

[Featured Case Comment, September 2015](#)

Failure to be Reasonable and to Cooperate

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[Park Avenue Flooring Inc v. EllisDon Construction Services Inc, 2015 ABQB 478](#)

There were many issues canvassed in the Park Avenue case, but this case comment focuses only on one: an award for "improper termination of the Agreements and ED's failure to be reasonable and cooperate".

The Parties

This case relates to a claim made by Park Avenue Flooring ("**PAF**") against EllisDon ("**ED**") in relation to the installation of tile floor at the Calgary International Airport, operated by the Calgary Airport Authority ("**CAA**").

Throughout much of this litigation, PAF was represented by one of its principals, Debbie Miller. ED was represented by counsel. It is a remarkable feat for an unrepresented Plaintiff to pull together a lengthy trial and run it successfully.

The Litigation

The decision of Justice J.T. McCarthy was rendered on August 5, 2015 after a long history. The work was performed in 2002 and 2003 and the litigation carried on for 9 years until the trial was heard. The bid for the work was formally accepted in January 2002 and issues arose between the parties almost immediately. By October 2003 the parties were in litigation. The trial lasted 127 days in 2012 and 2013 and included "thousands of pages of documents as well as written and oral argument".^[1] While the trial ended on October 1, 2013, the trial judge's decision was not issued for another 22 months.

It is unclear how long the written briefs submitted by the parties were, but McCarthy J. refers to written argument exceeding 500 paragraphs submitted by both ED and PAF. Before the trial was even heard in 2012 and 2013, PAF had brought a Summary Judgment Application which was dismissed by both the Queen's Bench Justice and the Court of Appeal. When the Court of Appeal dismissed the appeal, leave was sought at the Supreme Court of Canada, but leave was denied.

Claims and Judgment

PAF alleged that, at the time the subcontract was signed, the total work was expected to cost \$1,413,000.00. ED disputed PAF's assessment of the value of the subcontract and calculated the cost as approximately \$921,000.00. PAF was paid \$871,894.00 by ED for its work under the subcontract.

PAF claimed \$5,022,997.00 for unpaid invoices, loss of productivity, deleted work, approved extra work, overhead and loss of profit. PAF also advanced claims for breach of the subcontract, damages from negligence and punitive and exemplary damages. ED counterclaimed for \$115,767.48.

At the end of the day, PAF was awarded \$675,650.46, plus interest of \$201,932.22, for a total of \$877,582.68.

Background and Context

A large portion of the decision provided the background of the individuals and parties. ED was acting in its capacity as construction manager for the CAA. That meant that the CAA was involved in the matters leading up to this dispute, but it was represented by ED. The relationship between PAF and ED was not just bad, it was appalling. The judge recites the chronology and the disputes, but it appears that there was very little that the parties could agree to throughout the time that they worked together.

The context of the dispute and the litigation can be appreciated by referring to some of the allegations made by PAF and ED:

- **"PAF alleges numerous types of misconduct, including:**
 - (a) harassing and humiliating its employees;**
 - (b) repeatedly and unilaterally changing the work schedule;**
 - (c) refusing or delaying setting unit rates for extra work;**
 - (d) failing or refusing to process PAF's progress draw claims in a timely manner;**
 - (e) creating unnecessarily difficult conditions by requiring PAF to work in small areas or requiring work in areas where necessary preparation work had not been performed;**
 - (f) understating area sizes to reduce payments to PAF;**
 - (g) advising PAF employees not to work for PAF;**
 - (h) refusing to acknowledge damaged flooring caused by third parties;**
 - (i) requiring that PAF meet higher standards than those specified in the Subcontract or required of other contractors;**
 - (j) inappropriately giving numerous Formal Notices including on Christmas Eve or a Thursday or Friday resulting in holiday weekend work; and**
 - (k) requiring PAF to perform work outside the scope of the Subcontract."**^[2]

- ED denied each of these allegations. Its specific responses to them were:

- (a) **"Concerning harassing and humiliating employees, ED denies abusing or defaming PAF employees, and argues that it conducted itself fairly. ED instead claims that PAF supervisors were bellicose, confrontational and incompetent, and that their conduct was disruptive to the CYI Project participants;**
- (b) **Concerning the work schedule, ED argues that the schedules had to be changed due to PAF's inability to meet agreed scheduling requirements. ED also claims that PAF failed to attend regularly scheduled subtrade meetings and failed to provide input on schedules in a timely or constructive way, allegations that PAF denies. PAF further denies that schedule changes were required because of its inability to meet prior schedules.**
- (c) **Concerning irregular hours, ED argues that night and weekend work requirements were set out in the bid documents provided to PAF, and applied equally to all subtrades. ED states that the issue of additional premiums for such hours was mediated and paid in accordance with the mediator's directions.**
- (d) **In response to PAF's claims about understating work area sizes, ED argues that these were reviewed and approved by [the architect], the prime consultant retained by the [CAA]. PAF responds that assignment of certain small areas contravenes the Subcontract.**
- (e) **Concerning ED having inappropriately high standards for PAF, ED states that the requirements were consistent with the Subcontract and expectations of other subtrades, which is disputed by PAF. ED further states that the work was inspected by [the architect], who would apply the standards."^[3]**

