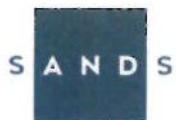

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SANDS Advokatfirma DA

REPORT - LEGAL REVIEW
Oceanteam ASA
Investigation of related party transactions

CONFIDENTIAL AND PRIVILEGED

Bergen District Court
via District Court Judge Jarle Ringheim

Only sent per email

Oslo, 4 November 2019
Our reference: 4170921.1-144269
Responsible Attorney: Nicolai Skridshol

Report from legal review of related party transactions in Oceanteam ASA

1 Introduction

1.1 Background and mandate

As set forth in the factual report dated 4 November 2019, one of the minority shareholders in Oceanteam ASA (OT) demanded an investigation in 2016 in accordance with Chapter Five of the Public Limited Liability Companies Act (PLLCA), and Bergen District Court ruled in favour. The ruling was appealed by OT, but on 23 March 2018 Gulating Court of Appeal ruled in accordance with Bergen District Court's ruling. Subsequently, lawyer and partner Nicolai Skridshol in SANDS Advokatfirma DA (SANDS) was requested to carry out this investigation.

The mandate SANDS was given is stated in the ruling from Bergen District Court on 20 February 2018 and in Gulating Court of Appeal on 23 March 2018[1]. The first part of the mandate covers mapping of facts (see our factual report dated 4 November 2019). The second part of the mandate concerns the legal review, and is as follows (unofficial translation from Norwegian):

> *2. Legal assessments of the facts, including assessment of whether the mapped transactions violate the provisions of the Public Limited Liability Companies Act on related transactions.*

In the period from 27 February 2018 to 4 November 2019. an investigation has been carried out according to the mandate given. A factual report summarizing the findings from the investigation was submitted on 4November 2019. The factual report has provided the basis for the legal assessment summarised in this report. The factual circumstances presented in the factual report are extensive and represents a variety of nuances. As a consequence, this assessment must be read in context with the factual report.

[1] The full rulings, including mandate, can be seen in folder 1 provided to Bergen District Court.

1.2 Disclaimer and clarifications

This report has been prepared for OT and all OT's shareholders.

The investigation has had a fact-finding focus, and this report is based on our understanding of the facts received from the investigation. If the factual grounds are changed and/or expanded, the conclusions might change.

SANDS' assignment is solely based on and limited to its scope of the investigation. SANDS disclaims any liability for possible errors or omissions resulting from the fact that SANDS has received incorrect or incomplete information and/or documentation.

2 Executive summary

In the period covered by our investigations, Hessel and Haico Halbesma and companies under the control of one or both individuals, have received payments from OT and subsidiaries of **EUR 8,861,317** in connection with various contractual arrangements. In the same period, travel and other expenses of **EUR 1,801,297** relating to the two individuals and members of their family have been charged to OT, with some private expenses being recharged to relevant parties.

In our legal assessment of the facts and circumstances uncovered in our investigation, we have focused on three legal topics: (i) abuse of position, (ii) invalidity of agreements due to lack of shareholder approval and (iii) unlawful distributions.

- During our investigations, we have reviewed documentation and performed interviews that leave an impression of an organisation that has been operated under very clear control by Hessel and Haico Halbesma, in a manner that – especially in aggregate - is well suited to give particularly those two individuals and companies under their control an unreasonable benefit at the expense of OT, which constitutes an abuse of position in breach of § 6-28 of the PLLCA. A consequence of such abuse of position could typically be *liability for damages* pursuant to § 17-1 of the PLLCA.

  We have reviewed a number of agreements with related parties and have concluded that certain material agreements most likely should have been treated in accordance with § 3-8 of the PLLCA. As the agreements in question have not been approved by the general meeting of OT, they are invalid, and the performance by the respective party should be *returned*, and those persons who assisted in implementing and performing pursuant to the invalid agreements could, pursuant to § 3-7 (2) of the PLLCA, be liable to ensure that *any distribution from OT thereunder is returned* to OT.

- Our investigation has uncovered a number of agreements and transactions that have or *may* have comprised elements of unlawful distributions pursuant to § 3-6 of the PLLCA. Pursuant to § 3-7 (1) of the PLLCA, the recipient of such unlawful distribution has an obligation to *return such received distribution*, and pursuant to § 3-7 (2), the persons who assisted in adopting or carrying out the resolution to carry out unlawful distributions could be liable to ensure that *any distribution from OT thereunder is returned* to OT.

3 Invalid agreements due to lack of shareholder approval

3.1 § 3-8 of the Public Limited Liability Companies Act

§ 3-8 of the PLLCA sets forth formal requirements for certain agreements between a public limited liability company and a shareholder or certain other related parties and persons. The key parts of the provision applicable to OT's agreements and transactions with related parties are (unofficial translation):

(1) *An agreement between the company and a shareholder, a shareholder's parent company, a director or the general manager shall not be binding on the company unless the general meeting has approved the agreement if the consideration from the company has a real value greater than one twentieth of the share capital at the time of the acquisition or sale. This rule does not apply to:*

1. agreement concluded in accordance with the provisions in § 2-4, cf. § 2-6, and § 10-2,

2. agreement as mentioned in § 6-10 and § 6-16a,

3. agreement concerning the transfer of securities at a price according to public quotation,

4. agreement entered into as part of the company's normal business which contains price and other terms that are customary for such agreements,

5. agreement covered by § 8-7 third paragraph first sentence no. 2 and 3, cf. second paragraph, if the parent company or the legal person owns all shares in the company,

6. agreement entered into in accordance with the rules in § 8-10.

(2) *The board of directors shall ensure that a report is prepared on the agreement according to the rules of § 2-6 first and second paragraph. The report shall contain a statement to the effect that there is a fair balance between the value of the consideration to be paid by the company and the value of the consideration to be received by the company. The report shall be attached to the notice to the general meeting and it shall with undue delay be notified to the Register of Business Enterprises.*

(3) *Performance according to an agreement which is not binding on the company shall be returned. The provisions of § 3-7 second paragraph shall apply similarly.*

(4) *The provisions of first through third paragraph apply similarly when the agreement has been concluded with a shareholder's related party or a related party to a shareholder's parent company, or with anybody who acts by virtue of agreement or understanding with a party as mentioned in the provisions of the first paragraph.*

We note that none of the agreements between OT and the respective related party have been presented to the general meeting for approval pursuant to § 3-8 of the PLLCA. (The annual general meeting held in 2013 did however approve an agreement between OT and Heer Holland B.V., with no reference to § 3-8 of the PLLCA. We have no information whether the agreement was presented in full, or if only some information was provided at the general meeting.)

As shown above, if § 3-8 applies to an agreement with a related party, and it has not been approved by the general meeting as prescribed therein, such agreement is not binding on the company and is invalid.

3.2 Consequence of invalidity

Pursuant to § 3-8 (3) of the PLLCA, the performance of a company according to an agreement that is not binding on the company shall be returned – each party shall in the outset return what it has received from the other party. Pursuant to § 3-8 (3) cf. § 3-7 (2) of the PLLCA, anybody who on behalf of the company has assisted in adopting the entering or carrying out of the performance pursuant to such invalid agreement, and who understood or ought to have understood that the agreement should have been approved by the general meeting, is liable for ensuring that the distribution – the performance by the company – is returned. (Such personal liability may be modified in accordance with § 5-2 of the Norwegian liability act – *Norw: skadeserstatningsloven.*)

If a party pursuant to an invalid agreement has delivered goods or services that have been consumed, and thus may not be returned, the receiving party shall return the value of such goods or services. Consequently, in respect of an invalid agreement for services, the service provider would have a duty to return the consideration received, but at the same time be entitled to compensation for such services. The claim for compensation can be set off against the claim for repayment. Thus, in order for any invalidity of such service agreement to have any financial consequences, there must be a mismatch between the value of the services provided by the service provider and the remuneration paid by OT for such services.[2]

3.3 Review of agreements with the related parties in respect of § 3-8

Section 3.4 below contains an outline of the key general deliberations when determining whether § 3-8 applies to an agreement with a related party, and specifically applied to the arrangement with Feastwood. Section 3.4 consequently contains a legal background for the analyses done on the agreements described in section 3.5 below.

3.4 Feastwood Holding Ltd

Feastwood Holding Ltd (Feastwood) has received substantial payments from OT in the period. The payments relate to (alleged) consultancy services as well as regular Board committee fees.

The annual costs for OT associated with Hessel Halbesma's services through Feastwood have been in the range of EUR 312,089 to EUR 1,760,347, in aggregate for the five-year period EUR 4,532,647.

The services in 2013 and 2014 were provided with no written agreement, whereas the period thereafter is based on a service agreement entered into 1 November 2016 with retroactive effect from 1 January 2015.

3.4.1 Did § 3-8 of the PLLCA apply to the agreements with Feastwood?

Feastwood was the largest shareholder of OT in the entire period covered by our investigation.

