

Conference Paper

Director's Accountability for the Company's Sales Results and Commissioner's Actions in Asset Recovery

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Abstract.

This study examines directors' accountability for company sales results and commissioners' actions in asset recovery regarding an embezzlement case involving Conti Chandra, a Director at PT. Bangun Mega Semesta (BMS) in Hotel Batam City Condotel (BCC). Relevant court decisions include Supreme Court Decision No. 567K/PID/2016, Pekanbaru High Court Decision No. 212/Pid.B/2015, and Batam District Court Decision No. 321/Pid.B/2015. It focuses on two main issues: corporate managers' accountability based on Law No. 40 of 2007 on limited liability companies and criminal liability for "embezzlement crime in position" within a limited liability company. The study uses a normative legal research method with a descriptive approach, relying on secondary data and qualitative analysis. Findings indicate corporate managers' accountability during general meetings of shareholders. Criminal liability for embezzlement relates to directors' fiduciary duty to shareholders, requiring prudence, responsibility, and good faith. Two recommendations are proposed: First, The Indonesian government should revise the limited liability company law on holding directors and commissioners accountable for neglecting management and supervision duties and emphasizing fiduciary duty. Second, the Directors of Batam City Condotel should adhere to fiduciary duty principles under the board of commissioners' supervision.

Keywords: commissioners actions, directors, embezzlement

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Published 5 January 2024

Publishing services provided by Knowledge E

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Selection and Peer-review under the responsibility of the 4th INCLAR Conference Committee.

1. INTRODUCTION

About companies, the crime of embezzlement can be committed by parties inside or outside the company's environment. However, it is generally carried out by parties within the company's environment, because usually these parties understand internal control within the company where they work, so it is not difficult to commit a crime of embezzlement.[1]

 OPEN ACCESS

The case related to the crime of embezzlement that will be studied and analyzed and discussed in this study is the “*Criminal Act of Embezzlement Using a Position*” committed by the defendant as the Director who served at PT. Bangun Mega Semesta (BMS) with the Batam City Condotel (BCC) Hotel business line. The case is contained in the Decision of the Supreme Court of the Republic of Indonesia No. 567K/PID/2016 jo. Pekanbaru High Court Decision No. 212/Pid.B/2015/PT.PBR jo. Batam District Court Decision No. 321/Pid.B/2015/PN.Btm. An. Defendant Conti Chandra.

As for the decision of the Batam District Court No. 321/Pid.B/2015/PN.Btm., namely:

1. *“Declaring that the Defendant Conti Chandra has been legally and convincingly proven guilty of committing the “Criminal Act of Embezzlement in Office”;*
2. *Sentenced the defendant because of that with imprisonment for two years;*
3. *Determine that the period of arrest and detention that the defendant has served is deducted entirely from the sentence imposed;*
4. *Establish evidence, in the form of: 4.1. s.d. 4.43 remains attached to the case file;*
5. *Burdened the defendant to pay court costs in the amount of Rp. 5,000,- (five thousand rupiahs)”.*

Based on the decision of the court of first instance, both the defendant and the public prosecutor have filed an appeal. Pekanbaru High Court No. 212/Pid.B/2015/PT.PBR. has rendered a decision by upholding the decision of the court of first instance. Furthermore, both the defendant and the public prosecutor have also filed a cassation to the Supreme Court of the Republic of Indonesia and the cassation has been decided based on the Decision of the Supreme Court of the Republic of Indonesia No. 567K/PID/2016, with a decision to reject the cassation request from Cassation Petitioner I (Public Prosecutor) and Cassation Petitioner II (Defendant Conti Chandra). That is, the ruling that applies to the defendant is that the defendant is still legally and convincingly declared guilty of committing the “Criminal Act of Embezzlement in Office”. For this reason, he was sentenced to two years in prison minus the prison term he had served.

The chronology of the case, which started with the Public Prosecutor from the Batam Attorney General’s Office, Aji Satrio Prakoso, stated in his lawsuit that the actions of Defendant Conti Chandra withheld the Deed of Sale and Purchase of PT. BMS without rights is an illegal act under Article 374 of the Criminal Code. In his indictment, the Public Prosecutor (JPU) Aji Satrio Prakoso charged the defendant with Article 374 of the Criminal Code Subsidiary Article 372 of the Criminal Code concerning “Criminal

Acts of Embezzlement". The defendant without the permission of PT BMS or Witness Tjipta Pudjiarta as Commissioner has controlled the money from the sale of 11 (eleven) Batam City Condotel apartment units which are money or assets that should belong to PT. BMS and possess company documents in the form of a Deed of Sale and Purchase of Shares Number 3, Number 4, and Number 5 from Notary Anly Cengana.

As a result of his actions, PT BMS suffered a loss of Rp. 7,712,594,929,- which made witness Tjipta Pudjiarta as Commissioner and Post PT BMS Shares unable to possess proof of ownership of shares in PT BMS which he has purchased. In the trial for reading the charges, it was revealed that the protector had sent a subpoena twice to return the deed, but the protection did not heed it and did not even return the Deeds of Sale and Purchase of PT. the BMS. The act of violation is legally and convincingly proven to have committed the "*Criminal Act of Embezzlement in Office*" as stipulated and subject to criminal sanctions under Article 374 of the Criminal Code.

