THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

PAUL SYDNEY VYAMUCHARO-SHAWA

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

REASONS FOR DECISION

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REASONS FOR DECISION

1. This matter was heard in the offices of The Law Society of Manitoba (the "Society"), 200 – 260 St. Mary Avenue, Winnipeg, Manitoba on Thursday, January 31, 2019 commencing at 9:30 a.m. Part way through the submission of the Society's counsel, the matter was adjourned and was completed on Monday, February 11, 2019.

2. The panel consisted of Douglas Bedford, Chairperson and Ms. Patricia Fraser, both members of the Society, and Ms. Carmen Nedohin, one of the public representatives appointed by the Society.

3. The Society was represented by Mr. Rocky Kravetsky.

4. The member, Mr. Paul Sydney Vyamucharo-Shawa, was present and at the commencement of the hearing was represented by Mr. Phillip Cramer. The panel was presented with an Agreed Statement of Facts and a joint recommendation that had been negotiated by counsel. The panel advised the parties that it found on the basis of the agreed facts that the member had committed acts of professional misconduct and was prepared to hear the submissions of counsel on the joint recommendation as to penalty and costs. During the course of Mr. Kravetsky's submission on behalf of the Society, a difference arose between the member and his counsel which resulted in an adjournment so that they could discuss the matter in private. The parties reassembled and Mr. Cramer advised that he and his client had been unable to resolve their difference and he had to withdraw and asked leave to do so. Leave was granted. The member was given one week in which to retain new counsel and to determine if he wished to proceed to have the

matter dealt with by way of agreed facts and a joint recommendation. He was advised that if he decided he wished to change his admissions as to the facts, he would have to file a motion to that effect together with an affidavit setting out the facts he believed relevant to a determination as to whether the panel should permit him to withdraw admissions that had now been accepted and found to have constituted professional misconduct.

5. When the panel reconvened at 9:30 am on Monday, February 11, the member advised that he had been unable to retain new counsel but wished to proceed to have the matter disposed of by way of agreed facts and the joint recommendation that was before the panel.

6. The panel heard the balance of Mr. Kravetsky's submission and the submission of the member and then withdrew to deliberate. Following that deliberation, the panel returned and advised the parties that it had resolved to accept the joint recommendation as to penalty and costs and in doing so acknowledged the importance courts and discipline panels of the Society placed on respecting joint recommendations save and except for those occasions where the panel is persuaded that acceptance of the joint recommendation would bring the administration of justice into disrepute or be otherwise contrary to the public interest. While the joint recommendation was accepted, the panel advised that it had had grave concerns that the penalty recommended, a six month suspension, was contrary to the public interest given the member's record. In effect, the facts and record in this case test the limits of what penalty, jointly recommended, may or may not be in the public interest. The parties were advised that written reasons would follow. These are the reasons.

Relevant Facts

7. Three transactions were at issue in this matter. Two involved the member's representation of clients on the purchase and on the sale of condominiums. The third involved the member's representation of clients purchasing the shares of a hotel business.

8. With respect to the first condominium transaction, a purchase which closed in April 2016, the member admitted that he failed to honour a trust condition to provide one of his clients, a credit union that provided mortgage funds, with the seven documents it stipulated it required in order to record the transaction as properly closed, for 11 months and, in the case of one document, almost 12 months. Within a month of the closing, the member had the relevant documents in his possession. The credit union made repeated requests that he comply with the trust conditions. Notwithstanding assurances that he would do so, he did not for 11 months do so.

