

judgment

NORTH HOLLAND COURT

Commerce, Canton and
Administration District Court
Alkmaar

Case number / appeal number: C/15/333907 / HA RK 22-192

Judgment of July 24, 2023

in the case of

NGOC HIEN LAM

residing in Purmerend, applicant,
former lawyer: mr. R.W.L. Russell in Amsterdam
current lawyer: mr. E. Doornbos in Badhoevedorp,

against

1. **XEM DO**,
residing in Ontario, Canada,
2. **FRANK ONNO VISSER**,
residing in Hoorn,
3. **QUOC THUC VU**,
residing in Alkmaar,
4. the foundation
STICHTING LINH SON TEMPEL,
established in
Oudendijk, defendants,
lawyer Mr. P.F. Keuchenius, Hoorn Nh.

The applicant shall hereinafter be referred to as "Lam." Defendants are hereinafter referred to collectively as "Defendants" and individually as "Do," "Visser," "Vu" and "the Foundation."

1. **The procedure**

- 1.1. The course of the proceedings is evidenced by:
 - The judgement of Dec. 22, 2022, and the documents referred to therein,
 - the corrective judgment of Feb. 2, 2023,
 - the Supplemental Statement of Defense with Appendices 33 and 34.

- 1.2. On April 6, 2023, the oral hearing of the request was held at which Lam represented by T.K.L. Nguyen and assisted by Mr. Doornbos aforementioned, Do, Vu, Visser, assisted by Mr. Keuchenius aforementioned, appeared. Vu assisted Do as interpreter. The clerk took notes of what the parties put forward in explanation of their positions. The parties' lawyers used pleading notes, which were submitted.

1.3. Finally, the judgment was determined.

2. Facts

2.1. The Foundation aims to spread and teach Mahayana Buddhism and Mahayana Buddhist teachings. The Foundation focuses on the Vietnamese Buddhist community in the Netherlands and owns its own Buddhist temple, called Linh Son Temple (hereinafter: the Temple). The Foundation is a non-profit organization and acquires its assets mainly by donations and gifts from visitors to the Temple.

2.2. With the establishment of the Foundation in 2015, Do, a monk with a highly regarded reputation within the Vietnamese Buddhist community, was appointed head of the Temple. At that time, Do was registered with the Chamber of Commerce (hereinafter: CoC) as president and director of the Foundation.

2.3. Lam has been treasurer of the Foundation since its inception. Since 2017, he was a disciple of Do according to Mahayana Buddhist teachings, so a student-master relationship prevailed between them.

2.4. In late 2021, Lam was told that Do had allegedly harmed the Foundation financially. He was told that there were major ambiguities and irregularities in the 's financial records. This news became known in the community.

2.5. A meeting was held at the Temple in late March 2022. A discussion then ensued as to whether Do made known at that meeting that he would resign as director.

2.6. Lam deregistered Do as a director at the CoC on March 29, 2022.

2.7. Do objected to the statement filed with the Coc. The CoC ruled that there was reasonable doubt as to the accuracy of the statement made. As a result, the changes to the CoC were reversed on August 9, 2022, and Do is again registered as a director of the Foundation.

2.8. Visser was asked in March/April 2022 by the board, including Do and Lam, to study and/or have a third party audit the Foundation's finances. He was given access to the Foundation's financial records for this purpose.

2.9. Visser turned over the Foundation's records to the accounting firm Boekhoudburo West-Friesland (hereafter BWF) in mid-April 2022 with instructions to provide insight into the Foundation's financial records from its inception. BWF came up with its findings in June 2022. These findings include, "*During the years 2015 through 2020, the ending balance of the bank accounts is higher than might be expected according to the cash flow statement. This would mean, for example, that in the relevant years there ended up being more income than was accounted for in the foundation's original documents. The difference focuses mainly on 2015 through*

2017. From 2018 to 2020 the differences are negligible. The loans have been reconciled."

2.10. On June 13, 2022, Lam was invited to a board meeting to discuss BWF's findings. Lam did not appear at the meeting.

2.11. Another board meeting was held on August 23, 2022. Lam was summoned to this, where it was mentioned that Lam's resignation was on the agenda. Lam did not appear at that meeting. At this board meeting, Lam was dismissed as a director of the Foundation. Visser and Vu were appointed as directors at this meeting.

