DRN-4595883

The complaint

Mr B complains that Elmfield Financial Planning Limited (Elmfield) unfairly charged him an initial fee of £5,168, despite him taking no business forward with it. He says that the fee was neither transparent nor clearly explained.

What happened

Mr B had a pension with a provider I'll refer to as provider T. I understand that he had been paying Elmfield an ongoing service charge of 1% of his pension.

In February 2022, Mr B wanted to explore the option of taking a lump sum under drawdown. So he asked his existing Elmfield adviser for advice.

I understand Mr B met with his adviser on 25 February 2022. Elmfield said that it verbally agreed a 3% Initial Fee and a 1% Ongoing Adviser Charge with Mr B at this time for the required work. Mr B said that Elmfield didn't explain the charges or how they would be paid. And that he hadn't agreed to any charges at this point.

Elmfield advised Mr B to transfer his pension to a drawdown pension with a provider I'll refer to as provider P. It felt that this would enable him to take his maximum tax-free cash under drawdown, without the need to also take an ongoing income from the plan.

Elmfield sent its Client Agreement (CA), which detailed its charges, to Mr B on 10 March 2022 by email. Mr B said he hadn't received the email as it had been sent to an old address. Elmfield said that Mr B called it on 15 March 2022 to discuss the fees with his adviser in more detail. It said that after that call, Mr B was comfortable with the fees. Mr B said that no one at Elmfield spoke to him about fees at this point.

Mr B said Elmfield called him about signing the CA. He signed it on 25 March 2022. He said he'd had to sign it in a hurry as he felt he was being pressurised. And that no one from Elmfield had gone through the key points or outlined the charges. Mr B said he felt he'd signed the CA without being fully informed.

Elmfield sent Mr B a suitability letter on 5 April 2022. This included details of its recommendation and also the proposed advice charges. The letter stated that Mr B would be charged £5,168 for the work carried out for the transfer.

Elmfield said that Mr B contacted it on 6 April 2022 with some queries about the charges. And that after that discussion, he'd been happy with the outcome. Mr B agreed that he'd called Elmfield to discuss the charges. But said that the 3% charge had only become evident when he received the suitability letter. And that the fees hadn't been explained to him earlier in the process. But he didn't agree that he'd been happy with Elmfield's response about the charges. He decided to put his transfer on hold.

I understand that on 21 April 2022, Elmfield called Mr B. He told it he had decided to put his plans on hold. And on 11 May 2022, Mr B called Elmfield about an alternative potential transfer which had no transfer fees and lower charges. His adviser called Mr B the following

day and said he would revisit some earlier forecasting work he'd done for Mr B, then arrange a meeting.

Mr B said he decided to use another adviser as he'd lost confidence in Elmfield. Elmfield said that provider T contacted it on 26 July 2022 to confirm that Mr B was removing it as his Servicing Agent on his pension.

Although Mr B didn't proceed with Elmfield's recommendation, Elmfield invoiced him on 27 July 2022 for £5,168, which was 3% of the fund value at the time of the advice. Elmfield felt this was the fee Mr B had agreed to for the work he'd instructed it to do when he'd signed its CA.

Mr B said he contacted Elmfield when he received the invoice to tell it he didn't accept that he owed this amount. Elmfield said that Mr B had called it on 28 July 2022 and that he'd accepted that he owed the amount.

Mr B wrote to Elmfield in early August 2022 to tell his adviser that he wouldn't pay the invoice. But when he received a further invoice later that month, he asked Elmfield for a final response letter. Elmfield told him he first needed to raise a formal complaint.

Mr B said he then received a further letter in September 2022 which said that if he didn't pay £5,168 by close of business on 15 September 2022, his case would be passed to a debt collection agency. Mr B said he then decided to pay £4,915.58, which was 3% of his fund value at the point of payment, but that he still didn't accept that he owed this fee.

Mr B raised a formal complaint to Elmfield on 12 September 2022.

Elmfield issued its final response to the complaint on 3 November 2022. It didn't think it'd done anything wrong. It said that it'd discussed the fee with Mr B on numerous occasions. And that he'd had the CA for at least two weeks before he signed it. It also said it'd carried out extensive work on Mr B's instruction.

Mr B totally refuted that the fees had been discussed and agreed with him several times. So he brought his complaint to this service.

Our investigator felt that the complaint should be upheld. He felt that there was no evidence that Mr B had been aware that he would have to pay a fee whether or not he proceeded with the recommendation. He acknowledged that Mr B had signed the CA. But felt that this hadn't made it clear that he would be liable for a fee regardless of whether he took business forward with Elmfield.

