

## **complaint**

Miss H has complained that Be Wiser Insurance Services Ltd mis-sold her a legal expenses policy alongside her motor insurance one.

## **background**

I issued a provisional decision on this complaint earlier this month. An extract follows:

*"Miss H took out a motor insurance policy through Be Wiser in 2013. Be Wiser is a broker so it's responsible for selling the policy but it's separate to the insurer. The documents Be Wiser sent Miss H said she had "free legal protection".*

*In 2014 Miss H was involved in a road traffic accident. She wanted to claim for personal injury and other losses that weren't covered under her motor policy. She got in touch with the legal protection provider who put her through to a solicitor. The solicitor agreed to act for her on a "no win no fee" basis and also took out an after-the-event (ATE) legal expenses policy on Miss H's behalf. In the event that she lost she may have been responsible for the other side's costs or her own solicitors' disbursements- so the ATE was there to cover those costs.*

*Miss H won her legal claim and was awarded around £6,500 in total for her injuries and her losses. Miss H said her solicitors kept around £2,200 for their costs and her pre-medical expenses. Miss H wasn't happy with this. She said when Be Wiser sold her policy to her it told her it was free and that there would be no deductions if she claimed.*

*Be Wiser didn't agree. It said the terms of the legal protection said that there would be a deduction of up to 25% from any damages the insured was awarded. It also said Miss H signed the "no win no fee" agreement and agreed to the ATE at the time. She only complained when her legal claim came to an end.*

*Miss H wasn't happy with Be Wiser's response and she also said its service has been poor. So she complained to us. She said she wanted Be Wiser to refund all the deductions that were made from her damages. One of our adjudicators looked at the complaint and thought it should be upheld. He didn't think the documentation Be Wiser had provided clearly stated that there would be deductions from any damages. Be Wiser hadn't recorded the sales call but it provided its sales script. Our adjudicator didn't think the script made it clear there would be deductions either.*

*Be Wiser didn't agree it had mis-sold the policy so it asked for an ombudsman's decision. It said it's not required to record calls and this shouldn't count against it. It said the legal assistance was provided free of charge and may not have been discussed in detail in the sales call. It said even if Miss H had asked during the sales call whether there would be any deductions in her damages she would've been referred to the key facts of the legal assistance which say there will be up to a 25% reduction. And the documentation hasn't changed since Miss H was sold the legal assistance. Be Wiser also said if Miss H hadn't received the relevant documents when she took out the policy or had trouble accessing them she could've queried this with it. And though Miss H said she did this Be Wiser said it has no record of this.*

### **my provisional findings**

*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 it.*

#### *the mis-sale*

*Miss H took out a motor insurance policy with Be Wiser. Be Wiser sent her a document with details of the cover she'd taken out. The documents said she also had "free legal protection".*

*From the documents Be Wiser has provided it appears that the "free legal protection" Miss H was provided with wasn't a legal expenses insurance policy. It was legal assistance provided by a claims management company (CMC). Under this agreement the CMC provides assistance with recovering uninsured losses, with arranging a credit hire car etc. And it's only available to Miss H in case she's involved in a non-fault accident.*

*This product is quite different to a legal expenses policy which broadly provides cover for legal costs and disbursements in claims which have 51% and over chances of succeeding. There are generally two types of legal expenses insurance policies; before-the event (BTE) and after-the event (ATE). BTE policies are significantly cheaper and are generally taken out alongside other insurance policies and can be used in the event of a legal claim- but where the cause of that claim hasn't arisen yet. ATE policies are more expensive and are only taken out after the event that leads to a legal claim has taken place. BTEs are cheaper because they may never be used whereas with ATEs policyholders are certain to make a legal claim.*

*In 2013- before Miss H took out her motor insurance policy- there was a change in the law with regards to ATEs. This included the fact that, in personal injury claims, the ATE premium was no longer recoverable from the defendant in the legal proceedings. And the same applied to the success fee charged by solicitors who take on cases on a "no win no fee" basis. After April 2013 these costs are generally borne by the claimant- and deducted from their damages. These deductions don't apply to claimants who use their BTE cover. So the difference between having an ATE and BTE may be quite significant to claimants.*

*Though the legal assistance Be Wiser provided isn't an insured product and so not something that I can look at, I can look at whether or not it was fair for Be Wiser, as a broker, to provide Miss H with this product and not to have discussed or offered her a BTE motor legal insurance cover.*