The act of the defendant who did not pay the company the money for the sale of 11 BCC apartment units in the amount of Rp. 14 billion rupiah was unlawful, according to the Public Prosecutor, the money should have been deposited with PT. BMS is not entered into a personal account.

The actions of the defendant mentioned above, clearly constitute a "*crime of embezzlement*". Repayment money from consumers that should have been deposited with the company, but instead was taken and controlled for their interests. With the existence of five elements of possession and special elements that are aggravating, the defendant is charged with committing the "*Criminal Act of Embezzlement in Position*" under Article 374 of the Criminal Code.

This research will answer the problems that arise, including regarding the regulation of the accountability of company management for the management of the company to shareholders based on the provisions of Law No. 40 of 2007 concerning Limited Liability Companies. Then, regarding the responsibility for "*Crime of Embezzlement in Office*" associated with the management and management of the company.

Based on the description of the background, the problems that arise in this study can be formulated as follows: First, How is the management of the company's management accountable for the management of the company to shareholders based on Law No. 40 of 2007 concerning Limited Liability Companies? Second, What is the criminal responsibility for the "*Crime of Embezzlement in Office*" in a company incorporated as a Limited Liability Company (PT)?

2. METHODOLOGY/ MATERIALS

This research is normative legal research.[2] The nature of the research is descriptive analysis.[3] The research approach is the statutory approach. The type of data used is secondary data sourced from primary, secondary, and tertiary legal materials.[4] Furthermore, primary data is also used to support secondary data. Secondary data was collected using “*library research*” techniques and “*field research*”.[5] Furthermore, these data were analyzed using qualitative analysis methods.[6]

3. RESULTS AND DISCUSSIONS

3.1. Literature Review

The several theoretical foundations used in this study include: Theory of Criminal Responsibility; the Business Judgment Rule Doctrine; and the Fiduciary Duty Doctrine. The explanation of these legal theories, respectively, is as follows:

3.2. Criminal Liability Theory

Criminal responsibility is a fundamental principle in criminal law, more commonly known as the principle of “*geen straf conder schuld*” (no crime without fault). Criminal responsibility without any fault in the perpetrator of the crime is called “*leer van het materiele feit*”. The Criminal Code (KUHP) itself does not provide an explanation of what is meant by the principle of “*geen straf zonder schuld*”, but this principle can be said to be an unwritten principle and applies in Indonesia. Therefore, in a criminal liability there are two things, namely: a criminal act (*daad strafrecht*) and the perpetrator of a crime (*dader strafrecht*). Criminal responsibility is a subjective element (mistake in the broadest sense).[8]

According to the dualistic theory, separating criminal acts from criminal liability causes mistakes to be excluded from criminal acts and placed as determinants in criminal liability. A criminal act is an act or a series of actions to which a criminal sanction is attached.[9] Moeljatno referred to the term criminal act as “an act prohibited by a legal regulation which prohibits it accompanied by a threat (sanction) in the form of a certain crime, whoever violates the prohibition”.[10] The person who has committed the act is then also punished, depending on the question, of whether the perpetrator in committing the act contains an element of guilt or not. If the person who commits

the crime does fulfill the elements of guilt, then he can be punished. If the perpetrator has no guilt even though he has committed a prohibited and disgraceful act, then the perpetrator is not punished.

The unwritten principle “no punishment if there is no mistake” is the basis for the punishment of the maker.[11] That is, actions that are despicable by society are accountable to the maker. That is, an objective reproach for the act is then forwarded to the accused. The next question is whether the defendant is also reproached by the commission of this act. Why is an objectively disgraceful act, subjectively accountable to him, therefore the act is dependent on the perpetrator himself.[12]

Whether or not the perpetrator can be punished does not depend on whether there was a criminal act or not, but on whether the defendant is reprehensible or not because he has not committed a crime.[13] Criminal responsibility is determined based on the fault of the maker (liability based on fault), and not only by fulfilling all the elements of a crime. Thus, mistakes are placed as a determining factor for criminal responsibility and are not only seen as mere mental elements in criminal acts.[14] Based on the principle of no crime without fault, Moeljatno put forward a view that in Indonesian criminal law is known as the dualistic teaching, in essence, this teaching separates criminal acts and criminal responsibility.

3.3. The Business Judgment Rule Doctrine

In company law, there exists a principle known as the Business Judgment Rule, which states that the Board of Directors of a company cannot be held responsible for losses resulting from their decision-making actions as long as these decisions were made in good faith and with prudence. This rule provides legal protection to directors, and they are not required to justify their decisions to shareholders or the court in the course of managing the company.[15]

The Business Judgment Rule doctrine serves as a shield for directors, protecting them from liability for business decisions that might have adverse effects on the corporation. In the context of the common law system, the accountability of corporate directors can be observed through the court’s considerations in the case of *Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co., Inc.*, 26 Ohio St.3d 15, 496 N.E.2d 959 (1986).

