IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Chender v. Lewaskewicz, 2007 NSSC 104

Date: 20070403
Docket: SN228256
Registry: Sydney

Between:

Robert Chender and Amy Chender

Plaintiffs/Respondents

v.

Klara Lewaskewicz

Defendant/Applicant

-and-

Henry Lewaskewicz and Georgina Lewaskewicz

Defendants

Judge:	The Honourable Justice Charles E. Haliburton
Heard:	November 14, 2006 and December 18, 2006, in Sydney, Nova Scotia
Written Decision:	April 3, 2007
Counsel:	Bruce T. MacIntosh, Q. C., for the applicant/defendant Guy LaFosse, Q. C., for the respondents/plaintiff

By the Court:

INTRODUCTION:

[1] Cape Breton affords many beautiful places around its shoreline. Broad Cove Chapel in Inverness County overlooking the Northumberland Straight and the Gulf of St. Lawrence is one of those. In 1954 Klara Lewaskewicz, with her husband and infant son Henry, had accumulated enough savings to make a down payment on a "run down old farm" purchased for the sum of $3,500.00 under an arrangement with the Nova Scotia Farm Loan Board. Klara and her husband were survivors from war torn Poland and forced labour camps in Germany. Klara had followed her husband to Cape Breton in August, 1951, bringing with her their 18 month old son Henry. The beauty of Inverness does not make prosperous farmers but with a combination of raising cattle and sheep and operating a market garden, this small family lived, worked and were free of debt by September, 1973. Klara's husband Ferdinand died January 27, 1995. Henry and his wife Georgina moved away from Broad Cove to Ontario on July 21, 2003.

[2] In the 50 years intervening between Klara's arrival and 2001 and perhaps particularly through the 90's, property such as that occupied by the

Lawaskewicz' has acquired a much greater value as vacation land than as farm land. The Chenders coming from New York had expressed interest in acquiring property with ocean frontage in that area. Through a real estate agent acting on instructions from Henry and a lawyer acting for them, beginning in 2001 and culminating in 2005 Chenders agreed to purchase Klara's farm in two lots at a price of $330,000.00.

[3] Klara and the Chenders are now before the court because an order of this court, issued by agreement of the parties on July 12, 2005, ordered Klara to remove herself from the home and property she has occupied since 1954. Leaving her home and abandoning the property is something which Klara is not prepared to do and is something which she says she has never agreed to do.

[4] Klara Lewaskewicz is the applicant in this matter. With her son Henry and her daughter-in-law Georgina she was one of three defendants in this action. This action, for specific performance was thought to be concluded by the consent order initialled by MacDonald J. in chambers, after negotiations between two solicitors Ralph W. Ripley representing the Chenders, and Frank Demont representing the Lewaskewicz family. By the terms of that order the Chenders were granted their application for specific performance

with a deed to be delivered on or before June 1, 2006. The price was $130,000.00, an amount fixed after a court appointed appraiser had valued this part of the property at $125,000.00. The parties were to bear their own costs.

BACKGROUND:

[5] Briefly recapping the background to that transaction; Chenders had acquired a portion of this property abutting the waterfront at a price of $200,000.00 in July, 2001. That purchase included a right of first refusal on the remainder lands. On November 28, 2003 Klara conveyed those remainder lands to her son Henry and his wife Georgina contrary to the clear intent of the right of first refusal. When the existence of this deed was discovered Elliott Fraser, then acting as the lawyer for Chenders, contacted Gerald MacDonald who had throughout represented the Lewaskewicz interests, demanding that the remainder property be appraised, as directed by the right of first refusal, and conveyed to the Chenders. After much dispute and a couple of changes of counsel, the matter was resolved with the disputed consent order.

[6] This application is founded on the proposition that it was only after that consent order had been taken out that Klara was advised or became aware that her home was to be acquired by the Chenders.

[7] The Interlocutory Notice presently before me seeks the following remedies:

> 1. An order setting aside the Consent Order of this Honourable Court dated July 12, 2005 signed by Ralph W. Ripley on behalf of the Plaintiffs, and Frank Demont on behalf of the Applicant and Defendants;
>
> 2. An order declaring the grant of right of first refusal between the Applicant Klara Lewaskewicz and the Respondents Robert Chender and Amy Chender dated September 25, 2001 void and of no force and effect because of both or either lack of due consideration and or non est factum or alternatively;
>
> 3. An order authorizing the reconveyance of the property to the Applicant and declaring that the Applicant's obligations pursuant to the said grant of right of first refusal have not been triggered.

ISSUES:

[8] I find the issues raised by the parties are conveniently set forth in the pre-hearing brief submitted on behalf of the Plaintiff/Respondents. They are enumerated as follows:

> 1. Should the court entertain the application filed by Klara who was no longer the owner of the property at the time of the consent order?

2. Does this court have jurisdiction and the authority to review and alter or reverse the order which has been consented to and filed or must the Applicant proceed by way of appeal or a new action?

3. Upon a review of the evidence, are there such circumstances established as to warrant the setting aside of the consent judgment?

4. Does counsel have authority to bind a client?

5. Do the established facts support the plea of non est factum in relation to the right of first refusal which she signed?

6. Is the right of first refusal void for lack of consideration?

7. Should this Honourable Court issue an order to reconvey the property to Klara, while declaring that her obligations under the right of first refusal have not been triggered?

[9] The point is ably made by counsel for Klara that there is a gross discrepancy in the sophistication of the parties to this application. Klara is an 82 year old lady of unknown education who has virtually never been absent from her home and adopted community since 1954. Only seldom, it is said, she has ventured as far as her nearest town, Port Hawkesbury. On the other hand, Robert and Amy Chender are well educated professional people, he is a lawyer. They have no difficulty with either written or spoken English. It is apparent that the Chenders can much more readily grasp the content and purport of written documents than can Klara who, after 50 odd years, still has somewhat of a struggle with the English language in both forms.

Nonetheless, the documents which have been executed by Klara, Henry and Georgina effectively conveyed to Chenders the rights which this action was intended to enforce.

[10] Counsel for Klara has reconstructed the sequence of events affecting the decision of Lewaskewicz family to offer the property for sale, the understanding that Klara had with respect to that transaction, her signing of the right of first refusal, and ultimately the negotiations which culminated in the Consent Order. It is uncontested that Klara received no legal advice and in many ways remained uninformed throughout. She received none of the proceeds from the sale, all of which went to her son Henry and/or his creditors.

