

Citation: Cook v. Baldigara et al  
2001 BCSC 18

Date: 20010103  
Docket: C984880  
Registry: Vancouver

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**DONALD CHARLES COOK and THELMA SHARP COOK**

PLAINTIFFS

AND:

**BARBARA JOAN BALDIGARA, MICHAEL BALDIGARA and  
PENDER HARBOUR REALTY LTD.**

DEFENDANTS

**REASONS FOR JUDGMENT**

**OF THE**

**HONOURABLE MR. JUSTICE CATLIFF**

Counsel for the Plaintiffs

David K. Jones

Counsel for the Defendants  
Barbara Joan Baldigara and  
Michael Baldigara

Angela E. Thiele

Date and Place of Hearing/Trial:

December 11-15, 2000  
Vancouver, BC

[1] In 1992 the plaintiffs purchased the defendants' residential property on the Sunshine Coast. They were shown the sewage disposal system and assumed it was fully operational. Over the ensuing years they discovered problems with the system and were eventually obliged to replace it. They have sued the defendants for damages claiming negligent misrepresentation and breach of covenant. Allegations of fraudulent misrepresentation were withdrawn on the last day of trial. The claim against the corporate defendant was dismissed by consent in September 2000.

[2] Mr. Cook is a former business executive. He retired in 1994, two years after the Baldigara purchase. Mrs. Cook is an emeritus professor of educational anthropology. Mr. Baldigara owns a real estate agency, but is now "virtually retired". His wife is seriously ill and took no part in the proceedings.

[3] The property is located at 5416 Sans Souci Road, Halfmoon Bay, B.C. In 1967 Elizabeth Bennett, the wife of Arnold Bennett, and Mrs. Baldigara each became the owners of an undivided one-half interest in the property. The property was divided into two building lots and an undeveloped common lot. The Bennetts and the Baldigaras each built a home on their assigned lot. The property borders on an arm of Secret Cove. Sewage could not be discharged on land as there was

insufficient soil for a septic field. Accordingly, Mr. Bennett installed a treatment plant under his verandah with an outlet pipe that ran down the property and into the water.

[4] In October 1976 the Department of the Environment granted Mrs. Bennett a permit to discharge effluent from two private homes into Malaspina Strait. A condition of the permit was that the outfall line extended approximately 720 meters to mid-channel at a depth of 60 feet. Mr. Baldigara gave evidence at trial that he had purchased 700 meters of required pipe and assisted in laying it as set out in the permit. Over the next sixteen years there were occasional problems with the underwater line caused by yachts dragging their anchors over it. This would cause the line to kink or fold over on itself so that waste could not get through the pipe. As a result effluent would remain in the pipe and the pump in the treatment plant would keep working until it burned out.

[5] Although all costs of the sewage system were shared, Mr. Bennett undertook its actual maintenance. Mr. Baldigara looked after the paperwork. The Ministry of Environment file shows that Mr. Baldigara reported two episodes of kinking in 1980 and that later in the year he wrote to say that a heavier line had been laid which he hoped would solve the problem. In June 1988 he again wrote the Ministry about the problem with

boat anchors and asked if the line could terminate mid-channel in front of the property. The request was refused. Because the treatment plant was under Mr. Bennett's verandah he was the one to learn if the system had backed up and to take remedial action. Mr. Baldigara remembers at various times seeing Mr. Bennett out in his boat attending to the line. Mr. Baldigara has a physical disability which made it difficult for him to get up and down to the dock where the outfall went into the water. Sometime around the beginning of September 1991, Mr. Baldigara said that Mr. Bennett told him he had cut the sewage line at the dock, presumably, thought Mr. Baldigara, because a kink in the line had caused a problem at the treatment plant.

[6] At this time Mr. and Mrs. Cook were minded to buy recreational property on the Sunshine Coasts. Through a friend, who lived at Secret Cove, they learned that the Baldigara home was for sale although it had not been put on the market. A visit was arranged by telephone. The Cooks live in West Vancouver. They had not owned a summer home before. On 22 September 1992 they took a ferry in the afternoon to the Sunshine coast and spent about an hour or an hour and a half at the Baldigara home. They were shown through the house and went down to the dock. At some point

Mr. Cook remembers being shown the sewage treatment plant. He was told the line went from the plant down to the water and under the dock. He also believes Mr. Baldigara said that his own property would not support an ordinary septic system because of a lack of soil. After walking around the common property there was more discussion about the property and the sale price. The Cooks decided to purchase it and either then or shortly after gave the Baldigaras a deposit cheque for \$5,000.

