COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Trans North Turbo Air Ltd. v. North 60 Petro Ltd.***,
2004 YKCA 9

Date: 20040615
Docket: YU00497

Between:

Trans North Turbo Air Limited

Respondent
(Plaintiff)

And

North 60 Petro Ltd., Patrick O'Hagan and Brian Larkin

Appellants
(Defendants)

- and -

Between:

Robert Brian Cameron

Respondent
(Plaintiff)

And

North 60 Petro Ltd., Patrick O'Hagan and Brian Larkin

Appellants
(Defendants)

- and -

Between:

Almon Landair Ltd.

Respondent
(Plaintiff)

And

North 60 Petro Ltd., Patrick O'Hagan and Brian Larkin

Appellants
(Defendants)

- and -

Between:

Summit Air Charters Ltd.

Respondent
(Plaintiff)

And

North 60 Petro Ltd., Patrick O'Hagan and Brian Larkin

Appellants
(Defendants)

Before: The Honourable Mr. Justice Smith
The Honourable Mr. Justice Thackray
The Honourable Mr. Justice Lowry

R. B. Davison, Q.C. and B. Churchill-Smith, Q.C.	Counsel for the Appellants
R. P. Saul and D. G. Pankratz	Counsel for the Respondent, Trans North Turbo Air Ltd. and Robert Brian Cameron
P. R. Chomicki, Q.C.	Counsel for the Respondents, Almon Landair Ltd. and Summit Air Charters Ltd.
Place and Date of Hearing:	Vancouver, British Columbia May 17, 18 and 19, 2004
Place and Date of Judgment:	Vancouver, British Columbia June 15, 2004

Written Reasons by:
The Honourable Mr. Justice Lowry

Concurred in by:
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Thackray

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] On 18 January 1999, a 50 year old aircraft hangar on the Whitehorse airport was destroyed by fire. This appeal is taken from orders for judgment in four actions entered after a three month trial before Mr. Justice Veale awarding damages with pre-judgment interest as well as increased and double costs to the owner of the hangar and others against those found responsible for the fire. Challenges to both liability and the assessment of damages are advanced based on the absence of sufficient evidence to support the judge's factual conclusions. The awards of pre-judgment interest and costs are said to have been a wrongful exercise of the discretion afforded a trial judge under the governing legislation and court rules in effect.

[2] I begin with a brief outline of the case that was tried and then proceed to address each of the grounds of appeal that are raised.

The Case Tried

[3] Trans North Turbo Air Limited (TNTA) is a long-established helicopter operator in the Yukon, British Columbia, and the Northwest Territories. The hangar was the centre of its operations from the time it acquired the building in 1970.

Seven of its twelve helicopters as well as a large inventory of parts, accessories, equipment, and tools were destroyed in the fire. The disruption to the company's business was, to say the least, devastating. Losses were also suffered by its tenant, Summit Air Charters Ltd. ("Summit"), as well as by Almon Landair Ltd. ("Almon") and Robert Cameron whose aircraft were in the hangar.

[4] North 60 Petro Ltd. ("North 60") leased space in the hangar until a few months before the fire. It erected a large sign on what is referred to as a flat part of the roof at the southeast corner of the building. On the day of the fire, two of its employees removed the sign. They used an oxyacetylene torch, producing an intense shower of sparks and slag at 2500 to 3000 degrees Fahrenheit, to cut the nuts off of two bolts. The torch was directed downwards about 18 inches from the surface of the roof while the cutting was done.

[5] The bolts secured a metal saddle supporting the sign to two six-by-six wood posts that protruded through the roof. The posts were affixed to the roof's supporting members below. The roof was constructed of fir wood overlaid with donnaconna board which is a highly combustible wood product that, when ignited, is capable of smouldering for long periods of time. The donnaconna board was in turn covered with sheets of a

petroleum-based roofing material that was underlaid with a tar-based adhesive resulting in a weatherproof covering that was itself combustible to some extent.

[6] The two employees were on the roof for about one hour. Five and one-half hours later, the building was engulfed in flames.

