

complaint

Mr E's complaint relates to the way Executive Benefit Services (UK) Limited have handled his financial affairs. He complains about a number of matters but essentially he considers that he has been given unsuitable advice and that the firm has made higher charges than agreed.

background

I issued my provisional decision in this case and made the following points:

Mr E made a complaint to the Financial Ombudsman Service relating to the following matters:

- 1. fees charged by EBS*
- 2. being incorrectly informed that EBS had professional indemnity insurance cover*
- 3. the advice from EBS to invest into a particular fund*
- 4. the conflict of interest of a lawyer that EBS recommended to Mr E who also acted for the business*
- 5. the appropriateness of advice from EBS to set up a trust arrangement*
- 6. the lack of reason why reports from EBS setting out the reasons for the business' advice.*

In summary the adjudicator found that:

- EBS had not given Mr E sufficient financial documentation to enable him to keep track of his investments. EBS should therefore provide Mr E with clear evidence that all the payments made out of his funds were in support of his financial objectives.*
- EBS had mis-led Mr E about the status of its Professional Indemnity Insurance and should offer to pay him £200 for the distress and inconvenience caused.*
- EBS was not open and transparent with Mr E when it recommended he appoint a legal adviser, but failed to mention that the legal adviser also had a relationship with EBS.*
- EBS had failed to provide Mr E with sufficient information to satisfy him that the setting up of the Trust was an appropriate recommendation to help mitigate inheritance tax. EBS should now provide Mr E with all the necessary information to support its recommendation to set up the trust.*
- EBS should provide Mr E with all relevant 'reasons why' documentation to provide him with a clear history of his financial transactions.*

Mr E accepted the adjudicator's findings, but EBS did not. EBS said that:

- The annual fee of £5,000 was for EBS to look after Mr E's FSA regulated matters.*
- Many of the fees referred to in the document attached to the adjudication were for EBS Trustees, which is not subject to the jurisdiction of the Financial Ombudsman Service.*
- EBS Trustees may owe Mr E £8,093.16, although it makes no admission about this. But EBS owes Mr E nothing.*

- *It is accepted that EBS did not have PI insurance at the time in 2003. A waiver from the FSA was in place. EBS accepts the adjudicator's recommendation that it should offer to pay Mr E £200 compensation for the distress and inconvenience caused.*
- *Mr R was the legal adviser recommended to Mr E. At the time of the recommendation he was a consultant with a firm of solicitors. It was that firm who did the legal work, although he was responsible for the day to day work. Mr E was aware of the relationship between EBS and Mr R, and in the circumstances EBS does not agree that there was a lack of transparency, so it is not prepared to pay the amount of £100 in compensation.*
- *EBS agrees that it recommended the setting up of a trust to take some of Mr E's assets out of his estate. Mr E had made a will bequeathing his whole estate to two friends, and he was keen that they received as much of his gross estate as possible. EBS kept Mr E informed of the Trust's purpose through review meetings with Mr E. Mr E defeated the purpose of the trust when he instructed the payment of a court settlement to himself rather than its rightful owner, the Trust.*
- *Mr E says that he has now seen all the 'reasons why reports' but complains that he did not see them at the time. EBS cannot see what else it can say about this.*

I came to following view on the complaint:

...in considering the merits of this complaint, it appears that a number of the issues about which Mr E is concerned, and which involve EBS Trustees and the Trust, do not relate to regulated activities. My decision is only concerned with those issues relating to regulated activities. I will deal with each of the issues under their respective headings.

fees and commissions:

In my view this is now the central issue between the parties.

The complaint is that Mr E agreed a fee level with EBS that involved the payment of £5,000 for the first three years after the client agreement was signed in 2003 and then [£3,000] in the following fourth and fifth years. Mr E says that it was agreed that any additional commissions received would either be repaid to Mr E or re-invested.

Mr E says that in 2007 EBS' attitude changed and it claimed to be entitled to invoice for additional hours worked and take commission received as this was provided for in the client agreement.

