



## The Ambiguity Application of Business Judgment Rule Doctrine as Director Immunity Right in the Company Law (Analysis of Supreme Court Verdict no 121k/pid.sus/2020)

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**Abstract** - Director is personally liable for the company's losses if proven guilty or negligent in carrying out his duties and may be personally sued by the shareholder as a result of his negligence or mistake in carrying out the management of the company which causes the company to suffer losses. This surely emits fear for Directors and hinders them in making important decisions for the Company. Essentially in carrying out their duties, Directors are always faced with uncertain so that fear of threats to the director's personal liability is one of the factors that reduces performance. This research uses normative-empiric research by analyzing the written law from such various aspects as theory, history, philosophy, comparison, structure and composition, scope and material, consistency, general explanation, and article by article, formality, and binding power of law, and mainly BJR norm application in the Supreme Court Verdict Number 121K/PID.SUS/2020. The results of this research shows that Judges in the Supreme Court Decision Number 121K/PID.SUS/2020 didn't consider the criteria for "readiness of information" and "the criteria for taking action to prevent continued losses" which are the essential criterias of the business judgment rule but only considered PT Pertamina has an asset impairment, PT Pertamina Hulu Energi is a subsidiary of a state-owned Enterprise, the Defendant (incasu Karen Agustiawan) has obtained permission from the Board of Commissioners, and the business decision doesn't contain elements of fraud, conflict of interest, unlawful acts and intentional errors, however these considerations create ambiguity and potential new legal disputes. because the actions of the Defendant (incasu Karen Agustiawan) have fulfilled all elements of the business judgment rule in Article 97 paragraph (5) of the Company Law, although the legal considerations of the Panel of Judges are incomplete, the business judgment rule can still be applied in the Supreme Court Verdict Number 121K/PID.SUS/2020.

Keywords: Board of Directors, Limited Liability Company, Business Decisions, Good Faith, Well-Informed.

### I. INTRODUCTION

The dynamic development across the globe brings changes in various sectors of human life, in the health sector, the legal sector and mainly the economic/business sector, the business sector in general has a strong relationship with the company because the company is a vehicle for entrepreneurs to seek profit. The Company itself has unlimited potential to contribute for the development of a country's economy, therefore the Company plays a very important role in the business sector of a country.

Based on detik.com, the Central Bureau of Statistics (BPS) conducted an Economic Census in 2016, in which the results of the census obtained data on the number of companies in Indonesia totaling 26.7 million. This figure has increased compared to the results of the 2006 Economic Census which totaled 22.7 million companies. That is, there

were 3.98 million new companies in the last 10 years [Michael Agustinus, \(2017\)](#). This means a greater potential for companies to support the economic sector of a country.

The most common form of company found in Indonesia is a Limited Liability Company (naamloze vennootschap), a Limited Liability Company is a capital partnership legal entity established based on an agreement, conducting business activities with an authorized capital which is entirely divided into shares and fulfills the requirements stipulated in this Law and implementing regulations. Limited liability company is an independent legal subject known as an artificial person (kunsmatige rechtspersoon) because the company does not have a physical body or human-like mind so that the existence and validity of a company is not threatened by death, bankruptcy, replacement or resignation of individuals from owners or shareholders because the company is a separate and distinct entity from its owner or shareholder [M. Yahya Harahap, \(2011\)](#).

The Company in carrying out its functions represented by a director. According to Article 1 number 5 of Law No. 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as "ICL"), the Board of Directors is a Company Organ that is authorized and fully responsible for the management of the Company. by the aims and objectives of the Company and represent the Company both inside and outside the court by the provisions of the articles of association. Therefore the directors carry out very broad duties and responsibilities in carrying out the management of the company on the daily basis.

Directors in carrying out their duties and responsibilities are required to carry out management by the aims and objectives of the company as stipulated in the Company's Articles of Association as well as policies deemed appropriate by the directors based on applicable laws and regulations and carry out the management of the company in good faith (bonafide) and full responsibility. The directors in carrying out their management must also be based on trust because the directors are the trustees of a company, so naturally, the directors must act in good faith in carrying out their duties because the assets and wealth of the shareholders are entrusted in such a way to the Directors so that they are managed and not used. for personal gain, but for the benefit of the Company.

Such enormous capacity and responsibilities place an extraordinary burden on the directors in carrying out their duties, whereas the provisions of Article 97 paragraph (3), and Article 97 paragraph (6) of the Limited Liability Company Law states that "a director is personally liable for the company's losses if the person concerned is guilty or negligent in carrying out his duties and a director may be personally sued by the shareholder as a result of his negligence or mistake in carrying out the management of the company which causes the company to suffer losses". This certainly emits fear for Directors and hinders them in making important decisions for the Company. Essentially in carrying out their duties, Directors are always faced with uncertain so that fear of threats to the director's personal liability is one of the factors that reduces performance. This condition will harm not only the Company but also the state, bearing in mind that previous companies in Indonesia contributed to the development of the national economy.

