

Judgment

NORTH HOLLAND COURT

Commerce, District and Insolvency
Location Haarlem

case number / roll number: C/15/334340 / HA ZA 22-726

Judgment of October 25, 2023

in the case of

the foundation
LINH SON TEMPLE FOUNDATION,
established in Heerhugowaard,
plaintiff
lawyer mr. P.F. Keuchenius in Hoorn Nh,

against

NGOC HIEN LAM,
residing in Purmerend,
defendant,
lawyer mr. E. Doornbos in Badhoevedorp

The parties will hereinafter be referred to as the Foundation and Lam.

1. The procedure

- 1.1. The course of the proceedings is evidenced by:
- the 's summons dated Nov. 28, 2022, with exhibits,
 - Lam's statement of defense,
 - The interim judgment of March 15, 2023, ordering a hearing of the parties,
 - the Foundation's letter of August 18, 2023, with further exhibits,
 - the oral disposal of August 31, 2023, notes of which were taken by the clerk and pleading notes submitted by the Foundation,
 - the notice of September 5, 2023, from the Foundation, seeking judgment.

1.2. Finally, the judgment was rendered.

2. The facts

2.1. On March 27, 2015, the Linh Son Temple Foundation was established. The purpose of the Foundation is to spread and teach Mahayana Buddhism and Mahayana Buddhist teachings, and further to include meetings. In particular, the Foundation is focused on the Vietnamese Buddhist community in the Netherlands. The

Foundation is the owner of a temple equipped real estate property at Oudendijk, hereinafter referred to as the temple.

2.2. When the foundation was established, X. Do (hereinafter Do), a monk with a highly regarded reputation within the Vietnamese Buddhist community, was appointed abbot of the temple and chairman of the board.

2.3. Lam had been a disciple of Do according to the Mahayana Buddhist teachings since 2017, so between them a student-master relationship applied.

2.4. Until December 31, 2021, the foundation had six board members, among whom Do and Lam. On December 31, 2021, three board members resigned on their own initiative. As of January 2022, the board consisted of Do (chairman), Lam (treasurer) and T.H. Nguyen (secretary).

2.5. In late 2021 Lam was told Do had disadvantaged the Foundation financially. He was told that there were major ambiguities and irregularities in the financial administration of the Foundation. This message became known to the community.

2.6. A meeting was held in the temple on March 27, 2022, at which Lam and a number of supporters urged Do to resign as a director of the Foundation. A discussion then ensued as to whether Do made known during that meeting that he would resign as board member.

2.7. Lam deregistered Do on March 29, 2022, as a board member in the trade register of the Chamber of Commerce (hereinafter: the C. of C.). On March 30, 2022, he enrolled B.P. Nguyen as a board member.

2.8. The Foundation objected to the deregistration of Do as director and the registration of B.P. Nguyen. The C. of C. ruled that there was reasonable doubt about the correctness of the declarations made. As a result, the changes in the trade register were undone on August 9, 2022, and Do is again registered as director of the Foundation and B.P. Nguyen is no longer registered.

2.9. F.O. Visser (hereafter: Visser) is requested in March/April 2022 by the board of the Foundation - among whom Do and Lam - to verify or audit the finances by a third party. To this end, he was given access to the Foundations financial records.

2.10. In a letter dated April 6, 2022, from the Foundation to Lam, signed by Visser as trustee on behalf of the Foundation, the Foundation wrote the following:

"(...) Mr X. Do and Mr T.H. Nguyen are still board members of the foundation together with you. (...) This means that you and B.P. Nguyen cannot make legally valid decisions on behalf of the foundation and legal and factual acts performed by you and/or by him on behalf of the foundation are unlawful. In particular, you are not entitled to enter into financial transactions, buy or sell movable or immovable property, or take any management decision whatsoever.

The foundation will hold you personally liable for any transaction, done from March 29 last, that is committed in violation of this summons”.

