

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

Civil Action No: HBC 158 of 2012

BETWEEN: **LIANGUI WANG** of Simla, Lautoka trading as **Fresh Green**
having its registered office at Valley Road, Sigatoka.

1ST PLAINTIFF

RUIGE TIAN of Lautoka trading as **Tian's Harvest**, having its
registered office at Kavanagasau Settlement, Sigatoka.

2ND PLAINTIFF

JIE LIU of Nadi trading as **Lily Garden**, having its registered
office at Valley Road, Naduri Village, Sigatoka.

3RD PLAINTIFF

AND: **CHINA GEZHOUBA GROUP (FIJI BRANCH) COMPANY
LIMITED** a limited liability company having its registered
office at 18 Rukua Street, Nailuva Road, Suva.

DEFENDANT

Before: **Hon. Chief Justice Kamal Kumar**

Counsel: Ms N. Karan for the Plaintiffs
Mr R. Singh for the Defendant

Date of Judgment: 8 December 2021

JUDGMENT

Introduction

1. On 8 June 2012, the Plaintiffs caused Writ to be issued with Statement of Claim claiming for special and general damages with interest and costs allegedly arising out of flooding of their farms at Valley Road, Sigatoka on 14 October 2011.
2. On 17 July 2012, the Defendant filed their Statement of Defence.
3. On 18 July 2012, Plaintiffs filed Reply to Statement of Defence.
4. On 21 August 2012, Plaintiffs filed Summons for Directions and on 12 September 2012, being the returnable date of the Summons, Order in terms of the Summons was made.
5. On 1 August 2012 and 23 October 2012, the Plaintiffs and the Defendant filed Affidavit Verifying List of Documents respectively.
6. On 12 July 2013, the Plaintiffs filed Application to Amend the Statement of Claim on 1 August 2013, being the returnable date of the Application, by consent Order in terms of the Application was granted and parties were directed to file amended pleadings.
7. On 6 August 2013, the Plaintiffs filed the Amended Statement of Claim.
8. On 4 September 2013, the Defendant filed Defence to the Amended Statement of Claim.
9. On 12 September 2013, the Plaintiffs filed Reply to Defence to the Amended Statement of Claim.
10. On 23 January 2014, the Defendant filed Summons for Specific Discovery which was heard on 21 May 2014, and adjourned for Ruling.
11. The Ruling on Application for Specific Discovery was delivered on 12 September 2014, when the Application was refused and dismissed with costs.
12. On 7 August 2015, Plaintiffs filed Minutes of Pre-Trial Conference between all the parties.
13. On 19 August 2015, Plaintiffs filed Copy Pleadings and Order 34 Summons.

14. This matter was listed for trial from 16 to 19 August 2016, which date was vacated and trial dates re-fixed for 21 to 24 March 2017, for Plaintiff's Counsel to arrange for another Counsel to conduct the trial.
15. On the same, the Plaintiffs were granted Leave to file and serve Supplementary Affidavit Verifying List of Documents.
16. On 24 August 2016, the Plaintiffs filed Supplementary Affidavit Verifying List of Documents.
17. Trial concluded on 23 March 2017.

Background/Undisputed Facts

18. Background/Undisputed facts are as follows:-
 - (i) That on or about 14 October 2011, Sigatoka pursuant to contract with Fiji Roads Authority constructing tarsealed road at Valley Road.
 - (ii) Due to heavy rainfall on 14 October 2011, Farms adjacent to Valley Road, Sigatoka and allegedly owned by the Plaintiffs were subject to flood.

Documentary Evidence

19. Following documents were tendered in evidence:-

Exhibit No.	Date	Document
P1	15/10/2011	Certificate from Sigatoka Police Station
P2	2/11/2011	Certificate from Sigatoka Police Station
P3	15/10/2011	Photographs
P4	26/6/2008	Certified True Copy of Instrument of Tenancy No. 10819
P5	12/5/2008	Certified True Copy of Instrument of Tenancy No. 10817
P6	6/10/2009	Certified True Copy of Instrument of Tenancy No. 11160
P8	17/8/2011	Photocopy of Certificate of Registration – Lily Garden

P9	3/5/2010	Photocopy of Certificate of Registration – Fresh Green
P10	31/3/2011	Photocopy of Crop Damage Assessment – Ministry of Primary Industries
D1	-	Photocopy of Sigatoka Valley Road Culvert Schedule
D2	21/10/2011	Photocopy of Fiji Road Upgrading Project – Department of National Roads
D3		Photocopy of Google map – Valley Road Sigatoka
D4	-	Photocopy of Sigatoka Valley Road Rainfall Form (Defendant)

Plaintiff's Case

20. All the Plaintiffs gave evidence and called four (4) witnesses namely:-

- (i) Dhup Singh of Saweni, Lautoka, Retired Police Officer **(PW1)**;
- (ii) Sukhendra Kumar of Barara Valley Road, Sigatoka, Taxi Driver **(PW2)**;
- (iii) Sowane Remudu of Qtrs 50 Alfred Road, Nausori, Senior Agricultural Officer **(PW3)**;
- (iv) Unaisi Remudu of Qtrs 50 Alfred Road, Nausori, Agricultural Extension Officer **(PW4)**;
- (v) Waidele Gaunavinaka aka Waisale Sigawale of Naduri Village, Valley Road, Sigatoka **(PW5)**.

21. PW1 during examination in chief gave evidence that:-

- (i) He had been a Police Officer for thirty-four (34) years, having worked at Keiyasi Police station (10 years), Lautoka Police Station (10 years) and then at Sigatoka Police Station **(SPS)** as Station Sergeant to administer SPS.
- (ii) On 14 October 2011, it rained in Sigatoka Town but was not heavy rain.
- (iii) Sigatoka River bank did not burst on that day.

- (iv) On Saturday 15 October 2011, at around 8.00am Mr and Mrs Tian lodged a complaint at the SPS about their farms being under water.
- (v) Upon receiving the complaint, he went with Tian, picked Agricultural Officer Sowane, and visited the farm at Barara, Valley Road, Sigatoka.
- (vi) He saw the vegetables on the farm submerged under the water and went around the farm with Agricultural Officer and saw where drain was blocked.
- (vii) Later at the complainant's request he prepared a report.
- (viii) Culvert next to the road and across the farm was clear.
- (ix) At one place, water was stagnant as a result of the drain being blocked from soil and gravel which was there due to work being carried out on the road.
- (x) Road work was being carried out by Gezhouba Company.
- (xi) He inspected Sigatoka River which showed that river bank did not burst and if river bank did burst then he would have been the first person to be notified to ensure safety of people of Sigatoka.
- (xii) On that day he did not receive any other report about flooding.
- (xiii) On that day he inspected Tian's farm with other farms managed by Tian and he inspected the farms for about forty-five (45) minutes.
- (xiv) He did not prepare any report on the same day.
- (xv) His observation was that the drain was covered with soil/gravel which blocked access to river.
- (xvi) He prepared his reports on 15 October 2011 and 2 November 2011 (Exhibits P1 and P2).
- (xvii) In reference to the report, he stated that culvert was not broken, culvert was new and drain was blocked by soil/gravel.
- (xviii) He did not visit the farm at any other time after preparing the report.
- (xix) He could not recall any report about this farm before 15 October 2011, during his twenty-five (25) years in Sigatoka.

