

**THE HIGH COURT
COMMERCIAL**

[2010 No. 1810 P]

BETWEEN

SPV SAM DRAGON INC.

PLAINTIFF

AND

GE TRANSPORTATION FINANCE (IRELAND) LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian McGovern delivered on the 15th day of June,

2012

1. The plaintiff is a company incorporated under the laws of Panama and is the owner of the M/V Sam Dragon, formerly named the M/V 'Pretty Flourish' ("the Vessel"). The defendant is a company incorporated in the State with registered offices in Shannon, County Clare, and provides financial services to the global transportation industry.
2. On 30th September, 2006, the defendant entered into a US\$35m loan facility agreement with a South Korean company, Samsun Logix Corporation ("Samsun") which was at that time the owner of the M/V 'Pretty Flourish'. The Vessel was registered on the Korean Shipping Register. Security for the loan facility included a mortgage on the Vessel. The mortgage was entered on the Register.
3. On 2nd February, 2009, Samsun filed a petition to enter an insolvency process known as 'rehabilitation' in South Korea. This is a process somewhat similar to the examinership process in this jurisdiction. On 13th February, 2009, Samsun defaulted

in making a monthly repayment on the ship's mortgage and under the terms of the mortgage, the defendant issued a notice demanding full payment of the loan.

4. On dates in January and February 2009, the Vessel was arrested in the Port of Ghent by various creditors of Samsun who were owed an aggregate amount of US\$51.5 million. On 1st April, 2009, the defendant applied for and obtained a Conservatory Arrest Order on the Vessel in Ghent. On 29th July, 2009, the court appointed a bailiff with responsibility for the sale of the Vessel by public judicial auction. The Vessel was advertised for sale, and on 12th October, 2009, the plaintiff's bid of US\$17m for the Vessel was successful. The proceeds of sale were deposited with the bailiff to await the court's decision on the order of priority. On 7th December, 2009, the Belgian court decided that the law to be applied to the distributions of the proceeds of sale would be Korean law.

5. The Vessel was sold to the plaintiff by way of judicial sale in Belgium. There is no dispute between the parties that the effect of the judicial sale was that, both by operation of law and under the Conditions of Sale, the plaintiff purchased the Vessel free from encumbrances. This had the effect of discharging the mortgage and the defendant's claim, as mortgagee, was transferred to the proceeds of sale. Because there were rehabilitation proceedings in the Korean courts which commenced in March 2009, the defendant, as mortgagee, had some uncertainty as to what would happen in the event that no scheme of arrangement was approved by the court and Samsun went into bankruptcy. The defendant obtained legal advice which persuaded it that it should not voluntarily vacate the charge on the Korean Shipping Register until such time as it received the proceeds of sale of the Vessel pursuant to the judicial sale in Ghent. On 24th July, 2010, the appeal period from the final court order as to distribution of the proceeds of sale of the Vessel expired, and by letter dated 26th July,

2010, from the defendant to Samsun, it consented to the deletion of the mortgage from the Register. On 6th August, 2010, an application for the discharge of the mortgage was signed by the defendant, and on 31st August, 2010, the entry of the mortgage on the Korean Register was deleted.

6. The plaintiff's claim in this action is brought as the purchaser of the Vessel in the judicial sale, for damages and expenses incurred by it in registering the Vessel on the Hong Kong Shipping Register. It says additional charges and expenses arose as a result of the failure of the defendant to comply with the plaintiff's request to remove the entry of the mortgage from the Ship's Register in Korea. It had always been the intention of the plaintiff to register the Vessel in the Hong Kong Ship Registry. On 4th December, 2009, the plaintiff secured temporary or provisional registration of the Vessel in Hong Kong since it was not possible to obtain full registration in circumstances where the Vessel remained registered on the Korean Ship Registry. Full registration on the Hong Kong Shipping Register can only be secured upon production of a Deletion Certificate from the vessel's former Registry.

7. The Hong Kong Ship Registry initially granted the plaintiff thirty days to provide the Deletion Certificate from the Korean Ship Registry and this was subsequently extended for a further sixty days.

