SUPREME COURT OF NOVA SCOTIA

Citation: Visual Design Consultants Inc. v. Royal and Sun Alliance Insurance Company, 2012 NSSC 387

Date: 20121218
Docket: Hfx. No. 259250
Registry: Halifax

Between:

Visual Design Consultants Incorporated

Plaintiff

-and-

Royal and Sun Alliance Insurance Company of Canada

Defendant

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: October 15, 16, 17, 18, 22 and 23, 2012 at Halifax, Nova Scotia

Written Decision: December 18, 2012

Counsel: Counsel for the Plaintiff- Christopher I. Robinson
Counsel for the Defendant - Murray Ritch, Q.C. and Wayne Francis

Wright, J.

INTRODUCTION

[1] On September 29, 2003 Hurricane Juan landed a direct hit on the Halifax area, wreaking havoc and destruction in its path. Countless buildings were severely damaged or destroyed. Among them was the business premises of the plaintiff Visual Design Consultants Inc. ("VDC"), a two storey building on the Bedford Highway. The extreme forces of wind and rain essentially blew the roof off the building, thus exposing to the elements the key working areas of the business operations which were located on the second floor.

[2] VDC is a marketing graphic design firm whose principal is Donald Oram. Mr. Oram is an award winning creative designer who was a founder of VDC in 1983. His forte is developing and assisting clients to help them achieve increased sales through improved visual advertising, packaging, branding and development. His business is primarily Maritimes based but also extends to both national and international markets.

[3] Beyond the hurricane damage to the building structure itself, all of VDC's electronic equipment was destroyed. This included, most significantly, five high powered computers with very specialized software for the graphic design industry. Those computers are vital to the operation of the business. In addition, peripheral equipment (printers, scanners and extra computers) was also destroyed.

[4] Also lost by VDC was virtually all of its finished work product which it had accumulated from the many projects it had done over the years. This consisted of portfolios of work done, samples of work product used for marketing, artwork, film, packages designed, photography and all of VDC's job dockets (i.e., sketches, designs, quotes, correspondence and work samples). Much of this work was not in electronic format and thus was forever lost for use in recruiting prospective clients with sample portfolios of work performed.

[5] At the time of this disaster, VDC was insured by a commercial policy issued by the defendant Royal & Sun Alliance Insurance Company of Canada ("RSA"). In addition to coverage for property damage, the policy also provided coverage for:

(a) business interruption loss;

(b) increased cost of working; and

(c) professional fees toward the cost of hiring accountants and other professionals to assist the insured in making a claim (to a maximum of $25,000).

[6] The parties were able to reach a settlement of the property and equipment damage claim and have since agreed on the increased cost of working claim. However, they have not been able to reach agreement on the quantification of the business interruption loss sustained by VDC as a result of the hurricane damage. That is the main issue which the court must now decide.

AFTERMATH OF THE HURRICANE AND ITS PROLONGED EFFECT ON THE BUSINESS

[7] Mr. Oram was out of province when the hurricane struck. By the time he was able to return to Halifax, all of the building contents had been moved to a storage space in Sunnyside Mall. When he made his way there, he was devastated by what he saw. As he described it, his entire professional life was on the floor all in a mess.

[8] Mr. Oram's foremost concern was to get the business back up and running again. With limited choices available to him, he decided to take temporary space in a substandard building adjacent to his parking lot. He made this choice because this was the only available space where he could re-establish telephone service relatively quickly (by having Eastlink run wires across the parking lot between the two buildings). Even so, VDC was without power or telephone service for at least a week.

[9] Mr. Oram described the temporary space as an empty shell of a building in a state of unfinished construction. It was cramped and dusty without paint, doors or floor coverings. He had no office for himself nor any facility for meeting clients. Nor was there any privacy for his staff members working there. Although the working conditions were deplorable, this was still his best option for restoring power and telephone service so that he could try to maintain contact with his clients.

[10] During the next two and a half months, Mr. Oram described himself as being in survival mode. He said he was inundated in having to deal with contractors and adjusters, all of whom were stretched thin from the widespread damage wrought by Hurricane Juan, in trying to get his building premises rebuilt. He also gave priority in his restoration efforts to the replacement of the five key computers required for the operation of his business.

[11] In having to focus his efforts on the restoration of his business premises and equipment replacement, Mr. Oram was unable to fulfil his principal roles with VDC, namely, performing all the creative design work for client projects, maintaining and building business relationships, and looking after job costing and invoicing.

[12] With all these distractions, Mr. Oram testified that he could not be in a creative mode in performing design work for clients. As he put it, "creatively, I was off". Nor did he have functional computers required to operate the business until at least late November. Mr. Oram said that he was trying his best to maintain his existing clients but had no time to devote to the development of new business.

