

Piercing the Corporate Veil on the Responsibilities of Limited Liability Company Directors in Nominee Agreements which have the Potential Risk of Lawsuits

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ABSTRACT

Companies are also an important business component and are widely available in the world, including in Indonesia where they are legal entities. The integrity of a member of the company's board of directors and board of commissioners to maintain their loyalty as the party entrusted with managing the company properly and correctly as a responsibility to stakeholders. This action is known as the Piercing the Corporate Veil doctrine, which in this paper is at issue if it turns out that there is a nominee agreement between the directors and shareholders of a third party who is actually the party who is one of the shareholders and what is the potential risk of legal action? If a dispute occurs in the company due to the nominee agreement, the company will experience the risk of loss. The author researches with normative legal research, which involves studying documents or written data, research on legal systematics, legal theory. In the initial stage the author conducted research on documents related to the subject of this discussion. Apart from that, use is based on the internet, newspapers and electronic media. In this case, the action of Piercing the Corporate Veil Shareholders in a Limited Liability Company turns out to be the discovery of a nominee agreement between the directors and shareholders from a third party who is actually the party who is one of the shareholders, so in this case the Nominee Agreement can be null and void by law and an attempt to smuggle the law because the Nominee Agreement has violated several regulations in Indonesia, namely Article 33 of the Investment Law and Article 1320 of the Civil Code and is not valid. The potential risk of a company lawsuit if a dispute occurs is due to the nominee agreement which results in the company experiencing a risk of loss because seen from the position of the Piercing the Corporate Veil Doctrine, it cannot be implemented properly because the agreement between shareholders and directors has been violated. regulations in Indonesia, namely Article 33 of the Investment Law and Article 1320 of the Civil Code. So there is less accountability.

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1. Introduction

There are various forms of economic mobilization and improvement in every state activity. Limited Liability Companies are the legal entities that are most in demand by entrepreneurs, because in terms of all types of transactions and types of effectiveness, company movements can expand and have various forms to increase creativity. In the form of a company, the Board of Directors is fully responsible for the company. The position of the Board of Directors is stated in Law no. 4 of 2007 Limited Liability Companies in Article 1 number 5 concerning the board of directors as a company organ that is authorized and fully responsible for managing the company for the interests of the

company in accordance with the company's aims and objectives, as well as representing the company, both inside and outside the court in accordance with the provisions of the articles of association. Meanwhile, to carry out their duties, it is contained in Article 97 paragraph (1), which states that the Board of Directors is responsible for the management of the Company as intended in Article 92 paragraph (1). According to Adrian Sutedi, in carrying out their duties the Board of Directors must pay attention to several principles of Directors' responsibilities in running the company.

Related to PT, namely that PT in general has the ability to develop itself, is able to capitalize capital and is a potential vehicle for obtaining profits both for the institution itself and for its supporters such as shareholders or investors, therefore this form of business entity (PT) very popular with the public. So PT as a legal entity, especially as a legal entity that can be used to obtain economic benefits, has more value compared to other business entities, both in terms of economic and juridical aspects.

Companies are also an important business component and are widely available in the world, including in Indonesia, where they are legal entities that have different qualities and characteristics from other forms of business. One of the characteristics that differentiates a PT from other business entities can be seen from the doctrine of separate legal personality, which essentially explains that there is a separation of wealth between the owner or investor (shareholder) and the wealth of the legal entity itself. Each person can own more than one share which will be proof of ownership of the company. The responsibility of the Board of Directors as a shareholder is also limited, namely as many shares as they own. If the company's debt exceeds the company's assets, then the excess debt is not the responsibility of the shareholders. If the company makes a profit, the profit is distributed according to the amount of ownership of each shareholder or other provisions stipulated in the articles of association. Shareholders will receive a share of profits called dividends, the amount of which depends on the profits obtained by the limited liability company.

