LIBOR, FOREX, CDS … What are the Prospects for Cartel Damage Claims in Relation to the "Banking Cartels"?

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Introduction

It is more than 100 years since Ambrose Bierce defined finance as "the art or science of managing revenues and resources for the best advantage of the manager". So we should not really have been too surprised to discover in the last few years that bankers had been colluding to gouge customers for their own gain in a whole variety of different ways.

Yet it is still shocking. Amongst the blizzard of acronyms and the technical complexity of financial products it is easy to forget that these are not victimless crimes. For every banker gaining a handsome bonus, someone somewhere will have been losing out. The news is filled with stories of huge fines being imposed on the banks and threats of jail sentences but there has not been a lot of evidence yet of claims for compensation.

What evidence there has been has not been altogether encouraging. Lawyers for plaintiffs who lost out from the most notorious example, the manipulation of the London InterBank Offered Rate (LIBOR), have filed claims in the US but most of the claims have already failed. In particular, all the antitrust claims were summarily dismissed.

Will claimants in England face the same difficulties?

US requirement of "antitrust injury"

The discussion has to start with the experience of the US plaintiffs to date.

In re: LIBOR-based financial instruments antitrust litigation

Plaintiffs filed claims relating to manipulation of the US Dollar LIBOR from mid-2011. Most sought class action status. The precise claims made varied but all included antitrust claims seeking treble damages.

The Judicial Panel on Multidistrict Litigation (also known as the "MDL Panel") transferred the cases to the Southern District of New York where they were entered on to the docket of Judge Naomi Reice Buchwald.

In due course, the defendant banks filed motions to dismiss alleging that the facts pleaded did not disclose any cause of action. On March 29, 2013, Judge Buchwald issued a 161-page ruling acceding to those motions in relation to the vast majority of the claims including all the antitrust claims.

The antitrust claims were dismissed because Judge Buchwald concluded that the pleadings did not adequately allege any "antitrust injury" on the part of the plaintiffs.

Antitrust injury has long been a prerequisite for recovery in US antitrust damages claims. It has been defined as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful".[1] It follows that there can be a violation of the competition laws (here, the Sherman Act) without any particular plaintiff having a claim, if that particular plaintiff did not suffer injury of a type the antitrust laws were intended to prevent.

Judge Buchwald found there was no antitrust injury primarily because the LIBOR-setting process "was never intended to be competitive" and it was not alleged that the existence of LIBOR was itself a violation of the antitrust laws. This was not, she concluded, a situation where otherwise competing banks chose not to compete; the setting of LIBOR was always, of necessity, a co-operative endeavour. Nor would she accept that the conduct alleged restricted competition in those related markets where the banks did compete, namely the arrangement of inter-bank loans and the issuing of LIBOR-based financial instruments.

Following the March 2013 ruling, plaintiffs sought to show antitrust injury in other ways such as by showing that LIBOR panel banks competed in relevant markets on the basis of creditworthiness and that manipulating LIBOR restricted that competition (much of the manipulation being precisely to give a false picture of creditworthiness). Judge Buchwald still was not impressed and refused permission to amend the complaint on August 23, 2013.

There has been much debate about the merit of Judge Buchwald's ruling on antitrust injury. There are good reasons to think that it may be overturned in the future, and not followed in other cases, but it is likely to stand for a while at least. It is, formally, an interlocutory

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[1] Citing *Brunswick Corp v Pueblo Bowl-O-Mat, Inc*, 429 U.S. 477, 489 (1977).

decision since Judge Buchwald did not dismiss all the claims. This has, so far, prevented the plantiffs from getting permission to appeal. Unless the US Supreme Court rules that interlocutory appeals should be allowed in the present situation,[2] no appeal will proceed unless and until the rest of the case has been determined.

