complaint

Mrs and Mr D complain about the advice they were given by Pentagon (UK) Limited to enter into a debt management plan (DMP). They say it was not the most appropriate option for them and say they were not told that one of their creditors had obtained a county court judgment (CCJ) against them, which led to a charging order.

background

I issued a provisional decision on this complaint in May 2013. Whilst I did not agree with some of the concerns Mrs and Mr D raised, I did find, overall, that their complaint should be upheld. This was because I was not persuaded the DMP was appropriate for Mrs and Mr D in their particular circumstances in 2009. I was also not persuaded the IVA option was properly discussed with them. I recommended Pentagon refund all the DMP fees it charged Mrs and Mr D, with interest.

I also recommended Pentagon refund the costs incurred when one of Mrs and Mr D's creditors (which I will call 'Creditor 1") obtained a CCJ and later secured this against their home. I did this because I accepted there was a potential for this debt to have been included in any IVA process, had this been recommended in 2009. I did not, however, agree with Mrs and Mr D's request that Pentagon pay off the secured debt, because it was the subject of a court judgment and was also a debt they had always owed.

I also recommended Pentagon pay Mrs and Mr D £350 for distress and inconvenience.

Mrs and Mr D's response to my provisional findings

Mrs and Mr D accepted most of my findings. But they did not agree that Pentagon should only pay the legal costs of the CCJ and charge. They suggested it should instead pay off the portion of the secured debt that could have been written off if the debt had been included in the IVAs they are both now in. They also did not agree that any compensation should go into their IVAs.

As an alternative method of redress, Mrs and Mr D's IVA supervisor suggested Pentagon should pay off the secured debt and refund the payments Mrs and Mr D made to Creditor 1 towards that debt. The IVA supervisor said Pentagon could then ask to be listed as a creditor under the IVAs, and would be entitled to receive a share of each IVA contribution.

Pentagon's response to my provisional findings

Pentagon did not accept my provisional findings. It provided a large amount of further evidence and also legal opinion. References to submissions from Pentagon should be taken to include submissions made by its representative.

It would not be practical to set out the full content of Pentagon's further submissions here, but I take the following to be the major themes:

- Mrs and Mr D were not advised to enter a DMP. They were given information about various debt solutions and made their own informed choice to take the DMP.

- The paperwork from the meeting was completed in line with all proper procedures. The adviser was experienced, fully trained and subject to regular compliance checks. The

paperwork recorded that the adviser and Mrs and Mr D agreed that alternative debt solutions – including IVA – were explained, discussed and discounted.

- IVA was available to Pentagon clients through a network of insolvency partners. If Mrs and Mr D wanted to pursue IVA, or the adviser felt this was best for them, they would have been referred to one of those partners.

- IVA was not available to Mrs and Mr D in 2009. Mrs D's loss of income soon after they met with Pentagon meant an IVA would have failed as they would have had no disposable income.

- Creditor 1 was also known to have an anti-IVA stance in 2009 and, with more than 25% of the vote by value, would be likely to have voted against IVA. Pentagon cited a particular legal case as evidence of this.

- If not for the DMP Mrs and Mr D's creditors would have pursued them and possibly petitioned for bankruptcy. The DMP was their best option, as it protected them from their creditors (except Creditor 1) until such time as IVA became a viable option.

my findings

I have reconsidered all the available evidence and arguments, including what the parties have now said and provided in response to my provisional decision, to decide what is fair and reasonable in the circumstances.

was the DMP appropriate?

Firstly, I am not persuaded by Pentagon's submissions that it didn't give advice. Mrs and Mr D approached Pentagon for help with what was a substantial and long-standing joint debt problem. I think it's fair to say Pentagon was the expert in that relationship and that Mrs and Mr D would be likely to rely on what they were told. I am satisfied Pentagon did advise Mrs and Mr D to enter into the DMP. It is therefore responsible for the appropriateness of that recommendation.

Pentagon suggests the correct test here is not whether the DMP was appropriate, but whether Mrs and Mr D could have successfully proposed IVA (or interlocking IVAs) instead. However, the correct test here is first and foremost whether the DMP was in Mrs and Mr D's best interests.

I am not persuaded that advising Mrs and Mr D to enter into a DMP simply because it was the only available option (and I will set out why I am also not persuaded it *was* the only available option) amounts to the same thing as being in their best interests. Given Mrs and Mr D's circumstances, level of debt, high number of creditors, available disposable income and the length of time the DMP was projected to last (between 11 and 15 years) I'm not persuaded the DMP was in their best interests. I think that is particularly relevant where the DMP involved some quite substantial initial – as well as ongoing – fees.

was IVA an available option?

