

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

Topic: **Other loans** Case number: **2018/11**

This complainant and building owner had entered into an agreement with a general contractor (GC) regarding the construction of a single family home. The construction project was funded by the building owner's principal bank. The general contractor agreement stipulated that the construction price of the building had to be transferred into the GC's account held with his bank in certain instalments based on progress of the construction. The building owner's principal bank asked the GC's bank for confirmation that it would check that the funds were being used for the intended purpose. The GC's bank issued such a confirmation to the principal bank for the building owner's attention. The GC became insolvent prior to completion of the building and had not paid several invoices from tradesmen, meaning that the building owner had to pay for services twice and suffered additional damage due to the delay in the construction. He claimed compensation for this from the GC's bank since it was obvious to him that the bank had breached its obligations under the usage of funds confirmation. The bank refused the claim for compensation. During the Ombudsman proceedings, it was possible to reach a compromise that was acceptable to both parties.

Unlike in the case 2018/10, this time the GC's bank had issued a so-called usage of funds confirmation to the bank providing the construction loan for attention of the building owner. In it, the bank confirmed, on behalf of the GC, that the funds paid into the specific GC's account with the bank by the building owner would only be used to cover the costs of the intended construction project in line with the progress made on said project. Since the building owner was unable to reach an agreement with the GC's bank regarding his claim for compensation, he went to the Ombudsman to seek clarification of the obligations incumbent upon the GC's bank as a result of the declaration issued, and whether or not the bank had fulfilled them.

The bank informed the Ombudsman that it believed that it was only obliged to perform a plausibility check on the payments to ensure there was a connection between the remuneration and the construction activity or progress as a result of the declaration issued. It maintained that it was not responsible for verifying the appropriateness of the individual invoices. In the bank's view, at no point had there been a corresponding trust agreement between the bank providing the construction loan or the building owner and itself. Moreover, no fee had been agreed upon with it for verifying the invoices. This would have been checked in detail and signed by the GC in advance. The bank's account manager had inquired about the progress of the construction on a regular basis, had performed plausibility checks based on the signed invoices, and had approved the associated payment instructions.

The Ombudsman understood these arguments put forward by the bank in principle. The building owner had claimed however that the bank had approved invoices for payment on which it was readily apparent that they did not, or only partially, concern his property which was part of a larger complex. The GC also charged fee invoices to the building account which allegedly exceeded the fee agreed upon with him by more than 50%. Many of the fee charges took place shortly before the GC's

insolvency when contractor invoices that were already overdue were submitted. At the Ombudsman's request, the bank declared that it was willing to check the criticised charges, to be named specifically, again and would then make a decision regarding any potential compensation. The building owner submitted the corresponding documents to the Ombudsman who forwarded them to the bank.

To the Ombudsman's surprise, the bank then sought the representation of an external lawyer and claimed that, at most, it would only be liable to pay compensation to the bank funding the construction loan if said bank had suffered a loss as a result of registered building contractor's liens, which was not the case here. It further stated that the invoices submitted by the building owner had been taken out of context. The bank stated that it was entitled to charge invoices relating to the complex to the account segregated for the building owner even if these charges did not relate specifically to his property. It explained the excess fee charges maintained by the building owner were in fact profit entitlements that the GC was of course entitled to also charge to this account.

The Ombudsman emphatically pointed out to the bank, that it had made certain assurances in the Ombudsman proceedings to which it was bound in accordance with the principle of good faith and, in his opinion, this newly submitted argument, untenable in terms of its content, was counter to the assurances given. In the Ombudsman's view, the plausibility check due on the basis of the usage of funds confirmation entitled the building owner to expect that the account segregated for him would only be debited for invoices that could be attributed to his property. The general contractor should only have paid out any profits once it was certain that all of the tradesmen's invoices had been settled. This check should also have been a component of the due plausibility check. The Ombudsman eventually managed to convince the bank that a substantial gesture of goodwill was appropriate for the building owner so that this case could be resolved amicably.