In addition to an allegation that ED, in breach of a duty of good faith and in breach of trust, invalidly called PAF's bond, PAF also alleged that:

- (a) **"ED did not pay for PAF's stand-by costs and delays cause by the G-8 summit, though it compensated others;**
- (b) **ED breached its duties by failing to disclose that, contrary to normal practice, ED itself did not provide a bond, nor was there a holdback for payment of subtrades. Thus, PAF could not claim against either when it was not paid;**
- (c) **ED failed to investigate or properly address an alleged assault of a PAF employee by employees of a competitor who were working for ED. ED denies that an assault occurred, and regardless, states the claim is statute-barred.**
- (d) **ED broke into PAF's lock-box, damaging it. As a result, PAF asserts that its materials, equipment, rented equipment and slate mock-up were later stolen. ED denies breaking into the lock-box, states that it has no obligation to provide PAF with a secure room, and contends it had no knowledge of the thefts."**^[4]

All of these allegations were made in the context of the judge finding that on certain items PAF should have been paid for work performed and it was not.

The judge found that one of the tilers, who was subcontracted to PAF, was the most believable witness at trial and consistently referred to his evidence. This included evidence of interference with PAF's work and PAF's requests to ensure that grout was left for 24 hours to cure before it was washed or walked on by other trades and the public. With regard to schedule, McCarthy J. found that the schedule issued by ED could not be relied on based on the tiler's evidence that "the work never went according to schedule".^[5]

The tiler testified that he could not get into the areas he was told to be tiled and that the schedule provided to him was "a joke". The tiler's evidence was that, if he had been given access according to the schedule provided, he could have tiled 1,000 square feet per day, but that was never achieved for a variety of reasons which were attributable to ED.

There were numerous disputes about the schedule and PAF provided evidence of a taped conversation between Debbie Miller (PAF) and Paul Forgues (ED) on November 23, 2002, in which Paul Forgues stated that he had always expected the schedule to be 18 months, a much longer period that PAF understood the work was to take. At trial, he indicated that he would not have said this if he had known that he was being taped.^[6]

After going through all of the evidence, the judge was prepared to award PAF damages for schedule delay, except for the fact that PAF had not complied with the notice provisions of the Subcontract and therefore was not awarded anything. The judge said "If PAF has complied with the notice requirement, it is my view that it would have been entitled to a substantial award to compensate for the delay."^[7]

ED's counterclaim against PAF for \$115,767.48, plus interest and costs for additional administrative and legal costs incurred to complete the work after the Subcontract was terminated, was dismissed. Regarding the ED counterclaim, McCarthy J. said that "finally, and perhaps most importantly, during the period of time that Mr. Forgues (ED) and Mr. Thompson (ED) claimed these administrative costs, PAF was legitimately owed substantial sums of money for which it had not been credited or paid by ED. In my view, this fact alone should disallow any of the so-called sets-offs or back-charges claimed."^[8]

Award for "improper termination of the Agreements and ED's failure to be reasonable and cooperate"

At paragraph 254, McCarthy J. states: "Therefore, in my view, an award of damages in favour of PAF for improper termination of the Agreements and ED's failure to be reasonable and cooperate is appropriate in the amount of \$150,000.00, plus pre-judgment interest on that amount from December 31, 2004".

In the section of the 71 page judgment leading up to the finding that PAF was entitled to \$150,000.00 for this heading of damage, the judge reviewed the evidence that one presumes he relied on for this award. Surprisingly, there is nothing concrete about the "improper termination of the Agreements" as the decision focuses on the "failure to be reasonable and cooperate." The following is my summary of the facts that the judge noted, but this summary does not cover every point the judge made:

