

judgment

NORTH HOLLAND COURT

Commerce, Subdistrict and
Administration Court
Alkmaar

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

Dec. 22, 2022, judgment

in the case of NGOC

HIEN LAM,
Residing at Purmerend,
applicant,
attorney mr. R.W.L. Russell of Amsterdam,

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
LINH SON TEMPLE FOUNDATION,
established in Oudendijk,
defendants,
attorney Mr. P.F. Keuchenius in 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."

The case in brief

Lam requested that the directors of the Linh Som Temple Foundation (the Foundation) be dismissed for financial mismanagement and neglect of their duties which endangers the Foundation's survival. Lam requested in an interim measure that the directors be suspended during the proceedings. In this judgment, the court addresses only the interim measure. The court rejects the request to suspend the directors. Lam relies on a report from AccountAd in support of his claim of financial mismanagement. However, this report only asks questions about financial management that have not been answered to date; the report does not establish actual mismanagement. In addition, there is no evidence that the continued existence of the Foundation is at risk. The court urges the parties to engage with each other to discuss the questions raised in AccountAd's report.

1. The procedure

1.1. The course of the proceedings is evidenced by:

- the application (with exhibits 1 through 11),
- the statement of defense (with exhibits 1 through 32), and
- Mr. Schalk's e-mail dated December 7, 2022 (with exhibit 12).

1.2. An oral hearing was held on Dec. 8, where appeared:

- Lam, assisted by Mr. Schalk aforementioned and Mr. Russel aforementioned and assisted by an interpreter as well.
- Do, Vu and Visser, assisted Mr. Keuchenius aforementioned. Vu additionally 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.

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 has no profit motive and acquires its assets mainly through donations and gifts from visitors to the Temple.

2.2. With the establishment of the Foundation in 2015, Do, a monk with 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 chairman 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 Foundation's financial records. This news became known in the community.

2.5. A meeting was held in the Temple in late March 2022 at which Lam and a number of supporters urged Do to resign as director of the Foundation. 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 from the Chamber of Commerce on March 29, 2022.

2.7. Do objected to the deregistration at the Chamber of Commerce. The CoC ruled that there were reasonable doubts about the accuracy of the statement made.

Consequently, the changes in 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 's finances. He was given access to the Foundation's financial records for this purpose.

2.9. Visser delivered the Foundation's records to the accounting firm Boekhoudburo West-Friesland (hereafter BWF) in mid-April 2022 with the task of providing 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 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 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 Board with 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 its grounds without the board's permission. In doing so, the court imposed on Lam a penalty for these injunctions of €500. per day. Lam was ordered to pay the costs of the proceedings.

2.14. 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 placed a garnishee order on Lam's account. Lam subsequently repaid the €63,000. 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.

2.15. Lam filed an objection with the Chamber of Commerce 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.

2.16. 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 of the Foundation in the period of April/May 2022.
- restitution of several items belonging to the Foundation which Lam or under his responsibility have disappeared from the Temple, on pain of a daily penalty of €250, and
- payment of litigation costs.

3. The request and defense

3.1. Lam requests by judgment, enforceable notwithstanding any remedy,

ii in the main case:

- Declare that Do resigned as a director of the Foundation on March 27, 2022.
- Annul the resignation decision dated August 23, 2022, dismissing Lam as director of the Foundation.
- To the extent Do would still be a director of the Foundation, dismiss him as director.
- To the extent that Visser would have been validly appointed as a director of the board, dismiss him as a director.
- to the extent that Vu has been validly appointed as a director of the board, dismiss him as a director.
- ex Article 2:299 BW to appoint 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 the Articles of Association on the director of the Foundation.
- order the defendants to pay the costs of the proceedings.

ii. in the preliminary injunction proceedings:

- to the extent that Do would still be a director of the Foundation, suspend him as a director for the duration of the consideration of the request for his resignation.
- Insofar as Visser would have been validly appointed as a director of the board, suspend him as a director for the duration of the consideration of the request for his resignation.
- to the extent that Vu would have been validly appointed as a director of the board, suspend him as a director for the duration of the consideration of the request for his resignation.

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- appoint, for the duration of the suspension, 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 bylaws on the director of the Foundation.

3.2. In support of his request for interim measure, Lam states that he fears the board will continue its mismanagement and improper performance of its duties. Lam fears that (once again) a lot of money will be taken from the Foundation. In addition, Lam argues that the continued existence of the Foundation is in jeopardy. The community involved has no confidence in the current board, causing them to give fewer donations. Lenders additionally want their loans back. There are also fewer celebrations, and the community no longer signs up to volunteer, causing the Foundation to lose revenue.