[11] It is contended by the Applicant that Chenders were playing “hard ball”. That they refused to compromise and insisted on “forcing the issue” at every turn. I am not prepared to accept that as a fact. Chenders like Lewaskewicz were represented throughout by well established lawyers. The clients were entitled to rely on their respective lawyers for advice and guidance. There is no reason to believe that Chenders acted otherwise than to follow the advice of the lawyer they had retained. The fact that Klara was receiving no advice

or information from her own lawyer with respect to the transaction cannot be laid at the door of Chenders.

THE EVIDENCE:

[12] What is the relevant evidence which I must take into account on this application?

[13] First the DOCUMENTS.

[14] The **Agreement of Purchase** reflects Chenders' offer to purchase from Henry Lewaskewicz and Georgina Lewaskewicz 12 acres abutting the shore for $175,000.00. It required the right to a 30 foot right of way from the highway to the land in question, and that the buyer be "satisfied" about the use of the remainder property. It was signed the 13th of July, 2001.

[15] There followed a "Counter Offer Form 200" signed by Henry and Georgina. It adjusted the price to $200,000.00 and added a proviso that Henry's construction company will have the opportunity to bid on excavation work and the words "see Appendix A". "Appendix A" included provision for the buyer to obtain a survey, required seller to landscape the "gravel pit" and grant a "right of first refusal" in the remainder property.

[16] Then follows the "Addendum" to Purchase and Sale Agreement dated the 13th of July, 2001, stating "The undersigned hereby ratify and confirm the agreement whereby Henry and Georgina Lewaskewicz have contracted to sell 12 acres ± at Broad Cove Marsh to Robert and Amy Chender upon **the same terms and conditions**". Dated the 16th of September, 2001, this document was executed by **Klara** and by Henry on behalf of his company "Broad Cove Chapel Enterprises Limited". It was witnessed by Leslie Vincent-Smith, the realtor involved.

[17] Next in sequence is a **"Right of First Refusal**" dated the 25th of September, 2001 between Klara Lewaskewicz, grantor, and Robert Chender and Amy Chender, grantees. This document was witnessed by Nicole Rovers, articled clerk.

[18] The document opens with the words "this right of first refusal made this 25th day of September, A.D., 2001 by Klara Lewaskewicz, etc." and continues,

> "witnesseth that . . . the Grantor hereby irrevocably grants to the Grantee and their heirs and assigns, the right of first refusal to purchase the lands described in Schedule "A" . . .
>
> > 1. Upon the Grantor receiving any offer to purchase the Property or entering into an agreement to sell, give, bequeath, or otherwise relinquish possession or make any other voluntary or involuntary transfer of the Property . . ."

The particulars of the agreement provide for a method of valuation in the event the Chenders purchase and for a release in the event of their failure to do so.

[19] In January 2004 Henry received an offer in the form of an "**Agreement of Purchase and Sale**" for vacant land which he accepted. The buyers are identified as Paul Colletti and Lorraine Parker, the sellers are Henry Lewaskewicz and Georgina Lewaskewicz, and it describes a portion of the property known to the parties as the "gravel pit" The purchase price is $50,000.00, the document is signed by the proposed purchasers and by Henry and Georgina.

[20] The final document which I consider to be relevant to the present issues is a **Quit Claim Deed** dated the 28th of November, 2003 whereby Klara as Grantor, conveys all her remainder property to Henry and Georgina, then living in the Province of Ontario.

ORAL TESTIMONY AND AFFIDAVITS:

[21] The realtor involved in the purchase of the shore lot by the Chenders was **Leslie Freeman**. She testified at the hearing and in relation to the affidavit

which she had given earlier. She said that she had "run into Henry" in the street in Inverness in the spring of 2001 when he indicated an interest in selling some of the family property "on the shore". That summer she showed the property to the Chenders who made an offer of $175,000.00 which resulted in a counter offer from Henry and an actual meeting "at the kitchen table" where they agreed to the purchase of the property for $200,000.00 with other conditions. There was very little discussion of a right of first refusal, only that if an offer on the remaining property was received, Chender would have an opportunity to match it. "That was what I understood."

[22] In the affidavit previously filed Ms. Freeman commented on the meeting at the kitchen table.

> "During the course of that conversation Robert Chender proposed a right of first refusal and provided assurances that Klara Lewaskewicz would be entitled to remain on her property for so long as she wished . . . such right of first refusal . . . was to be drafted by legal counsel for both parties.

She testified that it was only when she was requested to attend upon Klara and have her sign the "Addendum" that she realized that Klara was an owner. Klara signed at her request and "asked no questions". Her affidavit states;

> "Gerald MacDonald requested that I take an Addendum to Klara for her signature. I understood Klara was his client and did not inquire whether he had already explained the document to her . . . I considered myself a messenger and witness, not an adviser or interpreter . . . (after arranging for Henry to go to his mother's house with her) I simply obtained her signature and witnessed her signature as requested by Mr. MacDonald . . .it was apparent to me that there was a trusting relationship between mother and son and it was apparent that Henry was in charge of such matters on behalf of his mother."

[23] Ms. Freeman was further involved in 2003 in arranging a meeting between Chenders and Klara. She had by that time listed the home of Henry and Georgina for sale, and Henry had already departed for Ontario. They expected that Klara "would be happy to move" with them saying she had an old friend in Ontario.

[24] The affidavit of **Nicole Rovers** described her participation in obtaining Klara's signature on the Right of First Refusal (ROFR). She was an articled clerk with Gerald MacDonald, Q. C. of Port Hawkesbury from June 2001 to May of 2002. At Paragraph 3 of her affidavit of September 2006 she says

> "As best I recall my principal Gerald MacDonald requested that I attend at the residence of Klara Lewaskewicz in Broad Cove Chapel to obtain her signature on a document. I have no recollection of any specific instructions from Gerald MacDonald with respect to the content of the document." . . . (Paragraph 4) "My recollection of attendance upon Klara Lewaskewicz is similarly faded with the passage of time. I can recall generally attending upon her. Until my

> memory was refreshed I did not remember the nature of the document or that it was in fact a ROFR. I do not recall any substantive conversation with Klara Lewaskewicz and I cannot say whether I explained the document to her in any material fashion."

[25] Her affidavit concludes by saying that she could not contradict the comments in Klara's own affidavit at Paragraphs 21 and 22.

[26] At Paragraph 21, **Klara's** affidavit describes the visit.

