

**DECISION OF THE DISCIPLINARY COMMITTEE OF  
THE GENERAL LEGAL COUNCIL**

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ICILDA COUSINS

COMPLAINANT

MELBOURNE SILVERA

DEFENDANT

PANEL

PAMELA E. BENKA-COKER Q.C.      CHAIRMAN

GLORIA LANGRIN

DERRICK MCKOY

ROY STEWART

ATTORNEY-AT-LAW FOR THE COMPLAINANT

JOHN SINCLAIR

ATTORNEY-AT-LAW FOR THE ATTORNEY

**NARRATIVE**

The respondent attorney-at-law, Melbourne Silvera (hereinafter referred to as the attorney) is a partner in the firm of attorneys-at-law Messers Silvera and Silvera with offices at 42-44 East Street in the parish of Kingston. The attorney qualified as an attorney-at-law approximately forty years ago.

Miss Icilda Cousins, (hereinafter referred to as the complainant) although a Jamaican National, lived and worked in the United States of America at all material times. In August of 1991, she came home to Jamaica to attend her sister's funeral. She was hit down by a motor car and was injured, necessitating her hospitalisation to mend a broken leg.

Sometime after the accident she visited the offices of the "attorney" and retained his services to assist her in recovering compensation for the injury suffered and its consequential losses.

The firm of Silvera and Silvera conducted negotiations with the firm of Messers. Broderick and Graham with a view to arriving at a settlement on the complainant's behalf. An agreement as to the damages payable was reached in December 1995. The complainant signed a release that same month and returned it to the firm of Silvera and Silvera. A cheque in the sum of \$318,575.00 was received by the attorney in full and final settlement of the claim in January of 1996. Of that amount, the sum of \$248,304.50 was due and payable to the complainant after the agreed fees payable the attorney had been deducted. The amount payable to the complainant was not then paid over to her on

receipt of the cheque.

In May of 1996 the complainant, on a trip to Jamaica, visited the offices of the attorney and spoke to him, she asked him for the cheque representing the sum payable to her under the settlement arrived at on her behalf.

She did not receive the monies from the attorney. She did not receive the monies from the attorney on several subsequent visits shortly thereafter.

As a consequence of the attorney's failure to pay over the sum due to her, the complainant filed a formal complaint against the attorney dated the 20th day of September 1996 with affidavit in support. The Disciplinary committee held hearings into this complaint on the 5th July 1997, the 29th July 1997, and the 22nd August 1997.

THE COMPLAINT The substance of the complaint is as follows; "The attorney had settled a personal injury case for the complainant. Of that sum the Complainant was to receive the amount of \$248,304.00 and to the date of the signing of the complaint, the complainant had not received the within sum of money from the attorney. After several visits to the attorney's office to collect the money the attorney told the complainant that he was sorry but he had used the money for other purposes."

The ground of the complaint is Canon VII (b) (ii) of the Legal Profession (Canon) of Professional Ethics) Rules published on the 29th of December 1978. The said Canon states "An Attorney shall account to his client for all monies in the hands of the Attorney for the account or credit of the client whenever reasonably required to do so." Mr. Roy Stewart, attorney-at-law appearing for the complainant opened her case.

THE EVIDENCE The complainant gave oral evidence in support of her complaint. She stated that she was a home-help aid nurse and that she lived in New York in the United States of America.

She was injured in a motor vehicle accident in August 1991 on a visit to Jamaica. She retained the services of the attorney to sue on her behalf to recover damages as compensation for the injury she had suffered. On her visit to the offices of Messers Silvera and Silvera at 43-44 East Street in the parish of Kingston, she spoke to the attorney himself. She recounted to him the circumstances under

which she had been injured, and he took her case. She received several pieces of correspondence from Silvera and Silvera and in December 1995 she signed a release after a settlement in relation to the amount of damages payable had been arrived at in her favour.

On the 30th May 1996 having come to Jamaica she visited the offices of the attorney and spoke to him. She asked him for the cheque for the monies due to her. The attorney told her that he did not have the cheque but that she should return on Wednesday. The complainant returned to the attorney's offices on Wednesday but she did not get the cheque on that occasion. The attorney told her that he would send the cheque with his secretary to her home in Spanish Town, the complainant did not get the cheque.

