

1. Monopolies and Price Commission Reports

The British government has conducted two recent investigations of the real estate brokerage industry in that country. The first investigation was conducted by the British Monopolies Commission and resulted in a report published on February 20, 1969. The report recommended that the fee schedules and certain anticompetitive rules of the various national and local trade associations be abolished. The British government issued such an order in 1970.

Subsequently, the British Price Commission undertook an investigation to determine the effects of the 1970 order banning the fee schedules. This investigation resulted in a report which was presented to Parliament in August, 1979. This report concluded that at least non-price competition had increased following the 1970 order. The most important contribution to this increase in competition was the entry of "commercially," as opposed to traditional "professionally," oriented firms.¹ Fee competition, while undertaken by certain new entrants, was still not a common practice.²

The authors of the report also felt that exclusive-right-to-sell contracts and contracts containing clauses calling for the payment of the commission upon the production by the broker of a "ready, willing, and able" purchaser, regardless of whether the sale was concluded, were unfair.³ These types of contracts were apparently new in Britain. Generally, sellers were accustomed to paying a commission only if the broker procured the buyer and a sale resulted.

The materials in these two reports allow for certain comparisons between the U.S. industry and the British industry. Basically, the British industry is at a state of evolution similar to that of the U.S. industry before MLSs became predominant.

The British reports also briefly looked at the brokerage

1 British Price Commission, Charges, Costs and Margins of Estate Agents (1979) (hereinafter cited as "1979 British Report"), at 36.

2 Id.

3 Id. at 67.

industries of many other countries. When relevant, these materials are also discussed below.

2. Industry Structure

a. Regulation

Trade associations exist not only in Britain, but in all countries the British investigators examined. While Britain has no government regulation, such as licensing laws, government regulation is quite common in other countries.⁴

There were nine national real estate related trade associations in Great Britain in 1969.⁵ Most of these trade associations were originally formed around some other function, for example architecture. In addition to the national associations, there were 79 local associations. Approximately 80% of all agents in Britain belonged to some association.⁶ The local associations usually claimed market shares between 70% and 90% of the local practice.

There were two distinct schools of thought among agents which were reflected in the associations. Most of the associations were "professional" associations. One of the associations, however, was "commercially" oriented. All of the associations had Codes of Ethics. All of these codes had provisions which protect consumers. The "professional" associations also had code provisions which limited competition among the practitioners through such restrictions as advertising and solicitation bans.⁸

While the "professional" approach still predominated, there had been a greater emphasis on the "commercial" approach since the 1970 order. This was generally associated with more aggressive marketing and advertising. The Price Commission found no evidence that the increase in the "commercial" practice of brokerage had

4 British Monopolies Commission, Estate Agents (1969) (hereinafter cited as "1969 British Report"), at 7; 1979 British Report, at 54.

5 1969 British Report, at 7.

6 1979 British Report, at 18.

7 1969 British Report, at 8.

8 1979 British Report, at 36-37.

been accompanied by an increase in unfair practices.⁹

Great Britain had only one MLS similar to those in the United States. This existed in the city of Manchester. The reports did not study this area.

While Britain generally did not have multiple listing services, the Monopolies Commission noted a trend toward computerized distribution of housing information.¹⁰ Efforts along these lines had tried various combinations of allowing access to agents only, to agents and buyers only, or to agents and sellers only. Generally, the efforts appeared to be less than successful. However, one of the efforts did appear to be successful. This company, known as the National Property Register, was open only to agents who were members of the "professional" associations. This listing system was not available to agents who were members of the "commercial" association. This system was designed not to be an alternative to the existing system, but simply to facilitate cooperation among the industry members.¹¹

b. Firm Characteristics

The brokerage industries of the countries studied by the British Price and Monopolies Commissions have been traditionally highly fragmented and dominated by sole traders and partnerships.¹²

In Great Britain, lawyers historically were the intermediaries.¹³ By 1979, however, real estate brokers claimed approximately 70% of the market for transactions.¹⁴ Most of the remaining sales appeared to be undertaken by sellers themselves.

Brokers in Britain derived, on average, 46% of their income from residential brokerage. Their other income was derived from

9 Id. at 40.

10 1969 British Report, at 17.

11 Id. at 17-19.

12 1979 British Report, at 56.

13 1969 British Report, at 5.

