

**THE REAL ESTATE BROKERS ACT** ) **Order No. 2974**  
 )  
**Section 11(1)** ) **July 5, 2000**

**DONNA FERN ANN SPACK**

**WHEREAS:**

(A) On April 17, 2000, The Manitoba Securities Commission (the "Commission") issued a Notice of Hearing (the "Notice") giving notice of its intention to hold a hearing (the "Hearing") to consider, among other things, whether it was in the public interest to suspend or cancel the registration of Donna Fern Ann Spack ("Spack") as a salesman under *The Real Estate Brokers Act* (the "Act");

(B) Spack and Staff of the Commission ("Staff") entered into a Settlement Agreement (the "Settlement Agreement"), a copy of which is attached as Schedule "A", dated July 5, 2000, in which Staff and Spack agreed to a proposed settlement of the proceedings initiated by the Notice, subject to the approval of the Commission;

(C) Spack has consented to the issuance of this Order and has waived her right to a full hearing;

(D) The Commission has reviewed the Settlement Agreement and is of the opinion that it is in the public interest to make this Order.

**IT IS ORDERED:**

- 1. THAT** the Settlement Agreement, Schedule "A", be and the same is hereby approved.
- 2. THAT** pursuant to subsection 11(1) of the Act, Spack make a one time payment to the Treasury of the Province of Manitoba of \$5,000.00, to be paid on or before August 31, 2000.
- 3. THAT** pursuant to subsection 11(1) of the Act, Spack enroll in and successfully complete Unit 5 DRAFTING OFFERS (Residential Resale and Completed Condominium Units) of Phase 3: Real Estate as a Professional Career of The Manitoba Real Estate Association course within six months of the date of this Consent Order.

**BY ORDER OF THE COMMISSION**

**Director, Legal and Enforcement**

**Settlement Agreement**

Donna Fern Ann Spack

And

The Staff of The Manitoba Securities  
Commission

The Manitoba Securities Commission  
1130-405 Broadway Avenue  
Winnipeg, Manitoba  
R3C 3L6

## **Introduction**

A1. On April 17, 2000, The Manitoba Securities Commission ("the Commission") issued a notice of hearing (the "Notice of Hearing") giving notice of its intention to hold a hearing under *The Real Estate Brokers Act* (the "Act") to consider:

1. whether it is in the public interest to order, pursuant to subsection 11(1) of the Act, that the registration of Donna Fern Ann Spack ("Spack") as a salesman under the Act be suspended or cancelled;
2. whether it is in the public interest that Spack be ordered to pay the costs of the investigation and hearing; and
3. such further and other matters as counsel may advise and the Commission may permit.

A2. Discussions have been held between the respondent and staff of the Commission ("Staff") in an effort to settle the matters set out in the Notice of Hearing and Statement of Allegations (the "Proceedings"). A settlement (the "Settlement") has been reached based on the terms and conditions set forth in the herein agreement (the "Settlement Agreement").

A3. Pursuant to the Settlement, Staff agrees to recommend to the Commission that the Proceedings initiated against the respondent be resolved and disposed of in accordance with the terms and conditions of this Settlement Agreement as set forth below. The respondent consents to the Settlement and to the making of the consent order referred to in paragraph D. below, on the terms and conditions set forth in this Settlement Agreement.

## **B. Details**

B1. Donna Fern Ann Spack ("Spack") has been registered under the Act since April 10, 1978.

B2. Spack has been registered as an authorized official, under the Act on October 5, 1993.

B3. On August 30, 1999 a property legally described as Lot 6, Block 90, Plan 379 and commonly described as 222-4<sup>th</sup> Avenue N. E. in Dauphin, Manitoba (the "Property") was listed for sale on the Dauphin Multiple Listing Service (the "MLS"). The Property was owned by Rose Marie Babij.

B4. Spack was appointed as listing agent for the vendor, Rose Marie Babij, in the sale of the Property.

