No. 2 of 1949.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE AND ADMIRALTY DIVISION (IN PRIZE).

S.S. "UNITAS" and CARGO

BETWEEN

LEVER BROTHERS & UNILEVER N.V. "VANCEA" MAATSCHAPPIJ TOT BEHEER VAN AANDEELEN IN INDUSTRIEELE ONDERNEMINGEN N.V. and "SAPONIA" MAATSCHAPPIJ TOT BEHEER VAN AANDEELEN IN INDUSTRIEELE ONDERNEMINGEN N.V. *Appellants*

AND

HIS MAJESTY'S PROCURATOR GENERAL *Respondent.*

Case for the Appellants.

RECORD.

1. This is an appeal brought by the above-named Appellants against an Order made by the Right Honourable the Lord Merriman, President, p. 107.
on 20th February, 1948, dismissing the Appellants' claims for (inter alia) the release to them of the whale factory "Unitas" and ordering the condemnation of that vessel as good and lawful prize. The hearing of the claims took place before the learned President on 2nd, 3rd, 4th and 5th February, 1948. The learned President admitted an appeal by the Appellants, subject to the payment into Court of the sum of £500 as p. 107, ll. 38–9.
security for the costs of the Appeal. That payment has been duly made. The p. 108.
learned President also directed that the execution of the decree be suspended p. 107, ll. 42–3.
pending the determination of the Appeal; the reason for this suspension was that whilst the vessel was under requisition out of the Prize Court by the Ministry of Transport she was sold by that Ministry to the Union Whaling Company Limited for the sum of £1,050,000 subject to title not passing unless and until the vessel had been condemned.

2. The "Unitas" was captured by H.M.S. Royal Alexandra in p. 5, l. 16.
German waters shortly before 9th June, 1945. She was transferred to p. 3, l. 24.
Methil under British naval control and was there formally seized in Prize

on 1st July, 1945. The writ in the present proceedings was issued on
p. 1. 17th July, 1945 and served upon the vessel on 18th July, 1945. It was
p. 2, l. 11. not disputed that the vessel was at the dates of both capture and of
p. 13. formal seizure flying the German flag and that at those dates she was registered at Bremen.

3. The first-named Appellants (hereinafter called "N.V.") are a
p. 17, ll. 16-19. Dutch Corporation whose shareholding is publicly held mainly by British
p. 27. and Dutch nationals. N.V. owns and at all material times owned the entire share capital of the second and third Appellants (hereinafter respectively called "Marga" and "Saponia"), both of which are also
p. 17, ll. 30-34. Dutch Corporations. Marga and Saponia jointly own the entire share of a Company incorporated under the laws of Germany named Margarine Union Vereinigte Oel-Und Fettewerke A.G. (hereinafter called "Margarine Union"), the respective percentages of the share capital so held being
p. 27. 75 per cent. by Marga and 25 per cent. by Saponia. Margarine Union
p. 17, ll. 35-36. in turn owned the entire share capital of Margarine Verkaufs Union G.m.b.H. (hereinafter called "Verkaufs"), a company incorporated under the laws of Germany, in which the legal title to the "Unitas" was at all material times vested. The structure of the Unilever organisation of which the Appellants formed part between 1942 and 1947 is shown
p. 109. in diagrammatic form at page 109 of the Record. A statement of the shareholding of the various Dutch and German Companies appears at
p. 27. page 27 of the Record. Both these documents are exhibited to the affidavit of Mr. Paul Rykens, the Chairman of N.V. which is printed
pp. 16-26. at pages 16 to 26 of the Record. The history of these companies and of the changes which took place from time to time both in the structure of the Unilever organisation and in the names of the various companies
pp. 17-18. is set out in paragraphs 2 to 9 of Mr. Rykens' affidavit. It was not disputed by the Respondent that, notwithstanding the changes in the names of the various subsidiary companies and the differences in the structure of the organisation which took place between 1931 and 1947, control of the German companies in the organisation through which N.V., Marga and Saponia carried on business in Germany, was at all material times exercised by N.V. in and from Rotterdam.