The integrity of a member of the company's board of directors and board of commissioners to maintain their loyalty as the party entrusted with managing the company properly and correctly as a responsibility to stakeholders (all parties related to the company), is the main requirement for the board of directors and board of commissioners. Control over members of the Board of Directors and Board of Commissioners by shareholders is formally carried out through a well-documented General Meeting of Shareholders through GMS decisions that can be legally justified, however, shareholders often exercise control over the company through facts that are difficult to prove, because it is possible that the instructions occurred at non-formal meetings that were not documented. Avoiding documentation of shareholder control through non-formal channels is often carried out because such control violates the provisions of the Company Law and/or violates corporate legal doctrine.

Based on this, there is a doctrine of piercing the corporate veil which often occurs in company running practices. Doctrine of piercing the corporate veil Based on Article 3 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies ("UUPT"), Limited Liability Companies in Article 3 paragraph (1) of the UUPT regulate that, "Company shareholders are not personally responsible for agreements made on behalf of the Company and is not responsible for the Company's losses beyond the shares owned."

Based on the legal entity principle, one of them is for economic efficiency, the reason being that if there is limited liability, it will reduce monitoring by shareholders of management in managing the company because the responsibility of shareholders is only limited to the value of the shares deposited in the company. Shareholders have the right to transfer their shares to other parties and shareholders can also be verified not only to one company but to many companies.

However, based on the applicable provisions, there are exceptions to the concept of limited liability, namely conditions where the PT's responsibility shifts to the responsibility of the Shareholders, Board of Commissioners or Directors personally, namely responsibility up to personal wealth for losses experienced by each interested party. This legal term is known as the act of Piercing the Corporate Veil. Piercing the corporate veil is an act that makes an exception to a general principle, where the responsibilities of the founders and management of the company are limited, which can deviate by carrying out the responsibilities of the company management which are no longer limited. Thus, Piercing the corporate veil is essentially a doctrine that transfers responsibility from the company to Shareholders, Directors. or the Board of Commissioners. In the

context of Piercing the Corporate Veil by shareholders, the shareholders are responsible to the company's creditors, as a result of the shareholder's actions causing the company's assets to suffer losses and being unable to fulfill its obligations to creditors. Article 3 paragraph (2) UUPT provides criteria for Shareholder actions as Piercing the Corporate Veil.

However, in certain conditions, there are several companies which in practice own or establish a company with a nominee agreement. The development of corporate law is currently very rapid, especially in multi-national companies which involve various corporations in a holding company which is under the auspices of a business group. , The birth of non-operating companies and/or multi-purpose vehicles in corporate legal traffic provides opportunities for company owners to hide behind the dark side of a company to commit corporate crimes, not only related to transfer pricing, but also other corporate crimes that are difficult to pursue. company owners to be held accountable. A "nominee share" agreement is an agreement regarding share ownership between the shareholders listed in the articles of association and another party, where the actual share owner is a party other than the shareholders listed in the articles of association that have been approved or reported to the Ministry of Law and Human Rights. R.I.

It can also be said that a share nominee agreement is an agreement between the share owners who are formally listed in the Company's Articles of Association and a third party, where the shareholders listed in the articles of association based on the share nominee agreement are actually the third parties who are the share owners of the company. Such an agreement indicates that there is public deception regarding the actual share ownership stated in the Articles of Association as well as those registered in the official registration at the authorized agency including company registration in the company register at the Ministry of Trade and Industry as well as registration in the company register at the Indonesian Ministry of Law and Human Rights and other permits. Share nominee agreements, which are not recognized in company law in Indonesia, have given rise to puppet shareholders and puppet company administrators. With the share nominee agreement, the company in question has actually provided false public information (telling the public lies) regarding the actual share ownership. The legal principle of nominee agreements is indeed based on the principle of openness adopted by KHUPdt which is contained in Article 1338 which states "All agreements made legally apply as law for those who make them", making agreements and/or statements confirming that share ownership in a limited liability company for and on behalf of others. Furthermore, Article 33 paragraph (2) of the Capital Markets Law states that if an investor makes such an agreement, then the agreement is null and void by law. This is in line with what is regulated in the Civil Code (KUHPer). Article 1337 of the Civil Code states that a cause is prohibited, where if an agreement is made based on a prohibited cause then the agreement is invalid and will result in it being null and void. In line with the Capital Market Law, Article 48 of the Limited Liability Company Law also regulates that PT shares are issued in the name of the owner. So it is not permissible for shares to be issued in the name of an owner who is not the owner.