B5. On September 3, 1999, Spack was advised by Rose Marie Babij that a potential purchaser, Wes Hrytsay, had viewed the Property that morning, as the result of an invitation to do so by Rose Marie Babij, and wished to view the Property again, with his wife, that evening at 7:00 p.m. Rose Marie Babij requested that Spack attend at the Property for such viewing and Spack confirmed she would be there.

B6. During the afternoon of September 3, 1999, Rose Marie Babij called Spack to advise that Wes Hrytsay had cancelled the evening appointment. As a result, Spack called Wes Hrytsay's residence and spoke to his wife, Lillian Hrytsay. At that time, Spack advised Lillian Hrytsay that the Property was listed with her firm, Melnyk Spack Realty Ltd. ("Melnyk Spack"), in Dauphin, Manitoba, and that, when Lillian Hrytsay and her husband were able to view the Property, they could arrange an appointment. Lillian Hrytsay advised Spack that she and her husband were working with another agent. Spack replied that, since the Property was on MLS, that agent could show the Property, upon suitable arrangements being made through their agent.

B7. On September 4, 1999 Spack notified Larry Harlow, another prospective purchaser, of the listing and faxed the Property description sheet to him.

B8. On September 5, 1999 at approximately 5:30 p.m., Rose Marie Babij called Spack to advise that Wes Hrytsay and Lillian Hrytsay were at the Property, without their agent, and Rose Marie Babij requested that Spack attend at the Property.

B9. Spack attended at the Property and was advised by Wes Hrytsay that he and his wife were working with Phyllis Caruk ("Caruk"), a real estate sales person registered under the Act and employed with Century 21 Art Potoroka Realty Ltd. ("Century 21") in Dauphin, Manitoba. Wes Hrytsay indicated that, if he and his wife were interested in the Property, they would write up an Offer with Caruk.

B10. At approximately 10:30 p.m. on September 5, 1999, Spack retrieved a message on her answering machine from Caruk, advising that Caruk had written an Offer on the Property and had dropped the Offer through the mail slot at Melnyk Spack.

B11. On September 6, 1999, at approximately 9:00 a.m., Spack called Rose Marie Babij to advise her that there was an Offer on the Property and made arrangements to meet Rose Marie Babij at her residence.

B12. At approximately 10:30 a.m. on September 6, 1999, Spack presented the Offer to Rose Marie Babij. Rose Marie Babij told Spack that she had three primary concerns with respect to the Offer, being the price offered (\$17,000.00), the financing condition (which provided until 5:00 p.m. on September 13, 1999 to arrange financing) and the possession date (September 17, 1999).

B13. On the instructions of Rose Marie Babij, Spack prepared a Counter-offer, which was to expire at 4:00 p.m. on September 7, 1999. The Counter-offer included an increase in price to 19,000.00 and a delay in the possession date to September 28, 1999.

B14. Spack left a carbon copy of the Counter-offer with Rose Marie Babij and delivered the original to Century 21, by inserting the Counter-offer through the mail slot of the Century 21 office.

B15. Spack attempted to reach Caruk by calling the Century 21 office but, receiving no answer, left a message on Caruk's residence answering machine to advise that a Counter-offer had been delivered to the Century 21 office.

B16. Shortly after returning to her office, Spack was called by Rose Marie Babij, who advised that she had spoken again with Wes Hrytsay, who had informed her that he would not pay \$19,000.00 for the Property. Rose Marie Babij informed Spack that she would accept \$17,000.00.

B17. Spack called the Century 21 office again and, receiving no answer, left a further message on Caruk's answering machine, to advise that Rose Marie Babij was prepared to accept \$17,000.00: "... I had dropped off the Counter-offer at your office but just received a call from Rose Marie and there has been a change in the Counter-offer and she's instructing me that she will now agree to the \$17,000.00, so please give me a call before you present the Counter-offer and call me at ...".

