

Scottish Parliament Region: Mid Scotland and Fife

Case 200400906: Scottish Enterprise, Scottish Enterprise Tayside

Summary of Investigation

Category

Scottish Government and Devolved Administration - Enterprise Bodies

Overview

The complainant, Mr C, raised concerns that Scottish Enterprise Tayside (SET) failed to manage the installation of a computerised financial management system (FMS) and that they and Scottish Enterprise (SE) did not handle his subsequent complaints appropriately.

Specific complaints and conclusions

The complaints that have been investigated are that:

- (a) SET failed to properly manage the installation of a computerised FMS (*not upheld*); and
- (b) SET and SE failed to properly handle subsequent complaints to them (*not upheld*).

Redress and recommendations

The Ombudsman has no recommendations to make.

Main Investigation Report

Introduction

1. On 23 August 2004, Mr C submitted a complaint to the Ombudsman about Scottish Enterprise Tayside (SET) and Scottish Enterprise (SE). Two companies (Company 1 and Company 2) run by Mr C had been part of a pilot project aiming to test the suitability of a computerised financial management service (FMS) that could potentially be used by companies within the SET area to which they had provided financial support. Mr C alleged that SET's failure to properly manage the installation of the FMS led to huge problems in providing financial reports and ultimately damaged the viability of Company 2. He claimed that he lost a large amount of management time due to his focus being on sorting out the FMS problems and consequently lost customers and turnover.

2. Mr C also complained that SET and SE failed in their management of his complaints to them and as a result he had to resort to litigation, incurring major costs.

3. The complaints from Mr C which I have investigated are that:

- (a) SET failed to properly manage the installation of a computerised FMS;
- (b) SET and SE failed to properly handle subsequent complaints to them.

Background

4. Mr C bought a derelict historical building in 1989. He stated that the local council encouraged him to purchase the property and that there was an urgency because he was anxious to use a window of opportunity when the Army could undertake building works associated with the project. The family company managed by Mr C (Company 1) relocated to the building and Mr C's second company (Company 2) operated the building as a visitor centre.

5. Mr C had engaged a firm of consultants to assess the feasibility of a project to purchase and develop the building as a visitor attraction. These consultants reported that they did not consider the proposal to be viable. A contemporary file note of a telephone conversation between Mr C and the Scottish Development Agency (SDA) states that Mr C sacked his consultants and secured the services of other consultants to give advice on tourist numbers and spend per head. This second group suggested a reduced scheme which

was then appraised by a third firm, acting on behalf of the SDA, who made a formal offer of grant in March 1991.

6. In April 1993 SET approached Mr C explaining the details of a planned financial management project they were undertaking, and inviting him to take part in a feasibility study. The aim of the study was to refine how the project would be introduced and to see how it worked in practice. It was made clear to Mr C, that while SET believed that there would be clear benefits to Mr C's businesses from the project, he could withdraw at any time if he felt it was not meeting his needs. The project would include the use of a computerised FMS. Mr C accepted the invitation and participated in the pilot which ran from September 1993 until April 1994.

7. Mr C hoped to gain further grant assistance from SET, the successors of the SDA, for the development of the centre and also attract a major retailer to operate an outlet there. He was unsuccessful in this initiative and argued that this was due to his inability to provide appropriate financial information because of the inadequacy of the FMS. He claimed that this in turn was a direct result of the failure of SET to manage the installation. He believes that the FMS was not installed properly, the consultant (Consultant 1) engaged by SET to install it did not have adequate knowledge of the FMS, the FMS was suited to a much larger organisation and, therefore, unnecessarily complex, that it was not fully tested before completion of the pilot project and that it did not work properly. Mr C believes that the problems he encountered with the FMS were as a result of SET's failure to properly manage the project and their failure to adhere to their own code of best practice as set out in their Management Statement.

8. Mr C said that when he initially complained to SET about the lack of support and the failure of the FMS project, rather than handle the matter using their own complaints procedure or by engaging in Alternative Dispute Resolution (ADR), they put it in the hands of their insurers who involved their legal representatives. Mr C stated this gave him no option but to seek legal advice himself and to put the matter in the hands of his lawyers. According to Mr C, SET claimed there was no contract between them and Mr C regarding the FMS project so they had no contractual obligations towards him. Mr C disputed this and lodged a claim against SET in the Court of Session. Before doing so he had made a formal complaint to SE, which was investigated and on which they reported. Mr C had then complained to the External Complaints Adjudicator who was responsible for investigating complaints about SE and

their network of local enterprise companies at that time. When the claim was lodged the Adjudicator set the complaint aside until the outcome was known.