In the period 1 January 2013 to 1 November 2016, there was no written agreement between the two, but Feastwood invoiced OT for services other than ordinary Board committee services. Pursuant to minutes of the general meetings held in 2014 and 2015, it was resolved that the Board members may invoice EUR 300 per hour/maximum EUR 2,400 per day for extraordinary work. With no other specifications as to duration

[2] Cf. Ot.prp. no. 55 (2005-2006) pages 45 and 48; and Berge/Gåseide Røsås pages 101-102

and termination, we simply conclude based on the fact that a director is appointed for two-year terms and on the invoiced amounts for the period that the amount threshold of 5% of the share capital is passed.

The agreement dated 1 November 2016 provides for a fixed fee of EUR 80,000 per year which in itself exceeds the 5% threshold at such time. (The agreement was given retroactive effect from 1 January 2015, thus entitling the service provider the fixed fee of EUR 80,000 for a minimum of one year and ten months.)

Consequently, the amount threshold is passed both for the earlier oral agreements as well as the service agreement dated 1 November 2016.

As can be seen from the quotes in section 3.1, § 3-8 of the PLLCA contains certain exemptions that may apply.

3.4.2 Exemption for agreement concerning remuneration for board services

§ 3-8 (1) no. 2 provides an exemption for an "*agreement as mentioned in § 6-10 and § 6-16a*". § 6-10 of the PLLCA sets forth that remuneration to board members shall be determined by the general meeting. Consequently, the regular remuneration of NOK 300,000 per year to the Chairman paid to Feastwood (as well as the annual remuneration of NOK 200,000 to the other members of the Board), as adopted by the general meeting each year, clearly does not require approval pursuant to § 3-8 of the PLLCA.

A further question is whether the additional services provided by the Chairman pursuant to the oral agreement and subsequently the service agreement are to be deemed remuneration to the Board pursuant to § 6-10 of the PLLCA.

2013-2014

At this stage, there was no written agreement, and the services were provided based on oral agreement. The resolutions in the AGMs approved in arrears that the directors could invoice EUR 300 per hour, maximum EUR 2,400 per day, for *extraordinary work*. There is no clear distinction between ordinary board services and the types of services that can be deemed *extraordinary*. It can be argued that the remuneration paid for the services provided, is in fact board remuneration to be approved pursuant to § 6-10 of the PLLCA, thus no treatment pursuant to § 3-8 being required. This seems to be the implied view of Thommessen in its legal opinion of 26 April 2016, in which it is pointed out that the provisions in § 8-7 as well as § 3-8 of the PLLCA applied to the credit element of the remuneration (arising as Feastwood received settlement of its invoices prior to the remuneration being approved by the general meeting the following calendar year).

2015

Up until the entering of the service agreement, services were still provided based on oral agreement. The resolution at the AGM in 2016 approved in arrears a fixed fee of EUR 80,000 for further work required *beyond the basic scope and responsibility of a director*, and the right to invoice EUR 500 per hour for *extraordinary* work to be determined on a case by case basis in advance.

As set forth in section 3.1.6.2 of the factual report, OT received a legal opinion from BAHR that, based on the proposed wording of a resolution to be passed at the annual general meeting in May 2016, the additional services to be provided should be considered part of the remuneration to the Board Member, with the result that the agreement to provide services (at such time still not formalized in writing) would not require treatment pursuant to § 3-8 of the PLLCA.

Service agreement of 1 November 2016

We note that the opinion by BAHR is based on a proposal for a resolution to be passed at the AGM in May 2016, and that for obvious reasons BAHR had not been provided with the actual agreement of 1 November 2016. The wording of the agreement strengthens the argument that the agreement and the remuneration thereunder go beyond the ordinary services of a board member and remuneration for such board services, with the following scope of services:

> *(i) Proactively giving the Company exclusive access to the Service Providers' and long-time business partners;*
>
> *(ii) Business development activities for the various businesses of the Group;*
>
> *(iii) Activities related to the sourcing of financing, negotiations and strategy development related to the long term re-financing of the Group;*
>
> *(iv) Services related to further development of the design of the vessel North Ocean 300 series;*
>
> *(v) Maintenance and development of the partnership DOT with stakeholders of Diavaz;*
>
> *(vi) Maintenance and development of the partnership Oceanteam – Bourbon with stakeholders of Bourbon;*
>
> *(vii) Maintenance and development of the partnership with stakeholders of Fugro TSMarine/Shelf Subsea;*
>
> *(viii) Business development activities and IP expansion strategy for KCI the Engineers BV;*
>
> *(ix) General support to various management functions within the Group and participation in brainstorm sessions, process improvement projects, restructuring and increasing of the efficiency and synergy between the various business segments;*
>
> *(x) Initiation and steering of change management;*
>
> *(xi) Any other services related to the Group, that at the discretion of the Company, may appear suitable to be performed by the Service Provider.*

The board of directors has a primary responsibility to manage (*Norw: forvalte*) the company's business and to ensure that it is organised and run within the framework set forth by law, articles of association and any instructions from the general meeting. The board of directors further has a duty to supervise the day-to-day management and the company's business in general.

The different tasks set forth in the service agreement go far beyond the primary responsibilities of the members of the board of directors as such, and to a large extent cover business and management activities. The AGM in 2016 and 2017 approved that the Board Members may invoice for further work required by them *beyond the basic scope and responsibility of a director*. The AGM in 2014 and 2015 resolved that the Board Members could invoice for *extraordinary work*.

In our view, it is evident that all such additional services covered by the service agreement of 1 November 2016 do not fall within the exemption in § 3-8 (1) no. 2.

In respect of services based on oral agreements prior to such time, it is somewhat more uncertain. In our view, however, the uncertainty from 2013/14 was slightly clarified in the resolution in the AGM in 2016, with a reference to work required beyond the basic scope and responsibility of a director, and the written service agreements which expressed to *formalize the continuing engagement of the service provider and the Company*. Based on this, it is our view that the exemption for agreement concerning remuneration for board services most likely did not apply.

3.4.3 Exemption for agreement entered into as part of normal business

§ 3-8 (1) no. 2 provides an exemption for an *"agreement entered into as part of the company's normal business which contains price and other terms that are customary for such agreements"*.

The purpose of the exemption is to avoid unnecessary formal requirements – approval by the general meeting and the preparation of a report – and potential invalidity due to lack of such requirements being fulfilled, in respect of ordinary agreements that a company needs to enter into in order to perform its ordinary business operations. The preparatory works in respect of the current version of the provision (Ot.prp. no. 55 (2005-2006)) mentions lease of office space and accounting services, and it can generally be assumed that employment agreements and agreements for provision of legal services also fall within the scope of the exemption.

Correspondingly, a company may have a need to purchase consulting services in order to perform its ordinary business operations.

OT obtained a legal opinion from its legal counsel Grette dated 3 November 2016. Grette states the following regarding the service agreement:

> *"The Agreement formalises the continuing engagement of the Service Provider, and is individually designed to fit the Company`s needs. The service provider is engaged as an independent consultant to perform services awarded by the board of directors of the Company. Though entering in to such agreements is not a part of the Company`s core business, the Company has in recent years required on a sustained basis the services covered by the Agreement. Entering into the Agreement is therefore entered into as part of the Company`s normal business."*

As set forth in section 3.4.1.3.1 of the factual report, based on our gathering of facts during this investigation, we cannot see there are any other consultants receiving the amount of money as Hessel Halbesma has done. We have not seen any documentation of OT/the Board considering whether the oral agreement for consulting services should be treated pursuant to § 3-8 of the PLLCA or if it qualifies as an exempt agreement. The first traces of consideration of treatment pursuant to § 3-8 is seen in respect of a draft commitment agreement in May 2015, and sometime thereafter in respect of service agreements.

It is difficult to see that OT can argue that as OT has historically obtained services from Feastwood (without such agreement being approved pursuant to § 3-8 of the PLLCA, and thus potentially the oral agreement to purchase such services being invalid), the entering into of the written agreement in November 2016 confirming the same is *therefore* within the normal business of the company.

The scope of services is very wide and includes a general catch-all phrase of "any other service related to the Group, that at the discretion of the Company, appears suitable to be performed by the service provider".

The Norwegian Corporate Governance Board's recommendation on corporate governance section 11, third paragraph reads:

> *"Members of the board of directors and/or companies with which they are associated should not take on specific assignments for the company in addition to their appointment as a member of the board. If they do nonetheless take on such assignments this should be disclosed to the full board. The remuneration for such additional duties should be approved by the board."*

The principal stipulation that the board members should not take on additional assignments for the company is based on the need for members of the board to be independent of the company's executive personnel.