Black's Law Dictionary defines business judgment rule (hereinafter referred as "BJR") as "the presumption that in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and the honest belief that their actions are in the corporation's best interest" [St. Paul, \(2004\)](#). Both in Indonesia and its original legal system (Common Law), BJR applies as an immunity doctrine for directors in making business decisions in various criminal cases. Mentioned by Lori McMillan in the Business Judgment Rule as an Immunity Doctrine, this practice has long been implemented in several US court jurisdictions with the principle known as Presumption in favor of the board or business judgment presumption [Qurani Hamalatul, \(2021\)](#). There are several similar studies, the first being [Robin Panjaitan, \(2021\)](#), entitled "the application of the principle of the business judgment rule to directors who make policies that are detrimental to the company" where the research results show that the application of the Business Judgment Rule provides legal protection for directors and company officials from being held

accountable for any policies or business decisions or transactions that result in losses for the company, as long as the policies or business decisions or transactions are carried out in good faith, with full caution, and within the scope of responsibility and authority. The second is Santosa, (2020), entitled "criminal responsibility of state-owned directors who are losing money, should they?" where the results of his research that in every business activity carried out by corporations including BUMN are no exception, they are often faced with the problem of losses in one of their business transaction activities.

Indonesian law recognizes the BJR as a legal science doctrine that provides legal immunity for directors in carrying out their duties and responsibilities in managing the company as stated in the provisions of article 97 paragraph (5) of the ICL, which states that "members of the Board of Directors are not personally liable for the losses. If that the loss was not due to fault (schuld) or negligence (culpa), the decision was taken in good faith and for the benefit and by the aims and objectives of the Company, the decision doesn't involve director personal interest (conflict of interest) either directly or indirectly for management actions that result in losses; and they has taken action to prevent the loss from arising or continuing . However the application of BJR in the Supreme Court Decision Number 121K/PID.SUS/2020 creates ambiguity where the Panel of Judges in their legal considerations doesn't fully describe the fulfillment of all elements of the BJR as mentioned in Article 97 paragraph (5) even though these provisions are cumulative and only can be applied if all the criteria has fulfilled, thus the Supreme Court Verdict Number 121K/PID.SUS/2020 has created ambiguity in the application of the BJR doctrine in Indonesia, thus this research mainly formulated to analyze the dilemma of applying BJR in the Supreme Court Verdict Number 121K/PID.SUS/2020.

## **II. METHOD**

This research uses normative-empiric research, the legal research process conducted to bring a new argumentation, theory, concept as the prescription to answer the legal issues by studying and analyzing the legislation stipulations, verdicts, and other legal materials. In the context of normative-empiric research, this research is conducted to analyze the written law from such various aspects as theory, history, philosophy, comparison, structure and composition, scope and material, consistency, general explanation, and article by article, formality, and binding power of law, and mainly the Supreme Court Verdict Number 121K/PID.SUS/2020.

In line with the aims of the research, this research uses three approaches. The first is theoretical approach which is used to analyze the views and doctrines developing in legal science from the opinions of legal experts and theory specifically the legal norms of BJR. The second is statute approach which is used with activities of verification, classification of legal product in the form of legislation regulation which can hopefully take the basic principles of the legal issue substance in case of the understanding of BJR. The legislation regulation used in this research solely based on ICL. The third is case approach (kasuastik) which is used to study and analyzing the verdicts which are then abstracted and formulated to be a concept as an answer for the legal issues to be answered in this research. The verdict used in this research is The Supreme Court Verdict Number 121K/PID.SUS/2020.

## **III. RESULT AND DISCUSSION**

### ***BJR Doctrine in United States, Canada, & Indonesia.***

The legal doctrine of the Business Judgment Rule originates from the common law system which is a derivative of Corporate Law in the United States. In its application, this doctrine prevents courts in America from questioning business decision-making by Directors taken in good faith, in the sense that the directors of a company are not responsible for losses arising from an act of decision-making if the actions of the directors are based on good faith and prudentially Simbolon, (2018). Thus BJR originated from the United States

[Dennis J. Block, Nancy R. Barton, \(1990\)](#) whereas one of the corporate law experts in the United States,

Dennis J. Block, stated the reasons for the need for this doctrine. Block stated the three basic ideas of the BJR doctrine are:

- a) Recognizing the existence of human error (acknowledgment of human error);
- b) Recognizing the existence of risks in making business decisions (acknowledgment of risk in the business decision(s)); and
- c) Emphasizing that the court is not trapped in complex company and management decision-making and trapped in a second guess which the court itself is not ready to do.