Mr E says that the standard form contract had been queried at the outset and he had only agreed to sign because of the assurance EBS had given about the repayment and/or reinvestment or commission. He also made the point that the contract also says that Mr E will be informed before any chargeable work is carried out, that details would be given of any commission received. He says that no such information was given so EBS has acted in breach of the client agreement.

Mr E submitted a note, dated in January 2013, based on the incomplete information available to him, that estimates the overcharging at nearly £113,000.

The adjudicator said that EBS should provide Mr E with clear evidence that all the payments made out of his funds were in support of his financial objectives. This seems to be the only way that Mr E can start to unravel what appears to be a tangle of information and invoices involving a number of Mr E's businesses.

There does not appear to be a single document showing all outgoings from Mr E's assets, whether it involves EBS or EBS Trustees. Without such a document, Mr E has no means of being able to understand what he has spent, and why he has spent it.

I am obliged to make the decision I consider fair and reasonable in all of the circumstances. It is right that I should try to bring about a resolution to this complaint. I am concerned that simply ordering the production of documents will not have that result - although it will be an important step in that direction.

I am concerned by EBS's response to what is a very significant claim. Whether the claim is right in every respect or not, it is clear that a very significant amount of business has been carried out for Mr E and or his businesses. He is entitled to information so that he can work out whether the firm has charged him in the way that he says was agreed. EBS has not provided such information.

That said there does seem to be some confusing of Mr E's personal position (including Mr E personally acting as a trustee) and the businesses he owns or controls. The latter are separate legal entities. An agreement made by Mr E personally may well not bind his companies. But equally, I would have thought that for EBS to invoice those companies it needs to have some kind of client relationship with them - it does not seem likely that EBS can just invoice a company without there being some kind of relationship and the provision of some kind of service.

Further, any separate customer relationship with a separate client agreement undermines the point that the agreement relating to fees alleged by Mr E is the only agreement relating to fees. On the other hand if there are no separate client agreements this might tend to support the argument that the alleged agreement was the agreement for all work provided to Mr E in the broadest sense (ie to include his businesses).

(As regards whether the alleged agreement is the entire agreement I see that the calculation provided by Mr E refers to an agreed fee of £2,000 per year to a third party relating to accounting work for rental income. It is therefore clear that Mr E does not say that the alleged agreement covered all matters in their entirety.)

The summary of the alleged overcharging is commendably brief and fits on one page. In the section 'gross fees issued and paid' it records fees charged to Mr E and five companies which I understand to be Mr E's businesses. As I have mentioned those companies are separate legal entities. Mr E should therefore obtain and provide to me letters of authority from each of those companies authorising EBS to provide information to me. I will then provide copies of those letters of authority to EBS.

EBS must then provide a report to me answering each line of the summary document dated 30 January 2013. EBS should provide details of the work carried out in respect of the fees charged and it is to provide copies of the agreements under which it made those charges to the various companies concerned.

EBS is also to provide details of all of the various commissions received referred to in the summary. It is to provide details of the commission and the work to which it relates and provide evidence of the agreement under which EBS says it is entitled to receive the commission.

EBS is to provide an explanation and evidence showing how the commission was disclosed to the client.

EBS is also to provide details of the commission or income received omitted from the summary and recorded as unknown. And it is to provide details of any other commission or income received not included in the summary.

EBS may also provide any other comments or submissions it wishes me to take into account.

Mr E should also assist me by providing copies of all relevant documents in his possession or control such as client agreements between his various companies and EBS...

PI insurance:

Mr E's point here is that if EBS had not represented to him that it had PI insurance cover he would not have done business with it and would not then have suffered the loss he did. He therefore says that this misrepresentation caused or was one of the contributing factors in the loss he suffered.

I note the point but I also note that the same point was made in [a separate dispute] that was settled. It is therefore my view that this point, like the complaint about the investment fund, is not one that may be considered by this service.

conflict of interest of legal adviser:

EBS says that Mr E's point about there being a conflict of interest arising from Mr R's [relationship with EBS] is wholly irrelevant in this complaint. EBS says that despite this connection it cannot see any lack of transparency here.

