECORD - KEVIN LAYES

[164] Layes acknowledged in cross-examination that he was a former employee of Aventis Pharma. Inc. from March 26, 2001 to approximately October the 30th, 2001. He acknowledged that in August 2001 Aventis provided him with three

cheques payable to the Dr. Everett Chalmers Regional Hospital in Fredericton and these cheques were in the amounts of $10,247.60, $8,574.50 and $8,512.00.

[165] Mr. Layes was to deliver these cheques to the hospital, however, instead of delivering the cheques he opened an account at the Credit Union Atlantic branch in Halifax under the name of Dr. Everett Chalmers Regional Hospitality Consultants Limited. Layes acknowledged the correctness of the provisions in the civil suit against him by Aventis contained in paragraph 8 as follows:

> Information relating to the company D.R.G. Everett Regional Hospitality Consultants Limited on file at the Nova Scotia Registry of Joint Stock Companies reveals the following:
>
> (a) As of December 4, 2001, the President/Secretary of the company was Kevin J. Layes;
>
> (b) The company was incorporated on October 16, 1995 under the name "New Scotland Water Limited;
>
> (c) As of December 5, 2000, its registration was revoked for nonpayment of fees; and
>
> (d) As of November 7, 2001, the registration was reinstated and the company's name was changed to D.R.G. Everett Regional Hospitality Consultants Limited. The name change and the reinstatement were done as a result of the actions by the Defendant Kevin J. Layes shortly after his dismissal for cause as aforesaid.

[166] Layes pled not guilty to a charge of fraud relating to these cheques and was found guilty. He filed an appeal which was not pursued. Layes did say that the cheques or the funds represented by the cheques remained in the consultant's account he set up and that the funds were recovered. In any event, he ends up with a criminal record for fraud in relation to these cheques.

[167] In addition, during this employment Layes had the use of an authorized credit card for the purpose of charging legitimate business expenses and he has been sued for improper use, fictitious and false expenses. Layes was charged with fraud in relation to the misappropriation of these funds and pled guilty and, therefore, has a second conviction and criminal record for fraud.

[168] Layes did advise prior to the opening of this trial that Aventis had been reimbursed for the civil judgment they obtained in relation to his misappropriation of funds. A criminal record unrelated to the issue of credibility, under consideration, carries no weight. For example, if Layes had been convicted of impaired driving it would have no relevance to his credibility, however, where one has a criminal record relating to dishonesty, the criminal record can be used as a

consideration in assessing the credibility of the offender. In this case it is not necessary for me to attach any particular weight to Layes criminal record because I have had the opportunity to observe him over an extended period of time in order to conclude the manner in which he has conducted himself on numerous occasions that he has a total lack of objectivity and propensity to advance claims that are false, that he either knew were false, ought to have known such or didn't care less. He is a person totally lacking in credibility.

[169] On the first offence Layes was sentenced to one day imprisonment served and 18 months probation. On the second guilty plea he was sentenced to 2 years probation running from approximately January, 2006 to February, 2008.

DISCOVERY - COMMISSION EVIDENCE

[170] Layes wished to get into evidence the testimony of a number of witnesses who are outside of Nova Scotia and during a case management and subsequent consultations, agreement was reached to have a number of Layes' witnesses examined out of the jurisdiction with the discovery transcripts to essentially be treated as commission evidence subject to admissibility and objections. It resulted

in a time-consuming exercise for me to read all the transcripts and they were extensive, for example, the transcript of Harold W. Blakley, in addition to exhibits, was something like 333 pages. Very little assistance was given by the transcripts and, for example, Mr. Blakley was 84 years of age at the time of discovery, indicated that essentially he was a consultant to Matheson because of his business experience. He was asked numerous questions about documentation, particularly documents containing his signature and many of them he had no recollection and he had difficulty recollecting meetings etc. He did say something along the lines that nothing was expected of me except to formalize some documents and that he was a nominee because he was a friend of Jim Matheson. For example, he was asked if he signed the settlement agreement, May 17, 1996 and he says he thinks he remembers signing it and much of his evidence indicates that he was a consultant. For example, when Matheson went to the offices of Walmart in Bentonville, Blakley went along for the drive but didn't attend the meeting. He wasn't aware of the total time frame that he was an officer of NewCo etc. In fairness to Blakley, he has been asked a lot of questions about documentation and his discovery is some eleven plus years post the time frame he was involved largely as a consultant, so much of his evidence is not relevant to this action and may well be of some relevance in Layes' action against Matheson. Blakley does