Branson expressly conveys three fundamental aspects of the BJR, firstly as protection which supports the actions of management (in this case the directors) who have good intentions, secondly, in the litigation process, the BJR is a means of protection for directors, so that the courts are not mired in repeating decisions that are inherently subjective and unsuitable for judges, because judges are not business people, and the third is the business judgment rule as an implementation of economic policy which requires directors to innovate and take risks based on sufficient information [Douglas M, \(2012\)](#).

Weinberger, based on his research on United States court decisions, said that in several cases the Court did not have the authority to adjudicate business decisions compared to businessmen (have no authority to adjudicate the business decision made by the businessman), because the Judge himself is not a businessman. Weinberger also added that the Court itself acknowledged that the existence of a business judgment rule was useful in encouraging business risk-taking as well as respecting the business structure [Weinberger, \(2010\)](#).

Sharfman stated the BJR can only be classified as a defense after a decision has already been made by a BoD and not in any other circumstances. The doctrine revolves around a single principle that designates judges as inferior to BoD in terms of determining what is the best corporate decision in a given context. As a result of this designation, judges are required to respect BoD decisions and should refrain from reviewing any substantive decisions which are made by BoD [Bernard, \(2017\)](#).

Sharfman's opinion was also expressed by a United States Judge in one of the cases that was quite famous in the United States at that time, namely the case of "Dodge vs Ford Motor Co." wherein in its legal considerations, the Michigan Supreme Court was of the opinion that Judges are not business experts, thus lack the relevant qualities needed in order to undertake processes of corporate decision making".

The development of the BJR doctrine made American company law divide the BJR into 2 (two) concepts, namely the standard of liability and the abstention doctrine. Robert J. Rhee defines the concept of standard of liability as a theory in which the company acts for and on behalf of the shareholders so that the board of directors is only an agent who realizes this goal, in full in his journal it stated as follows: Standard of liability derives from shareholder primacy theory, which states that corporations primarily operate in the interests of shareholder profit and that a BoD is simply employed as an agent in order to realize this purpose" [Robert, \(2018\)](#).

Bainbridge said that the theory of abstention doctrine is rooted in the idea that the board of directors has power and rights in making decisions so that the board of directors is not merely an agent of the company, explained in full by Bainbridge as follows "This trend is rooted in direct primacy theory, which states that BoD have power and rights in relation to corporate decision making and are not mere agents of shareholder." . Under this school of thought, the rule forbids courts from reviewing the substantive merits of the honest business judgments of BoD, unless certain review conditions are fulfilled (e.g., there are indications of fraud, illegality or conflicts of interest, etc) .

Mc Millian states at their core, these two schools of thought are ultimately the same, specifically, they address a balance between authority and accountability during corporate decision-making processes. In terms of this idea, the business judgment rule aims to strike a balance between a BoD's need to exercise its authority when operating a business, while



simultaneously holding it accountable in order to prevent any deviations from the main purposes and objectives of corporations.”

The two concepts of thought have similarities in terms of enforcing the presumption of non-review where the court has no right to deepen decisions taken by the board of directors unless there are elements of fraud, fraud, and conflict of interest in them, and the second is the burden of proof. Imposed on the plaintiff to prove the decision contains elements of fraud, conflict of interest, and illegality .

Canada itself has also adopted the BJR doctrine whose application rests on the “duties of care” and “fiduciary duties” of the Director. The Delaware Supreme Court in America in the case of *Arranson v Lewis* in 1984 defined the BJR doctrine as a presumption that in making a business decision, the company's directors act on an informed basis, in good faith, and with a sincere belief that the actions taken are in the best interests of the company. If there is no abuse of discretion, the decision will be respected by the Court. The burden is on the party challenging the decision to establish facts that disprove the presumption.

Canadian Company Law recognizes the complexity of a company's business and its conduct respects business decisions made by directors who are deemed to have the necessary skill and integrity to act reasonably and recognizes the limitations and lack of expertise of courts to review directors' business decisions. This recognition was confirmed in the case of “*Maple Leaf Foods v Schneider Corp*” in 1998 which was cited by the Supreme Court in the decision of the case “*Keer v Danier Leather Inc*” which in its consideration the Panel of Judges stated the following: ‘The court must be satisfied that the director has acted reasonably and honestly. The court wants to see that management is making a reasonable business decision, not a perfect decision. As long as the director has selected one of the reasonable decision alternatives, the board of directors' business decision must be respected [Vasudev, \(2014\)](#) .