When Mr E appointed Mr R as his legal adviser, he would have expected Mr R to work for him and to have only his interests in mind when carrying out this role. If Mr E had been aware of Mr R's [his relationship with EBS], I believe it would have been a significant factor in his decision about whether to trust him as a legal adviser in his dealings with EBS.

the Trust:

The adjudicator recommended that EBS should provide Mr E with all relevant documents relating to the recommendation to set up the Trust, however EBS says that it has no written evidence to support its recommendation.

This claim is not very clear to me. In part this is a reflection of what seems to be poor record keeping by EBS.

Mr E seems to question the suitability of a trust arrangement for his needs. And he suspects that the arrangement was set up to create a more opaque structure in which monies could be withdrawn without his knowledge or consent. This second point is a very serious accusation and there seems to be little or no evidence to support it but it is nevertheless easy to understand such feelings if regular and clear accounting does not take place and EBS fails to observe good practice in things like providing a clear written explanation of the reasons for its recommendation.

My understanding is that the accounting is a matter for EBS's sister company which is the professional trustee. It is not a regulated company and I have no jurisdiction over it.

I cannot see that the advice to set up the trust as such was obviously wrong if Mr E wanted to save inheritance tax - which has not been denied. It would however have been good practice by EBS to record the reasons for its advice and I therefore presently consider that EBS should pay Mr E £200 for the inconvenience that its failure to do so has caused.

Both Mr E and the business made further submissions in response to my provisional decision which I have considered in order to reach my final decision. Where appropriate, I make reference to these responses in my findings below where I deal with what I consider to be the main issues.

my findings

I have considered all of the available evidence and arguments to decide what is fair and reasonable in the circumstances.

Mr E's relationship started with EBS in 2003 and the dispute relates to fees charged from that time onwards. It is not the only matter of dispute that has arisen between the parties – another matter of dispute arose in around 2006/07. That matter involved the use of lawyers and independent experts and was settled in 2010 only for the present dispute to re-emerge later. (I refer to this point in more detail later.)

Much of the present complaint concerns allegations that information was not provided to substantiate payments that were made some considerable time earlier and were not actively questioned at the time. While Mr E questions the payments now it will have been understood in general terms that businesses are normally paid for the services they provide in one way or another and that various payments were being made. Also, whilst Mr E has produced some papers to support his allegations, I am not persuaded that they all constitute sufficiently strong evidence to prove his points.

The point is made by Mr E that the business has repeatedly failed to provide information – that it did not provide information at the time the charges were made, or when requested by Mr E's solicitors in 2007/08. What is less clear is why Mr E did not keep track of things at the time or continue to pursue the matter in 2008 when his solicitor asked for information and it was not fully provided – again I will refer to this point further below.

It seems to me that EBS have, following my provisional decision, taken reasonable steps to satisfy the information requests from Mr E and his representatives. However, its responses have led to further requests and disputes from Mr E.

As previously mentioned, I may deal only with issues relating to regulated activities by regulated firms and will not therefore address any points that have been raised in relation to EBS Trustees (EBST). Mr E has said that he was unaware that unregulated activities would form part of the work undertaken on his behalf and that had he known he would have ended the relationship with EBS.

I do not however accept this.

As Mr E's representative points out, the client agreement with EBS from 2003 that includes the fee agreement included a reference to EBST. It said that EBST itself was not authorised under the Financial Services Act 1986 but EBS accepts responsibility for its acts and omissions.

I notice that Mr E's own expert did not find the use of a regulated firm for regulated business and a 'trustee' firm to provide administrative services as a trustee to be unusual or remarkable. Further there is a letter from Mr E's office from April 2003 that records the following:

"[The adviser from EBS] has advised that the pension fund be moved from [name of pension trustee] to EBS Trustees. The fund will then be wound up ... and a SIPP opened."

And my understanding is that trust was set up in 2003 with EBST as the trustees.

It is therefore difficult to accept that Mr E was not aware that EBST was involved in his affairs and that it had a different regulatory status.