*In its key facts document Be Wiser says:*

*"After a fair analysis of the market we will advise and make recommendations whilst considering your demands and needs for these products".*

*When Miss H took out her motor insurance policy she said she told Be Wiser legal cover was important to her. We don't have the sales call but as far as I understand Be Wiser doesn't dispute this. Miss H says Be Wiser told her she had free legal cover which Be Wiser denies. But her policy documents also say she had "free legal protection" so, on balance, I think that Miss H was given the impression by Be Wiser and the documentation it provided to her that she had a legal expenses insurance policy.*

*Those selling insurance have an obligation to make clear what they are selling to those taking out the policy so that they can make an informed choice. And when they recommend policies to them they have to make sure they suit their needs.*

*In this case Miss H said legal cover was important to her. But even if she hadn't said this I think Be Wiser, as the broker who was recommending motor insurance cover to her, should've either recommended a BTE policy to her-as it was after the April 2013 legal changes- or made it clear to her that the "free legal protection" she had wasn't an insurance policy. And that if she came to use this "free legal protection"- which she did- she would have to take out an ATE. And it should've also made it clear that this would cost more and that she'd have to pay 25% of her damages to her solicitors. I don't think it did this and as I said above I think its documentation which says it provides "free legal protection" is misleading.*

*Be Wiser said there's no mis-sale as the product is free of charge. And because Miss H agreed to sign the "no win no fee" agreement and take out an ATE. But policyholders aren't necessarily very familiar with insurance products or with the difference between an ATE and a BTE. The sales script Be Wiser provided in relation to the legal assistance says that if Miss H is involved in an accident she must get in touch with the CMC direct. I think this creates the impression that the policyholder must use this product. And the consequences of using this product are- in non-fault accidents- that the policyholder will be referred to a solicitor who will act for them on a "no-win-no-fee" basis and take out an ATE on their behalf.*

*So I think Be Wiser failed to advise Miss H properly when it sold her her motor insurance policy. And had it advised her properly about her legal expenses options, and that the "free legal protection" wasn't in fact an insurance policy, I think she would've chosen to pay extra and taken out a BTE. The cost of such an add-on to a motor policy is usually relatively low and I think most people would opt to take it, rather than not having insurance and risk having to later take out an ATE which would be more expensive and which would result in a reduction of their damages. For this reason I think Be Wiser should be responsible for the deductions in Miss H's damages.*

*I asked Be Wiser why it didn't sell Miss H a BTE policy. It told me it wouldn't have had access to a stand-alone BTE policy to sell to Miss H as an add-on. From what I've seen, Miss H's motor insurer would've been able to sell her BTE cover as an add-on if she'd taken out the motor policy directly from that insurer. And the same applies to other insurers whose motor policies are sold by Be Wiser. So it seems it is Be Wiser's choice not to provide this and to provide legal assistance instead. In these circumstances I think it should make it clear to its customers that they may be better off taking out a BTE which is something it can't provide them with but that it is something they may be able to take it out directly from a motor insurer. That way those of its customers who want legal expenses insurance can choose whether to proceed with Be Wiser or to look for insurance elsewhere.*

*For completeness I'd like to clarify that I don't think Miss H would've been able to use a BTE policy she may have on another policy like a home policy for example- even if she had such cover. BTEs sold with motor policies tend to be quite restrictive and can generally only be used in relation to road traffic accidents. They are sometimes referred to as MLE (motor legal expenses) policies and are generally added on to motor policies. Equally a lot of BTEs sold with other insurance products don't cover road traffic accidents.*

*My understanding is that Miss H may have been awarded a 10% uplift on top of her damages to make up for the deductions for the ATE premium and the solicitors' success fee. If this was the case, Be Wiser may deduct the 10% uplift from what it refunds Miss H.*

*the service*

*Miss H said that she made a number of calls to Be Wiser and asked for several documents from it but was ignored. She also said she didn't receive a response to her complaint and was told Be Wiser doesn't have a direct number for its complaints department so she had to write in to make a complaint. Be Wiser hasn't disputed what Miss H has said.*

*I think not providing a response to the complaint is a sign of poor service. And also if Miss H wanted to complain, she shouldn't have been restricted to only being able to complain by post. I think it would've been reasonable for another department within Be Wiser to have logged the complaint and referred it to the complaint's department. For these reasons, I think Be Wiser should compensate Miss H for the distress and inconvenience it caused her. I think £100 is reasonable.*