Supreme Court of Canada in the case of “*Peoples Department Stores Inc. (Trustee of) v. Wise*” in 2004 expanded the interpretation of the BJR doctrine which states that the Court refuses to make a second guess on the business judgment made by the director when the decision in question is within a reasonable territory, acts prudently and based on sufficient information. Considerations given by the Supreme Court of Canada expressly stated the following.

‘Directors and officers will not be deemed to have violated the duty of care under s 122(1) (b) of the CBCA if they act with care and based on reasonable information. The decisions they make must be reasonable business decisions taking into account all the circumstances that the directors or officers know or should know. In determining whether the board of directors has acted in a manner that violates its duty of care, it is necessary to reiterate that perfectionism is not required. Courts are incompatible and must reject the guesswork of applying business expertise to the judgments involved in making corporate decisions, but courts are able, based on the facts of each case, to determine whether the degree of caution in decision-making achieves what is claimed to be a reasonable business decision at the time. The decision was made.

The application of the BJR doctrine in Canada lies on the fiduciary duty of the director which is measured in good faith for the best interests of the company. The Supreme Court of Canada, still in the same decision, also conveyed the importance of the director's fiduciary duty in running a company, which is as follows:

‘Fiduciary duties under the law oblige directors and officers to act honestly and in good faith before the company. They must honor the trust and confidence that has been placed in them to manage the company's assets in pursuit of the realization of the company's goals. They must avoid conflicts of interest with the company. They must avoid abusing their position for personal gain. They must maintain the confidentiality of the information they obtain under their position. Directors and officers must serve the company selflessly, honestly, and loyally.’

Before the ICL was amended, it did not adopt the principle of BJR. This creates a gap where companies are risk-takers who aim to make a profit and directors are the spearhead

of the company in making business decisions that are often speculative with a tendency to suffer losses [Nasution, \(2019\)](#). This interest creates an urgency for a standard of accountability in making business decisions which assesses whether the decision is taken by procedures and in the interests of the company or whether business decisions are taken for the benefit of the Directors themselves, therefore ICL adopts BJR doctrine

This doctrine teaches that loss is seen as a risk inherent in business decisions. The Board of Directors as the management of the company is always required to always deal with the risk of loss and manage this risk, therefore this doctrine teaches the standard of responsibility of the Board of Directors not solely on the company's losses, but the main thing is the actions of the Board of Directors in making business decisions and carrying them out. These norms are then concretized in the original provisions 97 paragraph (5) and article 114 paragraph (4) UUPT, but in this paper, the researcher will only discuss in depth the provisions of article 97 paragraph (5), while these provisions are as follows

“(5) Members of the Board of Directors cannot be held accountable for the losses referred to in paragraph (3) if they can prove:

- a) the loss was not due to his fault or negligence;
- b) has conducted management in good faith and prudence for the benefit and by the aims and objectives of the Company;
- c) does not have a conflict of interest, either directly or indirectly, over management actions that result in losses; and
- d) Have taken action to prevent the loss from arising or continuing.”

There are comparison of BJR norms in the ICL and the BJR in United States namely the following:

a. Regarding the initial presumptions adopted in the ICL it is stated that each member of the BoD is personally responsible for the loss of the PT if the person concerned is guilty or negligent in carrying out his duties , this is different from that adopted by the business judgment rule doctrine, namely decision directors must be suspected by legal provisions and good faith until the plaintiff can prove otherwise [Stephen, \(2013\)](#).

b. Regarding the burden of proof, ICL adheres to the norm that Members of the BoD cannot be held responsible for losses as referred to in paragraph (3) if they can prove the elements in Article 97 paragraph (5) UUPT, this is different from the view of business the judgment rule which states that the burden of proof lies with the plaintiff, in which case the plaintiff can prove that the decision of the directors contains matters that are contrary to law (illegality), fraud and conflict of interest, then the relevant directors will not get protection from this doctrine [Kristanto, \(2010\)](#).

c. Regarding flexibility, the UUPT mandates that protection for directors is only given if all provisions in article 97 paragraph (5) UUPT are cumulatively fulfilled , this is different from what is intended in the business judgment rule doctrine which only relies on fiduciary duties.

Differences in the UUPT norms and the Business Judgment Rule doctrine in the United States are not seen as significant differences because these doctrines have similarities in the principle of protecting the Board of Directors who have good intentions and carry out their fiduciary duties.

### **3.2 BJR Application in Supreme Court Verdict Number 121K/PID.SUS/2020.T**

Karen Agustawan is the former Main Director of PT Pertamina who was charged with committing a criminal act of corruption by accepting offers from Citi Group regarding Participating Interest investments that had not gone through Due Diligence and risk analysis which resulted in a loss to the State's finances of IDR 568,066,000,000 (five hundred sixty-eight billion sixty-six million rupiahs) as stated in the calculation of the State financial report from the Public Accounting Firm Drs Soewarno, S.Ak.