2.12. Lam commissioned AccountAd to investigate the Foundation's finances. AccountAd prepared a "report of factual findings," dated Sept. 5, 2022.

2.13. In a judgment dated October 10, 2022, following summary proceedings between the parties, the court - in brief - ordered Lam to provide the Foundation's board with access to the Temple and handover the keys to the building and the van. The court also prohibited Lam from entering the Temple and the Temple grounds without the board's permission. In doing so, the court imposed on Lam a penalty for these injunctions of €500.00 per day. Lam was ordered to pay the costs of the proceedings.

2.14. During the hearing of the summary proceedings between the parties, it became clear that Lam had transferred €63,000 from the Foundation's bank account to his private account in September 2022. The Foundation placed a third-party attachment order on Lam's bank account. Lam subsequently repaid the money. By (default) judgment dated November 23, 2022, Lam was ordered to pay to the Foundation €63,000, plus statutory interest. Lam was ordered to pay the attachment costs and costs of the process as well.

2.15. Lam filed an objection with the CoC against the change of registration following his resignation and the new board composition as of August 23, 2022. This objection was denied by the CoC by decision dated Nov. 23, 2022.

2.16. By subpoena dated November 28, 2022, the Foundation claims - in summary - that Lam be ordered to:

- payment of €21,283.36 for unlawful payments from the Foundation's assets or withdrawals from the Foundation's assets during the period from March 29, 2022, to the end of October 2022.
- payment of €24,000 due to income due to the Foundation during the period from March 29, 2022, to the end of October 2022.
- payment of €5,000 on account of donations due to the Foundation during the period from March 29, 2022, to the end of October 2022.
- payment of €15,918.76 in repair costs of an unauthorized reconstruction in the building during April/May 2022.
- restitution of several items belonging to the Foundation that have disappeared from the Temple by Lam or under his responsibility, subject to a penalty of €250.00 per day, and

- payment of litigation costs.

2.17. Lam requested by interim measure in these proceedings that the directors be suspended during the proceedings. By order dated December 22, 2022, the court denied this request.

2.18. In response to the call to do so in the December 22, 2022 order, the parties agreed to meet at the Temple on January 11, 2023. In doing so, the defendants agreed to allow three people named by Lam to be present. Lam's request to record the conversation was denied by the defendants. At the appointed time, Lam appeared with eight people, six of whom had not been announced. One of them entered the Temple against the Foundation's wishes. The conversation did not take place.

3. Request and defense

3.1. Lam requests that the court, by order, enforceable notwithstanding any remedy,
I. Declares that Do resigned as a director of the Foundation on March 27, 2022.
II. Annuls the August 23, 2022, resignation order dismissing Lam as director of the Foundation.
III. To the extent Do would still be a director of the Foundation, dismiss him as a director.
IV. To the extent that Visser would have validly appointed as a director of the Foundation, dismiss him as a director.
V. To the extent that Vu would have been validly appointed as a director of the Foundation, dismiss him as a director,
VI. Ex Article 2:299 BW appoints three independent directors to be appointed by the court as directors of the Foundation, to whom shall be vested all the powers conferred by law and by the Articles of Association on the director of the Foundation,
VII. order the defendants to pay the costs of the proceedings.

3.2. Lam states the following as the basis for his request. At the meeting on March 27, 2022, Do was given the opportunity to explain himself and voluntarily resigned as a director. If the court finds that Do did not resign voluntarily, then there are grounds to dismiss him as a director. This is because there was financial mismanagement by Do during the period of January 1, 2015, to December 31, 2021, as evidenced by AccountAd's report. In addition, the continued existence of the Foundation is in jeopardy because the community no longer has confidence in the board.