pp. 19-20. 4. Mr. Rykens in paragraphs 12 and 13 of his affidavit explained the means whereby such control was exercised. Though the companies
p. 19, ll. 25-27. in Germany had their own boards of directors, these boards had no authority to deal independently with policy or management matters but
p. 19, l. 32. met solely for the purpose of carrying out decisions on such matters which had been taken in Rotterdam. N.V. appointed a body in Berlin
p. 19, ll. 37-43. known as the Præsidium the principal members of which were of Dutch nationality. This body controlled N.V.'s German businesses and ensured that the decisions taken in Rotterdam were effectively carried out. This evidence of Mr. Rykens was not challenged by the Respondent and was
p. 93, ll. 40-50. accepted by the learned President in his judgment.

5. The Respondent sought condemnation of the "Unitas" on two main grounds, first that, as it was not disputed that she flew the German flag, she was condemnable on that ground and secondly that, as it was not disputed that the legal title to her was vested in Verkaufs, she was condemnable as enemy property.

As to the first of these contentions the Appellants submitted before the learned President and will submit before your Lordships' Board that the rule as to the conclusiveness of enemy flag is only a prima facie rule and is subject to exceptions and that these exceptions cover the present case since it is the Appellants' contention that the evidence clearly established that the " Unitas " was placed under the German flag by N.V. involuntarily and under duress exercised on them by the German Government.

As to the second of the Respondent's contentions, the Appellants contend that, whatever may be the position under English municipal law, it is the duty of the Prize Court to look behind the legal facade and to determine where in the real and business sense the true ownership of the " Unitas " lay. In the Appellants' submission there can on the unchallenged evidence of Mr. Rykens be no doubt that in the real and business sense the true ownership of the " Unitas " was in N.V. and that for this reason the vessel is not condemnable as enemy property. The Appellants invited the learned President and will invite your Lordships' Board to apply in their favour the principle laid down by the House of Lords in *Daimler Co.* v. *Continental Tyre & Rubber Co.* [1916] 2 A.C. 307 and applied by Sir Samuel Evans, P., in the *St. Tudno* [1916] P. 291 at p. 297 (" the whole and sole ownership in the ship . . . was in every real and business sense in the Hamburg Amerika Linie ").

6. The Respondent sought to meet this submission of the Appellants by contending that, if it were permissible to treat Verkaufs as a mere branch of N.V., then Verkaufs was a " house of trade " of N.V. in Germany. The Respondent contended that in that event, since the " Unitas " was the concern of that house of trade, it was the duty of N.V. on the outbreak of war between Great Britain and Germany on 3rd September, 1939, to dissociate itself from Verkaufs. It was further contended by the Respondent that N.V. did nothing between the outbreak of war in September, 1939, and the invasion of Holland in May, 1940, so to dissociate itself and that for this further reason the " Unitas," as a concern of the German house of trade from which N.V. had not dissociated itself, was condemnable as good and lawful prize.

7. The learned President decided in favour of the Respondent on the ground the vessel's flag was decisive of her enemy character. He held that even if there were exceptions to the rule regarding enemy flag (which the Appellants contend is clearly established on the authorities), the present case did not fall within any such exception because the Appellants had failed to prove duress. As regards the Respondent's second submission, the learned President declined to apply the principle of the *Daimler* case in the Appellants' favour, holding that that principle applied in Prize Cases only in favour of the Crown but not in favour of Claimants.

p. 103, ll. 46–47.
pp. 100–101.
p. 105, l. 15.
p. 104, ll. 27–33.

8. As regards the further submission of the Respondent, referred to in paragraph 6 above, the learned President held that N.V. had failed in September, 1939, to dissociate itself from Verkaufs.

p. 106, ll. 3–7.