The wide scope of services covers business and management activities that the Board of Directors generally has a responsibility to supervise. That the Chairman of the Board provides such services on a substantial scale is in breach with the principal stipulation of the corporate governance code and implies a conflict of the duties as Chairman of the Board and as service provider. This is not in breach of any provision of law, but it does leave a question as to whether the service agreement can in fact be deemed to be within the *normal* business.

At the AGM in 2016, *in light of the amount of work beyond the scope and responsibility of a director undertaken and time spent in previous years and to be anticipated in the future,* a fixed fee of EUR 80,000 was set for each director, based on an hourly rate of EUR 500, i.e. 160 hours each. In light of this, it seems quite extraordinary that the agreement opens for up to 2,000 hours in one year. Add to that that in an internal memo from OT's corporate counsel dated 17 June 2016, see section 3.4.1.4.5 of our factual report, it is recommended that OT enters into an agreement with Feastwood for additional services for a maximum amount equal to 5% of the share capital, with a statement that in such case no voting of the AGM is required and no auditor's opinion. It seems more important to avoid the requirement for treatment in the general meeting and obtaining an auditor's opinion than to obtain services from Feastwood beyond such financial limits. Even if the provision of services up to the date of the service agreement could be found to be within the normal business, it is difficult to see that this agreement with such a substantial potential increase in the services provided can be deemed to be within the *normal* business.

To the extent the service agreement can be deemed to be entered into in the normal business, it still has to contain price and other terms that are customary for such agreements in order for the exemption to apply. The terms and conditions must be in accordance with any external norms for agreement terms within the relevant sector/area. If no such "objective criteria" exist, an overall evaluation must be made as to whether the agreement appears to be commercially justifiable.[3]

We note that the questions regarding the conflict of the duties as Chairman of the Board and service provider, the breach of the principal stipulation of the corporate governance code and the substantial increase in services provided described above, may be just as suitable to discuss in connection with the assessment of whether the agreement appears to be *commercially justifiable*, in addition to what is within the *normal business*.

3.4.4 Price

The fees payable under the Service Agreement are based on an hourly rate of EUR 500. The service provider is entitled to a fixed fee of EUR 80,000 for the provision of up to 160 hours, and any services in excess of that will be charged at the hourly rate. It is stated that the hourly rate is based on an evaluation of the rate

[3] Ot.prp. no. 4 (1995-1996) p. 24

charged by comparable, experienced international business and management consultants in Monaco, the Netherlands and Norway. We have several times requested these evaluations regarding these agreements, but OT has not presented these to us.

As set forth in section 3.4.1.3.2 of the factual report, OT obtained opinions from Loyens & Loeff and EY in April 2017, that concluded that the hourly rates *"can be considered to be at arm's length"* and *"we believe it is fair to assume, based on the above observations and assumptions, that the hourly rates [...] are at arm's length"*. We have registered that the opinions have been written based on the wording of the agreement, and not any analysis of the qualifications of Feastwood/Hessel Halbesma nor of the quality of the services actually provided.

It is difficult for us to have a strong opinion on the pricing but do note that in the entire period up to May 2016, the same services were provided at an agreed hourly rate of EUR 300, and then a 67% increase was suddenly introduced *with retroactive effect*, and thus we question whether EUR 500 is in fact a fair price.

3.4.5 Other terms and conditions

The service agreement is fairly short and contains the different types of provisions that can be expected for a consultancy agreement. On the face of the document, it seems to provide a fair balance between the parties, and we take particular notice of the following provisions.

Clause 2.1

> *During the term of this Agreement, subject to the terms and conditions stated herein, the Service Provider will provide advice and assistance in connection with the items specified in recital c) and in particular shall provide the following services (the "Services") to the Group as may be further specified in Annex A (Work Order) hereof, detailing the scope, duration and estimated price of the Services:*
>
> *[the scope is listed in section 3.4.2 above]*

Clause 3.1

> *Extraordinary services shall only be provided on the basis of work orders issued by the CEO or Board of Directors of the Company, agreed with the Service Provider in advance and in a format similar to work order no. 1 (annex A).*

Clause 3.2

> *The Service Provider shall together with each invoice submit to the Company a timesheet recording the time for the actions that have been performed by the Service Provider for the respective part of the Services in order for the Company on a continuing basis to be able to assess the value of the services.*

Clause 4

> *The Agreement shall remain in force until it is terminated by either party giving the other a 3 months' prior written notice.*

The quoted provisions seem suitable to provide OT with control of the form of services to be provided, the costs in connection therewith and by the termination right further flexibility in managing the costs. However, with the Halbesmas' effective control of OT and the Board of Directors, the termination right holds little effect in reality. The actual implementation of the service agreement also seems to tell a different story.

Any provision of additional services – i.e. beyond the 160 hours encompassed by the fixed fee - shall be based on work orders issued by the CEO or Board of Directors, detailing the scope, duration and estimated price. However, the initial work order (Annex A of the service agreement), is almost as wide as the general scope of services, and thus not setting forth much *detail* of the scope, and it also does not contain any estimated price except for reference to the hourly rate of EUR 500. It is further stated in Annex A, that work orders shall be issued as often as the parties deem necessary, but in any event *at least once per calendar year*. The second work order was issued for the entire calendar year 2017, again with a scope almost as wide as the general scope of the service agreement, and without an estimate of the total price.

The service provider has a duty to provide timesheets recording the time spent for the respective parts of the services. As set forth in section 3.5 of the factual report, the quality of the timesheets is overall very poor, without any form of specifications as to work performed, making it impossible to identify or verify what work has been done. For many of the invoices received, no timesheets exist. Furthermore, the control routines are weak and inconsistent. In sum, we deem it likely that the agreement would not have been entered into, or implemented in the manner done, if Feastwood had not been a related party of OT.

Thus, in our view, the service agreement as actually implemented does not seem to qualify as exempt under the exemption for agreements entered into as part of the normal business. The service agreement was stated to be a formalisation of the arrangement up until such time, and thus in our view the exemption would not apply to the previous oral agreements either.

3.4.6 Approval by the general meeting

As detailed above, in our view the agreements with Feastwood, both the service agreement and any oral agreements prior to such service agreements, should have been subject to the approval process set forth in § 3-8 of the PLLCA.

As a main rule, in order for a general meeting to be deemed to have approved an agreement pursuant to § 3-8 of the PLLCA, it must be a condition that it has been treated as a specific matter at the general meeting.[4] Further, the agreement that is to be approved must have been presented at the general meeting. In the ruling by *Borgarting lagmannsrett* included in *Rettens Gang 2009*, page 1570, regarding an employment arrangement with the spouse of a chairman of the board/general manager, it was not deemed sufficient that the shareholders were aware that she was employed and that they were made aware of her remuneration through the annual accounts and annual report.

It is evident that OT has not arranged for any report on the respective agreements being prepared, with a statement that there is a fair balance between the value of the consideration paid by the company and the value of the services received. Further, and more importantly, no agreement has been presented to the general meeting for specific approval. Without such approval, the agreements are not binding to OT. However, a general meeting may approve relevant agreements with retroactive effect, repairing any

[4] Aarbakke page 209

invalidity of agreements that have been entered and implemented in breach of § 3-8 of the PLLCA, even if a long time has passed after the entering of the agreement.[5]

In 2014 and 2015, the annual general meetings resolved to approve that the Board Members invoiced EUR 300 per hour and maximum EUR 2,400 per day for extraordinary work. We note that at the annual general meeting in May 2015, a large minority argued that several transactions with related parties should be approved in accordance with § 3-8 of the PLLCA. At the general meetings, the shareholders had information of the extent of such invoiced amounts, as the resolutions in both instances were in respect of the preceding accounting year. No agreement has been presented at the general meetings, but certain key elements - the hourly rates and total fees - were presented to the general meeting. As the requirement for validity is the approval by the general meeting, it can, despite the principle set forth in the above-mentioned ruling, be argued at least in principle that the oral agreements for extraordinary services performed in 2013 and 2014 have been approved by the general meeting.

In May 2016, the general meeting approved a fixed fee of EUR 80,000 per year for each director for work required of them beyond the scope of and responsibility of a director for each of the years 2015, 2016 and 2017, as well as the right to invoice EUR 500 per hour for extraordinary services beyond 160 hours per year, *to be determined on a case by case basis in advance*. As for the previous general meetings, it can be argued that this resolution does constitute an approval relevant for § 3-8 of the PLLCA. However, it is evident that the written service agreement dated 1 November 2016 has not at any time been presented to the general meeting for approval. Further, the terms of the agreement deviate somewhat from the terms set forth in the resolution by the general meeting in May 2016 – in our view, the resolution indicates a conservative approach to the ordering of additional services beyond the 160 hours per year, as that should be determined *on a case by case basis in advance*, whereas the service agreement sets forth a very wide range of services and a potential ordering of up to 2,000 hours per year. As the service agreement has not been approved by the general meeting, it is our view that it most likely must be deemed <u>not binding</u> on OT, and thus <u>invalid</u>.