Our investigator felt that Elmfield should take the following steps to put things right:

- refund the £4,915.58 that Mr B paid. And pay interest at 8% simple from the date Mr B made the payment up to the date of the refund.

- pay Mr B £200 for the distress and inconvenience it'd caused.

Elmfield didn't agree with our investigator. It felt that his findings had been based on assumptions rather than facts. It said that it made all its clients aware that it wouldn't start work on a client file until the fees are agreed and CA signed. Elmfield also said that Mr B had queried the fees before the suitability letter had been issued, and that he'd been comfortable with them. It also felt that Mr B had been fully aware of fees before he'd signed the CA.

Elmfield noted specifically that Mr B had agreed to the 3% initial and 1% ongoing fees during

the 25 February 2022 meeting. And that the fees had also been confirmed and agreed during the 15 March 2022 phone call.

A new investigator considered Elmfield's points and issued his view on the complaint on 3 December 2023. He agreed with the first investigator that the wording in the CA didn't make it clear that a fee would be charged if Mr B decided not to go ahead with the advice. He also agreed with the recommended redress.

Elmfield didn't agree with our second investigator. It said it didn't undertake any work until a fee had been agreed. And felt that the investigator had ignored evidence which it felt made it clear that the fee had been agreed. It felt that Mr B should pay it for the work he'd asked it to undertake.

Elmfield provided back-office notes which it felt showed that the fee had been discussed and agreed on 25 February 2022 and on 15 March 2022. It also said that its software recordings on the CA it'd sent Mr B on 10 March 2022 showed that he had opened and viewed it the same day. It said it'd then re-sent the CA on 15 March 2022 from where it had been opened on the 15, 16, 20 and 24 March 2022, before it had been opened and signed on 25 March 2022.

Mr B said he hadn't ever been told that a fee would be charged if he didn't proceed with the transfer. He said he'd only found out about the fee when he received the suitability letter. He felt that the CA didn't require him to pay a fee if he didn't proceed with the advice. Mr B totally refuted most of what the back-office notes said and also queried why Elmfield were now claiming that his phone calls with it had been written down, when it hadn't presented these notes before. He felt they weren't credible evidence.

Mr B said that he didn't remember fees being mentioned during the 25 February 2022 meeting with Elmfield. He acknowledged that he'd had the CA for 15 days before signing it, but said that due to his personal circumstances at the time he had felt pressurised into signing it. Mr B also said that nothing in the CA stated that fees could be charged if a transfer didn't go ahead. He said that the CA stated that any fee would be based on the amount transferred or invested. And he hadn't transferred or invested anything, so no fee should be applicable.

Our second investigator considered the new information Elmfield and Mr B had provided and issued his second view on 17 January 2024. He still felt the complaint should be upheld. He didn't consider that the CA which Mr B signed had made it clear that a fee would be charged if he decided not to go ahead with the advice. He said that the agreement had clearly stated: "*These fees are based on a percentage of the amount you invest and/or transfer"*. So he felt that when Mr B had decided not to proceed with the transfer, the CA had implied that no fee would be charged.

Our investigator felt that the back-office notes Elmfield had provided had only one specific reference to a fee still being charged if Mr B didn't go ahead with the transfer – in the note of the conversation between him and his adviser dated 15 March 2022. He said there was no subsequent written confirmation by email or letter of this conversation. And noted that Mr B disputed that he was ever told that a fee would be charged if he decided not to proceed with the advice. He felt that without any written confirmation, it was impossible to know what was actually said in these conversations and how the basis of Elmfield's remuneration was set out. He also noted that the FCA's COBS rule stated that under COBS 6.1.9 that:

"*A firm must provide a client with information on costs and associated charges including, if applicable:*

(1) the total price to be paid by the client in connection with the designated investment or the designated investment business, including all related fees, commissions, charges and expenses, and all taxes payable via the firm or, if an exact price cannot be indicated, the basis for the calculation of the total price so that the client can verify it.

The commissions charged by the firm must be itemised separately in every case…"

And that COBS 6.1.13 stated the following about the "*Medium of disclosure*"

"*Except where expressly provided, a firm must provide the information required by this section in a durable medium or via a website (where it does not constitute a durable medium) where the website conditions are satisfied*."

