

Fiduciary Duty Of The Board Of Directors In The Management Of Limited Liability Companies In Indonesia

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ABSTRACT

Law number 40 of 2007 regulates Limited Liability Companies in Indonesia and consists of three important components, namely the General Meeting of Shareholders (GMS), Commissioners, and Directors. The Board of Directors has two functions, namely management, and representation, and must exercise trust in good faith and without personal interests and conflicts of interest for the betterment of the company. Fiduciary duty is a doctrine that emphasizes trust in carrying out its duties and functions following the interests of the party who assigned it in good faith. In conclusion, a Limited Liability Company requires clear and strict legal arrangements and good supervision from stakeholders to operate effectively and efficiently.

ABSTRAK

Undang-Undang nomor 40 tahun 2007 mengatur Perseroan Terbatas di Indonesia dan terdiri dari tiga komponen penting, yaitu Rapat umum Pemegang Saham (RUPS), Komisaris, dan Direksi. Direksi mempunyai dua fungsi, yaitu manajemen dan perwakilan, dan harus menjalankan kepercayaan dengan itikad baik dan tanpa kepentingan pribadi serta benturan kepentingan demi kemajuan perseroan. Fiduciary duty adalah doktrin yang menekankan kepercayaan dalam menjalankan tugas dan fungsinya sesuai dengan kepentingan pihak yang menugaskannya dengan itikad baik. Kesimpulannya, Perseroan Terbatas memerlukan pengaturan hukum yang jelas dan ketat serta pengawasan yang baik dari para pemangku kepentingan agar dapat beroperasi secara efektif dan efisien.

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I. INTRODUCTION

A limited liability company is a legal entity and is a legal subject that can enter into legal relations with other parties. Activities carried out by a limited liability company are carried out by organs in a limited liability company. Law Number 40 of 2007 concerning Limited Liability Companies (hereinafter abbreviated as UUP) has accommodated and regulated various important parties involved in limited liability company activities, ranging from shareholders, directors, commissioners, third parties, and also the wider community. The company's activities can show the back and forth of the company, including the level of community stability. Elkington emphasized the existence of 3P as a triple bottom line, namely profit, planet, and people. The Company in carrying out its activities and sustainability must care about economic growth, environmental development, and social development. The point here is that in addition to pursuing profits (profit), companies must also pay attention and be involved in fulfilling the welfare of the community (people) and contribute actively

to maintaining environmental sustainability (PLANet), although the profit aspect remains the top priority because, without the benefits obtained, the fulfillment of community welfare and environmental sustainability will not be realized (Ardhy Pratiwi Setiowati,2009).

As a business field that emphasizes profit-oriented, in addition to the 3 P factor, the company must be appropriate in handling/managing and not causing conflicts, both inside and outside the company. The company's rotation is in the hands of the board of directors, as a trusted party, so the board of directors is responsible for the back and forth of the company. The Board of Directors plays an important role in the management of limited liability companies that are carried out daily and must be able to establish good cooperation with other parties to realize the company's goals and realize good corporate governance. Good Corporate Governance is a system that must ensure the fulfillment of the company's obligations to shareholders and all stakeholders and must be able to cooperate with stakeholders in achieving goals for companies. The company's poor relationship with stakeholders can cause obstacles and disruptions to the company's operations.

The management of the company is in accordance with the purposes and objectives of the company, and must be in accordance with applicable laws and regulations, as stipulated in Article 92 and Article 97 paragraphs (2) and (3) of the UUPT and realize good corporate governance.. Trust to manage becomes the foundation of the board of directors in stepping up and taking every decision in the interests of the company, and even the decisions of the board of directors that are detrimental to the company cannot be accounted for to him, if the board of directors can account for the decision based on the purpose and objectives of the company, there is good faith and there is no conflict of interest in it. The cornerstone of this protection of directors is the doctrine of the business judgment rule. In addition, the basis for protection for directors in carrying out their duties is based on the doctrine of fiduciary duty. This doctrine asserts that the direksi in carrying out duties must be full of responsibility for the benefit of the other person or party.