“The business judgment rule is a principle of corporate governance that has been part of the common law for at least one hundred fifty years. It has traditionally operated as a shield to protect directors from liability for their decisions. If the directors are

entitled to the protection of the rule, then the courts should not interfere with or second-guess their decisions. If the directors are not entitled to the protection of the rule, then the courts scrutinize the decision as to its intrinsic fairness is a rebuttable presumption that directors are better equipped than the courts to make business judgments and that the directors acted without self-dealing or personal interest and exercised reasonable diligence and acted with good faith. A party challenging a board of directors' decision bears the burden of rebutting the presumption that the decision was a proper exercise of the business judgment of the board".[16]

In the national legal system, the Business Judgment Rule doctrine has been accommodated in Law No. 40 of 2007 concerning Limited Liability Companies. Regarding the duties of a director, Article 92 states that:

1. *"The Board of Directors carries out the management of the company for the benefit of the company and by the aims and objectives of the company;*
2. *The Board of Directors has the authority to carry out the management as referred to in paragraph (1) by the policies deemed appropriate, within the limits specified in this law and/or the articles of association".*

Article 97 further states that:

1. (a) *"The directors are responsible for managing the company as referred to in Article 92 paragraph (1);*
 - (b) *The management as referred to in paragraph (1) must be carried out by each member of the board of directors in good faith and with full responsibility;*
 - (c) *Each member of the board of directors is personally responsible for the company's losses if the person concerned is guilty or negligent in carrying out his duties by the provisions referred to in paragraph (2);*
 - (d) *If the board of directors consists of 2 (two) members of the board of directors or more, the responsibilities as referred to in paragraph (3) apply jointly and severally to each member of the board of directors;*
 - (e) *Members of the board of directors cannot be held accountable for losses as referred to in paragraph (3) if they can prove:*
 2. *The loss was not due to his fault or negligence;*
 3. *Has carried out management in good faith and prudence for the benefit and by the aims and objectives of the company;*

4. *Does not have a conflict of interest, either directly or indirectly, for management actions that result in losses; And*
5. *Have taken action to prevent the loss from arising or continuing;*
 - (a) *On behalf of the company, shareholders representing at least 1/10 (one-tenth) of the total shares with voting rights may file a lawsuit through a district court against a member of the board of directors who due to their mistake or negligence causes losses to the company;*
 - (b) *The provisions referred to in paragraph (5) do not reduce the rights of other members of the Board of Directors and/or members of the Board of Commissioners to file lawsuits on behalf of the company.”*

The Limited Liability Company Law incorporates the principle of the Business Judgment Rule through Article 97, particularly in letters b, c, and d. However, letter A, which addresses losses not resulting from mistakes and negligence, is a distinct provision added to the Company Law.

According to Article 97(2) of the Company Law, the management of the company rests with the directors and must be carried out in good faith and with responsibility. This level of responsibility and good faith is not explicitly defined but can be understood through the application of the Business Judgment Rule, which is grounded in fiduciary duty.

Fiduciary duty encompasses two main aspects: the duty of care and the duty of loyalty, both outlined in Article 97(2) and paragraph (3) of the Company Law. The principle of good faith and responsibility stated in Article 97(2) aligns with the fiduciary duty principle in the Business Judgment Rule, prompting us to delve further into the concept of fiduciary duty and its scope.

3.4. Fiduciary Duty Doctrine

In the realm of company law, fiduciary duty refers to the obligation of directors to operate the corporation while adhering to two fundamental principles. These principles encompass the trust bestowed upon the directors by the company (*duty of loyalty*) and the standard of competence and prudence in their decision-making and actions (*duty of care*).^[17]

Put simply, fiduciary duty represents a professional connection between a company and its board of directors, comparable to the relationship between a lawyer and their client. Hence, every professional role entails a fiduciary duty relationship.^[18]

Talking about fiduciary duty cannot be separated from talking about duty of care and duty of loyalty. To make it easier to understand, it can be seen in the following example:

1. *Duty of Care*, for example, Financial reports that are offered to the director for review but related to *duty of care*, then a director must review the financial statements again. Can not be left alone or entrusted with the financial department alone.
2. *Duty of Loyalty*, for example: At the time of the GMS, shareholders must be present to make further policies so that the resulting policies are not reckless.

Every Director can seek protection under Article 97 of the Limited Liability Company Law if challenged by the Shareholders or the Board of Commissioners concerning their adopted policies. Nonetheless, they must substantiate that their decisions were based on the principles of fiduciary duty, encompassing the *duty of care* and *duty of loyalty*. This requirement ensures that the Board of Directors manages the company with honesty and responsibility.

A company's performance may not always benefit shareholders, and losses can occur. However, it would be unjust to hastily blame the Board of Directors for this. If the Board of Directors made decisions with sound judgment, resulting in reduced losses compared to choices, they should be acknowledged and rewarded for their accomplishments. Evaluating a director's competence goes beyond just looking at the profits generated; it also involves their ability to adeptly address problems and minimize the company's losses.

Minimizing the company's losses requires adhering to the principle of prudence, as outlined in Government Regulation No. 24 of 1998 on Annual Company Financial Information. Article 97(5) of the Limited Liability Company Law emphasizes that the Board of Directors must manage the company with good faith and prudence, aiming for the company's benefit and objectives. This prudence can be demonstrated individually or collectively in their decision-making. Moreover, they must be held accountable for the risks associated with their decisions to ensure good corporate governance. Both positive and negative aspects of accountability are addressed in this context. The pursuit of a conducive investment climate can sometimes lead to actions that deviate from the rules, resulting in an imbalance within the company itself.