> "A young lady from Gerald MacDonald's office appeared unannounced at my door step . . . she explained to me that she worked for Gerald MacDonald, Q. C. and that she required my signature on another document that had been overlooked when I had attended at Mr. MacDonald's office the previous day. Her visit and her explanation were both relatively brief. At the time I understood it had something to do with the right of way that was required from the shore front property over my retained lands to the highway . . . at no time did Gerald MacDonald, Q. C. ever discuss or describe that document to me when I attended to his office. To the best of my recollection Nicole Rovers provided no detailed explanation. . . at no time was I offered any legal advice, independent or otherwise".

[27] In her testimony Klara added "I never asked . . . she never explained". She was comfortable with signing "because it came from Gerald MacDonald".

[28] Her affidavit continues (Paragraph 22) . . .

> "had such document been properly described to me by either Gerald MacDonald, Q. C. or Nicole Rovers, I would have refused to sign because my intentions at that time had always been to eventually bequeath my property to either my son and daughter-in-law or my grandchildren. My intentions have not changed in that regard . . ."

[29] In her affidavit Klara alludes to the financial circumstances of her family at that time. Paragraph 6 indicates Henry had told her in the year 2000 that his business was not doing well and she had agreed to place a mortgage for $100,000.00 on her farm to finance his business, Broad Cove Chapel Enterprise Ltd.

> (Paragraph 7) . . . "as my only son I was willing to do almost anything for him including selling a portion of my lands . . . Henry's business did not improve . . . (when) "Henry told me he had an offer for (the shore front property) for $200,000.00 (she agreed that) "after paying back the Scotiabank mortgage the balance of the sale proceeds were to go to him as a gift from me to him".
>
> (Paragraph 12) . . . "I have no recollection of ever having seen or signed the original offer from the Chenders, the counter offer or the appendix "A" to such counter offer.

[30] At (Paragraph 24) she recites that Henry had advised her of his wish to sell the gravel pit, a 5.2 acre portion of the remainder lands. She says she would have agreed to sign any related documents but was never asked to do so.

[31] She goes on to say (Paragraph 25) that the Chenders arrived on the same day in summer 2003 that Henry and Georgina had left for Ontario. Her neighbour Patrick MacDonald paid her a visit and told her that Chenders would be offering $148,000.00 for the rest of her property. She says she told him she wasn't interested in selling. When the Chenders themselves arrived a few minutes later Klara says there was no such discussion and she

was “skeptical of their motives” in offering to cut grass and fix up her road. In testimony she agreed that they had been friendly. She said that the following year they returned with others and looked through the house. She said she couldn’t understand why they were looking at her home “I won’t sell for $130,000.00". She denied any knowledge of the negotiations which had taken place between Henry and/or the solicitors. While she agreed that her deed of November 2003 gave away her property to Henry she said “if I want him, he give it back”. She knew of Henry’s financial problems in 2001 but in 2003 she “didn’t pay much attention”.

[32] She was “largely unaware other than in the most general manner of the legal dispute with the Chenders”. . . paragraph 28 of her affidavit “at no time did Gerald MacDonald, Q.C. contact me or in any manner obtain my permission to act on my behalf”. In November of 2003 Henry indicated that Mr. MacDonald had recommended she sign the Quit Claim Deed conveying the entire balance of her property to Henry and Georgina. She believed this was a way to avoid having her Old Age Pension Supplement affected as had happened after the sale of the shore lot; so she complied with that advice and executed the deed. “I believed this deed was simply a way of permitting Henry to sell the gravel pit without affecting my pension.”

[33] At the time the Consent Order was taken out Klara was represented by Frank DeMont. At Paragraph 47 of her affidivat she says “at no time did I ever receive a report letter or copy of the consent order signed by Mr. DeMont on my behalf as his client.” At Paragraph 45 “Mr. DeMont never attempted to contact me directly in any manner to inquire as to my intentions before he signed the consent order which had the very effect of forcing me out of my home against my will. “At Paragraph 51 “Mr. DeMont improperly relied on representations from Henry regarding my consent when neither Henry nor Frank DeMont had my consent to act on my behalf in the manner they did.”

[34] The evidence discloses that Klara relied upon **Henry** to deal with business and legal matters. By his affidavit filed in this matter, Henry provides information placing the various documents in context. In 1973 his parents gave him a 26 acre portion of the farm property. He and Georgina built their home there which they occupied until moving to Ontario in July 2003. “Our family lawyer” was Gerald MacDonald. When his excavation business suffered financial reverses in 1998 Henry’s mother consented to mortgage her remaining property to “Scotiabank” for $100,000.00. The nature and effect of the collateral mortgage and guarantee, were not explained to her. Certain irregularities in the execution of these documents was not brought to

her attention. In 2001 with Henry's business continuing to suffer, a foreclosure was in the offing. In that environment, Klara agreed that Henry could arrange the sale of the "shore" property. That money was urgently required to satisfy the mortgage on his own home and to release the mortgage on Klara's.

[35] Ultimately the sale of 12 acres of shore front was agreed for $200,000.00 with the "Right of First Refusal" as part of that bargain. It was negotiated between Henry and Georgina on the one hand and Robert and Amy Chender on the other in the presence of the realtor Leslie Vincent-Smith as they sat around the kitchen table in Henry's home.. Henry says at Paragraph 19 of his affidavit "I casually agreed to such ROFR without discussing it with my mother . . ."

[36] Henry was treating his Mother's property as if it were already his own as he fully expected it would be. The Agreement of Purchase and Sale was signed only by him and Georgina. At Paragraph 23 he goes on to say

> "at the time of signing the Agreement of Purchase and Sale I spoke to my mother generally about the ROFR and that it would only take effect as and when she decided to sell her property. I never specifically sought her consent, nor did she voice any objection to the idea. I simply described it to her as part of the deal."
>
> (Paragraph 25) "Since my father's death my mother has effectively acknowledged me as the man of the "house hold" and has always

> expressed trust and confidence in the decisions I make . . . I am not sophisticated in legal matters. Had Gerald MacDonald forewarned me of the consequences of my failure to get proper authority or obtain my mother's free and informed consent I would have done so . . ."

[37] It was only when the title to the property was searched by Elliott Fraser that anyone expressed concern that Klara had not signed any documents. The Addendum to the Agreement was accordingly faxed by MacDonald to Georgina to be executed by Broad Cove Chapel Enterprises Ltd. and the same document was sent to the realtor requesting her to get Klara's signature.

[38] At Paragraph 34 Henry recites that he attended at MacDonald's office with his mother to sign the conveyance but there was no discussion of the ROFR which he did not in fact see until one and a half years later. The proceeds of the sale were disbursed entirely for Henry's benefit with Klara receiving nothing.