[7] TNTA took the lead in conducting the case for the plaintiffs at trial. It contended that North 60's employees were negligent in the way they used the torch and that they caused the fire. North 60 defended on both counts maintaining that its employees were not negligent and contending that there was an alternative cause for the fire or that the cause was unknown. A large volume of expert evidence was adduced on both sides particularly with respect to causation. The judge found that the two employees were negligent in failing to follow codified safety precautions to avoid starting a fire when using an oxyacetylene torch. He then found that, although no one could say with scientific certainty how the fire was started, it was open to him to conclude on the evidence that the employees of North 60 had ignited the roof with the torch. He held North 60 and its employees liable in the result.

[8] TNTA was awarded $12,216,284 in damages. Some $5.59 million of its claim was agreed. At issue was the amount sought in respect of three aspects of the claim: the loss of the hangar, the loss of parts and accessories, and the loss suffered as a consequence of the interruption of the company's business. The damages claimed by other than TNTA were agreed at $1,160,500 (CAD) plus $675,000 (USD).

[9] Judgment on liability and the assessment of damages was rendered on 27 March 2003 and is the subject of the first part of this appeal: 2003 YKSC 18.

[10] The judge awarded pre-judgment interest and costs to be taxed on Scale 5 but gave liberty to make further application. The parties were at odds on the rate of pre-judgment interest in particular and on the appropriate scale of costs, so application was made. North 60 maintained that the judge should exercise the discretion he had under the governing legislation to fix a lower rate of pre-judgment interest than would otherwise prevail. TNTA and Mr. Cameron, who were jointly represented, contended that they should have special or increased costs. All of the plaintiffs except Summit had made offers of settlement before trial that were less than the damages awarded so all sought an award of double costs, for which the ***Rules of Court*** provide.

[11] The judge declined to fix a lower rate of pre-judgment interest but he saw fit to order increased costs in favour of TNTA and Mr. Cameron. He proceeded, apparently without being asked, to fix their costs at 70% of $825,000, which TNTA and Mr. Cameron claimed to be their special costs. In so doing, he foreclosed any taxation, and any opportunity for North 60 to challenge the amount, of the special costs. Further, he held that all of the plaintiffs except Summit were entitled to double costs as well as double disbursements from the date of each offer to settle. Finally, he decided that, because TNTA and Mr. Cameron on the one hand, and Summit and Almon on the other, were separately represented, North 60 should pay two sets of costs.

[12] Judgment on the issues of pre-judgment interest and costs was rendered on 5 June 2003 and is the subject of the second part of this appeal: 2003 YKSC 26.

The Cause of the Fire

[13] North 60 does not contend that there is any basis for disturbing the finding that its employees were negligent. Its case on this appeal in respect of liability is confined to contending that it was not open to the judge to conclude that the employees caused the fire with the use of the torch on the roof. North 60 takes the position that the cause of the fire

may have been electrical in nature or that the cause is unknown. North 60 maintains that holding that its employees started the fire requires speculation going well beyond any proper inference that can be drawn from the evidence when it is common ground that no part of the building was seen by anyone to be on fire until just before it was completely engulfed in flames some five and one-half hours after the torch had been used.

[14] At trial, TNTA relied on the videotape recorded by a surveillance camera positioned on the airport terminal building across the airfield from the hangar to fix the location of the origin of the fire as being the base of the sign that was removed. Expert evidence was called on both sides to interpret the images recorded. The experts disagreed as to what could be taken from the recording on any scientific basis, but the judge found that intermittent luminous flashes are evident. They commence about three and one-half hours after North 60's employees left the roof and continue for two hours thereafter until the roof can be seen to be in flames. The judge found that the flashes appear at the precise location of the sign. At the hearing of this appeal, North 60 quite fairly states that the judge's findings in this regard are not being challenged.