9. Mr C changed his solicitors several times and as a result the court hearing was delayed. Mr C ultimately accepted the advice of his solicitors that he would not be able to prove that there was a contract in place and so was unlikely to get a favourable outcome by continuing with court proceedings. He then agreed that no contract existed and dropped the action. Mr C maintained that if this result had been obtained through an internal complaints procedure or ADR he would have accepted it and he believed that he should not have had to go through an expensive and stressful legal process to get to this stage. Moreover, according to Mr C, SE and SET have, throughout the dispute, refused to meet with him, insisting that all matters were handled through the lawyers. This has proved very costly for Mr C who felt that if the complaint was resolved internally or even using ADR the cost to him would have been substantially lower. Mr C maintained that he had been further disadvantaged by one of the legal firms he had used having connections with SE and gave this as a reason why he had to change lawyers, which further increased his costs.

10. Mr C estimated that this whole matter has cost him between two and a half to three million pounds, and has had a significant negative effect on his health, his family relationships, and his businesses. He believed that this could have been avoided if litigation had not been initiated by SET or SE as their first course of action. Mr C stated that, while trying to keep up with the escalating costs of legal action, he was also attempting to get his businesses to recover from the problems caused by the failure of the FMS. Mr C is seeking to return to the position he would have been in had the events relating to his complaint not arisen. Complaints Investigators from the Scottish Public Services Ombudsman (SPSO) who met with Mr C informed him that if his complaint was upheld, the Ombudsman could look at reasonable out of pocket expenses and time and trouble payments, but that compensation claims are outwith our remit¹.

¹ In cases where a complaint is upheld and it is found that hardship or injustice is a consequence or maladministration or service failure, the Ombudsman will recommend that, wherever possible, the complainant should be restored to the position they would have been in if there had been no failure on the part of the authority. Financial losses need to be clearly demonstrated and, where appropriate, shown in audited accounts. Where a complainant is seeking a large sum in compensation, then the appropriate route for determination is through the Courts.

Investigation

11. When Mr C first approached the SPSO he was still pursuing the legal route. The office of the Ombudsman could not, therefore, become involved at that stage. If a contract had existed that would also have precluded the SPSO from looking at the complaint.

12. When Mr C dropped his intention to pursue redress through the courts, the complaint was technically time-barred in terms of the Scottish Public Services Ombudsman Act 2002, but as it had already been presented to the External Complaints Adjudicator and had been put on hold, it fell to the SPSO to consider. In these circumstances the decision was taken to exercise discretion in order to consider and then investigate his complaint.

13. The investigation of this complaint involved the review of a huge volume of documentation provided by Mr C including correspondence, reports, business plans and various policy and procedural documents of a number of organisations. These were not sorted when presented, nor was the evidence to support Mr C's case clearly marked. The Complaints Investigator involved spent several weeks sorting the material and gleaning from it the relevant information. He then made written enquiries of SE, who provided comments, background information and additional documentation on their involvement, and that of SET, in the matters raised by Mr C. The Complaints Investigator met with Mr C on three occasions and with his accountant once. In line with the practice of the SPSO a draft investigation report, inviting comments, was presented to Mr C and SE. Mr C felt unable to give notes in writing but provided substantial comments at two meetings and during several telephone conversations.

14. Throughout the investigation Mr C has continued to ask for yet more information to be considered. His view is that SET and SE have withheld relevant documents from him and the SPSO. They have, however, provided material to which Mr C was not entitled when he made his FOI requests.

15. Responsibility for redrafting the report in the light of the comments received was passed to me and I have taken them into account. While I have not included every detail investigated, I am satisfied that no matter of significance has been overlooked.

16. Mr C and SE were given an opportunity to comment on a draft of this report. Mr C engaged the services of both a consultant and his accountant to assist him in making his response, which was extensive.