The chronology of this case began on January 29, 2009, where Ferederick ST Siahaan as Finance Director of PT Pertamina (Persero) for the 2006-2010 period received an quotation letter from Citibank Indonesia regarding Confidential Participation in a Project which without

prior discussion with the Managing Director of PT Pertamina and the directors others Karen (incasu defendant) immediately forwarded the offer to Ir Bayu Kristanto and R Gunung Sardjono Hadi who then wrote a reply letter to Citi Group stating that PT Pertamina was interested in ROC Ltd's offer which was later declared shortlisted/qualified. To study the offers from ROC Ltd, an Internal and External team (PT Delloite Konsultan Indonesia) was formed as financial advisors. There are obstacles in the implementation of due diligence on ROC Ltd where ROC Ltd does not provide the necessary data such as:

- A. Quality of earnings in the form of operating costs including administrative costs and employee costs;
- B. Cash flow from 2007 to 2009;
- C. Working capital in the form of operational costs from 2007 to 2009;
- D. Capital costs from 2007 to 2009; and
- E. Accounting policies.

This causes a lack of description regarding ROC Ltd company, thus the Director of Finance (Ferefederick ST Siahaan) together with Ir Bayu Kristanto and the technical team went to Australia to find out more about ROC LTD and signed a Confidentiality Agreement so that Pertamina could access and obtain all the documents or data needed;

March 18, 2009, Ir Bayu Kristanto made a presentation before the Upstream Oil and Gas Business Portfolio Development and Management Team (TP3UH) and explained the general description of the investment in the acquisition of the BMG Block in Australia even though there was no due diligence result yet. TP3UH then concluded to continue the process and TP3UH reported the conclusions of the presentation to Karen as the Director;

April 19, 2009, Karen as the main director together with Ferefederick ST Siahaan as the Finance Director held a meeting with the other PT Pertamina directors consisting of Oemar Anwar, Rukmini Hardihartini as the Refining director, Faisal as the Marketing Director and in the meeting it was concluded that the Director of PT Pertamina agreed to acquire the BMG block. Furthermore, PT Pertamina's Board of Commissioners consisting of Sutanto, Umar Said, Maizar Rahman, Sumarsono Gita Irawan Wirjana, and Humayan Boscha also decided in their meeting that they approved the Board of Director's proposal to participate in bidding in the Non-Routine Diamond Project investment project (BMG Block).

Using memorandum dated 22 April 2009, Karen applied for approval of the acquisition to the BoC by the provisions of article 11 paragraph 8 letter C of Pertamina's Articles of Association and was approved by the BoC through a memorandum dated 30 April 2009 which principally approved the proposal of the Directors to bid on the Diamond project. Karen acquired 10% Participating Interest (PI) of the BMG Block with an offer of US\$30,000,000 (thirty million USD) which Ferefederick ST Siahaan as Finance Director of PT Pertamina based on power of attorney dated May 27 2009 representing the company to sign a Sale Purchase Agreement (SPA) 10% Participating Interest (PI) with the approval of the Board of Commissioners of PT Pertamina Hulu Energi.

The BoC of PT Pertamina then believes that the reserves and production of the assets of the BMG Block Participating Interest are relatively small so they do not support the strategy of increasing PT Pertamina's oil reserves and production. and then thanked the directors that the bidding had been successful, but the other party did not approve the purchase of the Participating Interest.

On August 20, 2020, ROC Ltd as the operator of the BMG Block stopped production (non-production phase) because the replacement of spare parts that had to be done was estimated to be greater than the production costs (revenue) so ROC Ltd felt uneconomical, PT Pertamina Hulu Energi certainly did not agree with this action, but with a 10% stake, PT Pertamina Hulu Energi must follow the decision of the majority shareholder. The problem arises here, namely PT Pertamina Hulu Energi must pay operational obligations to the Australian BMG Block until 2012 by the Sale Purchase Agreement (SPA) of PT Pertamina Hulu Energi with ROC Ltd so that PT Pertamina Hulu Energi suffers a loss of AUD 35,189,996.