Implications for other banking cartel claims in the US

If it is followed by other judges, Judge Buchwald's logic would appear likely to apply in the same way to many benchmark manipulation claims. Certainly, none of the benchmark setting would ever have been intended itself to be competitive. At least one other judge in the same District, Judge George B. Daniels, has followed Judge Buchwald's lead in dismissing antitrust claims in relation to different benchmark interest rates.[3]

It must be emphasised, though, that other judges may yet take a different view even within the US. Moreover, it will always be important to focus on the facts of the particular alleged violation. Thus, for example, the misconduct alleged in relation to Credit Default Swaps (CDS) is quite different, not involving the manipulation of benchmark rates at all.

Defendants in US CDS actions have also filed motions to dismiss claiming, inter alia, a lack of antitrust injury In [4] but Judge Buchwald's reasoning would not appear to have any relevance in that case.

The position in England

There are no rulings yet in England on whether "banking cartel" victims can bring antitrust claims. There is, though, some very limited authority on the broader requirement for "antitrust injury".

Overview

European law requires that Member States must allow a right of recovery for those harmed by breaches of European competition law.[5] It is, however, for Member States to lay down the rules for such claims subject to the principles of equivalence and effectiveness.

It is established in English law that a breach of the European competition rules (arts 101 and 102 TFEU) can give rise to a claim for breach of statutory duty.[6] An individual who sues for a breach of statutory duty in English law must show, not only that a duty was owed to him, but also that it was a duty in respect of the kind of loss he has suffered.[7]

Thus, looking at English law in isolation it looks as though there should be a rule very similar to the requirement of antitrust injury relied on by Judge Buchwald. In fact, the US Supreme Court case requiring antitrust injury[8] was referred to in the only reported English case to consider the issue.

English law cannot be looked at in isolation though. The requirement that the duty relied on must be in respect of the kind of loss suffered was disapplied in the only case to consider it, *Crehan*, because it was held not to be consistent with European law in that case.[9]

Application to the "banking cartels"

The problem is that no-one knows how far the reasoning in *Crehan* goes or how reliable it is.

The reason it was disapplied in *Crehan* was because the European Court of Justice (ECJ) in that same case had said that a person in Mr Crehan's position had to be able to have a damages claim. It was accepted by the English Court of Appeal that this had to rule out the barring of the claimant's claim on the grounds that it was the wrong type of loss even though that specific argument had not been aired before the ECJ.

One view is that this logic only applied because of the fact-specific ECJ ruling in that case and that it would not apply in other competition damages claims. It can also be noted that the House of Lords ultimately reversed the Court of Appeal on other grounds[10]; whilst the House of Lords did not address the particular issue of "antitrust injury", its willingness to allow departure from European Commission precedent on the substance may suggest it would have taken a more sceptical view than the Court of Appeal on the scope of the ECJ's ruling as well.

The alternative view, though, is that if the ECJ would not allow Mr Crehan to be barred from a claim (on the basis of lack of antitrust injury or otherwise) then surely nor would it allow that to be the case for the putative claimants in the banking cartels. Mr Crehan was a party to the agreement that created the alleged breach of competition laws and the argument against him recovering was one of ex turpi causa, i.e. that he was one of the wrongdoers. No such argument can be advanced against those who are victims of the banking cartels. The victims are in a much more sympathetic position.

There are also more recent indications that the ECJ[11] will not be slow to use the principle of effectiveness as a basis for barring national rules that get in the way of recovery by victims of antitrust violations. This has been seen in an ECJ ruling this year prohibiting an outright