3.3. Defendants filed defenses against Lam's requests.

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

4. The review

4.1. In this judgment, the court judges only the interim measure requested by Lam. With respect to the requested, the court must answer the question whether the current board of the Foundation should be suspended while the main case is pending. The court is of the opinion that there are no grounds on which the current board of the Foundation should be suspended. Before explaining this opinion, the court will first explain why the court believes that Lam can be an interested party in these proceedings. The court will then address the question of who currently serves on the Foundation's board. Finally, the court will motivate its judgment on Lam's request.

Lam is an interested party

4.2. Pursuant to article 2:298 paragraph 1 BW, an interested party may request the court to dismiss a director. This interested party may also request the court, pursuant to article 2:298 paragraph 2 BW, to suspend a director during the investigation.

4.3. In answering the question of whether a person is an interested party, a factor is the extent to which the person in question may be affected by the outcome of the proceedings in a personal interest. Another reason may be that the person in question is otherwise so closely involved in the subject matter of the proceedings that there is an interest therein in appearing in the proceedings.¹

4.4. Lam served on the Foundation's board from its inception in 2015 until (at least) Aug. 23, 2022, in the position of treasurer. Lam accuses the current board, and Do in particular, of financial mismanagement. In response to this accusation, the defendants indicated that Lam, who served as

¹ Supreme Court Oct. 12 2018, ECLI:NL:HR:2018:1900

treasurer, is (co-)responsible for the financial management. Given these circumstances, Lam can be seen as an interested party. After all, the circumstances alleged by Lam against the board took place (also) during the period that Lam was part of the board of the Foundation. The fact that Lam did not participate in board meetings on financial policy in June 2022 and August 2022 does not alter the court's opinion. The court finds that Lam filed his application (the application is dated Nov. 21, 2022) within a reasonable time after his board affiliation ended.

Current Foundation's board (in review of the interim measure)

4.5. In assessing the requested interim measure, the court assumes that Do is a director of the Foundation. This is evident from the extracts of the CoC dated August 9, 2022² and September 9, 2022³. Furthermore, it has neither been stated nor shown that Do has been dismissed as a director by the Foundation. In the main case, a judgment will have to be rendered as to whether the deregistration of Do as chairman of the board at the CoC on March 29, 2022, was justified. This deregistration has been reversed by the CoC. Also, in the main case, the court will have to give an opinion on whether a legally valid decision was taken on Lam's resignation at the August 23 meeting. For the interim measure, the court does assume that Lam's dismissal was legally valid. After all, this was registered by the Chamber of Commerce and that registration was not changed after Lam's objection.

4.6. In assessing the interim measure, the court assumes as well that Visser and Vu were validly appointed directors. At the board meeting on August 23, Do and Nguyen attended as directors. Pursuant to Article 4(2) of the bylaws, the board appoints board members. The appointment of Vu and Visser as board members on August 23, 2022 - after Lam's resignation - has, in the court's preliminary opinion, taken place in accordance with the statutes of the Foundation.⁴

No suspension

4.7. The court sees no need to grant the interim measure requested by Lam. The court reasons this judgment as follows.

4.8. The (current) Article 2:298 (1) of the Civil Code provides (as far as relevant to this case) that a director can be dismissed for:

- neglect of his duty,
- other important reasons, or
- drastic change of circumstances based on which the continuation his board membership cannot reasonably be tolerated any longer.

Article 2:298 (1) of the Civil Code was amended on July 1, 2021. Until 1 July 2021, a director could, under the old Article 2:298 paragraph 1 BW and to the extent to these proceedings,

² Exhibition 13 statement of defense

³ Exhibition 24 statement of defense

⁴ Article 4(2) of the bylaws

be dismissed by the court if he did or failed to do anything contrary to the provisions of the law or the bylaws or was guilty of mismanagement.

4.9. Paragraph 2 of article 2:298 BW stipulates that during the investigation of paragraph 1, the court may take interim measures in the management and suspend the director. For a request under paragraph 2 to be granted, must be a presumption that one of the situations referred to in paragraph 1 of Article 2:298 of the Civil Code will occur.

4.10. Lam cites two reasons why the current board should be suspended. The first reason is that the board, especially Do, is guilty of financial mismanagement. The second reason is that the survival of the Foundation is in jeopardy because the community no longer has confidence in the current board, causing the Foundation to lose revenue.

AccountAd report offers no evidence of financial mismanagement

4.11. Lam substantiates his claim of mismanagement by the board, and specifically Do, with AccountAd's report. Unlike Lam, the court does not read from this report that AccountAd found that there was actual mismanagement or the siphoning off of money from the Foundation into Do's accounts.