[39] In 2003 Henry decided to sell the gravel pit which he had considered to be his own. Before listing it however he contacted Gerald MacDonald to inquire about the effect of the ROFR and saw the document for the first time. As a result the Chenders were advised of the proposed subdivision which they believed triggered the ROFR. Meanwhile Henry and Georgina were attempting to persuade Klara to go with them to Ontario which she

refused to do. Klara also refused to sign the Agreement of Purchase and Sale with respect to the "gravel pit". Negotiations or discussions between the lawyers extended over a period of months and in the meantime on the advice of Gerald MacDonald, Henry obtained from his mother a conveyance of the entire remainder property. Frank DeMont was eventually retained by Henry to act on behalf of Henry, Georgina and Klara. It was Mr. DeMont who consented to the order which the Applicant now seeks to set aside.

[40] It is clear that Mr. DeMont took his instructions directly from Henry and had no contact whatsoever with Klara.

[41] The Applicant and Henry were cross examined on their affidavits. Klara's oral testimony expanded on her experience with lawyers and property transactions. There was the original purchase of the farm that was arranged by her husband with the services of a lawyer. After Ferdinand died she conveyed two parcels to other individuals using the services of Gerald MacDonald. She and her husband had conveyed the 26 acres to Henry in 1992. She understood that she had "signed for a loan" for Henry in 1998 and that if Henry failed to repay the $100,000.00 borrowed she could lose her home. In 2001 she said she agreed to sell her property to pay off the loan she had underwritten. As to the use of any proceeds over and above the

$100,000, that was not discussed; although she didn't think there was much left after Henry paid off his bills. She had signed the Addendum which was later attached to the Agreement of Purchase and Sale "because my son was present" but she did not ask to have it explained.

[42] Henry described his excavating business. He lived across the road from his parents and his company, Broad Cove Chapel Enterprises Ltd. used the gravel pit which had been there since the 1930's. He had built his own house in 1973-1974 but did not get a deed and take title until the late 1980's. As of 1998 he needed to inject money into his business. His house was already mortgaged for $54,000.00, but his mother was prepared to help by facilitating a loan of $100,000.00. He did not caution his mother about any risk to her property. He left that to the lawyers. He agreed that his mother was lucid and had a good knowledge of English. In 2001 he needed more money and his mother agreed that "we" would offer the waterfront for sale. There was no discussion with his mother before the $200,000.00 Agreement of Purchase and Sale was signed. The "kitchen meeting" took place at his home, not mother's, where he "probably read" the counter-offer. The ROFR document was not drafted at that stage and the discussion with regard to such an arrangement was that 'if and when there was a sale" Chender would

have “first call”. “It never occurred to me that we would ever sell the property.” He confirmed that the reference to “terms and conditions” in the Addendum was or were not the subject of enquiry by either him or his mother; when they had attended the office of Mr. MacDonald to execute the final documents his mother asked no questions.

[43] With respect to the tentative sale of the “gravel pit” he and Georgina had signed the acceptance form. The realtor attempted to have his mother sign but she had refused because “she was worried about her pension”. When his mother agreed to give the Quit Claim Deed to him and Georgina for the balance of the property he said he was beginning to understand that the property could not be subdivided and that the object of the deed was that Klara “would not get hit with taxes if we sold more land”. He agreed that the Chenders had paid a substantial amount of money for the ROFR. He spoke of the things done between 2003 when the issue of the triggering of the ROFR first arose until the date of the consent order. During that time he was endeavouring to sell the property or at least obtain a bona fide offer from third parties for the purchase of the entire remainder. At one point he said it was listed for $250,000.00. Henry’s evidence with respect to this

period did not disclose any concern about protecting Klara's right to remain in her house.

[44] The story as seen by **the Chenders** is shorter. It is not disputed that they were unaware of any problem until September of 2003 when Elliott Fraser advised them of Henry's proposal to subdivide the remainder property and sell the gravel pit. They had an interest in both acquiring that property and preserving it's integrity and believed that the right of first refusal guaranteed their right to do so. Thereafter they acted on the advice of their legal counsel.

[45] In the affidavit filed by Amy Chender she avers that, with her husband and two sons, they regularly "visited family and vacationed in Nova Scotia prior to 2001". They were interested in purchasing waterfront property and had made that fact known to Leslie Vincent-Smith the realtor. As a result they visited the property, met Henry and Georgina in their home across the road from Klara's and learned that they were planning to move to Ontario, taking Klara with them.

[46] Robert Chender in his affidavit says; that they retained Elliott Fraser to represent them in connection with the purchase; that they offered $175,000.00 for the shore lot with some provisos about the development of

the remaining property. "We were not willing to buy the waterfront property if there were any possibility that the remainder property would be developed or subdivided and have more than one house on it." After the negotiations in Henry's kitchen, they agreed to a price of $200,000.00 with a ROFR which Chender believed would satisfy his concerns about future use of the remainder. The details were left to their respective lawyers. Mr. Chender in his affidavit expressed his surprise when his lawyer discovered that the property in fact belonged to Klara. However, the closing proceeded without difficulty and he was provided with the expected documentation including the Right of First Refusal.

[47] Both Robert and Amy Chender refer to their initial meeting with Klara in summer of 2003. Their introduction was by a neighbour, Patrick MacDonald. This was a social visit to Klara's home. No business was discussed although Amy Chender does refer to the conversation with Klara when she "said to me that she wanted to spend one more winter in the house and then would move to Ontario".

[48] It was that September when Chenders were advised by Elliott Fraser that the ROFR had been triggered (gravel pit) and the dispute ensued. In early 2004 Mr. Chender was advised of the fact that the entire property had been deeded

to Henry and Georgina. His solicitor told him "this was another act triggering the right of first refusal". As a result an Originating Notice (Application Inter Partes) was filed on August 17, 2004 seeking an order for specific performance. Apparently no defence was filed to this application although correspondence was filed with the court indicating that the Defendants Klara, Henry and Georgina were being represented by Gerald MacDonald.

[49] There were negotiations with respect to the price to be paid for the property and perhaps with respect to Klara's continued occupation. I assume these negotiations began early in the year as Mr. Chender's affidavit relates (the discussions)

> "what was the appropriate or fair market value for purchase of the remainder property and not as to whether the right of first refusal was binding or whether it had been triggered."