[13] Things only got worse when he tried to deal with this situation by passing the management responsibility for several client accounts to his lone salesman working for VDC at the time. This move proved to be counterproductive after Mr. Oram received several customer complaints which resulted in Mr. Oram having to spend time doing damage control with those clients.

[14] It was not until mid-December that the company was able to return to its restored business premises. Even then, however, Mr. Oram said that it was not business as usual right away. He was still dealing with contractor issues over window leakage problems and unfinished restoration work, as well as the re-installation and setting up of the new computer equipment. A dispute with RSA over the replacement of peripheral electronic equipment (an extra computer, scanners and printers) also lingered until March of 2005.

[15] VDC also experienced staff difficulties in the aftermath of the hurricane. Two of its key employees (out of a complement of five in total) had their employment terminated after tensions grew over the assignment of additional job responsibilities and having to endure deplorable working conditions in the temporary space. The lone salesman above referred to left the company's employment in late December or January and the key production artist departed in February. Fortunately, the latter was readily replaced by a freelancer who had been doing work for the business and Mr. Oram was able to hire a new salesman not long afterwards.

[16] It was not until April of 2004 that all of the finishing touches were added to the building premises to complete the restoration. At that time, VDC held an open house for its clients to show both existing and prospective clients that the company was ready to carry on business. Indeed, Mr. Oram stated that the business didn't really return to normal until about November of 2004 which was slightly more than a year after the hurricane struck.

[17] There is no question but that VDC experienced a loss in sales revenue and related gross profit from the interruption in its business operations caused by Hurricane Juan. The difficulty lies in the proper quantification of that loss in accordance with the provisions contained in the insurance policy issued by RSA.

POLICY COVERAGES AND DEFINITIONS

[18] I begin by setting out at large all the relevant provisions of the insurance policy which bear upon the quantification of this business interruption claim. They are found under the Profits, Actual Loss Sustained Extension provisions as follows:

INSURING AGREEMENT

This Form insures against actual loss sustained directly resulting from necessary interruption of business caused by destruction or damage by the perils insured against to the property insured.

MEASURE OF RECOVERY

This insurance is limited to the actual loss sustained by the Insured for loss of "gross profit" due to (a) reduction in "turnover" and (b) increase in cost of working and the amount payable shall be:

(a) in respect of reduction in "turnover": The sum produced by applying "rate of gross profit" to the amount by which the "turnover" during the "indemnity period" shall, in consequence of the destruction or damage by a peril insured against, fall short of the "standard turnover".

(b) in respect of increase in cost of working: The additional expenditure (subject to paragraph (b) of Clause 4) necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in "turnover" which, but for that expenditure, would have taken place during the "indemnity period" in consequence of the destruction or damage by a peril insured against, but not exceeding the sum produced by applying the "rate of gross profit" to the amount of the reduction thereby avoided;

less any sum saved during the "indemnity period" in respect of such of the "insured standing charges" as may cease or be reduced in consequence of the destruction or damage by the perils insured against.

Additionally, this insurance covers reasonable fees payable to the Insured's auditors for producing and certifying particulars or details of the Insured's business required by the Insurer in order to arrive at the loss payable under this Form in the event of a claim.

TURNOVER: means the money paid or payable to the insured for goods sold and delivered and for services rendered in course of the business at the premises.

STANDARD TURNOVER: means the "turnover" during that period in the twelve (12) months immediately before the date of the destruction or damage by perils insured against which corresponds with the "indemnity period"; to which such adjustments shall be made as may be necessary to provide for the trend of the business and for variations in or special circumstances affecting the business either before or after the destruction or damage by perils insured against or which would have affected the business had the destruction or damage by perils insured against not occurred, so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the destruction or damage by perils insured against would have been obtained during the relative period after destruction or damage by perils insured against.

RATE OF GROSS PROFIT: means the "rate of gross profit" earned on the "turnover" during the financial year immediately before the date of the destruction or damage by perils insured against; to which such adjustments shall be made as may be necessary to provide for the trend of the business either before or after the destruction or damage by perils insured against or which would have affected the business had the destruction or damage by perils insured against not occurred, so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the destruction or damage by perils insured against would have been obtained during the relative period after the destruction or damage by perils insured against.

<u>INDEMNITY PERIOD</u>: means the period beginning with the occurrence of a peril insured against and ending no later than twelve (12) months thereafter during which the results of the business shall be affected in consequence of the destruction or damage by a peril insured against.

[19] It is in the interpretation and application of the foregoing policy provisions that the two overall primary issues of dispute arise. They have been framed as follows:

(a) How long were the plaintiff's business results affected by the loss?

