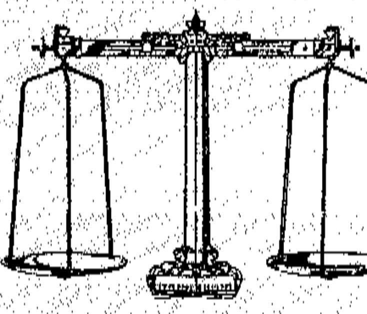
You the jury



This is the first in a short series of articles, due to appear every other month, on burning topics affecting intermediaries currently and in the future. Each will contain a voting slip for "You the Jury" to complete. Please let us know your views by returning that slip each time.

The author, Mike Fenwick, was born in 1946 in Glasgow. Educated at Ayr Academy, he joined Royal Insurance in 1964.

He moved over to insurance broking in 1971, when he was co-founder of Asset Services (Paisley) ltd., where he remains to date. He is also a director of number of companies involved in marketing and insurance design.

Married with three sons and one daughter, he defines his hobby as "finding problems to suit the answers".

ET TU, SIR GORDON?

What is the connection between Sir Gordon Borrie, insurance brokers and Rome?

What caused Malcolm Reid, Registrar of ROLAC, to be quoted as saying, "We only wish it was possible to deal direct with intermediaries, but it isn't"?

What is the importance of this sentence from the Government's White Paper on Investor Protection – "The law should not create artificial distinctions".

There is a common answer to these questions. An answer which not only could throw ROLAC upside down but also could turn the present provisions for life assurance outlined in the Government's White Paper inside out.

Interested? Well, finding the answer *and then proving* it requires a degree of patience because it comes in the form of a jigsaw. You will need to study each of a number of individual pieces before the picture itself finally forms.

Let me assure you, however, that the effort involved will prove fully justified because the final picture is the future of the entire life assurance industry – and *you the jury* will help to decide that future.

STOCK EXCHANGE RULES

The first piece of the jigsaw comes between 1978 and 1983. Sir Gordon Borrie, as Director General of the Office of Fair Trading, referred the Stock Exchange rule book to the Restrictive Practices Court. This referral did not, however, come to a conclusion. Instead an agreement was reached between the Department of Trade and Industry and the Stock Exchange by which the Stock Exchange gained exemption from the provisions of the Restrictive Trade Practices Act. This exemption was granted in exchange for one major condition – *that the Stock Exchange gave up its system of fixed commissions and operated on the principles of a free market.*

The second piece of the jigsaw begins in 1982. In the face of escalating commissions and a predicted commissions war, the LOA and ASLO submitted a memorandum to the Government calling for legislation on commissions. The then Minister involved said no to that request, but warned that he would consider using his powers to have commissions disclosed.

Immediately thereafter, the BIBA was quoted as saying it had been invited to participate in discussions between the life associations and non-member offices to explore the possibility of reaching *a voluntary commissions agreement acceptable to all.*

Piece number three occurs in September 1983, when ROLAC published its Consultative Paper. The document confirms confidential discussions with intermediary bodies. It also contains details of a letter from Alex Fletcher, MP, which quotes, "His preference was for the insurance industry to settle the question of commissions themselves".

Indeed, the paper itself reads, "A voluntary market agreement on commissions is not a matter for the life offices and the intermediaries alone . . . " "We must act responsibly to protect the interests of the consumer".

Please re-read those quotes and fully absorb the joint industry approach which is detailed because now we come to the eyebrow raiser. The paper also says, " . . . even though intermediaries and intermediary bodies will not be a party to the actual agreement".

Now, why suddenly did intermediaries literally cease to exist in the insurance industry and what happened to the "we" approach?

ROLAC TERMS

The answer is piece number four. It appears in January 1984, when ROLAC published its commission terms and maximum rates. The booklet contains the following note, "Under the requirements for exemption under paragraph 8 of the schedule to the Restrictive Trade Practices (Services) Order, 1976, only insurance companies may participate in the agreement. For this reason intermediaries and intermediary bodies are precluded from being parties to the agreement".

