

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Sturzenegger v. Peters et al.*, 2004 YKSC 19

Date: 20040309
Docket No.: 01-A0222
Registry: Whitehorse

Between:

**PETER STURZENEGGER
doing business as ZURICH TRUCKING**

Plaintiff

And:

**K. PETERS INDUSTRIES NORTHERN LTD. and
KERRY PETERS doing business as KPI NORTHERN**

Defendants

Appearances:

Keith Parkkari
Kerry Peters

For the Plaintiff
On behalf of the Defendants

Before:

Mr. Justice L.F. Gower

REASONS FOR JUDGMENT

Introduction

[1] Peter Sturzenegger operates his trucking business as a proprietorship under the name of Zurich Trucking. He used Gordon Holland as his agent to drive Zurich's only semi-truck and to procure trucking work, along with the related billing and receiving. He claims he provided trucking services for Kerry Peters and his company between September 2000 and November 2001, which have not been paid for. After all setoffs and credits admitted by Mr. Sturzenegger, he claims a total of \$39,375.98.

[2] Mr. Peters, for the defendants, says that his company, K. Peters Industries Northern Ltd., contracted only with Gordon Holland and fully paid him for all these

trucking services. There is no real dispute that the trucking services were provided over the relevant time period. However, the defendants argued that they had no contract with Mr. Sturzenegger, and if they did, then payments of all accounts due were made to Mr. Sturzenegger through Mr. Holland, which Mr. Holland failed to forward to Mr. Sturzenegger.

[3] Mr. Holland says he began working as Mr. Sturzenegger's agent prior to September 2000. Whenever he worked as such for the defendants he would prepare and submit invoices to Mr. Peters for each trucking job or series of related jobs. Mr. Sturzenegger acknowledges that Mr. Peters paid Mr. Holland for some of those invoices, but not all. Mr. Peters alleges improprieties in how Mr. Holland issued these invoices, as well as how he dealt with the payments received. He says he eventually terminated his dealings with Mr. Holland in October 2001.

[4] Mr. Peters is the principal of K. Peters Industries Northern Ltd., incorporated in 1992, but struck off the Yukon corporate registry sometime prior to November 27, 2003, for not being in good standing. Mr. Peters denied carrying on business in any capacity outside his company. Mr. Sturzenegger's counsel argues that, in order to obtain the benefit of limited liability, K. Peters Industries Northern Ltd. was required to identify itself as such on all contracts and related documents. He says the company failed to do so and, as a result, both Mr. Peters and his company should be jointly and severally liable.

Issues

[5] The issues in this case are as follows:

1. In the event liability is established, are Mr. Peters and his company jointly and severally liable?
2. Was there a contract between Mr. Sturzenegger and either or both of Mr. Peters and his company?
3. If there was such a contract, was there any impropriety in the billing and receiving for the trucking services by Mr. Holland on behalf of Mr. Sturzenegger?
4. Is there an outstanding balance payable by Mr. Peters and his company to Mr. Sturzenegger?

Issue #1 - Joint and Several Liability?

[6] Mr. Sturzenegger's counsel argued that, pursuant to s. 12(7) of the *Business Corporations Act*, R.S.Y. 2002, c.20, K. Peters Northern Industries Ltd. was required to identify itself as such on all contracts, invoices, negotiable instruments, advertisements and orders for goods and services issued by or on behalf of the company. He points to a number of documents provided by Mr. Peters which indicate that either Mr. Peters or his company variously operated as KPI Northern Ltd., KPI Trucking and KPI Northern. Mr. Sturzenegger's counsel implicitly argued that in order for Mr. Peters to benefit from the limited liability of his company, K. Peters Northern Industries Ltd. was required to comply with s. 12(7). Logically, the issue of joint and several liability would ordinarily follow a determination of whether there is any liability at all (in this case, liability in contract). However, because the proper identification of the defendant parties is relevant to the

issue of contract, it is in some respects a threshold issue. It will also simplify future reference to the defendants in the rest of these reasons for judgment for me to deal with the issue of joint and several liability now.