(b) What is the quantification of the loss during that time period?

<u>INDEMNITY PERIOD</u>

[20] I turn first to the determination of the length of the Indemnity Period upon which the quantification of the business interruption loss is to be based.

[21] The insurance policy clearly sets out that the length of the Indemnity Period is limited to the period of time during which the <u>results</u> of the business are affected in consequence of the damage by a peril insured against (up to a maximum of 12 months). The Oxford Dictionary defines "result" in the business sense as "the outcome of a business' trading over a given period, expressed as a statement of profit or loss".

[22] The position of the defendant is that the Indemnity Period should end in early January of 2004, based on its submission that the direct impact of the hurricane damage then ceased to affect the business results. The defendant argues that by that time VDC had returned to its restored business premises and was again fully operational to the point where its sales revenue in the first quarter of 2004

was back to a normal level. To allow a bit more leeway, however, the financial expert retained by the defendant, Ms. Susan MacMillan of the Grant Thornton firm, based her business loss quantification analysis on alternate indemnity periods of six months and nine months respectively.

[23] The position of VDC is that the Indemnity Period should extend to the full maximum 12 months following the hurricane. This position is taken primarily because of the nature of the business and the extended business development process it entails, together with the fact that the sales revenue of the company did not rebound to normal levels overall until an upswing which began in the last quarter of 2004 (i.e., more than 12 months after the hurricane).

[24] VDC's position in this regard was endorsed by its own financial expert, Nikki Robar of the Price Waterhouse Coopers firm, who accordingly performed her quantification of loss analysis based on a 12 month indemnity period. The evidence of both these financial experts will be reviewed in detail later in this decision.

[25] The nature of the business and its related client development process is a very important factor in the determination of the appropriate indemnity period. Mr. Oram testified at length about his approach in client development, a function for which he is solely responsible on behalf of VDC. He explained that VDC's business mix usually consists of four or five large accounts (i.e., producing sales revenue greater than $100,000) combined with several smaller accounts (there were a total of approximately 38 accounts existing at the time of the loss). He

described the industry as being very competitive where it is contract based and that there is a constant business development requirement.

[26] Mr. Oram went on to explain the process, particularly in the recruitment of clients with large accounts, which he is constantly engaged in. It begins with the identification of who prospective clients might be and then gaining an understanding of their business needs before setting up a meeting with the decision maker to make a presentation. Significant follow up is then required in hopes of landing the new work and essentially selling VDC to a prospective client to grow their business. As Mr. Oram put it, its all about personal relationships in his business and it takes time to build those relationships and gain the trust of clients. He said that typically, it takes 10 to 12 months or more to land a large client.

[27] This important feature of the business was underscored in the evidence on behalf of the plaintiff as an explanation in large part for the delay in the beginning of the upswing in VDC's sales revenue until the last quarter of 2004 (and which continued to rise thereafter). The evidence on behalf of VDC (including that of Ms. Robar) indicated that the relatively good results in the first quarter of 2004 were predicated upon the billings for the work in progress which the company had on the go before the hurricane struck. That appears to be a reasonable conclusion for the court to make.

[28] I interject here reference to the submissions made by the defendant that the lower sales figures for VDC during the middle two quarters of 2004 were attributable to other causal factors, namely, the turnover of two key staff positions above mentioned and the fact that VDC experienced further damage to its building in June of 2004. That damage occurred when a leaking pipe in the upstairs bathroom during off business hours resulted in a sizeable escape of water which, for the most part, gravitated to the downstairs level.

[29] I am not persuaded that either of these intervening events were the cause, or materially contributed to, the depressed sales figures for VDC during the middle two quarters of the calendar year 2004. Although the court recognizes that there was a turnover in two key staff positions in early 2004, both were quickly replaced without any further fallout. With respect to the June, 2004 water damage occurrence, I accept the evidence of Mr. Oram and his wife Renee Oram (who also worked for VDC performing general office manager duties) that business operations were largely unaffected by it. Their uncontradicted testimony was that approximately 90% of the damage was confined to the downstairs level and thereby did not seriously affect the main working areas of the company which were on the second floor. Although the necessary repair work extended over five to six weeks, it was well handled in its remediation and Mr. Oram described it as more of an annoyance than a disruption. This occurrence did not give rise to another business interruption loss claim by VDC.

[30] After considering all the evidence on this point, I have reached the conclusion that the proximate cause of the reduction in sales revenue by VDC during the last quarter of 2003 and the first three quarters of 2004 was the prolonged effect of the hurricane damage. It understandably took a full year before the sustained upswing in sales revenue began, with the time and effort necessary for Mr. Oram to regain his creativity mode and to rebuild client relationships.