Failure to apply the precautionary principle in decision-making by the Board of Directors can lead to detrimental outcomes for the company. Accountability is closely linked to decision-making, and the success of the company becomes the yardstick

to judge the effectiveness of these decisions, whether they yield positive or negative results.

Arrangements for Directors' Accountability to Shareholders in Managing Limited Liability Companies under the Limited Liability Company Law

Principles of Accountability of the Board of Directors of the Company

Limited Liability Company (hereinafter referred to as the “Company”) is the most widely used form of the company as a vehicle for carrying out business activities, both nationally and internationally. This form of company is known in almost all countries in the world under different names, for example, in Anglo-Saxon countries it is known as “Company Limited by Shares (Co.Ltd.)”, in Germany, Switzerland, and Austria it is called “*Aktiengesellschaft (A.G)*”, and in the Netherlands named “*Naamloze Venootschap (N.V)*”.[19]

The rapid development of the international economic system since the post-World War II period has prompted fundamental changes to the principles of the company system as an important factor in national and inter-state economic activities. Therefore, the principles of the company system contained in Article 36 to.d. Article 56 of the Criminal Code is very far behind and can no longer be used in line with developments in economic life. In fact, in the country of origin of these provisions of the Criminal Code, namely the Netherlands, the provisions concerning “*Naamloze Venootschap (N.V)*” have long changed according to the needs of the times based on Article 128 paragraph (1) jo. Article 129 Law No. 1 of 1995 concerning Limited Liability Companies, as declared, repealed and no longer valid based on Law No. 40 of 2007 concerning Limited Liability Companies.

The Company Law embodies the principles of a contemporary limited liability company system aimed at addressing the requirements and expectations of the current era, encompassing: The principle of shareholder responsibility (“*Piercing the Corporate Veil*”); The principle of responsibility and ability of the management (“*Fiduciary Duties*”); The principle of protection of minority shareholders (“*Personal Right & Derivative Action*”); The principle of creditor protection (“*Capital Maintenance Doctrine*”); and the principle of openness (“*Disclosure*”).[20]

According to Article 97(3) of Law No. 40 of 2007 concerning Limited Liability Companies, the management of a company is mandated to be conducted by each member of the Board of Directors with “*good faith*” and “*full responsibility*.” However, the Company Law does not provide a specific definition of “*good faith*.” Therefore, the scope of the duties and authorities of the Board of Directors will be elucidated using a doctrinal approach. In several doctrines of company law, the Board of Directors is expected to

fulfill their duties and exercise their authority in good faith following the standard of duty of trustees.

The annual general meeting of shareholders: the ultimate authority in the company

The company's organizational structure comprises the General Meeting of Shareholders (GMS), the Board of Commissioners, and the directors. The GMS, as per Article 1 number (4) of the Company Law, possesses the highest authority in the company, encompassing all powers not delegated to the directors and commissioners within the bounds specified in the law and/or the Articles of Association. This highest authority is empowered to determine the company's general policies, appoint and dismiss directors and commissioners, and ratify their annual reports.

According to Article 76 paragraph (1) of Law No. 40 of 2007 concerning Limited Liability Companies, the GMS is convened at the company's domicile or the location where it conducts its primary business activities, as specified in the Articles of Association. The law also stipulates that the GMS must be held within the territory of the Republic of Indonesia.

The GMS consists of two types: the Annual GMS and Other GMS, outlined in Article 78 paragraph (1) of Law No. 40 of 2007 concerning Limited Liability Companies. The Annual GMS must be convened no later than six months after the end of the financial year, and all relevant documents from the company's annual report must be submitted as per Article 78 paragraph (2) and paragraph (3) of the law. On the other hand, Other GMS can be held at any time based on the company's requirements and benefits, as indicated in Article 78 paragraph (4) of Law No. 40 of 2007 concerning Limited Liability Companies.

The company's Board of Directors is responsible for organizing both the Annual GMS and the Other GMS. The process starts with a call for the GMS, under Article 79 paragraph (1) of Law No. 40 of 2007 concerning Limited Liability Companies. A GMS can be convened at the request of one or more shareholders jointly representing 1/10 or more of the total shares with voting rights, unless the Articles of Association stipulate a smaller proportion, or based on a request from the board of commissioners, as stated in Article 79 paragraph (2) of the law. Shareholders' requests for holding a GMS must be submitted to the board of directors through registered letters, accompanied by reasons, and a copy of the request must be submitted to the board of commissioners, as per Article 79 paragraph (3) and paragraph (4) of Law No. 40 of 2007 concerning Limited Liability Companies.