She again visited the offices of the attorney, she enquired of him again about her cheque. He told her was going to send his son with the cheque. The attorney also told the complainant that he had received the money from the Insurance Company but he had used it.

The complainant then told the attorney that he should not have used the money because he ought not to have been able to change the cheque. The attorney told her that she would get the cheque on the weekend. The complainant did not get the cheque from the attorney in 1996. She therefore made a complaint to the General Legal Council.

Having made a complaint to the General Legal Council, she retained the firm of H.G. Bartholomew and Co. to assist her in recovering her money from the attorney. On the 4th of July 1997 she visited the offices of H.G. Bartholomew and Co. She was shown a letter dated the 4th July 1997 from Messers Silvera and Silvera enclosing a cheque payable to H.G. Bartholomew & Co. in the sum of \$302,591.35.

The complainant said she did not authorise the attorney to keep her money at this time nor did she authorise the attorney to use her money. In one of the letters directed to her, the firm of Silvera and Silvera had advised her as to how much they would retain from the amount paid over to her as fees.

Twelve documentary exhibits were tendered through this witness Exhibits 1,2,3,4, 4b, 5,6, and 7 represent a series of correspondence between Messers. Silvera and Silvera, and Messers. Broderick and Graham, and Messers Silvera and Silvera and the complainant which clearly indicate that the firm of Silvera & Silvera were the attorneys-

at-law acting on behalf of the complainant.

Exhibit 6 is worthy of comment. In that letter dated the 12th March 1996 from the firm of Silvera & Silvera to the complainant, the attorneys-at-law set out a statement of their costs. In this letter the amount paid over to the firm by the attorneys-at-law representing the defendant, Messers. Patterson Phillipson & Graham is stated as \$318,575.00. After all payments due to the complainant's attorneys-at-law been deducted the balance due and owing to the complainant was \$248,304.00.

In this letter Messers. Silvera & Silvera then ask the complainant if she wished them to deliver the cheque to her sister she was to authorise them to do so.

Exhibit 8 represents the form of release signed by the complainant acknowledging receipt of the sum of \$318,575.00 by way of compromise of her claim.

Exhibit 9 is the letter dated 1st July 1996 directed to the secretary of the General Legal Council by the complainant complaining about the attorney's failure to give her the money due to her.

Exhibit 11 is her formal complaint to the Disciplinary Committee of the General Legal Council.

Exhibit 12 is a photocopy of a manager's cheque paid over to the firm of H.G. Bartholomew & Co. in the sum of \$302,591.35 by Messers. Silvera & Silvera.

This sum was paid under cover of letter dated the 4th July 1997 and signed by the attorney and was calculated as follows:-  
\$248,304.50 representing the principal sum due to the complainant and \$54,286.85 representing interest for the period 1/6/96 to 4/7/97 at a rate of 20%. A cheque disbursement voucher was attached to the said the letter. There was minimal cross examination of the complainant by Mr. John Sinclair who appeared for and on behalf of the attorney.

Under cross examination she admitted having received exhibit 6 from the attorney stating the amounts due and payable to her. She said that on the second occasion that she visited the attorney at his office, he had told her that he had used the money. She said the attorney was confused on that occasion and he did tell her that he used the money after sending her to speak to his secretary.

It is important to note that no case for the attorney was put to the complainant by the attorney-at-law representing him.

THE CASE FOR THE ATTORNEY John Sinclair, who appeared for the attorney, waived his right to open to the attorney's case. The attorney gave evidence the substance of which is as follows.

When examined by his attorney, the attorney agreed that the firm of Silvera did receive monies paid for and behalf of the complainant in settlement of her case. He did eventually pay the money to the complainant. He did not pay the complainant before June 1997 because there was a breakdown with the accounting system at the firm. The accountant had migrated and the firm was having difficulties. The firm did not have the proper information. Funds were paid out without proper procedures. Collections were not being made and disbursements were being made. The firm eventually secured the services of an accountant and things were back to about 90% normal now.

The attorney denied telling the complainant that he had used the funds for his own use. The attorney said that he told the complainant that there would be a delay in payment. The above is a fair and adequate representation of the examination in chief of the attorney .