2.11. In mid-April 2022, Visser submitted the Foundation's records to the accounting firm Boekhoudburo West-Friesland (hereafter: BWF) with the aim to provide insight into the Foundation's financial records as of its establishment. BWF issued its findings in June 2022. These findings include, *During the years 2015 to 2020, the ending balance of the bank accounts is higher than can be expected according to the cash flow statement. This would mean, for example, that in the relevant years there was ultimately more income than recognised in the foundation's original documents. the difference mainly focuses on 2015 to 2017. Over 2018 to 2020, the differences are negligible. Furthermore, the loans have been reconciled.*"

2.12. On June 13, 2022, Lam was invited to a board meeting to discuss the findings of BWF. Lam did not appear at this meeting.

2.13. Another board meeting was held on August 23, 2022. Lam was summoned to this meeting but was unable to attend. His request to reschedule the board meeting was not responded to. During this board meeting, Lam was dismissed as a board member of the Foundation. Visser and Q.T. Vu were appointed as board members at this meeting.

2.14. Lam had AccountAd investigate the finances of the Foundation. AccountAd has prepared a "report of factual findings" dated on September 5, 2022.

2.15. In a judgment dated October 10, 2022, following summary proceedings between the parties, the court - in brief - ordered Lam to allow the Foundation's board access to the temple and to hand over 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. The court thereby imposed on Lam a penalty for these injunctions of €500. per day. Lam was ordered to pay the costs of the proceedings. He did not appeal.

2.16. During the hearing of the summary proceedings between the parties, Lam was found to have transferred €63,000 from the Foundation's bank account to his private account in September 2022. The Foundation has made a pre-judgment third-party attachment 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 and litigation costs as well.

2.17. Lam filed an objection with the C. of C. against the change of registration following his resignation and the new board composition as of August 23, 2022. This objection was rejected by the Chamber of Commerce by decision dated Nov. 23, 2022.

2.18. In a judgment dated December 22, 2022, following an action by application between the parties, the court rejected the interim measure to – in brief - suspend Do, Visser and Vu as board members of the Foundation as Lam requested.

2.19. In a judgment dated July 24, 2023, following an action by application between the parties, the court rejected Lam's requests. Lam had requested - in brief - that the court (i) rule that Do had resigned as a board member on March 27, 2022, (ii) set aside the dismissal order of August 23, 2022 by which Lam was dismissed as a board member, (iii) to the extent that Do, Visser and Vu would still be (legally valid) board members, dismiss them as board members, and (iv) would appoint three independent directors as board members of the Foundation.

3. The dispute

3.1. The Foundation claims - in summary – to declare enforceable notwithstanding any remedy in full, that the court orders Lam to pay:

- I. an amount of €21.283,36 for improper payments from the Foundation's funds or withdrawals from the Foundation's funds in the period March 29, 2022, until the end of October 2022,
- II. an amount of €24,000, due to income to the Foundation in the period March 29, 2022, to the end of October 2022,
- III. an amount of €5,000. Due to donations to the Foundation in the period March 29, 2022, to the end of October 2022,
- IV. an amount of €15,918.76 for repair costs of an unauthorized reconstruction in the Foundation's building in the period of April/May 2022,
- V. return of a cash book, three binders containing administration and blueprints with floor plans, a desk with PC, printer and monitor, a stamp of the Foundation and items of Do taken from his room, subject to amelioration of a penalty payment and order Lam to pay the costs of the proceedings.

3.2. The Foundation bases its claims on the fact that Lam acted unlawfully and/or that Lam, as a board member, bears a personal reproach, by withdrawing the claimed amounts from the assets of the Foundation and removing the goods without permission. The Foundation contends that Lam was informed by a letter of April 6, 2022, that he was not to perform any legal acts or factual acts on behalf of the Foundation. If so, he would be held personally liable. Furthermore, the Foundation claims that Lam has violated the property rights of the Foundation by carrying out reconstructions in the temple (or having them carried out) without the consent of the Board.

3.3. Lam's defence is that Lam cannot be held personally at fault in respect of the posts claimed. He was a board member of the Foundation during the relevant period and exercised his powers in the interest of the Foundation. In addition, Lam's actions did not result in any damage to the Foundation.

