Privy Council Appeal No. 2 of 1949

Lever Brothers and Unilever N.V. and others - - - *Appellants*

v.

His Majesty's Procurator General - - - - - *Respondent*
in the matter of S.S. "Unitas" and cargo

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH MAY, 1950

Present at the Hearing:

LORD PORTER
LORD SIMONDS
LORD NORMAND
LORD MACDERMOTT

[*Delivered by* LORD PORTER]

This is an appeal against a decree by the President of the Probate, Divorce and Admiralty Division of the High Court of Justice sitting in Prize who on the 20th February, 1948, pronounced that the steamship "Unitas" belonged at the time of capture and seizure to enemies of the Crown and was liable to confiscation as good and lawful prize. The learned President gave leave to appeal subject to the provision of security for costs of the appeal, and directed that the decree should be suspended pending the appeal. The "Unitas" is a whale factory ship of about 21,000 gross registered tonnage. The evidence on behalf of the Crown was confined to the formal affidavits of seizure and ship's papers from which it appeared that throughout her life from the date when she was built in 1937 until she was seized she was registered in the Port of Bremen, Germany, and was of German nationality. At all material times her immediate ownership was vested in a German limited liability company known prior to June, 1939, as Jurgens-Van den Bergh Margarine Verkaus Union G.m.b.H. and thereafter as Margarine Verkaufs Union G.m.b.H., referred to hereafter as "Verkaufs". She was registered in the name of "Verkaufs", and at the date of capture and seizure was flying the German flag. At the time of the unconditional surrender of Germany she was lying in the port of Wilhelmshaven in Germany and was there captured by H.M.S. "Alexandra". After capture she was transferred to Methil in the County of Fife and there formally seized in prize on the 1st July, 1945. The writ herein was issued on the 17th of that month, and on the 10th August, 1945, an appearance was duly entered on behalf of the first appellants, Lever Brothers and Unilever N.V. of Rotterdam, referred to hereafter as N.V., as parties interested in the ship. On the 18th June, 1946, further appearances were entered for the second appellants, "Marga" Maatschappij tot beheer van Aandeelen in Industrieele Ondernemingen N.V., referred to hereafter as "Marga", and the third appellants "Saponia" Maatschappij tot beheer van Aandeelen in Industrieele Ondernemingen N.V., referred to hereafter as "Saponia", as parties interested in and as beneficial owners of the ship. On 7th January, 1947, a claim was filed on behalf of all these appellants as parties interested in or as beneficial owners of the ship, tackle, apparel and furniture. An additional claim was filed at the same time for all losses, costs, demurrage

and expenses by reason of her seizure and detention as prize, but was abandoned before their Lordships, it being admitted that the seizure, but not the condemnation, was justified.

" N.V." is a Dutch Corporation. Its shares are publicly held mainly by British and Dutch nationals, and it owns the entire share capital of the second and third appellants, both of whom are also Dutch corporations. They in their turn jointly own the entire shares of a Company incorporated under the laws of Germany, named Margarine Union Vereinigte Oel-Und Fettewerke A.G., hereafter called " Margarine Union ", and Margarine Union owned the entire share capital of Verkaufs. It was not disputed by the respondent that the general control of the German Companies in the Organisation through which N.V., " Marga " and " Saponia " carried on business in Germany was at all times exercised by N.V. in and from Rotterdam. Though the Companies in Germany had their own boards of directors, these boards had no authority to deal independently with policy or management. N.V. appointed a body in Berlin known as the Praesidium, the principal members of which were of Dutch nationality, and this body controlled N.V.'s German businesses and ensured that the decisions taken in Rotterdam were effectively carried out. The respondent maintained that condemnation of the " Unitas " was justified on two main grounds, first, that she flew the German flag, and secondly, that the legal title to her was vested in Verkaufs. In answer to the first of these contentions the appellants submitted that the flying of an enemy flag is only a prima facie ground for condemnation, and is subject to exceptions which cover the present case. As to the second, they maintain that it is the duty of the Prize Court to look behind the legal façade and determine where the true ownership of the " Unitas " lay, and that on the principles laid down in the House of Lords in *Daimler Co.* and the *Continental Tyre & Rubber Co.*, 1916, 2 A.C. 307 as applied to prize in the *St. Tudno,* 1916, P. 291, the whole and sole ownership in the ship was, in this case as it was in that—in every real and business sense in the beneficial owners. The respondent on his part maintained that the principles laid down in the Daimler case might be effective in a case where the legal ownership was in a friend or neutral, to disclose an enemy beneficial ownership and so lead to condemnation, but would not dispose of enemy taint where the legal ownership was that of an enemy. But in any case they maintained 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, and 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 the United Kingdom and Germany on 3rd September, 1939, to dissociate itself from Verkaufs. This duty they did nothing to fulfil between the outbreak of war and the invasion of Holland in May, 1940, and for this further reason the " Unitas ", as a concern of the German house of trade, was condemnable in prize.