3.5 Should other agreements with related parties have been treated pursuant to § 3-8 of the PLLCA?

3.5.1 Heer Holland B.V. (services from Haico Halbesma)

As described in our factual report (section 3.4.2), a service agreement seems to have been prepared in 2011, but we have only been provided with a draft. The arrangement based on such agreement from 2011 was presented to and approved by the AGM in 2013. A new service agreement was entered into 1 July2016.

The service agreements are for the provision of services as CEO, and Haico Halbesma was formally registered in the Norwegian Register of Business Enterprises as CEO of OT from 9 May 2006 to 15 June 2018.

From a corporate law perspective, it is permitted and not uncommon to retain the services of a CEO by way of management for hire, which OT did pursuant to the mentioned agreements. In the outset, the entering of such agreement is a matter for the Board of Directors. However, when the agreement is entered into with a shareholder, § 3-8 of the PLLCA must be considered.

[5] Berge/Gåseide Røsås pages 97-98

The agreement is with Heer Holland B.V., with Haico Halbesma being designated as the CEO. It must be assumed that such agreement falls outside the exemption in § 3-8 (1) no. 2 (which exemption includes i.a. agreements regarding remuneration to certain leading employees)[6]. However, in our view these agreements must be deemed entered into as part of the company's normal business. Provided they contain price and terms that are customary for such agreements, the exemption in § 3-8 (1) no. 4 can be applied. Although we have not seen any benchmark analyses of the agreement, annual remuneration of EUR 280,000-360,000 does not appear clearly unreasonable for a CEO of a company listed on Oslo Stock Exchange.

The service agreement of 1 July 2016 contained a termination fee of EUR 1,800,000, equal to 60 months' ordinary fees, payable on a termination by OT without cause. This does seem quite a bit above market, but we note that the termination fee was waived as part of a settlement in connection with Haico Halbesma's resignation as CEO, and do not consider this one contract term sufficient to prevent the exemption to apply. Consequently, in our view the service agreements did not require the approval by the EGM pursuant to § 3-8 of the PLLCA.

3.5.2 Cenzo B.V./Groom Hill SARL

The agreements with Cenzo and Groom Hill are described in section 3.4.3 and 3.4.4 of our factual report, respectively.

Each of the two companies entered into a general service agreement with OT dated 1 November 2016 and approved by the Board 13 December 2016. Prior to these agreements, the companies provided some form of consulting services to OT based on oral agreements. Groom Hill invoiced based on a fixed annual fee of EUR 75,000, whereas Cenzo invoiced based on a fixed annual fee of EUR 70,000. Neither of the two were required to submit any timesheets or in any other manner document the extent of work performed.

We have noted that the general meetings in 2014 and 2015 approved that the directors, i.e. including Cenzo and Groom Hill, may invoice EUR 300 per hour/maximum EUR 2,400 per day for extraordinary work. This does not match the alleged agreed fixed fee, nor does it fit with the two not providing any documentation of the amount of work performed.

Any agreement with the two companies for the provision of services, to be provided by the respective member of the Board of Directors, must in our view be deemed in reality to be an agreement with the respective director – with a company which acts by virtue of an agreement or understanding with the respective director, cf. § 3-8 (4).

3.5.2.1 Amount threshold

There is no information about duration or termination provisions in the oral agreements. As a director is appointed for two-year terms, two years seem a natural starting point for the duration of an agreement for remuneration in connection with such directorship. We note that both served for more than two years, and invoiced EUR 70,000 and 75,000, respectively, each year, which is above the amount thresholds in § 3-8 of the PLLCA. The agreement dated 1 November 2016 provides for a fixed fee of EUR 80,000 which in itself exceeds the 5% threshold at such time. (The agreements were given retroactive effect from 1 January 2015, thus entitling the service providers the fixed fee of EUR 80,000 for a minimum of one year and ten months.)

[6] Berge/Gåseide Røsås page 39

Consequently, the amount threshold is passed both for the earlier oral agreements as well as the service agreement dated 1 November 2016.

3.5.2.2 Exemption for remuneration for board services

We note discrepancies in how the two directors viewed the work performed under the oral agreements. Pos explicitly stated that she did not work as a consultant for OT, and that all work was part of the role as director (cf. section 3.4.3.4 of the factual report), whereas Hill stated that he was expected to do extra things besides the work strictly required of a Board member (cf. section 3.4.4.4 of the factual report). We note, however, that it was subsequently clarified in the resolution in the AGM in 2016, with a reference to work required beyond the basic scope and responsibility of a director, and the written service agreements which expressed to *formalize the continuing engagement of the service provider and the Company.* Based on this, it is our view that the exemption for agreement concerning remuneration for board services did not apply.

3.5.2.3 Exemption for agreements entered into as part of normal business

The service agreements contain the following scope of services:

Cenzo B.V.[7]:

- *(i) General corporate and HR advice,*
- *(ii) Advice on group personnel policies and personnel insurance advice,*
- *(iii) Advice related to assessment, selection and training of personnel,*
- *(iv) Mediation in HR disputes and dispute resolution,*
- *(v) Any other services related to the Group, that at the discretion of the Company, may appear suitable to be performed by the Service Provider.*

Groom Hill SARL:

- *(i) Advice related to corporate services, development and related documentation,*
- *(ii) Advising on corporate structure and restructuring,*
- *(iii) Advising on strategic cooperation with joint venture partners,*
- *(iv) General legal advice and assistance with contract negotiations, activities related to the sourcing of financing, negotiations and strategy development related to the long-term refinancing of the group and related documentation,*
- *(v) Any other services related to the Group, that at the discretion of the Company, may appear suitable to be performed by the Service Provider.*

Both agreements thus provide a scope of services that can seem natural to source within normal business operations. Though not nearly as wide a scope as the scope of services for Feastwood, these agreements also contain a general catch-all phrase of "any other service related to the Group, that at the discretion of the Company, appear suitable to be performed by the service provider". We further have the same reservations as for Feastwood in respect of directors providing services within areas the Board of Directors generally has a responsibility to supervise, and the breach of the principal stipulation in the corporate governance code that the directors should not take on additional assignments for the company.

[7] Note that the written service agreement was entered into with Cenzo B.V.'s parent company, Cenzo Holding B.V., but all invoices were issued by Cenzo B.V.

We find it questionable whether the agreements, oral and written, can be deemed exempt as agreements entered into as part of normal business.

3.5.2.4 Price and other conditions
Regarding the hourly fees of EUR 500 introduced at the AGM in 2016 and the written service agreements of 1 November 2016, we question whether it is a fair price for the services. As set forth in section 3.4.4 above, with respect to the services of Feastwood, OT has obtained opinions from Loyens & Loeff and from EY, but this has not been done in respect of Cenzo and Groom Hill. We further find it questionable that the two service providers are deemed of *equal* value, given their background and qualifications, and their respective form of services.

The oral agreements as understood by the service providers, supported by the structure of invoicing, as well as the written service agreements do not require the service providers to submit any timesheets or any other form of documentation of their work. It is difficult to see that a company would enter into an agreement with external consultants against a fixed fee with no minimum requirements to work performed or of documentation. In our view, this is a strong argument that the exemption for agreements entered into as part of normal business did not apply to the oral or the written agreements with Cenzo and Groom Hill.

3.5.2.5 Approval by the general meeting
As detailed above, in our view the agreements with Cenzo and Groom Hill, both the service agreements and any oral agreements prior to such service agreements, should have been subject to the approval process set forth in § 3-8 of the PLLCA.

It is evident that OT has not arranged for any report on the respective agreements being prepared, with a statement that there is a fair balance between the value of the consideration paid by the company and the value of the services received. Further, and more importantly, no agreement has been presented to the general meeting for specific approval. Without such approval, the agreements are not binding on OT.

In 2014 and 2015, the annual general meetings resolved to approve that the Board members invoiced EUR 300 per hour and maximum EUR 2,400 per day for extraordinary work. At the general meetings, the shareholders had information of the extent of invoiced amounts, as the resolutions in both instances were in respect of the preceding accounting year. The wording of the resolution clearly indicates that the fees to the two companies are based on invoices based on *time spent*, not a fixed fee without any requirement to document any work performed. At the AGM in 2016, a resolution is passed to approve a fixed fee for 2015 (and 2016 and 2017), with information that the fee is set *in light of the amount of such work undertaken and time spent in previous years*, again a clear indication that the two companies have documented sufficient work previous years. In our view, the general meetings' approval of fees for 2013-2015 cannot be deemed approval of the underlying oral agreements pursuant to § 3-8 of the PLLCA, as the general meetings had been provided with inadequate, or even misleading, information regarding such agreements.

With respect to the written service agreements dated 1 November 2016, we refer to section 3.4.6 above. As the service agreements have not been presented to and approved by the general meeting, it is our view that they most likely must be deemed not binding on OT, and thus invalid.