Further it is also clear that there was unhappiness about fees and EBST as indicated in an email from EBST in February 2006 to Mr E's representative which included the following:

"I am happy we have resolved our relationship with [Mr E] regarding the historical charges and can go forward with a clear picture of what he wants in regular reporting format. We also agreed the 1% fund charge on the SIPP should provide all our reasonable future remuneration requirements. We will advise if additional time or outlays in any respect of his affairs is likely to incur any additional charges."

We have looked at 2 invoices of April 2003 to [two of Mr E's companies] and the latter raised in part to pay the pro-forma Invoice for [company name] from [a third party company]. This was then replaced. As we cannot precisely recall what this was actually for we have credited [Mr E's bank] account with £2000 (+VAT)...In addition we have agreed to make his 2006/07 SIPP contribution of £3,600...

We believe we have gone a long way to demonstrate our willingness to accept some responsibility for misunderstanding his need for clarity and hope this is now fully resolved."

With regard to EBS accepting responsibility for EBST this does not necessarily give this service jurisdiction over the acts and omissions of EBST. There is a formal process under the (old) Financial Services Act 1986 and the (present) Financial Services and Markets Act 2000 under which a firm accepts responsibility for the acts of an Appointed Representative – but that is not what has happened in this case. The client agreement does not refer to EBST as an appointed representative, EBS has not referred to it as an appointed representative

and EBST's stationery did not refer to itself as such. Further I can see no record on the FCA's register of EBST as EBS's appointed representative and EBS has confirmed that there was no such formal arrangement between EBS and EBST.

As previously mentioned EBST is not a regulated company (either directly or as an appointed representative of EBS) and this service does not have jurisdiction over it. I cannot therefore, for example, consider whether or not EBST did limit its fees as stated above or get agreement to any additional fees it charged etc.

Fees and commissions

Mr E or his representative have made numerous comments about fees and commissions but helpfully condensed that down to a one page schedule setting out the alleged overcharged fees and commissions retained. Each line has been considered separately by the parties.

item 1

This is said to be fees of £2,600.00 charged by EBS to Mr E.

EBS has produced invoices from EBST totalling £2,350 (only £600 plus VAT related to EBST, £850 plus VAT relate to the fees of an actuary and a property valuer). Both are addressed to Mr E. One related to winding up his company pension arrangement the other to one of his other companies. Both are from 2005. The balance of £250 is covered by an invoice also from EBST (EBS says) and is dated in February 2012 and amended by hand to a date in March 2004.

Mr E says these matters were not invoiced at the time and the payment was just deducted from his client account.

Mr E says the fee for winding up the pension should have been included in the fees agreed. He does not however dispute the third party charges included in the invoice if they can be backed up.

Mr E says the work on the invoice for the other company was carried out on other occasions and not invoiced showing EBS's inconsistency.

Mr E says the £250 fee was for a service that ought to have been included in the agreed annual fee.

My view is that it is difficult to say after all this time that the work was not carried out by EBS, rather than EBST, or that the fee was paid to EBS rather than EBST without Mr E's knowledge or agreement.

As this item concerns EBST I am unable to comment further.

item 2

This is said to be fees of £5,839 charged by EBS to an overseas company controlled by Mr E.

EBS has produced two invoices from EBST that together total the figure questioned in item two. They are addressed to the relevant company and date from 2004 and 2005.

All of the points made above relating to EBST relate equally to this item.

item 3

This is said to be fees of £1,734 charged to Mr E's trust.

Mr E's representative says the fees relate to work that was not extraordinary and no separate charge should have been made. The point is made that one invoice is for a small and improbable sum and was clearly invoiced just to clear a client ledger. While I note these points it is not disputed that all of the questioned fees were charged by EBST. I cannot therefore consider those matters further for the reasons already given.

item 4

This is said to be fees of £10,250 charged to Mr E's pension fund.

EBS has provided two invoices it says are from EBST which date from 2005. Again there is no real evidence that this relates to EBS rather than EBST.

item 5

This is said to be fees of £2,415 charged to one of the companies controlled by Mr E. EBS has provided an invoice from EBST from 2003 relating to advising on development land acquisition, funding and company restructuring.