The learned President decided in favour of the respondent on the ground that the vessel's flag was decisive of her enemy character. He held that even if there were exceptions to the rule as to the enemy flag the present case did not fall within them. He agreed with the respondent's second submission that the principle of the Daimler case did not apply even if it were established that the beneficial ownership was that of a friend or neutral, and further held that N.V. had failed between September, 1939, and May, 1940, to dissociate itself from Verkaufs.

Having regard to the importance of the interests involved and in view of the likelihood of an appeal to their Lordships' Board, the learned president dealt fully with each of the three contentions put forward in order that full assistance might be afforded on appeal to their Lordships in considering each aspect of this case. But as the Board think that the flying of the enemy flag alone is in this and in most cases sufficient to dispose of the matter at issue they refrain from expressing any opinion as to the other two difficult and controversial matters.

Prima facie, of course, the flying of an enemy flag in wartime is conclusive of the nationality of a ship and subjects her to seizure and condemnation in a Court of Prize. If it is done voluntarily it is conclusive,

but, say the appellants, if under duress or indeed under pressure and against the will of the owner of the ship it is but an element to be taken into consideration and may well be inconclusive.

For this argument reliance is placed upon the expressions over and over again appearing in the cases which begin with Sir William Scott's words in *The Vrow Elizabeth* (1803) 5 Chr. Rob. 3 at p. 6.

"In that case (viz. an earlier unreported case), however, it was held that the fact of sailing under the *Dutch* flag and pass was decisive against the admission of any claim; and it was observed that as the vessel had been enjoying the privileges of a *Dutch* character, the parties could not expect to reap the advantages of such an employment, without being subject at the same time to the inconveniences attaching on it. When I lay down this rule, I do not say that there may not be cases of such particular circumstances, as to raise a reasonable distinction. The treaty of *Amiens* had stipulated for the liberty of withdrawing *British property* from the ceded and restored islands. But the Governments of *France* and *Holland* afterwards refused to suffer such property to be exported from these colonies, otherwise than in ships of *France* and *Holland*, and on a destination to those countries. The difficulty which has arisen in the removal of *British* property, for want of shipping, may have induced our own Government to permit *British* ships to put themselves under *Dutch* flags for this particular purpose: and in such cases the particular situation of affairs arising out of this refusal to execute the treaty, may have entitled such parties to a relaxation of the general rule."

This consideration was repeated in the *Fortuna* (1811) 1 Dods. 81 in the words of the same judge at p. 87. "All that the Court has thrown out respecting the effect of the flag and pass is this, that the party who takes the benefit of them is himself bound by them." He adds what is germane to another aspect of this case, "But they do not bind other parties as against him."

It will at a later stage be desirable to analyse the width of the exception to which Lord Stowell refers, but at the moment the quotations set out above are examples of those relied upon by the appellants in support of the proposition that in order to be bound by the rule of the flag the shipowner must voluntarily adopt it and not be coerced into its use.

For the allegation that their act was involuntary, the appellants lay stress upon the statements endorsed in Mr. Ryken's affidavit. They may be summarised as follows.

On the 1st August, 1931, the German subsidiaries of N.V. were indebted to N.V. or its subsidiaries in Holland to the extent of about £7,500,000 sterling, and at this time the German Government introduced financial legislation under which these credit balances were converted into what were known as blocked Marks, with the result that N.V. and its Dutch subsidiaries were no longer able freely to obtain repayment from Germany of loans which they had advanced to their German subsidiaries for the provision of working capital or of monies due from them for the supply of raw material. About the same time the amount of Reichsmarks representing the trading profits of the subsidiary companies of N.V. in Germany ceased to be transferable to N.V. or its subsidiary companies in Holland. These Reichsmarks, which did not represent foreign claims on Germany, were classified as "inland marks" and could be used within limits for making investments in Germany. As a result of these and further financial restrictions later imposed the accumulated cash and cash investments held by N.V.'s subsidiary companies in Germany had risen by 1936 to a figure of about 61,000,000 Reichsmarks.