[15] TNTA then advanced a theory as to how the fire was actually started. It adduced expert evidence to establish that the sparks and slag from the torch ignited the donnaconna board and that, once ignited, the donnaconna board smouldered for a period of hours until the fir wood beneath it was ignited and the fire burst into open flame spreading upwards to the barrel or main part of the hangar roof. The sparks and slag were said to have gained access to the donnaconna board through cracks in the roofing material or, more particularly, through gaps between the roofing material and the six-by-six wood posts that supported the saddle on which North 60's employees used the torch. Various opinions were adduced to support different aspects of this theory, but it was advanced in totality by an expert in the origin, cause, and spreading of fires. The judge preferred the evidence of TNTA's expert witnesses over those called by North 60 who expressed contrary opinions that bore on TNTA's theory of causation.

[16] In essentially accepting TNTA's theory, the judge concluded, at paragraph 230, in material respects:

> There was opportunity for the sparks or slag from the oxyacetylene torch to come into contact with and ignite the donnaconna and fir board of the southeast corner roof through gaps or cracks in the petroleum-based cover.

[17] It is this specific finding of fact that North 60 now maintains is not supported by the evidence. It says that there is no evidence of any cracks or gaps in the roofing material from which this fact can be inferred. It says further that, without proof of this fact, the opinion on the origin and cause of the fire, upon which TNTA relied, is flawed and carries no weight, citing ***R. v. Abbey***, [1982] 2 S.C.R. 24, 138 D.L.R. (3d) 202, [1983] 1 W.W.R. 251.

[18] I can say at once that I consider any frailty there may be in TNTA's theory of the way in which the fire was actually started is of little consequence. The video surveillance recording establishes that the flat part of the roof at the southeast corner of the building was burning three and one-half hours after the employees left the roof, and at the precise location where the torch had been used. Given that the luminous flashes are evident for two hours before any other indication of fire is recorded, no reasonable alternative origin of the fire can be suggested. The only logical inference to be drawn is that, by some means, the use of the torch ignited the roof that was made of combustible materials. That is not a matter of speculation. It is an inescapable conclusion.

[19] I do not consider it was necessary that TNTA prove by positive evidence that there were cracks or gaps in the roofing material, nor was it necessary that the opinion as to the origin, cause, and spread of the fire be accepted. Once it was established that the roof containing donnaconna board, which could smoulder for a long time, was burning some hours after the employees of North 60 had negligently used an oxyacetylene torch at the precise location where the burning occurred, it was open to the judge to conclude that an opportunity for the sparks and slag to ignite the donnaconna board must have existed.

[20] What Lord Wright said about the difference between inference and conjecture in ***Caswell v. Powell Duffryn Associated Collieries, Ltd.***, [1940] A.C. 152 at 169-70 (H.L.) continues to be instructive in cases of this kind. That was a case about a death in a mine that could not be precisely explained:

> My Lords, the precise manner in which the accident occurred cannot be ascertained as the unfortunate young man was alone when he was killed. The Court therefore is left to inference or circumstantial evidence. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the

> inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

[21] This is certainly not a case where there are no positive facts from which the opportunity for ignition of the donnaconna board can be inferred. It can be inferred as a matter of reasonable probability, if not a practical certainty.

[22] It cannot, in any event, be said that there is no positive evidence of cracks or gaps in the roofing material. TNTA's maintenance handyman testified that the roofing material did crack and that he made repairs when the cracking caused the roof to leak, although, given the inclement weather in Whitehorse during the winter, he was probably not on the roof for some months before the fire.

[23] TNTA's maintenance director testified that he was on the roof periodically. He was on the flat part of the roof at the southeast corner perhaps six months before the fire and recalled observing small gaps (1/8 to 1/4 inch) between the roof material and the wood posts where the material that extended up two or three inches had curled away from the posts.

[24] North 60 called the roofer whose firm had replaced the roofing material on the flat part of the hangar roof in 1994. He had inspected the roof in 1995 and 1996 in keeping with his two year guarantee, but he had not been on the roof since then. He testified that he thought the development of cracks within four years to be unlikely and he described the length those he employed and worked with would usually go to prevent the development of gaps around wood posts such as held the saddle for the sign. He said that normally the flashing would extend upward eight inches and would be secured with an adhesive as well as nails around each post one quarter inch from the top. But he could only say what would usually be done and he agreed that what TNTA's maintenance director described was the kind of problem that might be expected four years after the roofing material was replaced.