[2] The plaintiffs failed to get permission from Judge Buchwald and also from the Second Circuit Court of Appeals. But the US Supreme Court granted certiorari on June 30, 2014 and will hear the appeal in its next term, which starts in October 2014. The US Supreme Court only hears a small minority of the cases referred to it.
[3] *Laydon v Mizuho Bank* (SDNY, March 28, 2014) concerning the so-called Yen LIBOR and Euroyen TIBOR interest rate benchmarks.
[4] *Re Credit Default Swaps Antitrust Litigation* (SDNY).
[5] *Courage Ltd v Crehan* (C-453/99) [2001] E.C.R. I-6297; [2001] 5 C.M.L.R. 28.
[6] *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] A.C. 130 at 141 per Lord Diplock.
[7] *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 at 211 per Lord Hoffmann; [1983] 3 W.L.R. 143; [1983] 3 C.M.L.R. 43.
[8] *Brunswick Corp v Pueblo Bowl-O-Mat Inc* 429 U.S. 477, 489 (1977).
[9] *Crehan v Inntrepreneur Pub Company (CPC)* [2004] EWCA Civ 637; [2007] 1 A.C. 333 at [158].
[10] *Crehan v Inntrepreneur Pub Company (CPC)* [2006] UKHL 38; [2007] 1 A.C. 333; [2006] 3 W.L.R. 148.
[11] More accurately, now, the Court of Justice of the European Union (CJEU).

ban on recovery of umbrella damages[12] but also in the *Pfleiderer* case concerning access to competition authority files.[13] As such, even if *Crehan* itself should not be interpreted as going so far as to ban an antitrust injury requirement, there must be a reasonable prospect that the ECJ would block such a rule on a future referral.

Even if an antitrust injury requirement were permissible as a matter of European law, it must still be questionable how far Judge Buchwald's reasoning would apply directly to "banking cartel" cases in England.

In particular, one has to consider whether Judge Buchwald's assessment can be consistent with the existence of an antitrust infringement at all. Judge Buchwald was careful to point out that there could be a lack of antitrust injury to the specific plaintiffs before the Court despite there being a Sherman Act violation (consistent with previous authority, as noted above) but the question is whether her interpretation of the factual allegations could ever be consistent with the existence of a violation at all. It is hard to see how it could because her view was that the conduct was directed at markets that were never meant to be competitive and any harm in competitive markets was not of a sort that the antitrust laws were supposed to prevent. This would seem to leave little scope for any infringement finding whether on the basis of per se illegality or the rule of reason.

Judge Buchwald's view could conceivably be correct looking at USD LIBOR in isolation (there being no antitrust infringement findings in either the US or the EU) but it is hard to see how the same logic could apply for other "banking cartel" cases where there are or will be antitrust infringement findings, including Yen LIBOR, EURIBOR and probably others in due course. Moreover, unlike in the US, it would not be open to an English court hearing a damages claim to dispute a previous finding of an infringement by the European or English competition authorities, even if arrived at by way of settlement. The infringement findings will be treated as binding for all purposes.

At a minimum, one cannot unthinkingly assume that claims in the other "banking cartel" cases will fail if there is a requirement of antitrust injury or similar in English law.

Other ways to "skin the cat"[14]

A further reason for not necessarily worrying about whether there is a requirement for "antitrust injury" in English law is that there may well be effective ways of claiming loss resulting from the "banking cartels" without having to rely on any cause of action where the concept might be applied.

The claimants in the US have tried to adopt the same approach, with some of the alternative claims under the Commodity Exchange Act being the only federal claims to survive. In the US, though, the alternative claims are much less attractive than the antitrust claims because the antitrust claims carry treble damages, allow recovery of attorneys' fees and have a longer limitation period.

In England, the position is different. There are likely to be far fewer advantages to the breach of statutory duty claim. An American might fairly point out that this is because England does not provide treble damages for any cause of action, but this overlooks the fact that (unlike in the US) pre-judgment interest is available in all cases and can double the damages where an infringement has occurred over a long period. The most relevant advantage that there might be with a breach of statutory duty claim is that it may be the only claim that could be the basis for an opt-out collective action in England.[15] There are, though, other ways of grouping together claims.

Other causes of action may well be more advantageous. The only LIBOR claims reported to have been brought in England to date have been ones based on misrepresentation. Such actions potentially offer claimants the opportunity to set aside unprofitable transactions even if they would have been unprofitable without any LIBOR manipulation. Where a misrepresentation claim is not possible or advantageous, another option would be a claim for unlawful means conspiracy. Unlawful means conspiracy ought to get around any possible need to prove antitrust injury and may offer a more generous measure of damages than would otherwise be available.