[50] This is reflected in the affidavit of Henry filed with the court September 24th, 2004 in which he says

> "the parties have had many negotiations to try to reach a sale price and to allow Klara to continue to reside in her residence . . . (subject to Klara's continued residence) they are willing to sell at fair market value . . . prepared to honour the right of first refusal provided a fair market value is obtained and Klara Lewaskewicz is allowed to continue to reside until she can no longer do so".

[51] With respect to Klara's indefinite occupation of her home Chender says at Paragraph 30 of his affidavit

> "I was quite surprised since we had been told that she was planning to move to Ontario shortly and that the issue to my understanding was only about the price to be paid for the remainder property".

(Paragraph 34)

> "we also discovered that the remainder property had been listed for sale for a price of $269,000.00 . . . it was obvious that if the land had been sold he would move Klara out. It was clear to us at that time that despite Klara having apparently changed her mind and decided to stay that was irrelevant to Henry and Georgina and that the issue was only about money and not about whether Klara wanted to stay or not."

[52] The dispute shifted to what agreements had been reached between Messers MacDonald and Elliott. Two new lawyers therefore became involved. Their negotiations culminated in the consent order issued by the court on July 12th, 2005 ordering the lands to be conveyed with vacant possession at a price of $130,000.00 with all parties bearing their own costs. Chender instructed his solicitor "to settle on a compromise basis (affidavit Paragraph 45)

> a) we were extending the time period for closing to June 1, 2006;
>
> b) despite the earlier indication that both parties would share the cost of Peter Constable's (appraisal) report we agreed to incur the total payment for that;
>
> c) we agreed not to pursue costs despite the fact that we had been largely successful in settling on a basis upon which we had originally proposed;

> d) we were agreeing to pay more for the remainder property than the value placed on it by Peter Constable (the court ordered appraisal)."

The property transaction however did not close and the present interlocutory application was brought on behalf of Klara. Chender observes at Paragraph 49 of his affidavit "Importantly, at the time that the consent order was signed and issued, Klara Lewaskewicz was no longer the owner of the remainder property; rather, Henry and Georgina owned it."

[53] When cross examined Robert Chander agreed that the negotiations with Henry for the purchase of the property were cordial and that the gist of ROFR was an opportunity to match any offers received. Responding to the suggestion that his legal expertise had resulted in unfair negotiations and his own drafting of the ROFR, he testified that his concern had been to have some control over the ultimate use of the remainder property. His lawyer he said, had suggested that a ROFR would do that, and his lawyer had drafted the document. As a lawyer he had no experience or specialized training in the area of property law. Indeed he testified he had never seen a "Right of First Refusal previously".

[54] On their visit to Klara's home in late August 2004 their counsel had been negotiating a resolution of their differences since some six months. At that time it was understood by Chenders they would be acquiring Klara's home

in the near future. Accordingly on this visit they took with them an architect and a builder/contractor to "assess the dwelling to determine what repairs and renovations may be necessary on the home once we acquired it". This group explored the entire house making inquiries about its construction, insulation, etc. Amy Chender, in her affidavit, swears that during the visit Klara

> "said that she was told by Henry that we were trying to push her out of her house" . . . We believed that she was leaving to join her son in Ontario according to what she told us in 2003 and according to the correspondence Elliott Fraser received from Gerry MacDonald . . . (Paragraph 12) "Clearly something had shifted between our 2003 visit and our 2004 visit with respect to Klara's interest in leaving. I left the visit puzzled by her smile and refusal to directly address my question about leaving."

[55] Donald Beamish the contractor who accompanied the Chenders on that visit was retained to "inspect" the home. His affidavit says he advised Klara

> "of the purpose of my visit mainly to inspect her home . . . I asked (her) some specific questions about the condition of the home, as to whether there was insulation in the home, the cost of heating and the style and condition of the foundation."
>
> (Paragraph 9) "The architect and I discussed changes to the home which might be required or made for aesthetic purposes. Some of these discussions took place in the presence of Mrs. Lewaskewicz."
>
> (Paragraph 11) Klara "did comment to me when we were discussing the home that she generally relied on her son to deal with such matters . . . (Paragraph 12) There was no doubt in my mind when I met (her) that she understood the reason for my visit . . ."

FINDINGS OF FACT:

[56] I conclude from this evidence that the facts are:

1. In 2001 Klara Lewaskewicz was the sole owner of the property both shore lot and remainder when her son Henry listed the shore lot for sale with the realtor.

2. That her property was at that time encumbered with a mortgage of $100,000.00 made collateral to a loan from the Royal Bank to her son Henry.

3. That Henry's construction business was failing.

4. That he was unable to meet his obligations from his own resources.

5. That Klara had no income except from her old age pension and supplement.

6. That the home owned by Henry and Georgina was subject to a mortgage to the Bank of Nova Scotia and the equity therein was insufficient to satisfy Henry's business debts.

7. That Henry was aware of his financial difficulty and was under pressure from the financial institutions to liquidate their loans.

8. Whether after full consultation with his mother and his wife or otherwise, Henry decided to sell the “family property” to satisfy immediate financial obligations, close down his construction excavation business and look for work in Alberta. He and Georgina would move to Ontario and locate a home with better schools for their childrea, and a better life for themselves. When relocated they would provide accommodation for Klara in a “granny suite”.

9. Klara relied upon Henry to look after her business affairs and her general welfare and would do “whatever” was needed to support her only son.

10. Henry listed the shore lot for sale and specifically advised his mother of his intention to sell it.

11. Henry negotiated the sale price with Robert and Amy Chender and agreed to a Right of First Refusal on the remainder property.

12. The ROFR document was prepared by Elliott Fraser acting on Chender’s behalf and circulated to Gerry MacDonald for his approval and revisions. Gerry MacDonald did not read the document and forgot to review it with his clients.

13. The property transaction closed in the ordinary way and after the event the right of first refusal was signed by Klara without alteration and delivered to the purchaser.

14. Klara Lewaskewicz received no advice whatsoever about the value of her property in part or in whole, the use to which the money received on the sale would be applied, the impact of the sale on her old age supplement income, or any tax obligations that might be triggered otherwise. She executed the deed in the office of lawyer Gerald MacDonald, together with a direction to pay the proceeds, none of which were paid to her. Her signature was subsequently obtained on the right of first refusal, in the presence of an articled clerk who made no effort to explain its contents.