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

4. The review

4.1. The Foundation bases its claims on the fact that Lam is personally culpable by virtue of his position as a board member, or that he has otherwise acted unlawfully toward the Foundation. The Foundation takes the view that Lam acted in violation of the Articles of Association by acting without the consent of the board. In addition, he acted in violation of the board's instructions.

4.2. Liability under internal director liability (Article 2:9 BW) requires that the director can be blamed seriously. Whether a serious accusation exists must be assessed based on all the circumstances of the case. The circumstance that the director violated provisions of the articles of association intended to protect the legal entity must be a serious circumstance which, in principle, establishes the director's liability. However, if the director thus held liable has put forward facts and circumstances based on which it could be assumed that the alleged act contrary to the statutory provisions does not constitute a serious reproach, the court must expressly take these facts and circumstances into account in its judgment (Supreme Court, 29-11-2002, AE70I 1, JOR 2003/2).

4.3. The Foundation contends that Lam acted in violation of the statutory provision that directors are only jointly authorized. Lam has acted without consulting the other board members, thereby establishing that Lam has acted seriously culpable.

4.4. Lam countered that it was not customary to have a board meeting when something had to happen in the temple. The community collectively determined what was needed and implemented it collectively. Visser explained at oral argument on this matter that until the end of 2021, when there were still six board members, the day-to-day things and ongoing affairs were mainly taken care of by Ms. Le. No board meetings were called then, but it's plausible that it was discussed with the board members present. As of 2022, Ms. Le was no longer present, and no more board meetings were called. In 2020/2021, Visser did a lot of arranging, such as arranging a building permit and an event permit and that was done in consultation with board members. This was not done in a board meeting but through ad hoc coordination. Suggestions also came from the community, but then there was no disagreement between the community and board members yet. For the first few months of 2022, the board did not meet, Visser said.

4.5. Based on what Lam and Visser stated about the usual course of business and the fact that Do, as stated at the hearing, was only present in the temple for short periods of time a few times a year, the court assumes that it was not customary for decisions affecting the usual course of business to organize a board meeting or to consult the entire board. In respect to the conduct alleged in this case, failure to act in accordance with the provisions of the articles of association under these circumstances does not constitute a weighty circumstance that, in principle, establishes the director's liability, until one of the directors makes an issue of it.

4.6. Furthermore, the Foundation bases the alleged board members liability or Lam's unlawful conduct on Lam's failure to comply with the April 6, 2022 letter to Lam in which the Foundation notified him that he is no longer authorized to enter into financial transactions, to buy or sell any movable or immovable property, or to make any investment decision whatsoever, and that he will be held personally liable for any transaction made as of April 29, 2022. This letter is signed by Visser, on behalf of Do, president of the Foundation.

4.7. During the oral hearing Visser stated about (among other things) this letter that at the board meeting of March 28, 2022, the board asked them to arrange things for the Foundation and that Lam also authorized him as well. That authorization was for handling board decisions and Do authorized him to act on behalf of the Foundation as well. He was therefore authorized to send this letter on behalf of the board of the Foundation, Visser said.

4.8. Lam has contested in court that he authorized Visser at the time. According to Lam, Visser was only authorized by Do and that only concerned the handling of paperwork, not replacement of the board or the management.

4.9. The letter dated April 6, 2022, on which the Foundation relies, was signed by Visser, on behalf of Do, chairman of the Foundation. The fact is that Lam remained a board member of the Foundation until August 23, 2022, and had the corresponding powers. However, from April 6, 2022, it was intimated on behalf of Do that the informal course of affairs regarding board actions was no longer tolerated and Lam had to comply with the provision that he was authorized to represent the Foundation only jointly with another board member. He further had to bear in mind the possibility that it would later be held that B.P. Nguyen never became a board member in the absence of a valid board resolution appointing him. The court will assess the various items claimed by the Foundation from that starting point.

