

January 17, 2001

IN THE MATTER OF: THE REAL ESTATE BROKERS ACT

- and -

IN THE MATTER OF: PHYLLIS MARIE CARUK

REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION

Acting Chairman:

Mr. E. O. E. Bergman

Board Members:

Mr. R. G. McEwen
Mr. K. S. Kristjanson

Appearances:

Ms N. Martin) Counsel for the Commission
Mr. R. L. Tyler) Counsel for the Respondent

BACKGROUND

A Notice of Hearing and Statement of Allegations was issued by staff of the Manitoba Securities Commission (the "Commission") dated April 17, 2000.

The hearing was convened in Dauphin on October 6, 2000 where all the evidence was heard and then adjourned to Winnipeg for argument which was heard on November 21, 2000.

This complaint arose out of a sale of a residential property in Dauphin (the "Property") owned by Rose Babij ("Rose"). The listing agent for the Property was Donna Spack ("Spack"). An order was issued by the Commission relating to Spack pursuant to a Settlement Agreement on July 5, 2000. Mrs. Phyllis Caruk ("Caruk") is registered as a real estate agent and is the subject of this hearing.

ALLEGATIONS

The Notice of Hearing and Statement of Allegations allege the following:

1. Caruk is not fit for registration under the Act due to the following allegations:

(a) Caruk did not act in the best interest of her clients and acted in a manner not in accordance with industry standards by contacting the vendor, Rose Marie Babij instead of contacting Ms Babij's real estate agent, Spack, to advise that Wesley Hrytsay and Lillian Hrytsay were interested in the property.

(b) Caruk did not act in the best interests of her clients and acted in a manner not in accordance with industry standards by contacting the vendor and threatening court action without instructions from her employer, Century 21 Art Potoroka Realty Ltd.;

(c) Caruk did not act in the best interest of her clients and acted in a manner not in accordance with industry standards by contacting Larry Harlow, threatening court action and making representations about the property in an attempt to have Larry Harlow abandon his offer to purchase on the property; and

(d) such further and other matters as counsel may advise and the Commission may permit.

EVIDENCE

The panel makes the following findings of fact based on the evidence presented at the hearing:

1. An offer to purchase the Property was made to Rose by W & L Hrytsay (the "Hrytsay Offer") at 8:20 p.m. on 5th day of September, 1999.
2. A counter offer to the Hrytsay Offer was signed made by Rose at 11:45 a.m. on the 6th day of September, 1999.
3. Rose telephoned Mr. Hrytsay at his work at 11:30 a.m. on the 6th day of September, 1999. During this conversation Rose verbally accepted the Hrytsay Offer to purchase the Property for \$17,000.
4. During the September 6th telephone conversation Mr. Hrytsay advised Rose to contact her real estate agent (Spack). Rose agreed and Mr. Hrytsay and Rose arranged for Hrytsay to again telephone Rose at 12:30pm.
5. Mr. Hrytsay then telephoned Caruk to advise her that Rose has accepted the Hrytsay Offer.
6. L. Harlow ("Harlow") offered to purchase the Property for \$17,000 pursuant to an offer to purchase dated September 6th, 1999 (the "Harlow Offer"). The Harlow Offer was accepted at 12:40 p.m. on the 6th of September 1999.
7. Hrytsay telephoned Rose again at 12:30 on September 6th at which time Rose advised that the Property had been sold. Through this conversation it became apparent to Hrytsay that Rose was referring to the Harlow Offer and not the Hrytsay Offer.

8. Following his conversation with Rose, Hrytsay telephoned Caruk and told her he could not understand what was going on. Hrytsay instructed Caruk to find out what had happened.

The validity of the Hrytsay Offer is presently before the courts to determine if this was a valid contract. A decision on the validity of either offer is not necessary for the determination of the matters raised in the Statement of Allegations.

The allegations for the most part focus on Caruk's conduct following the matters set out above.

On legal advice Hrytsay filed a caveat on the property. Mrs. Hrytsay telephoned Rose about the house and told her maybe we will see you in court.

Caruk contacted Spack and was told by Spack to tell the Hrytsays that they did not have a deal. Caruk stated her people wanted some answers. Spack replied to Caruk that you do what you have to do. Caruk then contacted her employing broker, Arthur Potoroka about this problem to seek his advice on what to do. Potoroka on examination stated:

"I didn't specifically recall instructing her to phone Rose. Unusual circumstances she would do what she believed she had to do in order to get information she was seeking."