Fiduciary duties in a limited liability company are essentially related to the position, authority, and responsibility of the board of directors (Frans Affandhi, 2016). Violation of fiduciary tire duty results in the emergence of personal liability of the board of directors. Meanwhile, for the defense of directors in a company, the principle of the Business Judgment Rule can be used. This principle of defense of directors (Business Judgment Rule) can be measured on the basis of fiduciary duties.

This paper will examine the responsibility of the board of directors in the management of a limited liability company based on the doctrine of fiduciary duty associated with responsibility due to the negligence of the directors which results in his property being able to a form of responsibility in the management of a limited liability company, and based on the principles of good corporate governance

II. RESEARCH METHOD

This research will be conducted using normative juridical research methods with secondary data sources. A normative juridical approach is used to analyze the doctrine of fiduciary duty of directors in a Limited Liability Company using the applicable positive legal perspective. The data sources used are secondary data which includes documents such as laws and regulations, court decisions, and company documents. The data collection technique used is document study, which is a data collection technique by collecting documents related to the research topic. While the data analysis used is qualitative analysis, which is a data analysis technique used to understand data in depth. In data analysis, the author will consider relevant legal theories and legal doctrines in reviewing the fiduciary duty of directors in a Limited Liability Company. With the chosen research method, it is hoped that this research can provide a clear picture of the responsibilities of the board of directors

in carrying out their fiduciary duties and understand the concept and application of fiduciary duty in the context of a Limited Liability Company.

III. RESULT AND DISCUSSION

Good Corporate Governance.

According to the World Bank, Good Corporate Governance is a collection of laws, regulations, and rules that must be met that can encourage the performance of company sources to work efficiently, generate economic value and long-term sustainability for shareholders as well as the surrounding community as a whole (www.hupelita.com, 2022). Decree of the Minister of State/Head of the Investment and Development Agency for State-Owned Enterprises No. Kep. 23/MPM. PBUMN / 2000, dated May 31, 2000, concerning the Development of Good Corporate Governance Practices in Persero Companies, it is stated that what is meant by Good Corporate Governance is a healthy corporate principle and is applied in The management of the company is carried out solely for the sake of maintaining the interests of the company in order to achieve the goals and objectives of PerusAhaan.

Thus, Good Corporate Governance can be interpreted as a process and structure used to increase business success, and corporate accountability that aims to increase company value in the term long by paying attention to the interests of stakeholders and based on laws and regulations, morals, and ethical values. From the various understandings above, it can be stated that in Good Corporate Governance there are several important things, namely:

- a. Effectiveness comes from the Corporate Culture, Ethics, Values, Systems, Business Processes, policies, and organizational structure of the company which aims to support and encourage company development, management Resources, and risk more effectively and efficiently, the company's accountability to shareholders and other stakeholders.
- b. A set of principles, policies, and company management systems that are applied for the realization of efficient, effective, and profitable company operations in carrying out organization organs and company business to achieve strategic goals that meet the principles of good business practice and its application in accordance with applicable regulations, care for the environment and are based on Ting Gi's socio-cultural values.
- c. A set of regulations and or systems that lead to the control of the company for the creation of value-added for stakeholders (government, shareholders, company leaders, and employees) and for the company itself.

Asa principle, policy, system, or regulation based on ethical values, the benefits of implementing good corporate governance for the company include:

- a. Improving performance and trust both internally and externally from the company's internal and external sides;
- b. encourage the Company's organs in making decisions and carrying out actions based on high moral values and compliance with laws and regulations, as well as awareness of social responsibility;
- b. Increase the confidence and trust of shareholders and stakeholders in the company
- c. Avoid and protect the Board of Directors/Commissioners/Supervisory Board from lawsuits and interference from outside the company
- d. Increase the competitiveness of the company.
- e. Can increase investment from inside and outside the company and even foreign investment
- f. Positively affect the stock price (for companies that have already gone public)
- g. Making a good contribution to the country

On the other hand, the purposes and objectives of implementing Good Corporate Governance in the company are as follows :

1. Maximizing company value by increasing the principles of openness, accountability, trustworthiness, responsibility, and fairness so that the company has strong competitiveness, both in terms of national as well as international.
2. Encourage professional, transparent, and efficient management of the company, as well as empower functions and increase independence.
3. Encouraging company management in making decisions and carrying out actions based on high moral values and compliance with applicable laws and regulations, as well as awareness of the existence of corporate social responsibility to stakeholders and environmental sustainability around the company.
4. Increasing the company's contribution to the economy
5. Increase the value of the company's investment and wealth

A director who runs a company based on the principles of good corporate governance that is good and consequential will avoid poor management of the company through the decisions and even discretion he takes. The company will be able to develop in accordance with the goals and objectives of the company and will avoid the risks that will be experienced by the company.