3.3. Regarding the annulment of the dismissal decision, where Lam was dismissed as a director of the Foundation, Lam argued that Do could not validly dismiss him because Do was no longer a director. Should the court judge that Do was a director, Lam states that he was not properly summoned to the August 23, 2022, meeting and was not heard. Therefore, the dismissal decision was not valid, Lam said.

3.4. Lam requests furthermore that board members Visser and Vu be fired for failing to act on Do's alleged mismanagement. He requests this in case it is

established that they validly appointed. According to Lam, that is not the case because Do was no longer a director at the time of their appointment.

3.5. Defendants filed defenses against Lam's requests.

3.6. The parties' contentions are discussed in more detail below, to the extent relevant.

4. Review

Interested parties

4.1. The defendants argued that Lam's request should be declared inadmissible because he does not qualify as an interested party as meant by Article 2:298 of the Civil Code. This is because Lam is no longer a board member. Even to the extent that he should be considered a lender to the Foundation, he cannot be seen as an interested party, the defendants said.

4.2. The court considers as follows. Who in a concrete case can be regarded as an interested party as meant by Section 2:298 of the Dutch Civil Code must be deduced from the nature of the proceedings and the related statutory provisions. When answering the question whether someone is an interested party, a role will be played to the extent to which this is so closely involved in the subject matter of the proceedings that there is an interest in appearing in the proceedings¹.

4.3. Lam was treasurer of the Foundation from 2015 until (at least) Aug. 23, 2022 and, given that position, responsible for its finances. In particular, the basis of his requests is financial mismanagement by the (current) board, particularly Do. In its defense, the Foundation includes Lam's role as treasurer. Lam is thus closely involved in the subject matter of the present proceedings. In accordance with the Dec. 22 judgment the court therefore judges that Lam should be considered an interested party. He is therefore admissible to his requests.

Dismissal director Do

4.4. In his request, Lam took the primary position that Do is no longer a director of the Foundation. Indeed, according to Lam, during the March 27, 2022, meeting, Do unequivocally stated to the board and his followers that he was voluntarily stepping down.

4.5. First, the defendants argued that a declaratory judgment cannot be requested in an intermediate proceeding. The court ignores this defense and holds first that a declaratory judgment can be pronounced in both a writ proceeding and in an intermediate proceeding. The declaratory judgment must remain within the **limits** of the relevant statutory provision and be limited to the determination

¹ HR October 12, 2018, ECLI:NL:HR:2018:1900

of the legal relationship in dispute between the applicant and the defendant². That is the case in this case, so the court will decide on the substance of the request.

4.6. The Foundation's bylaws provide in Article 4, paragraph 5, opening words and subparagraph (d) that a director shall cease to hold office by his voluntary resignation. The court finds that Do did not resign voluntarily. The twelve written statements from volunteers do not show that Do submitted his resignation to the Foundation's board. Thus, even if Do said at the meeting that he will voluntarily resign, that cannot be considered as submitting his resignation to the Board.

4.7. For the sake of completeness, the court notes that the statements are identical to each other and written in the Dutch language. Many of the Foundation's volunteers are not proficient in the Dutch language. It is therefore questionable whether they had any knowledge at all the contents of the declaration at the time of signing.

4.8. The court therefore rejects the request.

Annihilation decision to dismiss Lam

4.9. Lam furthermore requests an annulment of the August 23, 2022, decision dismissing him as a director of the Foundation. According to Lam, the dismissal is not legally valid because Do cannot perform legally valid board activities after his voluntary resignation as director. Should Do have been entitled to do so, the notice convening this board meeting did not state that the proposed resignation was on the agenda and that Lam had not been heard about his resignation. The decision was therefore not valid, Lam argued. Moreover, after being summoned to this by letter, Lam requested that the meeting be rescheduled because he was indisposed, he states.