The attorney was cross-examined by Roy Stewart. He admitted that in the beginning the complainant came to him personally to deal with her case. He did not recall whether or not the complainant telephoned his offices but she did come to speak to him about the money in May of 1996. He received the money on the 10th of January 1996. He did send the complainant a statement in March 1996 advising her of the fees to be paid, and how much she was to receive.

He did not pay the complainant in March of 1996 because there was a mix up in the accounting department and the money was not available to pay her at that time. The money was not available because improper disbursements had been made. The firm does operate a client's account and each individual would have a file. The file would show when the money was received but it would not show when the money was lodged. Ultimately the file would show that the money had been paid out. At the time the complainant came in for the funds, there were not sufficient funds to pay her at that time. Her money

was in fact used to pay something else. He again denied that he told the complainant that he had used her money.

The attorney admitted that he did receive a letter from Mr. Bartholomew in August 1996. He did not respond to that letter but he did telephone Mr. Bartholomew. He did tell Mr. Bartholomew that a cheque was on its way. The attorney admitted receiving a letter in July 1996 from Mr. Bartholomew, a letter in September 1996 and one in March 1997. The attorney admitted that at no time did he reply to any of these letters. Letters dated July 1996, August 26th 1996, September 26th 1996 and March 7th 1997 from H.G. Bartholomew to the attorney were tendered as exhibits 13, 14, 15 and 16. The attorney did not on receiving these letters pay the complainant. The money was paid to the firm of H.G. Bartholomew & Co. on the 4th July 1997. He was to appear before the General Legal Council on the 5th July 1997. The attorney denied misappropriating the funds due to the complainant.

In response to questions from the panel the attorney stated that he had been an attorney-at-law for almost 40 years and that in 40 years he had handled client's funds. He knew that client's funds are trust funds. He knew that clients' funds should only be used for purposes authorised by the client. He did not tell Mr. Bartholomew in writing that the firm was having problems with its accounting department, nor did he tell the complainant about the problems. He said that what he meant by improper disbursements is that disbursements were made to other people when funds were not being collected. He agreed that if one person's money is used for a purpose other than that authorised by the person that is conversion in law. He said that in a sense, he was saying that the complainant's money had been converted by paying it out to other persons.

The attorney admitted that he did not account to the client for the money he had in hand for her. John Sinclair declined to ask any questions as a consequence of those asked by the panel and closed the attorneys' case.

Both John Sinclair and Roy Stewart declined to make closing submissions to the panel.

STANDARD OF PROOF This case against the attorney involves allegations of grave impropriety which if proven, severely impugn the character

and conduct of the attorney. It bears re-stating that the standard of proof in such a case is a standard of proof beyond reasonable doubt. See BHANDARI V ADVOCATES COMMITTEE 1956 3 ALL E.R. p.743.

BURDEN OF PROOF The burden is on the complainant to produce evidence to satisfy the degree of proof alluded to above.

EVALUATION OF EVIDENCE The facts in this case are very simple. The complainant herself gave evidence on her own behalf and the attorney gave evidence on his behalf. On a careful examination of the evidence given by the complainant, we can find no material allegation of fact on which she did not speak the truth. The cross-examination to which she was subject by John Sinclair was minimal indeed, and in no way discredited her evidence or devalued its merit. She was candid and forthright and at no time sought to mislead the Committee. All her factual evidence surrounding the charge was supported in material particulars by the documentary evidence. The Committee finds the complainant Icilda Cousins to be a witness of truth.

In the attorney's evidence, the only significant departure from the evidence given by the complainant was that the complainant said that the attorney said that he had used the money. The attorney said that he did not tell the complainant that he had used the money. In all other respects the attorney's evidence confirms the evidence of the complainant. It is important to observe that on his own evidence the attorney implicated himself in the charge laid against him by the complainant.

After a careful examination of the evidence in its totality, this Committee makes the following findings of fact as it is obliged to do in keeping with section 15(1) of the Legal Profession Act.

FINDINGS OF FACT AND MIXED LAW AND FACT

1. THE ATTORNEY is a partner in the firm of attorneys-at-law of Messers Silvera and Silvera.
2. He has been an attorney-at-law for almost 40 years.
3. In August 1991 the complainant Icilda Cousins was injured in a motor vehicle accident in Jamaica.
4. She secured the services of the attorney to recover on her behalf from the defendant, damages for compensation for the injury she suffered.