(a) SET failed to properly manage the installation of a computerised FMS

17. The FMS was originated by a firm of business management consultants (Consultancy A). This scheme was developed as a programme that a local enterprise company could use to deliver added value services to small and medium enterprises.

18. SET had a concern about the quality of management accounts produced and used by some of the companies within their area and commissioned Consultancy A to undertake a FMS pilot project outlining the details of the terms for monitoring and reviewing progress on the programme. The commissioning of Consultancy A and the details of the contract between them and SET are not issues within the jurisdiction of the Ombudsman.

19. Consultancy A submitted a proposal to SET in February 1993 to pilot the FMS in a number of Tayside companies. The aim of the project was to test the FMS on different companies to see whether it would be suitable for more general use. This objective is outlined to Consultancy A in a letter from SET dated 16 February 1993:

'We intend to develop this project into a major new product for [SET] to offer to clients. We are, therefore, looking to this pilot to provide us with the necessary test bed information to enable us to define the scope of the programme and enable us how best to launch it across a wider front.'

The FMS went on to become a successful SET programme for a number of years.

20. SE stated that Consultancy A had completed several projects for their network of local enterprise companies and had developed a solid reputation. They added that the pilot FMS programme was to be delivered by Consultant 1 (a qualified chartered accountant) with prior experience of the successful implementation of several financial and management information systems for a variety of companies.

21. In April 1993 SET wrote to Mr C explaining the FMS project and the need to undertake a feasibility study by piloting the project with different types of

businesses in Tayside. Mr C was invited to participate by allowing his companies to be involved in the pilot.

22. It was explained to Mr C that the overall objective of the project was to enable businesses to better understand, control and report on their performance through the use of modern financial information systems and to manage their affairs more effectively and take appropriate action timeously.

23. Mr C was advised that, if during the course of the project it was not meeting his needs, he could decide to withdraw.

24. In June 1993 Consultant 1 carried out a review of Mr C's businesses to determine if it was appropriate to include them in the pilot. He expressed reservations about Mr C's ability to fulfil his role in the project, the lack of historic accounts for the companies and Mr C's reluctance to return telephone calls. Nonetheless he recommended that the companies were suitable for inclusion in the pilot FMS programme but that SET should point out most strongly to Mr C that he would be required to participate fully in the project. Mr C agreed to take part in the pilot.

25. Mr C claims that in reality he was not given much choice as to whether or not to go ahead, and that SET appeared to require FMS to be in place before further funding assistance from SET could be accessed. There is no evidence that this is the case.

26. The project ran from September 1993 until April 1994 with SET paying for Consultant 1's time and Mr C providing any hardware and software required.

27. The accounting software package to be used by both companies was agreed by Consultant 1 and Mr C on a value for money basis and this decision was reported to SET. It was a well known off-the-shelf product of which 20,000 copies had been sold.

28. Throughout the project, as part of the monitoring process, a number of status reports were produced by Consultant 1 on 30 September 1993, 26 November 1993, 25 February 1994 and 31 March 1994 and sent to SET.

29. These status reports, while indicating the progress of the project, also highlighted a number of problems that were encountered.

30. The 30 September 1993 report indicated that both Mr C's bookkeeper/administrator and his general manager had resigned.

31. The 26 November 1993 report noted that the office junior had left, although a new bookkeeper had been recruited, and a number of temporary staff had been taken on to input data.

32. It was also reported that at this stage Mr C and/or his accountants had not compiled the accounts for Companies 1 and 2 for the years ending May 1993 and June 1993 respectively. There were, therefore, no opening balances for either business and in the report it is stated that:

'[Mr C] is still fixed on the idea of keying data for last financial year for both companies, with a view to saving money on his accounting and audit fees.'

33. Consultant 1 reported that this exercise was secondary to the purpose of the FMS, but without clear opening balances for the current year, they would be unable to produce proper management accounts². Mr C stated that the decision to enter the data for the previous financial year was made jointly by him and Consultant 1 and that, even if it was his (Mr C's) decision, the other parties went along with it, whereas they should have known from their expertise that this course was foolhardy and stopped him. Consultant 1 highlighted his worry about the delay in entering data:

'we are concerned at the lack of progress in general transaction input, but recognise that [Mr C] has had staffing problems, together with manual records which are in a mess.'