The search for these two things is that the author wants to know that in the context of Piercing the Corporate Veil by shareholders, the shareholders are responsible to the company's creditors, as a result of the shareholders' actions which cause the company's assets to suffer losses and cannot fulfill its obligations to creditor. Article 3 paragraph (2) of the Company Law provides criteria for Shareholder action as Piercing the Corporate Veil if it turns out that there is a nominee agreement between the directors and shareholders from a third party who is actually the party who is one of the shareholders and what is the potential risk of the company's lawsuits if a dispute occurs due to the nominee agreement which results in the company experiencing the risk of loss?.

2. Method

In seeking understanding based on the formulation of the problem that the author is looking for, the writing system in this method uses normative legal research which involves studying written documents or data, research on legal systematics, legal theory. In the initial stage the author conducted research on documents related to the subject of this discussion. Apart from that, use is based on the internet, newspapers and electronic media

3. Results and Discussion

Results

Refers to the provisions of regulations regarding shareholders in limited liability companies. Based on Article 3 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies. In this case, Limited Liability Companies in Article 3 paragraph (1) of the Company Law stipulate that, "Company shareholders are not personally responsible for agreements made in the name of the Company and are not responsible for the Company's losses in excess of the shares they own." However, in this case there is an exception that exists. This legal term is known as the act of Piercing the Corporate Veil. Piercing the corporate veil is an act that makes an exception to a general principle, where the responsibility of the founders and management of the company is limited to the amount of shares that can be made. deviate by carrying out the responsibilities of company management which are no longer limited.

It is emphasized again in the Elucidation to Article 3 paragraph (1) of the Company Law, that all shareholders are only responsible for the deposit for all the shares they own and does not include their personal assets. By looking at these arrangements, to answer your question, in principle the Company's debts cannot be charged individually or jointly to shareholders, because the Company as a legal entity is an independent subject that can act for and on itself, including entering into agreements. and engagements with other parties as well as acquiring, controlling and transferring the Company's assets. However, there are exceptions to this, namely as regulated in Article 3 paragraph (2) of the Company Law, where it is stipulated that shareholders can be held personally responsible if things happen: the following things:

1. The Company's requirements as a legal entity have not been or are not fulfilled
2. The shareholders concerned, either directly or indirectly, in bad faith, exploit the Company for personal interests
3. The shareholders concerned were involved in unlawful acts committed by the Company
4. The shareholders concerned either directly or indirectly unlawfully use the Company's assets, which results in the Company's assets being insufficient to pay off the Company's debts.

Then, in the Elucidation to Article 3 paragraph (2) of the Company Law, it is stated that in certain cases the possibility of eliminating the limited liability responsibility is possible if the things mentioned in this paragraph are proven. The shareholder's responsibility is equal to the deposit for all the shares they own, possibly forfeited if it is proven that, among other things, there has been a mixing of the shareholder's personal assets and the Company's assets so that the Company was established solely as a tool used by shareholders to fulfill their personal goals as intended in the letter b and d. Thus, Piercing the corporate veil is essentially a doctrine that transfers responsibility from the company to Shareholders, Directors. or the Board of Commissioners. In the context of Piercing the Corporate Veil by shareholders, the shareholder is responsible to the company's creditors, as a result of the shareholder's actions causing the company's assets to suffer losses and being unable to fulfill its obligations to creditors. Article 3 paragraph (2) UUPT provides criteria for Shareholder actions as Piercing the Corporate Veil.