[25] The evidence of TNTA's maintenance personnel lends some support to the judge's conclusion that there was an opportunity for the sparks and slag from the torch to ignite the donnaconna board. No one could say whether any cracks or gaps actually existed on the flat part of the roof at the southeast corner on the day of the fire, but it was, on all of the evidence, open to the judge to infer that they did.

[26] North 60 adduced evidence of the possibility of an electrical fire from an expert in electrical fires who expressed the opinion that, assuming the state of the wiring in the hangar to be what it was, certain electrical anomalies associated with the fire meant that an electrical fire had to be considered as one of the several potential causes of the fire. North 60 also relied on the report of the fire department's investigation that concluded the cause of the fire was undetermined. The contention was that the evidence weighs as heavily in favour of there having been an electrical fire, or a fire caused by some other means, as it weighs in favour of TNTA's theory. The judge rejected that contention. Certainly, the fact that the roof was recorded by video surveillance to be burning for two hours before there was any other indication of a fire puts an alternative cause beyond serious contention. That fact is inconsistent with the fire having originated anywhere else or having been caused by other than the negligent use of the torch.

[27] It follows that I do not consider there to be any basis on which it could be said that the judge erred in his conclusion as to the cause of the fire.

The Loss of the Hangar

[28] North 60 contends that the judge erred in respect of each item of TNTA's damages that he assessed at trial. The first of those is the loss of TNTA's hangar. North 60 contends that, in assessing damages for the replacement of TNTA's hangar, the judge made no proper allowance for betterment.

[29] The hangar was 44,000 square feet in floor space. TNTA used 20,000 square feet of that space for its own operations and leased some of the space that remained. The cash value of the building at the time of the fire was appraised at $810,000. North 60 obtained an appraisal of the replacement value that ranged from $3,585,000 (original wood construction) to $4,142,000 (structural steel construction). The hangar stood on airport property that was leased from the federal government. The lease expired in 2016 and could not be renewed. It was thus uneconomic to build a new hangar on the same site. TNTA had to find a new location. It purchased 15 acres of land with three buildings, having a total of 15,000 square feet of floor space, close to the airport. The buildings required extensive renovation. After operating under difficult temporary circumstances for two years, TNTA moved into its new facilities in January 2001 while the renovations were ongoing. The acquisition costs of the

buildings (including all renovations) were $1,981,849, and of the land, $893,000, for a total of $2,874,849.

[30] The claim in its final form has four components:

1) the cost of the new hangar facilities - $2,493,903 (i.e., the total acquisition cost less $380,946 in betterment being the present value of land ownership in 2016);
2) the loss of rent which TNTA would have received - $432,723;
3) the costs of remediation following the fire - $107,435;
4) the reduction in occupancy costs TNTA would have incurred had it remained where it was for the balance of the lease – ($245,982).

[31] The total claim was then $2,788,100 (rounded).

[32] North 60 takes no issue with the second, third, and fourth components, but it argued at trial, as it does now, that $2,788,100 is an unreasonably high amount to compensate TNTA for the loss of its hangar because no allowance is made for various factors that served to put the helicopter operator in a better position than it would have been in if there had been no fire. In that event, TNTA would have continued to use

the hangar until 2016 at which time, it is to be assumed, it would have purchased land and buildings similar to the replacement facilities it began to occupy in 2001.

[33] North 60 cites an increase in TNTA share value attributable to the acquisition of an asset worth three times the value of the hangar that was destroyed. In my view, that is not a relevant consideration in terms of the bettering of the company's, as opposed to the shareholders', position. North 60 cites TNTA's ownership of newer buildings with reduced maintenance and structural expenses that have been renovated to TNTA's specifications. There is, however, little evidence as to what savings might be enjoyed and, though renovated to suit the company's current operations, the new facilities limit TNTA's ability to expand. North 60 claims TNTA will have the advantage of increased tax pools and higher tax deductions, but no attempt was made to quantify what, if any, real benefit may result. Perhaps, most significantly, North 60 maintains TNTA has been put in a better position because it now owns land that, it is assumed, it would have had to acquire when its lease expired in 2016. That, however, has no immediate value to the company in terms of its operational base, and there is a measure of betterment allowed in the calculation of TNTA's claim in that regard in any event.