4.12. AccountAd adds the following caveat at the beginning of the report, "*We do not express an opinion on what the factual findings mean for the preparation of the accounts based on the information available, existing bank movements for the period from 01-01-2015 to 31-12-2021 and the loan contracts available and assessing the accuracy and legality of the underlying contracts and related records as a whole. The Group⁵, represented by Mr. N.H. Lam will have to make its own assessment in this regard in which the Group may make use of this report of factual findings.*"

The report shows that specific work was agreed to be performed the preparation of the accounts based on the data provided to Drs. Tien Phain MBA RA of AccountAd. These data concern bank entries for the period January 1, 2015, to December 31, 2021, the existing loan contracts and assessing the accuracy and legitimacy of the underlying contracts and related accounting records. AccountAd's report showed that the Foundation does not have a cash book or loan records from which the positions of the loans at any time can be determined. The report also shows that because of the ambiguities found, AccountAd has not been able to compile a final accounting for the fiscal years of 2015 to 2021 in accordance with the initial engagement. AccountAd's investigator questions whether the accounts published by the board led by Chairman Do for the period 2015-2021 are error-free. However, he does not confirm this. Instead, the report left a number of questions open to date.

Finally at the end of the report there is the following limitation in use and scope of distribution: "*In preparing this report, the expectations of the intended users have been taken into account. Therefore, this report is addressed only for*

⁵ The report refers to the Group as the Group of Linh Son Temple's Buddhist volunteers represented by mr. H.N. Lam

the Group. (...)". This limitation makes it clear that the report was prepared solely for the benefit of the Group and thus is to be considered a party report. It makes it impossible to rely solely on AccountAd's report for the suspension of the current board.

4.13. The court notes that AccountAd's findings do not refer to a recent period but extend over the entire period from the Foundation's establishment in 2015 to December 31, 2021. If financial mismanagement were indeed found to have occurred, it apparently occurred from the 's inception. Nevertheless, this has not resulted (so far) in the Foundation being unable to continue to exist. This is one of the reasons why, in the court's opinion, there is no need to grant the requested interim measure.

4.14. Opposite AccountAd's report are BWF's findings which, in brief, show that the Foundation's available funds were not less than could be expected based on the history of loans and donations. Nor do these findings show any mismanagement by the Foundation's board.

4.15. Based on these circumstances, the AccountAd report does not support Lam's claim of mismanagement. Nor is the report sufficient on which to conclude that there is a justified suspicion of mismanagement. However, AccountAd's report and BWF's findings show that the written account of the 's financial policy is flawed. In addition, AccountAd's report shows that there are several questions that need to be answered. However, these findings do not provide sufficient evidence of financial mismanagement to warrant the board.

4.16. The court points out to Lam that the questions in AccountAd's report must be answered not only by the current board and Do but especially by the Foundation's board until Dec. 31, 2021. Thus, Lam, too, must answer the questions (as well). This follows from Article 5(2) and Article 9 of the 's Articles of Association.⁶ AccountAd's report places several requirements on the Foundation's financial policy and its recording according to Dutch legal entity law. This Dutch legal entity law also covers how the board of the Foundation should function and consult with each other. Lam emphasized that the relationship between the parties is a hierarchical one in which Do leads the Foundation and his authority should not be questioned. However, this does not diminish the responsibilities that the other directors have under the Dutch legal entity law and to which they can be held accountable. In that respect, therefore, Lam as (former) director, because treasurer of the Foundation, should also

⁶ Article 5 paragraph 2 stipulates that the board is obliged to keep such records of the financial position of the foundation and of everything concerning the activities of the according to the requirements arising from these activities, and to the books, documents and other data carriers belonging thereto in such a way that the rights and obligations of the foundation can always be known. Article 9 stipulates how a financial year must be closed by the board and how it must be reported.

provide further explanation of financial management. Lam was invited to do so by the Foundation. Moreover, during the oral hearing the defendants indicated that if Lam does not feel safe entering the conversation with the other board members about financial management, he can be assisted by whomever he wishes. Given this commitment, the court believes that this has created sufficient safeguards for Lam to enter the conversation with the board members, including Do who is higher in rank in the community.

4.17. The court included in its judgment that ING Bank had started an investigation at the Foundation under the Financial Supervision Act and the Wwft⁷ but had not yet completed that investigation. The Court also considers the fact that Visser stated during the oral hearing that he works at a bank and has taken the banking oath. If it appears that Visser is associated with a Foundation in which mismanagement has taken place or is taking place, then his personal career will be affected as well.