[7] I agree with the general comment by Mr. Sturzenegger's counsel, in this context, that third parties are entitled to know if they are dealing with an individual as opposed to a corporation, because different risks may arise and different forms of security may be sought for any given commercial transaction.

[8] I find that Mr. Peters was notoriously sloppy in identifying how he was carrying on business. In the documents provided by Mr. Peters (in Exhibit 2, Part 3) there are a number of accounts, records, invoices, and so on which refer to various incarnations of Mr. Peters' business name or his company name. In fairness, not all were issued by Mr. Peters or his company directly, but they were subject to clarification or correction by Mr. Peters and are nevertheless indicative of how Mr. Peters carried on business:

- a Telus Mobility account form which identifies the account holder as "Kerry K. Peters o/a KPI Northern Ltd." for accounts dated August and September 2001. There was no evidence from Mr. Peters that he ever made any attempt to correct the manner in which the account holder was identified. More importantly, there was no evidence that "KPI Northern Ltd." exists as a corporate entity. If this was a clerical error on the part of Telus Mobility, Mr. Peters should have brought it to their attention.
- receipts which have presumably been tendered as proof of payment from "Kerry Peters", the individual, to Zurich Trucking/Gordon Holland. I don't recall

any specific evidence as to who drafted these receipts, but the documents originated from Mr. Peters and appear to be in his handwriting. It is therefore reasonable to infer that Mr. Peters prepared the receipts for signature by Mr. Holland. If that is correct, and if Mr. Peters claims that he never carried on business with Zurich Trucking in any capacity other than through his company, then it begs the question why the receipts indicate that payment was received from “Kerry Peters”, the individual.

- a cheque payable on the account of J. Peters, Mr. Peters’ mother, to Zurich Trucking, re: “KPI Trucking”. Mr. Peters testified that his mother was involved from time to time in making payments on behalf of his company. There was also evidence that Mr. Peters was involved in a numbered Yukon company owned by his mother, specifically on a bid for a clearing job on the Campbell Highway, for which Mr. Peters intended to act as supervisor. Thus, there was some evidence of a fairly close business relationship between Mr. Peters and his mother. In that context, it is surprising that Mrs. Peters would incorrectly refer to Mr. Peters’ company as “KPI Trucking”. Again, there was no evidence from Mr. Peters that he took any steps to clarify or correct this misidentification, if that is what it was.
- an invoice from Clover Bar Heavy Truck Parts, of Sherwood Park, Alberta, from September 2000, made out to “KPI Northern Ltd.”. It is reasonable to infer that Clover Bar would not have identified the purchaser of its truck parts as such, unless they had been provided that name by the purchaser. Whoever did so failed to correctly identify the company.

- an invoice from Orls Truck Trailer and Equipment Repair, from November 2000, made out to “KPI Northern”.
- an invoice dated October 6, 2001 from “KPI Northern Ltd.” to Gordon Holland/Zurich Transport, regarding the construction of a road on Mr. Holland’s acreage.
- an invoice dated October 29, 2001 to Zurich Trucking, again from “KPI Northern Ltd.”.
- a statement prepared by Mr. Peters’ accountant, in April 2001, which purports to be from the non-entity “KPI Northern Ltd.”. One would logically expect that Mr. Peters’ accountant would know the correct name of his business or corporation. It appears that was not the case and Mr. Peters made no attempt to correct, clarify or explain the misidentification in his evidence.
- computerized accounting statements prepared by Mr. Peters’ accountants, presumably acting on Mr. Peters’ instructions, all headed by an entity described as “K.P.I. Northern”. The entries on those statements appear to run from as early as April 1999 to May 2001, that is through much of the time period involved in this lawsuit. Once again, at the risk of being repetitious, there was no attempt by Mr. Peters to clarify or explain why *his own business documents* did not correctly identify the corporation from which he now seeks the protection of limited liability.

- the lease agreement between Mr. Sturzenegger and Mr. Peters dated August 20, 2001. Mr. Peters prepared this document himself. He specifically referred to the lessor as “Kerry Peters K.P.I.” He signed the document under his own name with a notation following his signature “For KPI”.