8. On 5th January, 2010, the Jeju District Court in Korea refused an application of Samsun (the original owners of the Vessel) for deregistration of the Vessel from the Korean Registry on two grounds:

- (a) The preservation order made by the Rehabilitation Court on 6th February, 2009, remained on the Register; and
- (b) The mortgage had not been cancelled.

The plaintiff claims that it was required to seek registration of the Vessel under a Flag of Convenience and that it registered the Vessel in Panama on a temporary basis and then subsequently in Hong Kong on a permanent basis when the entry in the Korean Register was finally deleted.

9. These proceedings commenced by plenary summons issued on 24th February, 2010. The statement of claim was delivered on 5th March, 2010, and included claims for an injunction requiring the defendant, its servants or agents to take all steps necessary in order to discharge the mortgage on the Vessel from the Korean Ship's Register and/or an injunction restraining the defendant from obstructing or refusing to discharge the mortgage on that Register or otherwise obstructing the registration of the Vessel on the Hong Kong Shipping Register by the plaintiff. Events have since overtaken the claim for such relief as the entry of the mortgage was deleted prior to the hearing and full registration of the Vessel in the Hong Kong Register was achieved.

10. In order to determine whether the defendant has a legal liability, the court must decide whether there is a legal duty on the mortgagee of a vessel to take affirmative steps to delete the entry of the mortgage on the Ship's Register in circumstances where there has been a judicial sale in a country other than the country of registration.

Applicable Law

11. This case involves parties from a number of countries and legal issues arising in several jurisdictions. This raises a question as to what law applies. Does one law apply to the arrest proceedings in Ghent and another law apply to questions surrounding the issue of the removal of the entry of the mortgage from the Ship's

Register in Korea? The plaintiff alleges the defendant committed two separate wrongful acts that gave rise to tortious liability, namely:

- (a) The defendant failed to disclose, prior to the holding of the judicial auction, that it did not intend to delete the entry of its mortgage on the Korean Shipping Register; and
- (b) the defendant failed to delete the entry of its mortgage on the Korean Shipping Register after it was requested by the plaintiff to do so.

12. By the time the case concluded, it was agreed between the parties that Belgian law applied to the first issue. The remaining question was whether Belgian law or Korean law applied to the second alleged wrongful act?

13. The defendant argues that the law applicable to the claims made by the plaintiff are determined by the provisions of the Rome II Regulation (Regulation (EC) No. 864/2007) of the European Parliament and of the Council of 11th July, 2007, on the law applicable to non-contractual obligations (“Rome II Regulation”).

14. Article 4 of the Rome II Regulations provides as follows:

“(1) Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

(2) However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

(3) Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.”

15. A distinction is to be drawn between “damage” caused by a harmful event and mere “indirect consequences”, see *Dumez France v. Hessische Landesbank* [1990] ECR I-49, *Marinari v. Lloyds Bank plc.* [1995] ECR I-2719, and *Hillside (New Media) Ltd. v. Bjarte Baasland & Others* [2010] EWHC 3336 (Comm.)

16. The defendant argues that the second issue, namely, the failure of the defendant to delete the entry of its mortgage from the Korean Shipping Register is subject to Korean law for the following reasons:

- (a) The Vessel was registered on the Korean Shipping Register.
- (b) The owner of the Vessel prior to the judicial auction, Samsun, was a Korean company.
- (c) The mortgage entered into between Samsun and the defendant was governed by Korean law and the courts of Korea had non-exclusive jurisdiction in respect of proceedings relating to the mortgage.
- (d) The mortgage was entered on the Korean Shipping Register.
- (e) The Vessel was the subject of a preservation order made by the Korean Rehabilitation Court on 6th February, 2009, which was recorded in the Korean Shipping Register on 26th February, 2009.