Pentagon puts forward two reasons why IVA would not have been possible in 2009. These are that:

- Mrs D's almost immediate loss of income meant they had no disposable income to pay to creditors so any IVA proposed at the time would have fallen at the first hurdle; and

- Creditor 1 had an anti-IVA stance and would have voted against any proposal made.

Mrs and Mr D's disposable income

Mrs and Mr D met with Pentagon in August 2009. They had over £41,000 of unsecured debt split between fifteen lines of credit, with £300 of monthly disposable income.

Pentagon suggests Mrs and Mr D asked for £6,800 of debt with their bank (which I will call 'Bank 1') to be excluded from the DMP. It suggests this would have had a further negative effect on their disposable income. However, that is not supported by the overall evidence.

The client financial planner does show Bank 1's two debts (an overdraft and a loan) as 'pending' and says *"pending until new bank (account) opened"*. Mrs and Mr D say they were told to leave these debts out of the DMP temporarily whilst they switched bank. This is supported by Pentagon's contact notes, which show that on 1 September 2009 the adviser told Pentagon Mrs and Mr D were no longer using Bank 1, so those debts could also now be acted on.

This is further supported by the debt management agreement which includes Bank 1's debts in the total debts and number of creditors to be acted on. This was used to calculate the initial instruction fee. And the initial assessment of the amount Mrs and Mr D could afford to contribute towards their DMP did not separately itemise the £250 of contractual payments they would have had to pay to Bank 1 if the intention was for those debts to be excluded from the DMP. I therefore find it likely that it was always intended for Pentagon to act on the debts with Bank 1 as well as the rest of Mrs and Mr D's unsecured debts.

I can see from the contact notes that Mrs and Mr D called Pentagon in February 2010 and asked to include two further debts, of around £800, in their DMP. But it seems these were the only debts Pentagon was not aware of when it first advised Mrs and Mr D and they were a relatively small addition to Mrs and Mr D's overall debt total.

By the end of September 2009 Mrs D had lost her job. So – on the figures – they went from a monthly surplus of around £300 to a deficit close to £300. Pentagon says Mrs and Mr D were able to make only nominal payments totalling £60 to their creditors between August 2009 and February 2010. It says this is evidence that Mrs and Mr D would not have been able to make any contributions to an IVA.

I noted Mrs D's loss of income in my provisional decision – because the overall effect was that it extended the proposed term of the DMP to fifteen years. I agree that, on paper, it appears Mrs and Mr D had nothing in the way of surplus income for an IVA (or, for that matter, the DMP). However, it seems the paperwork does not tell the whole story.

Mrs and Mr D agree that Mrs D lost her job in September 2009. But they say Pentagon's adviser visited them again soon after and completed a further statement of affairs which showed they still had a surplus income. They explain that this was because Mrs D had a modest weekly income from some part-time work. And they say Pentagon's adviser forgot to include Mr D's pension income in the August 2009 figures. They also say some of their expenditure figures were adjusted down.

Mr D's pension income (around £155) was recorded in Mrs and Mr D's 2011 interlocking IVA proposals – which also recorded that Mr D had been receiving that income for around three years. So it seems likely Mr D was receiving pension income in 2009. However, pension income was not shown in the August 2009 client financial planner.

Pentagon's contact notes show it did receive a revised statement of affairs in November 2009 – which supports what Mrs and Mr D now say. That statement of affairs seems to have shown a surplus income of £221 per month (plus a further £50 to pay Pentagon's monthly management fee). And Mrs and Mr D did pay those contributions from February 2010.

The contact notes also indicate that Mrs D later got another job. Although Pentagon didn't find out about this until July 2010 it seems this happened in around April 2010. Mr D's income had also increased somewhat in that period, with the effect that they were able to increase their DMP contributions to £326 (including the £50 management fee) from September 2010.

When exploring Mrs and Mr D's income position I also don't think I should disregard that they paid Pentagon's initial fee (£2,795) in instalments between August 2009 and February 2010. Mrs and Mr D argue that this could have been put towards IVA contributions instead; or used to make higher payments to Creditor 1 to forestall court action.

Overall, Pentagon's submissions about Mrs and Mr D's disposable income – or lack of it – are not borne out by the amount of money Mrs and Mr D actually paid to Pentagon. Nor do they seem to be supported by the content of Pentagon's own contact notes.