Item I €21,283 to unlawful payments

4.10. The Foundation has split this item of €21,283.36 into the following categories:

- a. Purchase of items without board order: €4,920.98
- b. Third-party payment without description: €5,248.60
- c. Legal expenses/accountants' fees Mr. Lam: €6,524.05
- d. Event costs €2,466.91
- e. Reconstruction costs €2,080.47
- f. Unclear €42.35

a. Purchase of items without board order: €4,920.98

4.1 1. About this item Lam argues that these costs were incurred in relation to the normal conduct of the Foundation's business. These costs had to be incurred in relation to the maintenance of the temple and having celebrations held at the temple. The Foundation argues that this cannot be the case. The costs for the celebrations are normally very low to nil, because much is donated both financially and in kind by the followers. In some cases, receipts are paid from people who

bought products to make food, but even the cost of market stalls is often donated.

4.12. Considering the Foundation's explanation that the costs for the celebrations are normally very low to nil, it would have been in Lam's path to more concretely clarify what items were purchased and/or what costs exactly were incurred and for what purpose they were purchased/made. Lam has not done so and thus he has not sufficiently substantiated that these costs had to be incurred in connection with the maintenance of the temple and the organization of the celebrations. In this regard, the court considers that the Foundation was apparently able to relate the costs under d. "Event Costs" to the celebrations at the temple. Since Lam has not sufficiently substantiated that these costs were incurred in relation to the normal course of business of the Foundation, Lam will be ordered to pay this item to the Foundation.

b. Payment third parties without description: €5,248.60

4.13. According to Lam, this item refers to the repayment of loans received by the Foundation. Because of the repayment of these loans, the debt position of the Foundation has decreased and there is no damage. While the Foundation argued that Lam should not have done this without the consent of the board, it did not substantively respond to the defense that this concerns repayment of loans. The statement submitted by the Foundation as exhibit 12 shows that this item concerned two payments. It should have been up to the Foundation to verify whether these payments were indeed based on loans and to respond substantively. The Foundation failed to do so. The court therefore assumes that these were loan repayments, so that there is no damage as alleged by Lam. This means that this item will not be awarded.

c. Legal costs/accountant fees Mr. Lam: €6,524.05

4.14. Lam countered that these costs were incurred in the interest of the Foundation to gain insight into the previously identified ambiguities and irregularities in the Foundation's financial records. In contrast, the Foundation argues that these costs were incurred not in the Foundation's interest. The Foundation had at earlier commissioned accountant BWF to gain insight into the Foundation's financial records from the date of creation. According to the Foundation, this is a counter-expertise on Lam's initiative with the intent to impeach Do.

4.15. The court held that Lam did not sufficiently substantiate how the assignment to the accountant was in the Foundation's interest, given that an examination had already been performed by BWF. In the absence of such substantiation, Lam did not sufficiently contest the Foundation's contention that this was a counter-assessment. This item will therefore be awarded.

d. Event costs €2,466.91

4.16. It is not in dispute between the parties that these costs were incurred as part of celebrations at the temple. According to the Foundation, however, these celebrations did not fall within the

objective of the Foundation because certain people, particularly Do and Visser, were excluded from the celebrations.

4.17. It is established that one of the Foundation's objectives is to organize meetings (see 2.1). These costs are therefore part of the daily business of the Foundation. The fact that Do and Visser were excluded from these celebrations does not mean that these celebrations were not organized for the benefit of the community and benefited the Foundation. This means that the Foundation should bear these costs itself, and this part of the claim will be rejected.

e. Reconstruction expenses €2,080.47

4.18. The Foundation takes the position that Lam should not have carried out the reconstruction without the consent of the board. It argues that it has been disadvantaged by the reconstruction because it did not want this reconstruction and Do no longer has its own toilet in his room.