9. The main controversy on the facts before the learned President related to the question of duress. The learned President agreed that a
p. 101, l. 17. case of duress, relied upon as an exception to the general rule as to the conclusiveness of enemy flag, had never previously arisen. The Appellants submit that on the evidence adduced by them duress was abundantly proved. The only evidence on this point is contained in the affidavit by Mr. Rykens. The Respondent called no rebutting evidence nor was any application made on his behalf to cross-examine Mr. Rykens upon his affidavit. There follows in paragraphs 10 to 16 (inclusive) of this Case
pp. 20–26. a summary of paragraphs 14 to 29 of Mr. Rykens' affidavit.

p. 20, ll. 42–45. 10. Restrictive financial legislation was first introduced into Germany
p. 20, l. 29. on 1st August, 1931. At that date the equivalent of about £7,500,000 was owing to N.V. or to N.V.'s subsidiary companies in Holland by N.V.'s subsidiary companies in Germany, as a result inter alia of supplying raw materials on credit terms. All these sums became " blocked marks." Apart from, and in addition to these " blocked marks " which represented foreign claims on Germany, that is to say the claims of N.V. or N.V.'s
p. 21, ll. 3–31. subsidiary companies in Holland on N.V.'s subsidiary companies in Germany, there came into existence " inland marks " representing trading profits accumulating in the hands of the subsidiary companies in Germany which, but for the restrictive financial legislation would in the ordinary way have been remitted by way of dividends paid by the subsidiaries in Germany to the subsidiaries in Holland or to N.V. The accumulation
p. 20, ll. 49–50. of these large sums of money thus placed a powerful weapon in the hands of any future German Government which wished to force N.V. to act
p. 21, ll. 1–2. not as N.V. wished to act but as the German Government might decide that N.V. should act. In paragraph 16 of his affidavit Mr. Rykens gave
p. 21, ll. 27–31. the figures of " inland marks " which had accumulated by the end of 1936. Certain means deposed to by Mr. Rykens were adopted by N.V. to reduce the balances of " inland marks " but these did not reduce the
p 21, ll. 23–31. amount of " blocked marks."

11. Towards the end of 1934, in order to reduce the volume of
pp. 21–22. " blocked marks," N.V. began a programme of building ships in Germany for sale outside Germany. This policy is described by the learned
p. 94, l. 21. President in his judgment as " the extraction process." All contracts
p. 22, l. 1. made in pursuance of this programme were placed in the name of N.V. or of one of its non-German subsidiaries. (A full list of all contracts placed between November, 1934, and October, 1936, in pursuance of
pp. 87–88. this policy was, at the learned President's own request, handed to him during the hearing, without objection from the Respondent. This list appears at pages 87–88 of the Record.) This policy was carried out in
p. 22, ll. 4–14. full agreement with the German Government who however imposed conditions as to the method of financing the ships built. The financial
pp. 21–23. side of this policy is described by Mr. Rykens in paragraphs 18, 19 and 20
p. 23, ll. 10–11. of his affidavit. None of the ships so built was put under the German flag. Indeed the purpose of the policy was to enable " blocked marks "
p. 23, ll. 9–11. to be exported from Germany in the form of ships and this purpose was
p. 87. in part achieved. The last contract was placed on 31st October, 1936, and the last delivery made in June, 1939. But the programme was

discontinued in 1936 for the reason given by Mr. Rykens in paragraph 20 of his affidavit, namely that the conditions imposed by the German Government became so stringent as to make the transactions uneconomic. p. 23, ll. 2–8.

12. Meanwhile since 1931 N.V. had ceased to import raw materials into Germany on credit terms and had insisted upon the German subsidiaries paying cash in foreign currency for materials supplied. Both before and especially after the accession to power of the Nazi party, the German Government sought ways and means of reducing expenditure in foreign exchange on raw materials and also sought to reduce their dependence upon foreign interests for raw materials. In 1935 Dr. Schacht, then Reich Minister of Economy, sought to force N.V. to resume imports of raw materials upon credit terms and when N.V. refused hinted at adverse consequences for them if the refusal was persisted in. In paragraph 23 of his affidavit Mr. Rykens describes other threats which were made to him, in particular threats of cuts in the production quotas of N.V.'s subsidiary companies in Germany which would be made if he refused credit terms, as he did. p. 23, l. 20. p. 28, ll. 28–33. p. 23, ll. 38–40. p. 23, ll. 41–45. pp. 23–24. p. 24, ll. 18–20.