In the situation of calling for a GMS, the company's directors must convene the GMS within 15 (fifteen) days from the receipt of the request to hold the GMS, according to Article 79 paragraph (5) of Law No. 40 of 2007 concerning Limited Liability Companies. Failure to do so will lead to another submission being requested to the Board of Commissioners, or the Board of Commissioners may call for the GMS itself, as stipulated in Article 79 paragraph (6) of the law. In cases where the directors or the board of commissioners do not convene the GMS within the designated timeframe, the Chairperson of the District Court with jurisdiction over the company's domicile may grant permission to the applicant or shareholder to personally convene the GMS, as mentioned in Article 80 paragraph (2) of Law No. 40 of 2007 concerning Limited Liability Companies. The granting of permission to hold the GMS also entails provisions related to:

1. The GMS format, agenda as requested by shareholders, the notice period, quorum for attendance, and/or decision-making requirements for the GMS, as well as the appointment of meeting chairpersons, with or without adhering to statutory provisions or the Articles of Association; and/or
2. An order obliging the directors and/or the board of commissioners to attend the GMS, as stated in Article 80 paragraph (3) of Law No. 40 of 2007 concerning Limited Liability Companies.

The Board of Directors initiates the summoning of shareholders before convening a GMS, yet in specific circumstances, the Board of Commissioners or shareholders can also summon a GMS as stated in the provision by the Chairman of the District Court, under Article 81 of Law No. 40 of 2007 concerning Limited Liability Companies. According to the Limited Liability Company Law, the summons for a GMS must be issued no later than 14 (fourteen) days before the scheduled date of the GMS. These summons can be delivered through registered letters and/or published in newspapers, as outlined in Article 82 paragraph (1) and paragraph (2) of Law No. 40 of 2007 concerning Limited Liability Companies.

For publicly listed companies, before issuing the GMS summons, an announcement must be made within 14 days before the GMS, providing the invitation to the GMS and adhering to regulations in the capital market sector, based on Article 83 of Law No. 40 of 2007 concerning Limited Liability Companies. Article 82 of the Limited Liability Company Law governs the guidelines for the invitation to hold a GMS. Article 82 Limited Liability Company Law states, namely:

1. *“Summons for the GMS are made by registered letter. The purpose is to ensure that the summons has been made and addressed to the shareholder’s address. Calls for GMS for public companies are made in two daily newspapers.*
2. *The summons for the GMS includes the date, time, place, and agenda of the meeting accompanied by a notification that the materials to be discussed at the GMS are available at the company’s office from the date the call for the GMS is made until the date the GMS is held.*
3. *If the summons is not by the provisions, the GM’s decision will still be declared valid if all shareholders with voting rights are present or represented at the GMS and the decision is approved unanimously”.*

Concerning the convening of a GMS, the GMS can be conducted if more than $\frac{1}{2}$ of the total shares with voting rights are present or represented unless otherwise specified in the law and/or the Articles of Association, as stated in Article 86 of Law No. 40 of 2007 concerning Limited Liability Companies. The Articles of Association cannot establish a smaller quorum than the one set by the Limited Liability Company Law, with the following conditions: Firstly, if the quorum mentioned in Article 86 paragraph (1) is not met, a second GMS summons can be issued. The summons for the second GMS must indicate that the first GMS was conducted but did not achieve the required quorum. Secondly, the second GMS is deemed valid and entitled to make decisions if at least $\frac{1}{3}$ of the total shares with voting rights are present or represented unless otherwise specified in the Articles of Association. Thirdly, if the second GMS fails to meet the quorum, the Chairman of the District Court can establish a quorum for the third GMS upon request from the company. Similar to the summons for the second GMS, the summons for the third GMS must indicate that the second GMS was conducted but did not attain the necessary quorum. The second and third GMS are held within a period of no less than 10 days and no more than 21 days after the previous GMS was conducted.

According to Article 87 paragraph (1) of the Limited Liability Company Law, GMS decisions are reached through deliberation to achieve a consensus. If a consensus cannot be reached, the decision is considered valid if it garners the approval of more than $\frac{1}{2}$ of the votes cast, unless otherwise specified by law and/or the Articles of Association. As previously mentioned, the GMS holds the highest position among other company organs. However, the term “highest” is no longer used in the Limited Liability Company Law, as indicated in Law No. 40 of 2007. The Company Law states that the GMS is a company organ with powers not granted to the directors or the board of commissioners within the limits specified in this law and/or the Articles of Association.[21]

This change occurred because the GMS, as a company organ of the Limited Liability Company, was perceived and interpreted erroneously as having unrestricted authority despite being labeled as having the “highest” authority. The previous understanding was that the GMS had the power to decide on any matter within the company. To rectify this misconception, the term “highest” was omitted from the Limited Liability Company Law, which was previously present in Law No. 1 of 1995 concerning Limited Liability Companies. However, in essence, the GMS remains the primary and fundamental organ of a PT with exclusive authority not vested in the directors and/or the board of commissioners. One of the key functions of the GMS is to amend the Articles of Association, as stated in Article 78 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies.

