

The complaint

Mr B has complained that Moneywise Investments Plc (Moneywise), an insurance broker, failed to take out a before the event (BTE) legal expenses policy for him despite him paying extra for this when he took out his motor insurance policy.

What happened

I issued a provisional decision on this complaint in July this year. An extract from that decision follows:

“Mr B had taken out motor insurance through Moneywise at least between 2012 and 2017 and he believed he had paid extra for BTE cover in 2016. Mr B was involved in a motor accident in June 2016 and wanted to make a claim against the third party using his BTE cover. He contacted Moneywise who said he didn’t have BTE cover and referred him to a claims management company and to one of its panel solicitors to discuss the matter with them directly.

Moneywise said that Mr B didn’t return the documentation sent to him by the panel solicitors so they closed their file two months later. It said the panel solicitors heard nothing from Mr B until May 2019 when he emailed them asking them to take over his claim as he was unhappy with his solicitors. But the panel solicitors didn’t take the case on.

Mr B was unhappy to be told he had no BTE cover. He said he could remember discussing this with Moneywise at the time and that he had agreed to take it out and had been charged for it separately- so it should’ve been arranged.

Moneywise said it didn’t provide any insurance products at the time so it didn’t understand why Mr B believed he had BTE cover. It said it had renewed Mr B’s policy with his motor insurer, A, in January 2016 and his total premium came to £365.11. It said Mr B had been sent renewal terms from A saying the premium would be £385.11 which included a £20 administration charge and £20 for BTE cover. It said Mr B declined the BTE cover so Moneywise ultimately only charged him £20 for the administration charge in addition to the premium.

Mr B was unhappy and with Moneywise’s response and complained to us. He provided us with a copy of a policy certificate for BTE cover with a separate insurer, L, but L told us this was for a policy that lapsed in 2012.

Our investigator thought the complaint should be upheld. He said there was evidence that Mr B paid £385.11 in total. So BTE cover must have been included or Mr B was told would be included.

Moneywise didn’t agree and asked for an ombudsman’s decision.

What I’ve provisionally 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 considering upholding this complaint.

Was BTE cover sold to or taken out for Mr B in 2016?

Moneywise said Mr B decided against taking out BTE in 2016 and provided us with a handwritten note which purports to support this. But it also sent us a screenshot of its accounts system which shows that it charged Mr B £385.11 that year which included a £20 administration fee.

Moneywise provided us with a document of the legal expenses cover it says it provided to its customers in 2016- free of charge. From what I've seen this isn't an insurance policy but assistance to pursue a claim. This is essentially what Moneywise offered Mr B when he made his claim in 2016. This assistance means that a claims management company takes over and arranges for the claim to be referred to solicitors who then take out after the event legal expenses cover (ATE) along with a conditional fee or no win no fee agreement (CFA).

ATE cover costs substantially more than BTE, one of the reasons being that it is taken out specifically in order to make a claim. Whereas BTE is taken out before the event takes place, and may not be used during the period of cover. Since April 2013, the main difference between having a BTE and an ATE (with a CFA) in personal injury claims is that if the claimant/consumer is successful in their claim against the third party, they themselves are responsible for the ATE premium and the solicitors' success fee (if a CFA is also taken out post April 2013) though they receive a 10% uplift in their damages award to mitigate for this. Before April 2013 the ATE premium and success fee were recovered from the other side. So, before April 2013 having an ATE as opposed to a BTE didn't affect the claimant as much as it does now.

Mr B says he remembers that Moneywise specifically told him it was selling him BTE in 2016 and that this was provided by his motor insurance company. It's not possible to confirm if this conversation took place and what was discussed because Moneywise said its calls weren't recorded at the time.

From the little evidence available, it seems Mr B paid £20 extra which on balance I think was for BTE cover- especially since Moneywise said the legal assistance it provided in 2016 would've been provided for free. This is further supported by the fact that the renewal letter it had sent to Mr B said the £385.11 premium included a £20 charge for BTE. The letter also suggests that it was in fact selling a legal expenses insurance policy at the time. Bearing in mind Mr B had BTE previously, it's unlikely that he would not have wanted to take it out again. Even if, as Moneywise says, at the time it didn't sell BTE, unless it can provide evidence to show that it explained to Mr B that the legal assistance it was providing at the time wasn't an insurance policy, I think it is fair and reasonable to proceed on the basis that Mr B thought he was paying for BTE.

