

complaint

Mr and Mrs A complain, in summary, that Baines & Ernst Limited, ("BEL"), didn't provide them with appropriate information when they entered into a debt management plan ("DMP") with it. The complaint is brought to this service on Mr and Mrs A's behalf by a claims management company ("CMC"). But for ease, I shall refer below to all actions being taken by Mr and Mrs A unless stated otherwise.

background

Mr and Mrs A entered into a DMP with BEL in February 2014. The main issues of their complaint are that BEL didn't tell them about fee free services and a Debt Arrangement Scheme ("DAS"). Nor did BEL refer them to a third party who could provide a DAS. They are also unhappy that they weren't told that fees would be payable, that interest and charges could continue to be charged and that their credit file could be affected.

our adjudicator's view

The adjudicator didn't recommend that the complaint should be upheld. She noted that BEL wasn't obliged to inform Mr and Mrs A about fee free services at the time the DMP was sold to them under the Office of Fair Trading's ("OFT") guidance. She also didn't think that a DMP sold prior to 1 April 2014 was subject to the Financial Conduct Authority's ("FCA") requirements in CONC 8.2.4(1). She was also satisfied that Mr and Mrs A were made aware that fees would be applicable. She'd listened to a recording of the initial set up call in which BEL's agent explained the monthly fee cost, annual review cost and the set-up fee cost. The call also covered information about interest and charges being frozen. But BEL also made it clear that this wasn't guaranteed. BEL also told Mr A that their credit files could be affected whilst on a DMP.

The CMC disagreed and responded to say, in summary, that BEL was obliged to comply with CONC 8.2.4(1) even though the DMP was sold prior to 1 April 2014. The CMC also said that BEL should have explained all available options to Mr and Mrs A under the OFT's guidance. It should also have explained the benefits and disadvantages of a DAS. It also failed to refer Mr and Mrs A to a third party who could provide a DAS as BEL was unable to do so. It said that a DAS was a more suitable solution for Mr and Mrs A than a DMP.

my provisional decision

After considering all the evidence, I issued a provisional decision on this complaint to Mr and Mrs A and to BEL on 1 February 2017. I summarise my findings:

As the evidence was incomplete, inconclusive, or contradictory, I reached my decision on the balance of probabilities – in other words, what I considered was most likely to have happened in light of the available evidence and the wider circumstances.

I noted that the CMC had asked to speak to the ombudsman dealing with the matter, but I didn't think this was necessary, as I believed I understood the issues involved in this case.

Referral to fee free services

I noted that the CMC believed that Mr and Mrs A should have been referred to free services. When Mr and Mrs A were sold the DMP, the OFT's Debt management (and credit repair services) guidance from March 2012 ("the 2012 Guidance") applied. The 2012 Guidance specifically said that a referral to free debt advice should be made where appropriate to do so (Clauses 2.5d and 3.23g of the 2012 Guidance). The 2012 Guidance said that this would be the case if there were priority debts and/or an immediate emergency, or if Mr and Mrs A didn't have enough disposable income to afford the fees and their monthly plan payments. I could see that Mr and Mrs A's monthly disposable income was assessed at £100, that Mr A was employed, and there didn't appear to be an immediate emergency or priority debts. I could also see that Mr and Mrs A were able to make most of their payments to BEL. Because of this, it appeared to me that the fees and monthly plan payments weren't unaffordable.

I noted the provisions of CONC 8.2.4 which came into effect on 1 April 2014. These said the availability of free debt advice services should be made in a debt management firm's "*first written or oral communication with the customer*". But in this case, I noted that Mr and Mrs A's DMP was set up and BEL had its first communication with Mr and Mrs A before the obligations in CONC 8.2.4 were introduced. So I didn't think that BEL had done anything wrong here.

Debt Arrangement Scheme

The CMC had referred to the requirements under the 2012 Guidance. It believed that in line with these, BEL should have referred Mr and Mrs A to a DAS as one of the debt management options available to them. It also said that BEL should have explained the disadvantages and advantages of a DAS. And it said that BEL had failed to refer Mr and Mrs A to a third party who could provide a DAS, as BEL was unable to do so.

I had listened to the initial sales call between BEL's agent and Mr A. BEL's agent did refer to other debt management options during the call, as well as a DMP. But, the agent had included as available options a debt relief order and an individual voluntary arrangement, both of which weren't available in Scotland where Mr and Mrs A lived. And so I could see that they weren't available options for Mr and Mrs A. BEL's agent had also referred to a protected trust deed which is available in Scotland. But he hadn't mentioned a DAS, which is an option available in Scotland.

I had seen BEL's DMP Review letter and documents sent to Mr and Mrs A on 15 September 2016 and I noted that these said that Mr and Mrs A were eligible for a DAS. So, I thought it was clear that a DAS would have been one of the available options for Mr and Mrs A.