Again, there is no reason to consider that the fee was paid to EBS rather than EBST.

item 6

This is said to be a fee of £11,464 charged by EBS to another of Mr E's companies.

EBS says that EBST was paid an annual fee of £5,000 plus VAT by this company. That company paid by standing order and EBS produced a sample invoice from 2004.

Mr E says that fee is not in dispute. He says other invoices were raised and sums withdrawn with agreement. Details have not however been given and bearing in mind all that I have said so far, I see no evidence that this matter relates to EBS rather than EBST.

item 7:

This is £7,000 cash said to have been deposited with EBS and not reflected in the client ledger.

EBS says Mr E occasionally deposited cash with it – one of his businesses was a cash based small business.

Mr E's representative said the following in response on this point:

"EBS should be well aware of the nature of these sums: £3000 was cash paid to [named individual] towards fees, and receipted by [named individual] (copy of receipt on file). £5000 was cash paid to [named individuals] for fees (£3000 and £2000

respectively): this sum was not receipted. Neither sum of cash was reflected in the client ledger. The fact that Mr E operated a ... business dealing exclusively in cash seems immaterial to the fact that cash sums were received and not noted in the client account."

This item is therefore different from all the previous items. Here it is acknowledged that Mr E knew about the payment and that it related to fees that presumably he therefore accepted were due or he would not have paid. The only issue is a lack of a record in the client ledger.

It is not clear whether this matter relates to EBS or EBST but in either event I cannot see that anything now turns on this lack of record keeping point after all this time and given all of the other matters in dispute between the parties.

item 8:

This is £29,306 commission in respect of a transfer to a SIPP.

This was commission that Mr E says was not properly disclosed. EBS says this was disclosed at the outset by the product provider – EBS has not said that it disclosed the commission itself. The client agreement from 2003 said:

"If...EBS receives a commission or discount from an insurance company or other institution in respect of the Client's business being placed there, the Client will be given details of the amount by EBS and any fee which might otherwise be charged by EBS to the Client will be waived".

The document from the product provider did disclose the initial commission but was not clear about renewal commission. EBS should have explained these matters to Mr E in accordance with the agreement it had with Mr E.

EBS did say in March 2012 that its investigations had revealed that the commission was:

2006 - £36 initial commission
2006 - £10,294 renewal commission
2007 - £10,814 renewal commission

It went on to say that during the same period it had an agreement for a £5,000 per year fee and did not invoice for fees for the relevant 2.5 year period.

The point made was that the commission was used to offset the agreed fee. EBS then made an offer based on the surplus of net commissions (for this item and two other smaller items) over the agreed fee level. The offer was just over £3,000.

Later in March 2013 EBS reviewed matters again and said it did not consider that EBS owed anything although EBST may owe £8,093.

More recently EBS has explained that the initial commission was £8,180 not the £36 used in its above calculation.

It is my view that EBS has not been clear about these matters. These were significant sums and the SIPP transfer was a significant transaction. EBS should have clearly explained the fees and commission involved – as it said it would do in the agreement, whatever was

common practice in the industry at the time - and not just relied on the standard disclosure in the document from the product provider.

I will return to this point further below in the conclusions section.

item 9:

This is a commission of £1,750 from a different product provider.

EBS says this was disclosed in a reason why report in 2003. Mr E says he did not receive that report. It is however difficult to conclude after all this time that the report was not sent at the time.

item 10:

This relates to commission paid in respect of an investment that has been the subject of separate litigation and so I am unable to consider this item.

item 11:

This is a commission of £420 from different product provider.

EBS says this was disclosed in a reason why report in 2003. Mr E says he did not receive that report. It is however difficult to conclude after all this time that the report was not sent at the time.

item 12:

This is a commission of £2,905 from a different product provider.