It is unclear whether Moneywise failed to set this up or believed it hadn't charged it but it supports Mr B's assertion that he paid for and took out BTE. On balance, I think Mr B paid for BTE and was under the impression that he had BTE- whether this was ultimately taken out or not. And I think this was down to Moneywise's actions so I think it's fair and reasonable that it compensates him for its failure to arrange this policy for him.

How should Moneywise compensate Mr B?

I now need to consider how Moneywise's actions put Mr B in a worse position than the one he would've been in if he had BTE in 2016.

Mr B provided us with an extract from a BTE policy which he says is the one he had taken out. The underwriter for that policy said that policy expired in 2012. So I don't think I can rely on that document.

My understanding from what Mr B told us is that after he decided not to proceed with Moneywise's panel solicitors he instructed other solicitors who acted for him on a CFA with an ATE. I understand that Mr B was unhappy with those solicitors and has since instructed other firms to represent him.

Mr B told us that if he had BTE all along he would've been able to choose his own solicitor (whereas Moneywise only offered him a panel firm) and that this would've meant his personal injury claim wouldn't have suffered. I understand that the claim is ongoing and has been issued in court.

I'm sorry to disappoint Mr B but even with a BTE policy he still wouldn't have been able to choose his own solicitors- at least not until court proceedings need to be started or unless there was a conflict. In any event I see that Mr B did choose his own solicitors but was unhappy with their work- I understand this happened with at least two firms. Based on this, I think not having BTE cover hasn't caused him any prejudice in this regard.

Mr B wrote to Moneywise's panel solicitors in 2019 asking them to pay his court issue fee which he said was £7,700. But I don't think Moneywise is responsible for this as this is something any ATE or a BTE provider would've covered, if not recoverable from the other side.

I understand Mr B had dis-instructed two of his former solicitors. I understand that they had taken out ATEs and CFAs and that their terms may stipulate that if he decides he no longer wants to pursue his legal claim he may be liable for their costs. If that is the case, I wouldn't expect Moneywise to pay for any additional costs Mr B may be liable for to his solicitors because I don't think these losses flow directly or at all from Moneywise's actions.

It follows that I think it's fair and reasonable that Moneywise puts Mr B back in the position he would've been had BTE been taken out for him. With the evidence available to me, the only prejudice I can envisage that Mr B suffered is having to take out ATE and pay for its premium and perhaps the solicitors' success fee. So if Mr B is able to provide evidence of those losses he may do so and ask Moneywise to reimburse him. And if he believes that Moneywise in failing to set up a BTE for him caused him any further losses he may raise those with Moneywise- but they have to flow directly from Moneywise's actions.

My provisional decision

For the reasons above I am considering upholding this complaint. Moneywise Investments Plc should reimburse Mr B for any losses that flow directly from it failing to take out BTE cover for him in 2016 subject to him providing evidence in support of those losses. These may include his ATE premium and any solicitors' success fee less the 10% uplift on the damages award. It must also pay 8% simple interest from the date those losses were incurred to the date it makes payment."

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've decided to uphold this complaint.

Firstly, I'd like to apologise to both parties for the delay in issuing this decision. And secondly, I understand that Mr B has been unwell and I wanted to say how sorry I was to hear that and that I wish him a full recovery.

The parties' responses to my provisional decision

Both parties responded to my provisional decision. Moneywise didn't agree with my decision and made a number of points including the following:

- It didn't agree that Mr B had paid for BTE in 2016. It attached a letter which it says is the renewal from A in 2016 which it says states that the premium was £365.11 including insurance premium tax.
- It also attached a further copy of its offer letter to Mr B which it says states that the total premium was £385.11 which included a documentation charge of £20. It said the £385.11 is repeated on the remittance slip at the bottom of the letter.
- It added that if Mr B wanted to take out BTE cover he would've had to pay a further £20 and that this would've brought the premium to a total of £405.11. It said this option was open to Mr B and detailed in the letter but he declined it. It said this was recorded on its office copy and added that it provided evidence that Mr B paid a total £385.11.
- It denies that it told Mr B at the time that it was selling him BTE which is what Mr B had told us.
- It said that I failed to take into consideration Mr B's actions which led to this complaint including the fact that he dis-instructed two former solicitors already.
- It said that Mr B decided not to take out BTE at the time for his own reasons but after being involved in a non-fault accident decided to create a fictitious account of events which contradicts the factual information provided by Moneywise.
- It said it's not within my remit to comment on the actions of solicitors and also that unless I am able to satisfy myself without any reasonable doubt that Mr B was sold BTE by Moneywise I am obliged to reverse my provisional decision.

