

**Zama'aiah Binti Haji Nayan
Hj Kamsani Bin Haji Ahmad**

... Plaintiffs

AND

**Tan Kai Haur
(Trading under the name and Style of "EDWOOD REAL ESTATE DEVELOPER")
Pg Hj Zainal Ariffin Bin Pg Seri Wijaya Pg Hj Ahmad**

... Defendants

**(Intermediate Court of Brunei Darussalam)
(Civil Suit No.18 of 2019)**

**Dk Hj Norismayanti binti Pg Hj Ismail, Judge
2nd November 2023**

Civil Law - Negligence – earthworks and construction of retaining wall – obstruction of natural flow of water/existing earth drainage - adverse effect on neighboring lands – damages to land and other properties – Nuisance - claim for loss and damages – damages to properties and household items – constructions of concrete drain to repair existing earth drain – repair works to landscape, plants and fish pond.

Mr C.W. Lim and Muhammad Rusyddin bin Bagol (M/S Ahmad Zakaria & Associates) for Plaintiffs.
Mr Eric Siow and Mr Jonathan Cheok (J Cheok Eric, Advocates & Solicitors) for Defendants.

Cases cited:

Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd [1984] 1 MLJ 286
Greenock Corpn v Caledonian Ry Co, Greenock Corpn v Glasgow & South Western Ry Co [1917] AC 556

J U D G M E N T

Dk Hj Norismayanti, Judge:

Plaintiff's case

1. This is the Plaintiffs' claim for damages and loss allegedly caused by the 1st Defendant's negligent acts in the construction of the development project which adversely affected the neighbouring lands. The 1st and 2nd Plaintiff are husband and wife and live at No.7, Simpang 466-2-27, Kg Sungai Akar, Jalan Kebangsaan Lama, Brunei Darussalam (the Plaintiffs' house). Haji Kamsani Bin Hj Haji Ahmad ("2nd Plaintiff") was also granted a Temporary Occupation License ("TOL") to a land next to the Plaintiffs' house which the 2nd Plaintiff obtained in August

1999. The Defendant's land at Lot. 35745, Kg Sungai Akar, Jalan Kebangsaan, which is the site of the development project is situated adjacent to the Plaintiffs' TOL land.

2. It is the Plaintiff's case that the Tan Kai Haur ("1st Defendant") started developing Pg Hj Zainal Ariffin Bin Pg Seri Wijaya Pg Hj Ahmad's ("2nd Defendant") land on about April or May 2016. As part of the development project, the Defendants erected a retaining wall between the 2nd Defendant's land and the Plaintiffs' house. The construction of the retaining wall involved the excavation and clearing of the Defendant's land which included a pond shared with the 2nd Plaintiff's TOL land. The Plaintiffs allege that, during the start of excavation and clearing operations, the 1st Defendant's workers began depositing significant quantities of soil into the shared pond, which subsequently obstructed the drainage system of both the Plaintiffs' house and the TOL land. The 2nd Plaintiff believes that the earthworks and retaining wall increased the risk of flooding within the perimeter of the 2nd Defendant's land and the Plaintiff's house.
3. The Plaintiffs also claim that upon discovering the obstruction to the drainage system of their house, the 2nd Plaintiff did in fact warned the 1st Defendant's workers of the potential risk of water blockage and resulting flooding. However, the Plaintiffs contend that this warning was ignored.
4. Further, the Plaintiffs assert that during the initial phases of the development project, they were affected by a prolonged period of continuous rainfall. This led to the accumulation of substantial volumes of water, which subsequently caused blockages within the premises of the Plaintiffs' house, including instances of flooding. The Plaintiffs further contend that these circumstances played a significant role in the septic tank of their home overflowing. This unfortunate series of events spanned a period of approximately seven months, from September 2016 to March 2017.
5. The Plaintiff and their family, it is claimed, found themselves in a predicament that rendered their house uninhabitable. The cause of their distress was the overflowing septic tank, which, in turn, made the house's bathrooms unusable. This situation created an environment that was not only inconvenient but also potentially hazardous to the health and well-being of the Plaintiff and their family. The Plaintiffs maintain that the development project, coupled with the adverse weather conditions, directly contributed to the aforementioned issues, causing significant inconvenience and distress to the Plaintiffs and their family.

Loss and Damages

6. The Plaintiffs allege that due to the overflow of the septic tank during that period of time, it resulted in a complete blockage of all the bathrooms within her house. This unfortunate incident rendered the bathrooms unsanitary and unfit for use. The unsanitary conditions of

the bathrooms raised significant health concerns among the plaintiffs, particularly the potential risk of diseases transmitted by mosquitoes. Consequently, they were compelled to invest in a larger quantity of mosquito repellents than they had previously needed. This situation has caused considerable inconvenience and distress to the plaintiffs, who now seek redress for the discomfort and potential health risks they have been exposed to.

