

## **The complaint**

The trustees of the K Trust complains that Rathbone Investment Management Limited (RIM) failed to carry out any annual reviews in respect of the funds within the whole of life policy taken out by Mr K which has led to an increase in premiums and exacerbating the gap between the total amount of premiums paid and the sum assured.

## **What happened**

Before I set out what happened this complaint was initially referred to us by one of the trustees but there have been communications with both remaining trustees throughout the complaint. For ease of reading I will simply refer to the trustee in respect of any communications with us.

In 2000 Mr K was advised to take out a reviewable WOL policy on a standard basis for the purposes of providing a sum of money on his death that would help pay his potential Inheritance Tax (IHT) liability. The initial annual premium was £11,524 providing a sum assured of £158,503 but was reviewable on the tenth anniversary and every five years thereafter.

Mr K met with an adviser in 2009 to review his existing IHT arrangements and was advised that he couldn't get an alternative WOL policy due to his age and was advised to continue the existing policy. However, the adviser did recommend a change of fund at that time. Following review of the policy in 2010 at the 10 year anniversary the provider informed Mr K the premium would need to increase to £18,183 if he wanted to keep the sum assured at the original figure. The adviser discussed the options for the policy with Mr K who decided to pay the increased premium. There was a further review in 2015 and Mr K agreed to keep the same sum assured and pay a slightly increased premium of £18,680.

RIM didn't uphold the complaint. It said that the original adviser had recommended the initial fund from a choice of five based on its excellent performance and that when the adviser had met with Mr K in 2009 he recommended a switch of fund to diversify Mr K's underlying portfolio and because the recommended fund had performed better and could provide greater and more stable returns and had a reduced management charge. RIM said that in the circumstances consideration had been given to the underlying fund in 2009.

One of our investigators considered the complaint but didn't think it should be upheld. She didn't think there was any issue about the suitability of the WOL policy when it was recommended in 2000. She also thought that RIM had done what it should have done in respect of the reviews in 2010 and 2015. She said that whilst she hadn't seen that RIM had considered making the policy paid up, given that this would have reduced the sum assured and as such not provide the sum assured Mr K wanted, this wasn't a suitable option.

In response to the investigator's opinion the trustee said that he believed that RIM had a duty to review the fund in the WOL policy annually or at least regularly and there isn't evidence of proactive financial management. In terms of making the policy paid up he argued that it was difficult to say this wouldn't have been suitable when RIM never considered this and the saved future premiums if it had been made paid up could have been

paid into something else, such as a bond.

The trustee said the investigator was wrong in saying that RIM weren't responsible for annual reviews of the WOL as in 2009 it identified Mr K's aims and objectives as putting all his existing policies under the advisory remit of RIM with ongoing financial advice. He said it was receiving annual fees for providing the advice and providing annual reviews for the other investments and that those reviews were incomplete because they didn't include the WOL policy.

RIM subsequently argued that the complaint had been made too late but an ombudsman decided that it had been made in time and we could therefore consider the merits. A different investigator provided a further opinion on the complaint addressing the points and information provided by the trustee in response to the first investigator's opinion. She also didn't think the complaint should be upheld. She explained that RIM had received ongoing trail commission for the policy and that this didn't mean it was required to review the policy or its suitability. The investigator explained that the Financial Conduct Authority (FCA) changed the way advisers were paid in 2012 but that any existing trail commission could continue until the product ended.

The investigator said that RIM did have an ongoing advisory service with Mr K but that this was limited to specified onshore bond investments and that as far as the WOL policy was concerned it acted as agent and provided guidance only on the premium reviews. She said that it had provided such guidance in 2010 and 2015 but she hadn't seen evidence it provided this in 2020. The investigator said that if it should have provided such guidance and didn't it should investigate that and offer fair compensation. The investigator also said that the provider had confirmed it wasn't possible to make the policy paid up.