34. During November 1993 Consultant 1 halted the project until such time as sufficient progress had been made on data entry for the current year.

35. The 25 February 1994 report to SET stated that no transaction input had been completed for Company 1 for the current year. Consultant 1 reported that all efforts had been devoted to entering historical data for the previous financial year and that it had been agreed to drop Company 1 from the project.³

² SE have informed me that the FMS could be installed without year end accounts but that without opening balances it would not be possible to produce proper management accounts.

³ In his report Consultant 2 states that the word 'drop' has been wrongly interpreted. According to SET's note, the intention was to concentrate on completing Company 2's input for 1993/94 after which Company 1 would catch up. He writes that it was anticipated that all data for both companies would be completed by about mid April.

36. The 31 March 1994 report to SET indicated that the project was continuing slowly with Company 2's accounting system being stable with data entered up to October 1993. The budgeting system was implemented and the framework of the budgets was completed. However, very little budget data had been entered.

37. In April 1994 Consultant 1 produced a project completion report which was agreed in draft with Mr C and discussed at a meeting on 14 April 1994 with Consultant 1, Mr C and SET present.

38. The project completion report stated:

'This report has been compiled as a result of a final meeting with the business manager [Mr C], where it has been agreed that the broad aims of the [FMS] will have been fulfilled, and that the business will derive substantial benefit from the project in the near future'.

The report continued:

'In his [Mr C]'s opinion, despite the set-backs experienced, the [FMS] has definitely been a worthwhile exercise which will show significant benefits in the near future'.

39. In summary the report listed what had been achieved for Company 2 and went on to state:

'We have not yet achieved the main aims of the [FMS] to provide quality regular management financial information, together with quality budgetary and cash forecasts. These should be achieved in the near future (within the next two – three months).'

The report then listed the outstanding tasks for both Companies 1 and 2.

40. On a copy of the project completion report, the official of SET who attended the meeting on 14 April 1994, annotated his notes of the meeting indicating that Mr C agreed with all summary points and indicating that remaining tasks such as the installation of the report generation function, could be supported by Consultant 1 at Mr C's cost.

41. Consultant 1 provided Mr C with an outline proposal, together with costings, which listed the tasks that remained to be completed and in which Consultant 1 could assist him.

42. On 28 June 1994 a meeting was arranged by Mr C with Consultant 1 and his accountant to discuss how Mr C should take forward the proposals outlined in Consultant 1's letter.

43. At this meeting it was noted that the current trial balance listing produced from the FMS was out of balance and did not match the system audit trail report.

44. Consultant 1 subsequently invoiced Mr C for this meeting and was paid.

45. Mr C arranged another meeting with Consultant 1, which he states took place on 12 August 1994, to assist with progressing the FMS. At this meeting Consultant 1 informed Mr C that he had now taken up a new job with another firm and that he would, therefore, no longer be able to continue with the project as outlined in his proposal letter. He left Mr C with the name, address and telephone number of another consultant who would be able to help.

46. Mr C did not contact this other consultant at that stage.

47. Both Mr C's companies operated manual financial accounting systems and these were continued throughout the FMS project.

48. During September or October 1994 the FMS suffered a number of serious hardware problems which resulted in a loss of data. This required the system to be restored and the data re-entered for at least one of Mr C's companies.

49. In the meantime a high street retailer expressed an interest in leasing a floor in the visitor centre. Heads of agreement had been sent by them to Mr C. This led to discussions between Mr C and SET about the further development of the centre. (The retailer subsequently decided not to lease space in the building.)

50. Initially Mr C was unable to provide any financial information about the performance to date or about future performance of the centre after the proposed development.

51. In order to progress this matter SET agreed to fund a review of the financial situation of both Mr C's companies and of the FMS. This review was carried out by Mr C's accountant.

52. The report of this review dated 20 December 1994 concluded:

'Financial systems installed under the [SET FMS] scheme are, in the main, satisfactory and pertinent to the needs of the business. However, there is no doubt that considerable teething problems arose and a great deal of bad luck over technical faults within the hardware caused [Mr C] to spend a disproportionate amount of his time on this subject, time which, he argues, could have been essentially spent building up the businesses.'

