Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Aluminium Limited, Alcan Aluminum Corp., and National Distillers and Chemical Corp., U.S. District Court, D. New Jersey, 1968 Trade Cases ¶72,631, (Apr. 30, 1968)

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United States v. Aluminium Limited, Alcan Aluminum Corp., and National Distillers and Chemical Corp.

1968 Trade Cases ¶72,631. U.S. District Court, D. New Jersey. Civil Action No. 1174-64. Filed April 30, 1968. Case No. 1841 in the Antitrust Division of the Department of Justice.

Clayton Act

Consent Decree—Compliance—Divestiture—Relief—Deficient Offers.—A company was granted its application for relief from any further obligation to divest itself of particular assets as a going concern under the terms of a consent decree, since it properly rejected the only two offers made during the nine months alloted by the decree. One offeror had declined to take particular warehouse leases that were essential to creating a viable competitor within the terms of the decree. (Another reason for rejection, the buyer's refusal to assure continued employment of particular personnel, was not considered by the court.) The other was not an "eligible purchaser" under the decree because it had not demonstrated its ability to meet the financial terms set out by the decree.

For the plaintiff: J. E. Waters and Gerald Connell, Dept of Justice.

For the defendants: Pitney, Hardin & Kipp, by Donald B. Kipp (Milbank, Tweed, Hadley & McCloy, by William E. Jackson and Isaac Shapiro, of counsel).

Opinion

COOLAHAN, District Judge: On December 30, 1964, the United States of America (hereinafter referred to as the plaintiff) filed suit against the above named defendants and moved for a preliminary injunction under Section 7 of the Clayton Act, 15 U. S. C. § 25, for the purpose of enjoining the proposed acquisition of the Aluminum Division of National Distillers and Chemical Corporation (hereinafter referred to as National) by the Alcan Aluminum Corporation (hereinafter referred to as Alcan). Plaintiff prayed that if the proposed merger were not preliminarily enjoined, Alcan, nevertheless, be required to divest itself of the assets acquired from National. This court denied the motion for a preliminary injunction and entered an order permitting the acquisition; the court further ordered that the assets of the acquired company be segregated pending the final determination of the case on the merits.

Prior to the agreed trial date, both counsel for the plaintiff and Alcan entered into negotiations in order to seek to reach a mutually acceptable pre-trial settlement, and at the same time, avoid a long and protracted trial. As a result of these negotiations, a final consent judgment [1966 TRADE CASES ¶ 71,895], was agreed upon by the parties and signed by this court on November 4, 1966. Under the terms of this judgment, Alcan was required to offer for sale a portion of the assets acquired from National, namely, either the Flexalum Division assets, located at the Riverside Plant at Riverside, California, or the Riverside Plant itself, to an eligible purchaser. The obligation to sell was to last for duration of nine months; if, at the end of this period an eligible purchaser could not be found, Alcan would then have the right to make application to this court for an order relieving it of its obligation to offer the above assets for sale.

The manufacturing facilities located at the Riverside Plant are utilized in the final processing of aluminum strip into Venetian blinds, awnings, and siding. These three product lines, according to the allegations of the plaintiff's complaint, were the lines of commerce most seriously affected by the proposed merger between Alcan and National. The objective to be achieved, therefore, from the sale of the Flexalum Division assets was the restoration of competition among individual competitors of all three products. Stated differently, the sale of the Flexalum Division assets as a going business concern to an eligible purchaser would create a viable competitor

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capable of carrying on the production of Venetian blinds, awnings, and siding. Unfortunately for those concerned, however, at the expiration of the nine-month period referred to above, Alcan was unable to consummate a sale of these assets; on September 11, 1967, Alcan moved in this court for an order relieving it of its obligation to offer for sale the assets located at the Riverside Plant. The plaintiff presented a memorandum in opposition to the motion and requested a hearing, which was held on December 22, 1967. At the conclusion of testimony and final arguments by both parties, the court took the matter under advisement for further disposition.