Mr B also responded to my provisional decision and provided a number of documents in relation to his legal claim. He repeated that Moneywise had told him that it was selling him BTE at the time. He said had that been the case he would've been able to instruct a solicitor of his choice to deal with his claims and not the solicitors he did end up instructing who are now pursuing him for unpaid fees. And he would also not have had to pay a 25% success fee or an ATE premium. He said Moneywise never sent him details of his BTE despite him asking it to do so and that when it did, he was referred to a claims management company who presented him with confusing conditions. He said he now has bailiffs chasing him for outstanding legal fees.

Mr B also said he has been ill and has been unable to work and will be claiming everything he lost financially from Moneywise.

My response to Moneywise

Before I issued my final decision I went back to Moneywise with the following comments: Moneywise says that the letter it attached to its response to my provisional decision shows that Mr B didn't pay for BTE in 2016. The letter it provided alongside the renewal notice from A says: "*We have pleasure in reminding you that the above policy expires on 24/1/2016 and to maintain your cover we would ask that the renewal premium of £385.11 be paid on or*

before the expiry date...The above premium includes a £40.00 Charge. This Includes £20 Documentation Charge & £20 Legal Expenses premium..."

This letter was sent to us previously as part of Moneywise's file. However, in the copy that Moneywise has now sent us the words "*The above premium*", "*a £40 charge*" and "*£20 Legal Expenses Premium*" are crossed out by hand. Both versions of the letter have a handwritten note which says "*client paid only £20 No legal cover taken*". Moneywise had previously told us that the letter that was sent to Mr B had the words that said that the premium included a £20 LEI premium crossed out by hand. So Moneywise says that the premium was £365.11 without BTE cover plus the £20 administrative charge. Moneywise now says that if Mr B wanted BTE he would've paid £405.11 in total.

Moneywise said the premium was £365.11 and didn't include LEI cover. This isn't clear from reading the letter so I asked Moneywise to point to me to the part of the letter which says the basic premium is £365.11. Also the handwritten note says "*client paid only £20 No legal cover taken*". Yet Mr B still paid £385.11. So from reading the letter it appears that the price for the policy was the same whether there was BTE included or not. I appreciate Moneywise now says the premium including BTE would've been £405.11 but this isn't what the renewal letter says. And I haven't seen this in any part of Moneywise's file either.

Even if the words relating to the BTE had been crossed out from the letter sent to Mr B at the time it's not clear to me why Mr B would agree to pay £385.11 despite, according to Moneywise, making it clear he didn't want to pay the extra £20 to take out BTE cover. I would have expected Mr B to have queried the fact that his premium had stayed the same despite not opting for the BTE cover. But there is nothing on Moneywise's file to say that he did. And as I said above there isn't anything in the file to say that the total premium was in fact £405.11.

Even if the total premium with the BTE was £405.11 as Moneywise now says there isn't anything on its file to say this. And, from what I've seen, Moneywise never wrote to Mr B to clarify this and instead relied on a letter that it crossed some words out from by hand and which it didn't keep a copy of. I appreciate Moneywise has now provided a copy of the letter with the relevant words crossed out but I assume this was done later on as I would have expected this to have been in its original file otherwise which isn't the case.

From what I've seen Mr B paid £385.11 in total so I agree with Moneywise in that sense. But the letter doesn't say the total premium would've been £405.11 with BTE. I said if Moneywise was referring to another letter it should provide me with a copy along with an explanation why this wasn't in its original file.

I can see from the document that Moneywise says is the renewal offer from A that the premium was £365.11. But I don't think this shows that this doesn't include BTE. Also, more importantly the letter that was sent to Mr B says that the £385.11 total premium included a £20 admin fee and a £20 BTE premium. The letter therefore suggests the premium was £345.11. Even if Moneywise had crossed those words out this doesn't explain why the letter would still say the total premium was £385.11 and why Moneywise didn't also cross this out and replaced it with £405.11 so that it was clear to Mr B that he wasn't paying for BTE. And I still don't think it's clear why the letter would suggest that the premium is the same with BTE or without it. Whether it included BTE or not the impression it would've given Mr B would've been that he had BTE.