Of course the reality is that any IVA(s) recommended in 2009 would have taken time to arrange. It would have involved a period of information gathering, calculation, negotiation and (as necessary) re-negotiation with creditors. I find it likely that the changes to Mrs and Mr D's income – and the inclusion of around £800 of additional debt – could have been accommodated within that process. I am not persuaded it would be safe to conclude that those changes would have meant an IVA could not have been proposed.

would Creditor 1 have voted against an IVA?

Pentagon also cites case law as evidence that Creditor 1 (which held more than 25% of the debt by value) had an 'anti-IVA' stance in 2009. But, having looked at the cited case, it doesn't lead me to conclude that Creditor 1 would certainly have voted against IVA(s) for Mrs and Mr D.

I see clear distinctions between the circumstances of the undisclosed debtor in the cited case and Mrs and Mr D's circumstances. The debtor in that case was young, working, living with his parents and had a manageable number of creditors. He also had a reasonable level of disposable income compared to his total debts.

Creditor 1 explained to the court the criteria it used when deciding whether to vote for or against a protocol-compliant IVA. This included giving consideration to the level of debt owed to it compared to the person's total indebtedness and their disposable income.

Creditor 1 said it would vote against an IVA if a person had a minimal number of creditors and if an informal DMP directly between it and the debtor could be arranged and would last for less than 10 years.

Creditor 1 said it did not approve DMPs that would last for more than 10 years. It also said it would look at the debtor's age and circumstances, as well as how they had built up their debt, as secondary considerations. I note that Creditor 1 said it approved around 90% of IVA proposals it received (although that figure was disputed in court and no direct finding was reached on that point).

Mrs and Mr D were older than the debtor in the cited case and were at a very different point in their working lives. They had teenage children living at home. Given the size of their total level of debt against their disposable income – as well as their high number of creditors – it seems unlikely any informal DMP would be easy to achieve, or would last less than 10 years. And, despite both working, they had amassed sizeable debts by using credit to support their day to day living.

On the evidence Pentagon has offered I cannot safely conclude that Creditor 1 would have voted against IVA for Mrs and Mr D in 2009. I find Pentagon's submissions about that to be speculative and I am not persuaded by its arguments.

did Pentagon offer an IVA to Mrs and Mr D?

I said in my provisional decision that Mrs and Mr D's wishes shouldn't be ignored when advising them on possible debt solutions. Pentagon relies heavily on two ticked boxes in the application checklist as evidence that IVA was discussed with Mrs and Mr D and that they rejected that option. It also says, and has provided evidence, that it had started to offer IVAs through a network of partner businesses from 2007.

Whether or not Pentagon offered IVA in 2009, I again have to say I don't find its submissions persuasive. I think it is worth repeating what I said in my provisional decision about this:

"The application checklist indicates that IVAs were discussed by Pentagon's adviser. And Mrs and Mr D also say they specifically asked about this option. But what is much less clear is why Mrs and Mr D apparently chose not to take an IVA. There is no information or explanation in either the checklist or the financial planner to explain why an IVA was not appropriate for Mrs and Mr D, or why they did not want one. Whereas Mrs and Mr D say they were told it was not the right option for them and say they were given incorrect information about the impact an IVA might have on them as homeowners."

I can't see that anything Pentagon has now said sheds any more light on this, or should lead me to change my conclusions on this issue. Pentagon has still not offered what I consider to be a compelling explanation for why Mrs and Mr D would have chosen to disregard IVA as a debt solution. It suggests they may have done so because they did not like the idea their creditors would expect them to look into releasing equity from their property in year five.

However, Mrs and Mr D have said they were discouraged from IVA by being told it put their home 'at risk'. I find their submissions to be more persuasive.

Pentagon argues that Mrs and Mr D were looking for 'a breathing space' and that the DMP gave them protection from their creditors. It also says the DMP arguably facilitated Mrs and Mr D's successful IVA proposals in 2011, by removing Creditor 1 as a potential obstacle. However, again I think these statements are speculative.

Mrs and Mr D were in significant financial difficulty. It doesn't strike me that they were looking for a breathing space to cope with temporary financial upheaval. They had long-

standing debt problems and a limited timeframe to deal with those problems, with no expectation of any real improvement in their overall financial position.