Judex Factie at the Central Jakarta District Court Number 15/Pid.Sus/TPH/2019/PN JKT.Pst dated 10 June 2019 with its decision stating that Karen Agustiawan has been legally and convincingly proven guilty of committing the crime of corruption jointly as charged in the subsidiary indictment, Judex Factie at the Central Jakarta High Court No. 34/Pid.Sus-TPK/2019/PT.DKI with his ruling stated that it upheld the decision of the Corruption Crime Court at the Central Jakarta District Court Number 15/Pid.Sus/TPK /2019/PN Jkt.Pst dated 10 June 2019, but Judex Juris in the Supreme Court Verdict No. 121K/Pid.sus/2020 stated that Karen Agustiawan was proven to have committed the act as charged by the public prosecutor but it was not a crime, and therefore declared Karen Agustiawan is free from all lawsuits (ontslag van alle rechtsvervolging) based on the legal consideration below:

- a) The "loss" experienced by PT Pertamina Hulu Energi was an impairment, namely a corporate action in the form of a decrease in asset values that were fluctuating in nature and was not a real cooperative loss.
- b) That what PT Pertamina Hulu Energi experienced was a fluctuating impairment in the bookkeeping/recording according to financial accounting standards.
- c) Whereas the reason for the public prosecutor's cassation cannot be justified because of the severity of the sentence is the authority of a judex factie and additional penalties are not imposed on the Defendant because the losses suffered by PT Pertamina Hulu Energi as a subsidiary of PT Pertamina (Persero) are not real state financial losses (is only a fluctuating decrease in value) and as the decision of the Constitutional Court Number 01/PHPU-Pres/XVII2019 dated June 27 2019 has stated that "the participation and placement of SOE capital in SOE subsidiaries does not turn a subsidiary into a SOE ;
- d) That the finances of SOE subsidiaries do not include state finances as referred to in the Constitutional Court decision Number 01/PHPU-Pres/XVII/2019 so that the losses suffered by PT Pertamina Hulu Energi as a subsidiary of PT Pertamina (Persero) are not losses to the state's finances because PT Pertamina Hulu Energi as a subsidiary of PT Pertamina Hulu Energi is not subject to Law No. 17 of 2009 concerning State Finance and Law number 19 of 2003 concerning SOE.
- e) Regarding the Commissioner's Permit and Approval, the Defendant (incasu Karen Agustiawan) had received bidding permission and approval through the Board of Commissioners' Memorandum dated April 30 2019, but the day after signing the Sale Purchase Agreement on May 27 2009, the Board of Commissioners showed an ambiguous attitude .
- f) That there is a fact (notoire feiten) that oil companies (Oil Companies) are full of risks because there are no definite parameters to determine the success or failure of an exploration so that what happens in the Australian BMG block as experienced by all world oil and gas companies is something that it's common that the no risk, no business adage applies more clearly .
- g) That what was done by the defendant (incasu Karen Agustiawan) along with other PT Pertamina Directors was solely in the context of developing PT Pertamina namely trying to increase oil and gas reserves so that the steps taken by the Defendant as the Main Director of PT Pertamina and Main Commissioner of PT Pertamina Hulu Energy does not depart from the realm of the Business Judgment Rule, characterized by the absence of elements of fraud, conflict of interest, tort and intentional mistakes.

### **3.3 The Ambiguity of Applying BJR in the Supreme Court Verdict Number 121K/PID.SUS/2020**

Based on the facts contained in the verdict, the researcher believes that in determining whether the business judgment rule doctrine applicable, it must be assessed based on the provisions of article 97 paragraph (5) of the ICL which are the following:

#### **3.3.1 Fulfillment of the "The loss was not due to his fault or negligence" Criteria.**

Business is unpredictable, a business decision often turns out of control and out of planning, so the Directors in this case are like blindfolded people . The Fulfillment of this



criterion places great emphasis on the decision-making "process" by the board of directors, whether the decision is prepared and taken based on internal procedures, business standards, research, or leading expert opinion or the decision is taken recklessly without any preparation. If the decision is carefully prepared but results in a loss, the relevant directors cannot be held accountable.

Prof Dr. Bismar Nasution, S.H, M.H stated that a business decision must be taken rationally. The measure of rationality here can refer to what actions other directors will take if faced with the same conditions and situations . Prof. Bismar also provided several actions that can be taken by the Board of Directors in measuring the rationality of a decision, namely:

- a) Obtained sufficient information regarding management policies or decisions to be taken;
- b) Agenda and supporting documents regarding management aspects and business decisions must be available along the decision-making process;
- c) Express questions or statements with an impartial mind in the decision-making process;
- d) Make records and documents about their participation in the decision-making process; and
- e) Establish a committee/team to ensure essential matters relating to the decisions and have been examined by experts in the field in terms that cannot be handled or understood by management

The Panel of Judges in the Supreme Court decision didn't explicitly elucidate the fulfillment of these criteria, so the Researchers believe that the Panel of Judges should have elucidate the fulfillment of these elements explicitly considering that the application of the provisions of Article 97 paragraph (5) is cumulative. Factually, the researchers believes that the act of forming an internal and external team, namely the appointment of PT Delloite Konsultan Indonesia as a financial advisor and Baker McKenzie Sydney as a legal advisor to carry out an in-depth study of the offer can be classified as a prudential act to be well-informed. The researcher also assessed that, although several documents were not provided by ROC Ltd, efforts to obtain clear information on ROC Ltd continued by the signing of a Confidentiality Agreement so that PT Pertamina Hulu Energi could access important documents of ROC Ltd.

