

**IMPLEMENTATION OF *FIDUCIARY DUTY* PRINCIPLES
ON THE ERROR OR NEGLIGENCE OF THE BOARD OF DIRECTORS OF
A LIMITED LIABILITY COMPANY CAUSING LOSSES TO BE CHARGED
AS PERSONAL RESPONSIBILITY**

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ABSTRACT

The provisions of article 104 paragraph (2) of Law Number 40 Year 2007 regarding Limited Liability Company, imply that the Board of Directors to be jointly responsible for all obligations that cannot be repaid from bankruptcy property if the bankruptcy caused by errors or omissions is a provision that impose directors in managing activities business of Limited Liability Company. In practice, however, no Limited Liability Company in Indonesia is bankrupt due to a mistake or negligence of the board of directors, due to a fault or omission of the board of directors not clearly regulated in Law Number 40 Year 2007 regarding Limited Liability Company, so that the provisions of article 104 paragraph (2) Number 40 Year 2007 About Limited Liability Company is not possible to be used in practice world. In this study we used normative research method by providing analysis of primary and secondary legal materials to complete the analysis of this paper by using organ theory and fiduciary duty as the basis of the grip to find the conclusion that the act of error or omission of the board of directors can be measured by using the intention of the concept of fiduciary duty which is accommodated by Law Number 40 Year 2007 about Limited Liability Company.

Keywords : *Responsibility, Directors, Errors Or Omissions*

I. INTRODUCTION

As a legal entity, the Limited Liability Company has separate assets and is capable of acting in legal acts by means of its organs, therefore, the Limited Liability Company before the law is deemed to be the same as the man, the "artificial man" capable of performing legal acts. The ability of a Limited Liability Company is to do legal action, to place Limited Liability Company subjected to independent law, having rights and obligations in the legal relationship and able of suing or being sued, taking decisions, making debt accounts, and having wealth, like ordinary

people¹, and its implementation is on the board of the board of directors as the organ of a Limited Liability Company, working as an agent.

Article 3 Paragraph (1) of Law Number 40 Year 2007 concerning Limited Liability Company states, "The shareholders of the Company shall not be personally liable for any engagement made on behalf of the Company and shall not be liable, for the Company's loss exceeding the shares held". Mark R. Hinkston states that the shareholders of the company and its officers are isolated from personal responsibility for the Limited Liability Company, known as "*corporate veil*". And it has long been recognized that the Limited Liability Company is a separate entity and distinct from shareholders, even then, owned by one person². Therefore shareholders are not automatically responsible for corporate debt and are not responsible for the contract of the company.

In Article 1 paragraph (5) of Law Number 40 Year 2007 regarding Limited Liability Company it is stated, "The Board of Directors is a competent corporate organ and fully responsible for the maintenance of the Company for the Company's interests and purposes and represents the Company both inside and outside the court in accordance with the provisions of the articles of association".

A board of directors must act in an attitude, that the actions taken are quite reliable, for the best interests of the company. This means, that when considering the business problem of the company, the task of the board is for the best interests of the company, not for the benefit of the person or other organization.

The Board of Directors has a fiduciary position in the management of the company and the mechanism of the relationship must be fair. According to common law experience the relationship can be based on theoretical duty. The fiduciary duty relationship is based on trust and confidence which in this role includes, scrupulous, good faith, and candor. In understanding the fiduciary relationship, the common law recognizes that a fiduciary person naturally has the potential to abuse his authority. Therefore, the relationship of trust holders must be based on high standards³.

In performing the assigned tasks, the directors shall only act within the scope of the authority granted. In Limited Liability Companies, directors have the most important role, whether it is to regulate or manage the Limited Liability Company. The Board of Directors has full responsibility for management and management for the interests and objectives of the Limited Liability Company. Therefore, the Limited Liability Company in conducting business activities shall not be contrary to the provisions of legislation, public order and / or morals. For that, the directors in running the management must do in good faith.

¹ I.G.Rai Widjaya, "*Hukum Perusahaan Perseroan Terbatas*", (Bekasi Timur : Edisi Revisi Kesaint Blanc Anggota IKAPI,2002) hlm 14.