Given the COBS rules, our investigator felt that Elmfield should've disclosed the fee it proposed to charge Mr B in a "*durable medium*." He didn't consider that a phone call would meet this requirement. Therefore, while he acknowledged that Elmfield had carried out a significant amount of work in preparing the suitability letter, he felt that Mr B should've been made aware of the fees that he would be charged in writing.

Elmfield didn't agree with our investigator. It felt that he'd simply accepted what Mr B had said. It also said that it hadn't provided the fee information in writing because it had discussed it with Mr B. Elmfield felt that Mr B should pay something for the work it'd done on his behalf. It wanted to come to a compromise on the fee.

As agreement couldn't be reached, the complaint has come to me for a review.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I'm going to uphold it, for largely the same reasons as both of our investigators. I'll explain the reasons for my decision.

I first considered what the CA said.

The Client Agreement

The CA stated that an initial consultation meeting would be conducted free of charge. It further stated that the CA would be discussed at this first meeting: "*to ensure all your questions are fully answered*." The CA also made it clear that work wouldn't start until it had been signed.

Section 3 of the CA covered: "*Paying for our services*". It stated:

"*We charge for our services by way of a fee. These fees are based on a percentage of the amount you invest and/or transfer. The fee can be paid either directly by you or deducted from your investment*."

The section then provided examples of the charges for specific amounts invested/transferred. These included the following:

"*If you provide a lump sum of £110,000 and opted to pay Elmfield Financial Planning Ltd from your investment, we will receive £3,300 which the provider would deduct before the remaining £106,700 is invested*."

The CA also included a section: "*Administration only*." This stated that Elmfield would charge £60 per hour for administration work. And that this charge would be confirmed with a consumer before any work was done.

Mr B said that he'd always understood that fees weren't applicable if he didn't go ahead with Elmfield's advice. He also said that his new advisers had reviewed the CA and made the following points:

- the CA covered Elmfield's hourly charges for administration only. And said that any charge under this category would be confirmed with a consumer before any work began. But Elmfield had never confirmed any expected cost to Mr B.

- The only other charges related to transfers. But the CA stated that fees would be based on a percentage of the amount invested and/or transferred. Mr B hadn't transferred or invested anything, so no fee was applicable under the terms of the CA.

Having carefully considered the CA, I agree with both of our investigators and Mr B and his new advisers that although the CA did explain the fees that Elmfield would charge for its work, it wasn't clear that those fees would be charged even if he didn't proceed with the advice. In fact, I'm satisfied that the wording suggested that no fee would be charged if no money was invested and/or transferred. I say this because of the wording I've including above under Section 3 of the CA: "*These fees are based on a percentage of the amount you invest and/ or transfer*." And because the example given in that section suggests that the fee would be deducted from the invested/transferred amount.

I also consider that the fee that was to be charged was significant. And therefore I would've expected it to have been set out in a completely clear way to Mr B before any work was undertaken. I've not seen any evidence that this happened. Therefore I agree with our second investigator that Elmfield was in breach of the COBS rules.

Elmfield said that Mr B was aware that a fee would be charged regardless of whether he went ahead with the advice or not. As I noted above, I'm not persuaded that the CA made this clear. But I've gone on to consider whether there's other clear evidence that Mr B was made fully aware of the charges before the work went ahead.

Is there evidence that Mr B was fully aware of the fees and when they would apply before signing the CA?

Elmfield has provided back-office notes to this service which it said showed that Mr B had been made aware of the charges before he signed the CA. These notes weren't used in Elmfield's final response to Mr B. Nor were they initially provided to this service when we asked for the business file.

From what I've seen, there are a number of points where Elmfield said that it verbally agreed the fee with Mr B. These are as follows:

During the 25 February 2022 meeting with his adviser. The notes recorded: "[*Adviser name] and [Mr B] have verbally agreed a 3% Initial Fee + 1% OAC to run a Drawdown File to Transfer Mr B's personal pension with [provider T] to [provider P], to release his Maximum Tax-Free Cash only*".

On 14 March 2022, when Elmfield called Mr B as he hadn't signed the CA. The notes recorded: "*He said he has not sent them back as he did not envisage paying a £3000 fee to take his monies*."

On 15 March 2022, when Mr B called Elmfield. The notes recorded: "*Mr B rang the office to discuss the fees in more detail – the outcome of that phone call was that Mr B was in agreement with the fees discussed at the initial meeting, which was 3% of Transfer value and not £3000.00 + 1% OAC*".