have a lack of recollection of documents and communication with Macdonald but I conclude that there is nothing arising out of this memory conflict with Macdonald and to some extent, Bryson. I find much of what Blakley did was entirely within his expectation of formalizing documents and, if, on occasion he would ask Matheson what they were about and when assured that they were in order, he would proceed to sign them. The signing of the May 17, 1996 settlement document was dealt with by Layes in his examination of Blakley at some length and, at one point, Blakley says he doesn't recall it but that he's not saying he didn't or might not have but he thought he would have recalled signing it if I had read it clearly.

[171] He has trouble with the signature of his name on a number of documents. By way of example, the settlement agreement of May 17, 1996 was clearly in order and clearly Layes had legal advise from his counsel, Noseworthy and it was negotiated by Noseworthy with Robert MacKeigan, Q.C. and not McInnes Cooper. Overall, I would assess the examination of witnesses outside of Nova Scotia as being a substantial waste of time and resources.

[172] Blakley was examined by Mr. Jesudason on behalf of the defendants and by way of example, Blakley was asked (p. 152-3) that Layes in his pre-trial brief made reference to Blakley advising him that he was a “personal friend” of Cleghorn who was the Chairman and CEO of the Royal Bank of Canada and that financing would not be an issue. When asked if he had any recollection of ever telling Layes that he was a personal friend of Cleghorn and that financing for Sugarloaf Company would not be an issue, his answer was, definitely not. Question: Are you completely sure you never did that? Answer: That’s right.

[173] Layes also indicated in his brief that on, or about, December 4, 1995 Blakley was at a meeting when there was a conference call placed to Cleghorn and that Blakley was at that meeting and when asked about it, he said he had no recollection of that whatsoever and he doesn’t think the meeting took place. He went further to say, I’m sure it didn’t happen. Overall, the evidence of Mr. Blakley is of no assistance. He denies some of the representations made by Layes relating to Cleghorn.

[174] I quote only one final example, and, that is, it was put to Blakley that Layes’ affidavit of January 19, 1996, he swears in para. 85 that December 14, 1995 Layes

phoned Blakley in South Carolina and that Blakley went on to advise Layes that he was president and that Layes should take charge of the operations and also that Blakley indicated that he was one hundred percent behind Layes absolutely and Blakley's response is straightforward, **not true**. In fact, he also pointed out that he had sold his home in South Carolina prior to that date. No purpose would result in further commenting on the evidence of Mr. Blakley with the exception of his observations on Ms. Boutilier's position.

[175] Layes acquiring the evidence of Blakley was really not helpful to his cause. It permitted, in cross-examination, the question of how Blakley viewed Boutilier. To begin with, he states that if Ms. Boutilier said Macdonald went with Matheson and Murdoch to Bentonville, Arkansas that was **untrue**, at least on the visit he made. His impression of Boutilier was interesting. His response was as follows.

> THE WITNESS: (Blakley) I had a business association with her mainly - - well, I guess exclusively in Jim Matheson's office where she worked. It was always business-like. She was an intense person. She was obviously, in my view as a businessman, a gal who was determined to go through the glass roof. She was climbing in every way possible. I think she misrepresented herself - - and I did know she misrepresented herself in some discussions I had as having more authority than I thought she had. I guess I better leave it there.
>
> ...

Q. No. You say that she misrepresented her authority, meaning she portrayed herself as having authority which you felt - -

A. Which I felt she didn't have.

Q. Give me an example of authority she was claiming she had or give me an example of those conversations.

A. She was the boss lady of Sugarloaf, and that Mr. Murdoch and Mr. Matheson reported to her in that respect, something like that.