4.19. In its defense, Lam argued that this reconstruction benefits the community and thus the Foundation. According to Lam, the initiative to create additional toilets on the second floor came from the followers. There was a need for accessible toilets on the second floor because in the days around celebrations volunteers often slept on the second floor, often elderly members, while the only accessible toilet was on the ground floor. The toilet on the second floor was in Do's room and was always locked. Almost the entire reconstruction was paid for by the followers, only the material costs were paid by the Foundation. The work was carried out by the followers free of charge. The reconstruction replaced Do's toilet with two toilets and made them accessible to everyone. Do's room retained a sink and was made somewhat smaller.

4.20. The court considered that a reconstruction like this was not part of the daily business. The question, however, is whether Lam's carrying out (or having carried out) this reconstruction prejudiced the Foundation. Apparently, there was a need in the community for accessible toilets on the second floor; after all, the followers carried the work free of charge. The Foundation has not refuted that position. The Foundation now has two new toilets accessible to everyone, including Do, for which only the cost of materials was borne by the Foundation. The Foundation's assertion that it did not want this reconstruction is insufficient to speak of disadvantage to the Foundation, given the added value for the followers in return. This means that this part of the claim will be rejected.

f. Unclear €42.35

4.21. Lam argued that this item refers to costs for repairs to a drainpipe. The Foundation has not disputed this in substance. Such (limited) maintenance costs relate to the daily routine of things and are for the 's account. This part of the claim will therefore be rejected.

Items II and III €24,000 and €5,000 of revenue and donations

4.22. The Foundation claims payment of €24,000 and €5,000 due to revenue and donations due to the Foundation. According to the Foundation, Lam announced on social media that the May 15, 2022, celebration rose €8,000. The Foundation assumes that the July 24, 2022 and August 14, 2022 celebrations raised at least the same amount. The amount of €5,000 sees the donations from the weekly Sunday celebrations. That amount comes from an image of the cash book shared by Lam via social media, showing that the April 17, 2022, Sunday celebration rose €1,000. The Foundation claims that there must have been many thousands of euros of donations during the period from March 27, 2022, to mid-October 2022, and at least €5,000 in any case. Nevertheless, Lam did not deposit anything at all in the bank account in that period.

4.23. Lam submits as defense that the cost of the celebrations has exceeded the benefits and that the other celebrations have brought in less.

4.24. During the oral hearing, the Foundation further explained that in previous years, from the revenue and donations received, the following amounts on average were deposited in the bank account per Month: in 2019 €6,657, in 2020 €5,817 and in 2021 €6,566. In the period April through October 2022, Lam literally did not deposit anything, whereas during these 7 months, based on the previous amounts, it is expected that some (7 x €6,000 =) €42,000 should have been deposited in the Foundation's bank account. This amount must therefore have been withheld by Lam.

4.25. Considering the preceding contentions, it would have been incumbent on Lam to support his defense with further facts and circumstances. Lam has not done so. The court considers the claim sufficiently substantiated. In the absence of a sufficiently substantiated challenge to the Foundation's assertions, and since the amount claimed is moderate in relation to the amount of missing income/donations calculated on the basis of previous years, the Court will grant items II and III, totaling €29,000.

Item IV € 15. 918.76 for repair costs reconstruction

4.26. As considered above in 4.20, the court finds that Lam did not prejudice the Foundation with the reconstruction. This item is an extension of item e (reconstruction costs) so this item will also be rejected. In doing so, the court also takes into consideration that the restoration has not yet taken place, and the question is whether that restoration is necessary. Given the Foundation's statement of the usual monthly income, it seems the Foundation would have had sufficient income to carry out the restoration if it had deemed necessary.

Post V return of goods

4.27. Lam argued the following with respect to the reclaimed goods:

- The cash book belongs to Visser's mother-in-law, Lam never had it in his possession,
- The three binders with records and building plans are indeed in Lam's possession and can be returned to the Foundation. He previously offered them to the Foundation, but they were not received at the time.

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- The desk with pc, printer and monitor and the Foundation's stamp were never in the possession of Lam. The statement that only Lam had the key for a long period of time is correct, he had four keys made from the newly installed locks and had also given others a key.
 - The items that were taken from Do's room were thrown away by volunteers because they were food from 2015 that was out of date.