7. The Plaintiffs also contends that the flooding and overflow of the septic tank also caused significant damage to the interior of their house. The damages included personal properties and various household equipment. The list of affected items includes, but is not limited to tools, carpets, cabinets, and a range of cooling appliances such as freezers, refrigerators, and coolers. Additionally, the plaintiffs' wardrobes were not spared from the unfortunate incident, with numerous clothing suffering damage. The Plaintiffs maintains that the flooding and overflow of the septic tank were the direct causes of these losses and damages.
8. The 1st Plaintiff also supports the 2nd Plaintiff's claim of damages caused to the TOL land situated next to the development project. The damage caused is comprehensive and includes the landscape, plants, fruit trees and fish which the Plaintiffs have been rearing in the pond situated on the TOL land.
9. The Plaintiffs also asserts that they both suffer from emotional distress each time it rains fearing that flooding will occur again and that water would enter their house. This emotional distress stems from many anxious thoughts regarding the state of their house and other external dangers that could arise from flooding and water entering their house. Their children also suffered from exhaustion from having to clean the interior and exterior of the house multiple times as a result of the flooding and resulting events.

Defence case

10. The Defendant deny any liability on the damages and losses suffered by the Plaintiffs to their house and TOL land. It is the Defendant's position that any works earthworks done on the 2nd Defendant's land was part of the approved earthworks plan. The defendants call upon Chung Sze Kiat ("DW1") to give evidence on their behalf. DW1 is an engineer from Alam Sejagat Consulting Engineers ("Alam Sejagat"). According to DW1 and verified by the 1st Defendant, Alam Sejagat were appointed as engineers for the development project of the 2nd Defendant's land at Lot 35745, Kg Sungai Akar. The earthwork plans for the development project were submitted to the relevant authorities who then granted the necessary approvals. Both the 1st Defendant and DW1 states that the earthwork plans comprise of the following: -

- (i) Construction of a retaining wall between the 2nd Defendant's land and the Plaintiffs' land;

- (ii) Land filling and raising the level of the Defendant's land. The level of the Defendant's land was only raised after the construction of the retaining wall was completed;
- (iii) Constructing a drain immediately next to the retaining wall on the Defendant's land.

Approved earthworks

11. In response to the Plaintiffs' claim that the dumping of soil has resulted in a blockage to their land's drainage system, the Defendants counter-argue that the erection of the retaining wall has effectively prevented any water flow between the Defendant's and the Plaintiffs' properties. Furthermore, the testimony of DW1 substantiates that Alam Sejagat conducted regular inspections of the earthworks on the Defendant's land, confirming that the executed earthworks were in strict compliance with the approved plans.
12. It is also DW1's testimony that ABCI did not require an impact assessment report to be carried out in accordance with section 36 of the Building Control Regulations (BCR). Further he also claims that section 38 of the BCR is not applicable to the 2nd Defendant's land bordering the TOL land. It is not relevant to the 2nd Defendant's land as the retaining wall is built on top of a flat ground of the 2nd Defendant's land.
13. DW1 also maintained that the Defendants had adhered with section 39 of the BCR. According to DW1, the Defendant's land drainage system was in full compliance with this requirement, effectively ensuring that no private land would be adversely affected by water discharge. DW1 also asserts that section 31 of the BCR is not applicable as there was no existing river or stream flowing through the land and which required to be diverted.
14. Further to the above, it is the Defendants' case that there is no existing earth drain at border separating the 2nd Defendant's land and the TOL land (area marked as X3, page 22 of P2). The area was previously filled by their shared pond prior to the development project. The topography drawings were referred to the court to show that there was no prior earth drain existing at area marked X3. The Defendants' therefore alleged that the Plaintiffs failed to adduce any evidence to show that there was in fact an earth drain at area marked X3 prior to the commencement of the development project.

Report on site visit

15. Upon receiving notification from the 1st Defendant regarding the Plaintiffs' grievances about flooding on their property and the TOL land, DW1 conducted an inspection of the Plaintiff's house and land. This inspection was conducted on the 22nd February 2017. DW1 subsequently compiled his observations and conclusions into a detailed report dated 11th March 2017, which was then submitted to ABCI, Ministry of Development on the. The report explained that upon the receipt of the Plaintiffs' complaint in 2016, their contractor promptly mobilized a team of workers to undertake the necessary remedial measures. The team was tasked with the excavation and repair of the earth drain situated along Lot 35745 and the TOL land.