The Defendant (incasu Karen Agustiawan) did not immediately take the offer without reviewing it, but the Defendant (incasu Karen Agustiawan) carried out a follow-up study with the Upstream Oil and Gas Business Portfolio Development and Management Team as stated in the legal considerations, thus The Researcher assessed that the criteria for information readiness that the panel of judges considered were incomplete by not elucidate the fulfillment of this element.

### **3.3.2 Fulfillment of "Has Implemented Management in Good Faith and In Accordance with the Purpose and Objectives of the Company" Criteria.**

Brian A Garner defines bad faith as the opposite of good faith, generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or contractual obligation, not prompted by an honest mistake as to one's right or duties but by some interested or sinister motive.

Satre states that to be sure, one who practices bad faith is hiding a displeasing truth or presenting as truth a pleasing untruth. Bad faith then has in appearance the structure of falsehood. Only what changes everything is the fact that bad faith it is from myself that I am hiding the truth [Jean-Paul Sartre, \(1992\)](#).

Good faith (*geode trouw*) in the Indonesian legal system is divided into "subjective good faith" and "objective good faith". Subjective good faith is interpreted as a subjective state of mind that doesn't know or has no knowledge of certain information or events. Objective good faith is interpreted as a norm to behave by decency and decency (*redelijkheid en billijkheid*). Siti Ismijati Jenie said that *redelijkheid* is everything that can be accepted and understood by

human common sense (ratio), while *bilijkheid* is interpreted as what is considered polite and proper in the eyes of society, so that good faith is interpreted as everything good that can be captured with ratio and decency [Siti Ismijati Jenie, \(2007\)](#).

The Panel of Judges in the verdict did not elucidate in detail the "good faith" exercised by the Defendant (*incasu* Karen Agustiawan), however, the Researchers believe that these criteria have been fulfilled through the decision to Acquisition of the BMG Block which was carried out not containing an element of deception, the decision process was align with PT Pertamina Hulu Energi's Article of Association and the decision was made solely to increase PT Pertamina Hulu Energi's oil and gas reserves so that the application of the good faith criteria in this decision was appropriate even though it was not further elaborated by the Panel of Judges.

### **3.3.3 Fulfillment of "No Conflict of Interest" Criteria.**

Conflicts of interest are closely related to the principle of duty of loyalty, the principle of no conflict of interest, and the principle of corporate opportunity which states that directors shall not use company assets for their gain causing harm to the company; or use important company information for personal gain; or use the position of directors to obtain personal interests, or take profits or company profits and use them for personal gain; or directors are prohibited from being competitors or competing with the company, the obligation to ensure that members of the board of directors do not have a personal interest in decisions or implementation of business decisions and prioritizing business opportunities for the company rather than personal or family profit opportunities or other parties. Therefore the Board of Directors must guarantee that there is no conflict of interest to ensure that decisions are taken and the management of the company is solely in the best interest of the company.

The Panel of Judges didn't elucidate the elements of "no conflict of interest" carried out by the Defendant (*incasu* Karen Agustiawan), however, the Researchers believe that this criterion is appropriate as a criterion for applying the business judgment rule by the provisions of Article 97 paragraph (5) UUPT which was proven through Decision No. 15/Pid.Sus-TPK/2019/PN Jkt.Pst The panel of Judges stated that Karen was only proven to have violated a subsidiary charge and not the primary charge because, from the evidence and witnesses presented in the trial process, Karen was deemed to have abused her authority as referred to in paragraph (3) of the Corruption Law. Therefore, based on the facts at trial as well as the decision of the first instance and appeal, it was not proven that Karen enjoyed the crime money as charged by the public prosecutor in the primary indictment, but the High Court Judges considered that Karen had abused her authority as stated in Decision Number 34/Pid.sus- TPK/2019/PT.DKI is as follows

"Whereas the result of misusing the rules outlined in the company (PT. Pertamina) resulted in losses to the state and benefited Anzon Australia as a subsidiary of the ROC Oil Company (ROC Oil) in the amount of Rp. 586,066,000,000 (five hundred eighty-six billion sixty-six million Rupiah)."