The CMC had said that a DAS was more appropriate for Mr and Mrs A than a DMP as less fees would be payable under a DAS. I could see that this would be the case. I noted that the fees for a DAS are up to 10% of the payments made whereas Mr and Mrs A were paying initially £35, and then £38 as fees out of each £100 they paid. I noted that the 2012 Guidance said that debt management companies should be transparent about the full range of options potentially available to consumers, and the key benefits and actual or potential disadvantages associated with each option (2.5d). I didn't think BEL had acted in line with the 2012 Guidance, as it hadn't told Mr and Mrs A about a DAS and its benefits and disadvantages including lower fees. Clause 2.6 of the 2012 Guidance said that debt management companies should provide accurate information when dealing with consumers in the different jurisdictions of the UK due to the different debt management options available

in the different jurisdictions. I didn't think BEL had acted in line with this, as it had included options which weren't available in Mr and Mrs A's jurisdiction.

I had asked the adjudicator to ask BEL for its comments on the above and it said that it didn't offer a DAS as a debt solution itself, and that it wasn't obliged to offer every possible solution to clients. I agreed that every solution didn't need to be discussed, but I would have expected all solutions potentially available to a consumer to be discussed, whether or not the solution was offered by BEL. And I didn't think that BEL had acted appropriately in not raising a DAS as an option with Mr and Mrs A.

I had also asked for BEL to supply its review scripts to me. I had seen the review scripts for 2014, 2015 and 2016. I noted that BEL had tried to arrange annual reviews with Mr and Mrs A, and appointments were made but later cancelled or not followed through by Mr and Mrs A. I could see that the review scripts did include a product assessment section and a DAS was one of the products included in the assessment. But it wasn't clear from the script that the lower fees for a DAS would have been mentioned in any discussion of suitability. I also noted that BEL had sent a suitability report to Mr and Mrs A in September 2016, and whilst this contained a lot of information about a DAS, it didn't say that the fees for a DAS were substantially less than for a DMP with BEL. So, on balance, I didn't think that even if a review had been carried out with Mr and Mrs A, that the lower fees for a DAS would have been raised by BEL.

Having carefully considered the specific circumstances of this complaint, on balance, I thought that Mr and Mrs A would have chosen a DAS rather than a DMP at the point of sale and on review, if its advantages, including lower fees, had been explained to them. As a result I thought that they had suffered financial loss by paying more fees than they would have paid if they had entered into a DAS. I noted that the fees for a DAS are up to 10% of payments made. So, I thought that an appropriate compensation award in this case would be the amount of the fees paid by Mr and Mrs A for the DMP less 10% of the total payments made by Mr and Mrs A to BEL (to reflect the fees they would have paid for a DAS).

Subject to any further representations by Mr and Mrs A or BEL, my provisional decision was that I intended to uphold this complaint in part. In full and final settlement of it, I intended to order Baines & Ernst Limited to pay Mr and Mrs A compensation equal to the fees paid by Mr and Mrs A for the DMP less 10% of the total payments made by Mr and Mrs A to BEL. I also said that BEL must pay the compensation within 28 days of the date on which we told it Mr and Mrs A accepted my final decision. If it paid later than this it must also pay interest on the compensation from the date of my final decision to the date of payment at 8% a year simple.

BEL responded to say it was in agreement with my award save that the refund of the fees should be until September 2016 when Mr and Mrs A became aware that they were eligible for a DAS and chose not to pursue it.

The CMC responded to say that in a DAS, the fees payable would not be taken from the consumers' contribution. Instead, the consumers' debt would reduce by the amount paid and the creditors would absorb the fees taken by the DAS Administrator via providing an element of write-off. DRSP also said that if that methodology was to be used, then the deduction of the 10% shouldn't be made. The CMC also said that they believed that BEL should reduce the current debt balances to the level they would have been if the consumers had been on a DAS.

my findings

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

With regard to the fees for a DAS, I now understand that the creditor gets 90% of the debt and 10% is distributed (2% as application fee and 8% for payments distribution). But I also understand that there are some money advisers who may charge the debtor before they enter a DAS. And the difficulty is in knowing who the consumers would have sought advice from as BEL didn't offer this solution.

I also note what the CMC said about reducing the debt balances. But I don't agree with this, especially as Mr and Mrs A were later told about a DAS and didn't go down that line. And in any case the redress we provide is to refund fees and not put the consumers in a mythical position (unless there were to be very specific reasons for such an action).

I also note that BEL is happy to refund the fees to Mr and Mrs A from when their DMP began until September 2016. I think this is reasonable. Whilst the information BEL provided in September 2016 didn't refer to fees, I think that Mr and Mrs A could reasonably have sought more advice about the DAS at that time.

So, having considered the parties comments, I asked the adjudicator to tell the parties that I proposed to revise the outcome in my provisional decision so that BEL pay Mr and Mrs A compensation equal to the fees paid by Mr and Mrs A for the DMP from when their DMP began until September 2016, and to ask for their comments on this.

I haven't received any further comments from the parties on my revised outcome, but I'm satisfied that it's a fair resolution to this complaint.

my final decision

My decision is that I uphold this complaint in part. In full and final settlement of it, I order Baines & Ernst Limited to pay Mr and Mrs A compensation equal to the fees paid by Mr and Mrs A for the DMP from when their DMP began until September 2016.

BEL must pay the compensation within 28 days of the date on which we tell it Mr and Mrs A accept my final decision. If it pays later than this it must also pay interest on the compensation from the date of my final decision to the date of payment at 8% a year simple.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs A to accept or reject my decision before 10 April 2017.

Roslyn Rawson
ombudsman