[31] As will be noted later in this decision, VDC was in a growth stage up until the time of the hurricane. It regained that growth trend in early 2005 and beyond. I am accordingly lead to the conclusion that the results of the business were adversely affected by reason of the hurricane damage for the full 12 month maximum Indemnity Period.

QUANTIFICATION OF BUSINESS INTERRUPTION LOSS DURING THE INDEMNITY PERIOD

Intent and Operation of the Policy

[32] The intent of the insurance policy is to replace lost gross profits that VDC would likely have earned during the appropriate indemnity period had the hurricane damage not occurred. That requires a determination, under s.2(a) of the Profits, Actual Loss Sustained Extension above quoted, of the "reduction in turnover". "Reduction in turnover" is explained as the sum produced by applying "rate of gross profit" to the amount by which the "turnover" during the indemnity period falls short of the "standard turnover" by reason of the hurricane damage.

[33] "Turnover" can be more simply defined as meaning "lost sales revenue".

[34] The starting point therefore in the quantification of this loss is the calculation of "standard turnover". The goal of this calculation is simply to enable the projection of sales revenue that VDC would have earned during the indemnity period had the hurricane damage not occurred.

[35] There are essentially two steps in performing the calculation of "standard turnover", namely:

(1) Determining the actual revenue during the year prior to the hurricane damage; and

(2) In projecting the sales revenue that VDC would have earned during the subsequent indemnity period had the hurricane damage not occurred, making adjustments to the prior year's actual revenue to reflect:

(a) trend of the business, and

(b) special circumstances affecting the business.

[36] Therein lies the foremost difficulty in this case. The parties are totally at odds as to how the actual revenue from the year prior to the hurricane should be adjusted or "normalized" to arrive at the appropriate "standard turnover" which in turn is used to project the sales revenue that VDC would have earned during the subsequent indemnity period but for the hurricane damage. At the heart of this difficulty is how to adjust the revenue from an abnormally large printing contract which VDC had obtained from Fuji Photo Film USA Inc. ("Fuji") which was substantially performed during the year immediately prior to the loss.

The Fuji Contract

[37] After 10 to 12 months of cultivating Fuji as a client, according to the evidence of Mr. Oram, VDC finally landed a large contract from Fuji for its *"Get the Real Picture"* promotion (in association with Wal-mart). This was a promotion for the conversion of digital photos to print form and although it did include some design work by VDC, it consisted mostly of printing work which VDC contracted out to a company named Print Atlantic.

[38] The total sales revenue from this contract to VDC (which really consisted of a series of six or seven contracts related to this one promotion) amounted to $741,825 in the year immediately preceding the loss (i.e., October, 2002 to September, 2003). In addition, VDC realized sales to Fuji of $31,560 in the period from October, 2001 to September, 2002 and a further amount of $34,644 in the period from October, 2003 to September, 2004. This lucrative contract resulted in a year over year sales increase for VDC of $620,784 (i.e., from total sales revenue of $576,733 for the 12 months ending September, 2002 to the level of $1,197,517 for the 12 months ending in September, 2003 (when the hurricane damage occurred).

[39] Shortly before the hurricane struck, Mr. Oram was hopeful of landing another such large contract from Fuji consisting primarily of printing work. He was contacted by a Fuji representative who asked him to obtain a quote for the associated printing costs. Mr. Oram obtained the requested quote from Print Atlantic on September 9, 2003 (20 days before the hurricane struck) which came in at the grand total of $1,146,393. Mr. Oram relayed this figure to Fuji who

thought it was on the high side but indicated they would take it under consideration, perhaps using a lower volume to meet their budget from Wal-mart.

[40] Before anything further developed with respect to that proposed work, Hurricane Juan struck and the proposed contract never came to fruition. Mr. Oram was never advised of the reason why the contract did not materialize but suspects it may have been related to the hurricane damage of which Fuji was aware and may have been concerned about meeting its deadlines with Wal-mart.

[41] With the sales revenue from Fuji falling to the level of $34,644 in the subsequent 12 month period, and with the hurricane damage to contend with, VDC's sales revenue for that period shrunk to approximately $400,000. VDC has not been successful in obtaining any further work from Fuji since that time.

Determination of Lost Gross Profit During Indemnity Period

[42] All of the financial information in support of the plaintiff's business interruption claim was gathered and provided by Mr. Boyd Hunter. Mr. Hunter is a Chartered Accountant and Certified Financial Planner with the firm of Hunter Belgrave Adamson with more than 30 years experience.