- (f) An unsuccessful application was made by the plaintiff to deregister the Vessel from the Korean Shipping Register on 20th November, 2009.
- (g) A further unsuccessful attempt was made by Samsun, on behalf of the plaintiff, to deregister the Vessel from the Korean Shipping Register on 30th December, 2009, which was dismissed by the Jeju District Court on 5th January, 2010.
- (h) The reason why the plaintiff could not obtain permanent registration of the Vessel on the Hong Kong Shipping Register and why it was deregistered from temporary registration on that Register on 30th March, 2010 and why it was necessary to obtain registration on the Panama Shipping Register was because it could not obtain a Deletion Certificate from the Korean Shipping Registry.
- (i) A Deletion Certificate from the Korean Shipping Registry could not be obtained until two conditions were satisfied. First, the preservation order had to be deleted which required an application to be made to the Rehabilitation Court. Second, the mortgage had to be deleted which required an application to be made by Samsun or the defendant. These conditions could only be fulfilled in Korea.
- (j) The reason why the defendant declined to voluntarily delete its mortgage from the Korean Shipping Register was on the basis of legal advice that to do so could imperil its entitlement to the proceeds of the judicial auction, the priorities in respect of which were to be decided in accordance with Korean law.
- (k) Part of the damages claimed by the plaintiff relate to legal services obtained in Korea.

17. The defendant claims that these are connecting factors to Korea rather than Belgium and that accordingly, under the provisions of Article 4(3) of the Rome II Regulation, Korean law applies.

18. The plaintiff asserts that the damage it sustained occurred in a number of different countries. The plaintiff is a Panamanian company. Its shipping agent is a Swiss company, Shipping Asset Management. The technical management of the Vessel is carried out by Univan Ship Management Ltd., a Hong Kong company. The plaintiff was temporarily registered in Panama and Hong Kong and is now registered in Hong Kong without restriction. The plaintiff claims costs incurred in Hong Kong, Panama, Switzerland, Belgium and Korea. Having considered the evidence, it seems to me that the country most connected with the alleged wrong arising out of the failure by the defendant to delete the entry of the mortgage from the Korean Register is Korea, and that the consequences in other jurisdictions were “indirect consequences” within the meaning of Article 4(1) of the Rome II Regulation. Accordingly, I hold that Korean law applies to this issue.

19. Before going on to apply Belgian and Korean law to the issues which have been raised, I wish to consider, briefly, the evidence of a number of witnesses on issues relating to international custom and practice in Maritime Law where the judicial sale of a vessel takes place by a mortgagee. It seems to me that such evidence is relevant as Maritime affairs, by their nature, have an international dimension and are governed to a significant extent by International Conventions which have been widely adopted and, in many cases, form part of the domestic laws of countries. For example, in this State, the Jurisdiction of Courts (Maritime Conventions) Act 1989, provides that the Arrest Convention of 1952 shall have the force of law in the State and judicial notice shall be taken of it. The court heard evidence from a number of

competent witnesses with extensive experience in International Maritime trade on the effect of a judicial sale of a vessel and the extent of a mortgagee's liability to clear the entry of a mortgage from a Ship's Register. Insofar as some consistency in this evidence emerges, it may be of assistance in resolving conflicts of evidence that emerge on Belgian or Korean law and I have examined such evidence in that light.

20. There is wide consensus in the International Maritime world as to the effect of a judicial sale of a vessel. Thomas on '*Maritime Liens - 1989 (Vol. 14 British Shipping Laws)*' describes the effect as follows at para. 527:

"A sale by order of a court of competent jurisdiction in proceedings in rem operates to extinguish all liens attaching to the res and to convey a valid title to the purchaser which is free of all encumbrances and good against the whole world. An American commentator has viewed the effect of a judicial sale as like the dry docking process in which the hull is scraped clean of her encumbrances. The resultant fund in the hands of the court, being the proceeds of sale, thereafter represents the res and all liens which formally attach to the res are transferred to the fund . . ."