[34] The judge assessed the loss of the hangar at the full amount of the claim as calculated by TNTA. He did so recognizing that the "major concern" was whether TNTA was benefiting unreasonably from the fact that it owns 15 acres of land rather than holding a lease that would expire in 2016. Given what it would have cost to replace the hangar and the fact that TNTA had to relocate, he took the view that the acquisition of the new facilities put TNTA in as close a position as possible to what its position was before the fire and that it is highly speculative that the company is in any better position in the result.

[35] He adopted the principle that the starting point in valuing a commercial building is the replacement cost: ***Nan v. Black Pine Manufacturing Ltd.*** (1991), 80 D.L.R. (4th) 153, 55 B.C.L.R. (2d) 241, [1991] 5 W.W.R. 172 (C.A.), and noted that TNTA's actual cost was well within the range of the replacement cost of the hangar. Indeed, what can be said to have been the actual cost to replace the hangar itself of $2,493,903 is not only more than one million dollars below the lowest appraised replacement value that North 60 obtained, it is $380,946 less than TNTA's actual costs.

[36] The judge recognized that comparisons between TNTA's position before and after the fire will differ. On the whole,

I do not see any frailty in his reasoning. He considered all of the factors that bear on what TNTA suffered by the loss of its hangar and assessed damages accordingly. I do not consider he overlooked any aspect of betterment that he was required to take into account and counsel have cited no authority that would suggest otherwise. The judge simply did not accept that TNTA would necessarily be in a better position than it would have been had there been no fire and, given the amount of the award in relation to the replacement value of the hangar, as well as the costs TNTA actually incurred, there is in my view no basis on which his assessment can be criticized.

The Parts and Accessories

[37] The second item in the assessment of damages in respect of which North 60 maintains the judge erred is the award for the loss of parts and accessories destroyed in the fire. The judge awarded TNTA $1,959,100 for this loss.

[38] The record of the company's inventory was recreated largely, but not entirely, from memory because all of its files were lost in the fire. Statements of values were largely based on opinion. North 60 maintains that the judge erred in relying on the evidence adduced when better evidence

could have been obtained. It suggests that evidence could have been obtained from aircraft manufacturers and other suppliers that would have established the actual loss more reliably. Further, North 60 points to aspects of the evidence that were indicative of the loss being less than TNTA maintained: from 1999 to 2001, TNTA's actual expenditure for parts and accessories was only $593,000; TNTA recovered only $850,000 for parts and accessories on its property insurance policy; and the cost/net book value TNTA recorded for its parts and accessories inventory in its 1998 financial statements was perhaps $500,000 less than it claimed as its loss. It must, however, be accepted that none of these considerations is necessarily conclusive of TNTA's loss.

[39] I am unable to see any error in the assessment made. There was evidence of what was lost and its value was adduced from TNTA's parts manager who was no doubt the person in the best position to testify about the company's inventory. It was, of course, open to North 60 to adduce any evidence that was available to counter the evidence on which TNTA relied. North 60 did adduce some expert opinion in this regard, but the judge found there was no evidence to support the facts assumed.

The Business Interruption Loss

[40] The third item in the assessment of damages in respect of which North 60 maintains the judge erred is the assessment of TNTA's business interruption loss. The judge awarded $1,883,684. There are two aspects of the award. North 60 takes issue with both.

i) Lost Contribution Margin

[41] The first aspect of the award has to do with damages assessed at $1,147,844 for TNTA's lost contribution margin, or its loss in revenue less variable expenses. The judge recognized that, as North 60 contended and TNTA accepted, the economic activity in the Yukon declined significantly in the years 1999 and 2000. However, he effectively found that the loss the helicopter operator sustained in those two years was primarily a consequence of the disruption in its business and its ability to market its services caused by the destruction of its hangar and more than half of its fleet.

[42] The loss occurred at a time when TNTA was changing its focus from the work it traditionally did in the mining industry, which was in decline, to work in the northern oil and gas industry that was expanding. In 1999, there were significant deposits of natural gas discovered in the south-

eastern Yukon on the traditional lands of the Kaska First Nations.