22. During cross-examination PW1:-

- (i) Stated that Tian came alone to lodge complaint.
- (ii) Stated that prior to Tian's complaint he attended complaint regarding flash flooding due to bursting of Sigatoka River bank.

- (iii) Stated that when he went, he saw the farm situated between the road and Sigatoka River was partly submerged.
- (iv) Stated that according to his knowledge all farms belonged to Tian and are located at Barara Flat, Valley Road, Sigatoka.
- (v) Confirmed that there is a hill after Barara Flat.
- (vi) When it was put to him that when it rains Barara Flat Road gets flooded at times, he stated that it does not as there are drains on both sides of the road which results in water following through the stream and going to the river because the road is higher than the farms.
- (vii) Stated that the drains were running parallel to the road and at the time of complaint, road was under construction.
- (viii) Stated that he did not collect any data on how much rain was collected as he was in Sigatoka Town which is about eight kilometres from the farm and there was no heavy rain in Town.
- (ix) Stated that the Report dated 15 October 2011 (Exhibit P1) was typed and signed on that day but not prepared on that day.
- (x) In reference to the report, stated that there is an error in the report in that instead of saying "accident broke one side of water culvert" it should say "drain was blocked".
- (xi) Stated that he read the report before signing but overlooked the fact and it should have said culvert was clear.
- (xii) Agreed that he prepared and signed the report dated 2 November 2011 (Exhibit P2), and the Court should rely on it.
- (xiii) Stated that Tian came to him and said culvert was not broken and then he re-visited and prepared another report (Exhibit P2).
- (xiv) Stated that he visits Valley Road daily or weekly to visit community but not the farms.
- (xv) Confirmed that he said culvert was clear but drain was blocked with no access for water to go to river which he saw during his investigation.
- (xvi) Stated that the culvert was clear.

23. During re-examination PW1 stated that when he visited farm on 15 October 2011, the culvert was not broken and it (culvert) was new.

24. PW2 during examination in chief gave evidence that:-

- (i) He is nearly 64 years old and was residing at Barara, Valley Road, Sigatoka since his birth.
- (ii) On 14 October 2011, at about 3.00pm he was home and left home at 3.30pm.
- (iii) During that time it started raining and the rain slowed down when he left home at 3.30pm.
- (iv) He came back home at 6.30pm at which time it was raining and there was a bit of water in his compound but no flooding.
- (v) He knows Tian, whose farm is on the other side of Valley Road and about one and half to two chains from the Road.
- (vi) At the relevant time construction work was being carried out at Valley Road, whereby gravel road was being converted to tarsealed road with road level being lifted.
- (vii) Construction was being carried out by a Chinese company with long name and construction work just started or was half done.
- (viii) Sigatoka River bank did not burst on 14 October 2011.
- (ix) On 14 October 2011, when he came on the main road he saw water on Tian's farm.
- (x) He then went home and called Tian to inform him that there is water on his farm.
- (xi) Chinese company constructed the road, installed new culverts and put gravel on side of culverts and because of this culvert was blocked by gravel/soil and water went to Tian's farm.
- (xii) Culvert was blocked due to them leaving gravel on the edge of culvert.
- (xiii) In reference to photos shown he stated that culvert was blocked and that is the reason drain was blocked.
- (xiv) Gravel and soil was there because the company was installing new culverts and as such they dug soil and brought gravel which was left on the side of the culvert.
- (xv) Farms on Tian's side were flooded.
- (xvi) After he called Tian he came at around 8.00pm to 8.30pm when they went in Tian's van to the Chinese contractor's yard which is about 10 to 15 chains from Tian's farm.

- (xvii) Since they were talking in Chinese language, he did not understand what they were talking about.
- (xviii) Prior to 14 October 2011, there were lot of floods in that area.
- (xix) Tian's farm got flooded before 14 October 2011, because of Sigatoka River being flooded.
- (xx) On 14 October 2011, Sigatoka River did not overflow.
- (xxi) Tian's farm is bit on the lower side and as such water from other farms flow into Tian's farm.
- (xxii) There is a drain to let water out from Tian's farm but on 14 October 2011, water was not coming out of Tian's farm as culvert edge was blocked by soil and gravel.

25. During cross-examination PW2:-

- (i) Agreed that he stays opposite Tian's farms which were the only farms damaged on that day and behind his (PW2) property is a hill and that hill is away from the farm.
- (ii) Agreed that entire area including his/Tian's property is known as Barara Flat which is not huge but is big.
- (iii) Agreed that the main Valley Road separates his property from Tian's farm.
- (iv) When it was put to him that at that time there were drains on both sides of the road he stated that it was not and road was being constructed.
- (v) When asked to what was culvert connected to he stated that there was a drain next to the culvert but no drain along the road.
- (vi) Stated that drain next to culvert was constructed by the Chinese Company.
- (vii) Stated that there was a drain before the road was being constructed.
- (viii) Stated that on 14 October 2011, there was little water on his property but lot of water on Tian's property.
- (ix) Agreed that width of Tian's farm covers quite a bit of area along the road and when it was put to him that distance is around 300m he stated that he has not measured.
- (x) When it was put to him that apart from the culverts he is talking about there are 3 or 4 more culverts along Tian's farm he stated that

there are 2 more culverts.

- (xi) When it was put to him that the 2 other culverts do same thing as blocked culverts he stated that not at that time but now it does.
- (xii) Stated that he cannot recall if on 14 October 2011, the Chinese Company was also affected by flood water.
- (xiii) Stated that he did see that Tian's farm was under water when he came home at 6.30pm.
- (xiv) Agreed that from his home he cannot see Sigatoka River.

26. PW3 during examination in chief gave evidence that:-

- (i) In October 2011, he was Senior Agricultural Officer with Ministry of Primary Industries.
- (ii) On Saturday 15 October 2011, just before 12.00noon Dhup Singh (PW1) came with Tian and asked him to go along with them to check why was water logged.
- (iii) He noticed that the farms were under water.
- (iv) He knows Tian looked after whole farm and as such he treats the farm as one.
- (v) His investigation revealed that water was blocked due to blocked drain and that is the reason there was water on Tian's farms.
- (vi) He did not prepare any report but directed his staff to make assessment and report was prepared by Unaisi Remudu.
- (vii) He was on the farm with Dhup Singh and Tian not for too long.
- (viii) After inspection he went home and the following week (could not remember exact date) he directed his officer to do the assessment.
- (ix) Assessment is carried out using Government Compensation Schedule which they refer and where compensation rate is clearly specified and stated, that plant area is taken in chains and other costs that they need to refer to.
- (x) For plants which can be counted they count plants to work out costs for plan whereas for crop like rice, they multiply cost by area.
- (xi) In this instance, they waited water to be subsided and farm to dry up to the assessment.

- (xii) They waited for farm to dry up because farm will be muddy and evidence of plants dying out becomes visible when water subsides.

27. During cross-examination PW3:-

- (i) Stated that on 15 October 2011, he went to the farm before 12noon and before he had breakfast (between 7 to 9am).
- (ii) Stated that he saw water on the farm side and not the other side of the road.