16. In his above-mentioned report, DW1 further details his site visit, during which he was accompanied by both the developer and the 2nd Defendant. The 2nd Defendant, in his account, alleges that the earthworks carried out by the 1st Defendant had a detrimental impact on his fruit trees and led to the unfortunate demise of his fish population in the pond on the TOL land. On this issue, DW1 noted that prior to the commencement of the earthworks, which included filling up the pond that overlaps both the 2nd Defendant's and Plaintiff's land and the construction of a retaining wall, the water from the pond was already naturally flowing towards the TOL land. DW1 also discovered the construction of a permanent structure close to the existing earth drain which according to DW1 may hinder the smooth flow of the drainage system. DW1 is therefore of the view that the blockage to the earth drain was not due to the earthworks done by the 1st Defendant but was because the Plaintiffs did not provide any maintenance on the existing earth drainage on their land.
17. DW1's report therefore provides an objective account of the site conditions, both before and after the earth drain was dug up, and serves as a critical piece of evidence in understanding the allegations made by the 2nd Defendant.
18. Moving on to the 2nd Plaintiff's complaints of flooding inside his house, DW1 also conducted an inspection of the Plaintiffs' house. DW1 noticed that the area of the house affected by the flooding was an extension to the house and claims that it may not have been constructed in strict compliance to the required authority guidelines. It is DW1's finding that the floor level of the extension was below ground and there was no perimeter drain around the extension. This led DW1 to conclude that the flooding within the residence was not a direct consequence of the earthworks done by the 1st Defendant.
19. The 2nd Plaintiff also complained about the malfunction of the toilets in the house. From DW1's site inspection, he observed that the existing earth drain invert level outside their boundary were much higher than the invert of the overflow pipe from the septic tank. DW1 therefore is of the view that the proper functioning of the toilets was not caused by the earthworks done by the 1st Defendant. DW1 also concludes his report by stating that Defendants' contractor had already done their part by helping to excavate and repair the earth drain along Lot 35745 and the TOL land.
20. Based on the above-mentioned findings of DW1, it is clear that DW1 firmly maintains that the flood issues experienced by the Plaintiffs cannot be attributed to any negligence on the part of the 1st Defendant. Instead, the evidence suggests that the flooding may be a result of structural inadequacies essential in the design and construction of the house extension.

Court's considerations and findings

Situation on Plaintiffs' land and TOL prior to the commencement of the development project

21. It is imperative to state that the Plaintiffs have made a significant claim regarding the issue of flooding. They assert that such an issue had never occurred at their house and the TOL land prior to the commencement of the development project on the 2nd Defendant's land. This claim is not without its substantiating evidence. The 2nd Plaintiff, in particular, has provided compelling evidence to support this assertion. He has stated that there had not been any incident of flooding since they started living in their house in 2003. This is a significant period of time, spanning over a decade, during which no such incidents were reported or experienced. This fact lends considerable weight to the Plaintiffs' claim and raises serious questions about the potential impact of the development project on the local environment and the properties in its vicinity.

Situation on Plaintiffs' land and TOL after the commencement of the development project

22. The Plaintiffs further contend that ever since the development project commenced, they have experienced flooding on their properties. The 2nd Plaintiff, in particular, has been vocal about this issue. They assert that they had experienced flooding on their properties not once, not twice, but three (3) times from late 2016 to early 2017. This is a relatively short period of time during which such incidents have occurred repeatedly. It is also noteworthy that this period coincides with the commencement of the development project on the 2nd Defendant's land in 2016. This connection between the timing of the development project and the incidents of flooding is too significant to be dismissed as mere coincidence. It suggests a potential causal relationship between the two, which warrants further consideration.

Situation on Plaintiffs' land and TOL after the building of concrete drainage

23. The Plaintiffs, in their testimony, have provided substantial evidence to support their claim that there has been no reoccurrence of flooding on their property since the construction of a concrete drain on the boundary between their land, the 2nd Defendant's land, and the TOL land. The construction of the concrete drain, they argue, was a necessary and justified response to the 1st Defendant's negligence, a measure taken to protect their property and prevent further damage. This drain was built to counteract the effects of the earth filling activity carried out by the 1st Defendant and their contractor, which had previously caused significant waterlogging and flooding on the Plaintiffs' property. The Plaintiffs argue that the flooding would not have occurred if not for the 1st Defendant's negligent act of blocking the existing earth drainage system, an act that was not only irresponsible but also in direct violation of the established norms of property management and maintenance.

24. The Plaintiffs further contend that the 1st Defendant's failure to remedy the situation, even after being notified by the Plaintiffs, is indicative of their disregard for the potential damage and inconvenience caused to the Plaintiffs. The 2nd Plaintiff had taken the initiative to inform the 1st Defendant's foreman about the issue, expecting that the necessary corrective measures would be taken immediately. However, the Plaintiffs submit that the 1st Defendant's lack of action in this regard has only served to worsen their situation.

What happened between the commencement of the development project and the Plaintiffs building the concrete drain?