3.5.3 Oceanteam Holding B.V.

Two agreements/arrangements are described in section 3.4.5 of our factual report. The lease agreement for office space with Oceanteam Holding B.V. is dated 2008, and is outside the scope of our assignment. The agreement was initially for a 5 + 5-year period, but after the first five-year period, it was prolonged for two years only. On a general note, an agreement for the lease of office space can qualify for the exemption for

agreements within the normal business, always provided that the agreement contains price and other conditions that are customary for such agreements.

The guarantee arrangement in respect of Amstel Lease financing, with no written agreement, resulted in payments below the 5% threshold of § 3-8 of the PLLCA, thus the provision is not applicable to the arrangement.

3.5.4 Toha Invest B.V.

The arrangement with Toha Invest BV is described in section 3.4.6 of our factual report.

The lease agreement for office space was entered into by Oceanteam Shipping B.V. Consequently, § 3-8 of the PLLCA is not applicable to the agreement.

3.5.5 C

As described in section 3.4.7 of our factual report, Oceanteam Shipping B.V. was party to a lease agreement with C regarding an apartment in Amsterdam. § 3-8 of the PLLCA is not applicable to the agreement.

3.5.6 Challenger Management Services S.A.M.

The arrangement with Challenger Management Services S.A.M. is described in section 3.4.8 of our factual report.

The payments to Challenger have mainly been related to OT's office in Monaco, which "looked like an apartment, but with several working stations". As mentioned above, on a general note, an agreement for the lease of office space can qualify for the exemption for agreements within the normal business, always provided that the agreement contains price and other conditions that are customary for such agreements.

3.5.7 4C Offshore Ltd.

The agreements with 4C Offshore Ltd. are described in section 3.4.9 of our factual report.

The agreements we have been provided with, have been entered into prior to the start of the period covered by our investigations. We have therefore not investigated these further, but note that in any event, 4C Offshore Ltd. has not even been identified as a related party before the financial year 2016.

3.5.8 Heleos Energy B.V.

As set forth in section 3.4.10 of our factual report, only EUR 2,000 has been paid to this company in 2016 (the only year that it was mentioned as a related party in OT's financial statements), well below the threshold in § 3-8 of the PLLCA.

3.6 Other basis for shareholder approval being required

§ 6-27 (1) of the PLLCA reads (unofficial translation):

> *A member of the board of directors may not participate in the discussion or decision of any matter which is of such particular importance to himself or any related party that he must be deemed to have a special and prominent personal or financial interest in the matter. This provision is similarly applicable to the general manager.*

At the Board meeting 1 November 2016 approving the service agreement with Feastwood, Hessel Halbesma did not attend. At the Board meeting 13 December 2016, approving with retroactive effect the service agreements with Cenzo B.V. and Groom Hill SARL dated 1 November 2016, as well as the work order for 2017 for Feastwood, each director abstained from the discussion and decision upon the agreement with the respective director's company. In our view, these agreements appear mutually conditional. The approval of one agreement would effectively not be obtained without corresponding approval of the other two. Thus, each director effectively had a prominent interest in each of the agreements, one directly and the other two indirectly. As such, it can be argued that each director was disqualified to discuss and decide upon the service agreements of 1 November 2016, as well as previous oral agreements, and that as a result, each such agreement should have been presented to the general meeting for approval even if deemed to fall outside of the scope of § 3-8 of the PLLCA.

Certain elements of the agreements have been subject to approval in the general meetings of OT. However, the specific matters treated and the information given at the general meetings have been of a nature that in our view means that the respective agreements cannot be deemed approved by the general meetings, see sections 3.4.6 and 3.5.2.5 above.

4 Unlawful distributions

4.1 Introduction

The PLLCA includes provisions with the purpose to protect a company's capital. The Norwegian company legislation contains a fundamental basis of a company being an independent legal entity separate from its shareowners. Key provisions are §§ 3-6 and 3-7 of the PLLCA.

§ 3-6 (1) and (2) of the PLLCA read (unofficial translation):

> (1) *Any distribution from the company may only be done in accordance with the rules regarding dividends, capital reduction, merger or demerger of companies, and repayment following liquidation.*
> (2) *Distribution includes any transfer of values which directly or indirectly benefits the shareholder. The value shall be the actual value on the date of transfer.*

§ 3-7 of the PLLCA reads (unofficial translation):

1. *If a distribution has been made by the company contrary to the statutory provisions of this act, the recipient shall return the received assets. In the event of a distribution of dividends or repayment following capital reduction, merger, demerger or liquidation, the preceding rule is nevertheless inapplicable if the recipient, at the time he received the distribution, neither understood nor ought to have understood that it was unlawful.*
2. *Anybody who on behalf of the company assists in adopting or carrying out a resolution for unlawful distribution and who understood or ought to have understood that the distribution was unlawful, is liable for ensuring that the distribution is returned to the company. Such liability may be modified in accordance with § 5-2 of the liability act.*

Pursuant to the above provisions, any *transfer of value* from a company which directly or indirectly benefits a shareholder, is considered a *distribution*, which may only be carried out in accordance with the specific set of rules mentioned in § 3-6 (1). Consequently, the term "distribution" encompasses value transfers that are part of what can appear to be an ordinary business transaction, e.g. where the company is overcharged for assets or services from a shareholder. Further, the term clearly encompasses a reimbursement of a shareholder's expenses where the expenses cannot be deemed a company cost, or any form of payment without any performance by the shareholder.

Where the recipient of a transfer of value from a company is not a shareholder, it will need to be determined whether the transfer of value *indirectly* benefits one or more shareholders. The preparatory works for the former limited liability companies act (of 1976) mentioned the situation where a transfer of value from a company to *another company which completely or partially is owned by the same shareholders* as an example of a situation within the wording *directly or indirectly benefits*[8]. The transfer of value has an impact on the fortune of a shareholder as a consequence of the impact the transfer of value has on the third party (company B) - the shareholder's fortune experiences an indirect increase of his fortune due to the increase in fortune of company B[9].

In respect of related physical persons, it is assumed that value transfers to a shareholder's spouse or children are deemed to benefit the shareholder indirectly, but beyond that it is difficult to specify a precise limit as to what distributions to which persons will constitute a *distribution*.

However, due to the provisions on gifts in § 8-6 of the PLLCA, it is in practice rarely a need to determine whether a value transfer indirectly benefits a shareholder.[10] A company may grant gifts only on certain specific conditions. Of potential relevance to OT is only gifts within the company's distributable reserves at the relevant time and subject to approval by *all shareholders*. § 8-6 does not specify the consequences of the provision of a gift in breach of the provision, but possibly the matter must be considered with the basis in § 6-33 of the PLLCA, resulting in the gift being invalid.[11]

[8] Ot.prp. no. 19 (1974-75) page 186
[9] Cf. Bugge Reiersen page 228
[10] Berge et. al page 24
[11] Aarbakke page 630

4.2 Applicability of §§ 3-6 ad 3-7 of the PLLCA on OT's related parties

The companies that have been stated as related parties in some or all years in the period covered by our investigation are:

Related party	Individual	Year stated as a related party					Type of transaction (SANDS' comment)
		2013	2014	2015	2016	2017	
Feastwood Holding Ltd.[12]	Hessel Halbesma	x	x	x	x	x	Hessel's management company
	Haico Halbesma					x	CEO bonus/CFO salary
Heer Holland B.V.	Haico Halbesma	x	x	x	x	x	Haico's management company
Cenzo B.V.	Catharina Petronella Johanna Pos	x	x	x	x	x	Pos' management company
Groom Hill	James Wingett Hill	x	x	x	x		Hill's management company
Oceanteam Holding B.V.	Haico Halbesma Hessel Halbesma	x	x				Guarantor/office rental
Toha Invest B.V.	Haico Halbesma Hessel Halbesma				x	x	Office rental
C	Haico Halbesma's long term partner				x	x	Apartment rental
Challenger Management Services S.A.M.	*B* Hessel Halbesma Haico Halbesma	x			x	x	Communication services and rental of office space in Monaco
4C Offshore Ltd.	Haico Halbesma Hessel Halbesma				x	x	Data system provider
Heleos Energy B.V.	Haico Halbesma				x		
Imperator AS[13]	*B*				*x*	*x*	

Feastwood Holding Ltd is a direct shareholder, so any transfer of value to Feastwood will directly have benefited a shareholder.

According to notes to the financial statements for 2013-2017, Haico Halbesma has in the entire period owned shares directly, in addition to his ownership through Feastwood Holding Ltd. Any transfer of value to Heer Holland B.V., Oceanteam Holding B.V., Toha Invest B.V., Challenger Management Services S.A.M., 4C Offshore Ltd. and Heleos Energy B.V., as well as Feastwood Holdings Ltd. (BVI), will indirectly have benefited Haico Halbesma and, as applicable, the indirect shareholder Hessel Halbesma.