Q. So, she told you - -

A. She was up here and they were here.

Q. That she was above Mr. Matheson and Mr. Murdoch?

A. That's right. She didn't tell me that. She represented herself or presented herself as being their superior authority in any dealings I might have.

Q. So, the way she carried herself and the way she expressed herself, you concluded that she was, in effect, suggesting that she was the boss of Mr. Matheson and Mr. Murdoch?

A. In those dealings with Sugarloaf Spring Rain, because that's the only dealings I had with her. I had no dealings with her in any other respect.

[176] The witness expanded further but the foregoing makes it clear how Blakley viewed Boutilier's presentation of herself. It certainly is consistent with my

conclusion that in dealing with people like Macdonald and Bryson, she certainly conducted herself as having the authority to give instructions.

[177] Essentially, Blakley's evidence as to how things were run, whether there was any suggestion of Layes being treated unfairly or that Boutilier took any objection as to how the company was being run etc, is diametrically opposed to that of Boutilier's and more consistent with what I concluded to have transpired on a factual basis.

[178] I am going to comment on the discovery evidence of Debora S. Trollope taken November 1, 2007 in Toronto. Ms. Trollope previously worked for Loblaws. She guesses it was around 1992/1993. She was in marketing first and then she moved into the Walmart Division. Her relationship between Walmart and Loblaws didn't last very long and she moved into a different division when Walmart entered into Canada.

[179] Under cross-examination, Ms. Trollope confirmed the contents of an affidavit she swore September 18, 2007 and she was taken through a comparison

with a number of paragraphs in Layes' sworn affidavit of September 11, 2007. She confirmed that she had no authority whatsoever to enter into contracts on behalf of Loblaws or Walmart and she couldn't enter into any contract with Layes or his company for Loblaws or Walmart. At one point she talked of how Walmart goes about entering into or choosing a particular supplier. That they would bleed the vendors dry and that Walmart were very aggressive in terms of getting the lowest price. She confirmed that in her dealing with Layes or his company, she had no knowledge of any contract as advanced by Layes and, as far as she was concerned, there was no arrangement facilitated through her for any Walmart contract. Overall, Ms. Trollope's evidence did not advance this action and, if anything, it simply strongly contradicts what Layes was advancing and is preferable to Layes' evidence.

[180] The final discovery evidence I will comment on is that of Mr. Adam Djuk (Djuk) who in June/July of 1993 commenced employment with a company called Intersave Buying and Merchandising which subsequently changed it's name to Loblaw Brands, he believes around September of 1995. Djuk acknowledged that he had no knowledge of anything relating to this lawsuit. Did not know Layes. Does not recognize him. No knowledge of OldCo or NewCo. No recollection of

ever meeting Layes or speaking with him in the 1995 or 1996 time frame, however, he is able to state clearly that with respect to part of Layes' pre-trial brief that at least one statement would not be accurate. The statement having been to the effect that Layes had the inside track and was aided by Djuk.

ISSUES

1) Were McInnes Cooper & Robertson in a conflict of interest given the positions of the Plaintiffs and the alleged Ontario Investors group?

2) Were the Defendants negligent in their duty of care to provide the Plaintiffs with sufficient legal advice and a reasonable standard of service with the George agreement and the Purchasers' agreement and to ensure the company remained operational as an economically viable operation?

3) Did the Defendants breach their fiduciary duty owed to the Plaintiffs?

4) Did the Defendants negligently misrepresent themselves and purposely distort documents or fail to act where they should to assist the alleged

Ontario Investors' group to the detriment of Kevin Layes and Sugarloaf Spring Rain Ltd.?

[181] I have framed the issues exactly as Layes outlined them in his final written summation to the court.