[43] The judge made his assessment on the assumption that there would have been work available for TNTA and that the helicopter fleet would have been engaged to the extent that it had been in the year preceding the fire. He also found that, had the fire not occurred, the purchase of one additional helicopter TNTA bought at the end of 2000, an A-Star, would, as TNTA maintained, have been purchased by the end of 1999 to facilitate the company's acquisition of business in the oil and gas industry. The judge found that TNTA had a business opportunity to supply helicopter services in a joint venture with the Kaska Nation for the seismic exploration of the gas deposits that had been discovered and that the A-Star, which TNTA ultimately did acquire, would have been utilized in 2000 with TNTA earning revenue comparable to what it actually earned with that aircraft in a joint venture with the Kaska Nation in 2001.

[44] North 60 contends now, as it did at trial, that, given the downturn in the economy in 1999 and 2000, there is no sound basis on which it could be assumed, with sufficient certainty to warrant a substantial award of damages, that TNTA's business in those years would have been unaltered from

what it was in 1998. North 60 points out that the opinion of the business valuation expert, on which TNTA relied in calculating this aspect of its claim, allowed for only a 10% reduction in revenue due to the economic decline, without any attempt being made to prove the actual extent of the decline. North 60 adduced evidence of significantly greater decline and it relies on the fact that TNTA adduced no evidence of any business it actually lost after June 1999 when the replacement of its helicopters was largely complete. It says that, on the evidence, from that date onwards, it is less than certain that any specific business that would have been available to TNTA was actually lost.

[45] The submission North 60 makes now is largely a re-argument of its case of a declining economy it advanced at trial. What the argument appears to overlook is that while there is little evidence of any economic recovery in 2001, TNTA's revenues increased substantially. The revenue in 1998 was $5.2 million. In 1999, with the fire having occurred in January of that year, the revenue fell to $4.2 million. That was consistent with the fact that the whole of TNTA's base of operations was lost along with seven of its twelve helicopters. Even after six months, when most of the helicopters were replaced, the company was operating out of makeshift premises,

as it continued to do for the next eighteen months. In 2000, revenue fell further to $3.2 million. TNTA maintains that its inability to market its business through 1999, because of the ongoing disruption with which it struggled, was manifest in lost business in 2000. The manager of the business, who was the person primarily responsible for marketing the company's services, was simply not able to devote the time required to pursue sufficient business to keep the helicopters engaged to the extent they had been in 1998. He and the other senior personnel were completely pre-occupied with re-establishing TNTA's operations. In 2001, TNTA's revenues increased to $4.7 million.

[46] TNTA may not have been in a position to adduce evidence of specific instances of lost business or, more fairly, business the company was unable to acquire after June 1999, but, in the circumstances of this case, that was not necessary for the judge to conclude with sufficient certainty that the helicopter operator's reduced revenue in 1999 and 2000 was attributable to the interruption of its business caused by the fire as opposed to the decline in the economy, save for perhaps the 10% decline that was allowed in the way TNTA's claim was calculated.

[47] North 60 also contends that TNTA failed to prove with the necessary certainty that it lost revenue in 2000 because the fire delayed its purchase of an A-Star helicopter until the end of that year. It maintains that, in 1999, when TNTA was invited to enter into a joint venture with the Kaska Nation to supply helicopter services beginning in June 2000, TNTA had no plans to acquire the necessary A-Star helicopter and took no steps to do so until it lost one of its helicopters in June 2000. The helicopter crashed and was not replaced. North 60 contends further that it is doubtful TNTA would have been able to conclude the business arrangements necessary in time to commence the work (an alliance agreement with the Kaska Nation that was a precondition was not entered into until June 2001), and questionable that TNTA had the capability to do the work (the operator engaged for the work in 2000 used two A-Star helicopters).