- Mr. Studer (ED) informed PAF's workers that PAF was not paying its people (November 2002) which led to workers leaving the job because they were concerned they would not be paid. The trial judge made a finding that as a result of the misrepresentation about people not being paid, the "best installers" for PAF left the job site.
- Mr. Nerland (PAF) gave evidence that "he and PAF's installers were constantly being told [by ED] that they were going to get thrown off the job site and would not be paid".^[9]
- "PAF received payment on January 21, 2003 in the amount of \$38,084.55. It did not receive another payment for another 14 months (until April 1, 2004). This was long after the Agreements had purportedly been terminated by ED. A further payment was made in June 2004 in the amount of \$32,528.05. After January 21, 2003, PAF continued to work on the project until May 2003. At this time, ED's employees, no doubt including Mr. Studer, were encouraging PAF's installers to quit because they were not going to get paid – a self-fulfilling prophecy, so to speak. In my view, PAF was impeded in its ability to fulfil its obligations, and this was breach of an implied term of a Subcontract to be reasonable and cooperate."^[10]
- An installer who worked briefly for PAF stated that he complained to Mr. Studer (ED) about not being paid by PAF and Mr. Studer asked him why he worked for "those bitches" if he was not being paid. The judge found that "this statement was made at a time when significant amounts of money were due and owing to PAF by ED."^[11]
- At trial, Mr. Studer was cross-examined by PAF's principal, Debbie Miller, and explained his behaviour as follows: "I wouldn't have said it except in a quiet room to

one guy – why is he working for those bitches? But at that point I'd had enough of you."^[12]

- ED threw off the site two PAF tile installers for allegedly being incompetent, but the trial judge found that this was not the case and, in fact, one tiler was allowed back on the site by ED.
- A representative of the architect tried to assist in resolving issues between ED and PAF, but was told to not get involved. The architect's representative told PAF's principal in a telephone conversation "we owe you", but the following day received a letter from ED stating that the architect's "involvement would not be in the best interests [to the architect] on our project. We have requested your office to remove yourself from the process as your position as arbitrator has interfered with our process of administrating PAF's contract."^[13]
- Mr. Nerland (PAF) noted in his diary that Mr. Studer (ED) said that Paul Forgues (ED) and Debbie (Mrs. Miller) (PAF) had a problem with each other that was out of control.^[14]
- The animosity was so great that representatives of PAF stopped attending site meetings.
- Debbie Miller, the principal of PAF, was not allowed to be on site and at the same time ED was complaining about PAF's lack of professional supervision.
- Even members within the ED group were wondering why change orders were not being approved for PAF.
- Other consultants on the job could not understand why substantial completion was not being confirmed to PAF when the work appeared to be complete, other than deficiencies, and had been in use by the CAA for many months.
- The judge found that the deficiency holdback was excessive, bearing in mind the significant amount of money due and owing to PAF and the lack of satisfactory proof that PAF was responsible for the deficiencies alleged by ED. McCarthy J. said: "ED made it clear that no holdback monies, or any monies whatsoever due and owing under the Agreements, would be released until all deficiencies were satisfactorily addressed. Again, this was hardly reasonable or cooperative on ED's part."^[15]
- The judge acknowledged that Debbie Miller (PAF) was not as cooperative and reasonable as she should have been and she misrepresented certain costs. The judge found that "these were instances of a lack of reasonableness and a lack of cooperation by PAF, but they pale in comparison to the lack of reasonableness and lack of cooperation of ED and its employees, as discussed above."^[16]
- The judge further found that "while Mrs. Miller and PAF were unreasonable and uncooperative on occasion, ED was disproportionately unreasonable and uncooperative. At the end of the day, the failure to pay PAF on a timely basis caused PAF significant delays and problems in its ability to carry out the Subcontract. PAF was on site well in excess of 400 days."^[17]
- Before making the award of \$150,000.00, plus pre-judgment interest, to PAF, McCarthy J. reviewed the financial statements of PAF and found that PAF had "essentially gone out of business". In particular, McCarthy J. noted that in 2004 PAF

had incurred extra administrative and overhead costs in the amount of \$40,000.00, which included professional and legal costs, a \$40,000.00 claim from Sovereign General Insurance Company, the bonding company, which has been held in abeyance, and \$70,000.00 owed to commission sale staff who performed additional duties that would not normally be expected of them. Although he does not say so, these numbers add up to \$150,000.00 and immediately after reciting them, the judge awards \$150,000.00, plus pre-judgment interest, for "improper termination of the Agreements and ED's failure to be reasonable and cooperate".^[18]

This case addresses a number of the issues that can arise when projects are acrimonious. The long drawn out battle between the subtrade and the general contractor is an unfortunate circumstance because all parties will have spent far more time, energy and money on the resolution of this dispute than the dispute was ever worth. Where a relationship between two parties is so poisoned, it behooves the parties to replace the individuals involved so that a better business solution can be achieved.

[1] At paragraph 1

[2] At paragraph 88

[3] At paragraph 89

[4] At paragraph 92

[5] At paragraph 165

[6] At paragraph 333

[7] At paragraph 334

[8] At paragraph 310

[9] At paragraph 228

[10] At paragraph 243

[11] At paragraph 229

[12] At paragraph 229

[13] At paragraph 233

[14] At paragraph 236

[15] At paragraph 249

[16] At paragraph 251

[17] At paragraph 252

[18] At paragraph 254