### **my provisional decision**

*For the reasons above, I'm considering upholding this complaint and directing Be Wiser Insurance Services Ltd to pay Miss H:*

- All the deductions that were made from her settlement payment that wouldn't have been made had Miss H had a BTE policy. This may include the solicitor's success fee, any disbursements and the ATE premium. If Miss H received a 10% uplift on top of her damages Be Wiser may deduct this from the refund it issues. Be Wiser should also pay simple interest at the rate of 8% per year from the date the other side paid her damages to the date Be Wiser reimburses her\*.*
- £100 for the distress and inconvenience it caused her."*

### **developments**

Miss H has received my provisional decision and says she agrees with it.

Be Wiser didn't agree with my provisional decision and made several comments which include the following:

- It doesn't have BTE cover to offer.
- What the underwriting insurers may happen to provide in addition to the motor policies it sells has nothing to do with the product it sold Miss H which is free and provided with all motor policies.
- It's not obliged to offer BTE cover or to advise its customers on whether they should use the product or not or whether there's one better suited to their needs.
- Where it says in its key facts document that it analyses the market and makes recommendations to its customers while considering their demands and needs, this is specifically in relation to the insurance products it sells and not the free benefits which are given alongside them.
- The key facts document makes it clear that a 25% deduction would be made. It didn't lead Miss H to believe she had BTE and that there would be no deductions in her damages.
- When Miss H contacted the CMC it would've explained all the conditions to her before she signed an agreement with it. She could've claimed through her motor insurer instead.

### **my findings**

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 not to change any of the findings I made in my provisional decision.

Most of Be Wiser's points were addressed in my provisional decision but I'll respond to the main ones.

Be Wiser said it's not obliged to offer BTE cover to its customers. As I said in my provisional decision those selling insurance should make sure that policies they recommend to their customers suit their customers' needs. And they should also make their customers aware when their demands and needs aren't met. As I said in my provisional decision I think most people would opt to add BTE onto their motor policy as its cost is normally relatively low, rather than risk having to later take out an ATE which would be more expensive and which would result in a reduction of their damages. If this isn't an option for those taking out motor insurance through Be Wiser it should make them aware of this.

So if Be Wiser doesn't want to provide BTE cover I think it should make this clear to its customers and it should also make clear that the "free legal protection" it provides isn't an insurance product. And it should also make them aware of the differences between this product and a BTE policy. As I said in my provisional decision I think Miss H was led to believe, by Be Wiser and the paperwork it provided her with, that she had BTE cover.

Be Wiser said it didn't give Miss H the impression she had BTE cover. But the free product it provided her with was called "free legal protection". I'm aware of a number of BTE policies on the market which have similar names so I think Miss H was given the impression she had BTE cover. And the wording "free legal protection" is on the first page of Be Wiser's letter to Miss H containing its key facts document. The 25% reduction in damages term appears in the CMC's paperwork- which is a separate document.

Be Wiser said when Miss H called the CMC it would've told her about the terms of the agreement she was signing with it. As I said in my provisional decision, by that point, Miss H had no choice but to take out ATE cover. She'd already been involved in an accident so BTE cover wasn't available to her. So the fact that she signed an agreement with the CMC doesn't change my findings.

Finally Be Wiser said Miss H could've claimed through her motor insurer instead. But her motor insurer wouldn't have been able to handle her personal injury claim as she didn't have a legal expenses policy with it.

### **my final decision**

For the reasons above, I'm upholding this complaint and directing Be Wiser Insurance Services Ltd to pay Miss H:

- All the deductions that were made from her settlement payment that wouldn't have been made had Miss H had a BTE policy. This may include the solicitor's success fee, any disbursements and the ATE premium. If Miss H received a 10% uplift on top of her damages Be Wiser may deduct this from the refund it issues. Be Wiser should also pay simple interest at the rate of 8% per year from the date the other side paid her damages to the date Be Wiser reimburses her\*.
- £100 for the distress and inconvenience it caused her.

Be Wiser Insurance Services Ltd must pay the above within 28 days of the date on which we tell it Miss H accepts 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 Miss H to accept or reject my decision before 27 November 2017.

Anastasia Serdari  
**ombudsman**

*\*If Be Wiser Insurance Services Ltd considers that it's required by HM Revenue & Customs to withhold income tax from that interest, it should tell Miss H how much it's taken off. It should also give Miss H a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.*