

May 11, 2004

IN THE MATTER OF: THE REAL ESTATE BROKERS ACT

- and -

IN THE MATTER OF: HAROLD ALBERT SHRUPKA

**REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION**

Panel:

Chair	Ms. K.E. Hughes
Board Members:	Mr. W.J.A. Bulman
	Mr. D.H. Smith

Appearances:

Ms. S. Gingera) Counsel for the Commission
Mr. Robin Kersey) Counsel for the Respondent

Background

Mr. Shrupka has been registered under the Real Estate Brokers Act as a real estate salesman since February 26, 1990 to the present day, and for the last 13 years he has been employed by Re/Max Real Estate Inc.

A hearing was held by a panel of the Commission on January 27 – 29, 2004 to consider Mr. Shrupka's fitness for registration under the Act. The allegations against Mr. Shrupka are that he acted in a manner not in accordance with industry standards and contrary to the interests of the Purchasers by: representing that the purchasers were protected under the New Home Warranty Program(NHWP) without verifying the accuracy of this statement, permitting a counter-offer with a new party as vendor, informing the purchasers that they had to release the \$25,000.00 holdback and instead could rely on the NHWP to cover work not yet done, using an inappropriate Offer to Purchase form, and by permitting the Vendor/Builder to sign the NHWP Certificate of Possession in blank. It is also alleged that Mr. Shrupka committed fraud by intentionally misrepresenting to the Purchasers that the NHWP would protect the Purchasers for work that was not completed when the NHWP did not provide such coverage.

Facts

These allegations arise from a single transaction. In May, 1998 Elsie and Reg Ripley attended an open house to view houses being constructed in a new development. They met Bill Loewen, a salesman with Re/Max Real Estate Inc., and entered into a contract to have a house built by Mike

Juracevic, operating under the name Kimberley Homes or Kimberley Development. The contract was prepared on the standard Offer to Purchase form for an existing dwelling, and made to 3396208 Man. Ltd. It was not accepted, but a counter-offer was made by 3586252 Man. Ltd. This counter-offer was not accepted by the Ripleys, who made another offer which was again countered, and accepted – all on the original offer to purchase form. When the Ripleys took it to a lawyer they knew he refused to proceed because he said it was an inappropriate form for the purchase they were making. Mr. Loewen then suggested they see his lawyer, Mr. A. Wortzman, who did agree to act for them. Both the Ripleys and Mr. Wortzman testified they were told this was the only form the builder would agree to use. The Ripleys both gave evidence that the NHWP coverage was an attractive feature of the contract to them. Mr. Wortzman wrote to the solicitors for the Vendor/Builder on June 2, 1998 outlining some points he wanted to clarify because the usual contractor's purchase agreement was not used, and received a response from Al Shrupka, as the managing partner of Re/Max, confirming the points Mr. Wortzman raised, and saying there would be a pre-inspection a couple of days before possession at which time they would receive the NHWP inspection report. This letter also referred to the vendor as a third numbered company - 3779123 Man. Ltd.

On September 14, 1998, possession day, Mr. Wortzman wrote to the lawyer for the Vendor, enclosing a trust cheque for the remainder of the purchase price upon certain conditions, including a requirement that \$25,000.00 be held back until the residence was completed, that there would be a hold-back under The Builders Lien Act, and that the Ripleys would have all the required documentation for the NHWP. The Ripleys arrived at the new house, with the moving van, to discover that a substantial amount of work remained to be done, including exterior stucco, and driveway and sidewalk paving. Mr. Shrupka arrived while they were in the process of moving, to tell them that Juracevic would not agree to a holdback of any kind and they couldn't move in unless they agreed to remove that condition. When they expressed concern about the incomplete work he assured them that the NHWP would cover it if the builder didn't complete it. They phoned their lawyer for advice, and after Mr. Shrupka also spoke to him and gave him the same assurances, the lawyer advised the Ripleys to release the money that was being held back. The Ripleys were under pressure – they had sold their old home, their furniture was in the van, and they had nowhere else to go. They did an inspection of the house with Mr. Shrupka, who had with him a blank Certificate of Possession signed by Juracevic, and listed the incomplete items.

Within the next few months the Ripleys found that their house was not registered under the NHWP. Mr. Juracevic had enrolled some of his properties, but only under the name 3396208 Man. Ltd. Even if the house had been enrolled, the defects would not have been covered because incomplete work is not insured by the NHWP.