² Mark R. Hinkston, "Piercing the Corporate Veil", *Wisconsin Lawyer*, vol,79, Nomor 2,Februari 2006, hlm 2.

³Bismar Nasution,"*Pertanggung Jawaban Direksi Dalam Pengelolaan Perusahaan*",
<https://bismar.wordpress.com/2009/12.23/pertanggungjawaban-direksi/>

In judicial practice in a common law system, violations committed by directors against duty of loyalty and duty of care standards have developed. The Board of Directors shall not only be held responsible for the company, but also against any third party or creditor, if breach of violation done by directors against standard of duty of loyalty and duty of care cause loss to third party or creditor. The shift of responsibility of the Board of Directors is granted to everyone, including any third party or creditor and the context of the actions or contracts made by the Board of Directors.⁴

In the judicial practice in Indonesia, none of the Limited Liability Companies are found to be bankrupt, solely due to errors or omissions of the board of directors. For example in the case of *The Hongkong Chinese Bank Ltd vs. PT. Document & Shipping Kodja Bahari (PT HBC vs. PT PKB)* and *PT. Indosurya Mega Finance vs. PT. Greatstar Perdana Indonesia (PT IMF vs GPI)*.

In the case of *PT. HCB vs PT. PKB*, the judge gives consideration that the action of *ultra vires* of the Board of Directors is not the responsibility of the company (*PT Dok & PKB*) but the responsibility of both members of the Board of Directors. But in the case of *PT. IMF vs PT. GPI*, at the Commercial Court level, the judges' considerations differ from the previous case. In this case the judge is of the opinion that the *ultra vires* act does not invalidate the Company's liability to the Third Party, even though the Supreme Court's ruling of responsibility lies with the board of directors.

The difference of judges' considerations in this case is, according to the writer, the "limitations" of Law Number 40 Year 2007 on Limited Liability Companies. This condition should be corrected and addressed so that the law becomes the truth and benefit and can provide legal and justice protection to all persons involved in business activities as referred to in Article 97 of Law Number 40 Year 2007 Concerning Limited Liability Company (3) "Each member of the Board of Directors shall be responsible for personal responsibility for losses of the Company, if the person concerned is guilty or fails to exercise his / her services in accordance with the provisions referred to in paragraph (2). Article 104 Paragraph (2) states that "In the event of bankruptcy as referred to in paragraph (1) in the case of a mistake or negligence of the board of directors, and the bankruptcy property is not sufficient to pay all the obligations of the Company in the bankruptcy, each member shall be jointly liable, responsible for all liabilities which is not settled from the bankrupt property ". Law Number 40 Year 2007 About Limited Liability Company does not contain explicitly, how the standard of measure determines the errors or omissions of the board of directors.

⁴Philip Lipton dan Abraham Herzberg, "*Understanding Company Law*", (Brisbane : The Book Law Company Ltd,1992), hlm 342.

II. DISCUSSION

a. Determining Actions of Error Or Negligence of the Board of Directors in the Management of Limited Liability Company Activities

Limited Liability Company as a legal entity with separate entity principle, limits all legal actions conducted by the Board of Directors in the implementation of the management of Limited Liability Company's business activities. The principle of a separate entity closes the space for a third party to claim losses to the board of directors, although it is possible that the losses suffered by the third party result from an act of error or omission from the board of Limited Liability Company.

Limited Company's Engagement on the actions of the Board of Directors in the context of the implementation of the Limited Liability Company's management responsibilities, pursuant to the provisions of Law Number 40 Year 2007 regarding Limited Liability Company, Article 104 Paragraph (2) is the loss suffered by third parties may be charged to directors if the Board of Directors proven to have made a mistake or negligence in conducting Limited Company's business management activities.

Consideration of the Panel of Judges in the Decision of the Supreme Court of the Republic of Indonesia Number 21 K / N / 2000, in the case of The Hong Kong Chinese Bank vs. PT. Divers & Shipping Kodja Bahari is the board of PT. DPKB issued a letter without approval and the knowledge of the Board of Commissioners that made PT. DPKB bankrupted. In its decision, the Panel of Judges gives consideration, that the losses incurred by the actions of directors were the responsibility of the board of directors jointly.