According to notes to the financial statements for 2014-2016, the director James Hill has owned shares directly per the balance sheet dates of such accounts. Any transfer of value to Groom Hill will indirectly have benefited James Hill.

[12] 19 December 2016, Oceanteam entered into an agreement called Novation agreement with Feastwood Holding Ltd. (Cyprus) and Feastwood Holdings Ltd. (BVI), where Feastwood (Cyprus) novates all of its benefits rights, liabilities and obligations under the Service Agreement with Oceanteam, to Feastwood (BVI)

[13] As B is not covered by the given mandate of this investigation, we will not focus on Imperator AS in this report

Any value transfer to C should most likely be deemed to be for the indirect benefit of Haico Halbesma. Alternatively, such value transfer would be deemed a gift, as would be the case for a value transfer to Cenzo B.V.

None of the payments from OT to related parties have been done in accordance with the rules regarding dividends, capital reduction, merger or demerger of companies, or repayment following liquidation. Consequently, to the extent such payments imply any transfer of value, the transfer is unlawful, and pursuant to § 3-7 (2) of the PLLCA, the recipient has an obligation to return the received funds. In respect of any value transfer that constitutes a gift, no such gift has been treated at the general meeting and been approved by all shareholders and would thus be invalid.

A distribution in violation of § 3-6 of the PLLCA is unlawful from the first NOK. It is sufficient that there is a mismatch. It is not required to be a clear/significant mismatch. The process to determine whether a transaction constitutes a distribution can be divided in three phases. First of all, the value of the parties' contributions is determined. The term distribution is based on a conservative valuation principle. Secondly, if there are mutual rights and obligations, the value of the respective party's contribution must be compared. For a distribution to take place, there must be a net transfer of value from the company to the shareholder. Thirdly, it must be considered whether any transfer of value nevertheless is commercially reasoned.[14]

If it is not possible to determine a precise fair market value, but only a range, Filip Truyen has stated that the lowest value in the range shall apply[15]. However, Aarbakke argues that there is reason to grant the parties some discretion with respect to the contributions that are difficult to value.[16] Reiersen argues that the parties must have some discretion within valuation intervals that are justifiable.[17]

4.3 Potential unlawful distributions

Our investigation has uncovered a number of agreements and transactions that have or *may* have comprised elements of unlawful distributions pursuant to § 3-6 of the PLLCA.

4.3.1 Feastwood Holding Ltd.

The agreements are described in section 3.4 above and in section 3.4.1 of our factual report.

As set forth in section 3.4.4 above, we question whether the hourly rate of EUR 500 applicable from 1 January 2015 constitutes fair pricing.

At the AGM in May 2016, it was resolved to increase the hourly rate from EUR 300 to EUR 500 with retroactive effect from 1 January 2015. At such time, Feastwood had invoiced for 2,352 "regular hours" in 2015 and more than 600 hours in 2016 up until the AGM at a previously agreed hourly rate of EUR 300. The rationale behind such retroactive increase of already agreed fees can be questioned, and it can be argued

[14] Truyen page 127
[15] Truyen page 127
[16] Aarbakke page 193
[17] Reiersen page 196

that it does in fact constitute a distribution to Feastwood that should have been treated and approved as such to be lawful.

Feastwood has invoiced OT for a substantial number of hours of work. We have noted quite a few invoices, especially in 2017, without timesheets, some instances of invoices being above the maximum agreed fees, and remarkable systems in the number of hours invoiced. The invoices and related timesheets contain close to no information about the work done, making it impossible to understand or control what kind work Hessel Halbesma supposedly did. We have further noted that the approval routines for these invoices appear weak and inconsistent, and statements from former employees that they do not believe Hessel Halbesma worked as much as the invoices claim.

Following the AGM in 2016, at which it was resolved to approve a fixed annual fee of EUR 80,000 for each of the years 2015-2017, Feastwood received EUR 160,000 as lump sums for 2015 and 2016 even though Feastwood had already invoiced hour by hour for 2015 and 2016.

If there is a mismatch between the value of services actually provided by Feastwood and the remuneration paid, this would generally qualify as *unlawful distribution*.

4.3.2 Cenzo B.V. / Groom Hill SARL

The agreements are described in section 3.5.2 above, and in section 3.4.3 and 3.4.4 of our factual report. As the two companies and the directors Pos and Hill have not submitted any timesheets, it is difficult to get a clear view of what amount of services has in fact been provided.

Although the resolutions in the AGMs in 2014 and 2015 set forth that the two invoiced based on an hourly rate of EUR 300 in 2013 and 2014, the invoices have in fact been based on fixed fees with no documentation of time spent. The fixed fees of EUR 70,000 and 75,000 invoiced would suggest 233 and 250 hours of service, respectively. The written service agreement entitling the two to a fixed fee of EUR 80,000 is based on an assumption of approx. 160 hours of work at an hourly rate of EUR 500, expressed to be based inter alia on work performed historically, whereas there does not seem to be adequate documentation of the amount of such past work. If we take the reference to *work performed historically* at face value, it would indicate that OT has estimated (as there is no documentation) an average of 160 hours of services performed, in itself showing a mismatch between the fixed fees paid and the value of the services received.

As set forth in section 3.5.2.4 above, we question the hourly rate forming the basis for the fixed fee, and also whether equal pricing of the services provided by the two service providers constitutes fairpricing.

If there is a mismatch between the value of services actually provided by the two service providers and the remuneration paid, this would generally qualify as *unlawful distribution*, however, with respect to Cenzo B.V., potentially gifts that should be *deemed invalid*.

4.3.3 Haico and Hessel Halbesma – private expenses

As set forth in section 4 of our factual report, in our review of the travel bills of both Haico and Hessel Halbesma, we find that several expenses classified as company expenses, appear highly questionable with regards to being associated with OT's daily operations. To the extent private expenses have been covered by OT, this would qualify as *unlawful distributions*.

4.3.4 Haico Halbesma – remuneration for services as CFO

As set forth in section 3.1.3 of our factual report, Haico Halbesma provided CFO services for a period of time in 2016. For these services, Feastwood Holding Ltd. invoiced a fee of EUR 17,500 per month for the period 1 January to 31 October 2016, in total EUR 175,000.

We have received conflicting information as to the starting point of Haico Halbesma actually providing CFO services, but clear indications that it was during the spring. Payment to Feastwood of fees for a period in which no services were provided would qualify as *unlawful distribution*.

4.3.5 General remark regarding arm's length terms

There may well be other transactions and agreements that comprise elements of unlawful distributions from OT or subsidiaries. Without going into further detail regarding such other matters, we refer to KPMG's statements in Management Letter dated 24 May 2017, see section 3.6.1 of our factual report:

> *"We have been informed that Oceanteam ASA during 2016 and 2017 on a regular basis has paid for travel costs and other costs of a personal nature and subsequently invoiced to Feastwood Holding Limited. We ask for the Board's assessment of whether or not these payments are in accordance with the Norwegian Public Limited Liabilities Act and in particular in relation to the current difficult financial position of the company.*
>
> *Furthermore, we have not been presented with documentation supporting the valuation of services provided from all related parties and hence, we have not been able to conclude on whether the services are valued on an arms-length principle"*

5 Abuse of position in the company

5.1 Relevant legislation

Prohibition against abuse of position or authority is a central part of the legal protection of minority interests. The PLLCA has provisions prohibiting the abuse of positions applicable to the general meeting and board members and others representing the company.

§ 5-21 of the PLLCA reads (unofficial translation):

> *A general meeting may not adopt any resolution which is suited to give certain shareholders or others an unreasonable benefit at the expense of other shareholders or the company.*

§ 6-28 (1) of the PLLCA reads (unofficial translation):

> *Members of the board of directors and others who represent the company pursuant to §§ 6-30 through 6-32 may not adopt any measure which may tend to give certain shareholders or others an unreasonable benefit at the expense of other shareholders or the company.*

§ 5-21 is directed at the shareholders acting through the general meeting, whereas § 6-28 is directed at board members and others representing the company, inter alia the general manager. Decisions passed at a general meeting are transparent, in that the shareholders have a right to receive notices, right to attend and vote and a right to see minutes from the general meetings. The decisions process for the board and management is different, and minority shareholders typically have far less, if any, insight into such process. This implies that the duty of loyalty for the directors and managers pursuant to § 6-28 should be stricter than the duty of loyalty of shareholders pursuant to § 5-21.[18]

The core of the rules on abuse of position are decisions or measures that directly or indirectly imply differential treatment of shareholders. This includes for instance high board remuneration which in reality is a "payment on the shares", agreements favourising a company in which the main shareholder has interests or share issues directed at selected shareholders.