The Ripleys tried various avenues to obtain some relief, but were largely unsuccessful, and either did some of the work themselves or paid to have it completed.

Discussion

It has been suggested that many of the players were at fault in this episode, and that Mr. Shrupka should not be singled out.

It is possible that if there had been more care taken by some of the other participants in this transaction the Ripleys may have been alerted to the possible risks and the resulting consequences, but Mr. Shrupka cannot avoid responsibility for his actions, or inactions, as the case may be. He was actively involved in selling new houses for Mr. Juracevic, who seemed to be controlling the process. Mr. Shrupka states that the builder refused to use a construction contract instead of the residential Offer to Purchase form, although a construction contract would have provided more safeguards for purchasers. Also, Mr. Juracevic signed (at some unknown time) a Certificate of Possession, left it with his wife to give to Mr. Shrupka to complete, and then went to the lake. Mr. Shrupka was Mr. Juracevic's agent for the purpose of selling houses he built, but the NHWP did not expect anyone other than the builder to complete the Certificate of Possession, committing the program to certain obligations. Mr. Shrupka is an experienced businessman, with a wide range of experience, yet he seems not to have attached any significance to the various numbered companies he was dealing with. He was selling homes and using the NHWP as a feature, but did not know what the program covered, and seems to have taken few steps to acquire an understanding of the program.

Findings

We find that Mr. Shrupka failed to meet industry standards and acted contrary to the interests of the Purchasers in the following actions:

He represented to the Ripleys and their lawyer that they were protected by the NHWP when they were not, for two reasons – the program did not cover incomplete work and the builder sold the house under a numbered company different from the one registered with the program. He didn't seem to show any concern that the builder was using several different names, and he didn't appear to have requested any more information about the NHWP other than the glossy brochures that were handed out to prospective purchasers.

The Offer to Purchase was not appropriate for the purchase of a home under construction. Although it was Mr. Loewen who prepared the offer, it was Mr. Shrupka who testified this was the only form the builder would agree to use, and Mr. Shrupka was the managing partner of the office. The MREA education material states that a counter-offer should not be countered, let alone a counter to that counter-offer, on the same form, but that a new form should be prepared.

On the day of possession, he told the Ripleys and their lawyer, Mr. Wortzman, that they could not move in unless they released the \$25,000 holdback to cover unfinished work and that they could rely on the NHWP. He was wrong. This placed the Ripleys in the vulnerable position of having no recourse when the builder did not complete the unfinished work. Although the Ripleys were not his clients, the MREA Code of Ethics requires the realtor to deal fairly with all parties to a transaction.

Mr. Shrupka took a blank, signed NHWP Certificate of Possession, and completed it later with the Ripleys. Counsel for Mr. Shrupka submits that, as agent for the builder he had the authority to complete the contract binding his principal, even if the third party, the NHWP, did not know that the principal had not completed the form. The Certificate, however, was placing a liability on the NHWP as to coverage, and Mr. Shrupka had no authority to do so.

It is also alleged that Mr. Shrupka committed a fraudulent act by knowingly misrepresenting to the Ripleys that the NHWP would cover incomplete work, when it would not. The panel heard conflicting evidence on the question of whether or not Mr. Shrupka knew that the NHWP did not cover incomplete work. Mr. Koersvelt, of NHWP, said that he visited Mr. Shrupka's office in the summer of 1998 and told him he had to stop misinforming people. Mr. Shrupka said there was a very brief visit to introduce him to a visiting NHWP official, and there was no discussion of coverage. Mr. Shrupka did not adhere to the Standards of Business Practice requirement of a reasonably prudent realtor to discover facts for every property for which he accepts an agency "to avoid error, misrepresentation or concealment of pertinent facts". However, we did not find that the evidence was sufficient to persuade us that he knowingly and fraudulently misrepresented the facts.

Disposition

We have considered the fact that Mr. Shrupka has not been the subject of prior complaints to the Commission, and do not feel a suspension is warranted at this time, provided Mr. Shrupka is prepared to take and complete within six months, Unit 3 of Phase 2 of the Manitoba Real Estate Association Salesman Course Construction and New Home Sales, and provide the Registrar with proof of his successful completion of this course. Failure to do so will result in a suspension of his license.

Costs

Costs may be spoken to.

May 11, 2004

"K.E. Hughes"

K.E. Hughes
Chair

"W.J.A. Bulman"

W.J.A. Bulman
Member

"D.H. Smith"

D.H. Smith
Member