28. PW4 during examination in chief gave evidence that:-

- (i) She obtained Diploma in Tropical Agriculture from Fiji College of Agriculture.
- (ii) She has been employed as Agriculture Officer with Ministry of Agriculture and on 15 October 2011, she was based at Sigatoka Research Station.
- (iii) Part of her job was to advise farmers and stakeholders.
- (iv) She was not around on 15 October 2015, to take report and two weeks after that date she inspected Tian's farms.
- (v) Her inspection showed that crops have been rotten and the farms were quite big which would be more than 100 acres in estimate.
- (vi) She prepared the Report dated 31 March 2011 (Exhibit P11).
- (vii) To do an assessment, the officer has to go around the farm, count number of crops on the ground at time of inspection and come up with assessment of damages by referring to Compensation Schedule with crops classified as mature or immature.
- (viii) Assessment was done after two (2) weeks as that was the time an officer could walk on the farm.
- (ix) Crops would be damaged by water logging damaging the root system.
- (x) Assessment includes what is in the MOA Schedule and does not include Labour costs etc.
- (xi) Date on report being 31 March 2011, is an error and should have been 3 November 2011.
- (xii) Reads contents of Report (Exhibit P10).

29. During cross-examination PW4:-

- (i) In reference to Assessment Report (Exhibit P10) confirmed that before preparing her report she had Police Report with her which was received on 2 November 2011.
- (ii) When it was put to her that farm was visited on 17 October 2011, she stated that her Supervisor visited the farm on 15 October 2011.
- (iii) In reference to report saying 17 October, she stated that it is 27 October 2011.
- (iv) When Court queried as to date of 17 October 2011, being clear in photocopy witness gave no explanation.
- (v) When asked why she carried out investigation one year before (17/10/10) she stated it is typing error.
- (vi) When asked as why she carried out inspection one year before the incident stated that "2010" is a typing error.
- (vii) Confirmed that date 31 March 2011, is also not correct.
- (viii) Stated that she is aware that you have to be absolutely sure that dates etc. in report has to be right.
- (ix) Agreed that when she was doing her report Dhup Singh's (PW1) report was in front of her.
- (x) Agreed that in her report she did not mention the Chinese company accidentally breaking the culvert.
- (xi) Agreed that Dhup Singh (PW1) said two (2) farms were damaged but her assessment says three (3) farms were damaged.
- (xii) When it was put to her that she was not sure which farms were damaged, she stated that while doing assessment she had to walk through the farms, which she did.
- (xiii) Confirmed that her visit was after two (2) weeks.
- (xiv) Agreed that since she went after two (2) weeks she did not witness the flood.
- (xv) Agreed that Dhup Singh (PW1) was in a better position to say how many farms were damaged or under water and stated that she was taken to three (3) farms that were water logged and affected by water by the Farm Manager, Mr Tian.
- (xvi) Tian showed her all three farms.

- (xvii) When asked as to what documents she sighted to see that Tian was Farm Manager, she stated that he told her.
 - (xviii) When asked it was not her duty to ascertain how many farms were damaged in that area she stated that her duty on that day was to do assessment on those farms which were identified by Tian.
 - (xix) Stated that she got number of plants by counting plant per row and multiplying by number of rows.
 - (xx) When asked \$4,000 cucumber, stated it would be an estimate she stated that there will be very small error.
 - (xxi) Stated that she counted in rows and multiplied and farms are well organised.
 - (xxii) Agreed that, that is what she did for lettuce (15 lines).
 - (xxiii) When asked why she did not do that for cucumber she stated that she overlooked to put number of plants per line.
 - (xxiv) Agreed that her Report could have been done better.
 - (xxv) Stated that she did thorough investigation.
 - (xxvi) When asked as to what evidence she had that Fresh Green was owned by people for who she was doing the assessment, she stated that she did not have any assessment of ownership and she was told by Farm Manager what the allocations were.
30. During re-examination PW4 confirmed that she had done farm visitation for assessment of damages.
31. PW5 during examination in chief gave evidence that:-
- (i) On 14 October 2011, he was employed by Defendant as Coordinator and at that time Defendant was constructing Valley Road.
 - (ii) On 14 October 2011, during night time Company's driver came to inform that the Manager called Mr D wanted to see him regarding a complaint they received from one of the landowners.
 - (iii) He then went to see his boss who told him to go and see Mr Tian's farm about the complaint arising out of flood.
 - (iv) He went to Tian's farm with driver and Foreman of Chinese descent.
 - (v) When they reached the farms, they saw water on the farms and plants were submerged.

- (vi) They thought that the farms belonged to Tian.
- (vii) He remembers water was over-flooding into the drain and from the farms water did not drain out from the culvert because the culvert was blocked.
- (viii) With his torch, he saw gravel/soil blocking the culvert.
- (ix) After that he went with the driver and reported what he saw to the Manager, who said to him that he will look for machine to remove gravel/soil blocking the culvert.
- (x) Drain was not cleared the same night and he has no idea why it was not so.
- (xi) Drain blockage was cleared the next day and he was present at site when drain was being cleared.
- (xii) He was present at the time culvert was being cleared by use of digger and it took approximately one (1) hour to clear.
- (xiii) He did not see Sigatoka River bursting its banks on 14 October 2011.
- (xiv) There was heavy rain on 14 October 2011.
- (xv) He left employment with Defendant after construction of the road.

32. During cross-examination PW5:-

- (i) Stated that he could not recall signing Statement on 22 October 2011.
- (ii) Stated that he could not recall going to Nadroga/Navosa Provincial Council on 22 October 2011, but went there most of the time.
- (iii) Confirmed that statement dated 22 October 2011, has its signature which bears Nadroga/Navosa Provincial Council stamp.
- (iv) Stated that it is not his statement and is that of person named Jone Uluinibau, leader of the clan whose signature appears as witness.
- (v) Stated that he should have been the witness.
- (vi) Stated that he knows he is under oath and still maintains that it is Jone Uluinibau's statement and not his.
- (vii) Agreed that in Valley Road there is Tian's farm and Company's campsite which has 50 to 60 Chinese employees.
- (viii) Stated that camp site is about 100m away from Tian's farm.
- (ix) When asked if digger and machines are at campsite he stated that it depends and if machines are in operation at a particular site it will be there otherwise it will be at camp site.

- (x) Stated that he is not sure if there were any machines at camp site on 14 October 2011.
- (xi) Stated that his village is at quite a distance from the camp site which is between village and Tian's farm and Tian's farm is close to the campsite.
- (xii) When it was put to him that he wanted Court to believe that Manager sent driver to pick him up he stated "Yes".
- (xiii) Stated that Manager did not use anyone from 50 to 60 Chinese employees.
- (xiv) When asked if it did not sound odd that he was asked to come and inspect when he was on leave he stated that:-
 - (a) Manager wanted to see him because his job was to look after landowners in that area.
 - (b) Chinese employees were classified to work in different areas.
 - (c) He attended to complaints from the landowners and the public.
 - (d) He was not only looking after Tian's case but other cases too.
- (xv) Stated that he did not meet Tian when he arrived at campsite as Tian was going home.
- (xvi) Stated that his Manager told him to go and check and see what Tian was complaining about.
- (xvii) Stated that culvert was blocked opposite Tian's farm.
- (xviii) Stated that he noticed water only on Tian's farm and not on both sides of the road.
- (xix) When it was put to him that PW2 gave evidence that there was water in his compound as well he stated the Sukhendra's house was in front and he only went to see where the culvert is.
- (xx) Stated that he cannot tell time of inspection but it was at night time.
- (xxi) Stated that with his torch he could see flood on Tian's farms and see culvert from other side.
- (xxii) Agreed that there was heavy rain on that day and it rained on both sides of the road.
- (xxiii) Agreed that there were rocks and soil in front of culvert.
- (xxiv) In reference to the diagram he stated that drain on opposite side was blocked.

