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United States v. Aluminum Company of America and Rome Cable Corporation.

1967 Trade Cases ¶71,980. U.S. District Court, N.D. New York. Civil No. 8030. Decided April 27, 1966. Case No. 1512 in the Antitrust Division of the Department of Justice.

Clayton Act

Divestiture—Continued Operation of Divested Firm—Factors Considered in Framing Decree.—A judgment, in an anti-merger suit, requiring an aluminum company to divest itself of an electrical conductor firm would generally follow the consent judgment in *U. S. v. Kaiser Aluminum and Chemical Corp*. (1965 TRADE CASES ¶ 71,354), requiring sale to an eligible purchaser which would keep the divested company in operation; however, a provision in the *Kaiser* case permitting retention of the acquired firm in the event that good faith efforts to sell failed was rejected. Factors considered in framing the order included (1) the fact that the acquisition was similar to and motivated by the Kaiser acquisition, (2) the same line of commerce (aluminum conductor) was involved, and (3) the communities affected in both mergers were depressed labor areas. The judgment is intended to afford an opportunity of total divestiture, but to be elastic enough so that other remedies may be used in the event that no purchaser dedicated to the continuance of the divested firm as an active competitor is found. It is not intended to eliminate the acquired firm from its position in the business world or in the local communities in which its facilities exist.

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For the defendants: Ferris, Hughes, Dorrance & Groben, Utica, N. Y.; Robert Groben, of counsel. Bergson & Borkland, Washington, D. C.; Herbert A. Bergson, Howard Adler, Jr., and Hugh Latimer, of counsel; William K. Unverzagt, Pittsburgh, Pa.

Memorandum Decision and Order Re: Judgment

BRENNAN, Judge: This memo is intended to indicate the bases of the court's entry of a final judgment in this action and to afford a brief explanation thereof. The defendants will be referred to as “Alcoa” and “Rome” as in the pertinent prior decisions.

This is an antitrust litigation, the background of which is found in *United States v. Aluminum Company of America and Rome Cable Corporation* [1963 TRADE CASES ¶ 70,653], 214 F. Supp. 501 and in [1964 TRADE CASES ¶ 71,116], 377 U. S. 271. The latter decision of the Supreme Court reversed the prior mentioned decision *of* this court and provided that “since there must be divestiture, the case is remanded to the District Court for proceedings in conformity with this opinion”.

The lapse of time is principally accounted for by the good faith efforts of counsel for the litigants to agree upon a form of judgment which would meet the practicalities of the existing circumstances and at the same time carry out the mandate of the Supreme Court. It is sufficient to say that the efforts of counsel and the court were not successful in their purpose. A hearing was then held on October 4, 1965 at which both oral and documentary evidence was offered by the defendants. The plaintiff offered documentary evidence. Counsel next presented numerous proposed Findings of Fact. Briefs were filed by both parties and proposed final judgments were submitted. On February 4, 1966, at the request of the court, counsel appeared before the court at which time the court indicated its then conclusion as to the form and content of the proposed final judgment to be entered. As the result of this conference, the positions of the litigants were somewhat modified. Counsel were urged to agree upon the form and content of a judgment which would reflect the substance of the provisions which the court

indicated were justified by the evidence. Efforts to accomplish the above result are apparently at a stalemate and the court has proceeded to prepare and enter a final judgment which it feels adequately protects the interests of the litigants, complies with the mandate of the Supreme Court and serves to protect the public and local interest insofar as same can be evaluated at this time.

Generally speaking, the difficulty here seems to arise by plaintiff's general contention to the effect that the language of the Supreme Court decision requires the complete divestiture of Alcoa's interest in the assets of Rome and the restoration of that company as a financially strong, well managed, viable corporation, capable of continued existence in the competitive area of the business world.

Alcoa, on the other hand, contends that the mandate of the Supreme Court is something less than absolute and that the language of the decision must be read in the light of the limited nature of the violation found. It further contends that the relief to which the plaintiff is entitled must be based upon equitable considerations, keeping in mind the factual circumstances affecting the public, the community interests and the obvious requirement that this court should not, by its decision, deny to the defendant Alcoa the business advantages granted to a competitor similarly situated.

The Law

Only brief reference is necessary to indicate to the litigants the court's awareness of its responsibility and of the legal principles which must serve as guides in the matter of the divestiture ordered. In *Gilbertville Truck Co. v. U. S.*, 371 U. S. 115 at 130, the obligation of the court here is expressed as a “heavy responsibility” to afford a remedy consistent with the facts before it “with as little injury as possible to the interests of private parties or the general public”.