[182] Normally one would expect some expert evidence with respect to the standard required of the professionals against whom allegations are made of the nature advanced by Layes. This absence does not preclude me from applying the highest standard of professionalism and integrity to the solicitor and client relationship. With respect to the conflict of interest allegation, the former Nova Scotia Barristers' Society Legal Ethics and Professional Conduct provides some guidance in Chapter 6 entitled IMPARTIALITY AND CONFLICT OF INTEREST BETWEEN CLIENTS:

Rule

A lawyer has a duty not to

(a) advise or represent both sides of a dispute; or

> (b) act or continue to act in a matter where there is or is likely to be a conflicting interest, unless the lawyer has the informed consent of each client or prospective client for whom the lawyer proposes to act.

[183] The discussion of the rule goes on to indicate that if an issue becomes contentious between the clients then the lawyer, although not precluded from advising them on other non-contentious issues would be in breach of the rule if he attempts to advise them on the contentious issue and in such circumstances the duty on the lawyer is to refer the clients to other lawyers. The factual situation here is very clear that Layes was first to retain McInnes Cooper but in retaining McInnes Cooper he brought in two matters to be addressed. First, his take-out of George and, second, putting into effect primarily by documentation the agreed relationship between Layes and the investors. The parameters of that relationship were clear and unequivocal from the very outset in Layes' instructions to Bryson on the 16th of November and on the introduction of the investors in Layes meeting with Brennan on the 17th of November, 1995. McInnes Cooper did nothing more than continue to follow the primary instructions and parameters set by Layes and contrary to his beliefs, nothing of a confidential nature was communicated to Macdonald, Bryson , Brennan or McInnes Cooper. All of Layes' communications of what might be deemed confidential related to the operation, production and

financial aspects of OldCo which he provided direct to the investors. While the investors were older and had a greater level of experience, Layes was an educated, active business person and it is quite appropriate in a proposed business relationship that the clients are permitted to settle any business, management issues etc. by direct negotiation in which the lawyer does not participate. At no time did Layes, Boutilier or anyone contradict or indicate any dispute with respect to the manner in which Macdonald reported primarily but not exclusively to Matheson/Glenora Investors and was not until Layes left Macdonald's office on the 27th of December, 1995 that for the very first time he expressed any concern or dissatisfaction with what he had put into place in the first instance and what was carried out in a non-complicated, straightforward legal services manner.

[184] Layes does, in his final summation, provide a definition from Black's dictionary, 7th edition 1999 of conflict of interest as follows:

> A real or seeming incompatibility between one's private interests and one's public or fiduciary duties. 2. A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely effects either client or if the clients do not consent.

[185] I've already made clear that Layes second stage moving forward involvement with Matheson/Glenora/Investors was carried out on his instructions and entirely within the parameters of his directions. At no time until after he had discharged McInnes Cooper, December 27th/December 28th, 1995 was there ever any evidence advanced or notice given to McInnes Cooper by anyone that the dual representation adversely affected either client. Layes' statements are simply unsupported by any credible evidence.

[186] Where a conflict of interest actually arose in this action was when McInnes Cooper, having acted for Layes, should not have acted against Layes in what was the same or related matter, even though there was an element of urgency and the time frame that McInnes Cooper acted inappropriately was very narrow. A determination that a solicitor may be acting in a conflict of interest situation is not predicated on one's client or a third party advancing that point of view. The conflict of interest was clearly in focus when McInnes Cooper instituted the second lawsuit pleading the very documentation they had prepared for both Layes and Matheson/Glenora Investors. Fortunately, when Layes' solicitor, Noseworthy, effectively raised the issue of conflict of interest, Macdonald, Bryson and Brennan sought the advise of their senior, highly respected counsel, Alan J. Stern, Q.C. who

recommended that the actions commenced by Bryson be turned over to some other solicitor and that was done without delay and, in fact, in days. I make note that what transpired in this regard was, in effect, the position Brennan took from the moment Noseworthy generally raised the conflict of interest allegation in his December 28th, 1995 letter to McInnes Cooper.