[9] Whatever “KPI” may be, it is not a limited liability company. It is apparent that Mr. Peters has become accustomed over the past several years to referring to his business under that acronym. However, KPI is certainly not an adequate description of K. Peters Industries Northern Ltd. On its own, KPI cannot be said to be anything more than some type of proprietorship name which Mr. Peters has adopted.

[10] Mr. Peters’ confusion about which entity he was carrying on business under is also evident from excerpts from his cross-examination and closing submissions on January 19, 2004 (Transcript, respectively at p. 36, lines 20 – 26 and p. 112, lines 16 – 19):

... I’ve always carried on business under the corporate name of K. Peters Industries Northern Ltd., which is KPI Northern Ltd. I don’t carry on business as Kerry Peters or as KPI Northern. It’s – I mean, I might phrase and say it’s KPI but the paperwork and everything goes through K. Peters Industries Northern Ltd. It’s a limited company ...

Gord Holland has worked for *Kerry Peters and/or KPI Northern Limited* for 12 years as a sub-contractor or lease operator and has never had any issues up until October 2001 when he was fired. (emphasis added)

Incidentally, this is also seemingly inconsistent with the Statement of Defence, which denied (in paragraph 4) that Kerry Peters, the individual, carried on business as KPI Northern.

[11] It is worth noting that s. 12(3) of the *Business Corporations Act* prohibits a person from carrying on business in the Yukon under any names that contains the abbreviation “Ltd.” unless that person is incorporated. It is therefore a contradiction in terms where the accounts show that Kerry Peters, the individual, was operating as KPI Northern Ltd., the corporation.

[12] The Ontario Court of Appeal in *Truster v. Tri-Lux Homes Ltd.*, [1998] O.J. No. 2001, stressed the requirement that corporations identify themselves as such in order to benefit from their limited liability. At paragraph 21, the court said:

... [I]ncorporation provides corporate officers and shareholders the legal protection thought to be necessary for modern business relations; however, if one expects to benefit from this protection, then others must, at a minimum, be informed in a reasonable manner that they are dealing with a corporation and not an individual ... persons who set up after the fact that they contracted solely on behalf of another bear the onus of establishing that the party with whom they were dealing was aware of the capacity in which they acted ...

The last part of the above quote makes it clear that if Mr. Peters now wishes to say that he only contracted for the receipt of trucking services on behalf of his company, then the company has the onus of establishing that Mr. Sturzenegger and Mr. Holland were aware that they were dealing with Mr. Peters through that company. The company has not satisfied that onus.

[13] In these circumstances, it seems to me that it would be unfair to Mr. Sturzenegger to allow Mr. Peters the benefit of limited liability through his company. I find as a fact that Mr. Peters was, throughout the relevant time period, variously dealing with Mr. Holland, Mr. Sturzenegger and other third parties both in his own capacity as Kerry Peters, carrying on business under various names and through K. Peters Industries Northern

Ltd. However, at any given time, it was not clear which incarnation Mr. Peters was operating under. Therefore, I conclude that if there is liability assessed in Mr. Sturzenegger's favour, then it will be against both defendants jointly and severally.

Issue #2 - Was There a Contract With Sturzenegger?

[14] Gordon Holland has lived and worked as a truck driver in Watson Lake for the last 12 years or so and has previously provided trucking services for Mr. Peters. When Mr. Holland provided trucking services on his own behalf, for example between September 2000 and August 2001, he would provide invoices, usually made out to "KPI Northern", from himself. Those invoices (Exhibit 2, Part 2, Tab 1) are summarized in the account summary of Mr. Holland (Exhibit 6). Mr. Peters has fully paid his account with Mr. Holland for those services.