25. It is a fact that the 2nd Plaintiff and the 2nd Defendant share a pond which is positioned on the 2nd Defendant's land and a small portion of the 2nd Plaintiff's TOL land. As part of the development project, the 1st Defendant was to construct a retaining wall and part of the retaining wall was to cut across the perimeters of the pond. Consequently, this undertaking required the 1st Defendant to excavate the pond and earth fill that part of pond on the 2nd Defendant's land. It is also pertinent to mention that the earthworks also included the levelling up of the 2nd Defendant's land after the construction of the retaining wall was completed.
26. It is the Plaintiff's contention that the shared pond serves as an outlet for the natural flow of water drainage from the adjacent properties. In earth filling the pond, the Plaintiffs claim that the 1st Defendant had negligently filled the existing earth drain situated in between the boundary of the 2nd Defendant land and the 2nd Plaintiff's TOL land (marked as X3 on photo 1A, page 22, bundle P2). The said area in between that was also earth filled by the 1st Defendant falls part of the 2nd Plaintiff's share of the pond on his TOL land. It is contended that the negligent act of earth filling the entire pond constituted as trespass. It is the 2nd Plaintiff's evidence that he never granted the Defendants permission or consent to earth fill his share of the pond on his TOL land. Further, the Plaintiffs contend the earth filling of the pond on his TOL land obstructed the natural flow of existing drainage which resulted in the flooding of the Plaintiff's house and TOL land.
27. It is the Plaintiffs' case that the pre-existing earth drain was capable of effectively channeling water away from their residence and TOL land towards neighboring properties, preventing the accumulation of water on their premises. The Plaintiffs assert this is evidenced by the fact that there had been no instances of flooding at their house and TOL land prior to the commencement of the development project.
28. Therefore, the material change that occurred during this time is the 1st Defendant's earthworks and building of the retaining wall. The Plaintiffs therefore submit that the Defendants failed to discharge their duty of care towards the Plaintiff by not assessing the risk of their works.

Did the Defendants act negligently?

29. In highlighting the responsibilities of the Defendants, the Plaintiffs refer to the Defendants' Development Agreement ("DA") dated 21st December 2012 and makes specific reference is to the following clauses:

Clause 2.1.2 of the DA: *"The Developer shall forthwith and **NOT LATER THAN SIX (6) MONTHS** from the date of fulfilment and satisfaction of the Pre-Condition, the Developer shall: - (b)*

*make application to the relevant authorities for approval for the earthworks on the Land. Upon approval, the Developer shall proceed to carry out the said earthworks and shall complete the same **WITHIN SIX (6) MONTHS**. Thereafter, the Developer shall apply to the relevant authorities for confirmation that the earthworks have completed in accordance with the requirements by the relevant authorities.”*

Clause 4.10 of the DA: *“The Developer shall construct the Landowner’s Apartments in good substantial and workmanlike manner. In conformity with the approved Site Development Plan cum Floor Plans, Building Plans and Specifications according to good current construction practice, **in compliance with all Acts, bye-laws and regulations and with due diligence.**” (emphasis mine)*

Clause 13 of the DA: *“This Deed shall be governed by the Laws of Brunei Darussalam and subject to the non-exclusive jurisdiction of the Courts of Brunei Darussalam.”*

30. Granted that the Defendants have obtained the approval from ABCI for the earthworks plans but the Plaintiffs submit that the approval comes with it certain regulations which is of relevance in the present case. Item No.31 of the said regulations (page 36 to 38 of D1) specifically states that the applicant must ensure and be held accountable so that earthworks does not interfere with flow of the existing drainage. If there are any complaints, damage to government/private property and land, then the applicant should be ready to repair the situation as soon as possible at their own expense.
31. Based on the above clauses and regulations, the Plaintiffs submit that the Defendants have a fiduciary duty to adjacent landowners in that the developer has a duty to consider the impact of their development on adjacent landowners.
32. In consideration of the Plaintiffs’ submissions on the developer’s duty of care, the court finds that it is important to address the issue of fiduciary duty. Generally, fiduciary duty can be defined as a legal and ethical obligation that requires a person or entity, referred to as the fiduciary, to act in the best interest of another party, known as the beneficiary or principal. However, within the context of property development, developers typically do not have a fiduciary duty to adjacent landowners unless there is a specific legal relationship that creates such a duty. In the present, no such legal relationship has been established.
33. Nevertheless, the court does find that in property development, developers are required to comply with conditions and regulations stipulated by the relevant authorities. These guidelines can cover provisions intended to safeguard the concerns of adjacent landowners. This is shown in the Building Control Regulations which applied to the approval granted by ABCI, particularly regarding the drainage matter (as outlined in item no. 31, paragraph 27 above) and the same has been referred to in the Defendants’ defense.