53. The report made two recommendations regarding the FMS:

'The report Generation Function has never been set up properly; and this requires urgent attention, to enable [Mr C] to produce monthly reports and accounts.

Supplementary training is required ... on how to use the output of the system, and understand it, ie to use it effectively, and efficiently, for decision-making.'

54. Subsequently SET agreed to part-fund the preparation of a business plan for the further development of the visitor centre. This was produced by Mr C's accountant and submitted to SET on 2 February 1995 with further information regarding proposed capital expenditure being received on 7 February.

55. Following a review of the information in the business plan the decision was made by SET that the project was not commercially viable. A letter to this effect was sent to Mr C on 10 February 1995.

56. After providing new information on the development of the centre Mr C was asked by SET to provide revised projections including monthly cash flow, profit and loss and balance sheet. It was also pointed out that if the proposal could be supported the SET contribution was unlikely to exceed 25% of eligible capital expenditure.

57. On 9 March 1995 the Chief Executive of SET sent a letter to Mr C detailing the issues which were still outstanding and needing to be resolved.

58. On 12 April 1995 the Chief Executive of SET sent a letter to Mr C turning down the request for financial support for the further development of the centre, due to the fact that Mr C had failed to provide some required information and based on Mr C's assumption that SET would give him a grant for the entire capital cost of the project. However, he indicated that SET might be prepared to consider the matter further if Mr C came back with evidence of other funding.

59. There is no indication that Mr C made further representations to SET on the development at this stage.

60. In June 1995 SET commissioned a consultant (Consultant 2) to review the FMS delivery in both of Mr C's companies. A supplementary brief was issued to identify areas where SET could have exercised greater control or influence to achieve a better outcome.

61. In his Summary and Conclusion Consultant 2 reported that:

'Whilst the project has not achieved the total objectives, the company is in no worse a position than it would have been had the service not been delivered.

Had the company not decided to process 92/93 [previous year] information in an attempt to save accounting costs, then it might have stood a better chance of having achieved more in the computer system for the financial year 93/94. My view is that the company took the decision to process 92/93 in spite of advice to the contrary.

Had the company engaged the services of [Consultant 1] directly in April,⁴ then the incident of the reliability of the trial balance ... was less likely to have occurred.

All parties involved became too absorbed with the implementation of the computer system rather than the production of management accounts.

[SET]'s role was that of project management. I [Consultant 2] find no evidence to suggest that SET did not exercise reasonable care over the management of this project.'

⁴ See paragraphs 40-46

62. Consultant 2 concluded his report by listing actions required to complete the FMS project.

63. In April 1996 SET received a report dated 31 March 1996 from Consultant 3 who had been commissioned by Mr C to review the FMS system within Mr C's companies. Consultant 3 was an expert on the software package used in the FMS system and had been recommended to Mr C by the software designers.

64. Although this report was compiled two years after the FMS pilot and Consultant 3 had no prior involvement he concluded that the problems with the FMS arose because of the way it was implemented.

65. Consultant 1 subsequently disputed the allegations made by Consultant 3 and explained his view of events in a response, dated February 1999, to a complaint lodged by Mr C against Consultant 1 with the Institute of Chartered Accountants of Scotland.

66. Consultant 1 claimed that any problems with the way the system was set up were as a result of changes, errors or technical problems which occurred after the completion of the pilot project and after his involvement in it.

67. During April 1996 SET received a proposal from Consultant 3 to carry out additional work on the FMS within Mr C's companies to rectify the problems.

68. On 10 April 1996 SET wrote to Mr C offering to provide funding for the additional work proposed by Consultant 3. The letter stated that the offer was made without any admission of liability on the part of SET. Mr C accepted the offer. Consultant 3's work on the FMS within Mr C's companies continued throughout 1996 and 1997, and on 9 May 1998 he wrote to SET stating that the work was completed and that Mr C's accountant was happy with the results.