13. In paragraphs 24 to 28 of his affidavit Mr. Rykens describes how the "Unitas" came to be built. The first approach was made to Mr. Hendriks, the principal Dutch member of the Præsidium, by Dr. Schacht, who told Mr. Hendriks that the German Government was "relying upon" N.V. building a whaling fleet for operation under the German flag. Mr. Rykens and Mr. Hendriks were well aware from the outset of the covert threat lying behind the approach. But they were able to resist the first approach because to man such a fleet required the recruitment of experienced Norwegian officers and seamen. This the Norwegian Government was unwilling to permit at the time. Mr. Rykens was therefore able to give Dr. Schacht a valid excuse for refusing to comply with his wishes, though he knew that if this obstacle were removed, N.V. would then have no alternative but to comply with Dr. Schacht's requirements. pp. 24–26. p. 24, l. 35. p. 24, ll. 43–48. p. 25, ll. 5–18. p. 25, ll. 16–18.

14. At the beginning of 1936 the ban on the recruitment of Norwegian crews was lifted and Dr. Schacht, who meanwhile had approached other German concerns with the same objective, made a fresh approach to Mr. Hendriks. Mr. Rykens appreciated the seriousness of the situation, were he to refuse to comply with this new request. Dr. Schacht's terms included requirements not only that the fleet when built should be chartered to a new company to be formed in which N.V. would have no more than a 50 per cent. interest but also that the fleet was not to be transferred from the German flag without the consent of the German Government. Both Mr. Rykens and Mr. Hendriks tried up to the last stage of the negotiations to insist that the fleet should be registered under the Dutch flag, but Dr. Schacht refused to agree. The task of concluding the arrangements was entrusted by N.V. to Mr. Simon Thomas, the responsible Dutch member of the Præsidium concerned. p. 25, ll. 22–23. p. 25, l. 19. p. 25, ll. 23–24. p. 25, ll. 24–28. p. 25, ll. 30–35. p. 25, ll. 35–37. p. 25, ll. 46–48.

15. In paragraphs 28 and 29 of his affidavit Mr. Rykens states that he was never left in any doubt as to the reality of the threats behind Dr. Schacht's proposals and that he had no doubt at all that, if N.V. p. 26. p. 26, l. 5.

p. 26, ll. 5–11. had refused to agree to Dr. Schacht's terms for building the whaling fleet for operation under the German flag, effective steps would have been taken to confiscate or render virtually valueless N.V.'s assets in Germany and to restrict to a minimum any further carrying on of their business in Germany. He instanced, as an illustration of the high-handed and p. 26, ll. 11–16. lawless action taken by the German Government, the arbitrary withdrawal of the production quota of a factory in East Prussia belonging to one of N.V.'s German subsidiaries, so that the factory was forced to close down. Mr. Rykens deposed that " but for the pressure brought to bear by Dr. Schacht and the sanctions which the German Government was in a 10 position to impose, had N.V. not ultimately complied with their demands, the said whaling fleet would never have been built and thereafter owned and operated under the German flag. The construction of the whaling p. 26, ll. 17–23. fleet was not voluntarily undertaken by N.V. nor was it a freely chosen investment which N.V. decided to make of their own volition." He contrasted the circumstances in which the " Unitas " came to be constructed p. 26, ll. 25–30. in Germany and those in which the other ships came to be so constructed, not one of which was placed under the German flag. He further deposed p. 26, ll. 32–37. that the " Unitas " and their catchers " were built only as a result of the direct pressure by the German Government . . . and were only registered 20 under the German flag as a result of that pressure in spite of every effort . . . to avoid having to comply with this demand of the German Government and to secure Dr. Schacht's agreement to their being registered under the Dutch flag." As above stated, no application was made to cross-examine Mr. Rykens and before the learned President, Counsel for the Respondent did not challenge the statements of fact contained in the affidavits filed on behalf of the Appellants.