Similarly, in Decision Number 30 / K / N / 2000, in the case of PT. Greatstar Perdana Indonesia vs PT. Indosurya Mega Finance, the Panel of Judges gives consideration that the losses received by third parties are the responsibility of the directors, due to the directors of PT. GPI issuing a letter without written approval from a Commissioner.

From the two considerations of the Panel of Judges above, it can be concluded that there are legal norms that can be interpreted as a form of requirement of a mistake or omission of the board of directors taking action in the management of Limited Company's business activities against third parties.

The Board of Directors is the holder of the authority and the law has determined the board of directors entirely to serve the company, so the board of directors must be the fullest and full mindedness of working to manage and manage the Limited Liability Company. This requires the board of directors who are entrusted with trust as "agents" of a Limited Liability Company, in a fiduciary duty trust to work and to a duty of loyalty and duty of care based on good faith.

The consideration of the Supreme Court of the Republic of Indonesia in the above decree shows that the actions taken by the Board of Directors are the responsibility of the Board of Directors. This shows the characteristic nature of Limited Liability Company with separate legal

personality principle, then the consequence of civil law conducted by directors can be delegated to directors in taking action violate duty of loyalty and duty of care. In giving promissory note as a guarantee of debt bonding to a third party, it is imperative and obligation of directors to obtain approval from all Commissioners as confirmed in the Articles of Association.

This is in accordance with the organ theory that the legal entity is a real reality, just like the nature of human personality, a true incarnation in the law. The legal entity becomes a body that forms its will by means of tools or organ or its administrators, such as a man who utters his will by means of his mouth or by the hand if it is written on paper. Based on the organ theory, the board of directors has the obligation of good faith to seek approval to the board of commissioners when the directors manage legal relationships with other third parties bind business relationships so that directors must issue promissory notes to conduct business, suspected and conscious directors that the requirement to obtain the approval of the commissioner which according to the Articles of Association has the authority to legitimize the validity of the legal action of the Board of Directors binds a third party in a legal relationship, as the Fiduciary Duty theory as a law-enforced obligation for someone utilizing another person, on the subordinate for a moment. Persons who have the obligation are required to implement them based on a standard of the highest standard of duty as stated in law.⁵ This offense is referred to as the duty of loyalty and duty of care which result in errors or omissions that cause harm to another entity namely the Limited Liability Company called board of commissioners that must be delegated to the board of directors.

b. Compensation Claims by Creditors and Third Parties to Directors Based on *Fiduciary Duty Offenses*.

Any mistake or omission by a Limited Company's board of directors in the management of a Limited Liability Company, in Law Number 40 Year 2007 regarding Limited Liability Company, is a requirement to punish the directors personally liable for losses incurred for a Limited Liability Company.

The provisions of article 97 paragraph (3) of Law Number 40 Year 2007 regarding Limited Liability Company reads, "every member of the board of directors is personally liable for the loss of the Company, if the person is guilty or negligent in performing his duties in good faith and with full responsibility".

From the provisions of article 97 paragraph (3) of Law Number 40 Year 2007 regarding Limited Liability Company, it can be drawn a conclusion, on the one hand, the benchmark determines whether or not there is an element of error or omission of the board of directors which resulted in Limited Liability Company suffering losses based on good faith, on the other hand, the

⁵Fauzie Yusuf Hasibuan, *Keseimbangan dan Keterbukaan Dalam Kontrak Anjak Piutang di Indonesia*, Penerbit : Fauzie & Partners, Jakarta 2010, hal. 143.

system of civil liability held by Law No. 40 of 2007 on Limited Liability Company is the internal responsibility system, namely the responsibility of the directors only to the loss of Limited Liability Company.

Further, analyzing the system of responsibility adopted by Law No. 40 of 2007 on Limited Liability Companies, is a common system of responsibility prevalent in civil law, which is called liability based on fault, which determines a person can be sued for legally accountable if the action is done there is an element of error.