[15] Sometime prior to September 17, 2000, Mr. Sturzenegger entered into an arrangement with Mr. Holland in which Mr. Holland would drive Mr. Sturzenegger's 1995 Peterbilt truck on Mr. Sturzenegger's behalf and under Mr. Sturzenegger's business name of Zurich Trucking. Mr. Holland was to be paid 20% of the gross billings for any job. From the balance would be paid the expenses for the operation of the truck and the rest would go towards the cost of the truck. Mr. Holland was responsible for finding work for the truck as well as for issuing invoices and collecting accounts. He was provided with a bank card by Mr. Sturzenegger for the Zurich Trucking account, which authorized him to make deposits but not withdrawals. Only Mr. Sturzenegger was authorized to make withdrawals from the Zurich Trucking account. There were no suggestions in the

evidence of any dispute between Mr. Sturzenegger and Mr. Holland about improper handling of funds or any other accounting issues.

[16] On September 17, 2000, Mr. Holland began providing trucking services for Mr. Peters on behalf of Zurich Trucking. Mr. Peters thought that Mr. Holland was carrying on business as Zurich Trucking. He said that he was not aware of Mr. Sturzenegger's involvement as the proprietor of Zurich Trucking until much later. Exactly when Mr. Peters first became aware of Mr. Sturzenegger's involvement in Zurich Trucking is not clear, but I will come back to that shortly. In any event, Mr. Holland continued to provide trucking services to Mr. Peters on a number of occasions from September 17, 2000 to and including November 15, 2001.

[17] Mr. Peters admitted in argument that there was an oral agreement between him and Gordon Holland covering the entire period in issue between September 2000 and November 2001. However, he was adamant that there was no agreement of any kind between him and Mr. Sturzenegger.

[18] The Supreme Court of Canada, in *Freidmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, restated the general rule that an agent can enter into a binding contract with a third party, even where the third party is not aware of the relationship between the agent and the principal. This is the situation of the so-called "undisclosed principal". At paragraphs 15 and 18 of *Freidmann Equity*, the court said as follows:

When the third party contracts with an agent and the contract is not under seal, the principal has the same rights and liabilities under the contract whether he or she was disclosed to the third party and despite the fact that

his or her name did not appear on the face of the contract. Therefore, undisclosed principals can sue and be sued in their own name on any simple contracts made on their behalf by their agents as long as those agents have acted within the scope of their delegated authority in so doing.

[19] When asked about the lease agreement dated August 20, 2001, Mr. Peters responded that this did not in any way change the oral agreement he had with Mr. Holland. He said the lease agreement was prepared for insurance purposes only, as though it had no other legal effect. He seemed to ignore the fact that the agreement is evidence that he was aware of Mr. Sturzenegger's involvement with Zurich Trucking at least as early as August 20, 2001.

[20] I find there was a contract between Mr. Sturzenegger, the undisclosed principal, and Mr. Peters, the third party, via Mr. Holland, Mr. Sturzenegger's agent. It is irrelevant that Mr. Peters did not initially know that Mr. Holland was acting as Mr. Sturzenegger's agent.

[21] Further, I find that Mr. Peters' actions in completing and attending to the execution of the lease agreement, as well as his conduct subsequent to that date, are evidence of his intention to be bound by the contract with the previously undisclosed principal, Peter Sturzenegger. This is pursuant to the doctrine of ratification, which was referred to by the Ontario Court of Appeal in *John Ziner Lumber Ltd. v. Kotov*, [2000] O.J. No. 3797 in the following simple terms:

“The doctrine of ratification allows a party to come in after the fact and give antecedent authority to a contract that has already been made.”

Issue #3 - Were There Improprieties in the Billing and Receiving?

[22] Mr. Peters said that he paid Mr. Holland for the trucking services by Zurich and that these payments have not been properly accounted for between Mr. Holland and Mr. Sturzenegger. Unfortunately, Mr. Peters provided absolutely no evidence to support that proposition.

[23] It gets worse. Mr. Peters argued at the end of the case that Mr. Holland committed serious improprieties including double billing, misappropriation of funds and siphoning off of money from Mr. Sturzenegger. Essentially, he alleged fraudulent and criminal activities by Mr. Holland. However, when I pressed him on each of these points to show me a single example in the evidence to support such claims, he was unable to do so.