The trustee didn't agree with the opinion of the second investigator and the matter was referred to me for review and decision. I issued a provisional decision as I thought that RIM did agree to provide ongoing reviews, however I found that it wasn't possible to say whether Mr K would have been in any different position if these had taken place. The findings from my provisional decision are set out below.

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

*In doing so, I've taken into account relevant law and regulations; relevant regulators' rules guidance and standards; codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time. But I think it's important to note that while I take all those factors into account, in line with our rules, I'm primarily deciding what I consider to be fair and reasonable in all the circumstances of the case.*

*It is for me to decide what weight to give evidence a party relies on and where there is a dispute about the facts my findings are made on a balance of probabilities – what I think is more likely than not.*

*The purpose of my decision isn't to address every point raised and if I don't refer to something it isn't because I've ignored it but because I'm satisfied I don't need to do so to reach what I think is the right outcome. Our rules allow me to do this, and it simply reflects the informal nature of this service as a free alternative to the courts. Having considered everything I agree with the conclusion of the investigator that this complaint shouldn't be upheld.*

*The trustee has referred to the FCA identifying that many firms had been charging for*

reviews that weren't then carried out and argues that where reviews aren't carried out the client loses the money paid for non-existent reviews as well as on growth potential. However, I am only concerned with what RIM did or didn't do and the review by the FCA provides no evidence that it did anything wrong.

RIM initially advised Mr K about the WOL policy, along with other investments, in a letter dated 3 December 2009. It explained in that letter that Mr K wouldn't be able to obtain an alternative insurance due to his age – 88 at that time. RIM recommended that he continue the policy but switch the underlying fund on the basis that this 'would diversify the underlying portfolio further with a view to providing greater and more stable returns in the future' and pointed to the recommended fund performing better than the existing fund and with less volatility. It also identified that the charges were slightly less.

The advice set out was one-off advice for which RIM charged a fee of £2,500. The letter refers to RIM charging an ongoing fee of 0.5% per annum of assets that "fall under its advisory remit for ongoing review" subject to a minimum fee of £1,000 plus VAT. It said that as it is 'not advising on existing investments with Rathbones' it wouldn't levy a fee in relation to those investments but it would "on other investments and policies".

The letter of 3 December 2009 concludes with:

"The continued suitability of the recommendations I have made should be reviewed regularly and we should discuss these periodically either by telephone or by having a meeting."

The reference to levying a fee in respect of other investments and policies does suggest that RIM would be levying a fee for ongoing advice for the WOL policy. I am also mindful that the advice letter did include the recommendation for a fund switch for the WOL policy and the letter also suggests the suitability of that recommendation should be reviewed regularly.

I acknowledge that in later correspondence RIM identified that the ongoing advisory service was restricted to reviewing two investment bonds and that it acted only as agent for the WOL policy and provided guidance on the premium reviews. I am also mindful that the annual reviews never referred to the WOL policy.

However, the excerpts of the correspondence I have referred to above does to my mind support a conclusion that RIM agreed it would carry out ongoing reviews of the WOL policy which wasn't limited to it just providing 'guidance' on premium reviews every five years even if that isn't what it intended.

I am reinforced in that view by what the adviser said in his letter of 2 June 2010 following the 10 year policy review. In that letter the adviser set out the options Mr K was presented with and the discussions that had taken place about these, confirming that Mr K had opted to increase the premium and keep the sum assured the same. The adviser referred to RIM keeping the commission to cover the costs of the current and ongoing reviews of the plan. The letter concludes with:

"I believe this course of action best meets your objectives for protecting your estate against Inheritance Tax and is affordable and in line with your previously stated attitude to risk. We will keep this plan under review with you at regular intervals."