This civil liability is found in articles 1365, 1366, 1367 of the Civil Code, of a general nature, in civic action, as an unlawful act perpetrated by a person or group of persons harming others.

The imposition of personal liability to the board of directors for the loss of a Limited Liability Company, resulting from a mistake or omission made by the board of directors when exercising a Limited Liability Company, constitutes a separate entity from the characteristic nature of the Limited Liability Company. But there are many issues to look for, when the loss comes, what is the benchmark to say that the loss suffered by the Limited Liability Company is a mistake or omission of the board of directors.

In addition to the above matters, from the liability system adopted by Law Number 40 Year 2007 regarding Limited Liability Companies, another problem arises, that is, if the loss occurs to a third party, whether the directors are personally liable for such third party losses.

Any losses incurred to a third party resulting from a mistake or omission of the board of directors in the performance of the duties and responsibilities of the management of the Limited Liability Company's activities, pursuant to Law No. 40 of 2007 concerning Limited Liability Company, in no way impose a settlement regulation.

Looking back to, article 45 of the Criminal Code it is stated, "the responsibility of management is nothing more than to carry out the tasks assigned to them as well as they are, even because all the engagement of the company, by itself is not tied to a third party".

The provisions of article 45 of the Criminal Code closes the opportunity of third party claiming against those who are given the responsibility of carrying out the Limited Liability Company. They are against the engagement that is committed, not bound by responsibility to a third party. Thus, if the engagement is made to cause a loss to a third party even though the loss is due to an error or omission of those who are given authority and responsibility to engage, the third party may not demand the personal responsibility of those who engage.

The conditions contained in the KUHD are in contrast to Law No. 40 of 2007 on Limited Liability Companies, and according to the writer this circumstances allow the court to examine in practice the possibility of imposing personal responsibility on the board of directors for third party's losses resulting from misconduct or negligence of the directors.

Supporting the above opinion, the writer refers to Article 97 paragraph (2) of Law Number 40 Year 2007 regarding Limited Liability Company, which reads, "the maintenance as referred to in paragraph (1) shall be executed by every member of the Board of Directors in good faith and full of responsibility".

Article 97 paragraph (2) of Law Number 40 Year 2007 regarding Limited Liability Company, states that there is a deep emphasis to the directors for directors in the implementation of the management of the Limited Liability Company in good faith and full of responsibility.

According to the writer, the directors in conducting the management of the Limited Liability Company in good faith and full of responsibility, means that it is not enough to carry out the duties and responsibilities, but meaning is far more than that understanding. The existence of the word good faith and full of responsibility according to the author is directly proportional to the duties of fiduciary duty directors in the duty of loyalty and duty of care. So according to the writer, the benchmark to determine the error or omission of the board of directors will only be measured by being able to understand what is actually demanded by the duty of loyalty and duty of care to the board of directors before making a decision.

c. Personal Responsibility of Directors Established As a result of *Ultra Vires* Actions

Ultra vires doctrine begins with a rigorous and rigid conception. The *ultra vires* doctrine determines the legal action of an enterprise that is beyond the authority granted by the clause of the memorandum object or the articles of association, is void, non-binding of the Limited Liability Company and null and void, even if all shareholders wish to ratify.⁶ Thus it can be said that *ultra vires* doctrine is a teaching that prohibits directors acting or making decisions out of the object that has been formed.

Ultra vires doctrine with the core of the teaching, is the responsibility of the board of directors for acts of civil action that is done, which is outside the clause of the object memorandum or Company Articles of Association.

Law No. 40 of 2007 on Limited Liability Companies does not regulate and express explicitly the actions of *ultra vires*, but from some provisions of the articles contained therein, it can be seen that *ultra vires* acts are not justified with the exception.

Article 2 of Law Number 40 Year 2007 regarding Limited Liability Company reads, "The Company must have a purpose and business activities that are not contrary to legislation, public order, and / or morals".

⁶Nike K. Rumokoy, "Pertanggungjawaban Perseroan Selaku Badan Hukum Dalam Kaitannya Dengan Gugatan Atas Perseroan", Vol. XIX/No.2.Januari-Maret/2011, hlm 15.