The possession of these large amounts of blocked and inland marks led the appellants to endeavour to find means of extracting the blocked marks from Germany, even at a considerable financial sacrifice. Accordingly they obtained the consent of the German authorities to order the construction inside Germany, on behalf of N.V. or one of its associated companies, of ships for exportation and sale to foreign purchasers. As a term of their consent the German authorities required (inter alia) that

part of the building price should be paid out of the proceeds of the sale of certain commodities which N.V. was to import into Germany. This obligation involved the expenditure of considerable sums in currency other than German, which amounted at first to 20 per cent. and later to 45 per cent. of the building price. Nevertheless by these means N.V. and its associated companies were able to extract from Germany a proportion of the blocked mark balances and to convert them into foreign currency.

By the end of 1935 twenty contracts for the construction of 47 ships of approximately ¼ million tons had been placed, and between January and October of the succeeding year 13 further contracts had been placed for 21 ships totalling over £200,000. Meanwhile in April or May, 1935, Dr. Schacht approached Mr. Hendriks and Mr. Rykens with a view to persuading the appellants to build a whaling fleet in Germany for operation under the German flag. But the appellants were able to avoid complying with the proposal at that time because Norwegian seamen experienced in whaling operations were needed for the successful prosecution of the whaling enterprise and the Norwegian Government were unwilling to allow them to sail under the German flag. At the beginning of 1936, however, this obstacle had been overcome and Mr. Rykens and Mr. Hendriks knew that similar proposals for the building of whaling fleets had been made by Dr. Schacht to two of the trade rivals of N.V. in Germany and that those trade rivals had agreed to undertake the task. At this juncture Dr. Schacht again approached Mr. Hendriks. The terms then proposed contained the stipulation that the fleet could not be transferred from the German flag without the consent of the German Government and that the vessels should be chartered to and operated by a German concern in which the appellants would enjoy no more than a half share. If accepted, the plan would attract a subsidy of 30 per cent. with a maximum of RM.3,500,000 from the Reich towards the construction of the fleet. The appellants ultimately decided to accept the proposals and instructions were given so that the necessary arrangements for a contract with the German Government might be made. Ultimately an agreement was reached by the 20th May, 1936, under which certain further provisions were confirmed. The appellants were to build a whaling fleet consisting of the "Unitas" and eight catchers at a total price of approximately RM.13,000,000, and in return were to receive from the Reich Government a subsidy of 30 per cent. of the building cost with a maximum of RM.3,500,000. The appellants were to advance the foreign currency required for the purchase of items supplied from abroad, estimated at £7,000 sterling, and to be allowed to recoup themselves these advances plus a fair rate of interest by deliveries of whale oil from the first whaling season at fair market prices. They also agreed to finance such of the costs of the whaling expeditions as would have to be paid in foreign currencies on similar terms, and to operate the fleet when built through a working company at a charter price of a quantity of whale oil (estimated at 7,000 tons per annum) which they would afterwards sell to the German Government at the ruling world price converted into Reichmarks. The balance of the whale oil was also to be sold to the German Government by the working company on similar terms. The agreement was subject to the condition that the appellants should have treatment not less favourable than that accorded to their German competitors, and the Reich Air Ministry or Naval Observatory was to be permitted to set up meteorological stations on board the vessels and to arrange for experienced radio operators and short wave equipment to be carried on board.

This history of the negotiations which led up to the building of the "Unitas" does not of itself show duress or, indeed, any undue pressure by the German Government, but Mr. Rykens says categorically that the hidden threat was there. In the first place, he says that on a previous occasion in 1935 when N.V. was asked to supply guelders to the German Government on credit terms and refused to do so, open threats were uttered by high officials in the Ministry of Finance that N.V.'s previous quotas would be cut and that although Dr. Schacht and Herr von Ribbentrop alleged that they were unaware of the proposed cuts, he had

no doubt that they knew of the threats. The attitude of the German Government and the covert threats lying behind the pressure that was brought to bear are perhaps best set out in Mr. Rykens' own words at the end of his affidavit in paragraph 28:—

> "Though my conversations with Dr. Schacht and also Herr von Ribbentrop were conducted in a courteous manner I was never left in any doubt as to the reality of the threats lying behind their proposals and I have no doubt at all that if N.V. had not agreed to the building of the whaling fleet in Germany for operation under the German flag effective steps would have been taken to confiscate or render virtually valueless the N.V. assets in Germany and to restrict to the minimum any further carrying on of business by N.V. in Germany. As an illustration of the high-handed and lawless action of the German authorities I would mention that before the outbreak of war one of N.V.'s German subsidiaries carrying on business in East Prussia had the quota of one of its factories arbitrarily taken by the German authorities so that it was forced to cease carrying on business."