As per Article 88 of the Company Law, for any amendments to the Company’s Articles of Association, a GMS must be convened with the attendance or representation of at least 2/3 of the total shares with voting rights declared present at the meeting. Furthermore, the GMS resolution will be deemed valid if it is approved by at least 2/3 of the total votes cast unless the Articles of Association specify otherwise.[22]

Article 75 paragraph (1) Limited Liability Company Law, states that: “*GMS has authority that is not given to the Board of Directors or the Board of Commissioners, within the limits specified in this law and/or the articles of association*”. According to M Harahap, M.Y., regarding this provision: “*In general, any authority that is not given to the directors and/or the board of commissioners, becomes the authority of the GMS, it can be said that the GMS is the highest organ of the company which is the highest agreement between shareholders in the GMS*”.[23]

Shareholders' declaration of release and discharge of responsibility (acquit et discharge)

The shareholders grant a statement of release and discharge of responsibilities to the directors and board of commissioners during the GMS when the annual report presented to the shareholders at the GMS is approved. As stated in Article 66 paragraph (2) of Law No. 40 of 2007 concerning Limited Liability Companies, the Company’s Annual Report must contain, at a minimum:

1. *“Financial reports consisting of at least the balance sheet at the end of the recent financial year in comparison with the previous financial year, profit and loss statements for the relevant financial year, cash flow statements, and reports on changes in equity, as well as notes to these financial statements;*
2. *Reports on the Company’s activities;*

3. *Report on the implementation of Social and Environmental Responsibility;*
4. *Details of problems that arose during the financial year that affected the Company's business activities;*
5. *Report on supervisory duties carried out by the Board of Commissioners during the past financial year;*
6. *Names of members of the Board of Directors and members of the Board of Commissioners;*
7. *Salary and allowances for members of the Board of Directors and salaries or honorarium and allowances for members of the Company's Board of Commissioners for the past new year”.*

The financial statements must be prepared according to financial accounting standards. For companies required to undergo auditing, the balance sheet and income statement for the relevant financial year should be submitted to the Minister, as stated in Article 66 paragraph (3) and paragraph (4) of Law No. 40 of 2007 concerning Limited Liability Companies, following the provisions of the applicable laws and regulations.

The annual report, reviewed by the board of commissioners, is to be submitted to the GMS within 6 (six) months after the Company's fiscal year ends, as indicated in Article 66 paragraph (1) of Law No. 40 of 2007 concerning Limited Liability Companies.

All members of the Board of Directors and the Board of Commissioners who served during the relevant financial year sign the Annual Report. The report is made available at the Company's office for shareholders' inspection from the date of the GMS summons, according to Article 67 paragraph (1) of Law No. 40 of 2007 concerning Limited Liability Companies. If any member of the Board of Directors or the Board of Commissioners does not sign the Annual Report, a written explanation must be provided or stated in a separate letter attached to the Annual Report by the Board of Directors, as per Article 67 paragraph (2) of Law No. 40 of 2007 concerning Limited Liability Companies. Failure to sign the Annual Report and not providing reasons in writing will be considered as approval of the contents of the Annual Report by the concerned member, as mentioned in Article 67 paragraph (3) of Law No. 40 of 2007 concerning Limited Liability Companies.

According to Article 68 paragraph (1) of Law No. 40 of 2007 concerning Limited Liability Companies, the Company's Directors must arrange for the Company's financial statements to be audited by a public accountant if:

1. *“The Company's business activities are collecting and/or managing public funds;*

2. *The company issues debt acknowledgment letters to the public;*
3. *The company is a public company;*
4. *The company is a limited liability company;*
5. *The Company has assets and/or business turnover with a total value of at least IDR 50,000,000,000,-; or*
6. *Required by laws and regulations”.*

Under Article 68 of Law No. 40 of 2007 concerning Limited Liability Companies, if the Company's financial statements are not subjected to audit by a public accountant, they will not be ratified by the GMS, as stated in paragraph (2). However, if the financial statements have been audited, the Company's Directors are responsible for submitting them in writing to the GMS, as per paragraph (3).

Upon receiving the financial statements, the balance sheet, and the profit and loss report, they must be announced in one newspaper, as outlined in paragraph (4). The announcement must occur within 7 (seven) days after obtaining approval from the GMS, under paragraph (5). Additionally, the reduction of the total value of assets and/or the amount of business circulation with a total minimum value of Rp. 50,000,000,000,- is regulated in government regulations, as specified in paragraph (6).

The GMS is responsible for approving the Annual Report, which includes the ratification of the financial statements and the report on the supervisory duties of the Board of Commissioners, under Article 69 paragraph (1) of Law No. 40 of 2007. The decision regarding the ratification of the financial statements and the approval of the annual report during the GMS is determined based on the provisions in the law and/or the Company's articles of association, as stated in Article 69 paragraph (2) of Law No. 40 of 2007 concerning Limited Liability Companies.

If the provided Financial Report is discovered to be incorrect and/or misleading, both members of the Board of Directors and members of the Board of Commissioners bear joint and several responsibility for the aggrieved party, according to Article 69 paragraph (3) of Law No. 40 of 2007. However, members of the Board of Directors and members of the Board of Commissioners can be released from this joint responsibility if they can prove that the situation was not caused by their fault, as mentioned in Article 69 paragraph (4) of Law No. 40 of 2007.

To establish this defense, Article 97 paragraph (5) of the Limited Liability Company Law provides the directors with the principle of the “*Business Judgment Rule*” to demonstrate the absence of fault.