[24] Mr. Holland said he would routinely submit invoices to “KPI Northern” from Zurich Trucking. He testified that he would also routinely deliver these invoices to Mr. Peters by hand. He specifically testified that Mr. Peters never objected to any of those invoices. On several occasions, Mr. Peters later indicated to Mr. Holland that he had lost the original invoice provided. In those cases, Mr. Holland would provide Mr. Peters with a subsequent carbon copy of the invoice. On one occasion a carbon copy was not available and a duplicate invoice was prepared by Mr. Holland’s spouse, Pam Davie, and was delivered to Mr. Peters.

[25] While Mr. Holland may not have been perfectly fastidious in his preparation of the invoices, I find that he was reasonably careful and consistent in doing so. In direct examination, he was taken through each of the invoices he prepared on his own behalf and those prepared on behalf of Zurich Trucking, and gave explanations and

clarifications, where necessary. For example, on one of his own invoices, 1072622, he misdescribed himself as the purchaser of the trucking services and KPI Northern as the trucker. On another occasion, with invoice 074141, prepared by him on behalf of Zurich Trucking, he failed to write in the name of the purchaser of the trucking services or the trucker. However, this was corrected not only in Mr. Holland's testimony, but also as I just mentioned, by the subsequent duplicate invoice under the same invoice number for exactly the same amount, prepared by Pam Davie. I find that Mr. Holland was a credible witness in this regard.

[26] Mr. Peters alleged that there were missing invoices. His basis for this allegation is that these invoices are not always numbered in perfect sequence. Mr. Holland gave evidence that he used an invoice book with pre-printed carbon forms with sequentially numbered invoices. However, on occasion, his spouse, Pam Davie, would also use this invoice book for her business purposes. The mere fact that the invoices provided by Mr. Holland to Mr. Peters, on behalf of Zurich Trucking, are not perfectly sequential is of no consequence and does not prove anything in this lawsuit. It is pure speculation by Mr. Peters that there are missing invoices. Even if there were, that would seem to work in his favour and not to his prejudice.

[27] The evidence of Mr. Peters on this issue of billing and receiving was difficult to follow. There were significant problems with his credibility and clarity. Mr. Sturzenegger's counsel submitted that Mr. Peters was "fast and loose with the truth". I have concluded that either Mr. Peters does not understand the nature of the oath that he swore before testifying in these proceedings or that he has such a poor memory or inability to organize his thoughts that his testimony was rarely capable of belief. The transcript is

replete with examples of Mr. Peters being inconsistent, contradicting himself and being almost absurdly evasive.

[28] His inconsistency about the name under which he carried on business has already been discussed.

[29] One particular passage during Mr. Peters' cross-examination by Mr. Sturzenegger's counsel reflects how Mr. Peters dealt with the invoices from Zurich Trucking. (Transcript December 11, 2003, pp. 27 – 30). It begins with Mr Peters being referred to his business' accounting records (Exhibit 2, Part 2, Tab 8) and a particular entry which corresponds with invoice 074141, dated September 17, 2000. Mr. Peters testified that the first time he saw that invoice was when it was faxed to him by Mr. Sturzenegger, which the evidence shows was on May 29, 2002. He then acknowledged that he normally takes the invoices received by his business and hands them in to the bookkeeper to enter into the accounting statements. Next he tried to equivocate by saying that it was his bookkeeper that would have received invoice 074141, and not himself. He then repeated that the first time he saw that invoice was when it was faxed to him by Mr. Sturzenegger. He subsequently conceded again that he usually opens the mail and receives the invoices, checks that they are "right" and then gives them to the bookkeeper - that was the "normal course" of business. Despite all that, he stated that he does not believe that he did that in the case of this particular invoice because he would have flagged it and it would not have been entered.

[30] Mr. Peters was subsequently asked again by me about invoice 074141 (Transcript, January 19, 2004, p.32). Amazingly, he acknowledged having received that

invoice **prior to** a package of other invoices mailed to him in an envelope from Mr. Holland's proprietorship, Elgo Holdings, on **December 11, 2001**.

[31] Mr. Peters also contradicted himself about the date he terminated his relationship with Mr. Holland. Some time was spent on this issue in Mr. Peters' cross-examination and he eventually settled on stating that Mr. Holland was fired between the 19th and 22nd of October, 2001. When he was asked about his earlier testimony that Mr. Holland continued to work for him by hauling two more loads **after** he gave Mr. Holland the statement of account dated **October 29, 2001**, Mr. Peters said that his earlier testimony was not correct.