At the outset, it would be helpful to briefly outline the events which occurred subsequent to the court's signing of the final consent judgment [1966 TRADE CASES ¶ 71,895], on November 4, 1966. Immediately following this date, Alcan commenced preparation to sell the Flexalum Division assets. The financial services of Hammond, Kennedy & Company, a firm specializing in investment and commercial banking, were retained in order to find a purchaser of these assets. At the same time, 1250 preliminary inquiries were mailed to persons who were regarded as possible prospective purchasers. Detailed brochures were then sent to those persons who expressed an interest in purchasing the assets located at Riverside. Persons receiving these brochures numbered approximately 100.

During the nine-month period in which Alcan was obligated to divest itself of the Flexalum Division assets, two proposals were received from prospective purchasers. Both of these, however, were rejected. The first proposal to purchase the above assets was received from a company called Hunter Douglas International Limited. This proposal encompassed only a portion of the assets required to be sold under paragraph 2(d) of the final consent judgment, and was rejected by Alcan on the ground that the proposal did not constitute an offer to purchase the Flexalum Division assets as a going business concern. The second proposal was received from the General Aluminum Corporation one day before the expiration of the nine month period mentioned above. Alcan, however, rejected this proposal and refused to negotiate further, on the ground that the General Aluminum Corporation, an insolvent and inactive corporation, did not qualify as an eligible purchaser under the terms of the final consent judgment.

Thereafter, Alcan brought its present motion for a release of its obligation to sell the Flexalum Division assets, claiming that it had made a bona fide effort to find a purchaser for these assets, that it had been unable to do so, and that it was not engaged in negotiations with any prospective purchaser. In deciding whether to grant or deny Alcan's motion, it is of course necessary for the court to determine whether Alcan's rejection of both the Hunter Douglas and General Aluminum proposals were justifiable under the terms of the final consent judgment. For this reason, a more detailed inquiry into the nature of the proposals and the reasons for their rejection is necessary.

I. The Hunter Douglas Proposal

Hunter Douglas International Limited is a Canadian subsidiary which is owned by Hunter Douglas Limited, a company which makes and sells aluminum fabricated products everywhere except in the United States. Hunter Douglas Limited sells many of its products under the Flexalum trademark, but because Alcan owns the exclusive rights to the Flexalum trademark for the domestic sale of aluminum fabricated products in the United States, Hunter Douglas Limited never regarded it as feasible to sell its products in this country absent an effective sales organization. Upon learning that the Flexalum Division assets were available for purchase, Hunter Douglas International Limited, which supplies Hunter Douglas Limited and other subsidiaries of Hunter Douglas Limited with raw materials, immediately entered into negotiations with Alcan. These negotiations culminated in a proposal transmitted by Hunter Douglas International Limited (hereinafter referred to as Hunter Douglas) to Alcan on July 7, 1967, the import of which was that Hunter Douglas offered to purchase substantially all of the Flexalum Division assets as defined by paragraph 2(d) of the final consent judgment. Specifically, this offer included inventory, finished goods, accounts receivable, and physical assets consisting mainly of aluminum processing equipment situated at the Riverside Plant. Hunter Douglas, however, was not prepared to include in its offer the assumption of leasehold obligations on five field warehouses operated by Alcan, despite the fact that these warehouse leases were included in paragraph 2(d) of the consent judgment as assets which Alcan was obligated to offer for sale. In addition, Hunter Douglas was unwilling to make a firm commitment with respect to continued employment of certain key warehouse and sales personnel employed by Alcan. Since Alcan regarded

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the position taken by Hunter Douglas with respect to both of these matters as untenable, the parties were unable to consummate a final agreement whereby the Flexalum Division assets could be sold. On July 10, 1967, Alcan rejected the Hunter Douglas proposal.

Plaintiff argues that Alcan's rejection was unjustified, and that therefore Alcan's motion for relief should be denied. Alcan of course takes the position that under the terms of the consent judgment, it was not obligated to accept Hunter Douglas' offer to purchase only a portion of the Flexalum Division assets. In addition, Alcan contends that the purposes which motivated the attempted divestiture of these assets could not be realized in the absence of Hunter Douglas' willingness to continue to employ the personnel referred to above. For the reasons stated hereafter, the court is of the opinion that Alcan was justified in rejecting the Hunter Douglas proposal.