Article 8 paragraph (1) of Law Number 40 Year 2007 regarding Limited Liability Company reads, "the deed of establishment contains the articles of association and other information relating to the establishment of the Company".

Article 15 of Law Number 40 Year 2007 regarding Limited Liability Company reads, "The articles of association referred to in Article 8 paragraph (1) shall contain at least: a) the purposes and objectives and business activities of the Company.

Article 18 of Law Number 40 Year 2007 regarding Limited Liability Company reads, "The Company must have the intent and purpose and business activities as stated in the Company's articles of association in accordance with applicable laws and regulations".

Article 21 paragraph (1) of Law Number 40 Year 2007 regarding Limited Liability Company reads, "Amendment of certain articles of association must be approved by the Minister".

Article 21 paragraph (2) of Law Number 40 Year 2007 regarding Limited Liability Company reads, "Amendment of certain articles of association as referred to in paragraph (1) includes among others: b) the purpose and objectives and business activities of Limited Liability Company".

Article 92 Paragraph (1) of Law Number 40 Year 2007 concerning Limited Liability Company reads, "The Board of Directors performs the management of Limited Liability Company for the interest of the Company in accordance with the purposes and objectives of the Company".

Pasal 92 ayat (2) Undang Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas berbunyi, "Direksi berwenang menjalankan pengurusan sebagaimana dimaksud pada ayat (1) sesuai dengan kebijakan yang dipandang tepat, dalam batas batas yang ditentukan dalam undang undang ini dan/atau Anggaran Dasar".

Article 92 paragraph (2) of Law Number 40 Year 2007 regarding Limited Liability Company reads, "The Board of Directors has the authority to carry out the management as referred to in paragraph (1) in accordance with the policy deemed appropriate, within the limits stipulated in this law and / or the Articles of Association".

From the provisions of the aforementioned article, it can be concluded that the limits of the authority of the Board of Directors of the Limited Liability Company are conducted in accordance with the objectives of the Limited Liability Company as set forth in the Articles of Association. If the board of directors takes legal action taken outside the Articles of Association, then the action is outside the authority of the board of directors and can be regarded as an "*ultra vires*" action.

Departing from the stiff application of *ultra vires*, initially giving legal effect of *ultra vires*, it is stated null and void. The reason is that the company is established for a particular purpose, therefore the company cannot do anything beyond the authorized.⁷

In the case of The Hong Kong Chinese Bank against PT. Dome & Shipping Maritime Kodja, it can be seen that the Panel of Judges assumes that the actions of directors of PT. Documentation &

⁷Tri Budiyo, "*Transplantasi Hukum, Harmonisasi dan Potensi Benturan*", (Salatiga: Griya Media, 2009), hlm 164.

Shipping Maritime Code is an act of *ultra vires*, because the directors provide promissory notes without the knowledge of the Commissioner, as the board of directors should take legal action to get approval from the Board of Commissioners as stipulated in the Articles of Association of PT. Divers & Marine Kodja Docks.

This is similar to the actions of directors in the case of PT. Greatstar Perdana Indonesia against PT. Indosurya Mega Finance. At the Commercial Court level PT. Greatstar Perdana Indonesia (as the requested party) is declared bankrupt due to the actions of the directors of PT. Greatstar Perdana Indonesia issuing a promissory note without the knowledge of a Commissioner, but the Panel of Judges appeals to the other point, that the actions of the directors of PT. Greatstar Perdana Indonesia which provides promissory notes without the knowledge of a Commissioner is a null and void act, so the Panel of Judges gives consideration that the loss should be borne by members of the board of directors jointly.

d. Personal Responsibility of the Board of Directors According to Law Number 40 Year 2007 Concerning Limited Liability Company

Article 1 paragraph (5) of Law Number 40 Year 2007 regarding Limited Liability Company states, "The Board of Directors is the organ of the company authorized and fully responsible for the management of the company for the benefit of the company and the purpose of the company and representing the company both inside and outside the court in accordance with the budget basic". So it can be said that the directors have broad authority over the management of the company, but the authority given is not without limit. Among the restrictions are set out in article 104 paragraph (1), article 92 paragraph (1) and Article 18.