9. With respect to the purchase of shares which transaction also closed in April 2016, the member admitted that he failed to honour a trust condition that required him to register two mortgages in favour of the vendors of the shares and that he failed to discharge his responsibilities to another member of the profession honourably and with integrity. The mortgages were ultimately registered over a year after the transaction

closed and as a consequence of the delay, an intervening registration by a creditor of the business was registered on the title of the land owned by the business. Counsel for the vendors of the shares was required to alter his trust condition in order for the registration of the mortgages in favour of his clients to proceed. Further, on April 7, 2017 the member sent an email response to counsel for the vendors of the shares advising that the mortgages in question had been "registered". However, some two weeks prior to sending that communication he was in receipt of a communication from the Property Registry advising him that the registration of the mortgages could not be completed due to the intervening registration and adjustments would have to be made to the documents he had submitted if he wished to proceed. The email in question was misleading . Counsel for the vendors was apprised of the correct facts three weeks after the misleading email. The member has agreed to be financially responsible for any loss to the vendors of the shares in the event that the intervening registration reduces the amount secured to them by way of the two mortgages and they thereby suffer a loss.

10. In October 2016, the member acted for the vendor of a condominium. The member received money in trust, one of the conditions being that he pay out a condominium lien (which amounted to $361.07) and provide a discharge of same. The lien was not paid until the end of June 2017 after repeated enquiries from counsel for the purchaser of the condominium, some of which enquiries were not answered. The member was not familiar with the preparation of the discharge form for the lien and following his payment of it there elapsed almost five more months from the end of June 2017 through to mid-November 2017 in which the member missed appointments he had scheduled to obtain the relevant signature on the discharge, incorrectly completed the discharge form and left the matter unresolved until a formal complaint was lodged with the Society. The member admitted that he failed to honour the foregoing trust condition with respect to the condominium lien and a corresponding undertaking he gave with respect to it and that he failed to answer with reasonable promptness enquiries from counsel for the purchaser of the condominium.

11. There was no suggestion that the member benefited in any way from the admitted misconduct. Indeed, as was observed by the Society's counsel, the member's conduct was "inexplicable", particularly given that he was in the first two transactions in possession of the relevant documentation in timely fashion and, with respect to the condominium sale, could easily have discharged his obligations promptly.

12. The foregoing admitted facts formed the basis of citations dated February 23, 2018 and April 3, 2018 that were served upon the member.

The Member's Record

13. Society counsel observed that the member's record was "about as bad as a record can get and [the member] still be practicing". We agree. Indeed, if the only factors to consider with respect to penalty were the admitted facts from the transactions before us, the recommended penalty would arguably have been harsh. However, when one turns to the member's record, which we are obliged to consider, one has grave concerns that

permitting the member to return to practice, after six months, may well not be in the interest of the public.

14. The member was called to the bar in Manitoba in 1989. While his first degree in law was from a foreign university, he is not a member of any other law society in Canada.

15. After 10 years of practice, the member accepted a formal caution in 1999 for breach of a trust condition.

16. A year later, in 2000, the member entered guilty pleas to nine charges of professional misconduct. He was suspended from practice for one year and ordered to pay costs of $10,000.00. Upon return to practice, he was required to practice under supervision for two years and was prohibited from signing on a trust account. The nine charges included three charges of misappropriating a total of $19,656.69 from a trust account. The Society's counsel advised with respect to these that there were "exceptional circumstances" which presumably weighed in favour of a one year suspension rather than an even more serious penalty. The nine charges also included one charge of attempting to mislead the Society.

17. Eight years later, in 2008, the member entered pleas of guilty to four charges, two related to assisting clients to defraud others and two to having funds in his trust account that were not trust funds. He was suspended for six months and ordered to pay costs of $5,000.00.

18. During the course of the foregoing six month suspension, in 2008, the member was investigated, but not, it seems charged, regarding alleged assistance to a client in a fraudulent conveyance and a separate incident of using his trust account to hide client funds. This investigation was resolved through an undertaking by the member not to practice law for at least five years following the expiry of the forgoing six month suspension.

19. In the event, the member did not return to the practice of law until 2015, seven years following the matters described above that occurred in 2008. Upon his return to practice in 2015, he was required to practice under supervision. There was some difficulty with respect to the choice or understanding of the initial supervisory lawyer. Since 2015, the member has practiced alone, subject to supervision.