Attention shall first be given to the problem raised by Hunter Douglas' refusal to assume the above warehouse leases. The crucial problem present throughout the negotiations between the parties and which underlay their disagreement with respect to the warehouse leases was basically how the Flexalum Division assets could be sold so as to permit the purchaser of these assets to operate them as a going business concern in the United States, thus enabling it to compete effectively in the domestic production and sale of Venetian blinds, awnings, and siding. As was adverted to earlier, the sale of these assets in this matter would help to restore competition in the aluminum byproduct industry. The question arises, however, as to what standard the court must adopt in deciding whether a given proposal to purchase the Flexalum Division assets is one which, if accepted, would result in this type of sale. Alcan's position is that the provisions of the final consent judgment, which were carefully scrutinized by the attorneys for the plaintiff, should be adopted in deciding whether to approve any proposal to purchase these assets, and that since, under paragraph 2(d) of the consent judgment, Alcan was required to offer for sale all warehouses used in the distribution of the three product lines referred to above, the Hunter Douglas proposal, which did not include the assumption of Alcan's leases on the warehouses, was not an offer requiring acceptance. While it need not be decided whether the fact that a given proposal to purchase the Flexalum Division assets departs in any manner from the provisions of the consent judgment would justify a refusal by either Alcan or the plaintiff to approve such proposal, the court, for the reasons which follow, is satisfied that a proposal to purchase the Flexalum Division assets which did not include the assumption of the warehouse leases would not further the objectives of increased competition in the aluminum byproduct industry.

In reaching the above conclusion, the court attaches great importance to the fact that both of the parties to the present proceeding regarded paragraph 2(d) of the final consent judgment, defining the assets which were to be made available by Alcan for sale, as the final determination of those specific assets which would have to be sold in order for a prospective purchaser to operate the Flexalum Division assets as a going business concern. This is evident from the following: When the tentative draft of the consent judgment was submitted by Alcan to attorneys for the plaintiff, the warehouse leases were not included in paragraph 2(d) as part of the definition of the Flexalum assets. The attorneys for the plaintiff, however, refused to approve this draft for the stated reason that the definition of the Flexalum assets had to be phrased in a manner which would make clear that what was being sold was a going business concern and not merely physical assets. According to the plaintiff, this would not be possible unless the warehouse leases were included in paragraph 2(d). Thereafter, the consent judgment was modified to include “warehouses presently used in the distribution of end products” as part of the definition of the Flexalum Division assets. The above clearly indicates to the court that it was considered undesirable for a prospective purchaser of the Flexalum Division assets to carve out for himself those assets defined in paragraph 2(d) which would be profitable for him to purchase and on the other hand, exclude from his offer those assets which he could not utilize effectively in his own operation. In this connection, it should be pointed out that under paragraph 4(d) of the consent judgment, Alcan was required to exclude from the sale of the Flexalum Division assets, at the election of the purchaser, those facilities used in the manufacture and sale of siding. The consent judgment is quite clear, however, that the remaining assets listed under paragraph 2(d) were to be sold in one package.

The plaintiff argues, however, that the rejection by Alcan of the Hunter Douglas proposal was not justified. The thrust of its argument is that Hunter Douglas, having discovered that it would not be financially expedient to

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assume the warehouse leases, could not be expected to purchase an asset which it could not utilize profitably. Stated differently, Hunter Douglas had the right under the terms of the final consent judgment to purchase only those assets which would enable it to continue to operate its own business as a going business concern. From what has already been said, it is clear that this argument is totally without merit. To again reiterate, the objective to be achieved from the sale by Alcan of the Flexalum Division assets was not to enable Hunter Douglas to purchase those assets which it thought could be utilized profitably in its own operation, but rather to create a successor to Alcan which would be capable of competing effectively in the domestic production and sale of Venetian blinds, awnings, and siding. The suggestion by the Government that these two alternatives can be equated is, in the opinion of the court, plain error.

One final word is in order with respect to the function of the warehouses in connection with Alcan's operation of the Riverside Plant. The market for Venetian blinds, awnings, and siding is a national one, but at the same time, however, orders for these products must be filled promptly. To meet this demand for prompt service, the present warehouse distribution system used by Alcan was put into operation more than twenty years ago. Such a system has made it possible for Alcan and its predecessors to serve effectively the needs of their customers without incurring excessive shipping costs which would be otherwise necessary to distribute its products on a national level. One consequence of operating the Riverside Plant without the benefit of the present distribution system would be the possible loss of distant geographical markets assuming that it continues to be necessary to provide immediate delivery to customers of products ordered. In the court's view, this fact is strong support for the position taken by Alcan with regard to the Hunter Douglas offer, keeping in mind the purposes incident to the sale of the Flexalum Division assets.