- (xxv) When asked whether drain or culvert was blocked he stated that it was mouth of culvert.
33. During re-examination PW5 stated that Statement was given to clarify that Ratu Jone Uluinibau was head of clan and Provincial Council can deal with the Company.
34. Second Plaintiff during examination in chief gave evidence that:-
- (i) He is 46 years old, has been in Fiji for fifteen (15) years and farming in Valley Road for eleven (11) years.
 - (ii) He looks after and manages three (3) farms owned by himself trading under name of Tian's Harvest, Liangui Wang trading as Fresh Green and Jie Liu trading as Lily Garden.
 - (iii) Size of all three (3) farms is about forty-five (45) hectares with his farm being at thirty-two (32) hectares.
 - (iv) He has about 60 to 70 workers.
 - (v) At around 3pm on 14 October 2011, it started raining, they finished work at 5.00pm and had dinner at 6.00pm.
 - (vi) At around 7.00pm one Indian neighbour called him to say his farm is flooded.
 - (vii) He knows the neighbours but is hard to remember name.
 - (viii) At that time he went to investigate with his labourer Sonitale and Shun Xiu Hai and saw that his farm was flooded (half of it).
 - (ix) Whole of his farm was flooded, Wang's farm was halfway and little bit of Liu's farm.
 - (x) Due to construction of road, they blocked edges of culvert and that is the reason farms were flooded.
 - (xi) When rain water comes to Wang's farm it flows through the culvert.
 - (xii) On 14 October 2011, water was not flowing out of Fresh Green because of piling up of rocks by Defendant during construction of road which blocked the culvert.
 - (xiii) Culvert was blocked on opposite side of the road.
 - (xiv) When he asked Defendant for help their response was that it was late and they could not do anything.

- (xv) Next morning when he saw farm still flooded he went to Agricultural Department, then to Police Station to lodge complaint and then to the Company to ask for help.
- (xvi) Defendant's employees came and removed gravel/soil with digger in his presence.
- (xvii) After that water flowed out of the farm and he saw that all crops and vegetables planted on all three (3) farms had been spoilt.
- (xviii) His farm had about 2400 pawpaw plants worth approximately \$11,000.00.
- (xix) Him and his labourers took seven (7) photographs (Exhibit P3).
- (xx) Photos shows the crops and the value of such crops as follows:-
 - Photo No.1: Top Part shows about 50kg of pawpaw valued at \$1.25 per kg whilst bottom part shows English cabbage.
 - Photo No.2: Shows lettuce with loss assessed at \$6,000.00 to \$7,000.00.
 - Photo No.3: Shows cucumber with loss assessed at approximately \$4,000.00.
 - Photo No.4: Shows young English cabbage with loss assessed at approximately \$1,500 to \$2,000.
 - Photo No.5: Shows matured English cabbage with loss assessed at approximately \$4,000.
 - Photo No.6: Shows tomatoes with loss assessed at approximately \$5,000.00.
- (xxi) Agriculture Department carried out assessment and valued total loss for all farm at about \$95,000.00.
- (xxii) He informed the Company about the amount of total loss.
- (xxiii) It took about two weeks to one month to clear farm and prepare for next season for English cabbage and two to three months for tomatoes and cucumber.
- (xxiv) He took photo No. 7 at around 7.00am on 15 October 2011, which shows blocked side of the culvert.
- (xxv) From his experience if culvert was not blocked, water would have gone through the drain.
- (xxvi) Rain water flows through culvert, through drain around Indian Farm and then goes across the road into the river.

- (xxvii) This is the second time his farm was flooded and the first time was in January 2009, when there was heavy rain and Sigatoka River burst its banks.
- (xxviii) Farm subject to Instrument of Tenancy No. 10819 (Exhibit P4) being the middle farm is owned by his sister Rui Fen Tian trading as Lily's Garden.
- (xxix) At first he said he is the owner of Tian's Harvest but when shown Instrument of Tenancy No. 10817 (Exhibit P5) he stated owner is Liangui Wang and he (Second Plaintiff) is trading as Tian's Harvest.
- (xxx) Farm subject to Instrument of Tenancy No. 11160 (Exhibit P6) is owned by Liangui Wang trading as Fresh Green.
- (xxxi) For Tian's Harvest, land belongs to Liangui Wang but farm belongs to him.
- (xxxii) He has not changed the name on the document and he manages the farm.
- (xxxiii) He invests on Tian's Harvest, Liangui Wang invests on Fresh Green and Rui Fen Tian invests on Lily's Garden.
- (xxxiv) Labour wages are paid as follows:-
 - Tian's Harvest - he pays
 - Fresh Green - Wang pays
 - Lily Garden - Jie Liu pays
- (xxxv) Profit from each farm belongs to the owners of the farm.
- (xxxvi) Losses from each farm are borne by owners of each farm.
- (xxxvii) As to arrangement about Tian's Harvest, harvest belongs to him but he has not changed the name.

35. During cross-examination Second Plaintiff:-

- (i) When it was put to him that he is not legal owner of Tian's Harvest he stated it belongs to him and he has registered it under his name.
- (ii) When asked if it is Instrument of Tenancy No. 10817 he stated he cannot remember and agreed that there was no evidence of his ownership in Court.
- (iii) Agreed that he planted on all three farms and that there is no evidence that he obtained consent to farm all those farms.

- (iv) Agreed that Lily Garden is owned by his sister Rui Fen Tian as and she is not a party to this proceedings.
- (v) Stated that there is a drain on Fresh Green lot.
- (vi) Stated that water flows from Fresh Green to culvert at Tian's Harvest towards end of Fresh Green and then to main culvert.
- (vii) Agreed that drain on his side is along the road.
- (viii) Stated that drain along Tian's Harvest and Fresh Green connects to drain before Tian's farm and water flows towards town end to the culvert.
- (ix) Agreed that land next to Tian's Harvest farm toward Sigatoka Town is higher and that Defendant did not do any work on that land.
- (x) Agreed that drain on both sides of the road run parallel to the main road.
- (xi) Stated that there is drain between Fresh Green and Lily Garden which was prepared by the owner who did not use engineers to prepare the drain.
- (xii) Agreed that when river gets full during heavy rain water is pushed upwards.
- (xiii) Disagreed when it was put to him that it was the reason water flowed and blocked the culvert.
- (xiv) When it was put to him that if water flowed towards Sigatoka town it would block main culvert he stated that it was not possible and culvert was blocked because of soil and rock.
- (xv) Stated that he used market price to determine loss suffered by Plaintiffs and price of long bean as calculated at the rate of \$110.00 per bag for 20 bags.
- (xvi) Stated that he has receipt in respect to purchase of seeds but it is not in Court.

36. Third Plaintiff during examination in chief gave evidence that:-

- (i) She has been operating Lily Garden situated at Valley Road, Sigatoka for about six to seven years and is the registered proprietor of business Lily Garden (Exhibit P8).
- (ii) Her uncle Tian looks after the farm from start and he does everything on the farm.