B18. Prior to receiving any response from Caruk, Spack met with Larry Harlow, who wished to view the Property. Arrangements were made with Rose Marie Babij and the Property was shown to Larry Harlow and his wife. During the showing, Spack was advised that they wished to make an Offer. Spack advised them that there was already an Offer on the Property; however, Larry Harlow and his wife wrote an Offer at approximately 12:30 p.m. on September 6, 1999. The terms of that Offer included a purchase price of \$17,000.00, without any financing condition and with a possession date of October 1, 1999.

B19. Rose Marie Babij instructed Spack that she wished to withdraw her Counter-offer to the Offer by Wes and Lillian Hrytsay and accept the Offer by Larry Harlow and his wife. As a result, the Offer by Larry Harlow and his wife was accepted, in writing, by Rose Marie Babij.

B20. As Spack returned to her office, Caruk called her on Spack's cell phone. Spack advised that Rose Marie Babij had withdrawn her Counter-offer and had accepted another Offer.

B21. Melnyk Spack returned the deposit cheque from Wes Hrytsay and Lillian Hrytsay to Century 21.

B22. On October 20, 1999 and December 15, 1999 Wes Hrytsay and Larry Harlow filed statements of claim in The Court of Queen's Bench, Dauphin Centre. Counsel for Rose Marie Babij is holding the purchase proceeds in trust until this matter is resolved in court.

### **C. Acknowledgements**

C1. Spack acknowledges and agrees that she:

(a) did not act in the best interests of her client and acted in a manner not in accordance with industry standards by not contacting Caruk to withdraw the revised Counter-offer before permitting her client to accept an Offer from Larry Harlow on September 6, 1999, when the Counter-offer by Rose Marie Babij to the Offer by Wes Hrytsay and Lillian Hrytsay was open for acceptance until 4:00 p.m. on September 7, 1999.

### **D. Terms of Settlement**

D1. In order to effect a resolution of the issues raised by the Notice of Hearing, Staff and the respondent have entered into this Settlement Agreement. Upon this basis, Staff seek an order (the "Consent Order") from the Commission pursuant to subsection 8(1) of the Act that:

(a) the Settlement Agreement be approved.

(b) Spack make a one time payment to the Treasury of the Province of Manitoba of \$5,000.00, to be paid on or before August 31, 2000.

(c) Spack enroll in and successfully complete Unit 5 DRAFTING OFFERS (Residential Resale and Completed Condominium Units) of Phase 3: Real Estate as a Professional Career of The Manitoba Real Estate Association course within six months of the date of this Consent Order.

### **E. Procedure for Approval of Settlement**

E1. The approval of this Settlement Agreement and the making of the Consent Order set out in this Settlement Agreement shall be sought at a public hearing pursuant to the Notice of Hearing.

E2. Staff and the respondent agree that if this Settlement Agreement is approved by the Commission, it will constitute the entirety of the evidence to be submitted to the Commission in connection with the Proceedings and the respondent hereby waives his right to a full hearing and appeal of this matter.

E3. If, for any reason whatsoever, this Settlement Agreement is not approved by the Commission or the Consent Order referred to in paragraph D. above is not made by the Commission, Staff will be entitled to proceed with the hearing commenced by the Notice of Hearing unaffected by this Settlement Agreement or the settlement discussions. If this Settlement Agreement is not approved or the Consent Order set out in paragraph D. above is not made by the Commission,

the terms of this Settlement Agreement will not be raised in the Proceedings or in any other proceeding.

E4. Staff and the respondent agree that if this Settlement Agreement is approved by the Commission and the Consent Order made upon the terms set out in this Settlement Agreement, this Settlement Agreement will be a public document.

E5. The respondent agrees that he will not raise in any proceeding this Settlement Agreement or the negotiation or process of approval of this Settlement Agreement as a basis for an attack on the Commission's jurisdiction, alleged bias, alleged unfairness or any other challenge that may be available.

DATED at Winnipeg, Manitoba, this 29th day of June, 2000.

Witness

Donna Fern Ann Spack

DATED at Winnipeg, Manitoba, this 4th day of July, 2000.

Staff of the Manitoba Securities Commission

per:

Director, Legal and Enforcement