

complaint

Mrs M has complained Baines & Ernst Limited mis-sold her a debt management plan in 2011. She'd been told her plan would last for 5 to 7 years but now realises at her current rate of repayment she won't be free of her debts for another 50 years.

background

Mrs M had more than £38,000 worth of debt and was looking for help out of this problem. She originally discussed debt solutions with Baines & Ernst (B&E) in February 2011.

A debt management plan (DMP) was set up. A letter dated 9 March 2011 confirms a repayment programme. At this time B&E estimated the minimum period to repay the creditors would be 380 months. This was contrary to what Mrs M believed.

At her annual review in 2012, her monthly payment was reduced from £138 to £93. This was all she could afford. Annual reviews were not carried out in 2013, 2014, 2015 or 2016. But during that period Mrs M contacted B&E a few times. She made it clear she thought her DMP was actually an Individual Voluntary Arrangement (IVA).as early as 2013. She got a letter from B&E in August 2013 confirming her debt arrangement was a DMP and not an IVA. They did say an IVA could be set up and they'd been trying to contact her.

Mrs M wonders why she would set up another IVA when she felt that's what she already had.

In 2016 after she felt her 'IVA' should have come to an end, she contacted B&E again. B&E sent Mrs M a final response in December 2016. This confirmed they didn't believe her DMP had been mis-sold to her. In 2011 Mrs M hadn't been willing to consider other debt solutions like bankruptcy or an IVA as she was a homeowner, paying a mortgage and didn't want to risk any equity remaining in her house.

Mrs M brought her complaint to the ombudsman service. Our adjudicator reviewed the evidence.

B&E's records show that:

- The first monthly payment of £138 was made to the DMP on 18 March 2011;
- 10 further payments were made up to 20 January 2012. A payment of £88 was made on 22 February 2012. Then, from 29 March 2012, 54 monthly payments of £93 were made until 1 September 2016;
- No further payments were then made to the DMP; and
- During this whole period, B&E's charges totalled £2,395. This amount was deducted from the payments made by Mrs M to B&E. The balance was distributed amongst Mrs M's creditors.

The records also show (amongst other things):

- A review of the DMP was carried out over the phone on 20 February 2012. Following this review, the monthly repayments were amended to £93;
- An internal note dated 13 May 2013 refers to Mrs M saying she thought her repayment programme was an IVA;

- The notes show irregular contact between Mrs M and B&E until August 2013 when B&E write to Mrs M explaining its position;
- In various telephone recordings between Mrs M and B&E it is clear Mrs M is made aware of the repayment period of the DMP (which had increased considerably from the initial estimated term of 380 months because of, mainly, the reduction in the monthly payment from £138 to £93). Mrs M is certain that she would never have agreed to enter into a repayment programme had she been made aware of the potential repayment term;
- B&E sent annual statements to Mrs M confirming the level of her outstanding debts. This statement also confirmed the period of time remaining for the DMP; and
- Her progress statement dated 30 September 2016 confirmed remaining debts stood at £34,827. She had 601 months (over 50 years) left to run before these were paid.

Our adjudicator felt a DMP may never have been the best solution to Mrs M's debt problems. Even at the beginning when Mrs M was 53 years old, 380 months was rather a long time for this to last. Whilst Mrs M may not have met B&E's criteria for an IVA in 2011, he felt B&E should have explored other debt providers with her. The length of her DMP was particularly relevant when her monthly payments decreased in March 2012. This resulted in a massive increase in its overall length.

However he felt Mrs M knew – from the letter dated August 2013 – she wasn't in an IVA but B&E missed numerous opportunities to assist her. It's clear she didn't want her existing DMP. Overall he recommended B&E refund all Mrs M's charges paid since March 2012 (£1,947), along with 8% simple interest.

Mrs M wanted to have her plan treated as if she'd been in an IVA for the length of time she'd paid her monthly amounts. She felt she should now be debt-free. She was also very concerned at the impact this was all having on her health as she felt she was now worse off than in 2011.

B&E also rejected our adjudicator's view. The case was sent to an ombudsman for consideration.

In July 2017 B&E entered into administration. Administrators have been appointed.

I completed a provisional decision on 21 August allowing both parties time to provide me with any new comments they wished to make. Neither party provided me with anything new. I am therefore able to complete my final decision.

my findings

I've re-considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. As no further evidence has been provided, I am mainly repeating here what was said in my provisional decision as my reasoning remains the same.

When someone approaches a debt solutions company to discuss their situation, it is reasonable to expect that company to give advice and information that's the most suitable for that person. B&E has suggested all types of solutions would have been discussed at the outset of discussions with Mrs M. A DMP was the best solution because her net disposable income at the time did not meet B&E's minimum criteria for an IVA. Also, Mrs M didn't want to risk the equity she held in her property.

But like our adjudicator, I told B&E early on in my consideration that the length of period of her DMP – even for 380 months as at the outset – could not be considered suitable. Just because Mrs M was willing to sign up to a DMP and was sent information confirming this length of time, doesn't mean this was ever suitable.

I suspect her debts were at such a level at this time, she was clearly desperate to get something sorted. Understandably she didn't want to give up the security of her home. But I see no reason to doubt her when she says she believed an arrangement would last 5 to 7 years. She's been extremely consistent on this point throughout her evidence to us. And B&E's own contact notes show this too. A recording of a telephone conversation from 24 July 2013 shows Mrs M referring to the fixed repayment of 5 to 7 years for an IVA whilst her term is much longer. So she is aware of the length of her debt period and clearly feels this was mis-sold.