By ratifying the Annual Report during the GMS, the GMS grants complete exoneration and discharge of duties to the members of the Board of Directors and Board of Commissioners for their management and supervisory roles throughout the preceding financial year, as long as these actions are duly reflected in the annual report, except for instances of embezzlement, fraud, and other criminal acts. This exoneration and release of responsibility are referred to as “*Acquit et Decharge.*”

Legal implications of the Board of Directors' responsibilities in the Annual General Meeting (AGM) with acquit et de charge declaration

The legal obligations of the Board of Directors are a reflection or description of how the Board of Directors executes its duties and exercises its authority in managing and representing the Company, which has been entrusted to them. When operating the Company, the Board of Directors must adhere to the principles of good faith, full responsibility, and prudence, all in the best interest and alignment with the goals and objectives of the Company. Accountability for the execution of duties and authority is reported and communicated by the Board of Directors during the General Meeting of Shareholders (GMS) of the Company.

As outlined in Article 97 paragraph (3) of Law No. 40 of 2007 concerning Limited Liability Companies, the Board of Directors bears personal responsibility for any losses incurred by the Company if they are found guilty or negligent in performing their duties and exercising their authority.

According to Black's Law Dictionary, the meaning of “*acquit*” is “to clear (a person) of a criminal charge”.[24] “*Acquit et decharge*” is defined as “to set free, release or discharge from an obligation, duty, liability, burden, or an accusation or charge”. This means that with Acquit et Decharge, the directors are released from their responsibilities, duties, or obligations for activities that have been carried out in 1 financial year. Consequently, the directors cannot be held accountable in the event of a loss suffered by the company.

The granting of acquittal (“*acquit et decharge*”) at the Company's GMS means that the Company's shareholders have decided and agreed to grant a full discharge of responsibility to the Board of Directors for the management and representation actions that have been carried out. This has the consequence that if in the future losses arise to the Company due to policies and/or based on the actions of the Board of Directors during their term of office in the financial year, the Board of Directors should no longer be held liable both civilly and criminally unless it can be proven on the contrary.

The question is whether by receiving the annual report of the board of directors, automatically all of their actions will be free from all lawsuits that will occur in the future. In practice, there are 2 (two) explanations for the answer. First, “*acquit et decharge*”

only applies to the legal actions of the directors that have been reported or reflected in the annual report and the report has been accepted by the Annual GMS. On the other hand, the legal actions of the directors that are not reported or reflected in the annual report are personal responsibility with all the legal consequences. Second, “*acquit et decharge*” will only provide civil acquittals and settlements, while legal acts of directors of a criminal nature are excluded and therefore cannot be granted “*acquit et decharge*”. Thus, it means that the directors must still be responsible for the criminal acts they have committed, both for and on behalf of the company, so that the company cannot be blamed.

The Limited Liability Company Law does not regulate this “*acquit et decharge*”, so the directors do not fully understand this provision. Development is precisely in corporate practice. For example, the editorial can be found in the agenda for the Annual GMS, which reads as follows:

“Approval of the Balance Sheet and Income Statement for the 2016 Fiscal Year as well as providing full release and discharge (acquit et decharge) to members of the Board of Directors and Commissioners from their responsibilities for the management and supervisory actions they carried out in the financial year”.

After being approved by the Annual GMS, it reads as follows:

“Agreed to provide full release and discharge of responsibility (acquit et decharge) to members of the Company’s Board of Directors and the Board of Commissioners and the Board of Directors of the Company in the sense of being responsible as wide as possible for the management and supervisory actions they have carried out during the 2016 financial year until the closing of the Meeting this insofar as the management and supervisory actions are reflected in the Company’s Balance Sheet and Profit and Loss Report”.

Thus, the Company Law should regulate this acquittal and discharge (acquit et decharge) because in reality this has happened and was carried out by the Company. By clarifying the position of acquit et decharge to the board of directors and how the mechanism should be at the Annual GMS. In addition, the advantage of having been regulated in the Company Law is to awaken the awareness of directors that acquit et decharge is important for their legal standing in the future (for example, no longer serving as directors). Directors who have obtained acquit et decharge, about the company, will have a calmer and clearer position, compared to directors who have never or have not obtained acquit et decharge from the company, due to not holding an Annual GMS regarding this agenda. Furthermore, the existence of this acquit et

decharge regulation can also minimize disputes between directors and shareholders at the Annual GMS. Disputes that should not have happened.

Arrangements per the responsibility of the company's management for the management of the company to shareholders based on the Company Law related to the implementation of the fiduciary obligations of the directors and the board of commissioners of the company. According to Detania Sukardja, that form of carrying out her responsibilities is included in her fiduciary duty, if she violates her fiduciary duty which results in a loss, she can be subject to criminal law provisions. When it turns out that there are actions of the management of the company which indicate a violation of fiduciary obligations, the management of the company does not have to be held responsible, there is a doctrinal rule of business valuation that can be used to defend himself. The board of directors and commissioners can show that they have good faith and are responsible by using the business judgment rule doctrine. So, the responsibility of the board is related to its "duty", not the accountability mechanism. The business judgment rule can be used as a defense for company management an excuse so that company management does not necessarily have to be held responsible for losses suffered by the company. If the management can prove that the management of the company has acted by applicable legal provisions, the transactions carried out do not contain conflicts of interest, and the management of the company has not made mistakes and mistakes and has taken legal steps to avoid further losses for the company.