The Supreme Court in *U. S. v. duPont & Co.* [1961 TRADE CASES ¶ 70,017], 366 U. S. 316 outlines in concise language the principal factors which must guide the court in the solution of the problem involved. It is generally recognized and specifically mentioned in the above decision that District Courts are vested with a “large discretion” in affording ultimate relief. The discretion however must be exercised in the light of the purpose of the statute and the circumstances involved. The relief to be granted must not be punitive but an effective remedy is not to be discarded solely because it will invoke an economic hardship. Divestiture is the most important of antitrust remedies and must be considered by the court. The relief granted is usually found in some form thereof. The protection of the public interest is the purpose of the statute and it is served when a violation of the statute has been found and the relief effectively pries open to competition a market that has been closed by defendant's illegal restraints. There is no serious dispute as to the above principles but the application thereof under the circumstances of this case has been and is a matter of definite controversy. We then turn to the facts, circumstances and equities as this court finds them which have prompted the judgment referred to above.

The Supreme Court Decision

In the original action in this court, the plaintiff contended that the statute had been violated, by the merger by acquisition of the two defendants, in ten separate lines of commerce. This contention was rejected by this court as to each separate line. It appears without contradiction that on appeal to the Supreme Court, the plaintiff contended that this court had committed legal rather than factual error insofar as the decision found no violation of law as related to the lines of commerce designated as aluminum conductor wire and cable and insulated or covered aluminum wire and cable. The Supreme Court, in its decision, upheld plaintiff's contention so that the violation ultimately found relates only to a comparatively small segment of the business conducted by Rome prior to the merger. The controversy then only involves aluminum conductor products and will so be referred to in this decision.

A considerable argument has been advanced by the plaintiff to the effect that the Supreme Court decision in itself mandated the complete diversity by Alcoa of all of the assets acquired from Rome and the restoration of Rome as a viable competitive entity. For all practical purposes, it is urged that this court has no alternative but to direct the restoration of Rome as it existed prior to its acquisition. This court is unable to completely adopt such

argument. If the Supreme Court had intended to limit or nullify the equitable powers which are ordinarily reserved to the trial court, there would seem to be no reason why the proceeding should have been remanded. A simple direction to enter a final judgment in accordance with the above argument would have been sufficient. Divestiture may be accomplished in many ways and this court concludes that the Supreme Court did not intend to relieve this court of its obligation to determine the nature of the relief which must be granted or to confine same in an inflexible mould.

The Plants

Rome, at the time of the acquisition, maintained manufacturing facilities at Rome, New York; Torrance, California; and Collegeville, Pennsylvania. It may be said that the principal facility was located at Rome, New York and employed at that plant about one thousand persons. This facility was engaged primarily in the manufacture of copper products, including wire and cable. It was at that plant, however, that the aluminum conductor products were manufactured which was the basis of the holding that the acquisition was in violation of the statute. The Torrance, California plant principally manufactures rigid steel conduit and tubing. The plant at Collegeville, Pennsylvania manufactures cable troughs, ladders and ducts for supporting or enclosing electrical conductors. Neither the Torrance nor Collegeville plant contained facilities for the manufacture of electrical conductors. There has been and is no contention that either plant was engaged in or possessed the facilities to manufacture the items upon which the violation of the statute was found.

The plaintiff, prior to the hearing of October 4, 1965, presented no actual plan or procedure by which the mandate of the Supreme Court may be accomplished. Its proposed judgment simply provides that Alcoa "shall divest itself of all ownership of Rome and re-establish Rome as an independent and viable competitor". Jurisdiction in the court is to be retained only to permit implementation of the above direction. Same is construed to foreclose any consideration of the adequacy of a partial divestiture or any other type of relief in the event that a sale of the assets to a purchaser, satisfactory to the court, cannot be made.

As already indicated, both litigants have been unable to agree upon the provisions of the judgment as discussed at the conference of February 4, 1966. Roth the plaintiff and Alcoa have subsequently submitted their version of such judgment which contains both a direction to Alcoa to divest itself of the Rome properties and the procedure to be followed to accomplish same. Neither of said proposed judgments has been adopted in all detail and discussion of same would seem to serve no useful purpose.

The Plans of Divestiture

About December 1, 1964, Alcoa submitted a proposed final judgment and plan of divestiture which will be referred to as the Triangle Plan. In effect, it provided for a partial divestiture of the assets obtained by the acquisition of Rome, limited to the offending aluminum conductor lines of commerce. Since same is not adopted by the court at this time, only brief reference will be made thereto.