69. Mr C was late in filing his end of year accounts for 1995 and 1996 with Companies House and he was fined as a result. After an appeal was refused he complained successfully to the Complaints Adjudicator for Companies House. He has stated that this is additional evidence to demonstrate the failure of the FMS. While the Complaints Adjudicator refers to the problem Mr C has had with the FMS, he makes no comment or judgement on it. His decision to

uphold the complaint was based on administrative failure on the part of Companies House Edinburgh. Additionally, in his report, he observed that Mr C had been fined for the late filing of reports in the years before the installation of the FMS and that:

'what has happened since 1992 might reflect an ill ordered company whose problems may have been made worse but which was inherently dilatory.'

70. The Complaints Adjudicator commented further that he did not understand why the company:

'did not take immediate steps to change its accounting systems. Such a step would have been common-sense for any prudent company ... For the company to have continued for as long as five years to feed vital accounting information into a system which it knew to be flawed seems to me to be most unsatisfactory.'

(a) Conclusion

71. Mr C had hoped to attract further assistance from SET and an additional company to base a retail outlet in the visitor centre. He argued that he failed to do so because he could not provide the necessary financial information. He claimed he could not supply the information because of difficulties with the FMS, and that these problems were caused by the failure of SET to properly manage the implementation.

72. Mr C was not given further public funding for the visitor centre by SET. The retail business that expressed an interest in locating an outlet there chose not to do so. Was this because Mr C could not provide management accounts and forward projections? These factors may have contributed to the decisions made, but SET included in their reasons their doubts over the viability of the centre even with addition of another retailer, and their own inability to provide the 100% capital funding requested by Mr C. The evidence does not support the contention that the lack of financial information was the only, or even primary cause, of the failure to attract further funding or another retailer to the centre.

73. Mr C also alleged that the difficulties caused by the FMS project had led to a downturn in his business.

74. Writing in 2000, his accountant stated that the FMS produced 'rubbish' and that there were additional costs in the remedial work and training required. He reported that he thought a synopsis of accounts for Company 1 from 1992 to 2000 would show a drop in sales, which when taking inflation into account, may amount to well over £1/4m in lost sales. He continued:

'Whether this can be attributed to the time [Mr C] spent rectifying the system or whether this can be attributed to the absence of [Mr C] from sales as a result of the work he was required to do in inputting and rectifying the system rather than a general trend for the ... industry or a change of marketing for example is another question.

'So far as [Company 2] is concerned, there has not been a change in the level of sales. They are consistently poor.'

75. Mr C's accountant, therefore, took the view that it was impossible to say to what extent, if any, the FMS had contributed to the problems experienced by the businesses and suggested that changes in marketing methods or a slump in the particular market could be the reason.

76. Was the FMS the reason why Mr C could not provide financial information when required? It was the duty of Mr C alone to keep management accounts for his companies. In the years before the implementation of the FMS, Mr C had failed to produce his accounts for Companies House on time (paragraph 69).

77. It is unfortunate that Mr C relied on the FMS that was being piloted with him rather than paper based accounts for not only the financial year during which the project was implemented, but the previous year as well. Despite the fact that the FMS could not deliver the information required, he continued to depend on it for financial management in the years immediately after the project.

78. While the FMS may have exacerbated the difficulties Mr C had in maintaining management accounts and producing financial projections, it cannot be held as the root cause.

79. That the FMS pilot project did not achieve all its aims in terms of Mr C's companies is not in dispute. This situation was reported by Consultant 1 and agreed by SET and Mr C in April 1994. The report by Mr C's accountant refers

to 'teething problems' and 'bad luck over technical faults' and to the outstanding tasks already acknowledged. Consultant 2 in his report argued that the 'company is in no worse a position than it would have been had the service not been delivered'. Following the report by Consultant 3, SET, without any admission of liability, funded him to carry out remedial work on the FMS which would assist Mr C in producing his accounts and provide him with the facility to provide forward projections.

80. Did SET fail to manage the implementation of the scheme? Responsibility for the management and execution of the project lay jointly with Mr C and SET. Through his complaint Mr C has argued that the fault for the failure lay with the way in which the project was managed by SET and Consultant 1. Independent reports commissioned by SET and SE referred to 'teething problems' in the system caused by a number of factors, including staff turnover in Mr C's companies. The report commissioned by Mr C was highly critical of Consultant 1. Consultant 1 was equally strong in rejecting the arguments. His argument that most of the faults outlined by Consultant 3 occurred after his involvement with the project is strengthened by the fact that they were not picked up in either of the earlier investigations by Mr C's accountant and Consultant 2. From the evidence available it cannot be shown that SET failed in their management of the implementation of the FMS.