And in the succeeding paragraph he shows the method adopted by the German Government in compelling compliance with their wishes in the following words:—

> "But for the pressure brought to bear by Dr. Schacht and the sanctions which the German Government was in a 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 said whaling 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. N.V. was in my respectful submission forced by the German Government into a position in which they had no alternative but to comply with the German Government's demands."

Their Lordships are prepared to accept for the purpose of their decision Mr. Rykens' statements but they are nevertheless of opinion that they are insufficient to constitute a ground for rejecting the conclusiveness of the fact of flying the German flag.

In the course of his judgment the learned President said: "I do not doubt at all that the German Government were in a position to bring economic pressure on foreign concerns trading in the country through German subsidiaries, nor would they hesitate to bring to bear any such pressure as they thought would serve their purpose."

Indeed he envisages the possible confiscation of N.V.'s German business as one of the steps which might be taken and in their Lordships' view the threat is none the less serious though one of the adverse actions which the German Government contemplated was the cancellation of the orders for ships to be built in Germany and sold abroad. In any case it was a threat of the most serious character and their Lordships are in no sense minded to minimise its importance.

But the question remains whether a threat to the economic interests or even existence of the N.V.'s German subsidiaries is enough to render a ship flying the German flag immune from the sanction of seizure and condemnation.

It does not in their Lordships' view assist the appellants' case to speak of the building of the whaling fleet and its German registration and chartering to a German company as involuntary. In truth it was not involuntary in the sense of being unintentional: it was a deliberate choice taken between two distasteful alternatives. It is only involuntary in the sense that the appellants would have preferred not to make a choice at all. Faced with the obligation of doing so, they made their election. And it is not irrelevant to remember that that election was made two years before war broke out and, though no accounts have been furnished and possibly none could be furnished, yet the ship was built in time to perform a whaling voyage at any rate in 1938 and may well have earned considerable emoluments for her owners. The fact that she was built

as a result of German pressure and German threats because a worse fate might have befallen the claimants if they did not give way seems to their Lordships a totally inadequate reason for avoiding the natural consequence of flying the German flag.

The strictness with which the rule is followed is accentuated again and again in the prize law of many countries and in the text books dealing with the topic.

Wheaton, Hall and Oppenheimer all state the principle in unqualified terms. It is enough to quote the first named (8th edition) at p. 588. "According to the rules observed in the British Prize Courts the flag of the enemy is conclusive against the ship flying it, but our Courts can go behind a neutral flag and ascertain who is the real owner and enemy shares in a ship flying a neutral flag can be condemned."

The cases to the like effect are well known and numerous. The two earliest reported the *Vigilantia* (1798) 1 Chr. Rob. 1 and the *Vrow Elizabeth* (1803) 5 Chr. Rob. 3 contain unequivocal statements to the like effect and indeed it is not disputed that this is the general rule. But it is said that the principle does not apply except in cases where the owners voluntarily chose to accept the benefit of the enemy flag for their own advantage.

To support this argument reliance is placed upon the type of expression to be found in the *Fortuna* (1811) 1 Dods 81 where the wording is: "All that the Court has thrown out respecting the effect of the flag and pass is this, that the party who takes the benefit of them is himself bound by them, but they do not bind other parties as against him"; or perhaps more clearly in the *Primus* (1854) 1 Spink P.C. 48 where the words used are: "If he reap the benefit accruing during peace he must also take the consequence of war".

Similar expressions are to be found in many of the cases, but in their Lordships' opinion a conclusion that a shipowner who built his ship unwillingly it may be, but still with the object of avoiding a position less favourable to himself, and sailed her under an enemy flag would avoid seizure and condemnation in prize in the event of war is altogether unjustified.

The statement that the shipowner has taken the benefit and must endure the consequences is not in essence a limitation of the doctrine, but an explanation of its origin.

It is true that as pointed out above Sir William Scott, as he then was, says in the *Vrow Elizabeth* (supra): "I do not say that there may not be cases of such particular circumstances as to raise a reasonable distinction", and instances a case where after the peace of Amiens the French failed to fulfil an undertaking to provide shipping to repatriate British subjects and ships flying an enemy flag were thereupon used for that purpose, and after outbreak of war held free of condemnation.