The plan provided for the elimination of the offending aluminum conductor lines of commerce as a product of the Rome plant. It in effect is intended to divest the aluminum conductor portion of Rome's business, the acquisition of which was found to be in violation of the statute, to transfer the competition afforded thereby to Triangle, together with certain machinery, good will and trademarks. It bound Alcoa to cooperate with Triangle in the matter of the expansion of Triangle's aluminum conductor business to the end of creating a competitor in the above lines of commerce, with a potential equal or greater than that possessed by Rome. This plan was strenuously opposed by the plaintiff and this court is not inclined to adopt it at this stage of the proceeding or at least until another less speculative plan is tested.

[*"Kaiser" Plan*]

In March 1965 an alternative judgment was submitted by Alcoa which has come to be known as the Kaiser Plan. It provided in substance that Alcoa be directed, within a stated time period, to sell the assets acquired from Rome to a purchaser. It provided that the upset price to Alcoa, payable by a purchaser, be based upon the adjusted book value of the land, plants and equipment and the book value of materials or inventories as of the

date of sate, same to include the capital expenditures made by Alcoa up to that date, the purchaser to assume the obligations of Alcoa insofar as the rights of employees are provided for in the existing labor and pension payment obligations. It was further provided that if Alcoa is unable to sell the plants within the time period set forth and in accordance with the price provision referred to above, that Alcoa should have the right to apply to the court for a determination by the court, Alcoa shall be relieved from further obligations to sell the plants. This plan of divestiture was likewise strenuously objected to by the plaintiff, especially as to the two provisions referred to above. In other words, the plaintiff opposed both the upset price provision and the provision which would ultimately allow Alcoa to keep the properties upon a finding by the court that a good faith effort to sell same had been made.

The Kaiser Plan or judgment follows the provisions of the consent judgment in the civil action entitled *United States v. Kaiser Aluminum and Chemical Corp*., Civil Action No. 2795, District of Rhode Island. It is difficult to answer Alcoa's contention to the effect that so long as the Kaiser Plan is recognized by the government as equitable and in the public interest, that it should be afforded the same relief upon a showing that the circumstances are so similar in the matter of the underlying considerations as to be practically identical. The Government's answer to this contention is something less than satisfactory.

[*Retention Provision*]

The judgment herein generally follows the judgment in the so-called Kaiser case except that the provision in the latter plan, which permits Kaiser to retain the acquired assets upon a finding of the court that a *bona fide* effort to sell same was without result, has been eliminated. The reason for this action is apparent without extended explanation since such provision permits the offending party to retain the competitive advantage, the acquiring of which has been held to be in violation of the statute. The upset price provision in the Kaiser judgment has been retained herein for several reasons. In the first place, the court is impressed that the broad line of copper products manufactured by Rome and the somewhat more limited line of aluminum products manufactured by Rome necessarily restricts as eligible purchasers those presently involved in the manufacture of similar products since by acquiring Rome assets, they may run afoul of the antitrust laws. This situation leaves the most likely purchaser to individuals or firms not presently engaged in the manufacture and sale of competing products. The ultimate object to be attained is the restoration of Rome under an ownership which in good faith intends to continue its operation in the future as an active competitor in the sale of the products which it manufactures. Neither the public nor local interest will be served if the Rome properties be transferred under court order to anyone whose purpose is dedicated to a short term profit or to the piecemeal disposition of its assets. It is not intended however that Alcoa should automatically reject any and all purchase offers which do not meet the upset price. The provision in the present judgment is intended to eliminate speculators but not to automatically exclude purchasers showing an ability and an intention to continue Rome as an active competitor in its field.

Matters Considered in Arriving at the Judgment Herein

Since the court has here adopted substantially all but one of the provisions of the Kaiser judgment, it would seem incumbent that the factual and legal bases for such action be discussed or enumerated.