§ 6-28 prohibits the adoption of *any measure* (*Norw: må ikke foreta seg noe*) which may tend to give certain shareholders or others an unreasonable benefit at the expense of other shareholders or the company. The prohibition is not limited to the entering of agreements, and it applies to formal decisions as well as measures taken without any resolution.

The regulation does not prohibit any form of special benefit for a shareholder or others. Benefits that are based on *commercially prudent reasoning* in the *joint interest* of the company and its shareholders shall not be deemed unreasonable and thus not prohibited.

The prohibition against abuse of position or authority can clearly cover a transfer of value/unlawful distributions, as a resolution or effectuation of such distribution is suited to give certain shareholders or others – the recipient - an unreasonable benefit – the value received - at the expense of other shareholders or the company – whose capital base is reduced. However, the provisions on abuse of position have a wider reach, including in that there is no condition that the effects of the resolution can be measured/converted to a market value.

The consequence of an abuse of position pursuant to the mentioned provisions is usually liability for damages pursuant to § 17-1 of the PLLCA, provided that the conditions for such liability are satisfied, most importantly that the abuse of position has in fact caused a loss at the hands of the company, a shareholder or "others". In some instances, it may also be argued that the measure or agreement is invalid, and that the performances thereunder shall be reversed.

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[18] Truyen page 123

5.2 Evidence of abuse of position

During our investigations, we have reviewed documentation and performed interviews that leaves an impression of an organization that has been operated under very clear control by Hessel and Haico Halbesma, in a manner that – especially in aggregate - is well suited to give particularly those two individuals and companies under their control an unreasonable benefit at the expense of OT.

Below, we will give a brief summary of certain key matters and circumstances. Some of the matters mentioned may not on a stand-alone basis constitute abuse of position but are included to show a more complete picture. We further emphasize that it may well be that not all the matters and circumstances have in fact resulted in an unreasonable (economic) benefit at the expense of OT, beyond the mere possibility that an economic benefit may arise.

We further note that some transactions and agreements have been made and measures taken in subsidiaries outside of Norway, particularly in the Netherlands. We have not investigated applicable legislation in such jurisdiction, and thus do not know if the described matters are in breach of local law. Notwithstanding this, to some degree Hessel and/or Haico Halbesma may in some of these instances be deemed to have acted as representative of OT as sole owner of the relevant subsidiary, in breach of § 6-28 of the PLLCA.

5.2.1 Agreements with Feastwood

The oral and written agreements with Feastwood have been described above. In our view, there is a number of aspects about the agreements as such, and the implementation of them, that have been well suited to give Feastwood and Hessel Halbesma an unreasonable benefit at the expense of OT:

- The failure by Feastwood to provide timesheets with information that would enable OT on a continuing basis to be able to assess the value of the services provided, with approval routines for the invoices appearing weak and inconsistent –possibly due to the existing culture in OT, where, according to former employees, no one dared to refuse to approve costs or invoices from the Halbesmas;

- The work orders issued in connection with the written service agreement being wide in scope and for long time periods, contrary to what would normally be expected to be meant by the agreement's wording "detailing the scope, duration and estimated price", in particular as the work orders are to be for "extraordinary work" in excess of 160 hours, which formed the basis for a fixed fee set "in light of the amount of work undertaken and time spent in previous years and to be anticipated in the future";

- Agreements being entered into without, as far as we are aware, there being carried out any third-party valuation (until those opinions obtained from Loyens &Loeff and EY in April 2017 in connection with the service agreement of 1 November 2016), even though this is required for any agreement with related parties that is not immaterial to OT, pursuant to OT's own corporate governance policy as detailed in the annual report for the relevant years;

- The increase in hourly rate from EUR 300 to EUR 500 with retroactive effect in respect of more than 3,000 hours that had already been invoiced at the previously *agreed* hourly rate;

- The fact that on 17 June 2016, OT's corporate counsel provided an internal memo, see section 3.4.1.4.5 of our factual report, recommending that OT enters into an agreement with Feastwood for additional services for a maximum amount equal to 5% of the share capital. It seems more important for OT to avoid the requirement for treatment in the general meeting and obtaining an auditor's opinion, than to obtain services from Feastwood beyond such financial limits. Once OT had received legal advice that an exemption from § 3-8 could be applied (with which we do not agree), an agreement for up to 2,000 hours per year was entered into, with potential annual fees in excess of 50% of the share capital;

- The remuneration paid to Feastwood has been made known to shareholders through the annual accounts and the annual accounts and certain specified fees approved by the general meeting. However, as far as we are aware, the shareholders have not at any time had information of e.g. the weak and inconsistent approval routines, the issue of work orders that do not comply with what we would expect from the wording and background of the service agreement, or the lack of obtaining third party valuations.

5.2.2 Agreements with Cenzo B.V. and Groom Hill SARL

The agreements have been described above. The oral agreements appear to have been for a fixed annual fee of EUR 70,000-75,000 (the invoicing indicates this to be the case), and the written service agreements have been for a fixed annual fee of EUR 80,000, in respect of both the oral and written agreements with no requirement to provide timesheets documenting the work actually performed. With no such requirement, the agreements are in our view clearly suited to give the service providers / directors an unreasonable benefit at the expense of OT.

The remuneration paid to Cenzo and Groom Hill has been made known to shareholders through the annual accounts and the annual accounts and certain specified fees approved by the general meeting. However, it appears that the shareholders and the market have been misled with respect to the basis for the fees paid to the two companies. The notes to the annual accounts for 2013 and 2014 state that the directors were entitled to EUR 2,400 per day; according to the minutes from the general meeting approving the accounts, it was stated that the fees were based on hourly rates of EUR 300; whereas the actual invoicing has been based on annual fixed fees with no requirement to document the amount of work. The notes to the annual accounts for 2015 state that payments to Cenzo and Groom Hill were mainly invoices based on hourly rates, whereas the invoicing again had been based on the annual fixed fees.

Further, as no timesheets had been provided for the previous years, it is difficult to understand how OT could propose that the general meeting approves a fixed fee of EUR 80,000 to each of the respective directors' company with information that the fee is set *in light of the amount of such work undertaken and time spent in previous years* – this information appears misleading.

5.2.3 Haico and Hessel Halbesma – private expenses

As set forth in section 4 of our factual report, both Haico Halbesma and Hessel Halbesma have had company credit cards that have been widely used for both corporate and private purposes. Expenses that were identified as private expenses were subsequently invoiced Feastwood and Heer Holland.

According to OT, only Hessel Halbesma and Haico Halbesma made the decision about what was company-relevant or not, and no one else was involved in this part of the process. Nobody questioned the travel bills, because they did not know what e.g. Hessel Halbesma did in his role as Chairman and consultant.

In our review of the travel bills of both Haico and Hessel Halbesma, we find that several expenses classified as company expenses appear highly questionable with regards to being associated with OT's daily operations. Available documentation lack expected and essential information relevant to decide if the cost is a legitimate company cost. With poor quality documentation, and ineffective control routines, the arrangement is well suited to give Hessel and Haico Halbesma an unreasonable benefit – the covering of private expenses – at the expense of OT.

The credit card arrangement seems as a minimum inappropriate for a listed company, providing credit to the chairman and CEO of a company without any specific limitations. We note that pursuant to § 8-9 of the PLLCA, credit to a board member or a CEO may only be granted within the range of funds that are available for distribution as dividends pursuant to § 8-1, and adequate security shall be provided for the repayment or recovery claim. We have no information of any formal security arrangement being provided, failing which the credit granted would be *unlawful*. We do, however, note information that amounts recharged by OT for personal expenses were subtracted from/set off against potential payments due to Feastwood and Heer Holland, which effectively provides some security for repayment.

We have identified certain other costs and expenses paid by OT that seem to be or in fact are private expenses, such as the payment of costs in respect of the Halbesmas' legal dispute with B described in section 5.4 of our factual report, as well as the matters described in section 5.1 – 5.3 of our factual report.

5.2.4 Toha Invest B.V.– Oceanteam Shipping B.V.

Oceanteam Shipping B.V. is party to a sublease agreement with Toha Invest B.V., in respect of office space owned by Oceanteam Holding B.V. The agreement is described in section 3.4.6 of our factual report.

It appears Haico Halbesma signed the lease agreement for both parties, with one co-signatory on behalf of Toha Invest. According to our information, the lease agreement has not been treated in Board meetings or general meetings of OT or OT Shipping B.V. We do not have any information about any informal approval process in respect of the agreements. One person being on both sides of the table provides ample opportunity to enter a deal of benefit to yourself.

We note that OT paid renovation costs on the premises owned by Oceanteam Holding B.V. without any written agreement. We have conflicting information on the amount of costs; (i) EUR 150,000 and (ii) EUR 81,000 for renovation and EUR 42,000 for furniture, which is still used by Oceanteam Shipping B.V. Although it is argued that the renovation was necessary to make the premises representative, the renovation adds value to the premises. When determining whether the agreed lease is on market terms, these renovation costs must also be taken into account. We note that different interviewees state that the rental price was above market price, even without taking these additional costs into account.