4.10. Lam's argument essentially amounts to an appeal to Article 2:15 (l) of the Dutch Civil Code, which regulates the grounds on which decisions are annulable. On behalf of Lam, his attorney, when asked, confirmed at the hearing that, as Do argues, the notice of August 23, 2022, board meeting did include the fact that Lam's proposed resignation was on the agenda. Thus, the contention that this was not the case falls short of the request. Further, in response to Do's reasoned challenge, Lam did not substantiate that he was unable to attend and requested that the meeting be rescheduled. In addition, the mere fact that Lam was not heard, in this case because of his own choice not to attend the board meeting, does not make it a violation of reasonableness and fairness. Apart from that, the (procedural) requirements arising from Article 2:15(3) of the Dutch Civil Code for a valid appeal for nullification have not been met either. The court rejects the request.

Dismissal director Do

4.11. Lam requests that Do, to the extent he would still be a director of the Foundation, be removed as a director.

² ECLI:NL:HR:2000:AA5319,r.o.3.2.2.

4.12. The possibility of dismissing a director of a foundation is vested in the court in the absence of supervisory power over the management by a general meeting of members (as in the case of an association) or shareholders (as in the case of a private or public limited company). The current article 2:298 paragraph 1 BW (new) provides, as far as relevant here, that a director can be dismissed because of:

- i) neglect of his duty,
- ii) other weighty reasons,
- iii) drastic change of circumstances based on which the continuation of his directorship can no longer reasonably be tolerated.

4.13. Pursuant to Article 29 of the New Civil Code Transition Act, Article 2:298 of the Civil Code (effective July 1, 2021) applies to facts that after the time of its entry into force. This means that the acts or omissions of the directors should be assessed based on the provision as it applied at the time of acting. With respect to Do, the petition also (and primarily) looks at acts of governance that took place before the new law came into force. These should be judged under the old law, when the grounds for dismissal (in addition to something done or omitted in violation of the provisions of the law or statutes) were, as far as relevant here, limited to the situation of "mismanagement".

Financial mismanagement

4.14. Lam claims that Do's actions as director of the Foundation since 2015 qualify as financial mismanagement within the meaning of Section 2:298(1) of the old Civil Code). According to Lam, the deficiencies include that Do deliberately processed donations to the Foundation as loans by himself to the Foundation, Do asked a volunteer of the Foundation to pay her loan from the Foundation on his private bank, Do instructed the Foundation to pay amounts of 15,000.00 and 33,000.00 to another board member without sound basis, and Do is a participant in numerous loan arrangements with the Foundation. Lam substantiates these contentions with AccountAd's report. Lam concludes from this that Do has siphoned off funds to his own bank account has financially disadvantaged the Foundation in this way

4.15. The court finds that Lam has not sufficiently substantiated his contentions and explains this as follows.

4.16. AccountAd's report and BWF's findings show deficiencies in the written accounting for the Foundation's financial policies. AccountAd's report additionally shows that there are several questions that need to be answered. Lam argues that AccountAd's report shows mismanagement. Whether that is the case can be left open for the purpose of assessing the main claims, given the following.

4.17. According to exhibition 33 attached to the additional defense, the Foundation has since answered the questions in AccountAd's report. The court notes that the Foundation has further disputed the various allegations on the financial level, with reasons. These include the loans which the Foundation provided to members. The

Foundation has provided text and explanation for each loan as to the amount of the loan and whether the loan has been repaid, concluding that, despite imperfections in the records, there is no evidence that funds have disappeared. The Foundation also formulated questions to Lam and requested documents from Lam.

4.18. The account of exhibition 33 was sent to Lam by the Foundation. Despite several requests from the Foundation, Lam did not respond in substance. It is up to Lam to sufficiently substantiate his claim regarding the Foundation's financial mismanagement. It would therefore have been incumbent on him to supplement and further substantiate his contentions in response to the defendants' reasoned challenge. However, he failed to do so. Therefore, the court held that Lam has not sufficiently argued for the conclusion that there was financial mismanagement by the Foundation.