[187] I have dealt generally with all four issues and specifically with the issue number one, the alleged conflict of interest and issue number three, the alleged breach of fiduciary duty (I comment further shortly) and I need only say with respect to issues two and three that there is no evidence to support, in any way, these allegations by Layes. The allegations in both of these issues are unfounded and given Layes total lack of credibility and my review of the totality of the evidence, neither issue gets beyond the allegation stage based on Layes' belief and not, in any way, shape and form, on any credible evidence.

[188] I have no reservation in stating that the evidence does not establish any prejudice whatsoever to Layes. Layes' alleged problems occurred after the termination by Layes of his retainer with McInnes Cooper on either the 27th of December or at the latest, the 28th of December, 1995. Layes' problems were of a

business nature and not legal. He had obviously, according to his evidence, personality difficulties with Matheson/Glenora/Investors related to the business operation, production, transportation costs, management conflicts etc. etc. etc. To the extent that Macdonald, Brennan, Bryson and McInnes Cooper were in a conflict of interest for a relatively short period of time, such conflict did not cause or contribute in any way to the alleged, unproven losses and damages alleged by Layes to have been suffered by him and OldCo. I have no reservations in saying unequivocally based on my findings of fact and Layes' total lack of credibility that none of the other issues (issues 2-4 inclusive) raised by Layes have been established anywhere near on a balance of probabilities and, indeed, there is no evidentiary basis established to any degree on any of the other issues raised by Layes. I acknowledge and comment on the onus upon Macdonald, Bryson and Brennan to show that whatever fiduciary duty they had to Layes and OldCo, such was not breached in any way, shape or form in paras. 191 and 192.

[189] I want to state very clearly that in the extensive written final submission of the plaintiffs submitted by Layes the submission contains innumerable allegations and statements purporting to be facts for which there is no evidentiary basis whatsoever or many instances Layes' lack of credibility in stating as facts that

which has only a foundation in his “belief”. Layes makes numerous unsupported statements, allegations and conclusions and by way of example, at p. 54 he says:

> For there is no doubt that without McInnes Cooper & Robertson’s assistance, the Matheson, Murdoch and Glenora gang would never have gained access to my company.

[190] This statement is not true and is absolute nonsense. I conclude that I made sufficient findings of facts and determinations of credibility that I need not write several volumes to address each and every false and unfounded allegation advanced by Layes.

[191] With respect to the allegation of breach of fiduciary duty, there is no evidence to support this. There is not, for example, one iota of evidence that Bryson, Macdonald or Brennan or McInnes Cooper failed to disclose to Layes any material fact. Acceptance of the dual retainer by McInnes Cooper was at the direction and within the retainer of McInnes Cooper by Layes. What transpired was anticipated and directed by Layes with respect to the advancement and going forward of the mutual interests of Layes and the Matheson/Glenora/investors group. Macdonald acknowledged that he had done some services for Matheson prior to this retainer but he couldn’t recall whether it was associated with Glenora

Distillers or matters associated with Glenora Distillers. Macdonald made it clear that they were not continuously acting for Matheson. He did some transactions. Layes' attempts to draw the inference that somehow or other Macdonald must be taken to have known the full and complete details of Matheson's alleged background because Layes said it was a matter of great public reporting and that Macdonald, who was involved in establishing the Nova Scotia Securities Commission from 1988 to 1991 must have known of Matheson's difficulties advanced by Layes in relation to the Alberta Securities Commission etc. There is absolutely no proof that Macdonald knew or ought to have known and, indeed, Layes and Boutilier made all kinds of accusations against Matheson and while Layes had Matheson on his witness list, Layes did not call Matheson and whatever the issues were, and they certainly appear to me to be clouded, between Layes and Matheson established nothing other than, at the very least whatever animosity existed between them it was not brought to the attention of McInnes Cooper until well after Layes terminated his relationship with McInnes Cooper at the latest, December 28th, 1995.

[192] Layes is correct in quoting **Martin v. Goldfarb et al.** 1997 O.J. No. 1918 dealing with the issue of a solicitor's duty to provide his client of his knowledge of

another's questionable background. In **Goldfarb** the lawyer had knowledge of the true identity, criminal background and character of one Axon. No such factual basis for any such determination or failure to disclose by Macdonald has been established by credible evidence. Further, nothing Layes advances alters my clear determination that Macdonald, Bryson, Brennan and McInnes Cooper met the onus upon them of establishing that there was no breach of fiduciary duty to Layes or OldCo.