[43] Mr. Hunter has done all the accounting work for VDC for about 20 years, preparing their annual financial statements, tax returns and other financial planning work. In the wake of Hurricane Juan, he was engaged by VDC to put together all the financial information pertinent to this claim and to prepare a calculation of the business interruption loss.

[44] Mr. Hunter also performed a second role in acting as the lead communicator in the presentation of the claim on behalf of VDC. Indeed, it was Mr. Hunter who prepared and submitted the Proof of Loss for consideration by RSA. That document is signed by Mr. Oram under date of December 13, 2005 and presents a business interruption claim for loss of gross profit in the approximate amount of $350,000 (after interim calculations were earlier provided by Mr. Hunter to Grant Thornton). That amount was rejected by RSA.

[45] It should be noted that Mr. Hunter did not testify in the capacity of an expert witness. Rather, he was called to testify in his capacity as the accountant for VDC to recount his close involvement in this matter throughout.

[46] There is no dispute in this case over the actual sales revenue figures for VDC in the relevant periods both before and after Hurricane Juan. Neither is there any material dispute over the veracity of any of the financial data provided by Mr. Hunter. It is also common ground that the same financial data was provided by Mr. Hunter to both parties and their respective financial experts for purposes of quantifying the business interruption loss.

[47] It is not necessary for purposes of this decision to give a detailed account of Mr. Hunter's involvement on behalf of VDC. Suffice it to say by way of overview that he provided financial information and interim calculations to Grant Thornton starting in June, 2004 and first met with Ms. MacMillan, RSA's expert witness, in March of 2005. Thereafter, he continued to provide additional financial information as directed.

[48] Similarly, Mr. Hunter provided the same financial data and information to Price Waterhouse Coopers, the experts retained by VDC. The individual in that firm initially retained was Mr. Lawrence Cosman in New Brunswick who prepared an expert report quantifying the business interruption loss. However, when it became known that Mr. Cosman would be unable to testify at trial for medical reasons, VDC retained Nikki Robar at the Price Waterhouse Cooper office in Halifax.

[49] It should be mentioned that on a contested motion before the court at the outset of the trial, it was ruled that although Mr. Cosman's expert report was not admissible under Civil Procedure Rule 55 for purposes of expressing an expert opinion (nor was it sought to be), it was admissible for the limited purpose of use by the defendant in cross-examination of the plaintiff's witnesses. The plaintiff intended to rely only on the expert report of Ms. Robar.

[50] The expert qualifications of both Ms. MacMillan and Ms. Robar were consented to by both counsel respectively and accepted by the court. Ms. MacMillan was qualified as an expert in forensic accounting, capable of giving opinion evidence on the quantification of the plaintiff's business interruption loss. Ms. Robar's area of expertise was described slightly differently as an expert in business valuations and the quantification of business and financial loss, capable of giving opinion evidence on the quantification of the plaintiff's business interruption loss.

[51] These two experts chose very different methodologies in their respective quantifications of the plaintiff's business interruption loss. The methodology chosen by Ms. MacMillan produced a loss amount ranging between $371 and $37,536 depending on the length of the indemnity period (six months versus nine months). In contrast, the methodology chosen by Ms. Robar produced a loss amount ranging from $220,306 to $356,134 depending on the choice between three alternate sets of assumptions. All three alternate scenarios were predicated, however, on an indemnity period of 12 months.

[52] I will first review the methodology utilized by Ms. MacMillan. She began by analysing VDC's total sales for the three years prior to the date of loss (October, 2000 to September, 2003) and for the one year following (October, 2003 to September, 2004). These 12 month periods are tied, of course, to the date of the occurrence of the hurricane rather than the company's fiscal year end of January 31st. These sales figures are set out below:

12 Month Period	**Total Sales**
October 2000- September 2001	$ 418,942
October 2001- September 2002	$ 576,733
October 2002- September 2003	$1,197,517
October 2003- September 2004	$ 405,483

[53] Ms. MacMillan then looked behind these figures by examining the Customer Sales Analysis prepared by Mr. Hunter which allowed her to determine what business VDC had on the go on a contract-by-contract basis. Her objective

was to analyse what existing contracts VDC had and what business they couldn't get because of the hurricane damage. In respect of the latter, Ms. MacMillan looked at the following three categories:

(1) Any existing work that was unable to be completed;

(2) Any loss of business by reason of poor quality of work occasioned by the hurricane damage; and

(3) Any lost business opportunities for new business that VDC was developing.

[54] VDC acknowledges that all current work projects existing as of September 29, 2003 were eventually completed and billed. VDC also does not assert that it lost any customers by reason of poor quality of work resulting from the hurricane damage. It is in respect of the third category above noted where the parties fundamentally differ.