- (iii) Her uncle Ruige Tian told her that on 14 October 2011, soil/gravel blocked culvert because of which water from their farm could not go out.
- (iv) She physically inspected her farm once a week.
- (v) She did not inspect farm on 14 October 2011, but inspected later and cannot remember the date.
- (vi) Vegetables on her farm being lettuce, cucumber and tomatoes were damaged to the value of \$1,500.00.
- (vii) Ruige Tian looks after the farm and she is in charge of selling vegetables.
- (viii) She invests in farm, keep all the profit and bears any loss.
- (ix) Loss of \$1,500.00 would be borne by her.
- (x) Ruige Tian is her mother's brother, who manages the farm and she lives in Nadi and she is in charge of selling.
- (xi) She did not inform iTaukei Land Trust Board about it.

37. During cross-examination Third Plaintiff:-

- (i) Agreed that on 14 October 2011, she was in Sigatoka, did not see the flood and told Court what her uncle told her.
- (ii) Agreed that in 2011, Instrument of Tenancy No. 10819 was owned by her mother Rui Fen Tian.
- (iii) Agreed that Instrument of Tenancy No. 10819 was transferred to her on 23 July 2013, and she instructed Jamnadas & Associates to issue this proceeding in 2012.
- (iv) Agreed that this proceeding is about flood in 2011.
- (v) When it was put to her that at time of flood she was not the owner of the farm she stated that the land was in her mother's name but she took it over and paperwork was taking long.
- (vi) When it was put to her that there was no evidence that she was allowed into property by her mother she said that at that time land belonged to her, she was waiting for TLTB to process and business was hers.
- (vii) In reference to clause 12 of Instrument of Tenancy she stated it was lodged with TLTB and the process was taking long.

- (viii) Confirmed that Transfer provides that she got Instrument of Tenancy transferred on 23 July 2013, in consideration of \$20,000.
- (ix) When it was put to her that consent was granted on 23 July 2013, she stated it was granted on 23 July 2012, but agreed that Transfer says 23 July 2013.

38. First Plaintiff during examination in chief gave evidence that:-

- (i) Name of his company is Fresh Green whose main office is located in Lautoka.
- (ii) On 14 October 2011, there was flood on farm in Valley Road which is subject to Instrument of Tenancy No. 11160 (Exhibit P6) and farm is managed by his relation Ruige Tian.
- (iii) Ruige Tian told him that on 14 October 2011, there was heavy rain from 3.30pm to 6.00pm and farm was flooded due to opening of culvert being blocked by Company constructing the road.
- (iv) He visited the farm at about 10.00am the next day and observed that vegetables were under water and there was flood around the farm.
- (v) English cabbage, lettuce, pawpaw, cucumber, long beans and Chinese cabbage to the value of approximately \$70,000.00 were destroyed.
- (vi) Agriculture Officer carried out assessment of damages on the farm.
- (vii) Expenses for Fresh Green is paid by him by him transferring monies to Ruige Tian.
- (viii) Profit from Fresh Green was his whereas profit from Tian's Harvest was Ruige Tian.
- (ix) He did not notify TLTB about Tian being Manager of his farm.
- (x) He is the owner of Fresh Green (Exhibit P9).

39. During cross-examination First Plaintiff:-

- (i) Stated that he did not witness flood on farms on 14 October 2011.
- (ii) Stated Tian looks after all farms and there is no employment contract.
- (iii) Stated he does not pay Tian wages but arrangement is that Tian arranges all crops and vegetables and he does sale.
- (iv) Stated that land subject Tian's Harvest belongs to him.

- (v) Stated that he did not inform TLTB and that he did not rent farm to Tian's Harvest.
- (vi) When it was put to him that 2011 was not the first time farms were flooded he stated he was not sure.
- (vii) When asked if he aware there was flood in 2009, he stated that it was and water was passing by.
- (viii) Stated that farms were flooded in 2012 during Cyclone Zena due to overflowing of River.

Defendant's Case

40. Defendant called two witnesses namely:-

- (i) Yonn Liu of Sawani, Nausori, Engineer (**DW1**).
- (ii) Mohammed Aiyaz Khan of Nagalimare, Valley Road, Sigatoka, Driver (**DW2**).

41. DW1 during examination in chief gave evidence that:-

- (i) He is known by the name of Allen Hussein.
- (ii) He is an Engineer and came to Fiji from China in March 2011, to work in Company's (Defendant's) project in Fiji.
- (iii) He is still employed by the Defendant.
- (iv) In 2011, he was based at Valley Road, Sigatoka and working as Site Engineer with the Defendant who was constructing road.
- (v) He knows that area well as he was there for three to four years.
- (vi) Road was designed by Fiji Government and Fiji Roads Authority ("**FRA**") provided distance between culverts.
- (vii) Sigatoka Valley Road Culvert Schedule was provided to them by FRA.
- (viii) There were three (3) culverts in front of Tian's Farms being Nos. 12, 13 (Twin Culvert) and 14.
- (ix) Two culverts were on Fresh Green and Tian's Farm and one was on Lily Garden.
- (x) Distance between No. 12 and 13 is 97.3m, No. 13 and 14 is 91m which distance is given by FRA.

- (xi) Diameter of No. 13 culvert is 900mm with diameter for No. 12 and 14 culverts being 600mm.
- (xii) In the Schedule "Inlet Section" means where water gets into culvert and Inlet Offset is level of water from bottom.
- (xiii) Land contour for No. 13 Inlet is 5.95m and No. 12 is 6.2m.
- (xiv) Engineer from FRA supervises construction of road and setting up of culverts.
- (xv) Process of installing culverts across road is as follows:-
 - (a) Dig half road, carry out DCP test to check if soil under culvert is soft or hard.
 - (b) Remove soft soil and fill with river gravel.
 - (c) After that Engineer from FRA has to come and give approval to proceed with the work.
 - (d) Once that approval is given, they then place the culvert.
 - (e) After that they put river gravel to cover the culvert.
 - (f) They then do sub-grade and put sub-base.
 - (g) After that they put sub-base followed by pose course.
 - (h) After pose-course, they do 1st and 2nd sealing.
- (xvi) In reference to photo No. 1 (Exhibit P3) he stated at that time they just finished sub-grade stage.
- (xvii) Tevita the Engineer from FRA inspected and gave approval for installation of under-vent and to proceed with work.
- (xviii) At that time he stayed at Company's yard called Chinese yard with about 100 people and the yard is about 150m away from culvert 13.
- (xix) Mr D was the Manager at campsite where they lived and had offices too.
- (xx) Drains are on both sides of the road.
- (xxi) Water flows to the right side of the road through culvert No. 13 and if there is too much water then it will flow through culvert No. 12 to culvert No. 14 with some water flowing to the small river which is less than 100m away from culvert No. 12.
- (xxii) The small river converges to Sigatoka River.
- (xxiii) Drains along the road is about 1.7m to 2.0m and at that time it was about 1.3m to 1.5 m.