[7] Mr. Baldigara's recollection is different and more detailed. He said that after showing the Cooks the house they went outside to walk down to the dock. He explained to them that the property was shared with the Bennetts and that although they had a permit for an outfall sewage system they were trying to convert to a land based system. He pointed out the area of a possible septic field between the two properties and told the Cooks of his meeting with a Ministry of Health representative (Mr. Adams) who had shown him where to dig holes to test soil depth and to dig percolation holes. He said he explained what they were trying to achieve and mentioned that the soil had been brought onto the property 20 years before. The party went down to the dock and Mr. Baldigara said he told Mr. Cook the problem they had had with

boat anchors causing kinking to the outfall line. He said he mentioned that his neighbour had cut the line and it had to be fixed. He said he also mentioned that one possible solution was to connect the line to the Jolly Roger outfall.

Correspondence produced at trial shows that Mr. Baldigara had asked to be hooked up to the Sunshine Coast Regional District outfall line in September 1988 and had been told it was feasible. In December 1989 the District had mentioned the options of connecting to the Jolly Roger treatment plant or joining into the District's outfall pipe direct - appearing to favour the former option.

[8] Mr. Baldigara said he was particularly concerned that the Cooks understood the situation fully as in buying the property they would become partners with Mr. Bennett. He said the cost for the alternative systems - Jolly Roger hook-up or land field - would be about the same (\$5,000), but because of the need to get easements over the water leases the land based system presented fewer problems.

[9] The purchase proceeded. Mr. Cook retained solicitors who wrote to the Ministry of the Environment to confirm that the sewage permit was in good standing. In the conveyancing documents Mrs. Baldigara, as vendor, covenanted that the permit was "valid and subsisting" and that its conditions had

been "duly observed and performed". Before a reply had been received from the Ministry about the permit, the purchase was completed.

[10] It was agreed that the Baldigaras would rent their former home for the time being. In late 1992 Mr. Baldigara saw Mr. Cook in the latter's office in Vancouver to fix the amount of rent. This was the second and last time the two men met before proceedings were started some six years later. Shortly after the purchase the Ministry informed Mr. Cook's solicitors that the permit was not in compliance "due to non-submission of annual monitoring data". Mr. Baldigara was informed and he obtained and submitted a sample from the treatment plant which passed muster. On 22 March 1993 the Ministry informed Mr. Bennett that the "permit is in compliance at this time". There was no evidence at trial about whether or not the outfall line Mr. Bennett told Mr. Baldigara he had cut in about September 1992 had been repaired. Mr. Bennett has recently died. Mr. Baldigara said he assumed Mr. Bennett fixed it as he always had in the past.

[11] The Baldigaras occupied the Cooks' property as renters for almost the whole of 1993. After this the Cooks took possession of their property, but only visited it about three days a month. In March 1993 the permit conditions were

changed to require grab sampling every 6 months, instead of once a year, and the submission of an outfall inspection report ever 2 years, the first report being required by 30 January, 1994. There was a complaint about the outfall pipe in July 1994 but an inspection by the Ministry of the Environment could not determine if the pipe was broken. In February 1994 Mr. Cook submitted a grab sample and was asked about the overdue outfall inspection report. Mr. Cook proposed to hire scuba divers to inspect the outfall pipe. When he told Mr. Bennett this, Mr. Bennett said, according to Mr. Cook, that there was no sense inspecting the line as it did not exist - the line had never gone to the mouth of the cove.

[12] Meanwhile Mr. Bennett was considering alternative disposal methods - either a ground field or the use of a holding tank. A Ministry inspection in May 1994 showed an unrepaired outfall pipe which Mr. Bennett told the Ministry he would not fix as summer boaters would only break it again. In January 1995, Mr. Bennett's application for a land field was rejected for lack of sufficient soil depth. With regard to submitting samples he wrote to the Ministry of the Environment to say that as both residences were vacant most of the time he



did not want to keep the treatment plant operating and would submit a sample when he returned in the spring or summer.

[13] Mr. Cook also sought an alternative method of sewage disposal. He hired experts who told him a field was feasible. But his application was rejected in early 1996. By October 1996 the treatment plant was no longer operating and the dock and pier had been removed. In July 1997 Mr. Bennett advised Mr. Cook that he intended to install a land field for his own residence and that Mr. Cook should make provision for his own sewage disposal. Accordingly, Mr. Cook, after investigation, had an "innovative" system installed, called a Glendon Biofilters System. It was finally installed in the spring of 1998 at substantial cost. I should add that over the years Mr. Cook, as well as Mr. Baldigara, had an often difficult relationship with Mr. Bennett, who does not seem to have been an easy man to get along with. This I assume added to the difficulty of solving sewage disposal problems.

[14] The plaintiffs complain that Mrs. Baldigara breached her covenant that the permit was in good standing. An annual report had not been submitted by the permittee. When this was made known to Mr. Baldigara he remedied the default at no cost to the plaintiffs. The Ministry then said the permit was in compliance. Mr. Jones submits that notwithstanding this the

permit was not in compliance because the permittee had not inspected the "pollution control works" and maintained them as required by the permit. The lack of maintenance is a reference to the reportedly cut line. The difficulty with this is that there is no concrete evidence that the line was cut at the date of purchase or, if it was, that it was not repaired by Mr. Bennett. The fact that Mr. Baldigara and his wife continued living in the house full-time thereafter, not to mention Mr. and Mrs. Bennett's presumed occupation, suggests that Mr. Bennett, who by all accounts was a meticulous person, would have remedied the situation. It would not be difficult to repair a 1 ½ inch plastic pipe which had been cut. It is to be remembered too that the summer boat anchor problem was then many months away. As for an alleged failure to inspect, the evidence points to Mr. Bennett having attended to the line over the years and presumably inspecting it to do so.

