

**NOVA SCOTIA COURT OF APPEAL**

**Citation: Lewaskewicz v. Chender, 2007 NSCA 108**

**Date:** 20071116

**Docket:** CA 280516

**Registry:** Halifax

**Between:**

Klara Lewaskewicz

Appellant

v.

Robert Chender and Amy Chender

AND

Henry Lewaskewicz and Georgina Lewaskewicz

Respondents

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**Judge:** The Honourable Justice Roscoe  
The Honourable Justice Cromwell dissenting by separate reasons

**Appeal Heard:** October 4, 2007

**Subject:** **Procedure: setting aside consent order; Agency; Non est factum; Undue influence**

**Summary:** Appeal from a decision dismissing an application to set aside a consent order, a quit claim deed and a right of first refusal.

The appellant, an elderly woman, with the assistance of her son, sold the waterfront portion of her farm property to the respondents. She also signed a right of first refusal giving the respondents the option to buy her remaining property if she ever agreed to sell or transfer it. A few years later her son attempted to sell a portion of her property. The respondents claimed that the right of first refusal was thereby triggered and offered to buy the balance of the appellant's lands. After failure of the negotiations with the son in that respect the respondents sued for specific performance of the right of first refusal. Soon after, the appellant signed a quit claim deed to her son and his wife of her remaining land. Further

negotiations between counsel led to the issuance of a consent order dated July 12, 2005, providing that the appellant would convey the remaining property to the respondents for \$131,000 before June 1, 2006.

Some time later new counsel was retained to represent the appellant. An application was brought on her behalf to set aside the consent order, the quit claim deed and the right of first refusal. The appellant claimed *non est factum* in relation to the right of first refusal, that she signed the deed under the undue influence of her son and that counsel had no authority to agree to the consent order on her behalf. The application was dismissed. See: 2007 NSSC 104.

**Issue:** On appeal, the appellant argued that the chambers judge committed palpable errors in making the findings of fact, and erred in law in not setting aside the consent order, the deed and the right of first refusal.

**Result:** Appeal dismissed. The majority, (per Roscoe, J.A. with Bateman, J.A. concurring) found that the chambers judge's findings of fact were supportable by the evidence and there was no basis in law to set aside the consent order, the quit claim deed or the right of first refusal. The factual findings were based in part on findings of credibility and were entitled to deference.

Although the chambers judge erred in finding that the appellant lacked standing to contest the consent order, the decision not to set it aside was supportable on the evidence. The son was the general agent of the mother with authority to retain counsel on her behalf. Counsel retained by the son had authority to bind the appellant when he consented to the order.

With respect to the right of first refusal, the conclusion of the chambers judge respecting the *non est factum* plea is essentially based on his assessment of the facts and the credibility of the appellant and her son. His conclusions that the son told her about it and that she did not read the document before signing it are supported by the evidence. That she was careless is a finding of fact entitled to deference.

Although the legal analysis of the chambers judge respecting undue influence was incomplete, the conclusion, that the deed should not be set aside, was nonetheless upheld.

Cromwell, J.A. (dissenting) would have set aside the consent order on the basis that the solicitor had no authority to consent to the order on the appellant's behalf.

**This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 41 pages.**