### **3.3.4 Fulfillment of "Have taken action to prevent the loss from arising or continuing" Criteria**

The fact was obtained that, the Panel of Judges didn't elucidate the preventive measures taken by the Defendant however, the researcher believes that this criterion has been fulfilled through PT Pertamina Hulu Energi's action in refusing ROC Ltd to stop production (non-production phase (NPP)), the reason this action can be classified as an effort to stop continuing losses is the shown effort of PT Pertamina Hulu Energi to stop ROC Ltd decision on entering the NPP phase which factually will causes damage to PT. Pertamina Hulu Energi, but because PT Pertamina Hulu Energi is a minority shareholder, PT Pertamina Hulu

Energi must submit to the decision of the majority shareholder which stated in the decision as the following:

“On August 20 2010 ROC Ltd as the operator of the BMG Block stopped production (Non-Production Phase -NPP-) because the replacement of spare parts that had to be done was estimated to be greater than the production revenue (Revenue) so that it is no longer economical. Even though they do not agree to the Non-Production Phase (NPP) because the shares which are only 10% make PT Pertamina Hulu Energi have to follow the decision of the majority shareholder (voting) so that PT Pertamina Hulu Energi (PHE) does not gain profit besides having to pay operational cost obligations (cash call). ) from the BMG Australia Block until 2012 according to the Sale Purchase Agreement between PT Pertamina Hulu Energi and ROC Ltd so that PT Pertamina Hulu Energi (PT PQHE) suffered a "loss" of AUD 35,189,996 (thirty-five million one hundred eighty-nine thousand nine hundred and nine twenty-six Australian dollars).”

The researcher argues that the act of refusal can be categorized as an action to prevent ongoing losses, even though in the end PT Pertamina Hulu Energi must submit to the decision of the majority shareholder. The researcher also said that PT Pertamina Hulu Energi could not cancel the contract (contract annulment) considering that doing so would potentially occur a new legal dispute and could cause further losses for PT Pertamina Hulu Energi.

Based on the fact mention above, materially the defendant action has fulfilled the whole criteria of BJR as stipulated on article 97 section 5 of the ICL, but theoretically those criteria works cumulatively, which in legal terminology cumulative means the whole requirement of an article needs to be fulfill in order for the article to be applicable.

The Supreme Court Verdict Number 121K/PID.SUS/2020 surely created a dilemma, whereas the Judges didn't elucidate the fulfillment of the “well informed” and “has taken action to prevent loss from occurring or continuing”, this created a conflict between theory and practice. By theory, the defendant should be guilty and BJR can't be apply in aquo verdict, this statement is based on criteria of BJR as stipulated on article 97 section 5 of the ICL which works cumulatively, which in legal terminology cumulative means the whole requirement of an article needs to be fulfill in order for the article to be applicable. By practice, the defendant action has fulfilled the whole criteria of criteria of BJR, even though the Judge didn't elucidate the whole criteria.

The Researcher in this case believes that BJR can be applied in this case even though the the Judge didn't elucidate the whole criteria, the researcher argument is based on Good faith (geode trouw) whereas in the Indonesian legal system is divided into “subjective good faith” and “objective good faith”. Subjective good faith is interpreted as a subjective state of mind that doesn't know or has no knowledge of certain information or events. Objective good faith is interpreted as a norm to behave by decency and decency (redelijkheid en bilijkheid). Siti Ismijati Jenie said that redelijkheid is everything that can be accepted and understood by human common sense (ratio), while bilijkheid is interpreted as what is considered polite and proper in the eyes of society, so that good faith is interpreted as everything good that can be captured with ratio and decency. , so it would not be decent and proper for Director who act purely and honestly for the best interest of the company to be punish by the mistakes of the Judge, thus the Researcher believes the fulfillment of the BJR criteria rest on the fact served to the trail and not the consideration of the Judges.

## **CONCLUSION**

The legal considerations of the BJR given by the Panel of Judges in the Verdict were not complete by not considering the criteria of "readiness of information" and "criteria of having taken action to prevent further losses", however the consideration was only in the form of losses experienced by PT Pertamina which were a decrease asset value (impairment), PT Pertamina Hulu Energi is a subsidiary of a BUMN so that the loss to PT Pertamina Hulu Energi is not a state loss, has received permission and approval from the Board of

Commissioners, and the decision is solely in the context of developing PT Pertamina with no elements of fraud, conflict of interest, tort and intentional mistakes.

The Panel of Judges created dilemma and a potential for new legal disputes by not considering the elements of "information readiness" and the element of "having taken action to prevent further losses" committed by the Defendant (incasu Karen Agustiawan) considering that the provisions of Article 97 paragraph (5) of the Company Law are cumulatively, but the facts of the trial proved that the business decisions of the Defendant (incasu Karen Agustiawan) both formally and materially had fulfilled all the criteria for the provisions of Article 97 paragraph (5) UUPT so that the researcher concluded that the BJR doctrine is applicable in the Supreme Court Verdict Number 121K/PID .SUS/2020.

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