- (xxiv) On 14 October 2011, he was at the camp site and there was heavy rain on that day.
- (xxv) At the camp site, they measure rain by using a small box with marks on it and records rainfall every morning at 9.00am with engineers from FRA which recording is done at 24 hour interval from 9.00 am to 9.00 am on the following day.
- (xxvi) Recording of rainfall for 14 October 2011, was done in the morning of 15 October 2011, and rainfall recorded for that day was 94mm which was highest recording for that month.
- (xxvii) Whether area will be subject to flooding will depend on how heavy the rainfall is and for how long it is raining.
- (xxviii) Sigatoka Valley Road Rainfall Form (Exhibit D4) was dated by Engineer from FRA.
- (xxix) Original of the Form is taken by FRA Engineer and copy is kept by them.**
- (xxx) Purpose of collecting the data is to see if they can carry out the work.
- (xxxi) He recalled that on that day it started flooding during night time at about 8pm or 9pm and there were Chinese workers at the site as no local workers stay at site during night.
- (xxxii) He did not see Mr Tian on that day but knows that he saw his boss Mr D and Tian wanted his boss to go and dig road so that water can go out.
- (xxxiii) Mr D then got their foreman Mr Woo to go and check.
- (xxxiv) Mr Woo checked and informed Mr D that both sides of the road was under water and there was no need to dig the road next to the culvert.
- (xxxv) Mr D and Mr Woo are in China.
- (xxxvi) He does not know if drains were blocked.
- (xxxvii) If drains were blocked then water will flow towards No. 12 culvert and if there is lot of water it will flow from left side of the road to the right side (Farm) because small river will get flooded due to heavy rain.
- (xxxviii) When asked when will water flow towards Sigatoka Town he stated that when water level in culvert 13 is above 25 cm then water will

flow towards culvert No. 12 and if water goes above 30cm in culvert No. 12 it will flow towards the small river.

- (xxxix) Farms also got flooded because it was on low side.
- (xl) In reference to Photo No. 6, stated that water is stagnant because it is at same level on both sides of the road.
- (xli) Level of water at culvert No. 13 (900m) is about 500 mm to 600 mm and in that case water will flow towards culvert No. 12 and to other side of the road.
- (xlii) Little bit of water could go beyond culvert 12 because small river is bit on higher side.
- (xliii) He knows Waisale Sigawale who was working for their company and is not working now because the project has finished.
- (xliv) Waisale Sigawale did not come to the camp site during night time on 14 October 2011, as he was not working during night time.
- (xlv) When it was put to him that Sigawale said that there was no water on other side of the road and culvert was blocked he denied it stating that if mouth of culvert was cleared even if it was blocked, water would flow through culvert No. 12.
- (xlvi) He knows that there was a drain from road to Fresh Green Farm but does not know if there was a drain from Fresh Green Farm to Lily Garden.
- (xlvii) His company did not dig drain from road to Fresh Green Farm as it is not their drain.
- (xlviii) Water flows from drain along the road to Fresh Green Farm will be very slow if it is a low gradient.
- (xlix) In reference to Photo 1, he stated that both sides of the road has same level of water and that is why water is stagnant.
- (1) If there is heavy rain, little bit of soil and gravel will go inside the culvert because at that time they did soil compaction.**

42. During cross-examination DW1:-

- (i) In reference to Photo No. 1 stated that once they compact the soil, little bit will go in the drain.
- (ii) Stated that culvert opening is towards the farm.

- (iii) When it was put to him that he was not familiar as to which side culvert is he stated that he thinks it is on the farm side because there is plenty grass on other side of the road.
- (iv) When it was put to him that he was not sure if Waisale came to the site at his Manager's request on 14 October 2011, he stated he knows Waisale did not come.
- (v) Stated that Mr Woo went to the site on 14 October 2011, and he did not visit the site on 15 October 2011.
- (vi) When asked if it would mean that he never visited site to see what happened on 14 and 15 October 2011, he stated that after dinner on 15 October 2011, he went towards the site for exercise.
- (vii) Stated that he is not aware that Company used digger to clear culvert area as that is not his work.
- (viii) Agreed that mouth of culvert 13 is bigger than mouth of culvert 12 and 14 and stated that even though mouth of culvert 13 is bigger speed of water flow will be same as culvert 12 and 14.
- (ix) When it was put to him that gravel/soil that was on side of the road blocked water from going to small river he stated that water could still go to small river through culvert 12.
- (x) Stated that there is a drain between culvert 12 and 13.
- (xi) Agreed that it would be correct to say that if drain was blocked, water would have travelled from culvert 13 to culvert 12.
- (xii) When it was put to him that there would be flooding if water travelled to culvert 12 he stated that both sides of the road is low and if drain on other side of the road gets full then water will not go.
- (xiii) Stated that on 14 October 2011, he did not see small river being flooded but he thinks it did as it happened plenty times.
- (xiv) Stated that he started work in May 2011 and from May to October 2011, there was no flooding within that area.
- (xv) When it was put to him that what he had shown on Board he had not seen it on 14 October 2011, he stated that he went for a walk at the site.
- (xvi) Stated that he has worked in field of engineering from 2009.
- (xvii) When it was put to him that he was not familiar with area he is working he stated that two (2) years was enough.

- (xviii) Stated that he said that when water level on both sides are same water will move slowly.
- (xix) When it was put to him culvert 13 is placed on farm side of the road so that there will be no flood on farm side he stated that if there small rain there it will not flood but if there is heavy rain there would be floods and culvert is of no use.
- (xx) When asked if he would agree that on 14 October 2011, Sigatoka River bank did not burst he stated that he does not know as they cannot see Sigatoka River from the yard.
- (xxi) He is no longer based at Sigatoka but goes there once a month to visit family.
- (xxii) Stated that if rainfall is 94mm whether there will be flood or not at culvert 13 will depend on how long rain is for and if it rains for 1 hour, there will be no flood but if it rains for 24 hours there will be flood.
- (xxiii) Disagreed that blockage at culvert 13 caused water on Tian's Harvest, Fresh Green and Lily Garden farms.

43. During re-examination DW1:-

- (i) Stated that before project started they were talking to local people with engineer and conducting survey.
- (ii) Stated at first, they had to survey road, find out where they can take soil from, build their camp site, install crusher at suitable place and explain the engineering works their company will do.
- (iii) Stated that when they surveyed the area they found that the area is low and in 2009, there was big flood.

44. DW2 during examination in chief gave evidence that:-

- (i) He worked for Defendant from November 2011, and prior to that he was employed as Bus Driver by Valley Buses driving on route Sigatoka to Keiyasi to Sigatoka.
- (ii) He has been residing at Naqalimare which is past Defendant's camp site since his birth which is 45/46 years.

- (iii) Flat where the farm is known as Barara Flat which is flood prone area with road/farms getting flooded and sometimes cars will not go through.
- (iv) Biggest flood in that area was in 2012 and prior to that it was flooded during cyclone Kina and there were small floods.
- (v) If area gets flooded and then water gets stuck on both sides of road then water will flow slowly.
- (vi) He was not on site on 14 October 2011, as he was not working.

45. During cross-examination DW2:-

- (i) Agreed that it was flood prone area when Valley Road was at lower level before road was built.
- (ii) Stated that he visited Tian's Harvest, Fresh Green and Lily Garden farms before but not during the period when there was water in the farms.
- (iii) Agreed that Valley Road is now at higher level and stated that it gets flooded like before.
- (iv) Agreed that he said the last flood was in 2012, and that it was caused by bursting of Sigatoka River.