In view of the court's disposition of the dispute concerning the warehouse leases, it is unnecessary to consider the refusal by Hunter Douglas to make a commitment for the continued employment of various personnel presently employed by Alcan.

II. General Aluminum Proposal

Disposition of the problem raised by Alcan's action with respect to the General Aluminum proposal is less difficult. General Aluminum was formerly a corporation engaged in roughly the same business as Alcan. The company is presently insolvent, has no principal place of business, and is totally inactive. In 1966, acute financial problems were encountered which required General Aluminum to sell its assets to satisfy the obligations to secured creditors. When it learned in the spring of 1967 that the Flexalum Division assets had been offered for sale, General Aluminum became interested in acquiring these assets for the purpose of resuming its business operations. On August 3, 1967, the day before the termination of the nine-month period which Alcan had to sell the Flexalum Division assets, General Aluminum submitted a proposal to Alcan in which it offered to purchase all of the assets defined in paragraph 2(d) of the final consent judgment, with the exception of the warehouse leases previously referred to above. Alcan summarily rejected this offer and refused to participate in any further negotiations with General Aluminum. Plaintiff contends that both the rejection and the refusal to negotiate were not made in good faith and were thus a violation of the requirements imposed on Alcan in the court's decree of November 4, 1966. For the reasons stated hereafter, the court finds that the course of action taken by Alcan with respect to the General Aluminum proposal was justifiable under the circumstances.

The pivotal question involved with respect to Alcan's rejection of the General Aluminum proposal and its refusal to negotiate is whether General Aluminum was an “eligible purchaser” as that term is defined in paragraph 2(b) of the final consent judgment In its proposal submitted to Alcan, General Aluminum offered to make a down payment of approximately five per cent of the total purchase price of the Flexalum Division assets, the balance to be paid over a twelve-year period. From the facts recited above, it is quite obvious that General Aluminum could not by itself finance the purchase of these assets, whatever the terms might have been. At the hearing held before the court on December 22, 1967, however, a former officer of the company testified that both Walston & Company and National acceptance Corporation (It is interesting to note that the latter had instituted foreclosure proceedings which led to the sale of General Aluminum's assets) had communicated to him informally that they would furnish adequate funds to finance the purchase of the Flexalum Division assets and also provide sufficient

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working capital which would permit General Aluminum to resume its operations as an aluminum processor. According to the testimony, Walston's loan was conditional upon its obtaining a security interest in the assets acquired by General Aluminum from Alcan. National Acceptance Corporation required that its loan be secured by receivables and inventory. In Alcan's opinion, however, there were two significant problems with such an arrangement. First, neither Walston & Company nor National Acceptance Corporation ever presented written formal commitments of financial backing to General Aluminum. Any commitment made by either was no more than an oral one. Second, General Aluminum never presented a satisfactory arrangement whereby it could assure Alcan of security to cover the unpaid portion of the purchase price of the Flexalum Division assets. The failure of General Aluminum to alleviate these two problems, in the opinion of the court, gave Alcan sufficient reason to conclude that no useful purpose could be served by continuing to negotiate with General Aluminum.

In conclusion, the court finds that Alcan made a bona fide effort to comply with this court's decree requiring it to offer for sale the assets defined in paragraph 2(d) of the final consent judgment, but despite such efforts, such a sale was never realized. The Hunter Douglas proposal was not one which Alcan could legally accept within the requirements set forth in the final decree of this court because this proposal did not include the assumption of the warehouse leases, an asset required for sale by paragraph 2(d) of the consent judgment. It being firmly established that General Aluminum was not an eligible purchaser within the meaning of paragraph 2(b), Alcan was under no obligation to entertain a proposal by the former to purchase the Flexalum Division assets.

Therefore, the court is of the opinion that Alcan's motion to be relieved of any further obligation to sell the Flexalum Division assets should be granted.

Let an appropriate order be submitted.

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