[15] Mr. Jones also submits that the outfall line either ended at the dock or, if it did not it did not extend to its full permit length. This would of course have been a breach of the permit. Again the problem is one of proof. Mr. Baldigara gave evidence of having assisted in laying the original line and of having bought the required length of improved pipe for

a second laying. He was not challenged about this on cross-examination. The only "evidence" that the pipe had not been laid properly is a somewhat ambiguous statement made by Mr. Bennett to Mr. Cook which was admitted not for its truth, but to explain why Mr. Cook did what he did. There is no admissible evidence that the pipe was not laid as it was required to be laid.

[16] Apart from the question of the sample, the plaintiff has not proved to the required standard that Mrs. Baldigara was in breach of the covenant she gave at the time of purchase. A sample was supplied as soon as practicable after Mr. Baldigara was notified and at no cost to the plaintiffs. For such a breach there could only be nominal damages.

[17] The claim against Mr. Baldigara is based on negligent misrepresentation. This in turn is based on Mr. Cook's evidence that Mr. Baldigara pointed out the treatment plant and the line going down to the dock, but explained nothing more about the sewage disposal system. Mr. Baldigara said that, on the contrary, he gave an account of the problems that had been encountered with the system and explained the alternatives that were being looked at. He said he showed the Cooks where he had been told to dig test holes for a land field straddling the two properties. I am sure both men

sincerely believe in the accuracy of their memories of a conversation eight years earlier. Obviously their recollections are in conflict. They cannot both be right.

[18] I conclude that Mr. Baldigara's recollection of the conversation is more likely to approximate to what in fact was said. He has had many years experience in real estate sales and property development. I accept that he was mindful of the need to explain as much as he could about the property interest he shared with Mr. Bennett. It was an unusual situation. The sewage disposal system was unusual, including as it did what has been called a secondary treatment plant situated under Mr. Bennett's control. The owners were in the course of making alternative plans for sewage disposal. I do not believe he would not have discussed these matters with Mr. Cook. They were clearly of great relevance.

[19] Allegations of fraud were withdrawn against Mr. Baldigara - appropriately in my view. He appeared to me to be an honest witness and I accept his evidence. It had an air of reality about it. He emphasized how important it was that Mr. Cook be put fully in the picture. I conclude he did his best to do so. That Mr. Baldigara was a credible witness appears also from the fact that it was he who disclosed that he had told the plaintiffs that the outfall line had been cut. The

plaintiffs seem to have based their case to a large extent on Mr. Bennett's assertion that the line had never been laid as required. A dishonest witness would not have made a disclosure about the cut line which could then be used against him and was.

[20] I conclude that because of the short time Mr. Cook had to digest a great deal of information in his only visit to the property before the sale, he has forgotten what he was told about the sewage system and the alternatives for its disposal. Mr. Cook's memory of the visit was shown not to have been wholly reliable. On discovery he insisted that he and his wife had taken the ferry in the morning and spent three or four hours at the property. He was a senior business executive who told us that in his work he relied on experts for advice and assistance. If it did occur to him that there might be problems with the system, he could well have considered he would rely on his solicitors to protect him. At trial Mr. Cook said that he felt he was protected by Mrs. Baldigara's covenant. But the covenant clearly would not entitle him to ignore the information given to him by her husband. It is also of some note that between 1992 and 1998 when the writ was issued, Mr. Cook made no complaint to Mr. Baldigara in any manner about the sewage system. The only

contact between the two was when Mr. Cook asked Mr. Baldigara in 1995 to provide him with a valuation of the property for tax purposes, which he did.

[21] Mr. Jones concedes that if I find Mr. Baldigara's evidence credible, the plaintiffs' case must fail. As I say, I accept Mr. Baldigara's evidence. I should add that if I had found that Mr. Baldigara had in effect simply represented that an operational system was in place, without mentioning problems in the past or an alternative future, there would still have been legal hurdles for the plaintiffs to overcome in reaching the substantial damage award they were seeking. In the light of my finding, however, I need not explore the matter further.

[22] For the foregoing reasons I must dismiss the plaintiffs' claim with costs on Scale 3.

"M.I. Catliff, J."

The Honourable Mr. Justice M.I. Catliff

January 5, 2001 -- Memorandum to the Legal Publishers issued advising that on page 6, paragraph 7, line 7 should read:

"...outfall line in September **1988** and had been told it was ..."