[57] The ROFR is entitled "this right of first refusal made this 25th day of September, A.D. 2001 with the operative provisions beginning with these words: **The Grantor hereby irrevocably grants to the Grantee and their heirs and assigns this right of first refusal"**. It is a four page relatively complex document signed during a fifteen minute visit. Klara assumed Henry and MacDonald knew and approved its contents. Nonetheless,

reading the first line of this document clearly conveys its import. (my emphasis)

[58] On the 28th of November, 2003 Klara conveyed all the remainder property to her son Henry and his wife Georgina by a Quit Claim Deed.

THE QUESTIONS:

[59] To conclude this decision, I propose to respond to the questions raised in paragraph 8. That will effectively deal with the remedies sought by the Interlocutory Notice.

[60] **1. Should the Court entertain the application filed by Klara who was no longer the owner of the property at the time of the consent order?**

Klara has pleaded "*non est factum*". The parties are in agreement with respect to the law relating to this plea. The Respondent relying on *Castle Building Centres Group Ltd. v. Da Ros* (1990), 95, N.S.R. 24, quoting Glube J. submits:

> 1. The burden of proving *non est factum* rests with party seeking to disown their signature. It is a heavy onus when the person is of full capacity.

> 2. The person who seeks to invoke the remedy must show that the document signed is radically of fundamentally different from what the person believed he was signing.
>
> 3. Even if the person is successful in showing a radical or fundamental difference the person raising the plea of *non est factum* must not be careless in taking reasonable measures to inform himself when signing the document as to the contents and effect of the document.

[61] The Applicant cites well known cases to the same purpose *Saunders v. Anglia Building Society* [1971] A.C. 1004 [1970] All E.R. 961 as cited in *Araki v. Wlodyka* [1983] 5 WWR 360 and a Nova Scotia case *Custom Motors Limited v. Dwinell* (1975) 12 N.S.R. (2d) 524:

> A successful defence based on *non est factum* is now clearly a two-part process . . .

(The Applicant) must establish there to be

> a radical difference to be between what he (s) signed and what he thought he was signing (a difference that is "fundamental", "serious" or "very substantial."

And the second part "is the issue of negligence or carelessness on the part of the signer".

> So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances.

And from the *Custom Motors* case:

> There is a heavy burden on a person of full capacity to establish such a distinction.

[62] There are several difficulties for the Applicant here. Firstly, it was Henry's evidence that he told his mother of the right of first refusal. And secondly that she was careless in failing to give even a cursory reading of the document when asked to sign it. More fundamentally it is not the right of first refusal which has caused her injury. In the final analysis, what has caused her injury is that she executed a conveyance of the entire property to Henry and Georgina which she clearly knew was contrary to the terms of the ROFR; and in the total absence of any advice from her family lawyer about the consequences of doing so.

[63] To restate the point, only if there were a basis on which she could advance the *non est factum* argument in relation to the deed she gave to Henry and Georgina, could she arguably avoid the consequences she seeks to avoid by this application. Executing the right of first refusal carried with it no consequence for Klara so long as she lived and unless she wanted to sell the remainder property to some other person. As counsel for Chenders points out at paragraph 73 of the Pre-Hearing Brief:

> The ROFR gave the Chenders the right to buy when Klara decided to sell. (It) in effect provided for Klara to remain living in her home for as long as she wanted.

[64] It may be that in signing the document she carelessly believed it was an overlooked and insignificant detail. There is however no credible evidence that she had an affirmative belief that it was something other than the right of first refusal about which she had some general knowledge. The document was clearly identified as such in its' first few words. She has said in evidence that it was always her intention to bequeath the property to her son and/or grandchildren. The implication is that she believed the ROFR would not be triggered if the property stayed in the family. Such a restriction however would not in my view be a fundamental or serious difference from the document which she signed. It would rather be a refinement of it's terms. Her evidence fails to prove "all the circumstances necessary to justify", releasing her from the bargain she made.

[65] Then, what about undue influence with respect to signing the conveyance to Henry and Georgina? Clearly neither Henry and Georgina, nor Gerald MacDonald, the family's lawyer, had any concerns about the frailty or weakness on the part of this 90 year old lady to understand what was in her best interests and her ability to make an independent judgment about whether or not to convey her property to her son. The evidence is that Henry and Gerald MacDonald discussed the pros and cons and they

concluded that it would simplify matters respecting Klara's estate. It would obviate the necessity of probate upon her death and it would permit Henry to deal with the sub-division processes involving Klara's property which he did. Whether or not Henry discussed "probate" he did discuss with Klara the fact that upon a sale of the property she would suffer the loss of her Guaranteed Income Supplement.

[66] Klara was not advised to seek independent advice and I am satisfied that she did not think it necessary. She believed that her interests and the interests of Henry and Georgina were perfectly aligned. Executing that conveyance was a conscious act on the part of both Klara and Henry based on what they thought were perfectly valid motivations. In that circumstance can it be said that Klara signed that deed because of undue influence?

[67] As between Klara and her son and daughter-in-law there may be some understanding with respect to a trust or a promise but there is no suggestion of any such reservation in the deed itself. She cannot now deny innocent third parties (buyers without notice) the right to rely on that document. This quit claim deed was executed by Klara and delivered to Henry on the advice of their family lawyer Gerald MacDonald.

[68] The decision to convey the property was one taken conscientiously by Klara for particular personal advantage. The conveyance was intended to vest the property in Henry and Georgina for all purposes.

[69] Henry and Georgina had the full carriage of the action for specific performance on behalf of the defence; they had full knowledge of the negotiations; and they made the agreement which would dispose of their property interest pursuant to the court order. In the circumstances I conclude that Klara has no interest in the property. She is no longer the owner and was not the owner at the time of the consent order. She therefore has no status to seek a remedy that would set aside that order and restore the property to Henry and Georgina so that they might, if they decide to do so, reconvey it to her.

[70] **2. Does this court have jurisdiction and the authority to review and alter or reverse the order which has been consented to and filed or must the Applicant proceed by way of appeal or a new action?**

The plaintiff/respondent (Chender) has cited a number of cases supporting the proposition that this court does not have jurisdiction to review or reverse the consent order approved by MacDonald J. The argument advanced relies upon Sections 38 and 39 of the ***Judicature Act*** and a number of cases including *Levy v. Messom* (1997) 159 N.S.R. (2d) 252 (N.S.C.A.), *Morenisy*

v. *Charest* (1991) 123 N.B.R. (2d) 392; 84 DLR (4th) 567, and *Gates Estate v. Pirates Lure Beverage Room* (2004) N.S.C.A. 36. These cases support the proposition advanced that; except with the consent of all parties concerned and affected; or in the absence of mistake or fraud or the like; a judgment once issued cannot be altered. The appropriate remedy in the circumstances is said to be the commencement of a new action.