4.28. The court considered the following. Lam acknowledges possession of the binders with their contents. He will therefore be ordered to return them. Regarding the cash book, Lam cannot be ordered to do so, because the Foundation has not refuted that the cash book is in the possession and/or property of Visser's mother-in-law.

4.29. Concerning the desk with printer and screen and the stamp the following applies. Visser explained during the oral hearing that on April 1, 2022, that he filmed the entire temple and at that time the desk with the pc, printer and monitor was still there. After that, Lam changed the locks and did not give a new key to Visser and Do until he was ordered to do so by the court. During that period, the goods disappeared from the temple and Lam had used the stamp. Lam's only defense was that he did not have the items.

4.30. The court is of the opinion that Lam is responsible for the disappearance of the items, because he changed the locks and did not give access to Visser and Do to the temple. The fact that he gave some keys to others does not mean that he is not responsible. This means that Lam has to return the desk with PC, printer and screen and the stamp to the Foundation.

4.31. Regarding the items from Do's room, the Foundation confirmed at the oral hearing that it was about food. Whether it was outdated, it could not say. To substantiate this item, the Foundation submitted as production 8 and 16 to the summons photographs on which other people can be seen with jars and bags with contents resembling food. This ties in with Lam's defense that it concerned food that was thrown away by the volunteers. The court therefore assumes that he does not possess those goods (anymore). This post will therefore be rejected.

4.32. The Foundation has demanded that items be returned on pain of a penalty of €250 per day. The penalty payment claimed will be granted provided it is capped at an amount of €2.500.

resuming

4.33. With respect to the claims under I, II and III, Lam will be ordered to pay a total of (€4,920.98 + €6,524.05 + €24,000 + €5,000 =) €40,445.03.

4.34. Lam will be ordered to return the three binders records and blueprints with floor plans, the desk with personal computer, printer and monitor (see pages 2 and 3 of the photos submitted by the Foundation as production 16 in its August 18, 2023, supplemental exhibits) and the Foundation's stamp.

4.35. Lam will be ordered to pay the costs of the proceedings as the unsuccessful party. The Court estimates the costs of the proceedings on the side of the Foundation at:

- subpoena	€	105.31
- court fee		2,837.00
- salary lawyer		€2,366.00 (2 points - rate 1,183.00)
Total	€	5,308.31

5. The decision

The court

5.1. Orders Lam to pay to the Foundation the sum of €40,445.03,

5.2. Orders Lam to return to the Foundation (i) three binders with contents entitled "binder Bank C. of C., fixed costs, municipality", "binder loans", "binder municipality permit" and an accompanying stack of tree drawings and floor plans, (ii) of the desk with PC, printer and monitor (see pages 2 and 3 of the photographs submitted by the Foundation as exhibit 16 in its supplementary exhibits dated August 18, 2023) and (iii) the stamp with the name and image (logo) of the Foundation, within two weeks from the date of this judgment, under penalty of amelioration of a penalty of €250. per day that Lam fails to comply with the order, with a maximum of €2,500,

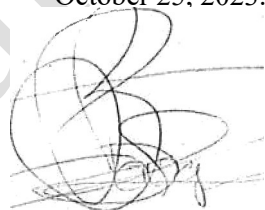
5.3. orders Lam to pay the costs of the proceedings, estimated to at €5,308.31 on the side of the Foundation.

5.4. orders Lam to pay the costs incurred after this judgment, estimated at € 173.00 for fees, to be increased, subject to the that Lam has not complied with the judgment within four days after notice has been given and the judgment has then served, by an amount of € 90.00 for legal fees and the costs of service of the judgment,

5.5. Declares this judgment thus far enforceable notwithstanding any remedy,

5.6. Dismisses the more or otherwise claimed.

This judgment was rendered by Mr. S.A.M. Groot and publicly pronounced on October 25, 2023.



VOOR GROESSE AFGEGEVEN
de griffier



Translated with DeepL