Actually in the context of company law, in terms of only receiving the money in a personal account, then the accountability mechanism for paying debts is + Rp. 6 billion according to Detania Sukardja cannot be blamed, because it can be accounted for as long as the money is not used. Meanwhile, in the context of criminal law, the elements of Article 374 and/or Article 372 of the Criminal Code, it is sufficient to fulfill the element of the article "controlling" the money from the sale can already be categorized as an unlawful act in a criminal context (*wedderrechtelijkheid*).

Article 155 of the Limited Liability Company Law: A Gateway for Initiating Criminal Legal Actions against Company Management

Regarding company directors who are not given *acquitt et decharge*, then based on Article 155 Law No. 40 of 2007 concerning Limited Liability Companies, states: "*The provisions concerning the responsibilities of the Board of Directors and/or Board of Commissioners for their mistakes and negligence which are regulated in this law do not reduce the provisions regulated in the law regarding criminal law*". The purpose of this provision is related to the rejection of the accountability report of the directors and/or the management of the company, if it is suspected that the directors and/or commissioners

have made a mistake or negligence, then the directors and/or commissioners can be prosecuted under criminal law. This demand for the accountability of the directors and/or commissioners must be based on the existence of a General Meeting of Shareholders (GMS) which in its policy determines to take further criminal law steps against the directors and/or commissioners.

According to Radjagukguk, E., a business law expert in his paper entitled “Understanding State Finances and State Losses” states that: *“The directors of a Persero state-owned company can be prosecuted from a criminal law perspective. This can only be done if the directors concerned commit embezzlement, falsification of data and financial reports, violations of the Banking Law, violations of the Capital Market Law, violations of the Anti-Monopoly Law, violations of the Anti-Money Laundering Law, and other laws that have criminal sanctions”*. [25]

A policy that has received approval from the GMS, even though it has an impact on losses cannot be criminalized because this is a risk in business. The exception is that in the implementation of this policy, there are acts that violate the law which result in losses. This can be prosecuted criminally, for example, the directors concerned commit embezzlement, falsification of data and financial reports, violations of the Banking Law, violations of the Capital Market Law, violations of the Anti-Monopoly Law, violations of the Anti-Money Laundering Law and other laws that have criminal sanctions. Corruption charges can still be applied to the actions of directors, but as long as they are not related to State-Owned Company wealth, for example in the case of bribery by State-Owned Company directors against state administrators. [26]

The form of carrying out their responsibilities is included in the fiduciary duty, if they violate the fiduciary duty which results in losses they can be subject to criminal law provisions. When it turns out that there are actions of company management that indicate fiduciary duty violations, company management is not responsible, there is a business judgment rule doctrine that can be used to defend itself. The board of directors and commissioners can prove that they have good faith and are responsible by using the business judgment rule doctrine. So, the responsibility of company management is related to their “duty”, not their accountability mechanism. The business judgment rule can be used as a defense for company management an excuse so that company management does not necessarily have to be held accountable for losses suffered by the company.

4. CONCLUSION AND RECOMMENDATION

The highest forum for holding company management accountable for the management of the company to shareholders is the General Meeting of Shareholders (GMS) based on Law No. 40 of 2007 concerning Limited Liability Companies. During the GMS, directors, and commissioners, as the management and supervisory bodies of the company, are responsible for presenting activity reports and financial reports related to the company's management and supervision. If these accountability reports are accepted by the shareholders during the GMS, the directors and commissioners are granted an acquittal and release of responsibility ("*acquitt et de charge*"). This means that no further legal action can be taken against them for their management and supervision during their past term of office. However, if it is later proven that a criminal act has occurred, Article 155 of the Limited Liability Company Law allows the GMS to decide to pursue criminal remedies against the directors and commissioners. The regulations concerning the Limited Liability Company Law should include guidelines on how to initiate legal action against directors and/or commissioners who fail to fulfill their management and supervisory duties based on the principle of fiduciary duty. While Article 155 provides an opportunity for shareholders to seek criminal remedies against company management suspected of committing a crime, there are no further provisions regarding the procedure for such actions.

Criminal liability for the "*Crime of Embezzlement in Office*" in a company incorporated as a Limited Liability Company is closely related to the trust placed in it. The trust given to a company director is carried out in the GMS forum in the form of a mandate. Trust (*fiduciary*) must be carried out very carefully (*prudent*), full of responsibility (*responsibility*), and in good faith (*good faith*). The size of the fiduciary duty is the duty of care and duty of loyalty. Associated with the case example, the directors as the defendant did not make a financial report on the proceeds from the sale of the 11 apartment units, which was an act that did not reflect responsibility and good faith. Therefore, criminal law remedies based on Article 155 of the Limited Liability Company Law can be filed against him, if he cannot prove that the proceeds from the sale of the apartment were used for the benefit of the company. The Board of Directors of Batam City Condotel should carry out management and management of the company by applying the principles of fiduciary duty. Its application must also be supervised by the Company's Commissioner. Commissioners must be active in requesting company documents for further review and analysis, whether there are financial reports that cannot be accounted for, or not. To avoid fraudulent acts of the directors. Embezzlement

in positions within the company occurs because supervision is not running, it is hoped that the Batam City Condotel Commissioner also carries out his duties and functions in carrying out company supervision.

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