In *The M/V 'Cerro Colorado'* [1993] 1 Lloyd's Rep. 58, the English Admiralty Court was dealing with a case where, before the judicial sale of the vessel took place, an advertisement had appeared in Lloyd's List warning any purchaser of the vessel that the vessel would remain subject to a claim for cruise wages by virtue of a judgment of the Spanish courts notwithstanding any sale under the order of the Admiralty Court.

The Admiralty judge, Sheen J., having considered the facts, said at p. 60:

"I wish to make it clear beyond doubt that the Admiralty Marshal selling by order of this Court gives the purchaser a title free of all liens and

encumbrances. As long ago as 1841 Dr. Lushington said in The Tremont [1841] 1 Wm. Rob. 163:

‘The jurisdiction of the Court . . . in these matters is confirmed by the municipal law of this country and by the general principles of the maritime law; and the title conferred by the Court in the exercise of this authority is a valid title against the whole world, and is recognised by the courts of this country and by the courts of all other countries’.

Dr. Lushington drew attention to the serious injury which would be inflicted upon property of this kind sold under the jurisdiction of the Court if there were any doubt about its right to confer a perfect title to the ship. The general principles of the maritime law to which Dr. Lushington referred are now embodied in the Arrest Convention.

In The Acrux [1962] 1 Lloyd’s Rep. 405 Mr. Justice Hewson dealt with a similar problem. The Judge quoted two passages from Castrique v. Imrie (1869) L.R. 4 H.L. 414. Those passages bear repetition 30 years later.

From the head note:

‘Where a foreign Court, having competent jurisdiction in the matter, and honestly exercising it, delivers, in a proceeding in rem, a judgment, by which the sale of a chattel (a British ship then lying in the foreign port) is ordered, the sale cannot afterwards be impeached in this country in an action against the vendee, even though the person seeking to impeach it would, by the law of this country, have a preferential title to the chattel here’.

Mr. Justice Blackburn said:

' . . . We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the Court sits . . . and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world'.

Mr. Justice Hewson drew attention to the far-reaching effects if the clean title given by the Court could be challenged. He pointed out that the maritime interests of the world would suffer in consequence. No innocent purchaser would be prepared to pay the full market price for the ship, and the resultant fund, if the ship were sold, would be minimised and not represent her true value. He said:

'This Court recognises proper sales by competent courts of Admiralty, or Prize, abroad - it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade'.

I adopt what was said by Mr. Justice Hewson. I can only express the hope that the Spanish Court will, as a matter of comity, recognise the decrees made by this Court, which endeavours to give effect to the International Arrest Convention. From time to time, almost every ship owner wants to borrow money from his bank and to give as security a mortgage on a ship. The value of that security would be drastically reduced if, when it came to be sold by the Court, there was any doubt as to whether the purchaser from the Court would get a title free of encumbrances and debts."

21. This is an important statement and represents the law in this jurisdiction and most other jurisdictions. Mr. Jonathan Lux of Ince & Company, solicitors in London, gave evidence on international practice regarding judicial sales and mortgages. He said that he was aware of some examples where the purchaser of a vessel in a judicial sale had issues with the removal of the mortgage from the Ship's Register. He said the problem was rather unusual, and despite his extensive experience, he had never personally come across the problem.

22. The court also heard evidence from three witnesses with extensive experience of International Maritime trade. Mr. Joseph Emmanuel Triay is a Barrister in Gibraltar and practices in a firm with extensive Maritime and Admiralty experience including judicial sales of vessels. Gibraltar is a jurisdiction which has a significant number of ship arrests and judicial sales. Mr. Leon Papazoglou is a Marine Consultant in the UK with extensive experience in many aspects of shipping and is a member of the Main Technical Committee of Lloyd's Register of Shipping and was previously a member of Det Norske Veritas, a classification society, and he has acted as an expert witness in disputes relating to ship management and to ship operational and technical issues. Mr. Steven Gonzalez is a Senior Vice President of the defendant company and during a long career with the defendant, has been involved in all aspects of marine finance including marketing, underwriting and portfolio management of shipping loans and leases. All of these witnesses gave evidence that, in their experience, a mortgagee would never be asked to delete its mortgage from a Shipping Register in circumstances where there was a judicial sale. The position is quite different where there is an agreed sale of the vessel. In those circumstances, the general practice is that the mortgage is discharged and the mortgagee cooperates in the removal of the charge from the Register. If the judicial sale takes place in the

country where the vessel is registered, the mortgage will usually be deleted from the Register automatically. If, however, the arrest takes place in a country where the vessel is not flagged, the purchaser of the vessel will usually register the vessel in an open registry and the vessel is likely to be struck off the old Register after a period of time for non-payment of registration fees.