16. The remaining facts relating to the construction of the vessel, after N.V. had decided to comply with Dr. Schacht's demands, is set out pp. 30–33. in an affidavit by Mr. Simon Thomas and in the exhibits thereto. This 30 affidavit appears at pages 30 to 33 of the Record. The total cost of the p. 32, l. 4. construction of the " Unitas " was R.M.7,472,351·35. This was paid for p. 36, l. 22. out of " inland marks," save as regards a small item of £7,000 for equipment purchased abroad.

17. Thereafter arrangements were made for the formation of the new pp. 55–58. company in accordance with Dr. Schacht's requirements, namely " Unitas " Deutsche Walfang G.m.b.H. The different interests in this p. 32, ll. 29–37. company are detailed in paragraph 8 of Mr. Simon Thomas' affidavit. p. 32, l. 21. This company was formed on 23rd September, 1937, on which day the p. 32, ll. 38–41. " Unitas " was delivered by the builders to Verkaufs and forthwith by 40 Verkaufs to the new company. Thus Verkaufs lost possession and control pp. 59–68. of the " Unitas " as soon as she was completed. The Charter between Verkaufs and the new company, which was on demise or bare boat terms, p. 68, l. 38. was signed on 24th February, 1938, but with effect, in the case of the p. 59, l. 41. " Unitas," from 23rd September, 1937.

18. The learned President (a transcript of whose judgment will be pp. 91–107. found at pages 91–107 of the Record) in his judgment does not in terms state that the fact that a vessel is flying the enemy flag is conclusive of the Crown's right to condemnation. Indeed the authorities such as *The Vrow*

Elizabeth (1803) 5 C.Rob. 2 and *The Tommi* [1914] P. 251 indicate that there are exceptions to the rule though the scope of such exceptions is nowhere fully stated. But the learned President rejected the Appellants' submission that the present case fell within any exception because he said : " I am far from convinced that it " (i.e. the building of the " Unitas ") " bore signs of being concluded under duress." He was however prepared to accept that the German Government was in a position to bring economic pressure to bear on N.V. and that they would not hesitate " to bring to bear any such pressure as they thought would serve their purpose." In the Appellants' respectful submission the duress relied upon by the Appellants was completely proved and the learned President was in error in concluding that it was not. As above stated Mr. Rykens' affidavit was uncontradicted and unchallenged by the Respondent. The learned President rejected Mr. Rykens' statement in paragraph 29 of his affidavit that the whaling fleet was built " only as the result of direct pressure by the German Government," because in his (the learned President's) view the construction of the whaling fleet " must have had a close connection with the extraction process." The learned President appears to have thought that the facts as to the " extraction process " as detailed in Mr. Rykens' affidavit and in the additional details produced at the learned President's request were inconsistent with Mr. Rykens' statements regarding the construction of the whaling fleet. In the Appellants' submission he was in error in this view. The two transactions were of a wholly different character and were undertaken from different motives. The " extraction process " had as its object the removal of assets from Germany and did not result in the building of any vessels under the German flag. The building of the " Unitas " on the other hand served no purpose of N.V., did not result in the withdrawal of assets from Germany and was undertaken solely as a result of the duress deposed to by Mr. Rykens. The learned President drew the inference that the advantage of continuing " the extraction process " without interruption must have been in the minds of those directing the policy of N.V. and " that the risk of this benefit being withdrawn cannot fail to have been a potent inducement to accept the proposal of building the whaling fleet." In the Appellants' submission, the learned President ought not to have drawn this inference. Mr. Rykens did not so state and either the Respondent or the learned President could have required him to be cross-examined upon this question had this been desirable. But even if (contrary to the Appellants' submission) the inference drawn by the learned President be a fair inference, the only conclusion which can be drawn therefrom is that there was yet another means available to the German Government, in addition to those deposed to by Mr. Rykens, of bringing pressure to bear upon N.V.

p. 102, ll. 26–27.
p. 96, l. 49.
p. 97, ll. 2–3.
p. 102, l. 28.
p. 102, l. 31.
pp. 87–88.
p. 103, ll. 1–5.