14 1979 British Report, at 16.

related businesses.¹⁵ Income derived from brokerage was generally in the form of commissions which were contingent upon the sale of the property. These were generally paid by the sellers. Very few purchasers paid agents.¹⁶ However, in many countries studied it was found to be common practice for both parties to pay their agents.¹⁷

Generally, it was found to be easy to enter the field of brokerage. However, it was very difficult to build a secure position due to the reputations of the established firms. Traditionally, it had taken a minimum of five years to build such a reputation. The advent of the "commercial" approach, with more aggressive marketing and advertising, appeared to have reduced this time to one to two years.¹⁸ The extent of entry was indicated by the fact that 20% of all brokers in business started within the previous five years.¹⁹ Generally speaking, the new entrants were considered the most important with respect to the increase in competition. They are, among other things, associated with fee cutting.²⁰

There appeared to be a trend of more offices and agents relative to the size of the market over time.²¹ Increases in the amount of business generally meant more offices rather than larger offices. The business per office appeared to remain about the same.²² Growth, whether by new entrants or by existing firms, was generally in terms of adding offices rather than expanding existing offices.²³

The services provided by the real estate brokers in Britain

15 1969 British Report, at 29.

16 Id. at 14.

17 Id. at 53.

18 1979 British Report, at 35.

19 Id.

20 Id.

21 1969 British Report, at 6.

22 Id. at 68.

23 Id.

are approximately the same as those provided by brokers in the United States. The brokers generally describe the property, suggest a selling price, do advertising, and help with negotiations.²⁴ It was also normal practice in Great Britain for the brokers to distribute lists of properties for sale to potential buyers.²⁵ MLSs generally did not exist. Furthermore, subagency arrangements among brokers were not common. Such arrangements were, however, used in a minority of transactions in the southern part of England.²⁶

3. Fees

In the countries that the British investigators examined there was a strong tendency for rates to conform to local norms. These were frequently under the influence of legal or association controls.²⁷ The ranges of rates found varied in 1979 from a low of 1% to 2% in the Netherlands and Norway to a high of 6% to 7% in the United States and 4% to 8% in France.²⁸

Until the 1970 order in Great Britain, both the national associations and the local associations had contingent fee schedules for sellers which were typically tapered from 5% to 1-1/2% or were fixed at between 1-1/2% and 2-1/2%. There were often lower rates for new houses. The fee schedules of the local associations were generally lower than those of the national associations.²⁹ The fee schedules specified that buyers' fees should not be contingent.³⁰

While these fee schedules were alleged to be "recommended," the associations also had rules forbidding price competition. In fact, the vast majority of offices followed the fee schedules. Departures were generally only with respect to new houses.³¹

24 Id. at 14, 100; 1979 British Report, at 24.

25 1979 British Report, at 42.

26 Id. at 18.

27 1969 British Report, at 71; 1979 British Report, at 53.

28 1979 British Report, at 53.

29 1969 British Report, at 20-23.

30 Id. at 20.

31 Id. at 25.

The average commission rates generally varied among regions and among local markets within regions. They were very stable, however, within any local market.³² The association's opinion was that fee cutters generally go broke.³³

The British reports broke the country into various regions. These regions, having different characteristics, were then compared. For our purposes, it is sufficient to consider only two regions, the North of England and the South of England.

Overall, the average commission rate found by the first investigation, prior to the 1970 order, was 2%. The averages for the two regions, adjusted to include advertising costs sometimes paid by sellers, were as follows: Northern England--2.3%, Southern England--2.8%. These rates were for residential resales only.³⁴

The 1979 report found a range of commissions between less than 1% to more than 3%.³⁵ The average in the South was 2%. In the North the average was 1.8%.³⁶ The post-1970 order average commissions appear to have gone down. However, due to statistical problems, the conclusion of the British report that they generally have not fallen is probably more reliable.

The regions of the North and the South have been used for comparison because there are different customs and commission rates in those two regions. In the South, open listings were the general rule. However, there were also exclusive listings in significant numbers. In the North, exclusive listings were completely dominant.

Not only were the average commission rates higher in the South than the North, but also the average home price in the South was approximately twice that in the North.³⁷ In all areas there had been a general increase in housing prices relative to other prices.³⁸

32 1979 British Report, at 48.

33 1969 British Report, at 53.

34 Id. at 23.

35 1979 British Report, at 27.