EBS says this was disclosed in a reason why report in 2003. Mr E says he did not receive that report. It is however difficult to conclude after all this time that the report was not sent at the time.

items 13 and 14:

Commission has been referred to as a 'turn' taken in respect of deposits. EBS says the sum involved is difficult to quantify and would be small.

I accept this 'turn' or commission was not disclosed but I also consider that it is unlikely that it would have been questioned if it had been specifically disclosed since the sums involved are likely to have been modest and relatively difficult to account for.

item 15:

This item relates to £2,598.78 commission shared with a stockbroker. EBS says Mr E paid the stockbroker's standard rate and then from that the stockbroker paid a commission to EBS which the stockbroker disclosed on its contract notes.

I consider this to be slightly different to items 13 and 14 above. These matters could have been more easily identified as relating solely to Mr E. And the arrangement ought to have

been explained to Mr E by EBS. The question is then whether Mr E would have expected this income to be offset against the fees EBS charged to him. It seems likely he would.

It should however be noted that the agreement between the parties is not entirely clear but certainly the written agreement talked of an annual payment for certain services and provided for the possibility of other services being provided for a fee charged on a time spent basis. This is provided for in clause four of the agreement. It went on to say if EBS receives a commission in respect of any of the client's business, the fee would be waived.

It is not clear to me that the list of things the annual charge covered included advice on buying or selling shares or arranging such via a stockbroker. EBS considers that this was extra work and that it could reasonably keep the commission it received from the stock brokers in lieu of a fee. It has also made the point that it has not rebated this commission to any other client from that time or been asked to do. This does not however necessarily make it right or mean that EBS has been as transparent in its dealings as Mr E would reasonably have expected from the client agreement.

It does however seem to me that while the commissions have added up, each commission payment was relatively modest and would have been accepted as reasonable payment for the work carried out – particularly bearing in mind that the rate charged by the stock broker was apparently its standard rate which it then shared with EBS.

Therefore while this matter could have been better handled I do not consider that Mr E has been caused any detriment in relation to this matter in relation to which I should make any finding or award.

item 16:

This is a commission of £526 paid by a firm of offshore consultants. EBS says it was paid to EBST. There is no evidence this was an EBS rather than an EBST matter.

item 17:

this item relates to a commission of £430 relating to 'the sale of plant'. Selling plant and machinery and matters connected to it is not a regulated activity and so this is not a matter I can consider whether it relates to EBS or EBST.

conclusions on items 1-17 :

It seems to me that generally the term 'EBS' has been used by Mr E to cover both EBS and EBST. However many of the above matters relate only to EBST and I cannot make any findings about them.

A number of other queries relate to matters that EBS says were disclosed in reason why reports that Mr E says he did not receive. But I note that Mr E was unhappy with the fees charged by the professional advisers he used before EBS and EBS wrote to those advisers about fees on his behalf. Further Mr E was unhappy about EBST's charges in 2006 and there were discussions and corrective action taken. And then his solicitors questioned charges in 2007 but the matter was not pursued at that point. It is therefore difficult to reasonably conclude after all this time, based on no real evidence, that the documents were not sent as EBS says.

I do however consider that there is evidence of EBS acting incorrectly in relation to items 8 and 15. While item 15 is a relatively modest matter in the overall dispute between the parties which did not cause any detriment, item 8 is more significant. In relation to item 8, I consider that there should have been more openness and the commissions properly disclosed and offset against the agreed fee.

It is unclear that there has been a full accounting for all of the commission in item 8.

There was total commission of £29,288 made up of initial commission totally £8180 and renewal commission of £10,294 in 2006, and £10,814 in 2007. During the same period charges of £11,500 should have been paid (ie £5,000+£5,000+£1500). So the excess of commission over charges was £17,788. In my view EBS should have accounted to Mr E for those commissions and it is not clear that it did so. EBS was right to make an offer to account for this commission (albeit the sum was not calculated correctly).