23. Mr. Gonzales gave evidence that at the time when the judicial auction took place in Ghent, the defendant had not formed any intention as to whether it would delete its mortgage or not. The issue had not been adverted to because the defendant did not anticipate there would be any necessity to delete the mortgage from the Korean Shipping Register or that it would be requested to do.

24. When the Vessel was offered for sale, the Belgian court fixed the terms and conditions of sale which provided at clause 10:

“The definitive adjudicatee shall have the obligation to inform the keeper of the Ship’s Classification Register in Korea, where the vessel is currently registered, of the sale.

Any and all fees and duties relating to the transfer of title and inscription in the Register or Maritime liens and mortgages, in Belgium, in Korea or in any other country, are for the definitive adjudicatee’s account and shall be borne by the latter. The definitive adjudicatee must also fulfil all formalities in this respect.”

25. Because of this clause and evidence furnished by witnesses concerning International Maritime custom and practice, the defendant argues that the plaintiff could not have had any expectation that the mortgagee would delete the registration of the mortgage following the judicial sale of the M/V ‘Pretty Flourish’.

Belgian Law

26. Evidence on Belgian law was given by Mr. Andre Kegels and Mr. Wim Fransen. Having heard their evidence, I am satisfied that the judicial sale was exclusively governed by Belgian law and that the mortgage or charge on the Vessel ceased to exist once the judicial sale took place. The rights of the inscribed creditors were transferred to the proceeds of sale. Article 1655, Belgian Procedure Code provides that the rights of the registered claimants are transferred to the price of the sale at the time of the adjudication. The mortgage was therefore cancelled by the judicial sale. This is consistent with the position adopted in most countries as outlined by a number of witnesses referred to above.

27. I accept the evidence of Mr. Fransen that, in Belgian law, a mortgagee does not make any representation in applying for a judicial sale. The sale is conducted by the court bailiff and the distribution of the proceeds of sale is conducted by the court appointed liquidator. Neither the bailiff nor the court appointed liquidator is a representative of the mortgagee (in this case, the defendant). While the holder of a mortgage would cooperate in removing the entry on the Register in the event of a voluntary sale, the position is quite different where a judicial sale is concerned.

28. There is no misrepresentation in this case. The conditions of sale are fixed by the court. In this case, clause 10 of the conditions of sale provided that the purchaser was to fulfil all formalities with regard to registration. It was the responsibility of the purchaser to arrange de-registration in Korea.

29. The plaintiff's allegation of an "*abuse of right*" by the defendant is a claim made in Belgian law on an issue involving the de-registration procedure in Korea. I have already held that that is a matter of Korean law and that Belgian law does not

apply. In Belgian law, an “*abuse of right*” arises when one of the following specific conditions are satisfied:

- (i) The person exercises his right with the sole purpose of deliberately damaging someone else; or
- (ii) the exercise of this right brings far less advantage to the holder of the right and far more disadvantage to the other person in circumstances where the holder of the right has the choice of exercising that right in another way less damaging to the other person, but with the same useful advantages for the holder of the right; or
- (iii) the exercise of the right by the holder is disproportionate to the disadvantage suffered by the holder.

30. Even if Belgian law did apply to this issue, none of those tests have been established. The Cour de Cassation in Belgium held that there is an “*abuse of right*” when the right is exercised in a way which is manifestly beyond a normal exercise of rights by a prudent and concerned person. The conduct has to be manifestly beyond the normal exercise of the right by a reasonable, considered or prudent person in the same circumstances.