[48] Again, North 60 is merely re-arguing the case it tried. The evidence is that the disruption caused by the fire precluded TNTA from entertaining any idea of acquiring an A-Star helicopter in sufficient time to have it readied for operation by June 2000. The aircraft, being European built, is quite different than any in the TNTA fleet. Its integration required planning and the extensive training of

both pilots and mechanics. Whether the required business arrangements could be made in time and whether TNTA had the capability to do the work are matters of argument. It was open to the judge to conclude as he did that, had TNTA's business not been interrupted by the fire to the extent that it was, TNTA would have been able to respond positively to the invitation extended by the Kaska Nation, providing helicopter services for seismic exploration commencing in June 2000.

ii) Increased Insurance Premiums

[49] The second aspect of the business interruption loss award with which North 60 takes issue has to do with the increase in insurance premiums of $735,800 TNTA attributes to the fire that destroyed its hangar. North 60 maintains that the increase was not a reasonably foreseeable consequence primarily because it was triggered by the unrelated loss of the helicopter that crashed in June 2000.

[50] There was no increase in the premium for the year 2000. TNTA changed brokers after the fire in 1999 and, rather than renewing with its existing underwriters, its property coverage was placed with different underwriters at a premium that was actually less than it had paid for the year 1999. In keeping with the practice in the industry, the destruction of the hangar would have been treated as a "shock loss", being one

loss in a five year, claims-free history that did not affect the premium negotiated. However, for the year 2001, the premium increased 250% because, with the helicopter crash in 2000, TNTA then had a five year claims record that included two major losses. The opinion evidence adduced is that at least 200% of the increase was attributable to the fire loss.

[51] In my view, it is not a question of whether the helicopter crash was foreseeable as North 60 contends. It is enough that it was reasonably foreseeable to North 60, as a former tenant of TNTA, that a devastating fire that destroyed the hangar and more than half of TNTA's helicopter fleet might well give rise to substantially increased property insurance premiums for TNTA. The fact that did not happen when the coverage for the next year was placed, because of the helicopter operator's claims history, does not render the increase any less foreseeable and compensable.

[52] There is, then, no basis on which to disturb the judge's award of damages for TNTA's business interruption loss.

[53] It follows that I would not accede to any of the grounds of appeal raised in respect of the judgment on liability and the award of damages rendered 27 March 2003.

Pre-Judgment Interest

[54] Section 35(3) of the Yukon ***Judicature Act***, R.S.Y. 1986, c. 96 provides for the awarding of pre-judgment interest at the prime rate existing for the month preceding the commencement of the action. Here that rate was 7.5%. North 60 sought to have the judge exercise the discretion afforded him under s. 35(7) to fix the rate of interest at 5.21%, such being the average prime rate existing from the time the action was commenced. The section provides:

> The judge may, where he considers it to be just to do so in all the circumstances, in respect of the whole or any part of the amount for which judgment is given,
>
> (a) disallow interest under this section,
>
> (b) fix a rate of interest higher or lower than the prime rate, or
>
> (c) allow interest under this section for a period other than that provided.

[55] The judge said that he did not find the difference between the presumptive rate and the average prime rate to be significant, although it does make a difference of more than $1.0 million in the pre-judgment interest recoverable. The judge saw that as more a function of the size of the damage award than of the spread in interest rates. He declined to exercise his discretion under s. 35(7).

[56] North 60 contends that his refusal to fix a lower rate is an error in principle. It maintains that interest is not to be used to penalize and should reflect only the value of money wrongfully withheld, citing ***Irvington Holdings Ltd. v. Black*** (1987), 58 O.R. (2d) 449 at 487, 35 D.L.R. (4th) 641, 14 C.P.C. (2d) 229 (C.A.), and ***J.W. Faux Ltd. v. Ontario Hydro*** (1996), 10 O.T.C. 295 (Ont. Gen. Div.). In the latter case, a lower rate of interest was fixed so as not to overcompensate the plaintiff. Section 130 of the ***Courts of Justice Act***, R.S.O. 1990, c. C.43, requires that the court take into account certain criteria in exercising its discretion to fix a rate of pre-judgment interest that differs from the presumptive rate.