81. The FMS project in which Mr C participated at the invitation of and with the support of SET was a test to see whether the system was suitable for businesses throughout the SET area. Given the caveat in the report to SET (paragraph 24) and the fact that there were no management accounts or closing balances for the previous financial year, one may question the wisdom of the SET decision to involve Mr C in the pilot. It was, however, a decision they were entitled to make and it was taken in the full knowledge of the concerns expressed.

82. Mr C had agreed to take part in a pilot project. No guarantee was given of suitability or success. Mr C and SET had an equal role in the management of the project and Mr C had the right to withdraw at any stage. At the conclusion of Consultant 1's agreed time with Mr C's companies, the implementation was incomplete, problems with the system were evident and the FMS could not produce the financial information required by Mr C. Where the fault for this lay is impossible to determine and in the event is not the crux of the matter. The terms of the project were clear to Mr C when he agreed to participate; it was a

test, a feasibility study, to see whether the FMS was suitable for companies in the SET area.

83. I conclude, therefore, that the lack of financial information alone cannot be blamed for the failure to attract funding or another company to the visitor centre. Neither can the FMS be seen as the sole cause for Mr C's failure to produce financial information or the downturn in business. Mr C agreed to take part in a pilot project to test the suitability of a particular FMS for businesses in the SET area. At the end of the agreed time for the implementation it was accepted by all parties that the work was not complete and that problems remained. Suggestions were made to Mr C for further action. The different conclusions of subsequent investigations demonstrate that it is not possible to apportion blame, even if to do so was appropriate. While there may have been a reasonable expectation, there was no assurance that the FMS would be suitable, nor that the project would achieve its objectives. In all the circumstances I do not uphold this complaint.

(b) SET and SE failed to properly handle subsequent complaints to them

84. Mr C did not secure additional financial assistance from SET for the further development of the visitor centre. He argued that this was as a result of his inability to provide the financial management information requested and cited the problems with the FMS as the cause. In response to oral requests from Mr C, and a letter from his accountant claiming compensation for work carried out as a result of the problems with the FMS, SET wrote to Mr C on 24 April 1998 asking him to specify his claim in writing so that they could take their lawyer's advice on this matter.

85. In May 1998 SET's Chairman wrote to Mr C stating that he had looked into this matter and was clear that SET had responded appropriately to his companies' problems.

86. On 9 June 1998 Mr C's solicitors, acting on behalf of his companies, wrote to SET's solicitors stating that they regarded SET to be in breach of contract. They referred to the calculation of losses involved as being particularly complex and asked that SET acknowledge and accept a claim and agree to a meeting to discuss the prospect of a settlement.

87. On 29 June 1998 SE wrote to Mr C sending him a copy of SET's complaints procedure and advising that in the first instance complaints should

be sent to the Chief Executive. Neither Mr C nor his solicitors submitted a complaint at that time.

88. In July 1998 Mr C's solicitors were advised that their claim for compensation, on behalf of Mr C, had been passed to SET's insurers.

89. In October 1998 solicitors, acting on behalf of SET's insurers, wrote to Mr C's solicitors stating that they did not accept that their client had a claim against SET. The reasons for this were set out in detail in the letter and included the assertion that there was no contract between SET and Mr C regarding the pilot project, that there was no guaranteed end result to the pilot project and that SET's role in the pilot was project management. The letter also stated that while Mr C had the opportunity to take advantage of the complaints procedure he had chosen not to do so.

90. In December 1998 Mr C made a formal complaint to SE. An official of SE met with Mr C and agreed a detailed statement of complaint. SE Audit investigated these complaints; the investigation included a meeting with Mr C.

91. SE Audit's report of their investigation, dated April 1999, stated that, with the exception of the identification of some areas of weakness regarding the FMS project which were not sufficient to constitute maladministration by SET, Mr C's complaints were unfounded. Audit Scotland considered this report and commented that:

'none of the issues raised in the internal audit report was, in itself, sufficiently important to justify further action at this stage.'