Test for negligence

34. Based on the above finding, the court must now turn to the question on whether the 1st Defendant breached the conditions stipulated by the ABCI approval for the 1st Defendant's earthworks for the development project.
35. The Plaintiff counsel refers to a Malaysian case *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286 (*Seong Fatt* case) where the Malaysian Federal Court set out the test applied by the trial judge on how a party can be found liable for negligent acts between neighbouring lands: -

"The learned judge had to consider whether on the evidence before him, on the balance of probabilities, he was satisfied – (a) that the appellants did carry out substantial earthworks on their land as alleged by the respondents; (b) that as a result of the substantial alterations to the appellants' land there was created a dangerous situation; (c) that by reason of the aforesaid there was an unnatural use of the appellants' land; (d) that the appellants knew or ought to have known that it was likely to affect the natural flow of water and the previous controlled drainage.

Among the particulars of negligence, the respondents alleged that the appellants – (a) failed to take heed the warnings that the said works could result in serious and sudden floods and could cause damage to them (respondents); (b) failed to take any sufficient steps to prevent the collection of water on their (appellants') land and to prevent the escape of such water, rubble, soil and debris on to the respondents' premises."

36. In the same case, the Federal Court Judges (FCJ), in addressing the issue of liability for damage caused by escape of water from land, reference was made to Halbury's Laws of England, 3rd Ed. Vol. 39 paragraph 709 which states: *"Although an owner or occupier of land is not liable for the escape of water, naturally on land, in the course of the ordinary and proper use of the land, he may be liable if an escape of water from his land occurs in circumstances amounting to a nuisance or if the escape is caused by his negligence or by willful act on his part which is not within the ordinary or natural use of the land."* The FCJ also found particularly relevant the following passage at paragraph 717: *"A person who alters the course of a natural stream will be liable for damage caused by water which escapes or overflows from the new channel due to the inadequacy or defective construction of the new channel."*
37. The FCJ also referred to the broad principle of law stated on the case of *Greenock Corpn v Caledonian Ry Co, Greenock Corpn v Glasgow & South Western Ry Co* [1917] AC 556 that

states at page 572: *"It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable."*

38. Having taken the above authorities and excerpts into consideration, the court finds it appropriate to adopt a similar approach taken by the trial judge in the *Seong Fatt* case in assessing a party's negligent act. However, considering the facts of the present case, the court sets out the test to apply as follows: the court must be satisfied:
- (a) that the 1st Defendant did carry out substantial earthworks on the 2nd Defendant's land as alleged by the Plaintiffs;
 - (b) that as a result of the substantial alterations to the 2nd Defendant's land there was created a dangerous situation;
 - (c) that by reason of the aforesaid there was an unnatural use of the 2nd Defendant's land;
 - (d) that the Defendants knew or ought to have known that it was likely to affect the natural flow of water and the previous existing drainage.
39. On part (a) mentioned above, it is a substantiated fact that the Defendants entered into a development agreement to build 96 units of luxury condominiums which was the basis of the substantial earthworks done on the 2nd Defendant's land in 2016. To be more specific, the relevant earthworks in this case would be the excavation and earth filling by the 1st Defendant on the natural pond shared by the Plaintiffs and 2nd Defendant. Part (a) of the test is therefore satisfied.
40. On part (b) of the test, it is an established fact that the pond on the 2nd Defendant's land has been completely filled and there now stands a retaining wall, a part of which now runs through the shared pond. It is alleged that the 1st Defendant also filled in the pond which falls part of the 2nd Defendant's TOL land. Now the pond is completely gone and the boundary of the 2nd Defendant's land is now lined with the retaining wall. In earth filling the pond and erecting a retaining wall, the natural flow of water through the existing drainage has been obstructed. The obstruction of the existing drainage resulted in overflowing of water into the Plaintiffs' house and 2nd Plaintiff's TOL land. The situation became dangerous as it affected the plants, trees and fish pond on the 2nd Plaintiff's TOL land and also damaged the Plaintiffs' house as a result of the ensuing flood from continuous rainfall. The court finds part (b) of the test also satisfied.
41. On part (c), it is a forgone conclusion that the earthworks on the 2nd Defendant's land constitute an unnatural use of the land i.e. building of condominiums and retaining wall which significantly altered the natural characteristics of the land. The court finds part (c) of the test is satisfied.