20. When the charges that were before us came to the attention of the Society, the member signed an undertaking on December 21, 2017 to the Society in which he committed to cooperate with the Society and, in summary, to maintain proper notes and records of all his advice and dealings with clients and others on files and to implement a formal diarization system in his office. The undertaking remains in effect.

Submissions of the Parties

21. The parties jointly submit that the Mr. Vyamucharo-Shawa be suspended for a period of six months commencing March 18, 2019 and ending on September 17, 2019, both dates inclusive. They jointly submit that he pay the sum of $10,000.00 as a contribution to the costs of the Society's investigation and prosecution at the rate of no less than $200.00 per month commencing on the 15th day of the month following his return to practice. They agree that the payment of the costs can be accelerated in the event of a payment being missed and a failure, upon notice, to remedy the default. It is understood by all that the current undertaking given by Mr. Vyamucharo-Shawa is to continue.

21. The Society submits that a joint recommendation does not have to be "perfect"; it should fit within a reasonable range of penalties given the facts of the misconduct before a panel and the member's record.

22. "Reasonable ranges" are normally set by a review of precedents. Mr. Kravetsky provided us with copies, among others, of the decisions of the Discipline Committee in *The Law Society of Manitoba v. Walsh*, 2006 MBLS 5 and *The Law Society of Manitoba v. Troniak*, 2009 MBLS 9. In both of the foregoing decisions, panels had to consider penalties to be imposed upon lawyers who had extensive and serious records, so these precedents are particularly apt. In both decisions panels expressed their concern that disbarment might be a more appropriate remedy given the history of the lawyers in question and a concern that they might be incorrigible. In *Walsh*, the member failed to carry out instructions from his client regarding a Divorce Order and failed to respond to enquiries from his client. The lawyer had been fined more than once in the past in significant amounts but not suspended. He had appeared nine previous times before the Discipline Committee. In the event, he was suspended for six months (his first suspension), fined $25,000.00 and ordered to pay costs of $3,910.52.

23. In *Troniak*, the member admitted to breaches of his duty to be honest and candid when advising clients. In particular, he admitted that he failed to advise his clients of a relevant arbitration award that affected their interests and he entered into contingency agreements with clients notwithstanding that he had agreed with opposing parties that he would not do that. The lawyer had a previous history before the Discipline Committee of similar charges. On a joint recommendation, reluctantly accepted by the panel, the member was suspended for 12 months and ordered to pay costs of $18,500.00.

24. Additional precedents were cited by the Society in support of a suspension in the matter before us. Society counsel noted that Mr. Vyamachuro-Shawa did not personally benefit from the misconduct in question. Although there were three admissions to breach of trust conditions, the trust conditions were, in due course, satisfied, albeit after one of them had to be altered due to Mr. Vayamucharo-Shawa's failure to carry it out in timely fashion. The concerning problem with the three transactions before us was an abject failure to fulfill the trust conditions in timely fashion coupled with a failure, in all three

transactions, to respond to many of the anxious enquiries made regarding fulfillment of the trust conditions by opposing counsel and, in the case of the condominium purchase, the credit union client. Counsel observed that the member was entitled to some leniency in light of his acknowledgement that he was culpable as set out in the agreed facts and that his admissions meant that some 12 witnesses were not inconvenienced by having to testify at what otherwise would have been a contested hearing. In the case of the purchase of shares, Society counsel suggested that the member ought to receive some recognition for stepping forward and accepting financial responsibility in the event that the vendors someday realize a loss as a consequence of the intervening registration. Society counsel noted that members can learn from their mistakes and can change their ways and while Mr. Vyamachuro-Shawa's record tends to contradict that, one should at least recognize that the current misconduct is not of the same magnitude as that for which he was penalized 19 years ago. The misconduct before us reflects the disorganized practice of a lawyer recently returned to practice after an absence of seven years rather than the very serious lack of integrity evident in the earlier convictions.

25. The Society believes that much of the member's current problems lie in the area of competence and the continuation of the present undertaking is the best way to ensure that this member, when he returns to practice, does so safely.