On 6 April 2022, when Mr B called Elmfield after receiving the suitability letter. The notes recorded that Mr B had: *"…some queries regarding the charges. Mr B spoke with [adviser name] and was happy with the outcome of the conversation/explanation*."

Mr B questioned the accuracy of these back-office notes. He said they included statements that were never mentioned or discussed.

Mr B provided his own recollections of what had happened, as follows.

Mr B said that during the initial meeting on 25 February 2022, the CA wasn't discussed, so he didn't have the opportunity to ensure that all his questions were fully answered, in line with the CA. He said he couldn't recall fees being mentioned.

Mr B said that Elmfield had called him on 14 March 2022 to ask him why he'd not signed the CA. He said that at that time he'd only glanced through the document. He said he'd told Elmfield he wasn't sure if he wanted to pursue the transfer. And that he'd questioned a fee of £3,300 which he'd read as an example in the CA.

Mr B said that on 15 March 2022 he'd had a brief call with his adviser as he wanted advice about if the timing of the transfer and taking a lump sum was advisable at this time. He said that his adviser told him he had to sign the CA. Mr B said that he was told that a fee of 3% would be charged, but that he'd misunderstood this to be £3,000. He said he hadn't verbally agreed to this. He said he'd signed the CA without fully understanding the fees and that no actual figure was given, so the fees weren't transparent.

Mr B said that it was only when he'd received the suitability letter on 6 April 2022 that he clearly understood that the fees would be £5,168. He also said this was the first time he'd been told what provider P would charge him in addition to this. Mr B said he called Elmfield to discuss and to explain that he wasn't happy with the fees. But that it didn't at this point tell him that he'd already incurred fees.

I can't know for certain what was said on the dates listed here as phone recordings aren't available. So I have to decide on the balance of probability what I think happened. From what I've seen, I'm not persuaded that Mr B was ever informed that the fees for the potential transfer would be payable regardless of whether or not he eventually transferred.

I say this because, even if I accept that fees were discussed during the 25 February 2022 meeting, and on the 15 March 2022 phone call, I can't reasonably say that the evidence shows that it was made clear to Mr B that the fee would be payable even if he didn't transfer. The 25 February 2022 meeting notes stated that the fee was for a transfer, not for the work behind that transfer. And the 15 March 2022 call notes stated that the fee was 3% of the transfer value. I consider that both of these explanations, assuming they were given at those times, don't explain that the 3% fee would be charged even if the transfer didn't go ahead. And when taken alongside the contents of the CA, I think it would've appeared to Mr B that the fees would only be taken if the transfer went ahead.

While I appreciate that Elmfield did do significant work on Mr B's behalf when looking into his potential transfer, I can't reasonably say that it made Mr B aware that it would charge a fee regardless of whether or not he went ahead with the transfer. The CA isn't clear that a charge would be made in any event. And there's no other compelling evidence that Mr B

was made fully aware of the fees he'd be charged and under what circumstances. Therefore I uphold the complaint.

I finally considered the distress and inconvenience Elmfield has caused Mr B.

Distress and inconvenience

Mr B said that this had caused him immense stress. And that he felt that Elmfield had let him down. He also said that he'd always felt he'd had to do his own research and then ask his Elmfield adviser, rather than him advise. Mr B said that the threat of debt collection and its consequences was very worrying.

I agree with our investigators that Elmfield should pay Mr B £200 for the distress and inconvenience caused by the letters threatening legal action.

Putting things right

I require Elmfield Financial Planning Limited to take the following steps to put things right:

- refund the £4,915.58 fee with simple interest at 8% each year from the date Mr B paid the fee up to the date of my final decision. The addition of simple interest is in recognition of the fact that Mr B has been deprived of the use of his own money for this period.

  If payment of compensation is not made within 28 days of Elmfield Financial Planning Limited receiving Mr B's acceptance of my final decision, interest must be added to the compensation at the rate of 8% per year simple from the date of my final decision to the date of payment.

  Income tax may be payable on any interest paid. If Elmfield Financial Planning Limited deducts income tax from the interest, it should tell Mr B how much has been taken off. Elmfield Financial Planning Limited should give Mr B a tax deduction certificate in respect of interest if he asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

- pay Mr B £200 for the distress and inconvenience the letters which threatened legal action caused him.

My final decision

For the reasons explained above, I uphold Mr B's complaint. I require Elmfield Financial Planning Limited to take the steps detailed in the "Putting things right" section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 27 March 2024.

Jo Occleshaw
Ombudsman