19. For these reasons the Appellants respectfully submit that the learned President was wrong on the main question of fact in the case and that, contrary to his view, duress was abundantly proved, the Appellants did not voluntarily place the " Unitas " under the German flag and the " Unitas " is not condemnable by reason of the fact that she flew the German flag.

20. As regards the learned President's refusal to apply the principle of the *Daimler* case in the Appellants' favour, the Appellants submit that the reasons given by the learned President for his refusal are unsound in law.

p. 104.

pp. 105–106. 21. The learned President also held that even if the principle of the *Daimler* case was applicable, N.V. had failed to dissociate themselves from Verkaufs. In the Appellants' submission this doctrine of dissociation has no application to ships and in English Prize Law has never been so applied. Its application is limited to cargoes. But if this be wrong in law, the Appellants submit that there was no step which N.V. could at any material time have taken by way of dissociation. It is said by the learned President p. 105, l. 50, p. 64. that N.V. ought to have insisted upon strict compliance with Articles 9 and 10 of the Charterparty between Verkaufs and the Unitas Company. But neither clause gives a right of withdrawal to Verkaufs. Nor is there any evidence that the Charterers ever threatened any breach of those clauses. In the Appellants' submission there was no practical step which N.V. could have taken.

pp. 81–82. 22. On 26th October, 1943, the Appellants' associated company Lever Brothers & Unilever Ltd. brought to the notice of the Ministry of War Transport the facts regarding ownership of the "Unitas." But notwithstanding this notice, the vessel was seized and the Respondent caused proceedings to be instituted in Prize against her. The Appellants will humbly submit that if their claim to the release of the vessel be well founded in law there was no cause justifying the seizure and that the Respondent should be ordered to pay damages.

The Appellants therefore humbly submit that the Judgment appealed from is wrong and should be set aside for the following among other

REASONS.

1) BECAUSE the fact that the "Unitas" was flying the German flag at the time of capture and was then registered at the port of Bremen does not conclusively determine her liability to seizure or condemnation in Prize.

(2) BECAUSE the construction of the "Unitas" in Germany and her subsequent registration and operation under the German flag were not voluntarily undertaken by the Appellants.

(3) BECAUSE the rule regarding the conclusiveness of the enemy flag only applies where the shipowner has "chosen to adopt" that flag and the Appellants did not voluntarily choose to adopt the German flag for the "Unitas."

(4) BECAUSE the "Unitas" was built and thereafter operated under the German flag solely by reason of the duress of the German Government, as proved by the unchallenged evidence adduced by the Appellants.

(5) BECAUSE the whole and sole ownership of the "Unitas" was in every real and business sense in the first Appellants or alternatively in the second and third Appellants, all of them subjects of a State allied with His Majesty.

(6) BECAUSE the doctrine of dissociation has no application to ships.

(7) BECAUSE there were no practical steps which the Appellants or any of them could take by way of dissociation.

(8) BECAUSE the " Unitas " was not liable to seizure and is not liable to condemnation.

(9) BECAUSE the said seizure was unreasonable having regard to the notice given to the Ministry of War Transport on 26th October, 1943.

(10) BECAUSE the condemnation of the " Unitas " would injure only subjects of, or of a State allied with, His Majesty.

(11) BECAUSE the judgment of the learned President was wrong.

WILLIAM McNAIR.

EUSTACE ROSKILL.

No. 2 of 1949.

In the Privy Council.

ON APPEAL

from the High Court of Justice, Probate, Divorce and Admiralty Division (in Prize).

S.S. "UNITAS" and CARGO.

BETWEEN

LEVER BROTHERS & UNILEVER N.V., "MARGA" MAATSCHAPPIJ TOT BEHEER VAN AANDEELEN IN INDUSTRIEELE ONDERNEMINGEN N.V. and "SAPONIA" MAATSCHAPPIJ TOT BEHEER VAN AANDEELEN IN INDUSTRIEELE ONDERNEMINGEN N.V. *Appellants*

AND

HIS MAJESTY'S PROCURATOR GENERAL *Respondent.*

Case for the Appellants.

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22 Chancery Lane, W.C.2. N2405-41892