26. Mr. Vyamachuro-Shawa acknowledged repeatedly that he accepted the agreed statement of facts. However, it was evident in his submission that the description of some of them still rankles. We pointed out to him, and Society's counsel reminded us, that the joint recommendation follows from the agreed facts, not a variation of them advanced during submissions with respect to penalty. At best, we can note that Mr. Vyamachuro-Shawa is of the view that the transaction involving the sale of shares was more complex than one might conclude from reading the agreed statement of facts. In any event, he expressed his remorse for what had occurred and acknowledged that the failures in question were "of his own making". He acknowledged that his practice was disorganized and that this contributed to him losing track of his obligation to fulfill trust conditions that required he forward documents to other parties, register mortgages in timely fashion and obtain a discharge of a lien. He quibbled modestly as to whether he had misled other parties in eventually responding to enquiries. There is no question based upon the agreed facts that the email sent to counsel for the vendors of the shares of the hotel business was inaccurate and, in the circumstances, misleading. As noted, counsel for the vendors was three weeks later made aware of the correct facts.

27. Mr. Vyamachuro-Shawa was at pains to assure us that he cares about his work and his clients, strives at all times to do his best and well understands the importance of trust conditions and of fulfilling them to the letter. He said it was not his preference to be a sole practitioner but he had been unable to find employment as a lawyer in a different setting. He attributed some of his problems to the stress of complying with the Society's requirements upon his return to practice of providing monthly reports, not signing trust cheques and so forth. He said that the present transgressions were different in substance from those to which he pled guilty ten and twenty years ago. He has three children and is

trying to assist them in the costs of their education. Not being able to earn a living as a lawyer for six months is going to make it very difficult for him to continue that support.

Analysis

28. We were concerned, frankly discouraged, reading this member's record and admissions to more breaches of trust conditions and more mismanagement of a law practice. Notwithstanding the member's fervent assurances that he had no intention to cause harm to anyone, there was harm and most certainly unacceptable inconvenience to a client and to other parties on numerous occasions in all three transactions. The public most certainly deserves competent work from lawyers, not what took place here, and while we believe that most members of the public would accept, were these the member's only transgressions, that he be given a 'second chance', endorsing this joint recommendation is an invitation to give this member a fifth chance to get things right. How can that be in the public interest?

29. In 1999 the Law Society of British Columbia found that in meting out penalties to lawyers in professional disciplinary matters, panels such as ours are well-advised to consider and weigh a number of factors (see *Law Society of British Columbia v. Ogilvy [1999] LSBC 17, Discipline Case Digest 99/25]*. We have considered these as a sound basis upon which to analyze what penalties are appropriate in the circumstances before us. Here, we do think it important that the lawyer gained no benefit or advantage from the misconduct, one of the factors recommended for assessment in *Ogilvy*. The "nature and gravity" of the offences are important to consider. Here, the offences are not of the same degree of seriousness as "misappropriation", "attempting to mislead the Society" and "assisting a client to commit a fraud" and we must keep in mind that this member has been penalized years ago for those offences and we are not, on this occasion, to 'tack on' a more serious penalty on the grounds that in the past his conduct was more "serious". Our concern is whether he has learned at all from previous penalties and whether there is a probability that he will repeat the same conduct in the future. *Ogilvy* suggests that these concerns can be addressed in part through a penalty that is sufficiently serious as to deter both the member, and, generally, all members of the Society from conducting themselves as this member did in the transactions we have reviewed. We are satisfied that a six month suspension does have very serious consequences for this member financially and while we do not think the vast majority of members of the Society would ever be tempted to engage in similar conduct, we think this penalty for this member does provide a clear message that repeated transgressions will be met with increasingly serious penalties including suspensions from practice and significant orders as to costs. Age and experience are another factor often cited in these cases. Mr. Vyamucharo-Shawa had been a lawyer in Manitoba for about 27 years when he committed the transgressions before us, though for close to nine of those years he was not practicing. This is not a case where the inexperience of the lawyer requires the application of a measure of leniency. However, we do accept that Mr. Vyamucharo-Shawa does deserve some credit for acknowledging his failures and for committing to compensate, if it comes to pass, the vendors of the shares as described above. These acts do demonstrate the maturity one

expects to see in lawyers who have practiced for 20 years or more and constitute a mitigating circumstance as *Ogilvy* suggests must be taken into account and weighed.