36 Id. at 47.

37 1969 British Report, at 32.

38 1979 British Report, at 14.

Because of the higher fees and higher home prices in the South, the average revenues per transaction were very substantially higher in the South than in the North. On the other hand, the average profits were essentially equal for all regions. There appeared to be a strong tendency of costs to vary directly with income per transaction. A very high percentage of this cost was labor.³⁹ Not surprisingly, the productivity in terms of sales per person per year in the North was substantially higher than that in the South.⁴⁰ There appeared to be substantially more agents per house in the South.⁴¹

The Monopolies Commission concluded, "[B]etween regions, the average cost varied with the average income per reported sale. We found that the same relationship also prevailed between towns within the same region and between offices within the same town."⁴²

The major conclusion of the Monopolies Commission was as follows:

[T]here is ample ground for concluding that it is as a result of competition for business other than through price that costs rise to whatever level is permitted by the level of income. As a result, substantially more resources (including people) are employed to effect a given number of sales in the South...than...in the North.⁴³

4. Open Listings and Exclusive Listings Compared

Exclusive listings completely dominated the North of England. While the Monopolies Commission in 1969 found that the exclusive-right-to-sell contract was not common,⁴⁴ the 1979 investigation found that 20% of all listings were on an exclusive-right basis.⁴⁵

Open listings were the general rule in the South. However,

39 1969 British Report, at 38-39.

40 Id. at 42.

41 Id. at 67.

42 Id. at 39.

43 Id. at 69.

44 Id. at 15.

45 1979 British Report, at 44-45.

there were a sufficient number of exclusive listings that the two forms were in competition with each other.

Generally, the exclusive listings appeared to be associated with less work on listings for which no commission was ever received.

Only 25% of exclusive listings resulted in no sale.⁴⁷ Because of this, agents working under exclusive listings were willing to invest more effort in the sale of the property.⁴⁸ For example, it was more common for agents working under exclusives to take photographs of the property.⁴⁹

Open listings were associated with much more waste. Much more work was done without any compensation. Approximately 80% of open listings resulted in no sale. This was usually due to another broker selling the property, and not due to the seller selling the property himself.

Perhaps because of this abortive work, where open listings competed with exclusive listings, they were .4% more expensive to the seller.⁵¹ For example, in the South open listings had an average commission rate of 1.9%.⁵²

Competition among brokers appeared to be greater in areas where open listings were found. Opens may have resulted in quicker sales, but perhaps also fewer completed transactions per agent.⁵³

Open listings also gave consumers more protection against underpricing of their property.⁵⁴

46 1969 British Report, at 59-60.

47 Id. at 66.

48 1979 British Report, at 57.

49 Id. at 40.

50 1969 British Report, at 15, 16, 66.

51 1979 British Report, at 51, 58.

52 Id. at 51.

53 Id. at 58.

54 Id.

Generally, the open listings were considered useful in reducing search costs in wider markets. Even though they cost more, consumers often preferred them due to the competition among the brokers for the sale of the house and the wider exposure their properties would receive.⁵⁵ There was some evidence that open listings had evolved later than exclusive listings and were increasing their penetration wherever they competed. The open listings appeared to be spreading northward into areas once dominated by exclusive listings.⁵⁶

CONCLUSION

The information developed by the British government provided some interesting comparisons. The real estate brokerage industries in Britain and the U.S. are similar in many respects, but there are also some striking differences.

Structurally, the industries are similar in that they are composed primarily of numerous small firms. Both industries are basically fragmented. In both countries trade associations have played important roles in defining appropriate competitive behavior, including, historically, suppressing price competition.

Structurally, the primary difference between the two countries involves the MLS. Britain generally has none.

While both countries show local uniformity of fees, the fee structures of the two countries differ markedly. While the U.S. is characterized by 6% or 7% commission rates in almost all communities, Britain has an average fee of only 2%. Further, this fee varies widely among the different regions in Britain and even within local markets depending upon the type of listing the seller selects.

The competition between the open and exclusive listings in Southern England, including the apparent waste involved in the open listings and the consumer preference for opens, provides an interesting comparison to the historical reason for the development of the MLS in the U.S. The British industry may be approaching the point where the U.S. industry rapidly converted to the MLS system of selling.

55 1969 British Report, at 59-60.

56 1979 British Report, at 59.