Further, OT negotiated and paid a termination fee of EUR 250,000 + VAT of EUR 52,500, such fee having been approved by the Board of OT. We generally agree that a company terminating a fixed term lease agreement will typically have an obligation to pay the lease for the entire term or negotiate a reasonable reduced termination fee.

In this particular case, Haico Halbesma seems to have initiated and executed the following:

- Entering into an agreement to lease from a related party office space much larger than previously used by the company with a substantial increase (275%) in the lease payments, for a fixed term of five years,
- Performed renovation work for the benefit of the owner,
- Terminating the lease agreement two years into the five-year term, following which the owner regained full right of disposal of the refurbished premises, together with a substantial cash payment.

5.2.5 Incentives to Haico Halbesma through Feastwood

Despite its own policy that the performance-related incentives to management employees shall not exceed one year's salary, on 24 June 2016 the Board resolved to grant CEO Haico Halbesma a bonus of EUR 450,000. According to the wording of the minutes from the Board meeting, the proposals for bonuses was *prepared and recommended by* CEO Haico Halbesma. Further, even though the bonus was paid to Feastwood, Hessel Halbesma seems to have participated in the decision to grant the bonus.

5.2.6 Company culture

Throughout our investigation process we have gained an understanding of the company and leadership culture. The culture can in itself be deemed a general abuse of position, and in any event the culture has enabled the implementation of various measures and agreements that are suited to give the Halbesmas an unreasonable benefit at the expense of OT. We refer to i.a. sections 2.4, 3.5 and 4.4 of our factual report.

Internal organisation

The Halbesmas have held a dominating role in the organization and on the shareholder side, with OT being described as a "closed circuit". We have the understanding that the Halbesmas have used their power in order to have their way. According to interviews and based on our overall perception of the company culture, it is our understanding that no one would oppose to the Halbesmas when they wanted money. We understand that the Halbesmas have managed to push through their will and overrun established control mechanisms and the finance department in order to have their way, either in terms of getting approved travel bills or having consultancy fees paid, with or without underlying contracts - including at times the company struggled financially with liquidity. According to information from interviews, it has not been easy for employees to stand up against the Halbesmas and say that they found amounts spent on different arrangements or travels to be high.

Shareholder environment

On the shareholder side, we understand through information from interviews that the Halbesmas tend to have their will in general meetings. Former shareholders have described the atmosphere in these meetings in the following way regarding participating at a shareholder meeting (unofficial translation):

> *"It was not a particularly pleasant affair as a minority shareholder. We asked the same questions as before, and felt we behaved neatly and professionally. We were well prepared and asked some critical questions, but we didn't get any good answers. It was a cold atmosphere.*
>
> *In a pause, Haico Halbesma came up in my face. He physically stood nose to nose. He talked to me in a low voice and said that we were not wanted here and that we just had to get away as a shareholder. We did not pursue this anymore, as there was probably no violation of anything, but pleasant it was not.*
>
> *The OT voted by a clear majority at all general meetings. An additional shareholder participated and voted with Halbesma. Halbesma was successful in all cases. We were notified in the minutes of the general meeting that the minority shareholder was not satisfied and voted against. We also mentioned that we believed they were in violation of § 3-8 asal."*

Corporate governance and transparency

We have noted OT's corporate governance policy as detailed in the annual reports for the respective years stating the following regarding agreements with related parties:

> *"All transactions that are not immaterial between the Company and a shareholder, a director or senior manager of the Company (or related parties to such persons) will be subject to a valuation from an independent third party.*
>
> *If the consideration exceeds 5 % of the Company's share capital such transactions shall be approved by the shareholders in a general meeting, to the extent required by the NCA Section 3-8."*

Notwithstanding this, agreements with related parties have been entered into without, as far as we are aware, there being carried out any third-party valuation (until those opinions obtained from Loyens & Loeff and EY in 2017 in connection with the service agreement of 1 November 2016). Further, in connection with the commitment agreement and subsequently the service agreement of 1 November 2016, OT seemed to go out of their way to avoid the need for shareholder approval and auditor's opinion. As Feastwood generally had control of the majority votes at general meetings, the agreements would have been approved if OT had put related party agreements to the general meeting for approval pursuant to § 3-8 of the PLLCA. This raises the question whether OT expected difficulties obtaining auditor's opinions in respect of such agreements, which OT indeed did experience in respect of the contemplated commitment agreement. We note that in an interview, KPMG stated that they had a working hypothesis that the agreement with Feastwood had to be presented at a general meeting (see section 3.4.1.3.1 of our factual report), but KPMG seems to have settled down with the advice from Grette.

On page 43 of the annual report for 2016, OT acknowledges deviations from the corporate governance policy in respect of related party transactions, and that OT *is in need of improving its routines in relation to related party transactions*. It is stated that the Board has ensured that all related party agreements have been entered on arm's length terms. Having failed to obtain the prescribed third-party valuations, it is difficult to fully grasp how the Board has ensured that all agreements are on arm's length terms.

6 Other issues

6.1 Tax matters

We have identified certain issues that may have tax implications, without going into any further analyses of such issues.

OT was party to a service agreement with Heer Holland B.V., pursuant to which Haico Halbesma was made available *full time* to serve as CEO of OT, providing some services to other companies in the group.

In 2016, Haico Halbesma performed additional services as CFO, and these services were invoiced through Feastwood Holding Ltd., a company incorporated in Cyprus, and controlled by Hessel and Haico Halbesma jointly, and not Haico Halbesma on his own. From the outset, we would assume that the services were in fact formally provided by Heer Holland B.V., which in such case would be the legal entity earning the right to the remuneration.

Further, in June 2016, the Board approved the payment of an incentive of EUR 450,000 for the CEO Haico Halbesma. In the annual report for 2016, explaining why OT awarded a bonus in an amount higher than the limits set forth in OT's corporate governance policy, it is stated that "the Board of Directors have deemed it critical that the Company retains its current CEO and that he is highly motivated to endure the challenges that Company is currently facing". As the incentive payment expressed to be to ensure the continued motivation of Haico Halbesma, we would expect the right to such payment to be earned by him personally or by Heer Holland B.V., as the company through which Haico Halbesma's services as CEO were provided. In Haico Halbesma's own words, cf. section 3.4.1.7 of our factual report, he invoiced incentives received (which in addition to the mentioned EUR 450,000 payment includes incentives received in 2013-2015) through Feastwood for *tax efficiency reasons*.

We have not reviewed whether the hiring of a CEO through a limited company incorporated in the Netherlands has been handled correctly taxation-wise, in particular whether the CEO should be deemed an employee, subject to taxation in Norway and OT liable for employer's contribution.

Each Board member has received ordinary board remuneration of NOK 300,000 (Chairman) / 200,000 per year, subject to Norwegian tax. In addition, substantial amounts have been invoiced through the directors' respective non-Norwegian company. In our legal review, we have taken at face value the statement in the resolution at the general meeting in May 2016 that fees beyond the ordinary remuneration is for *further work required of them beyond the basis scope and responsibility of a director*. We note that in previous resolutions, it was only referred to as *extraordinary work*. We further note (see section 3.4.3.4

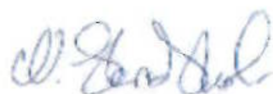
of our factual report) that Pos understood the entire fee of NOK 200,000 + EUR 80,000 (the annual fixed fee as from the AGM in May 2016) to be for the work as director, and that the board work was split up *"because we needed to have salary in Norway"*. In its opinion 28 April 2016, BAHR concluded that fees to Feastwood beyond the basic fee of NOK 300,000 should be considered as part of the remuneration to the Board member. This also seems to be the implied view of Thommessen in its legal opinion of 26 April 2016. We have, however, not gone into any more detail on the Norwegian tax treatment of the remuneration paid to the three directors and their companies.

6.2 Potentially criminal acts

As detailed in our factual report and in this report, we have identified a number of agreements, transactions and matters that in our view constitute abuses of position in OT, and very likely unlawful distributions.

A quite extraordinary matter is the fact that as a result of a certain commitment agreement between OT and Feastwood not going through, Feastwood invoiced an additional EUR 1,080,000 for 3,600 hours of consulting work for 2015 on top of 2,352 "regular hours" already invoiced – see e.g. section 3.5.1.1 of our factual report. It is extremely difficult to believe that Feastwood/Hessel Halbesma had in fact provided the work invoiced. KPMG objected to the invoice, and a credit note was issued (although not for the full amount). This attempt to charge for services not delivered, as well as any other invoices for services not delivered or use of company funds to pay private expenses, can potentially constitute violations of provisions in the penal code.

Best regards
SANDS Advokatfirma DA



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