Subsequent reductions in her monthly payment just compounded this problem. As I confirmed to B&E the regulator's view on the length of DMPs is that these should not generally exceed 15 years. I appreciate consumer credit regulation was different prior to 2014. But I'm looking at what is fair and reasonable. I'm not sure a DMP taking more than possibly the length of her life to complete – and Mrs M was in her mid-50s at the time – could be considered suitable.

So I believe this DMP was mis-sold. But what should B&E do to put things right?

I'm aware Mrs M's net disposable income didn't meet B&E's criteria for an IVA. Still I would have thought B&E should have mentioned there might have been other companies whose criteria would be different. But it's difficult to get round the fact B&E's notes from the initial set-up suggest Mrs M didn't want to risk the security of her home. However she may well have changed her opinion a year later if B&E had made it clear the ramifications of reducing her monthly payment.

It is apparent from B&E's notes from, at least, May 2013 that Mrs M thought she was originally in an IVA.

I accept B&E offered to discuss switching the repayment programme to an IVA. But I don't think Mrs M understood this. She felt she was already in an IVA, I think she was confused by these discussions. By setting up a new IVA (if this were possible), the time spent in the DMP would be duplicated and she would need to make more payments so she didn't feel this was what she wanted.

There's no doubt B&E could have been more proactive. I think once it became aware Mrs M was not happy with her DMP, it should have cancelled (or suspended) the arrangement. This might have caused problems with Mrs M's creditors but this could then have been covered in discussions between Mrs M and B&E or an alternative debt advice company.

when should B&E have become aware that this was a problem for Mrs M?

The evidence shows they knew about this in May 2013 when they had conversations with her. Resulting in their letter of August 2013. I think there was an opportunity to see there was a problem before this. This was the DMP review conversation which took place on 20 February 2012.

In this call, the B&E employee asks Mrs M whether her financial situation had changed. The discussion turns to the monthly repayments. The initial monthly payment of £138 had been reduced just prior to this review call. The B&E employee asks whether Mrs M can afford the reduced payments. She mentions that she is having difficulty and sometimes has to borrow from friends. However the B&E employee does not follow this up.

During the conversation Mrs M asks how a reduction will affect her creditors. She is told the payments will reduce. However, there is no mention that the repayment term will increase. The Management Plan – Progress Statement dated 21 February 2012 says the estimated number of months to complete the plan was now 751 months (62 years and 7 months). This doesn't seem fair or reasonable to me. I also note this information isn't placed prominently.

No further annual reviews were carried out after this time. B&E say Mrs M never responded to their letters. But I've seen nothing to show they understood what they were obliged to do. They are required to provide annual reviews and it's clear they didn't meet this commitment. Just sending one letter is not sufficient particularly when they knew the state of Mrs M's debts.

I can see Mrs M doesn't answer her phone to unknown callers. This is more than likely because the nature and number of her debts have led her to want to avoid being chased for payment. This is completely understandable. But there are other ways of getting in touch.

I'm sure Mrs M would have raised an objection about what was happening if the increase in her term had been pointed out to her. Even if she hadn't, I would have expected the sheer length of the estimated repayment period to have triggered concerns about the suitability of the DMP.

But in any case, as mentioned earlier I don't believe this DMP was ever suitable for Mrs M and therefore mis-sold to her.

what I think should happen now

Mrs M wants her debts to be treated as if she'd been in an IVA all that time. But this isn't possible and we can't recommend the debt being converted in that way. Nor do I know for sure whether a different company would have accepted Mrs M for an IVA and what the final outcome would have had on the equity on her house.

But I'm in no doubt all the management fees she paid B&E need to be repaid to her. They mis-sold her a debt solution which was never suitable to her. I also believe it's fair B&E pay her substantive compensation for the distress they've caused her. To a certain extent she's right. Mrs M is certainly not much better off now than she was six years ago when she first took out the DMP. I've considered this carefully. I've taken into account her personal situation and health. I believe the problems she's had with B&E have certainly exacerbated those.

I've balanced these considerations by noting Mrs M didn't respond to B&E's annual reviews. But I don't believe she should be penalised for being worried about her debts and, in all likelihood, being unable to cope.

There's not an exact matrix for deciding what's fair and reasonable in these circumstances. But I believe the impact on her has been severe. I therefore think B&E need to pay her £2,500 in compensation.

Mrs M knows B&E are in administration and the risk is she may not get any settlement at all. The administrators have told us there is little money available. But Mrs M should be considered as a creditor. I am completing the formal decision process allowed by the ombudsman service to maximise her chances of any final decision being settled by B&E's administrators.

my final decision

For the reasons I've given, my final decision is to uphold Mrs M's complaint. I'm instructing Baines & Ernst Limited to do the following to put things right:

- refund all the fees it has charged Mrs M from the beginning of her DMP, on 18 March 2011 until she stopped making payments to them in September 2016 (£2,395);
- pay 8% simple interest per year on those amounts from the dates Mrs M paid them until the date of settlement; and
- give Mrs M £2,500 as compensation for the trouble caused to her.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 23 October 2017.

Sandra Quinn
ombudsman