92. In April 1999 the Chief Executive of SE informed Mr C that he had not upheld his complaint and that, as all internal procedures had been exhausted, he referred him to the External Complaints Adjudicator, the appropriate body at that time.

93. In June 1999 Mr C wrote to the External Adjudicator listing 39 complaints against SET and SE.

94. In July 1999 Mr C lodged a claim against SET in the Court of Session.

95. In September 1999 the External Adjudicator notified Mr C that he had postponed his consideration of Mr C's complaint pending the outcome of the legal proceedings.

96. Mr C changed his solicitors several times, and consequently court hearings were postponed. Then in August 2004 Mr C, on the advice of his solicitors, withdrew from court proceedings and approached the SPSO to whom the functions of the External Adjudicator had been transferred by the Scottish Public Services Ombudsman Act 2002.

(b) Conclusion

97. The substance of this part of Mr C's complaint is that SET denied him their complaints procedure, which could have included ADR, and that SE also refused to reach a settlement through ADR, in particular a negotiated settlement or independent arbitration.

98. SET may not have treated Mr C's original concerns as a formal complaint, but I do not doubt that they took them seriously. They commissioned two separate reports, and after the report by Consultant 3 carried out remedial work on the FMS.

99. It was when Mr C then claimed compensation that SET asked him for a detailed claim and told him they would have to seek legal advice. They also pointed him in the direction of their complaints procedure.

100. SET are a public body and have a fiduciary duty to safeguard public funds. When Mr C submitted a detailed claim charging them with breach of contract and seeking compensation this was passed by SET to their insurers. This was the proper course of action. Solicitors acting for the insurers rejected the claim, but nonetheless encouraged Mr C to use the SE complaints process, which he did.

101. Mr C rejected the outcome of the SE investigation and went to the next stage of the process, the External Adjudicator. However, before the Adjudicator could carry out an investigation Mr C lodged a claim against SET in the Court of Session. Consequently the Adjudicator took the decision to suspend his consideration of all Mr C's complaints.

102. The key to this complaint lies in the difference between a complaint and a claim for compensation based on an alleged breach of contract. The suggestion by SET and SE that Mr C use their complaints processes to achieve resolution may have confused the boundaries between the two approaches. Mr C was, however, pursuing compensation and averring breach of contract. In these circumstances it would have been inappropriate for SET or SE to meet Mr C to negotiate a financial settlement.

103. Mr C alleged that SET and SE failed to handle his complaints properly and did not provide him with the opportunity for ADR or a negotiated settlement. I am satisfied that SET took Mr C's concerns seriously and acted on them and that SE completed an investigation, in line with their processes, in response to Mr C's complaint to them. It was Mr C who decided to lodge the claim in the Court of Session before the External Adjudicator had the opportunity to investigate and report.

104. Mr C takes the view that ADR was part of the SET/SE complaints processes and could and should have been offered to him. Neither complaints process mentions ADR. In October 2003 The Scottish Procurement Directorate provided advice to the Scottish procurement community on ADR. It is assistance in dealing with disputes between clients and suppliers in 'contract situations'. It states that, when contemplating ADR, it is important to obtain legal advice. The legal advice obtained by SE was that they were not liable and should not enter into negotiation with Mr C.

105. It is clear from the evidence as presented that it was Mr C's determination to pursue compensation that led to SET involving their insurers and lawyers. They had a duty to do so. Even if ADR had been part of their complaints processes, because liability was denied by SET and SE on the advice of their lawyers, neither ADR nor negotiation were appropriate routes for resolution. I, therefore, do not uphold the complaint.

24 October 2007

Explanation of abbreviations used

Mr C	The complainant
SET	Scottish Enterprise Tayside
SE	Scottish Enterprise
Company 1	The complainant's family business
Company 2	The complainant's company which operated the visitor centre
FMS	Financial management service
SDA	Scottish Development Agency
Consultant 1	Consultant who installed the computerised pilot financial management system in the complainant's companies
SPSO	Scottish Public Services Ombudsman
ADR	Alternative Dispute Resolution
Consultancy A	Firm of business management consultants who originated the pilot financial management system project
Consultant 2	Consultant commissioned by Scottish Enterprise Tayside to carry out review of financial management system in complainant's companies

Consultant 3

Consultant commissioned by the complainant to carry out review of financial management system