It is neither the place nor the time to discuss the detailed provisions of the Restrictive Trade Practices Act. Suffice to say, however, that it is *not* in itself illegal to form a restrictive trade agreement. It is, however, a requirement that one registers any such agreement with the Office of Fair Trading. Once such an agreement has been registered, the OFT must then, usually, refer it to the Restrictive Practices Court. If the court, in its deliberations, is satisfied that certain provisions have been met, then the restrictive agreement can be allowed to operate. If, however, the necessary gateways provided in the Act are not met, then the Court will declare that the agreement is void and, if the parties to

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the agreement ignore such a declaration, they will be held in contempt and subject to substantial fines.

A key sentence in the guide provided by the Office of Fair Trading says, "For instance, an agreement to fix prices would almost certainly be considered to contain significant restrictions".

RESTRICTED AGREEMENT

That key sentence indicates quite clearly why the Stock Exchange came under fire from the OFT and why, at first glance, you would think that ROLAC and the insurance companies should be meeting the same problem. In fact that problem can *never* exist for insurers, because the paragraph 8 involved confirms a complete exemption of *any agreement* which is "an agreement to which the only parties are persons permitted by or under part one of the Insurance Companies Act 1974 . . . to carry on insurance business and the only restrictions excepted thereunder relate to the provision of insurance services".

That exemption clause establishes the future of our industry. It forms a permanent division of rights between insurers and intermediaries. It establishes an insurance industry apartheid – with intermediaries fully subject to the law and insurers fully exempt.

Insurers are able, if they so desire, to form any agreement, even a totally restrictive one – as long as no intermediary is allowed to participate in that agreement.

Is this true? Where is the proof? Well look no further than the article written by Malcolm Reid, the Registrar of ROLAC, in the CII Journal published in August this year. I quote "The ROLAC proposals for an industry agreement were based on this exemption". "It followed that authorised insurance companies only could be party to the agreement; otherwise it would have been registerable and subject to challenge in the Restrictive Practices Court".

GROSS DEFORMITY

By now, the picture should be forming and you may be beginning to recognise its gross deformity. However, we are not yet finished. Let us examine an aspect of our industry discovered by Alex Fletcher, MP, and look at piece number five.

On 24th April 1985 the Parliamentary debate on the provisions of the White Paper is recorded in Hansard. Alex Fletcher, MP, is quoted as saying, "I suggest to my Right Hon. Friend that the market is not entirely in the hands of intermediaries. At the end of the day the insurance companies themselves underwrite the business. They control or have the capacity to control the market".

The comments made by Mr. Fletcher were related to the general insurance market. They are, however, equally appropriate to the life assurance market. Now, if one allies a capacity to control the market and a complete exemption from the law which is meant to prevent an abuse of such a position, one achieves near absolute power, with all that that implies.

Is this the position which the Government sets out in the White Paper for the protection of the investor? Remember, the Government aren't trying to legislate the insurance industry but are wanting provisions made for the *marketing* of its products – something in which you may feel that intermediaries might play some part.

I quote from the White Paper (the italics are mine): –

"It is essential that . . . the forces of *competition* are brought to bear *on practitioners and their institutions*".

"If the law and the regulatory system are to be clear and fair, there must be, so far as this is possible, *equivalence of treatment* between products and services competing in the same market. The law should not create artificial distinctions".

"Regulation is more likely to be effective if there is *significant practitioner involvement*".

"Discussions have reached an advanced stage in the life assurance industry towards a *voluntary maximum commissions agreement*".

Meanwhile, however, back at ROLAC, Malcolm Reid's comment quoted in a recent insurance periodical is, "We must not make an agreement – even an implicit one – with an intermediary on the payment of commissions".

It forms quite some picture, for the future of our industry, doesn't it?