However, in the context of Nominee Agreements which in practice still occur, nominee agreements have been prohibited in Law Number 25 of 2007 concerning Capital Investment (UUPM) and Law Number 40 of 2007 concerning Limited Liability Companies (UUPT). Article 33 paragraph (1) UUPM strictly regulates that domestic investors and foreign investors who invest in a PT make an agreement and/or statement confirming that share ownership in the company is limited to and on behalf of another person. Furthermore, Article 33 paragraph (2) UUPM states that if an investor makes such an agreement, then the agreement is null and void by law. This is in line with what is regulated in the Civil Code (KUHPer). Article 1337 of the Civil Code states that a cause is prohibited, where if an agreement is made based on a prohibited cause then the agreement is invalid and will result in it being null and void.

Discussion

Nominee Agreements themselves are not a new practice in Indonesia. In fact, sometimes nominee agreements are often used by business actors, including foreign investors, to smuggle applicable

laws. In the context of foreign investment, this includes circumventing provisions regarding restrictions on foreign investors' share ownership in a business sector. In fact, the use of nominees in investment activities (both local and foreign) is prohibited in the Investment Law. ownership of shares in a Limited Liability Company is null and void because it violates Article 33 paragraph (1) and paragraph (2) UUPM and the 4th condition for the validity of an agreement regarding halal causes. The validity and strength of binding nominee agreements will always refer to and cannot be separated from the provisions of Article 1320 and Article 1338 of the Civil Code. If the nominee agreement has taken into account and fulfilled the requirements for the validity of the agreement according to Article 1320 of the Civil Code and based on the provisions of Article 1338 of the Civil Code, then the nominee agreement already has binding force on the parties.

Based on the principle of *pacta sunt servanda*, agreements made by the parties, including nominee agreements, have binding force like law for those who make them. Nominee agreements can also violate Article 1320 of the Civil Code, in which case the investment legal regime prohibits nominee agreements. He refers Law No.25 of 2007 concerning Capital Investment which contains a prohibition on making agreements containing confirmation that ownership of shares in the company is for and on behalf of another person. The prohibition on holding a nominee agreement is, among other things, to avoid the occurrence of a company legally owned by an Indonesian citizen, but materially or substantially the owner of the company is owned by a foreign citizen. Apart from that, the prohibition on nominee agreements is also to prevent parties from getting around the provisions in legal regulations which limit the existence of business fields that are closed to foreign parties and open to foreign parties with requirements in accordance with applicable law.

The doctrine of Piercing the corporate veil Piercing the corporate veil is essentially a doctrine that transfers responsibility from the company to Shareholders, Directors. or the Board of Commissioners. The doctrine of piercing the corporate veil. Based on Article 3 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies ("UUPT"), Limited Liability Companies in Article 3 paragraph (1) of the Company Law regulate that, "The Company's shareholders do not is personally responsible for agreements made on behalf of the Company and is not responsible for the Company's losses beyond the shares owned." As well as the act of Piercing the Corporate Veil. Piercing the corporate veil is an action that makes an exception to a general principle, where the responsibilities of the founders and management of the company are limited to the amount of share that can be deviated from by carrying out the responsibilities of company management which are no longer limited. Thus, Piercing the corporate veil is essentially a doctrine that transfers responsibility from the company to Shareholders, Directors. or the Board of Commissioners.

However, the problem is that the prohibition on Nominee Agreements means that the piercing the corporate veil doctrine no longer applies. Because in fact, even though we can see many practices in nominee agreements in various events, in reality these nominee agreements are prohibited. May violate Article 33 paragraph (1) and paragraph (2) UUPM and the 4th condition for the validity of an agreement regarding halal causes and Law No.25 of 2007 concerning Capital Investment which contains a prohibition on making agreements containing confirmation that ownership of shares in the company is for and on behalf of another person. So in this case, the Directors of the Limited Liability Company will still be asked to be held accountable.

