

[1] The defendants apply to vary or set aside orders of this court made by consent. The principal issue is whether the court has jurisdiction to do so.

[2] This is a family dispute concerning a town allotment known as Tavatu'utolu at Kolomotu'a. It was the subject of a substantive ruling of this court in 2010 but then following the making of an application by the plaintiffs for the issue of a writ of possession the parties had the court make consent orders on 5 February 2015. The orders were on the following terms:

1. A Writ of Possession is to issue from the Court on the terms attached.
2. The first defendant is the lawful owner of the dwellinghouse which is presently on the town allotment, Tavatu'utolu, Kolomotu'a.
3. The first defendant shall vacate the said town allotment, Tavatu'utolu, and his said dwellinghouse, together with his wife and family as ordered in the Writ of Possession issued today, i.e. within 30 days from today.
4. The first plaintiff may occupy and use the said dwellinghouse and may let or rent out the same to any person for an income for herself but only with the written consent of the first defendant as to such person and terms of such tenancy.
5. The first plaintiff shall carefully use and preserve the said dwellinghouse for the first defendant when she would pass away, and she shall properly insure the same against fire, earthquake and hurricane at all times.
6. The second and third defendants shall not remove any part of the house of the second plaintiff and anything affixed thereto but they may remove

any other house or structure which they have built on it by no later than 30 days from the date of these orders.

- [3] On 17 March 2016 the defendants filed this application. They say that the plaintiffs have breached the terms of the consent orders in that they have allowed a Fijian women and two other Tongan women to occupy the dwellinghouse without the first defendant's permission and have failed to insure the dwellinghouse against fire, earthquake and hurricane. In his affidavit the first defendant 'Aipolo Vea states:

"That I am asking the Judge of the Land Court for an order setting aside Court Order of 5th February 2015 or varied and to vacate the dwelling house by the Fijian woman Nanise Likutabua and two (2) other Tongan women or any other people brought to the dwelling house by the first or second respondents and I and my family shall return to the dwelling house forthwith and if the first respondent shall return to Tonga then she is acceptable to come and reside with the applicants at the dwelling house."

- [4] The application is opposed by the plaintiffs. An affidavit has been filed by the second named plaintiff, Semisi Vea, who says that the dwelling house is unfinished in important respects and it cannot be rented and is uninsurable. He says that insurance cannot be obtained due to the incomplete condition of the house and because there are no drawings or plans particularly with regard to the foundations and structural integrity of the dwellinghouse. Semisi Vea also deposes that a Fijian lady has been allowed to stay in the

dwellinghouse to look after it but that it is not let or rented to her or anyone else due to lack of water and electricity and because the property is not fenced.

Jurisdiction

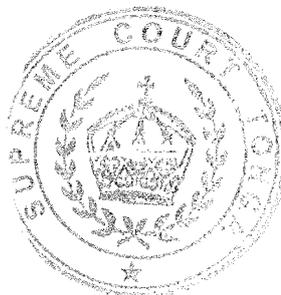
- [5] The application must fail on the matter of jurisdiction. Mr. Tatila argues that the court can make the orders sought under O.13 rule 7 Supreme Court Rules. This is plainly not the case. That rule applies where an applicant was not served with a copy of the relevant application notice and was adversely affected by the making of the order. It does not apply where orders have been made by consent.
- [6] In my view the court cannot vary consent orders on the application of just one of the parties except in an ordinary action brought for that purpose. Where a consent order embodies an agreement which amounts to a contract between the parties (as is the case here) the court will only interfere with it on the same grounds as it would any other contract. (White Book 1998 Ed, Vol 2 at page 1268-1270).
- [7] As I explained to Mr. Tatila, it appears to me that the defendants' options in this case are:
- [7.1] Apply to enforce the court orders using the execution process available under the Rules; or
- [7.2] Commence an ordinary action to set aside the agreement upon which the consent orders of the court are based;

if they consider such grounds exist.

Result

- [8] The application is dismissed.
- [9] The plaintiffs seek costs. For the defendants, Mr. Tatila asks that costs lie where they fall.
- [10] I had made the defendants' counsel aware of the problems facing this application at the last hearing. I am also told that before the hearing this morning an offer was extended by the plaintiffs that they would not seek costs should the application be withdrawn. Despite this the defendants chose to proceed with the application. It is only proper in those circumstances that the usual rule applies and that costs follow the event.
- [11] The plaintiffs are to have their costs which shall be fixed by the Registrar if not agreed.

NUKU'ALOFA: 12 May 2016.



A handwritten signature in black ink, appearing to be "O.G. Paulsen".

**O.G. Paulsen
President**