Issues for Determination

46. Issue for determination are as follows:-

- (i) Whether Plaintiffs are owners of subject vegetable farms in Valley Road, Sigatoka.
- (ii) Whether Plaintiffs have locus standi to bring this action.
- (iii) If answer to (i) and (ii) are in the affirmative, then whether Defendant owed a duty of care to the Plaintiffs.
- (iv) If so, then whether Defendant breached the duty of care owed to Plaintiffs.
- (v) If the answer to issue (iv) is in the affirmative then whether Plaintiffs suffered loss and damage arising out of the breach.

- (vi) If so, then what is the quantum of damages.

Whether Plaintiffs are owners of subject vegetable farms in Valley Road, Sigatoka

47. It is appropriate to look at the ownership issue for each Plaintiff separately.

Liangu Wang trading as Fresh Green - 1st Plaintiff

48. 1st Plaintiff is the proprietor of business known as Fresh Green (Exhibit P9) (hereinafter referred to as **“Fresh Green Farm”**).
49. Fresh Green is in the business of planting and selling vegetables from Fresh Green Farm situated at Valley Road, Sigatoka.
50. Fresh Green Farm is located on land known as Vakaviwa Lot 6 Tikina of Nokonoko Province of Nadroga/Navosa containing an area of 8.0938 hectares described in Instrument of Tenancy No. 11160 dated 6 October 2009 (hereinafter referred to as **“IT 11160”**).
51. 1st Plaintiff being the proprietor of Fresh Green is the lessee of IT 11160.
52. This Court has no hesitation in making a finding that Fresh Green Farm is owned by the 1st Plaintiff.

Ruige Tian trading as Tian’s Harvest - 2nd Plaintiff

53. 2nd Plaintiff is the proprietor of business known as Tian’s Harvest (hereinafter referred to as **“Tian’s Harvest Farm”**).
54. Tian’s Harvest Farm is in the business of planting and selling vegetables from farm situated at Valley Road, Sigatoka.
55. Tian’s Harvest Farm is located on land known as Vakaviwa Lot 5 Tikina of Nokonoko Province of Nadroga/Navosa containing an area of 6.0750

hectares described in Instrument of Tenancy No. 10817 dated 12 May 2008 (hereinafter referred to as **“IT 10817”**).

56. During examination in chief 2nd Plaintiff admitted that IT 10817 was owned by Lingui Wang and that Tian Harvest Farm is his and he manages.
57. This Court finds that on 14 October 2011, land on which Tian Harvest Farm (IT 10817) was owned by 1st Plaintiff and not 2nd Plaintiff.

Jie Liu trading as Lily Garden - 3rd Plaintiff

58. 3rd Plaintiff is the proprietor of business known as Lily Garden (hereinafter known as **“Lily Garden Farm”**).
59. Lily Garden Farm is in the business of planting and selling vegetables from farm situated at Valley Road, Sigatoka.
60. Lily Garden Farm is located on land known as Naduri (part of) Tikina of Nokonoko Province of Nadroga/Navosa containing 3.43636 hectares described in Instrument of Tenancy No. 10819 dated 26 June 2008 (hereinafter referred to as **“IT 10819”**).
61. During cross-examination Third Plaintiff agreed when it was put to her that:-
 - (i) In 2011, IT 10819 was owned by her mother Rui Fen Tian.
 - (ii) IT 10819 was transferred to her on 23 July 2013, and consideration sum stated in the Transfer is \$20,000.00.
 - (iii) She instructed her Solicitors to institute this proceeding in the year 2012.
62. This Court therefore has no hesitation in holding that on 14 October 2011, land subject to IT 10819 was owned by Rui Fen Tian and not 3rd Plaintiff.

Whether Plaintiffs have locus standi to bring this action

63. Defendant’s main contention is that the dealing between owner of IT 10817, 10819 and 11160 and 2nd Plaintiff and 3rd Plaintiff are illegal for want of

iTaukei Land Trust Board's consent. Section 12 of iTaukei Land Trust Act provides as follows:-

“s12(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his or her lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void, provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease.

(2) For the purposes of this section “lease” includes a sublease and “lessee” includes a sublessee.”

64. This Court will now consider dealings (if any) owners of IT 11160, IT 10817, IT 10819 had to see if it is illegal for want of ITLTB's consent.

IT 11160 - owned by First Plaintiff (Fresh Green Farm)

65. From the evidence led by 1st and 2nd Plaintiffs this Court makes following finding:-
- (i) Both of them entered into an arrangement whereby the 2nd Plaintiff ill manage First Green Farm.
 - (ii) In terms of arrangement 2nd Plaintiff would harvest and sell produce from Tian Harvest Farm for his own benefit.
 - (iii) Fresh Green Farm was subject to IT 11160 and owned by 1st Plaintiff.
 - (iv) 1st Plaintiff invested on Fresh Green Farm and derived the benefit from this Farm for himself. He also had to bear any loss from the Farm.
 - (v) Only arrangement between 1st Plaintiff and 2nd Plaintiff in respect to Fresh Green Farm (IT 11160) was for 2nd Plaintiff to manage the farm with benefit of sale going to 1st Plaintiff.

66. In view of what is stated at preceding paragraph this Court holds that the arrangement between 1st and 2nd Plaintiff in respect to Fresh Green Farm subject to IT 11160 is not a dealing being alienation by way of transfer or sublease or creates any interest in the subject let that calls for TLTB's consent pursuant to section 12 of ITLTA.
67. This Court therefore holds that 1st Plaintiff has standing to bring this proceeding.

IT 10817 - Owned by 1st Plaintiff

68. From the evidence of 1st and 2nd Plaintiffs this Court finds that:-
- (i) Arrangement between 1st and 2nd Plaintiff was that 2nd Plaintiff who is trading as Tian's Harvest will cultivate and derive benefit from Tian's Harvest Farm for himself.
 - (ii) 2nd Plaintiff was to bear costs of the cultivation for this farm and was solely entitled to all the profits from this farm. 2nd Plaintiff also had to bear any loss from this Farm.
 - (iii) He was not the Manager or employee of the 1st Plaintiff as far as this farm was concerned.
69. Even though no evidence has been led this Court is of the view that the arrangement mentioned in the preceding paragraph was in return for the 2nd Plaintiff to cultivate and manage the Fresh Green Farm.
70. This Court finds that the arrangement between the 1st and 2nd Plaintiffs in respect to land subject to IT 10817 is a dealing and creates an interest in the subject land which required consent of TLTB pursuant to s12 of ITLTA.
71. This Court therefore holds that since the arrangement between the 1st and 2nd Plaintiffs in respect to land subject to IT 10819 is illegal, the 2nd Plaintiff has no locus standi to bring this action.

IT 10819 - owned by Rui Fen Tian

72. From the 3rd Plaintiff's evidence it is clear that:-

- (i) In 2011, IT 10819 was owned by her mother Rui Fen Tian.
 - (ii) In 2011, 3rd Plaintiff was paying cultivation of the Farm and was solely entitled to the profit gained. Also any loss was borne by her.
73. This Court has not hesitation in holding that the arrangement between Rui Fen Tian and the 2nd Plaintiff amounted to a dealing.
74. This Court therefore holds that since the arrangement between the 2nd and 3rd Plaintiffs in respect to land subject to IT 10819 is illegal, 2nd Plaintiff has no locus standi to bring this action.
75. Having held that only the 1st Plaintiff has standing to bring this action, this Court will now deal with other issues in respect to 1st Plaintiff only.