[193] While Layes and Boutilier repeatedly referred to Matheson as a criminal and advanced that he had a criminal record the only person it has been established to have a criminal record is Layes. It should also be noted that Layes in his summation replies upon extracts of discovery evidence of Macdonald, some of which I don't recall ever having been entered into evidence at the trial, and in any event, in many cases was never put to Macdonald while he was on the stand.

DAMAGES - LACK OF EVIDENCE.

[194] Layes throughout this litigation hired a number of experts and at one of the case management conferences (September 28th, 2006) advised me that he was not

going to call any expert witness but subsequently engaged a forensic handwriting expert and then engaged Graham A. Davis, Ph. D.

[195] Amongst the earlier experts engaged by Layes was J. William Vienneau, C.A., CBV of White Burgess Langille Inman who filed a report September 14th, 2001. The defendants responded to the Vienneau report by engaging Michael D. Casey, C.A. BCV (Casey).

[196] Layes finally goes to trial relying on his own projections and various documentation and material and produces Dr. Davis who expressed the opinion that the net present value method of discounting income projections is an appropriate method of valuation to use in this case. With great respect to all of the experts, I conclude that I did not require any guidance from experts to determine the value and financial and organizational state of OldCo in November/December 1995. The court had the benefit of clear, unequivocal evidence of an astute businessman, George, with an intimate knowledge of the workings of OldCo, its relationship to Walmart etc. etc. and he tried first to sell his fifty percent interest in OldCo to the company for $69,000.00 plus additional terms and the company declined. He then exercised the shotgun clause and made his interest in this

company available to Layes for $20,000.00 plus some terms and as I have already noted, the $20,000.00 was not a cash offer but one of payments by installment without interest. Layes consistently indicated that what George was doing was attempting to buy him out and I have concluded very clearly that George knew the consequences of a shotgun clause and as Noseworthy said, there was concern for mounting trade debts which Beno confirmed were not being paid. In the marketplace, George was making available his fifty percent interest on what can only be described as a realistic value.

[197] Layes decided not to call his business valuator, Mr. Vienneau, and to rely upon his own projections and Dr. Davis' academic exercise on the utilization of the net present value method of discounting income projections, however, as I have noted in my findings of fact and lack of credibility on the part of Layes, any projections done by Layes and those done by Beno were founded in quick sand. By way of example, when Davis concludes that the company had long-term contracts in place for future years sales, it is one of many factual errors and there was absolutely no foundation for any claim beyond the magnitude of what George himself valued his half interest in OldCo which was in chaos and badly in need of capital etc. I do not quarrel with Dr. Davis' explanation of the methodology, but

simply stated, it had no application whatsoever to the factual situation that existed here. Layes preposterous claim of two hundred and twenty-six million eight hundred and one thousand, nine hundred and eighty-seven dollars and forty-two cents in 1995 dollars ($226,801,987.42) is yet another indication of Layes constant departure from reality. The evidence of Casey, while he, for some reason, was not given the additional terms of the George valuation i.e. addressing the loans outstanding, nevertheless Casey at least was realistic in recognizing the factual situation that existed in November/December of 1995. Given the lack of any foundation whatsoever Dr. Davis' opinion on the application of the traditional net present value discounted cash flow method in the calculation of damages was nothing more than an academic exercise in damages 101 and of no relevance to this action.

RESULT

[198] This is a lawsuit that should never have seen the inside of a courtroom and the action of OldCo and Layes is dismissed.

COSTS

[199] The parties are entitled to be heard on costs and I would ask the defendants' counsel to submit their position in writing on entitlement and quantum of costs and disbursements on or before May 1st and for Layes and OldCo to respond on or before May 26th , 2008 after which I will proceed to determine entitlement and deal with any taxation of costs and disbursements that may then be appropriate.

J.