31. The plaintiff claims that the defendant limited its right to freely use its asset, namely, the Vessel. This amounted to an infringement on the liberty of exercising a right. I do not accept this argument for two reasons: in the first place, there was no duty on the defendant to de-register the mortgage upon a judicial sale, either under Belgian law or by Maritime custom and practice. Secondly, it is clear on the evidence that the defendant had received advice to the effect that its position might have been compromised if it registered the mortgage, and there is no evidence of *mala fides* on

the part of the defendant. On the contrary, the evidence establishes that the defendant was quite prepared to de-register the mortgage if it was not going to harm its interests.

32. I accept Mr. Fransen's evidence that, under Belgian law, there was no appreciable risk to the plaintiff of the Vessel being rearrested for the balance of the sum secured by the mortgage and not recovered in the judicial sale. If a party had sought to arrest the Vessel, it would have been held bound by the reality of the judicial sale in Belgium.

33. I am satisfied that the issue of the defendant's failure to delete the entry of the mortgage on the Korean Shipping Register is a matter to be dealt with under Korean law. But even if I were to accept the plaintiff's argument that Belgian law applies, I am satisfied that there was no obligation on the defendant to delete the entry of the mortgage on the Korean Shipping Register according to Belgian law and having regard to the conditions of sale of the Vessel.

Korean Law

34. Evidence of Korean law was given to the court by Mr. Young Seok Lee and Mr. Jin Young Jung who are both Korean lawyers with extensive experience in Maritime law. Both witnesses agreed that in a judicial sale in Korea, a vessel is sold free from all encumbrances. The problem arising in this case was due to the unusual situation of having a rehabilitation process in the Korean courts and a judicial sale outside Korea in respect of a vessel owned by a Korean company involved in the rehabilitation process. This involves complex questions. It seems that no Korean court has made a decision on the questions which arise in this case.

35. In February 2009, an application to commence rehabilitation proceedings in the case of Samsun was filed in the Korean courts. A preservation order was made

for the purpose of ensuring the assets of the company would not be disposed of. Both Korean lawyers accepted that the preservation order lapsed when the rehabilitation proceedings commenced on 6th March, 2009. As I stated at the beginning of this judgment, the Vessel was arrested in Ghent by various creditors of Samsun in January and February 2009. The defendant applied for and obtained a Conservatory Arrest Order on the Vessel in Ghent on 1st April, 2009.

36. The Korean lawyers agreed that, if there had been a judicial sale in Korea, the Vessel would have been removed from the Register and the new owner would be entered on the Korean Register and could then apply to register the Vessel elsewhere. In this case, the complication arose out of the co-existence of the rehabilitation proceedings in Korea and the judicial sale of the Vessel in Belgium where the priorities on the proceeds of sale were to be fixed in accordance with Korean law. Mr. Jung and Mr. Lee agreed on the position that would arise in the event of a non-judicial sale. In that case, the mortgagee had an obligation to deregister the mortgage in Korean law if he was fully paid. In this case, however, there was a judicial sale and the proceeds of sale were not sufficient to meet the entire claim of the mortgagee. In those circumstances, Mr. Jung gave evidence that the mortgagee was not obliged to voluntarily delete the mortgage entry. On the other hand, Mr. Lee stated that it was the mortgagee's obligation to discharge the entry. In giving that opinion, he admitted he was unaware that the terms and conditions applicable to the judicial sale in Belgium placed an obligation on the purchaser to clear the entry on the Korean Register.

37. The position of Mr. Jung was supported by a number of expert witnesses from different jurisdictions who had extensive experience of judicial sales. These witnesses asserted that in the circumstances of a judicial sale, a mortgagee would not

be expected to cooperate in removing entries from the Register where the ship had formerly been registered. This would be a matter for the new owner to sort out on the basis that the mortgage would have been extinguished by the judicial sale. Having regard to that evidence, I prefer the opinion offered by Mr. Jung on that point.