4.18. At the hearing of the parties, Lam pointed to case law⁸ in which directors of a foundation were suspended pending an investigation as an order-in-charge. The question in that proceeding was whether the directors had been validly appointed. This question is not an issue for the court in the interim measure in view of the documents submitted from the CoC. Therefore, this case law does not lead to a different opinion by the Court.

4.19. Finally, Lam argued at the hearing of the parties that there is a need to suspend the directors because he fears that the board will continue mismanagement and improper performance of its duties and again withdraw significant funds from the Foundation. Lam did not substantiate his claim that funds would again be withdrawn from the Foundation. In addition, there is no evidence in this preliminary injunction that financial mismanagement has taken place. Therefore, the court sees no reason in this contention to suspend the board.

Insufficiently substantiated that continued existence of Foundation is at risk

4.20. The court finds that Lam has not sufficiently substantiated that the continued existence of the Foundation is at risk.

4.21. The Foundation's bylaws show that its purpose is:
spreading Mahayana Buddhism and Mahayana Buddhist teachings, organizing prayers, meditation, dharma classes, scripture study,

- Promote awareness and improvement for social harmony in society, in family life, between humans, animals and nature,
- Organizing projects for underprivileged people in Asia,
- Organizing projects to save animals from death,
- and the performance of anything related or connected to the foregoing.

⁷ Money Laundering and Terrorist Financing Prevention Act.

⁸ Judgment by the Amsterdam District Court of April 26, 2017, ECLI:NL:RBAMS:2017:2823

It has not been stated, nor has it been shown, that the current board is not fulfilling or cannot fulfill these goals of the Foundation. Lam has pointed to the fact that, since his departure, celebrations are not well attended, causing the Foundation to lose income. In support of this claim, he has photographs. These photos are insufficient to substantiate Lam's claim, especially considering the defendants' defense that the photos were not taken on Buddhist holidays. In this regard, the Court does not consider it implausible that the current situation in which the parties have ended has consequences for the attendance at the last celebrations in the Temple. In addition, the photographs concern a snapshot.

4.22. Lam also has not adequately substantiated his claim that lenders are recouping their loans and that the Foundation is losing revenue. The letters submitted by Lam in exhibition 8 offer insufficient evidence, especially given the defendants' reasoned defense. Two of these letters were allegedly drafted on behalf of the Foundations board. However, this is contested by the defendants. The third letter is only in the name of Lam and therefore also offers insufficient evidence. In addition, during the hearing of the parties the court did not as yet determine that the followers of Temple who support Lam in his request constitute the majority of the community involved in Temple.

4.23. That the community involved has no confidence in the current board has not been substantiated by Lam. This applies to Lam's assertion that Visser and Vu are not fulfilling the directorship as well and are only acting in the interest of Do.

Lam is ordered to pay the legal costs

4.24. Because the interim measures requested by Lam are rejected, he will be ordered to pay the costs of the proceedings. These costs are assessed on the side of the defendants at €676. for court fees and €1,126. (2 points x rate €563.) for attorney's fees, therefore an amount of €1,802.

Court's call to the parties

4.25. Lam, Do, Visser and Vu all claim to be the best interests of the Foundation and the community. It has become clear to the court that the current situation is not in the best interest of the Foundation and creates a division in the community. This is painful because one of the goals of the Foundation is to promote awareness and improvement for social harmony in society, in family life, between humans, animals and nature. The court therefore calls on the parties to take responsibility to the community and ensure that unity is restored and that divisions within the community are countered. To this end, they will have to enter the conversation (with each other) to answer the questions in AccountAd's report. This can also be done by jointly appointing an independent expert. It is in the interest of the Foundation and the community that parties in doing so communicate well to their supporters and are transparent in their actions.

4.26. In doing so, the Court reminds the parties to the fact that it is important as well for the main case (Lam's request to dismiss the current board) to have answers to the questions in AccountAd's report. After all, this report is dated September 5, 2022

and to date the questions raised in the report have been unanswered. The court charges this to both parties.

Continuation main proceedings

4.27. The hearing of the parties in the main proceedings is scheduled for April 6, 2022. The court will stay the hearing of the main case as hereinafter reported.

5. The decision

The court

- 5.1. Dismisses the requests for interim measures,
- 5.2. Orders Lam to pay the costs of the proceedings, assessed on the defendants' side to date at €1,802.00,
- 5.3. Declares the order enforceable notwithstanding any remedy,
- 5.4. Determines that the hearing of the main case will take place on April 6, 2022, at 1:30 p.m.

This decision was made by mr.drs. J. Blokland and pronounced in open court on December 22, 2022.