[55] With the exception of a prospective contract with Kraft (Quebec) where VDC had been asked to make a presentation by an October, 2003 deadline which it was unable to meet, Ms. MacMillan stated that VDC was unable to identify or prove any other specific new business that was lost during the indemnity period. In determining her Standard Turnover figure, therefore, that was the only new projected sales revenue that she made an adjustment for in the indemnity period, which was valued at $135,000.

[56] Ms. MacMillan then went on to make a further significant adjustment for the abnormally large sales figure derived from the Fuji contract above described between October, 2002 and September, 2003. Despite the ongoing discussions

which Mr. Oram was having with the Fuji representative in September of 2003 about further business (as evidenced by the September 9, 2003 quote from Print Atlantic above recited), Ms. MacMillan concluded that there was no support that VDC would have procured a similar volume of new work from Fuji or any other customer in the following 12 month period. She therefore considered it unreasonable to use the previous year's Fuji sales to project future sales had the incident not occurred. Accordingly, in order to normalize sales, she adjusted the sales revenue for the Fuji contract in a manner that she considered to more accurately reflect business patterns during the 12 month period before and after the incident.

[57] The adjustment she made was to back out the entirety of the sales revenue from Fuji and then add back in 15% of the 2002-2003 sales figure of $741,825 (i.e., $111,274) based on the assumption that that would adequately allow for the design fee component of the total sales revenue from Fuji. The selection of 15% was somewhat arbitrary but was generally based on Ms. MacMillan's overall review of the financial data available to her.

[58] After making this adjustment as a "special circumstance affecting the business" under the definition of Standard Turnover, Ms. MacMillan arrived at a total adjusted sales figure from October, 2002 to September, 2003 as follows:

Actual Total Sales	$1,197,517
Less Fuji Sales	$ 741,825
Add 15% design fees	$ 111,274

Total Adjusted Sales $ 566,966

[59] These adjusted figures for the year immediately preceding the hurricane were then used in forecasting sales revenue for the post-hurricane indemnity period.

[60] Having thus calculated a total adjusted sales figure of $566,966 as the Standard Turnover, which was broken down month by month from October, 2002 to September, 2003, Ms. MacMillan compared that with the actual sales figures using alternate indemnity periods of six months and nine months.

[61] Under the six month scenario, the Reduction in Turnover (lost sales) amounted to only $577. After then applying a rate of gross profit of 64.37% (using the adjusted sales figure of $566,966), the calculated loss payable to VDC works out to a mere $371.

[62] Using the nine month scenario, the Reduction in Turnover (lost sales) for that indemnity period amounted to $58, 316. After then applying the rate of gross profit similarly calculated at 64.37%, the calculated loss becomes $37,536.

[63] In my view, the methodology utilized by Ms. MacMillan is far too narrow to adequately forecast the loss of sales revenue by VDC following the hurricane. A customer by customer sales analysis should certainly be part of the analytical process but in and of itself, that singular approach does not in my view adequately take into account the growth trend of the business. The problem is that an insured

in such an industry as this cannot be expected to fully identify or prove what business it didn’t get on a contract by contract basis. There may well have been other lost business opportunities during the indemnity period which VDC would have no way of knowing about. Accordingly, I consider it appropriate to take more of a global approach by examining the overall trend of the business.

[64] Taking a big picture view here, VDC experienced a growth in sales revenue in every year for which we have financial information available (i.e., 2000-2006) except for the year immediately following the hurricane. That is well illustrated by a graph prepared by Ms. Robar entered as Exhibit 16.

[65] I am of the opinion that Ms. MacMillan’s methodology does not give adequate recognition to this growth trend. Indeed, her adjusted sales figure of $566,966 for October, 2002 to September, 2003 (which is used to project lost sales in the indemnity period) is less than the actual sales figure for the preceding year from October, 2001 to September, 2002. Even if the modest Fuji revenue for that year is backed out of that figure, Ms. MacMillan’s adjusted sales figure of $566,966 still represents virtually zero growth from that year to the next.

[66] Another trend not adequately taken into account, in my view, is the growth in printing revenue which was being realized by VDC (even after adjusting for the abnormally large Fuji contract). The data shows that the printing revenue for VDC between 2000 and 2004 was averaging between 25-30% of its total revenue. It is recognized, however, that there is no direct correlation between printing revenue and other revenues.

[67] For the reasons earlier stated, neither do I accept Ms. MacMillan's selection of alternate indemnity periods of six months and nine months respectively. I have already found as a question of fact that the appropriate indemnity period in this case should be the maximum of 12 months.

[68] For all these reasons, I reject the business loss calculation prepared by Ms. MacMillan ranging from $371 to $37,536 as being unacceptably low.