Moneywise says that it didn't tell Mr B at the time that it was selling him BTE. And it says that this is something that Mr B has made up since. Where each party has a different version of events from the other I look at all other evidence that has been presented to me in order to decide whose evidence I find carries more weight and who I think has a better recollection of

events. Moneywise says I need to decide beyond reasonable doubt that BTE was sold to Mr B if that's what I am going to decide. But this isn't correct- I need to decide this on the balance of probabilities, which is a lower bar.

So, to recap, I told Moneywise that the evidence I had was a letter that says that the total premium was £385.11 including BTE and documents that showed that Mr B paid £385.11. Moneywise says it crossed the words referring to BTE out in the letter it sent to Mr B. I have seen no evidence of this other than what it has told me. If it did so then it's not clear to me why it didn't also cross out the part that said the total premium was £385.11 if that was also incorrect bearing in mind it now says the total premium with the BTE was £405.11 and not £385.11 after all. And I also said that if Mr B didn't want BTE I would've expected him to query the fact that he was being charged £385.11 regardless of the fact that he didn't want to pay the additional £20 for BTE bearing in mind the letter he was sent said the total was £385.11 with BTE. This evidence leads me to believe that at the very least Mr B was given the impression that he was paying for BTE even if that wasn't the case.

I

n terms of my remit regarding solicitors, I told Moneywise that I have not made any findings about the actions of any of the solicitors. Nevertheless, I am able to refer to what happened as far as it involves the solicitors and I am also able to comment on the law and legal process and to take it into account. In this case I am explaining the effect that taking out an ATE post 2013 has on a consumer as opposed to having a BTE. This is within my remit.

Moneywise responded and reiterated some of its earlier points in support of the fact that it believes it never sold Mr B BTE cover and said that when it contacted Mr B in 2016 and discussed BTE cover with him he didn't require it. But is also accepted that its letter to Mr B when he took his policy out in 2016 could have been clearer. It offered, without admitting fault but as a goodwill gesture, to fund the cost of the first ATE policy Mr B took out subject to him providing evidence in support.

We put this offer to Mr B but he declined it and said he still wanted an ombudsman's decision.

For the reasons I gave to Moneywise above and in my provisional decision, on balance, I think Mr B was sold or was under the impression he was sold BTE cover in 2016.

Mr B's comments

As I said in my provisional decision I don't think Mr B would've been able to choose his own solicitor at the start, unless there was a conflict or proceedings were imminent. So, I don't think Moneywise's actions prejudiced him in that sense.

I appreciate that Mr B feels Moneywise is to blame for all his losses that relate to his legal claims including his legal fees. As I said in my provisional decision I don't think that's the case. This is because when he went to Moneywise about his legal claim it referred him to its panel solicitors without delay. It was his decision not to proceed through those solicitors which led him to instructing two other firms which he later dis-instructed. Again these were his own choices and not the result of something Moneywise did. As I said in my provisional decision all that I think Moneywise is responsible for is any success fee and ATE premium Mr B may have to pay if his claim is successful and upon it being settled less any 10% uplift he gets on his damages. This is because, as far as I can see, these are the only expenses he would've avoided if he'd had BTE cover from the start. And I said I expect Moneywise to pay these fees/expenses upon him providing evidence that he has incurred them and that they were as a direct result of him not having BTE cover.

I note Moneywise has offered to pay for one ATE premium. I appreciate the reason it may have specified that it would only pay for one is because Mr B may have taken out further policies when he changed solicitors. If that is the case I wouldn't expect Moneywise to pay for further ATE premiums as a result of Mr B's decision to change solicitors. As I said in my provisional decision I only expect Moneywise to pay for losses that flow directly from its failure to sell Mr B BTE cover in 2016 which would have covered him for his accident. And as I said on the evidence available to me at this stage this would include an ATE premium and success fee less any uplift.

In my provisional decision I said Moneywise should pay interest on those losses from the date they were incurred. By that I meant from the date Mr B had to pay them. I have clarified this in my decision below.

My final decision

For the reasons above I am upholding this complaint. Moneywise Investments Plc should reimburse Mr B for any losses that flow directly from it failing to take out BTE cover for him in 2016 subject to him providing evidence in support of those losses. These may include his ATE premium and any solicitors' success fee less the 10% uplift on the damages award. It must also pay 8% simple interest on the amount it pays out from the date those losses were incurred (i.e. when Mr B had to pay them) to the date it makes payment.

If Moneywise Investments Plc considers that it's required by HM Revenue & Customs to withhold income tax from that interest, it should tell Mr B how much it's taken off. It should also give Mr B a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 13 January 2021.

Anastasia Serdari
Ombudsman