5. In December 1995 after correspondence from the attorney she signed a release accepting the sum of \$318,575.00 in full and final settlement of her claim.
6. The signed release was returned to the attorney.
7. It had been previously agreed between the attorney and complainant that the attorney's fee would be paid from the amount recovered.
8. The attorney received a cheque from Broderick and Graham in the complainant's claim on the 10th of January 1996.
9. The amount due to the complainant after deduction of the attorney's fees was not paid over to her by the attorney.
10. In May 1996, the complainant visited the offices of the attorney on several occasions, and spoke to the attorney and requested her monies.
11. She did not get the money from the attorney and the attorney gave her several excuses and led her to believe that she would get the money.
12. The attorney did tell the complainant that he had used the money.
13. The attorney did improperly disburse the funds which should have been paid over to the complainant.
14. The complainant gave the attorney no authority to use funds due to her.
15. The attorney knew that he should not have used the funds due to the complainant in a manner other than that authorised by the complainant.
16. A bad accounting department would provide the attorney with no justification for having wrongly and without authority misapplied the funds of the complainant.
17. The attorney converted the funds which had been due and owing to the complainant from the time the monies were paid over to the attorney in January 1996.
18. In law, the fact that the attorney refunded the money with interest to the attorneys-at-law for the complainant, H.G. Bartholomew and Co. in July 1997 is irrelevant on a consideration as to whether the charge stated in the application and the affidavit in support has been proven by the evidence adduced.



CONCLUSIONS: The Committee after careful consideration of all the evidence, and after a perusal of the law applicable has decided that the conduct of the attorney as supported by its findings at paragraphs 1 - 18 of this judgment, amount to a breach of Canon VII (ii) (b) of the Legal Profession (Canons of Professional Ethics) Rules. Further, we find that the conduct of the attorney is such as to also be in breach of Canons I (b) and VIII (b) of the Legal Profession (Canons of Professional Ethics) Rules. The attorney has failed to maintain the honour and dignity of the profession and has indulged in conduct which tends to discredit the profession. The attorney has acted in a manner which fails to promote public confidence in the integrity and efficiency of the legal system and the legal profession.

The Committee finds that the conduct of the attorney was disgraceful, dishonourable and unbecoming of an attorney-at-law and tends to discredit the Legal Profession of which he is a member.

We find and are satisfied beyond reasonable doubt that the attorney Melbourne Silvera is guilty of misconduct in a professional respect.

It is now our task to determine the appropriate sanction in the light of our findings.

In doing so, we are mindful of the fact that in disciplinary proceedings such as these, the important consideration in determining adequate punishment for professional misconduct " is to protect the collective reputation of the profession and to maintain public confidence in the members of the profession." We place reliance on the statement of principle opined by Sir Thomas Bingham M.R. at p. 492 in the case of BOLTON V. LAW SOCIETY reported at 1994. All E.R. p. 486 which underscores our understanding of considerations in determining an adequate sentence for professional misconduct. Having found the attorney Melbourne Silvera guilty of professional misconduct of the gravest kind, conduct which erodes public confidence in the profession, we are of the unanimous opinion that the name of Melbourne Silvera should be struck from the roll of attorneys-at-law entitled to practise in the several Courts of the Island of Jamaica and we so order.

This order is made under section 12 (4) of the Legal Profession

Act.

As a Committee we wish to advise attorneys-at-law, that client's funds are to be treated with the greatest circumspection, moral rectitude, and unwavering integrity. Attorneys-at-law ought not to use clients funds, under any circumstances, without the authority of the client, and for purposes authorised by the client. Attorneys-at-law have no right to ostensibly borrow client's funds. Purporting to borrow clients' funds and subsequently refunding same does not exonerate the attorney-at-law from being found guilty of professional misconduct of the gravest kind even if there was no fraudulent intent on the part of the attorney-at-law.

We as attorneys-at-law have the privilege to belong to an honourable profession, it is our duty to preserve that honour.

Dated the 20<sup>th</sup> day of November 1997.



PAMELA E. BENKA-COKER Q.C.



GLORIA LANGRIN



DERRICK MCKOY