However, is this the future you would wish and if not, do you have any choice? Well perhaps you have and perhaps it's the Government that has none.

BUILT-IN SAFEGUARD

Piece number six. The Government has deliberately built in a safeguard to the overall position in its White Paper provisions. I quote: "Rules and practices will be subject to initial and continuing scrutiny for anti-competitive elements; after obtaining the advice of the Director General of Fair Trading, the Secretary of State will have power to require the amendment or withdrawal of rules which are judged to be detrimental to competition and not justified in the interests of investor protection".

This safeguard probably has a two-fold purpose. The first (which I can only assume) is that such a requirement is complete common sense. The second, and not so obvious, comes from Professor Gower's Report: Part 1 (and explains the reason for the title to this article). I quote under the heading in the Report – "Relief from Competition Law".

"Furthermore, the competition Articles of the Treaty of Rome have direct effect in the UK and the relevant Directorate . . . is alert to ensure that they are observed".

". . . This could not be done unless some independent Governmental authority had satisfied itself . . . Unless this is done, immunity cannot be justified and, in any case, would not be secured in relation to the competition Articles of the Treaty of Rome".

Now, unless the Government ignore their position in the EEC, Sir Gordon Borrie has to deliberate and advise the Secretary of State whether there are any restrictive practices involved in the eventual legislation. What I think is proved beyond any reasonable doubt in the above analysis is that it is the Restrictive Trade Practices Act, itself, which is the ultimate of all restrictive practices. It, and it alone, prevents a true voluntary industry agreement on commissions. The United Kingdom Government is at the forefront of requesting freedom of services within the EEC. It will prove most interesting to hear the comments from the first non-United Kingdom insurance broker to hear of the rules and regulations under which he must operate within this country and when pleading his case under the Treaty of Rome, it will be even more interesting to hear our Government's defence.

SOLUTION?

Having, I hope, now placed all the pieces of the jigsaw in front of you, let us see whether the puzzle has a solution.

There is one. It is the one equitable solution – and the only one which could have ever worked.

The primary concern of the Government is that, whilst retaining competition, the investor's interest is not served by escalating commissions. Two parties are involved in that equation – those that pay and those that receive – insurers and intermediaries.

It is already acknowledged in the market generally that the "fit and proper" test which intermediaries will require to pass in order to continue to operate will ensure standards of conduct broadly comparable to those already required under the regulations of the Insurance Brokers Registration Council.

Further, the unique position of the IBRC is acknowledged within the White Paper. I quote: "If IBRC is to play its part in the new self-regulatory structure, changes will have to be made to its constitution and rules. The Government will propose amendments . . . to fit IBRC for its new role".

The first such amendment must be to grant to intermediaries authorised under the reconstituted IBRC the right of exemption from the Restrictive Trade Practices Act – to the extent that a true voluntary industry-wide *maximum* commissions agreement may be formed.

Such an agreement may be hard to achieve. It will require a dedication of joint purpose not often seen in our industry.

If, however, that agreement can be formed, then and only then will independent intermediaries be able to compete not only for themselves, but because they offer a vital alternative to insurers in protecting the interests of the investor.

Some insurers are already calling for the support of the intermediary for ROLAC. Can that support be given, whilst the intermediary is refused the hand of actual agreement?

The future of our industry now lies with you the jury. The freedom to vote is yours and the choice is simple.

Ladies and Gentlemen,
Insurer and Intermediary,

YOU ARE THE JURY

Please deliver your verdict by crossing (X) one of the two boxes below, and returning this coupon to Brokers' Monthly and Insurance Adviser, 7 Stourbridge Road, Lye, Stourbridge, West Midlands DY9 7DG.

The future commission structure of the UK life assurance industry should be agreed by insurance companies only ☐

The future commission structure of the UK life assurance industry should be agreed by insurance companies and intermediaries together ☐

Name: ....

Address: ....

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Insurer / Intermediary
(please circle as appropriate)