Responsibility of the Board of Directors for the Company's Losses.

Article 1 number 5 of Law Number 40 of 2007 concerning Limited Liability Companies states that:

"The Board of Directors is the authorized organ of the Company and is fully responsible for the management of the Company for the benefit of the Company, in accordance with the purposes and objectives of the Company and the Company's management, both in and out of court in accordance with the provisions of the articles of association".

Article 1 number 5 confirms that the Board of Directors in carrying out its duties cannot be separated from the goals and intentions of the company and in accordance with the provisions of the applicable regulations per invitation, meaning that all actions and decisions taken by it must be in accordance with the goals and intentions of the company. This is as confirmed in Article 92 paragraph (1) of the UUPT that in carrying out the management of the Company is for the importance of the Company and in accordance with the purposes and objectives of the Company. The explanation of Article 92 paragraph (1) confirms that the duties of the board of directors in managing the company, among others, include daily management and daily management has no official explanation. The meaning of day-to-day management must be seen in the articles of association about what includes day-to-day management, although it is impossible to mention it in detail in the articles association. Furthermore, Article 97 paragraph (1) confirms: The Board of Directors is responsible for the management of the Company as referred to in Article 92 paragraph (1). Article 97 paragraph (2) can be detailed as follows:

- a. Must Carry Out Management for the Benefit of the Company
- b. Must Carry Out Management According to Policies That Are Considered Appropriate

The company's relationship with the board of directors is not only limited to the work carried out by the board of directors but also concerns the trust in it called a fiduciary duty. A simple translation is given by Yahya Harahap, that fiduciary duty is defined as having to be trusted and forever having to be "honest". A person has a fiduciary duty while he has a fiduciary capacity. Directors who carry out their duties and obligations properly based on the principles of good corporate governance, such as acting heartily, honestly, in good faith and realizing the goals and objectives of the company, and acting for the interests of the company responsibly can avoid liability legal responsibility, including being responsible for the property he owns. The duties carried out by the board of directors cannot be separated from the corporate culture, values, and systems contained in the company in order to realize good corporate governance. Good corporate governance will have a great influence on the development of the company. The realization is also based on the skills or expertise possessed by the

board of directors so that they are able to predict the development of their company well so that the decisions taken are not wrong. A decision taken by the board of directors and causing harm to the company must prove that the decision was taken for the benefit of the company and that there is no conflict of interest in it, or it can be proven that there is a force majeure.

These principles are a description of the doctrine of fiduciary duty also adopted in the Uupt, especially Article 97 paragraphs (2) and (3) which specify that the management entrusted to the board of directors must be carried out in good faith and full of responsibility. The application of fiduciary duty even extends to the personal property of the board of directors if the directors are proven to be negligent in carrying out their duties. This high trust requires the board of directors to always act and behave professionally based on a high level of ability and intellectuality and must be to realize their integrity and trust. Thus, a board of directors is required to have high standards of integrity and loyalty, show and act for the benefit of the company in a bona fides manner

The Board of Directors as an organ of the company has the duty and responsibility to advance and develop the company, but it is also possible that the company will suffer losses due to decisions taken by the board of directors. The risk of loss in carrying out its activities, and for limited liability companies, losses arising can be caused by decisions of the board of directors and can be inflicted on the Board of Directors or Commissioners. The Board of Directors can be held accountable for their personal property if the decisions/policies taken are detrimental to the company, and even if the company falls into bankruptcy.