4.19. In this respect, the court also points out that, in view of the content of the defendants' dispute and contrary to what Lam assumes, the defendants do not limit themselves to the formal defense that Lam was treasurer in the relevant period and therefore (jointly) responsible for the financial affairs of the Foundation. Indeed, the defendants have also put forward - undisputed - examples of financial decisions to which Lam himself agreed as well (such as the loan to Ms. Dieu Phong, to which, among others, Lam would already have agreed, before Do's consent was sought). In addition, Defendants have pointed out that the AccountAd report that was requested by Lam shows that AccountAd has records that Defendants do not have. Defendants have undisputedly claimed to have asked Lam several times for delivery of these documents and, despite Lams promise to do so, have not received these documents. Thus, there is not only formal, but also substantive reason why Lam is partly responsible for the financial policy pursued. As for the authority asserted by Lam, as a result of which Lam had to carry out everything Do wanted, including financially, without question, Lam limited himself to the mere assertion on that point and did not further substantiate this assertion, despite dispute by the Foundation and Do. The court therefore disregards this.

4.20. Since the financial mismanagement alleged by Lam has not been established, a ground for dismissal as meant within the Article 2:298 of the Dutch Civil Code old and new has not emerged on this point.

Foundation's continued existence in jeopardy

4.21. Furthermore, Lam has argued that the continued existence of the Foundation is in jeopardy. To the extent that Lam intended to base this argument not only to the requested interim measure but also on Do's request for dismissal, the court finds that Lam has not sufficiently substantiated this claim. The purpose of the Foundation is, among other things, to Mahayana Buddhism and Mahayana Buddhist teachings by organizing prayers, meditation, dharma classes and scripture study. There is no evidence that the current board is failing or is unable to fulfill the goals of the Foundation.

4.22. As considered in the December 22, 2022, judgment as well, the court held that the photos and letters submitted do not sufficiently substantiate that the community no longer has confidence in the current board. In preparation for the oral hearing on April 6, 2023, Lam did not bring any further documents into the proceedings that could lead the court to a different opinion.

Transgressive behavior

4.23. At the hearing, Lam raised a new ground for dismissal, namely that Do's transgressive behavior will be reported. The court considers the raising of a new ground for dismissal at this stage of the proceedings tardy and thus violates due process. This ground for dismissal is therefore disregarded.

Conclusion dismissal Do

4.24. All this leads to the conclusion that there are no grounds to dismiss Do as a director. The request to do so will therefore be dismissed.

Resignation Visser and Vu

4.25. Lam set these requests in case it is held that Vu and Visser were validly appointed directors of the Foundation. The court held that the latter is the case. Indeed, it was held that Do did not voluntarily resign as director.

4.26. Lam underlies his request for dismissal in the fact that Vu and Visser were aware of the financial mismanagement of the Foundation by Do and it has not been shown that they have taken any action since their appointment to the improper performance of duties by Do. In this way there has been neglect of their duties or other weighty reasons as meant in Section 2:298 of the Dutch Civil Code (new).

4.27. However, it has already been ruled above that the alleged financial mismanagement by Do has not been established (see 4.18-4.20). With this, the factual basis for Visser's and Vu's requests for dismissal has ceased to exist, so they will be dismissed.

Appointment of three independent directors

4.28. Lam's request to appoint three independent directors is dismissed as well. Indeed, since it has been ruled that Do is a director and the resignation requests of Do, Visser and Vu are dismissed, the Foundation now has a board.

Costs of the proceedings

4.29. Lam is the prevailing party, and he will therefore be ordered to pay the costs of the proceedings. In the December 22, 2022, judgment, Lam was ordered to pay the legal costs as well, including the court fee paid by the Foundation. Thus, the court fee will not

be on his account again. Until this judgment, the costs of the proceedings on the part of the Foundation are set as follows:

- salary lawyer	<u>€1,196.00 (2 points x rate €598.00)</u>
Total	€1.196,00

5. The decision

The court

- 5.1. denies the requests,
- 5.2. orders Lam to pay the costs of the proceedings, estimated to date at €1,196.00 on the side of the Foundation,
- 5.3. declares the order enforceable notwithstanding any remedy as to the award of costs.

This judgment was made by Mr. S.M. Auwerda and pronounced in public on July 24, 2023.