[32] There was inconsistency about the issue of Germain Gaulin and whether he worked for Mr. Peters in constructing the driveway on Mr. Holland's acreage. The topic of this work became irrelevant because of Mr. Peters' concession, at trial, that he was not claiming a setoff for this work. However, the questions and answers are relevant to Mr. Peters' credibility. Initially in cross-examination, Mr. Peters was asked:

Q He did some work for you, though, on the driveway?

A He was there for about three hours before I told him just to go home.

Q And he was working for you while he was there for those three hours?

A That's correct.

[33] Mr. Peters was then reminded that these answers were inconsistent with his earlier sworn evidence at the examination for discovery where he was asked about who was working on the driveway job:

Q You had you and your cousin, John Lenco, working?

A That's right.

Q Anybody else?

A No.

The contradictions continued as Mr. Peters was asked about the document he filed in response to a Notice to Admit that was signed by him and stated as follows:

Germain Gaulin was hired by the defendant for the purpose of spreading gravel at the said site and his employment was terminated within three hours of his starting due to his inability to operate heavy equipment and follow instructions.

[34] Mr. Sturzenegger's counsel then asked the following questions and received the following answers from Mr. Peters:

- Q Did you or did you not hire Mr. Gaulin for three hours to work at the driveway?
A Mr. Gaulin was already hired by us for other projects.
Q And did you have him, then, working on the driveway for three hours?
A I had him show up, and I sent him home.
Q Did you have him working on the driveway for three hours?
A He might have hung around there for three hours.
Q So which is correct, Mr. Peters, the evidence you're giving today or the statement you made in the Notice to Admit?
A Both, I believe.
Q Was he working or not working?
A He attempted to work.

[35] Mr. Peters acknowledged that his answer to Undertaking #8 from the examination for discovery was incorrect. There he was asked to provide records and confirm whether the work shown on all of Mr. Sturzenegger's invoices was done. Mr. Peters' response to that request indicated that the records he provided were complete and were "set out in [their] entirety". However, he acknowledged in answer to my question that that response was incorrect (Transcript, January 19, 2004, pp 42 – 43).

[36] Mr. Peters was also inconsistent about when he first became aware of Mr. Sturzenegger's involvement in Zurich Trucking. The Statement of Defence says (at paragraph 6) that the first time the defendants had "... any knowledge or

communication with the plaintiff was the commencement of this action ...” (I assume this was Mr. Peters’ drafting, as he has acted as his own counsel throughout these proceedings). However, it is apparent from Mr. Peters’ preparation of the lease agreement that he was aware of Mr. Sturzenegger’s involvement in Zurich Trucking as early as August 20, 2001, being the date of that agreement.

[37] As Mr. Sturzenegger’s counsel put it “Mr. Peters seems to say what he wants, when he wants, to serve his purpose.”.

[38] I find that there were no improprieties in Mr. Holland’s billing and receiving. Where there is a dispute between the evidence of Mr. Holland and that of Mr. Peters, I prefer the evidence of Mr. Holland. In particular, I accept Mr. Holland’s testimony that he prepared the Zurich Trucking invoices, provided them to Mr. Peters, and that Mr. Peters did not object to any of them. All payments made by Mr. Peters to Zurich Trucking have been properly accounted for. There was absolutely no evidence of misappropriation of funds paid by Mr. Peters to Mr. Holland for credit to the account of Zurich Trucking.

Issue #4 - Is There a Balance Due?

[39] Mr. Peters placed a great deal of importance upon a statement he provided to Zurich Trucking dated October 29, 2001, dealing with trips between Watson Lake, Yukon, and Libby, Montana. It purports to show that Mr. Peters owes a balance of \$1,965.30 to Zurich Trucking and includes a statement at the bottom: “Bank draft attached for full payment of \$1,965.30”. Mr. Peters argued, as I understand him, that when Mr. Holland cashed the bank draft, that signified a settlement of the accounts with Zurich Trucking.