The responsibility for the company's losses to the Board of Directors that cause the company to go bankrupt is to fulfill the following conditions:

1. There is an element of negligence (willfulness) or negligence on the part of the board of directors (with ordinary evidence)
2. To pay debts and insolvency costs, it must first be taken from the company's assets. If the company's assets do not meet, then they are taken from the assets of the personal directors
3. Reverse proof (omkering van bewijslast) is applied to members of the board of directors who can determine that the company's insolvency is not due to error (intentionality) or negligence

The Right of Indemnity of the Board of Directors.

The Right of Indemnity implies a balance of rights and obligations of the directors in the company. The Board of Directors in carrying out their duties and obligations to manage the company is often in an uncomfortable position and can be detrimental to them. This position, in addition to being able to bring losses to the company, can also harm itself, by involving his assets. The losses he suffered become complicated when the law or law does not regulate them. The responsibility and actions taken by the board of directors, including representing the company in and out of court, seem to be his full responsibility for the actions he takes. The actions taken by the board of directors can benefit or harm the company and this is done with full responsibility. A profitable action is the purpose of the company, but if the action is detrimental which remains the responsibility of the board of directors, it is proven in advance whether the action taken is full of responsibility, and honesty, and does not conflict with the interests therein or not and this is a risk to the board of directors.

According to the Common Law system, members of the Board of Directors do not have the right to receive compensation from the Company regarding such expenses. The costs incurred by it, cannot be "reimbursed" to the Company for the losses it has suffered. Reimbursement is the reimbursement or compensation of costs that have been incurred by the board of directors by using their personal funds in the management of the company. According to the Common Law system, all these expenses are the responsibility of the board of directors with all the consequences that exist therein.

As the current regulatory developments have allowed the Company to indemnify members of the Board of Directors in several ways. For example in the United States in Section 5 of The Model Act.

In this provision, the Company is authorized to reimburse members for losses suffered by members of the Board of Directors, if they face legal proceedings. However, it does not require reimbursement of costs incurred by members of the Board of Directors. The reimbursement was without questioning whether the member of the Board of Directors was guilty of what was charged or charged against him. Which is the benchmark, as long as the action or deed is done in "good faith" (good faith), and it is believed that the action he performs is "reasonable" and that reasonable for the best interest of the corporation).

The Uupt does not regulate the rights of the board of directors, as affirmed by Article 97 paragraph (3) of the UUPT, namely that each member of the board of directors is fully personally responsible for the company's losses if the person concerned is guilty or negligent in carrying out the u.s. tug in take care of the company. As a result, it is unclear whether a member of the Board of Directors has the right to obtain a replacement for the loss out (indemniteitrecht, indemnity right) from Perseroan for the costs incurred by him or her face the proceedings. the law he carried out against slavery he carried out in order to carry out the management of the Company. Provisions regarding the rights of the board of directors should be considered in the future so that the board of directors can avoid greater personal losses and become legal protection for the directors of a company.

Basically, the losses suffered by the company cannot be accounted for if the board of directors can prove:

- a. The loss incurred was not due to his fault or negligence;
- b. Has managed the company with good faith and prudence for the benefit of the company and in accordance with the purposes and objectives of the company
- c. Does not have a conflict of interest, either directly or indirectly, for decisions that are detrimental to the company
- b. Have taken steps to carry out maximum prevention and handling in avoiding these losses.

These elements are the defense of the board of directors so that the board of directors will avoid greater losses due to managing the company which is carried out without your, professional and full of responsibility.

IV. CONCLUSION

The Board of Directors as the manager and person responsible for the back and forth of a company must run the company responsibly, honestly, and without conflict of interest. The Board of Directors is entitled and authorized to act on behalf of and for the benefit of the company in accordance with the prevailing laws and regulations and the articles of association of the company.

Direksi who abuses his authority or position and is found guilty or negligent which results in the company suffering losses, the board of directors is personally responsible. The UUPT has expressly regulated the responsibility of the board of directors, the board of directors is found guilty or negligent in carrying out their duties and is fully personally responsible for the losses suffered Company.

The right of indemnity needs to be studied in depth, so that future arrangements can be made possible for the board of directors to reimburse the costs incurred in the interests of the company with proof and based on good faith and fairness. This is because the UUPT does not provide for the reimbursement of these costs.

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