[57] While it might be argued that this is an appropriate case for the exercise of discretion afforded by s. 35(7), it was not, in my view, an error in principle for the judge to decline to fix a lower rate of pre-judgment interest. The Act provides that where a judge considers it to be just in all of the circumstances the discretion is to be exercised. The legislation does not mandate that a lower rate must be fixed if the presumptive rate is higher than the average existing rate. It is a matter of discretion to be exercised in each

case. The judge did not see fit to fix a lower rate here. There was no error in that.

Costs

[58] The first question to be addressed in respect of the award of costs is whether it was open to the trial judge to award increased costs.

[59] Increased costs, for which Appendix B of the ***Rules of Court*** provided, have been abolished. The amending section, s. 7(3), provides, "No order for increased costs may be made after July 1, 2002."

[60] The wording could not be clearer, but the trial judge considered that by invoking Rule 1(10) it remained open to him to award increased costs on 5 June 2003. That rule provides:

> The court may order that a proceeding, or step in a proceeding, be continued and concluded under the rules in force at the time of its commencement.

[61] The judge said that he was ordering that the ***Rules of Court*** in force at the time the action was commenced (November 2000) be continued to the conclusion of the proceedings.

[62] Rule 1(10) has been invoked to award increased costs after 1 July 2002: ***Seaboard Life Insurance Co. v. Bank of***

Montreal, 2002 BCSC 1272; ***Kraus v. Fech***, 2002 BCSC 1594; and ***Hung v. Gardiner***, 2003 BCSC 285. However, more recently it has been held that Rule 1(10) cannot be invoked for that purpose: ***Strata Plan LMS 120 v. North Fraser Holdings Ltd.***, 2003 BCSC 1051.

[63] In ***Burrardview Neighbourhood Assn. v. Vancouver (City)*** (2002), 9 B.C.L.R. (4th) 334, 2002 BCSC 1770, I expressed the view that if Rule 1(10) could be invoked to permit an award of increased costs after 1 July 2002, it could only be on the basis of a prospective order, not an order sought and made after the costs were incurred. It is for present purposes unnecessary to determine whether the rule can be invoked in that way because here no prospective order was sought.

[64] I consider that s. 7(3) of Appendix B forecloses any order for increased costs in this case. The judge erred in purporting to invoke Rule 1(10) as he did to permit him to exercise discretion to award other than party-party costs.

[65] North 60 takes no issue with respect to the entitlement to double costs awarded as party-party costs. But it contends that there is no provision in the Rules supporting the judge's order of double disbursements.

[66] The Rules provide for an award of double costs where offers of settlement are made, as they were here. Rule 37(1) provides the following definition:

> "**double costs**" means double the fees allowed under Rule 57(2) and includes the disbursements allowed under Rule 57(4).

[67] The definition was considered in ***Brown v. Lowe*** (2001), 85 B.C.L.R. (3d) 162, 2001 BCSC 105, where it was held that "double costs" does not include double disbursements. It includes only the disbursements allowed under Rule 57(4).

[68] I do not consider that "double costs", as defined by Rule 37(1), includes double disbursements. It includes only the disbursements allowed under Rule 57(4). The judge was in error in awarding double disbursements in this case.

[69] As indicated at the outset, the judge saw fit to exercise his discretion in favour of awarding two sets of costs. North 60 maintains that an award of that kind is unwarranted where multiple parties are represented at trial by more than one counsel if there is no conflicting interest between them.

[70] It is arguable that no clear purpose was served by the various plaintiffs being separately represented, but that was for the judge to weigh in the exercise of his discretion

having regard for the way in which the trial was conducted. There is no basis on which it can be said that he erred in principle in awarding two sets of costs in the circumstances.

[71] It follows that I would accede, to some extent, to the grounds of appeal that are raised with respect to the judgment on pre-judgment interest and costs rendered 5 June 2003.

Disposition

[72] I would allow the appeal only to the limited extent of setting aside the order for costs. I would order that TNTA and Mr. Cameron as well as Summit and Almon be entitled to tax their party-party costs of the actions on Scale 5 and that all except Summit recover double costs but not double disbursements.

[73] I would give the parties leave to make written submissions as to the costs of the appeal if they cannot be agreed.

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Mr. Justice Smith"

I agree:

"The Honourable Mr. Justice Thackray"