38. As to whether or not the continued entry of the mortgage on the Register was a false or inaccurate statement, I again prefer the evidence of Mr. Jung who says that the mortgage entry no longer reflects the subsequent changes of ownership that have occurred and the fact that the mortgage has now been extinguished. He said that the mortgage entry was no more than that, and was not an inaccurate or false statement made by the mortgagee as contended for by the plaintiff.

39. Mr. Jung and Mr. Lee agreed that the provisions of the Korean Enforcement Acts do not apply to judicial sales outside Korea. I accept the evidence of Mr. Jung that it is very unusual to have a rehabilitation process in Korea and a judicial sale outside Korea and that this posed complex questions. I do not accept his evidence that it was necessary for the defendant to maintain the entry on the Register to keep their secured right as mortgagee. He said that if the rehabilitation did not work out when Samsun went into bankruptcy, this could have had serious implications for the defendant. However, he did refer to the Korean right of exclusion whereby, under Korean law, a mortgagee is entitled to prevent the object which has been offered as security from being consolidated into the pool of assets to be dealt with in the event of bankruptcy. In his opinion, the bankruptcy trustee could argue that the Vessel or the proceeds of sale thereof should be returned to the Korean court, in which case the mortgagee could exercise a right of exclusion so as to keep the Vessel and/or fund outside the bankruptcy pool, and that in order to do this, they should maintain their charge on the Register.

40. Mr. Jung raised a number of arguments in favour of the mortgagee not deleting the entry from the Register which I found to be unconvincing. He stated that the trustee in bankruptcy in Korea would not be in a position to recognise the Belgian court judgment and that a possible argument could be raised to the effect that it was not binding. He also said that the trustee could argue that the Vessel be returned and that if the defendant deleted the mortgage entry, it would no longer be entitled to exercise the right of exclusion. However, these claims seem to be at odds with the evidence wherein both Korean lawyers agree that Belgian law applies to the arrest and judicial sale, which was free from all encumbrances. Once the Vessel was sold, the mortgage was extinguished and the rights of the mortgagee vested in the proceeds of sale subject to the fixing of priorities by the Belgian court in accordance with Korean law.

41. The facts of this case are clearly unusual and I am satisfied that there were complex and novel issues arising in Korean law insofar as the continuing registration of the charge on the Shipping Register was concerned, having regard to the existence of the rehabilitation proceedings. I am also satisfied from the evidence given to the court, that under Korean law, a mortgagee is not obliged to voluntarily delete the mortgage entry where there has been a judicial sale of a vessel in another jurisdiction. These are relevant factors to be taken into account in determining the issues between the parties.

42. On 8th June, 2010, the final order was made by the Belgian court concerning distributions of the proceeds of sale of the Vessel to the defendant. On 24th July, 2010, the appeal period for challenging the final order of the Belgian court expired. An order for payment out of the proceeds of sale was made. On 26th July, 2010, the defendant wrote to Samsun consenting to:

*“(a) the deletion of the ‘Pretty Flourish’ mortgage from the entry relating to ‘Pretty Flourish’ in the Korean Ship Register, and
(b) the entry for ‘Pretty Flourish’ in the Korean Ship Registry being closed.”*

Was the act of the Defendant Unreasonable or Unlawful?

43. The reasonableness of the defendant’s actions is only relevant if Belgian law applies to the circumstances surrounding the deletion of the entry from the Register. I have already determined that Korean law applies to this issue. Therefore, the arguments raised by the plaintiff to establish a case against the defendant based on Belgian law are not relevant. Even if they were, I find no evidence of misrepresentation, abuse of right, infringement of the plaintiff’s liberty of exercising its property rights or the creation of a false impression.

44. So far as Korean law applies, I am satisfied that the defendant was not obliged to voluntarily delete the mortgage entry either before they received payment out of the proceeds of sale of the Vessel or otherwise. I prefer the evidence of Mr. Jung on this issue and his evidence of Korean law is supported by International Maritime custom and practice.

45. Accordingly, the plaintiff’s claim fails.