Potoroka was asked if he would consider threatening court action as an acceptable action for a salesman to take. His reply:

"Certainly not, I may quickly qualify that, that if there is a problem that looks like a legal problem, they are instructed to advise the client to seek legal counsel".

Following her conversation with Potoroka, Caruk proceeded to phone Rose about the Harlow Offer. In evidence Rose said that Caruk stated during this conversation, "You will pay for this. I will take you to court." However, on cross examination by Mr. Tyler, Rose was asked, "Do you recall if it was Phyllis that said, I will see you in court, or could it have been Mrs. Hrytsay that said, I'll see...". Rose answered "It could have been Mrs. Hrytsay."

Commission investigator Baluk testified that during his interview with Rose that Rose stated that Caruk told Rose that she would wind up in court over the transaction. This was reflected in Mr. Baluk's notes.

Caruk denies she threatened court action during this conversation with Rose.

The panel finds that court action was discussed during the telephone conversation between Caruk and Rose. The panel is not prepared to characterize this discussion as a "threat".

Caruk then called Mr. Harlow about the Harlow Offer and left a message on his call display phone on September 6, 2000. Mr. Harlow returned the call on September 7th and had a discussion with Caruk.

Caruk told Harlow that she had already sold the Property (pursuant to the Hrytsay Offer). Caruk claimed to have Spack on tape and that Spack and Harlow would end up in court or whatever.

Caruk, although acknowledging that she had a telephone conversation with Mr. Harlow, denied she stated she had Spack on tape and further denied that she threatened court action during the conversation.

The panel finds that Caruk did threaten court action when speaking to Mr. Harlow during this telephone conversation. The panel also finds that the reason these threats were made was to convince Harlow to abandon any right to the Property he may or may not have had pursuant to the Harlow Offer. In this way the Hrytsay Offer could proceed and Caruk would receive a commission on the sale.

The panel also finds that at the time of this and the previous telephone conversations made by Caruk that legal action had not been authorized by either her broker or by her client the Hrytsays.

PANEL DECISION

After reviewing all of the evidence presented at the hearing of this matter, and having reviewed the allegations contained in the statement of allegations the panel finds Caruk did not act in the best interest of her clients and acted in a manner not in accordance with industry standards by doing each of the following:

- a) contacting the vendor of the Property (Rose) and discussing possible legal action (whether or not the discussion constituted a threat) without instructions from her broker or instructions from her client Hrytsay;
- b) contacting the vendor of the Property directly and discussing possible legal action instead of contacting the real estate agent or broker for that agent; and
- c) contacting Harlow and threatening court action and attempting to have Harlow abandon whatever right to the Property he may have had at law.

The conduct of Caruk in this matter was unprofessional. She should more properly have reviewed the matter with her broker and then sought a legal opinion as to whether legal proceedings were appropriate. She should have instructed her client to seek legal advice. Instead she took the matter into her own hands and threatened legal proceedings with the intention of attempting to intimidate the parties to the transaction and preserve her commission.

Although the conduct of Caruk was inappropriate the panel has also taken into account the somewhat unusual circumstances surrounding this matter and the timing of the two competing offers.

It is the decision of this panel pursuant to section 11 The Real Estate Brokers Act that it is in the public interest to suspend the registration of Caruk for a period of 90 days, commencing ten days from the date of this decision.

However, in the interests of insuring Caruk better understands her role and responsibilities as a real estate agent, the panel is prepared to offer Caruk an alternative to a suspension of her registration. If Caruk is prepared to enter into an agreement with the Registrar to enroll in and successfully complete Unit 2: Representing the Seller; Unit 3: Representing the Buyer; and Unit 5: Drafting Offers of Phase 3 of the Salesman's Course, Real Estate as a Professional Career of The Manitoba Real Estate Association, the panel is prepared to conclude the matter by entering an order of reprimand on her registration instead of a suspension. If Caruk agrees but does not successfully complete these courses by December 31, 2001, the registration of Caruk under the Act will at that time be suspended for a period of 90 days.

It is the hope of the panel that Caruk will take this opportunity to educate herself with respect to the obligations and responsibilities of a registrant under the Act. If Caruk is not prepared to enter into such an agreement with the Registrar (which agreement would be reflected in the order of the Commission) then her registration under the Act will be suspended for a period of 90 days, commencing ten days from the date of this decision.

In either instance the panel orders Caruk to pay costs of \$1,000.

January 17, 2001

"E. O. E. Bergman"
Acting Chairman

"R. G. McEwen"
Member

"K. S. Kristjanson"
Member