42. Lastly, on part (d) of the test, the court is to determine whether or not the Defendants knew or ought to have known that it was likely to affect the natural flow of water and the pre-existing earth drainage. Based on the plans for approval of earthworks, both Defendants gave evidence that the earthworks included the works for constructing a drain immediately next to the retaining wall on the 2nd Defendant's land. It is evident that the 1st Defendant did know that there is a risk of water flowing from the 2nd Defendant's land to the Plaintiffs' land and the TOL land. However, by constructing a drain on the defendants' side of the retaining wall, it is assured that no water could flow from the 2nd Defendant's land to the Plaintiff's house land and TOL land. The Defendants also deny that the earthworks affected any drainage system on the Plaintiff's land.
43. Based on the facts and circumstances presented before the court, it is clearly evident that prior to the start of the development project, the shared pond served as a natural channel for water to escape from the surrounding lands. This pond, a shared resource between the parties involved, played a significant role in maintaining the ecological balance of the area, acting as a natural drainage system and preventing waterlogging on the adjacent lands. However, with the commencement of the earthworks on the 2nd Defendant's land, the dynamics of this natural system were significantly changed.
44. The pond was drained. This action, earth filling and dumping of soil by the Defendants, was not limited to their share of the pond but extended to the 2nd Defendant's share of the pond situated on the TOL land. This action disrupted the natural balance of the area, causing potential harm to the local ecosystem and infringes on the rights of the neighbouring lands.
45. In an attempt to deal with the potential effects of their actions, the 1st Defendant constructed a drain on the 2nd Defendant's side of the retaining wall. This drain, they claimed, allows water to flow away from the adjacent lands and preventing waterlogging. However, it is evident that this drainage system cannot replicate the ecological benefits provided by the natural pond, nor can it justify the actions taken by the 1st Defendant in dumping soil on the pre-existing water drainage system in between the 1st Defendant's land and the Plaintiffs' land and TOL land.
46. The court will now turn to the Defendants' assertion that there was no pre-existing earth drainage at the disputed area (area marked as X3, page 22 of P2). It is undisputed that there are two existing earth drains based on the topographical drawings at page 27 of P2, one leading to the shared pond and the other leading away from it. In the circumstances, the Defendants allege that they did not block any existing earth drainage at X3. The court is of the opposite view than that of the Defendants'. By dumping soil and drying up the shared pond, the Defendants' had adversely affected the natural flow of water leading into the pond which became blocked at the time.

47. The earth drain leading the water to flow into the shared pond, as per the topographical drawings, serves the purpose of channeling water towards a shared pond. It can be observed that the level of the shared pond receiving the water flow from the said earth drain is lower than the surrounding lands. The second drainage system (X4, page 22 of P2), on the other hand, is designed to divert water away from the shared pond. The court acknowledges that it is equally important as it prevents the overflow of water from the pond, thereby averting potential flooding in the surrounding areas. The court recognizes the significance of this system in maintaining the balance of water in the area and ensuring the safety and well-being of the residents.
48. The Defendants however submits that according to DW1's evidence, the earth drain at X4 was poorly maintained, with overgrown grass and was hardly visible. It is their case that there would still be flooding if the earth drain at X4 was not well maintained as it was the only natural channel for water to escape. There is also a new concrete fence at the boundary between the TOL land and the neighbouring land. It is claimed that there also a store constructed adjacent to the said fence and this hindered the flow of the water.
49. The Defendants also relied on the evidence given by the 1st Plaintiff who stated that the water that overflowed into their land came from the neighbouring lands and not from the 2nd Defendant's land. The Defendants claim that her evidence supports their claim that the Defendants are not liable to the damages and loss suffered by the Plaintiffs as the resulting flood water is from neighbouring lands. This argument however does not persuade the court on their position. The fact remains that the overflow of water from neighbouring lands never became an issue until the shared pond was earth filled and the natural flow of water to escape was obstructed, and led to the retention of water on neighbouring lands to overflow into the Plaintiffs' land and TOL land.
50. Further to the above, it is the Plaintiffs' evidence that after the construction of the concrete drainage at area X3, there have been no further instances of flooding on their properties. This is significant considering that there is still an absence of perimeter drainage around the Plaintiffs' house, specifically the house extension as highlighted by DW1. Furthermore, until the present time, there have been no additional instances of septic tank and toilet bowls overflowing during periods of heavy rainfall. This, the court believes, is particularly significant given the presence of a concrete fence erected by the second Plaintiff's neighbor in the area designated as X4, which DW1 attributed as the possible cause of flooding to the Plaintiffs' TOL land.
51. The Plaintiffs' evidence thus suggests that the construction of the concrete drainage system at area X3 has effectively mitigated the flooding issues on their properties, despite the lack of additional drainage measures and potential obstructions.