[69] I turn now to a review of the methodology used by Ms. Robar in the quantification of this loss.

[70] First of all, Ms. Robar concluded, and the court has so found, that the appropriate indemnity period is the full 12 month maximum allowed by the policy. Ms. Robar was led to that conclusion for essentially the same reasons set out and adopted earlier in this decision.

[71] Ms. Robar affirmed that the objective here is to try to predict the sales performance that VDC would have achieved during the indemnity period but for the hurricane damage. To that end, she did not focus on a customer by customer sales analysis as did Ms. MacMillan. She considered the proper analysis to be broader than that and one that should be based on discerning current trends of the business from its financial history. I have already indicated earlier in this decision that I consider that to be a generally preferable approach to the quantification of this loss.

[72] In getting down to specifics, Ms. Robar began by separating revenue from printing contracts from total revenue to help identify VDC's business trends. She noted that the historical average level of printing revenue was approximately 29% of total operating revenue (over the period from October 1, 2000 to September 30, 2002). She also noted the distinct nature of the printing gross profit, relevant to the other gross profit of the company.

[73] Ms. Robar also recognized the sales revenue from Fuji during the year prior to the hurricane as being unusually large and therefore requiring normalization in arriving at an appropriate Standard Turnover figure. Ms. Robar took a very different approach, however, in making that smoothing adjustment. She normalized the total operating revenue to remove the impact of the unusually high printing revenue from Fuji during the year prior to the hurricane by dividing the normalized operating revenue (excluding printing) by 71% (the mirror of the 29% figure above mentioned).

[74] Ms. Robar then set out in her report three alternate measures of Standard Turnover described as Scenarios 1, 2 and 3. Under Scenario 1, she applied a growth rate of 26.1% (taken from the 12 month period ending September 30, 2002) to the operating revenue (excluding printing) between October 1, 2002 and September 30, 2003 to arrive at a forecast operating revenue (before printing). She then divided that figure by 71% to arrive at the normalized total operating revenue. This scenario assumes that potential growth would have been achieved in the absence of the Fuji contract.

[75] The specific calculation is presented as follows:

Actual Operating Revenue before printing (October 2002 - September 2003)	$445,295
Growth Factor	x 26.1%
Forecast Operating Revenue before printing during indemnity period	$561,417
Percentage of all other revenue	÷ 71%
Standard Turnover figure (Scenario 1)	$790,727
Less: actual total revenue during indemnity period	($396,325)
Reduction in Turnover	$394,402
Rate of gross profit	x 55.9%
Lost gross profit	$220,306

[76] This calculation of lost gross profit then becomes the forecast for the business interruption loss during the following 12 month indemnity period.

[77] Scenarios 2 and 3 prepared by Ms. Robar produce even higher figures for lost gross profit during the indemnity period. Under Scenario 2, Ms. Robar calculated that the Standard Turnover amount of $790,727 represented a 41.4% growth when compared to the actual total sales for the prior 12 month period. She then applied this growth rate to VDC's sales revenue excluding printing between October 1, 2002 and September 30, 2003 to arrive at a forecasted sales revenue

before printing of $629,564. The latter figure was then divided by 71% (as in Scenario 1) to arrive at an alternate measure of Standard Turnover of $886,710. That in turn produces a lost gross profit figure of $273,920 after deducting the actual sales revenue during the indemnity period and applying the same rate of gross profit.

[78] This scenario is designed to account for the potential growth that may have been achieved if VDC had grown at a rate similar to its prior years growth, after excluding unusual printing revenue from the Fuji contract.

[79] Under Scenario 3, the projected loss of gross profit during the indemnity period was based on the actual results during the year immediately prior to the loss without any normalizing adjustments being made. This method of calculation produced an alternate Standard Turnover amount of $1,219,212. That in turn produces a lost gross profit figure of $356,134 during the indemnity period after making the deduction for actual sales revenue and applying the same rate of gross profit as aforesaid.

[80] This scenario is premised on the possibility that VDC could have achieved a similar total sales result during the indemnity period as it had the year before, had the hurricane damage not occurred.

[81] On reflection, I have discarded both Scenarios 2 and 3 and the numbers thereby produced. Simply put, they are based on assumptions which in my view are excessively favourable to VDC in trying to forecast what its total sales revenue

would have been during the indemnity period had the hurricane damage not occurred. By extension, I also reject the notion that the appropriate loss of gross profit amount should be settled by taking a simple averaging of the figures produced under the three scenarios.