4. Conclusion

The doctrine of Piercing the corporate veil Piercing the corporate veil is essentially a doctrine that transfers responsibility from the company to Shareholders, Directors. or the Board of Commissioners. The doctrine of piercing the corporate veil. Based on Article 3 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies ("UUPT"), Limited Liability Companies in Article 3 paragraph (1) of the Company Law regulate that, "The Company's shareholders do not is personally responsible for agreements made on behalf of the Company and is not responsible for the Company's losses beyond the shares owned." However, Article 3 paragraph (2) of the Company Law provides criteria for Shareholder actions as Piercing the Corporate Veil in a Limited Liability Company. It turns out that there is a nominee agreement between the directors and shareholders from a third party who is actually the party who is one of the shareholders, then in this case This Nominee Agreement could be null and void and an attempt to smuggle the law because

the Nominee Agreement has violated several regulations in Indonesia, namely Article 33 of the Investment Law and Article 1320 of the Civil Code and this action is not valid.

Nominee agreements also have the impact that foreign nationals or investors who have shares in a company can control a company so that this control has the potential to dominate the interests of foreign investors in the company, however this will be difficult for directors who have already entered into a nominee agreement. This. Nominee agreements can also violate Article 1320 of the Civil Code, in which case the investment legal regime prohibits nominee agreements. He refers Law No.25 of 2007 concerning Capital Investment which contains a prohibition on making agreements containing confirmation that ownership of shares in the company is for and on behalf of another person. The prohibition on holding a nominee agreement is, among other things, to avoid the occurrence of a company legally owned by an Indonesian citizen, but materially or substantially the owner of the company is owned by a foreign citizen. Apart from that, the prohibition on nominee agreements is also to prevent parties from getting around the provisions in legal regulations which limit the existence of business fields that are closed to foreign parties and open to foreign parties with requirements in accordance with applicable law.

The potential risk of a company lawsuit if a dispute occurs is due to the nominee agreement which results in the company experiencing a risk of loss because seen from the position of the Piercing the Corporate Veil Doctrine, it cannot be implemented properly because the agreement between shareholders and directors has been violated. regulations in Indonesia, namely Article 33 of the Investment Law and Article 1320 of the Civil Code. So there is less accountability. So the actions of the Board of Directors refer to the Regulations regarding the accountability of the Board of Directors UU no. 40 of 2007 concerning Limited Liability Companies ("UUPT"). Based on Article 97 paragraph (2) of the Company Law, the Board of Directors is obliged to carry out the management of the company in good faith and with full responsibility. And each member of the Board of Directors is fully personally responsible for the PT's losses if the person concerned is guilty or negligent in carrying out their duties, Article 97 paragraph 3. Doctrine of Piercing the corporate veil.

Article 92 paragraph (2) of the PT Law explains that the Board of Directors has the obligation to carry out management as intended in paragraph (1) in accordance with policies deemed appropriate, within the limits specified in the articles of association. In short, it can be concluded that ultra vires is the actions of the Board of Directors which are outside the aims and objectives as well as the Company's business activities which are determined by, among other things, carrying out actions which are carried out outside the aims and objectives of the company, actions which are carried out for their own personal interests, and actions which are carried out which are outside the authority given to them. to him based on applicable provisions or ultra vires. Then another thing is that the Board of Directors violated the principle of fiduciary duty. In this case, the form of violation is that the Directors' actions violate the principle of carrying out their duties in good faith and with full responsibility for the interests and business of the Company or what is called Fiduciary Duty, so that each member of the Company's Directors is responsible for their personal wealth. The principle of fiduciary duty also applies in the event of bankruptcy of the company. This is regulated in Article 104 paragraph (2) of the Company Law which states that, if bankruptcy occurs due to the negligence or error of the directors and the Company's assets are not sufficient to cover the losses resulting from the bankruptcy, then the members of the Board of Directors are jointly and severally responsible for the losses.

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