PI Insurance

No evidence has been submitted to contradict my view that I am unable to consider this aspect of the complaint, but I note that EBS are prepared to offer the adjudicator's recommended sum of £200 for distress and inconvenience.

conflict of interest of legal adviser

Whilst I recognise that Mr R (the legal adviser) may not have been appointed had Mr E been aware of his other roles, no evidence has been submitted to show how any conflict of interest actually disadvantaged Mr E. The potential conflict of interest is something that the lawyer and his law firm should have considered and this is a matter that ought to be addressed to them rather than EBS.

the Trust

My view remains unchanged on this matter, and I consider that a payment of £200 is appropriate.

conclusion:

This is a long running and involved dispute. And both parties are anxious to bring the matter to a close.

It should be remembered that I only have jurisdiction over EBS and not EBST also. I can therefore only try to resolve part of the overall dispute.

I am required to make the decision that I consider to be fair and reasonable in all of the circumstances. Mr E can choose whether or not to accept my decision. EBS is bound by my decision if it is accepted in the time limit I specify.

When Mr E referred the complaint to the Financial Ombudsman Service he said that EBS had offered £40,000 to settle the matter Mr E said he was not prepared to accept because he was concerned that his loss might be higher.

EBS later withdrew its offer and made lower offers which have also been rejected.

EBS has recently said that it considers Mr E vexatious in pursuing this matter. I do not agree. It does seem to me that Mr E had a valid claim against EBS in respect of item 8 above. I do however understand EBS's frustration in this matter. When the complaint was made to this service Mr E's representative said,

"...during the initial stages of the legal action, the working files of EBS... were obtained by [Mr E's lawyers]. On examining these file, it became clear that various sums had been withdrawn from [Mr E's] funds without his knowledge. In particular, various sums had apparently been "invoiced" to [Mr E] and his companies, and payment taken, without his knowledge. No invoices had ever been sent to [Mr E] or [his agent] other than the agreed quarterly invoices for £5,000 per annum.)

[The agent] then worked through the files and prepared an Excel report for [Mr E's lawyers], detailing the amounts she was able to trace and providing supporting documentation. However she was aware that not all information was available to her: this was repeatedly requested from EBS...the company has refused to provide greater detail.

On [his lawyers'] advice, the matter of overcharging and misappropriation of funds was excluded for the... legal action. It was felt by the partner leading the case that inclusion would cause too much confusion: it could hinder the recovery of the money [relating to a claim in respect of an unsuitable investment].

This was against Mr E's wishes, but he was prepared to take the advice of his lawyers. Now EBS has settled out of court, Mr E is now lodging a complaint with the FOS regarding this matter."

This was in late 2011. Mr E had instructed his lawyers in 2007 and the litigation started in 2009 and settled in 2010. While it can be seen why Mr E did not pursue to a conclusion the claim in respect of fees and charges between 2007 and 2010 it is normal for parties that are in dispute to seek to resolve all the matters between them so that they can then move on. The fact that the matter was not concluded in 2007-10 has caused both parties on-going frustration and annoyance.

Having considered all of the evidence and the parties' submissions, but being mindful that I can only consider EBS and not EBST, it seems to me that a figure of £20,000 would represent a fair and reasonable settlement of all of the matters discussed above in relation to EBS. I do not consider that that sum should be discounted because the claim is vexatious as EBS claims. But equally I do not consider it appropriate to apply interest at our usual rates on the sum in item 8 for the entire period that Mr E has been out of pocket. While Mr E has had difficulty in obtaining information from EBS it is the case that Mr E allowed this issue to go into abeyance for some time while he concentrated on another matter of dispute with EBS, albeit one that was of much greater value.

The sum of £20,000 broadly covers the unaccounted for commission in item 8 (£17,788) and a payment for the distress and inconvenience caused in respect of that matter, and the other two distress and inconvenience awards referred to above. It would also include a factor for the interest that might have been recovered if this issue had been included in the original dispute and settled at the same time. The figure is intended to be a broad global figure that represents a fair and reasonable settlement rather than one that should be broken down into precise individual elements.

my decision

My decision is that Mr E's complaint is upheld in part and that EBS should pay Mr E £20,000 in settlement of the matters of dispute discussed above between Mr E and EBS.

Philip Roberts
ombudsman