So too in the *Tommi* (1914) P. 251 it was said: "The law with regard to the effect of carrying the flag is perfectly clear, namely, that if a ship does sail under a particular flag, *unless there are very special exceptions,* she has elected to enjoy the protection of the state whose flag she flies and she is regarded as a ship belonging to that state".

Their Lordships accept the view that there may be circumstances which make the flying of the enemy flag inconclusive as a reason for condemning a ship in prize, but such circumstances must be very exceptional. The few in which a ship flying the enemy flag has escaped condemnation are all of that character. In addition to the cases mentioned in the *Vrow Elizabeth* (supra) their Lordships' attention has only been called to three and they are not aware of any others. Those three are the *Palme*, mentioned in Wheaton, p. 153, and reported in Balloz Jurisprudence General (1872) III, p. 94, the *Taxiarchis* also referred to in Wheaton and the *Pontoporos* 1 Brit. & Col. Prize cases 372.

The Palme was a German vessel purchased by the Swiss Red Cross from German owners. The Swiss Government would not allow their flag to be flown, the French Government forbade the use of its flag and

in default of any other the German flag was retained and a German agent appointed. The circumstances were peculiar and exceptional and a French Prize Court decreed her release.

The Taxiarchis was a case exhibiting some features of the same kind: she was British owned and registered in Cyprus which at that time was nominally under Turkish rule but actually administered by Britain. There was no national flag of Cyprus and therefore she flew the Turkish flag. In each of these cases, the absence of a national flag coupled with the neutral or friendly nationality of the owners was the deciding factor.

The Pontoporos was a Greek ship captured by the Emden and used as a coaling auxiliary, but her master never consented to her use as such and was kept a prisoner. The case is a true example of involuntary submission to enemy duress. Indeed the Prize Court which tried her case contrasted it with that of the *Carolina* 4 Chr. Rob. 256 where the master had, though unwillingly, accepted service under an enemy belligerent and the basis of the decision is explained at p. 379: "The act of force", it was said, "referred to by the learned Judge would seem to be the laying of an embargo on the ship and fitting her up as a transport against the will of the master and during his absence, but the facts show that when he returned he acquiesced." And in the Carolina itself Lord Stowell says, "A man cannot be permitted to aver that he was an involuntary agent in such a transaction. If an act of force exercised by one belligerent upon a neutral ship or person is to be deemed a sufficient justification for an act done by him contrary to the known duties of the neutral character there would be an end to any prohibition of the law of nations to carry contraband or engage in any other hostile act"

The circumstances in the last-mentioned case in substance resemble those now under consideration whereas those in the three cases relied upon by the Appellants are in a different category. It is, as a general rule, where captors are concerned, the use of the enemy flag which entitles them to seize. Neutral ownership of itself does not protect the ship. The *Ocean Bride* (1854) 1 Spink P.C. 66, was British owned and flew the British flag but was nominally transferred to Russian ownership in order to protect her from seizure in case of war between this country and Russia. On these facts being established she was released. As showing the importance of the flag it was said in the course of the judgment: "If this vessel had been sailing under the colours of an enemy I should say this was a claim which could not be sustainable, but here she remains navigated under British colours; and that prevents a difficulty which would have been insuperable—for, if the vessel had been under Russian colours, that would have been conclusive against all the world, for reasons I need not refer to, as it is a well-known principle".

Their Lordships have thought it desirable to deal with the grounds upon which the appellants support their case at some length as the claim is a large one and the principle at stake important. From the authorities which have been referred to, it is clear that the flag under which a ship sails constitutes one of the most if not the most important element which a Court of Prize has to consider in determining whether she is rightly seized and condemned as prize. But it is not necessary for them to set exact bounds to the limitations to be placed upon the dicta that the flying of an enemy flag is conclusive or to pronounce on the correctness or otherwise of every decision relied upon or the accuracy of every individual expression of opinion contained therein. Whatever view may be taken on the matter the present case is in their Lordships' opinion far removed from those exceptional cases in which that rule may be discarded.

In the view of the Board the "Unitas" was rightly seized and condemned and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

(68532) Wt. 8148—56 250 5/50 D.L. G. 338

In the Privy Council

LEVER BROTHERS AND UNILEVER N.V. AND OTHERS

v.

HIS MAJESTY'S PROCURATOR GENERAL
in the matter of S.S. "Unitas" and cargo

DELIVERED BY LORD PORTER

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.

1950