52. This case is a clear and undeniable instance of negligence and disregard for the pre-existing water drainage system that was in place for the Plaintiffs' land and TOL land. It is evident from the evidence presented that the Defendants' workers, in the course of their operations, dumped soil in a manner that completely obstructed the pre-existing water drainage system. This act, whether intentional or not, has resulted in a significant disruption to the natural flow of water, causing potential harm and inconvenience to the Plaintiffs. The Plaintiffs have provided photographic evidence (page 28 to 36 of P2) to corroborate their claims, which clearly shows the obstruction to the earth drain and the damages caused by the soil dumping. These photos, taken at various angles, provide a comprehensive view of the situation, providing absolute certainty about the veracity of the Plaintiffs' claims. It is also evident from the photos that there is an absence of an alternative channel constructed by the Defendants for the natural flow of water to escape.
53. The court is further satisfied that the Defendants were fully aware of the likelihood or risk of the earthworks affecting the natural flow of water. The basis for this conclusion is from the fact that the Defendants, having received numerous complaints about the overflow of water onto adjacent lands, had deployed workers to "*excavate and repair the earth drain*" (emphasis mine) situated between the retaining wall and the TOL land. This action, as mentioned in DW1's report, is a clear indication of the Defendants' knowledge of the potential impact of their earthworks on the natural water flow.
54. The court also takes into account the photographic evidence attached to DW1's report, which provides a visual representation of the situation before and after the excavation. The photos clearly show that the existing water drainage system, which had been adversely affected by the earthworks, began to flow freely after the excavation was carried out by the Defendants' workers. This further substantiates the court's belief that the Defendants were not only aware of the potential risks associated with their earthworks but also took steps to mitigate the impact of the adverse effects.
55. Therefore, the court readily concludes that the Defendants were aware of the potential risks and effects of their earthworks on the natural water flow. Their actions, as evidenced by their response to the complaints and the subsequent excavation and repair of the earth drain, demonstrate a clear understanding of the situation and suggests an acknowledgment of their role in causing the disruption to the natural water flow. Part (d) of the test is therefore satisfied.
56. Based on the above-mentioned findings, the court concludes that the Defendants are not in compliance with the Building Control Regulations (particularly on section 31 referred to above) and the court is fully satisfied on the test applied above and concludes that the Defendants' are liable for a negligent act i.e. their failure to ensure that the existing water drainage is not adversely affected by their approved earthworks.

Nuisance

57. The Plaintiffs also allege the negligent act of the Defendants had caused nuisance on his TOL land and their house. The Plaintiffs contend that the earthworks and earth filling of the shared pond found his TOL had caused the blockage of the existing water drainage system. The Plaintiffs claims that as a result of the blockage, it caused the Plaintiffs' main septic tank to their house to overflow. It is the evidence of the 1st Plaintiff that when the flooding occurred, water would come up through the manhole and out from the toilet bowl located in the toilet next to their kitchen. Water from the toilet near the living room would also overflow into the living room and water from the maid's toilet would overflow into their wardrobe room causing extensive damage to their property.
58. The Plaintiffs therefore claims that their main septic system was adversely affected, leading to the malfunctioning of the toilet facilities within their house. This unfortunate circumstance rendered the toilets unusable and created an unsanitary environment, causing considerable inconvenience to the Plaintiffs and their family. The severity of the situation compelled them to seek alternative shower and toilet facilities elsewhere. This situation has undeniably caused a significant disturbance in the Plaintiffs' lives, infringing upon their right to the quiet enjoyment of their home and land.
59. In their defence, DW1 relies on his findings stated in his report dated 11th March 2017 (paragraph no.15 and no.16 above is referred). Assertions of low floor levels in relation to the house extension, no perimeter drain around the extension and the lower level of the invert of the overflow pipe of the septic tank as the main cause of the damages and inconvenience experienced by the Plaintiffs. Having given this issue due consideration, the court is of the view that despite DW1's findings mentioned above, the Plaintiffs' never experienced any issue of flooding and overflow of the main septic tank causing damage to their land and house respectively. The issue of flooding only arose after the commencement of the development project. In the circumstances, the court finds that DW1's report does not carry much weight in supporting the Defendants' defense.
60. Further to their defense, DW1 relies on the findings presented in paragraphs 15 and 16 of his report. He argues that the primary factors leading to the damages and inconveniences suffered by the Plaintiffs are the assertions of low floor levels concerning the house extension, the absence of a perimeter drain around the extension, and the lower level of the invert of the overflow pipe of the septic tank.
61. In considering DW1's findings above, the court also takes into account the 2nd Plaintiff's evidence that there had been no further issue of flooding after the Plaintiffs had engaged a contractor to build a concrete drain between the retaining wall and the 2nd Plaintiff's TOL (area of blocked pre-existing drainage, X3). Under the given circumstances, the court finds that the probability of DW1's findings being the cause of the septic tank and toilet overflow

in the house is exceedingly low, especially considering that there were no subsequent overflows once the concrete drain was constructed. This also supports the Plaintiffs' assertion that the pre-existing earth drainage was sufficient to channel away water from their house and TOL land and thus preventing the accumulation of water on their lands.

62. After thorough consideration, the court holds a differing view with DW1's findings. Despite DW1's mentioned findings, the Plaintiffs did not come across any issues related to flooding and overflow from the main septic tank, leading to damage to their property. The problem of flooding only arose after the start of the development project. Thus, the court concludes that DW1's report does not significantly support the Defendants' defense and in light of the above-mentioned considerations and findings, the court concludes that the Defendants are held liable for nuisance resulting from their negligent act.