Whether Defendant owed a duty of care to the 1st Plaintiff

76. This Court accepts Plaintiff's submission that test for determining whether a person owes duty of care to another is that in **Caparo Industries P/c v. Dickman** [1990] 1 ALLER 568 and adopted in **Wartaj Seafood Products Ltd v. Ministry of Home Affairs** [2000] 1 FLR 2000. Three criteria identified in **Caparo** (ante) are:-
- (i) Foreseeability of damage;
 - (ii) Proximity of relationship;
 - (iii) Reasonable or otherwise of imposing a duty.
77. There is no dispute that:-
- (i) At the material time the Defendant was contracted by FRA to construct Valley Road which included laying down of culverts and drains.
 - (ii) On or around 14 October 2011, Defendant was carrying out road work at Barara Flat, Valley Road, Sigatoka which includes installation of culverts to drain out rain water.

- (iii) The 1st Plaintiff's farm is next to where the subject culverts were installed.
- (iv) There were residential dwellings and other farms situated at area known as Barara Flat and alongside Valley Road.

78. This Court also takes judicial notice of the fact that Barara Flat has been subject to flooding due to heavy rainfall or bursting of Sigatoka River.

79. This Court finds that it was reasonably foreseeable, that if the Defendant acted negligently then it would cause damage to properties adjacent to and in close proximity to the part of Valley Road where work was being carried out. Therefore it is not unreasonable to hold that at the material time the Defendant owed duty of care to 1st Plaintiff who owned Fresh Green Farm.

Whether Defendant breached the duty of care owed to the 1st Plaintiff

80. After careful analysis of the evidence and demeanour of the witnesses this Court makes following finding of facts:-

- (i) On and around 14 October 2011, Defendant was in the process of installing culverts to enable flow of rain water from the 1st Plaintiff's and the adjacent farms.
- (ii) The Defendant had to install three (3) culverts being culvert Nos. 12, 13 and 14.
- (iii) After completing the sub-grade stage the Defendant left gravel and soil next to culvert No. 13 to complete the remaining installation process.
- (iv) Due to heavy rainfall on 14 October 2011, the soil and gravel left next to the culvert got deposited into the drain blocking water from flowing through the culvert.
- (v) This resulted in 1st Plaintiff's Farm and adjacent farms being flooded.

81. This Court accepts 2nd Plaintiff's evidence as to what happened on 14 October 2011, as credible.

82. In contrast DW1's evidence was mostly technical and based on hearsay evidence as he was not directly involved with this incident.
83. No weight is given to Exhibit D4 which shows that level of rainfall on 14 October 2011, was 94mm, for the following reasons:-
- (i) Original Form was not produced in evidence;
 - (ii) Person (FRA Engineer) who signed the Form was not called as a witness.
 - (iii) Form shows 94mm of rainfall for 14 October 2011 but is crossed out.
 - (iv) Form that records 94mm for rainfall for 15 October 2015.
 - (v) Question one needs to be ask is that how can rainfall level of 15 October 2011 be entered for 14 October 2011 (a day before).
84. From this it is apparent that the Form was completed on one particular day and not filled on each day as shown on the Form.
85. Defendant could have easily and without much expense created a temporary fence around the gravel/soil or covered the gravel/soil with fine mesh which of course Defendant failed and/or neglected to do.

Whether Plaintiffs suffered loss and damage arising out of the breach

86. This Court has no hesitation in making a finding that 1st Plaintiff's Farm was subject to flooding which caused loss and damage to the 1st Plaintiff due to the Defendant's negligence.

Loss of Income

87. 1st Plaintiff in his evidence claims that his loss would be about \$70,000.00.
88. In the Amended Statement of Claim the 1st Plaintiff claims loss in the sum of \$76,320.50 with particulars provided.

89. No tangible evidence in the form of Bank Statements or Financial Accounts have been produced in Court to substantiate the claim.
90. Only tangible and independent assessment of loss of crop was that of Unaisi Ramudu (PW4) which this Court has no reason to doubt.
91. Apart from certain technical glitches as to date, this Court accepts what is stated in Exhibit P10 as credible evidence, which is based on investigation carried out by her and comparative schedule.
92. In terms of PW4's evidence:-
- (i) Her assessment on value of crop is based on Comparative Schedule held at Ministry of Primary Industries at that time;
 - (ii) Her assessment does not include labour cost for planting the crops.
 - (iii) She waited for two (2) weeks before carrying out the assessment which was to let the farm dry up to some extent.
93. In terms of PW4's evidence this Court has no hesitation in holding that the amount of loss suffered by 1st Plaintiff due to loss of crop was \$39,850.68.
94. 1st Plaintiff would have incurred harvesting costs which would obviously affect his nett loss.
95. However, since the loss assessed by PW4 does not include planting cost, it is not just and fair to deduct harvesting expenses from the amount so assessed.

Soil Erosion/Clean Up Costs

96. No particulars of any such loss have been provided in the Amended Statement of Claim filed almost twenty-two months after the incident.
97. Also no evidence was led to establish as to what was the cost of soil erosion and/or clean up costs.

Interest

98. 1st Plaintiff is entitled to interest on the judgment sum at close to commercial bank rate on deposits. Interest is awarded at 3% per annum.

Cost

99. Court takes into consideration that Plaintiffs called five witnesses, trial lasted for three days, both parties filed Submissions.

100. It goes without saying that the facts of the case does not call for indemnity cost or costs on higher scale.

Conclusion

101. Dealing between 2nd Plaintiff, 3rd Plaintiff and 1st Plaintiff as owner of IT 11160 as at 14 October 2011, were illegal for want of iTLTB consent and as such 2nd and 3rd Plaintiffs did not have any standing to bring this action.

102. 1st Plaintiff being owner of IT 11160 and Fresh Green Farm had standing to bring this action.

103. Defendant owed duty of care to the 1st Plaintiff.

104. Defendant breached its duty of care owed to the 1st Plaintiff which caused loss to the 1st Plaintiff.


105. The Defendant is liable to pay the 1st Plaintiff \$45,577.22 (Forty-five thousand five hundred seventy-seven dollars twenty-two cents) which sum is made up as follows:-

Amount of loss (Crops)	\$39,850.68
Interest 3% from 8/6/2012 (date of Writ of Summons) to 23/3/2017 (date of Trial)	<u>5,726.54</u>
	<u>\$45,577.22</u>

Orders

106. This Court orders that:-

- (i) The 2nd and 3rd Plaintiffs claim against the Defendant is dismissed and struck out.
- (ii) The Defendant do pay the 1st Plaintiff the sum of \$45,577.22 (Forty-five thousand five hundred seventy-seven dollars twenty-two cents) inclusive of interest upto date of trial of this action.
- (iii) Defendant do pay the 1st Plaintiff costs assessed in the sum of \$3,000.00.
- (iv) As between the 2nd Plaintiff, the 3rd Plaintiff and the Defendant, they bear their own cost of this action.



Kamal Kumar
Chief Justice

At Suva
8 December 2021

Solicitors:

JAMNADAS & ASSOCIATES for the Plaintiffs

MUNRO LEYS for the Defendant