The above wording doesn't support a finding that RIM would only review the policy when it was reviewed by the provider in my view – the reference to reviewing at 'regular intervals' to me is suggestive of more frequent reviews. RIM may argue the purpose of such a review would in any event been as to the policy's ongoing suitability as a means of protecting the estate in respect of IHT. But I can see no obvious reason why a review wouldn't include

*considering whether Mr K should remain in the current fund or switch to a different fund.*

*However, whilst it seems to me that RIM did agree to carry out reviews of the WOL policy which it didn't do, there is no way of knowing what the outcome would have been from such reviews. In other words there is no way for me to know whether such reviews would have led to Mr K being advised to switch funds or what fund he may have been advised to switch into.*

*In the circumstances I am unable to say that if such reviews had been carried out he wouldn't have been in the same position as he ended up by the time he passed away. In short I am unable to say that Mr K has paid more into the policy than he would otherwise have paid if the reviews had taken place.*

*In terms of him paying for a service he didn't receive he would have paid the same minimum fee for the ongoing service regardless of whether the WOL was reviewed or not so he hasn't paid for a service he didn't receive. In making that finding I want to make clear that the ongoing trail commission of 2.5% of the premium for the WOL policy wasn't payable in respect of RIM providing ongoing advice and was in any event used to partly offset the minimum fee payable for such ongoing advice.*

*I am sorry to disappoint the trustees, but whilst there is in my view evidence that suggests that RIM agreed to carry out reviews of the WOL policy which were never carried out, I am unable to say this has led to him being in a different position than he would otherwise have ended up in."*

I gave both parties the opportunity of providing any further information they wanted me to consider before I made my final decision. RIM responded and said that it agreed with my conclusions and had no further information to add. The trustee responded and made the following key points:

- The ombudsman's provisional decision acknowledges that RIM failed to provide the reviews it should have done but that it would be impossible to assess the impact of this.
- Whilst it would be very difficult to assess the financial impact of RIM not recommending fund switches it would be possible to get historic fund data from the policy provider to confirm whether at each anniversary the performance of the underlying fund was as strong as the performance of other available funds within the policy.
- This would allow a determination of whether there was a reasonable expectation of RIM recommending a fund switch to a better performing fund.
- With that established, whilst it would still remain very difficult to assess any potential difference in the ongoing performance and the subsequent alternative premium increases that may have applied at the five yearly review point it would further support that RIM failed to advise on appropriate switches.
- With more diligent review and proactive management of the WOL policy it is likely that Mr K would have been saved a proportion of the £300,000 expenditure in premiums on a plan that was due to pay out only half that much on his death.
- Whilst it may be complicated to establish the financial loss suffered the principal that Mr K wasn't provided with the service he should reasonably have been able to expect and was paying for, a reasonable compensation could be suggested by the ombudsman in lieu.

## **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.

I have considered everything that the trustee has said in response to my provisional decision but I am not persuaded that I should change the findings in my provisional decision which, for the avoidance of doubt, form part of the findings in this final decision unless I state to the contrary.

I appreciate that the trustee will be disappointed that having found that RIM didn't provide the service it should have done I am not awarding any redress. I acknowledge what the trustee has said about the possibility of getting historic fund data from the provider but I am not satisfied that this would allow me to reasonably conclude whether one or more fund switches would have been recommended if reviews had taken place or if they had been into which fund or funds. Moreover, even if I was to determine that a fund switch would have been recommended that wouldn't of itself determine what premiums Mr K would have ended up paying, as I think the trustee acknowledges.

The trustee argues that with diligent review and proactive management it is likely that Mr K could have saved a proportion of the £300,000 he paid in premiums. However, in my view it is completely speculative as to whether he would have ended up paying less in premiums if reviews had been carried out, given I am unable to say what would have happened if reviews had taken place.

The trustee has said that he understands that it may be complicated to establish the financial loss suffered but that I could suggest a reasonable compensation in lieu. However, for the reasons I have explained, it isn't a question of it being complicated to work out the financial loss, it is that there is no way of me knowing what would have happened if the various reviews had taken place and as such whether a loss has been suffered at all. I cannot make an award where I am unable to determine a loss has been suffered in the first place.

## **My final decision**

I don't uphold this complaint for the reasons I have set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H as trustee of the K Trust to accept or reject my decision before 21 November 2024.

Philip Gibbons  
**Ombudsman**