[*Similarity of Kaiser Facts*]

It is realized that, generally speaking, judgments based upon the consent of the litigants have little, if any, probative force in subsequent litigation involving a different defendant. *U. S. v. duPont & Co., supra*, footnote 12, page 330. Here, however, we have such a similarity of facts as to warrant the consideration of the Kaiser judgment in exercising the equitable obligation imposed upon the court. The plaintiff here has asserted in unequivocal language that the Kaiser acquisition “fostered” several similar acquisitions including the acquisition of Rome by Alcoa. This fact is recognized by the Supreme Court in *United States v. Alcoa, supra*, in note 6 on page 279 as a factor influencing Alcoa's decision to acquire Rome about two years later. Likewise the plaintiff conceded by its own statement that Rome was approximately the same size as the company acquired by Kaiser which, like Rome, “was one of the leading non-integrated fabricators of aluminum and other kinds of wire and cable”. Likewise the plaintiff recognized prior to the entry of the Kaiser judgment that “Alcoa ranked second

only to Kaiser in the production of insulated and covered aluminum wire and cable". The above concessions or assertions by the plaintiff would seem to require the consideration by this court of the terms of the Kaiser judgment since it can be fairly assumed that the plaintiff does not seek to place one competitor in a more unfavorable position than another in the same line of business.

[*Line of Commerce*]

Proceeding a bit farther, it is established that the same aluminum conductor line of commerce upon which the Supreme Court decision was based here was likewise involved in the Kaiser litigation. Additionally the public interest, which is the primary consideration in this type of litigation insofar as economics are concerned, is strikingly similar in both litigations. The effect of divestiture upon the economic condition of the local community involved is a factor to be considered in the matter of the public interest as a whole. Here the two geographic areas involved to wit—Utica-Rome, New York and the Providence-Pawtucket, Rhode Island—were classified, at the relevant times involved, as depressed areas insofar as the labor market is concerned. In fact, the Utica-Rome area appears to be more seriously affected since any change in status therein is occasioned by out migration of labor while the change in the Rhode Island area appears to result from the increase in work force therein. The present action was brought to trial and the decision of the Supreme Court was made prior to the entry of the Kaiser judgment. As long as it is conceded that the Kaiser acquisition fostered the Rome acquisition, it is not unlikely that the Supreme Court decision in the instant case afforded the motivation for the consent decree under discussion.

All of the above has prompted this court to adopt the Kaiser judgment in all but one of its essential parts. The following quotation, taken from *International Business Machines Corp. v. U. S.*, 343 F. 2d 914 at 920, is appropriate. "Equality of treatment is so dominant in our understanding of justice, that discretion, where it is allowed a role, must pay the strictest heed". If parity in the levying of taxes is essential to free and fair competition, as stated in the above decision (p. 923), such competition is impeded where an inequality is imposed upon competitors acting in closely related violations and involving similar circumstances.

There can be no serious contention that Rome's need for additional capital expenditures or its record of earnings arises from mismanagement, since the acquisition by Alcoa. They are rather the result of market conditions concerning which considerable evidence was taken upon the hearing. Judge Dawson found the same condition in *United States v. Kennecutt Copper Corp.*, [1964 TRADE CASES ¶ 71,181], 231 F. Supp. 95 at 104. The plaintiff pays Alcoa a compliment as to its management and as to the operation of the Rome facilities. Same is found in plaintiff's brief submitted October 4, 1965, after the hearing in support of its contention and is set out in the footnote below. [1]

[*Community and Business Position*]

In the course of the hearing in this proceeding, considerable evidence was received from community leaders, executives and labor representatives as to the detrimental effect of a directed sale of the Rome facilities. Same has not been overlooked in the preparation of this judgment. It is intended to afford an opportunity to test the availability of total divestiture which appears to be a preferred remedy in similar antitrust proceedings. At the same time, it is intended to be elastic enough so as to leave the door open for further consideration of the application of other remedies or types of divestiture in the event that no purchaser, dedicated to the continuance of Rome as an active competitor, is found. The judgment is not to be construed in any manner as forecasting the elimination of Rome's position in the business world it has occupied or in the local communities in which its facilities exist.

The entry of the judgment, filed simultaneously with this memo, is therefore directed, and it is

So Ordered.

Footnotes

1 “The various Rome facilities have been staffed and continue to be staffed with competent personnel, some of whom before the merger occupied positions of responsibility in the Alcoa organization. Rome's production facilities, research and engineering programs, employee policies, procurement and accounting procedures, patent position, market contracts and product lines have all been preserved or Improved during Alcoa's stewardship of Rome. There have been extensive improvements to the operating facilities through the expenditure of over $5 million. Abandoned facilities have been replaced by facilities of equal or better quality. Rome's procurement practices have been afforded a higher degree of autonomy than any other part of the Alcoa operation. Rome presently has excellent top level management. Its product line has been maintained and even expanded to keep pace with the industry, and Alcoa has preserved and expanded Rome's market contacts. Rome's research capabilities and patent position have been improved substantially since the acquisition; its accounting and procurement procedures have been improved by bringing them into conformity with procedures utilized by Alcoa.”