[71] A full answer to that thesis is to be found in *Coulter v. Dechant*, 2004 CarswellAlta 1328, Sulatycky A.C.J.Q.B., October 18, 2004 at paragraph 7 in which Sulatycky quotes Sherstobitoff J.A. writing in *Childs v. Childs Estate* (1987), [1988] 1. W.W.R. 746 (Sask. C.A.):

> In summary, the court has jurisdiction to enforce or set aside an agreement compromising an action notwithstanding that it involves matters extraneous to the action or there is a substantial issue as to the terms or validity or enforceability of the agreement. In deciding whether to exercise that jurisdiction the court will, of course, have reference to the body of authority which has grown in common law jurisdictions. The main criterion will be whether the requirements of justice to the parties are best served by a determination on affidavit evidence in the summary procedure (with possible cross-examination on the affidavits), or an order directing trial of an issue in the same action, or an entirely new action, or otherwise. In making this determination , the court must consider the substance of the questions to be determined, whether the credibility of witnesses is involved or likely to be involved, whether pleadings and discovery are desirable or necessary, and any other factors in the case which indicate proceeding in a particular way.

Sulatycky J., at page 11 concluded that in the circumstances as they existed in *Coulter v. Dechant*, opening up and reviewing the Judgment in those particular circumstances would be inappropriate. He said a paragraph 11:

> The substance of the questions to be determined (duress, undue influence, fraudulent or malicious misrepresentation, illegality and mistake) together with the credibility issues such questions engage militate firmly against the procedure proposed by the Applicant and in favor of a new action.

[72] The issue of the jurisdiction of the court to entertain an application such as the present has not been ultimately determined in Nova Scotia. In a case cited as *Brown v. Brown* (1999) 173 N.S.R. (2d) 41, Cromwell J.A. referring to *Irving v. Irving* observed at paragraph 9:

> It is doubtful that there is a right of appeal from a consent order: see *Irving v. Irving.* While the law on the matter may not be completely clear, there is strong authority for the view that an order made on consent cannot be the subject of an appeal.

Nonetheless, the reasoning of Anderson, County Court Judge, in a case cited as *CIBC v. White's Lake Services Ltd.* (1982) Carswell N.S. 91 reviewed the same arguments and many of the same authorities as those relied upon by the Respondent here. The principles reviewed in those cases found their source in *Halsbury's Laws of England* which he quotes:

> Unless all the parties agree, a consent order, when entered, can only be set aside by a fresh action, and an application cannot be made to the court of first instance in the original action to set aside the

> judgment or order, except, apparently, in the case of an interlocutory order. Nor can it be set aside by way of appeal.

And this further quote:

> A Judgment given or an order made by consent may be set aside in a fresh action brought for the purpose, on any ground which would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation, or non-disclosure of a material fact which there was an obligation to disclose, or by duress, or was concluded under a mutual mistake of fact, ignorance of a material fact, or without authority.

Anderson C.C.J. then quotes perhaps the most cogent reason for the rule as it appears in *Halsbury*:

> "The object of the rule is to bring litigation to finality . . ."

[73] To put the proposition into the context of the practical obligation of the court, Anderson then quotes from *Morstad v. Quintal* (1980) 14 Alta. L. R. (2d) 369 at 371:

> The question arises as to whether in the circumstances of the present case it is necessary to commence a fresh action, having regard to the additional delay and expense that would necessarily be involved. A question inevitably comes to mind - what useful purpose would be served by such an exercise? . . .

In my opinion it must surely be within the inherent jurisdiction of this court to grant the relief sought by the Plaintiff on the present motion without the necessity of going through the sterile routine of commencing a separate

action. A proceeding which would not result in the bringing forth of additional facts or otherwise advancing the administration of justice. The authority is discretionary. A consent order will rarely be altered or reversed since it represents a bargain reached after negotiation between the parties and their counsel, and it has been endorsed by the court. A cause of action must be brought to an end and there is a very strong presumption that when a consent order is placed before the court to be approved by a judge the cause of action is over.

I conclude that it was appropriate to bring this application before the court as counsel have done. Commencing a new action would not have produced more evidence, or a different result. No issues of credibility arise and that of undue influence has been fully explored.

Having entertained the application however this is not that rare case in which it is appropriate to set aside a consent order.

[74] **3. Upon a review of the evidence, are there such circumstances established as to warrant the setting aside of the consent judgment?**

It is established by the evidence that a serious injustice may have been perpetrated on Klara Lewaskewicz. Her acceptance was beyond trust. She placed total faith in the affection and business acumen of her son Henry and

they jointly relied on the advice and guidance of Gerald MacDonald. As we now know Klara simply signed the documents that were placed in front of her without considering the legal obligations created. Henry didn't bother to read or understand the ROFR and when he apparently received a caution from Gerald MacDonald about its possible impact on the gravel pit he nonetheless permitted the realtor to approach Klara to get her signature on that proposed Agreement of Purchase and Sale. The inference I draw from that fact is that he relied on the advice of Gerald MacDonald to the effect that the "subdivision" of the property and the sale of the gravel pit would not trigger the ROFR. This at a point in time when the issue was already being disputed between the lawyers. Finally there is Henry's action in obtaining the quit claim deed from his mother. The intent being to "simplify matters" on her death, and because it would avoid taxation issues for her and an adjustment of her pension rights.

[75] Neither Henry Lewaskewicz nor Klara were manipulated or influenced in these actions by Mr. and Mrs. Chender. The ROFR accorded them no right whatsoever to acquire the property before Klara's death or her voluntary abandonment of her home. Having agreed to pay $25,000.00 for the benefits of the ROFR there is no juridical reason to deprive them of that benefit. The

circumstances therefore are not such as to warrant setting aside the consent judgment.

[76] **4. Does counsel have authority to bind a client?**

An issue ancillary to that of the jurisdiction of this court to set aside the consent judgment is the issue of whether or not the client is bound by the agreement of their counsel. I ignore for the moment that Klara was no longer the owner of the property which was the subject of the negotiations. It seems to me the law on that issue is pretty clear. In Nova Scotia the leading cases have been cited by the Respondent: *Pineo v. Pineo* (1981), 45 N.S.R. (2d) 576; *Scherer v. Paletta* (1966), 57 D.L.R. (2d) 532; *Begg v. East Hants (Municipality)* (1986), 75 N.S.R. (2d) 431 (N.S.C.A.) and *Boutilier v. Boutilier Estate* (2005), N.S.S.C. 16. A selection of comments from the various cases reflect the state of the law:

> It is acknowledged that generally speaking a settlement concluded between counsel is binding on the parties.
>
> From a practical point of view, litigants must be bound by the settlements made by their counsel acting within the scope of their apparent authority otherwise the legal profession could not function.
>
> Where a principle gives an agent general authority to conduct any business on his behalf he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business or which falls within the apparent scope of the agent's authority.