63. To summarize, the court makes an overall finding in favour of the Plaintiff. The Plaintiffs succeed in their claim and the Defendant is found liable for negligence and nuisance as pleaded.

Damages

64. The Plaintiff seeks damages for emotional distress and inconvenience as well as damages amounting to an estimated sum of BND\$194,088.00. It is contended that at no point during the proceedings did the Plaintiffs request for an assessment of damages nor did the Plaintiffs imply that the trial will solely focus on the issue of liability. Furthermore, it is argued that the Plaintiffs should be capable of calculating the alleged damages incurred up until May 2017, as it is expected that no further damages would have accumulated beyond this specified period.

Emotional distress, inconvenience, discomfort and disturbance

65. The Plaintiff's gave evidence that the resulting flood caused by the Defendant's negligence in their construction and earthworks, they have suffered damage to their house and TOL land. The court finds it reasonable to accept that the overflow of the toilet bowls in the Plaintiffs house and damages to their household properties caused them considerable distress and inconvenience specifically during the period of continuous rain and flooding.

66. The court also accepts the Plaintiffs' evidence of their inconvenience of having to resort to other shower and toilet facilities during the relevant period due to the unsanitary state of the toilets in the house caused by the overflow of the main septic tank, all of which are owing to the Defendants' negligence.

67. Based on the evidence before the court, the Plaintiffs suffered from distress and inconvenience from September 2016 to April 2017. This would make a total period of eight (8) months. By April 2017, the Plaintiffs' construction of a concrete drain as an alternative

channel in place of the existing drainage that was previously blocked and dug up by the Defendant's contractors was completed. From that period on, the Plaintiffs claim they had no further flooding incidents.

68. Based on the above, the court finds that the Plaintiffs are entitled to be compensated for their distress and inconvenience caused during those eight (8) months. For the claim under this heading, considering the physical inconvenience, severity of the Plaintiff's situation and emotional distress suffered not just by the Plaintiffs but also their family members living in the same household, the court finds that the sum of BND400.00 per month per claimant is reasonable. The total due to the Plaintiffs under this heading is BND\$6,400.00 [\$400 x 8 months x 2 (Plaintiffs)]. The court awards BND\$6,400.00 accordingly. Interest at the rate of 6% is to run from date of judgment to date of final settlement.

Special Damages

69. The Plaintiff also makes a claim for the following:

	<u>Sum claimed (BND)</u>
(i) Cost of damage to kitchen and household electrical equipment, tools, carpets and cabinets	\$10,242.00
(ii) Cost of purchasing tools, equipment for house cleaning, repellants to prevent mosquito bites disease during the period of 8 months (September 2016 to April 2017)	\$3,846.00
(iii) Cost of engaging contractor to construct proper Drainage to solve water blockage, repair of main septic tank and toilets	\$20,000.00
(iv) Cost of repairing landscape, replanting plants, fruit trees and cleaning fishpond on TOL land	\$160,000.00

70. As previously addressed above, the court is satisfied that despite the number of complaints made by the Plaintiffs to the Defendants, there was no significant measure taken by the Defendants to ensure that the existing earth drainage was properly constructed and not cause any further inconvenience to the adjacent lands i.e. the TOL land and the Plaintiffs' house land. The court also acknowledges that the Plaintiffs' had to incur considerable expenses to rectify the damages caused upon their own house, TOL land and affected properties as well as measures taken to deal with the unsanitary condition within their house.

71. However, the court points out that no evidence was adduced to support these alleged expenses save for several unverified receipts that were allegedly issued by the Plaintiffs' contractors for the construction of the concrete drainage. It is the Plaintiff's submission that the issue of damages should be determined by way of an assessment of damages. However, the fact that there is a lack of evidence to support these claims at trial, it is the Defendants'

submission that the Plaintiffs have failed to establish any loss or damages suffered. It is also further argued that if the Plaintiffs were unable to adduce evidence of the expenses at trial, it is unlikely to be any different at the assessment stage.

72. Having considered the Defense's contention, the court concludes that this is not a case where damages have not been pleaded. Although the court agrees that there was no notice on record to sever the trial to focus solely on the issue of liability, the court does not find it fair to dismiss the claim for damages due to the insufficiency of evidence presented at this juncture.

73. The court is of the view that it is in the interest of justice for this matter to be directed for assessment. In these circumstances, the court exercises its judicial discretion to order the claim for damages to be assessed before a registrar. The damages to be assessed are to strictly fall under items (i) to (iv) of paragraph 69 above, in so far that they are proven to have been incurred as a direct consequence of the Defendants' negligence.

Order for Cost

74. The cost of the hearing is awarded to the Plaintiff, to be taxed if not agreed.

DK HJH NORISMAYANTI BINTI PG HJ ISMAIL

Judge, Intermediate Court