30. The Society submitted that the present undertaking given by Mr. Vyamucharo-Shawa is a reliable method to oversee his practice following the six month suspension and the public should have some confidence that there will be less likelihood of more competence issues arising in this member's practice. We cannot help but observe that the present misconduct took place while the member was subject to supervision given his return to practice after a seven year's absence. However, in our experience, undertakings to the Society and supervision often do prove to be effective tools. Absent the undertaking and the continued oversight by the Society implicit in the undertaking, we would not have been persuaded to accept this joint recommendation.

31. And, given the nature of the misconduct before us, breaches of trust conditions, failure to respond to a number of enquiries regarding fulfillment of the conditions and at least one misleading answer, it would arguably be harsh to impose a more severe penalty on Mr. Vyamucharo-Shawa than were imposed upon Mr. Walsh and Mr. Troniak given their equally concerning histories. Applying and balancing the factors identified in *Ogilvy* to the facts and record before us does not yield an obvious conclusion. It does, however, help us to understand that careful thought was given by counsel in arriving at the joint recommendation.

32. We reiterate our words at the hearing. Joint submissions as to penalty and costs in disciplinary matters deserve serious consideration by panels and should not be set aside unless one is persuaded that endorsing them would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. (See *Anthony-Cook v. Her Majesty the Queen,* 2016 SCC 43 and *Neil William Sullivan,* October 18, 2018 MBLS not yet reported). This is not to say that panels are to accept joint submissions without taking the time to consider carefully the public interest and whether the recommended penalty is appropriate. Courts have long rationalized the importance of accepting plea bargains on the grounds that such bargains are very much in the public interest. If such bargains were rarely approved, there would be few of them and we would all face the increased cost and time of proving virtually each and every case. Moreover, accepting this particular joint recommendation can in a fashion be said to be in the public interest for reasons beyond the application of the general principle set out by the Supreme Court of Canada in *Anthony-Cook v. Her Majesty the Queen.* In addition to expecting lawyers to be competent and to practice at all times with integrity, we think the public also expects lawyers to have a measure of tolerance for mistakes and an ability to apply sanctions in a measured way. If legal careers were brought to an end without applying some degree of tolerance to the choice of penalty and a weighing of the many factors relevant to a consideration of misconduct and previous records, lawyers would practice with more stress than most already do and inevitably with more fear of making mistakes. Excessive stress and fear lead often to poor judgements and decision making. That would not be in the public interest. We accept that in this difficult case, the joint recommendation is not a "perfect" solution and our balancing of relevant factors has not been perfect either;

however, the recommendation is most certainly fair to Mr. Vyamucharo-Shawa and was not made without consideration by the Society and now by us of the public interest.

Conclusion

33. For the foregoing reasons, we resolved on February 11, 2019 that Mr. Vyamucharo-Shawa be suspended for a period of six months commencing on March 18, 2019 and ending on September 17, 2019, both dates inclusive and that he pay a contribution of $10,000.00 to the costs of the Society's investigation and prosecution. The costs are to be paid at the rate of $200.00 per month, payable on the 15th day of each month commencing on the 15th day of the first full month of his return to practice, which installment amount can be changed by the Chief Executive Officer of the Society on 60 days notice which can be sent by email to the address then currently registered with the Society. In the event that an installment payment is not made on time and the default not remedied within 15 days of notice of it being sent, the entire balance then outstanding will fall due.

These written reasons signed the 1st day of March, 2019.

Douglas A. Bedford, Chairperson

Patricia Fraser, Panel Member

Carmen Nedohin, Panel Member