It is also difficult to agree that the DMP really gave much protection to Mrs and Mr D. It did not stop Creditor 1 from taking legal action and wouldn't have stopped their other creditors from taking similar action had they wanted to. Although Pentagon suggests Mrs and Mr D's other creditors would have pushed them to bankruptcy it is hard to see where their appetite for this would have come from, or what they would be likely to have gained in real terms.

Pentagon recorded that the forced sale value of Mrs and Mr D's property was less than their outstanding mortgage. It also seems unlikely their property would immediately have been taken from them in bankruptcy, given the children living there. They seem to have had no other realisable assets to speak of.

Overall, I am not persuaded that Pentagon acted in Mrs and Mr D's best interests when it recommended a DMP. So I uphold their complaint.

the redress proposed in my provisional decision

Pentagon says it should not pay the costs of the CCJ and charge because Mrs and Mr D were made aware of the action Creditor 1 was taking but were unable to stop it. However, as I said in my provisional decision:

"Pentagon's contact notes indicate that it had several discussions with Mrs and/or Mr D about the CCJ and the charging order – as well as having discussions with the creditor concerned. I do think overall that Pentagon tried to help Mrs and Mr D with this issue – but it is also clear to me that Mrs and Mr D did not properly understand what was happening and what this meant for them. I think that could be said to be a failing on Pentagon's part if Mrs and Mr D did not clearly understand the nature and consequences of the action one of their creditors was taking against them.

Mrs and Mr D's primary concern is that, as this debt is now secured on their home, it cannot be included in their IVA. I do understand their concerns about this. It seems quite likely that, had Mrs and Mr D been advised to take an IVA in the first place, this debt could have formed part of that process. That cannot now happen and I'm afraid I cannot interfere with the court's judgment in that respect.

Mrs and Mr D suggest that Pentagon should pay off the judgement (over £8,000) and so satisfy the charging order. However, I am not persuaded that is appropriate in the circumstances. It is a fact that Mrs and Mr D always owed that money to that particular creditor and they still do, albeit that the nature of the debt has changed to some extent. I don't think it would be appropriate to direct Pentagon to pay off that debt for them. I do, however, think it would be appropriate for Pentagon to compensate Mrs and Mr D for the costs added to the debt as a result of the CCJ."

Again Pentagon's submissions have not persuaded me to change my view on this. I do think that Pentagon failed to properly explain the consequences of the action Creditor 1 was taking. I think there is enough justification for saying that, had it done so, and had Mrs and Mr D been advised to go for IVA instead of DMP, those costs might have been avoided.

I have also considered Mrs and Mr D (and their IVA supervisor's) submissions that Pentagon should now either pay off a proportion of the secured debt or should pay the whole secured

debt and join their creditors under the IVA(s). I am not persuaded either option is appropriate here although I do understand their frustration. Both proposals rely on the successful completion of the IVAs for their full term. Whilst I wish Mrs and Mr D every success, it is not certain that they will complete their IVAs. So it is not certain that they will have a portion of their debts written off in the future.

Given this uncertainty I am reluctant to require Pentagon to either pay off a portion of the secured debt, or take on liability for the whole debt, when it is not certain that any part of that debt will be written off in the future. Overall I consider the redress proposed in my provisional decision is proportionate and is a fair reflection of the actual loss Pentagon caused to Mrs and Mr D. I think anything beyond that would be stretching too far into the realms of speculation.

Finally, I have noted Pentagon's argument that it should pay no more than £100 for distress and inconvenience to Mrs and Mr D. However, in light of all of the above I remain of the view that £350 is an appropriate figure.

my final decision

My final decision is that I uphold this complaint and I direct Pentagon (UK) Limited to:

- refund all fees Mrs and Mr D paid to their DMP, including the initial and ongoing fees;
- add interest calculated at a gross rate of 8% per year simple to the above, from the date of payment to the date of this decision;
- refund £290 of costs relating to the CCJ and charge; and
- pay a further £350 for distress and inconvenience.

Mrs and Mr D's IVA supervisor has told this service that any award would need to go towards the IVA. Mrs and Mr D have questioned this and asked for my advice. However, I'm afraid I cannot advise them on the terms of their IVA. Mrs and Mr D will have to negotiate with their IVA supervisor directly if they are unhappy with this outcome.

Pentagon (UK) Limited must pay the compensation within 28 days of this final decision being accepted. If it does not, it must add interest to the settlement at the interest rate quoted above, to the date of final payment.

Details of the IVA supervisor can be found in the covering letter accompanying this decision.

Dawn Griffiths
ombudsman