[82] It is trite to say that there is no perfect methodology when it comes to forecasting the volume of business a company would have done but for the interruption of its business by a hurricane. Such forecasting, by its very nature, is an imprecise exercise. Given the expert opinion evidence which is before the court, however, I am drawn to the conceptional approach taken by Ms. Robar under Scenario 1. It is that approach which properly takes into account the specific nature of VDC's business and client development process above described, as well the growth trend of the business on both the printing and non-printing revenue sides. As Ms. Robar put it in her testimony, this business was growing and the momentum from two to three years of prior growth was lost by reason of the hurricane damage.

[83] This approach also reasonably takes into account the required normalization of the unusually high printing revenue from the Fuji contract during the year prior to the loss. It may be open to criticism that the calculation incorporates the 29% historical average level of printing revenue compared to total sales revenue where it is conceded that there is no direct correlation between the two in VDC's business operations. However, it is indicative of a growth trend that needs to be reflected in taking a broader approach.

[84] There is, however, one component of Ms. Robar's calculation in Scenario 1 which, in my view, requires a further adjustment. That component is the growth rate of 26.1% which was utilized in the foregoing calculation to forecast sales revenue before printing during the indemnity period.

[85] In the first draft of her report, Ms. Robar used (under Scenario 1) a two year growth factor of 22% in respect of non-printing revenue. However, when that draft was reviewed by Mr. Hunter, he pointed out that that number was flawed because it penalized VDC for having booked some of its design fees in its printing revenue category. In other words, there was some design fee revenue that wasn't properly being taken into account in this calculation.

[86] On reflection, Ms. Robar considered that to be a meritorious comment. She therefore decided to adopt the single year growth rate for non-printing revenue of 26.1% from October , 2001 to September, 2002. She regarded that as a "clean period" which reflected the recent trend of the business on a normalized basis.

[87] In my view, the recent trend of the business ought to take into account the year immediately preceding the loss as well as the year before that, despite the complications in doing so. I note from Schedule 5 to Ms. Robar's report that the growth rate in non-printing revenue between the second year prior to the loss and year immediately preceding the loss was 14.5%. This produced a Compound Annual Growth Rate from October, 2002 to September, 2003 of 20.1%.

[88] Without putting too fine a point on an imprecise exercise, I have concluded that a fair and reasonable growth rate for non-printing revenue to be applied in this calculation is a rounded 20%. When that growth rate is plugged into the calculation set out earlier in this decision, it produces a Standard Turnover amount of $752,611. That in turn produces a lost gross profit figure of $199,164 after deducting the actual sales revenue during the indemnity period and applying the same rate of gross profit.

[89] In the result, I have reached the conclusion that the lost gross profit payable by RSA to VDC in accordance with the terms of the insurance policy is the rounded sum of $200,000.

Increased Cost of Working

[90] As recited earlier, the measure of recovery under the insurance policy includes increased costs of working, that is to say, additional expenditures necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in turnover.

[91] Because of the hurricane damage, VDC incurred such additional expenditures for work performed by Mr. Scott Faulkner in the areas of production and design. That additional expenditure came to a total amount of $12,240, liability for which is not contested by RSA.

Professional Fees Incurred

[92] The measure of recovery under the RSA policy also includes reasonable fees paid to the insured's auditors for producing and certifying particulars or details of its business as required to determine the loss payable.

[93] Over the nine year life of this claim, VDC has incurred professional fees and disbursements from Mr. Hunter in excess of $30,000. Of that amount, RSA has only paid to date the sum of $6,250 under this coverage.

[94] RSA's position at trial was that it was not responsible to pay for Mr. Hunter's time which he spent in the role as an advocate on behalf of VDC as opposed to gathering and supplying financial data. It therefore submitted that an overall reasonable amount to be paid under this coverage was $20,000 (i.e., an additional $13,250).

[95] Mr. Hunter's evidence, which I accept, is that the vast majority of the sums billed represents time and expense for gathering and supplying financial information for RSA. Furthermore, it is in my view too artificial a line to draw to justify any attempt to carve out from these billings Mr. Hunter's time spent in advocating this claim to RSA. I therefore allow VDC recovery of the full $25,000 maximum under this category of coverage.

CONCLUSION

[96] The court is satisfied that the plaintiff has met its evidentiary burden to prove a business interruption loss in the aggregate amount of $230,990. It shall therefore have judgment against RSA in that amount.

[97] In addition, the plaintiff is entitled to recover pre-judgment interest on this amount at the annual rate of 5%. Where the evidence is that RSA had received all the additional financial data and information that it required by the middle of January, 2009, the pre-judgment interest period shall run from thirty (30) days thereafter (i.e., February 16, 2009) to the date of judgment.

[98] The plaintiff shall also be entitled to its costs of this proceeding. If the parties are unable to agree on the quantum of costs, the court is prepared to receive written submissions within the next thirty (30) days.

J.