Conclusions on "antitrust injury"

For one reason or another, it looks unlikely that Judge Buchwald's reasoning will represent a significant impediment to claims in England.

Other considerations

It does not follow from the discussion above that claims will necessarily be easy or attractive in England. Potential claimants will need to consider a range of other issues before filing suit. The following is a necessarily brief and high-level assessment of some of the other issues that will be relevant.

Quantification of loss

One of the comments often heard when talking to other practitioners about possible LIBOR or other benchmark claims is the apparent difficulty of quantifying any losses caused and how this is likely to deter claims.

[12] *KONE AG v ÖBB-Infrastruktur AG* (C-557/12) [2014] 5 C.M.L.R. 5.
[13] *Pfleiderer AG v Bundeskartellamt* (C-360/09) [2011] All E.R. (EC) 979; [2011] 5 C.M.L.R. 7.
[14] For those not from an English cultural background I should explain that I am not advocating feline torture—the expression that there is "more than one way to skin a cat" simply means that there is more than one way to achieve a particular objective.
[15] The Consumer Rights Bill currently before Parliament will establish opt-out collective actions in the Competition Appeal Tribunal but, as currently drafted, the amendments to s.47A(2) of the Competition Act 1998 limit opt-out actions to actions alleging a breach of competition provisions, which would appear to imply only claims for breach of statutory duty.

Certainly, there will be complexities in relation to the benchmark claims that do not apply in other cartel damages claims. The manipulation did not necessarily move the benchmarks in the same direction all the time and one cannot readily apply the same techniques used in other cartel cases to identify the counterfactual price.

Nonetheless, difficulty is not the same as impossibility. A number of eminent economists have devoted considerable effort to identifying what the counterfactual prices are likely to have been. Indeed, it was the analysis by economists, such as Dr. Rosa Abrantes-Metz, that led to suspicions in the first place. This also allows profiling to identify who is likely to have lost out overall.

There are also other "banking cartels" where identification of victims and quantification may be much easier. CDS is perhaps one example since the allegation is that anyone buying or selling CDS lost out apart from the dealer banks.

Lack of information

One of the disadvantages for claimants of the English litigation system relative to the US one is that a higher standard of pleading is required (fact pleading rather than notice pleading) and there is less and later disclosure/discovery. This may tend to deter claims in respect of inherently secret arrangements.

This is a significant issue, but it is likely that there will ultimately be sufficient information to bring claims as a result of the publication of decisions by various regulators and/or discovery in other litigation. The information issues are likely to delay rather than prevent claims (unless limitation issues then come into play, but this should not be a huge problem in England for various reasons).

Costs and funding

Litigation in England is relatively expensive and claimants have to factor in the risk of having to pay defendants their costs if the claims fail (a risk that can be covered by after-the-event insurance, but at a cost). Claimants can recover a substantial proportion of their costs if successful, and some law firms and funders are willing to take good cases on a contingent basis, but the cost of bringing claims is still a significant impediment.

The most obvious way around the issue will be to seek to aggregate a modest number of larger claims, as has happened with previous cartel claims. Once the total value of claims is large enough, it should be possible to make a robust economic case for funding.

Reticence to sue the banks

It probably goes without saying that the banks have the resources to put up a hard fight if they are sued and any potential claimant is bound to think twice about the possibility of a long, hard fight. By the same token, though, how far will banks want to continue to fight and to keep washing their dirty laundry in public when they have already admitted the underlying wrong-doing?

Overall conclusions

It is unsurprising that claimants have been slower coming forward in England than in the US. There is less need for lawyers to get in early (there being no need, as yet, to get in early to secure a role as "class counsel"). There are also obstacles to early filing, including the need to build a group of claimants, find funding and secure the necessary information to plead a case that will survive a strike-out application.

None of the obstacles, though, look to be insuperable. In particular, it is unlikely that a requirement for "antitrust injury" will block claims in England. Some of the infringements may be much less attractive as the basis for damages claims than others but I would still expect there to be a number of claims in due course.