[40] I have two problems with Mr. Peters' submission. The first is that, on its face, all the statement really says is that a bank draft for full payment of \$1,965.30 is attached. It does not say that this is being tendered as full and final settlement of all accounts between Zurich Trucking and Mr. Peters.

[41] The second problem with Mr. Peters' submission is that there was no acceptance of this bank draft as a settlement. I agree with counsel for Mr. Sturzenegger that s. 25 of the *Judicature Act*, R.S.Y. 2002, c.128, requires that any acceptance by a creditor of part performance of an obligation must be an **expressed** acceptance in order to constitute satisfaction of the entire debt. The case of *Western Answering Service Ltd. v. Builders Reality (Calgary) Ltd.*, [1995] A.J. No. 63, essentially just confirms that point.

[42] There was evidence that Mr. Holland was infuriated when he received this statement, because it was not an accurate accounting of the true debt owed by Mr. Peters to Zurich Trucking. He was also concerned that if he cashed the bank draft he might be taken to have agreed that there were no further funds owing from Mr. Peters to Zurich Trucking. He discussed these concerns with Mr. Sturzenegger over the telephone. He also discussed these concerns directly with Mr. Peters. Under cross-examination by Mr. Peters, Mr. Holland said, "You handed me the statement and I said that it was not correct".

[43] The case of *IBI Group v. LeFevre and Co. Property Agents Ltd.*, [2003] B.C.J. No. 263, confirms that the conduct of the creditor after receipt of an offer, in particular rejecting the offer, is relevant in considering whether there was an express acceptance by the creditor. That seems abundantly self-evident.

[44] In short, I reject Mr. Peter's assertion that the statement dated October 29, 2001, provides any defence to Mr. Sturzenegger's claim.

[45] I find that Mr. Peters did not dispute Mr. Sturzenegger's claim for the unpaid invoices until Mr. Sturzenegger threatened litigation. I also find that Mr. Peters has not yet paid those invoices. I am satisfied that Mr. Holland made ten trips between Watson Lake and Libby, Montana, and not nine, as Mr. Peters testified. With the exception of the last trip to Libby, Montana, Mr. Peters never denied that the trucking services identified in the invoices delivered to him by Mr. Holland on behalf of Zurich Trucking (Exhibit 2, Part 1, Tab 2) were in fact provided.

[46] There was a dispute by Mr. Peters about the correct mileage between Watson Lake and Libby, Montana. Mr. Holland conceded that when he billed Mr. Peters for these trips he used an estimate of that mileage. Mr. Peters says he obtained the actual logged mileage from statements he subsequently received from Husky Haulers. Mr. Sturzenegger's counsel acknowledged that the difference between the estimated and actual mileage was 46 miles per trip. At the agreed upon rate of \$1.33 per mile, that results in a credit of \$61.18 per trip, times ten trips, for a total credit to Mr. Peters of \$611.80. Deducting that from the claimed amount of \$39,375.98 results in a balance due of \$38,764.18.

Summary and Conclusion

[47] 1. Both Mr. Peters and his company are jointly and severally liable for any debts owing to Mr. Sturzenegger for these trucking services.

2. There was a contract between Mr. Sturzenegger and Mr. Peters.
3. There were no improprieties in the billing and receiving by Mr. Holland on behalf of Mr. Sturzenegger.
4. There is an outstanding debt payable by Mr. Peters to Zurich Trucking in the amount of \$38,764.19.

[48] In conclusion, I grant judgment to Mr. Sturzenegger against K. Peters Industries Northern Ltd. and Kerry Peters, jointly and severally, in the amount of \$38,764.19

[49] It is appropriate that Mr. Sturzenegger receive pre-judgment interest on that amount pursuant to s. 35 of the *Judicature Act*, R.S.Y., 2002, c.128.

[50] Mr. Sturzenegger will have his costs for this action throughout. If the parties are unable to agree to a bill of costs, I direct that they come back before me for a further determination on that point.

[51] This case stands adjourned to March 17, 2004, at 2:00 p.m., at which time any remaining matters may be spoken to.

GOWER J.