Article 104 Paragraph (1) of Law Number 40 Year 2007 concerning Limited Liability Company reads, "The Board of Directors is not authorized to file for bankruptcy of the Company itself to the commercial court before obtaining approval of the *RUPS*, without prejudice to the provisions as regulated in the Law on Bankruptcy and Suspension of Payment Obligations".

Article 92 paragraph (1) of Law Number 40 Year 2007 regarding Limited Liability Company reads, "The Board of Directors shall run the management of the Company for the interest of the Company in accordance with the provisions of the law and regulations".

Article 18 of Law Number 40 Year 2007 regarding Limited Liability Company reads, "The Company has the purpose and objectives and business activities as stated in the articles of association of the company in accordance with the provisions of the law and regulations".

The provisions of the foregoing article, indicate that the directorship of Limited Liability Companies in Indonesia, are granted wide authority with restrictions, which are limited to perform, or even prohibited to do. That is, the authority given to the directors is a broad authority, not unlimited, but broad and restricted authority.

Indonesia, a country that holds a concept that board of directors may be liable to a Limited Liability Company and shall be liable to the creditors of a Limited Liability Company if it is insolvent. This understanding is expressly stated in Law Number 40 Year 2007 regarding Limited Liability Company Article 97 Paragraph (3) and 104 Paragraph (2).

Article 97 paragraph (3) of Law Number 40 Year 2007 regarding Limited Liability Company reads, "every member of the board of directors is personally liable for the loss of the company, if the person is guilty or fails to perform his duties in accordance with the provisions referred to in article (2)".

Article 104 Paragraph (2) of Law Number 40 Year 2007 concerning Limited Liability Company reads, "in the case of the issue referred to in paragraph (1) is due to a mistake or negligence of the board of directors and the bankruptcy property is insufficient to pay all the obligations of the Company in the bankruptcy, members of the board of directors are jointly and severally liable for all of the unpaid liabilities of the bankrupt property".

The provisions of article 104 paragraph (2) of Law Number 40 Year 2007 concerning Limited Liability Company gives responsibility to the directors only if when the bankrupt property is not sufficient to repay all obligations. Therefore, the burden of personal responsibility specified in article 97 paragraph (3) and article 104 paragraph (2) of Law Number 40 Year 2007 about Limited Liability Company, is a different responsibility burden. Personal responsibility in article 97 paragraph (3) is absolute, and there is no choice but to be proved to be a loss not by a fault or omission of the board of directors. While the burden of responsibility in article 104 paragraph (2) is not absolute, and any directors shall be liable only with joint responsibility when the bankruptcy is not sufficient to pay all liabilities.

III. CONCLUSION AND RECOMMENDATION

a. Conclusion

Error or negligence done by the Board of Directors may be measured using the concept of *fudiciary* duty accommodated by Law No. 40 of 2007 on Limited Liability Companies. The Board of Directors shall be deemed wrong or negligent if the directors are engaged in legal relationships with third parties or creditors without the knowledge or consent of the Board of Commissioners and causing any loss to the Company.

In practice, in accordance with the case under investigation, no Limited Liability Company is bankrupt due to a mistake or negligence of the directors, due to misconduct or failing of the directors and this is not clearly regulated in Law Number 40 Year 2007 regarding Limited Liability Company, so that the provisions of article 104 paragraph (2) Of Law Number 40 Year 2007 regarding Limited Liability Company which imposes loss to be borne by directors by joint responsibility is not possible to be used. The court prefers to assign responsibility to the directors in

accordance with the provisions of article 97 paragraph (3) of Law Number 40 Year 2007 regarding Limited Liability Company. The *ultra vires* action of the board of directors is considered a private act of the directors, so that the losses that arise are the personal responsibility of the directors in a civil manner.

b. Recommendation

In order not to be disputed with liability of loss, there needs to be strict regulatory provisions concerning errors or omissions of the board of directors, whether they are listed in the Statutes or in the Law. Organs of the Limited Liability Company shall take steps that bind the directors to be responsible when conducting legal relations to a third party, making mistakes or omissions and causing harm to the Company.

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