

Monitoring of the use of funds on a construction account held in the name of a general contractor

Topic: **Other loans** Case number: **2018/10**

The complainant had entered into an agreement with a general contractor (“GC”) to build a single family home. The agreement stated that the GC should open a building account with the bank in his own name with a heading stating the name of the construction project. The complainant paid the agreed construction sum into said account in instalments. The GC went bankrupt before the house was finished. The complainant sustained significant damage as a result. He demanded compensation from the bank because it had not checked the usage of the money the complainant had paid into the building account. The bank refused the claim for compensation, stating that it was under no obligation to the complainant to check the funds. The complainant raised some questions about the case with the Ombudsman who answered them.

The agreement entered into by the complainant with the GC for the construction of his single family home stipulated that the GC may only use the monies paid into the building account for the specific purpose of building the property. To this end, the GC was to provide the bank with a list of the tradesmen involved in the construction. Once the complainant discovered that the money had been used inappropriately, he filed a criminal complaint against the GC. During the criminal proceedings, it was established that the GC had, for the most part, transferred the money straight to his current account following receipt and had used it elsewhere. The complainant was now faced with the unfortunate situation of having to organise the completion of his property himself and was forced to pay for services he had already transferred funds to the GC for, into the agreed building account, again. He encountered significant financial hardship as a result. In his view, the bank should have monitored how the building account was being used and ought to have prevented the inappropriate use of the funds. He therefore presented the bank with a substantial claim for compensation as clearly no money could be obtained from the bankrupt GC anymore.

The bank argued that it was not in a contractual relationship with the complainant and did not provide the latter with any confirmations regarding usage of the funds. The bank denied having had any knowledge of the content of the agreement between the complainant and the GC. In spite of the heading name of the building account, the GC would have had the power to dispose of the funds freely. The bank stated that it would only have been willing to undertake such a check where this had been agreed upon accordingly with the complainant, and if it were compensated appropriately for it, or if it had financed the property. The case in point did not involve any of those scenarios however. The complainant did not agree with this reasoning and asked the Ombudsman what further action he could take against the bank. When contacting the Ombudsman, he claimed for the first time that a bank employee had originally assured him by phone that the bank would receive a list of tradesmen from the GC and would check the payments being made from the building account. He could only remember the approximate date of the phone call but not the name of the employee. He had obviously not had any further contact with the bank and there was also no correspondence with the bank regarding the building account. The complainant also accused the bank of having only opened the building account on the basis of a verbal instruction. The only written basis was Form A, in which the GC, as account holder, confirmed that he was the sole beneficial owner of the financial assets.

The Ombudsman expressed his regret concerning the difficult situation facing the complainant as a result of the GC's actions. In his view however, there was no statutory or regulatory provision which would prohibit a bank from allowing a sub-account to be opened verbally within the framework of an existing business relationship and only requesting a form A for said sub-account. In the Ombudsman's experience, it is also standard practice for banks to only check payments made from building accounts where this has been agreed upon accordingly with the building owner and where it receives compensation for the effort involved, or where it has agreed to fund the construction project itself. This is the case because such a check would mean additional expense for the bank and has risks associated with it.

In this case, the complainant would need to be able to prove that the bank had accepted such obligations to him without compensation. No such obligations were evident from the agreement between the complainant and the GC, an agreement to which the bank was not a contracting party. The argument that a bank employee had promised the complainant by phone that the bank would check the payments being made had so far not been submitted to the bank by the complainant or his lawyer. In the absence of a statement of position from the bank, the Ombudsman was unable to comment conclusively. He therefore informed the complainant that he would need to confront the bank again with this argument, and made him aware that his claim for compensation was likely to be difficult to be enforced if the bank denied having accepted by phone such an obligation to perform checks.