This last quote which comes from *Scherer v. Paletta* carries a "double barrelled" impact in the present case. The fact is that Henry and Georgina were fully apprised of the negotiations going on between the counsel they had been instructing (Mr. DeMont) and Mr. Ripley acting for Chenders. No issue can validly be raised with respect to whether or not Henry or Georgina are bound by the agreement reached by their counsel with the third parties. The question then arises whether Klara's position is any different. "Where a principle gives an agent general authority" these words surely represent the situation of Klara and Henry. The evidence is clear that Klara had full confidence and trust in Henry's judgment and in his arrangements for matters affecting her property. It was not just Henry who believed Klara's property belonged to "the family". Klara has expressly stated that the property was intended to be for the benefit of the family and that she would do what was necessary to protect Henry. Henry had authority to act as her agent. He exercised that authority in his arrangements to dispose of the property and in giving instructions to his counsel. It seems that he either did not ask for advice or was given bad advice. In the context of protecting his mother's right to remain on the property during her lifetime he clearly acted unwisely but it is equally clear that he acted with her authority.

[77] The Plaintiff's (Chender) as third persons are entitled to rely on the proposition that Henry and his counsel were acting within the scope of their apparent authority.

[78] **5. Do the established facts support the plea of *non est factum* in relation to the right of first refusal which she signed?**

This issue is discussed under Question 1 above. In disposing of this matter it is not necessary to finally conclude whether the concept of *non est factum* applies. As noted earlier and as is clear from the evidence; whether Klara understood or agreed to the ROFR has become irrelevant by virtue of subsequent events. It was a document which was approved by her counsel for her signature. She signed it on his advice. She was in breach of that agreement when she conveyed the property to Henry and Georgina. "*Contra proferentem*" is not an issue. The ROFR as drafted is no different from that which was agreed upon between Henry and Chender. The essential purport of which was conveyed to Klara by Henry. It was a contract, the final details of which were intended to be negotiated between the lawyers representing the two parties. If the draft as proposed by Elliott Fraser was neither reviewed nor altered by Gerald MacDonald is of no consequence in its enforceability by Mr. and Mrs. Chender against Henry and Georgina.

[79] **6. Is the right of first refusal void for lack of consideration?**

No, I find the consideration given for the Right of First Refusal was $25,000.00.

[80] **7. Should this Honourable Court issue an order to reconvey the property to Klara, while declaring that her obligations under the right of first refusal have not been triggered?**

The argument is made that her property interest should be restored to Klara because the combination of her age and the undue influence exerted upon her by her son provide a basis upon which the court can restore the *status quo*. While it must be said that there are circumstances here which appear to have factors in common with a number of cases cited to the court, nonetheless in the final analysis I have not been persuaded that the consequences of the actions taken should be set aside on the basis of any infirmity suffered by Klara. This application was initiated because she is determined to express her independence. She may not have fully appreciated the consequences which would flow from signing the various documents she signed but it has not been established that she was ignorant or did not understand the immediate purpose of those documents. As counsel quite properly has pointed out, alternative means of achieving whatever she wanted to achieve may have been available to her. If she had had more adequate advice she might have opted to act differently. She is by her own

counsel's word, a determined and self sufficient woman who does not intend to be told what to do by her son or by anyone else. She is capable of instructing counsel now, there is no reason to think she was any less capable of instructing counsel, or taking advice, in 2001. The actions she took in conveying the shore lot, in signing the right of first refusal, and in subsequently conveying the remainder property to Henry and Georgina, were actions taken for reasons known to her at the time. That she did not fully appreciate all the obligations she incurred and the consequences and the limitations that resulted does not permit her to resile from those contracts. She was not incompetent.

[81] There is no basis in law upon which the court can order Henry and Georgina to reconvey the property to Klara or to declare that which has in fact been done, has not been done. The ROFR was triggered, if not by the proposed sale of the gravel pit, then certainly by the conveyance to Henry and Georgina. In effect, this question asks whether the court has authority to re-establish the status quo as it existed before any dispute arose. That result would be idyllic but achievable only by consent and agreement among the parties.

[82] In reaching the conclusions I do, I am not unmindful of the urgent argument made by counsel for Klara that "undue influence" takes on a special character when the party who is the subject of influence is elderly and dependent in some way upon the beneficiary. The "single thread" in such cases said Lord Denning in *Lloyds Bank v. Bundy* [1974] 3 All E.R. 757 at page 715 is "inequality of bargaining power".

[83] There was no such power in the hands of Chender. The only power they had was that they had money which Henry and Klara needed. The bargain made was not improvident. The price obtained, as reflected by the appraisals, was at least as good as the "market". Do equitable considerations demand rectification of some sort? I am not persuaded. As a result of this series of transactions Klara has lost her right to pass her last years in her home, but to restore that right would achieve little. Her remaining objective was to pass on her property to her son, but her son had decided to sell the farm and make his life elsewhere.

[84] The fact is that if undue influence of his mother by Henry would relieve Klara of the results of executing the documents presently in issue, then the same argument could be as effectively made about the 1998 mortgage to the bank. The right Klara had to occupy her property was put in question by

that action. It could reasonably be said that the Chender purchase enabled her to avoid foreclosure and extend her enjoyment of her property for the following 9 years.

[85] That she was not clearly advised and cautioned about the consequences of all these documents, and about the need to protect her own interests as opposed to the interests of Henry simply underlines the importance of the obligation lawyers have in advising their clients when their respective interests may differ, and more especially so where advising elderly parents.

CONCLUSION:

[86] The application is denied. The property will not be reconveyed to Klara. The deed was executed by her for reasons which she believed valid at the time, to achieve a benefit which she then thought worthwhile. The effect of the execution and delivery of that deed was to trigger the right of first refusal.

[87] The consent order will not be set aside. While I have concluded that the court, in rare and proper circumstances, has the jurisdiction to do so, I have concluded that this would not be a proper case in which to exercise that

discretion. I think it appropriate to fix the costs of this rather complex application at $1,000.00.

Haliburton J.