Jurnal Bina Mulia Hukum
Volume 8, Number 2, March 2024, P-ISSN: 2528-7273, E-ISSN: 2540-9034
Article Published: 31 March 2024, Publication Page: http://jurnal.fh.unpad.ac.id/index.php/jbmh/issue/archive
DOI: https://doi.org/10.23920/jbmh.v8i2.1487

The Validity of Sale and Purchase of Shares in Relation to Nominee Share Ownership (A Case Study of Decision Number 3041K/PDT/2020 and 765PK/PDT/2020)

Siska Nadia[a]

ABSTRACT

The validity of capital injection into the Company and the existence of the shareholder nominee structure are closely related and directly impact legal actions, such as the sale and purchase of shares in the Company. There have been multiple instances concerning the sale and purchase of shares associated with Nominee Share Ownership, a practice commonly encountered in various sectors in Indonesia. This research will focus on two cases, namely Decision Number 3041 K/PDT/2020 and 765 PK/PDT/2020. In addressing these issues, the author is interested in discussing the decisions related to the Nominee Structure in Acquiring Limited Liability Company Share Capital and the Validity of Sale and Purchase of Shares in Relation to Nominee Share Ownership in Cases. This writing is normative legal research. The results of the research show that in the Case based on the Decision discussed, the Sale and Purchase of Shares related to Nominee Share Ownership is invalid and is a form of illegal action because it is contrary to the provisions of Article 48 paragraph (1) of the Company Law that the company must be issued in the name of the actual owner. However, the regulation in Company Law itself does not have an explicit prohibition on the nominee structure of shareholders. The nominee structure as an agreement is only valid and binding for the two parties making the agreement and is not binding on third parties, including not binding on the Company that issued the shares.

Keywords: nominee shareholder; share ownership; sale and purchase of share.

INTRODUCTION

In the definition of a Limited Liability Company ("**PT**") as outlined in Law Number 40 of 2007 on the Limited Liability Company as amended by Government Regulation in lieu of Law Number 2 of 2022 on the Job Creation ("**Company Law**"), it is stated that the capital of a PT comprises exclusively of shares. From this statement, it is implied that the capital of a PT is obtained through the issuance of shares. Similarly, there is a distinction between the understanding of capital and shares. In the definition of a PT, capital refers to the amount of money deposited into the company's treasury, which corresponds to the nominal value of its shares. Shareholders who deposit money into the company's treasury will receive proof of capital participation in the form of shares. Thus, it can be interpreted that shares are evidence of capital participation in a company. The parties who contribute capital to a PT are referred to as shareholders who have interests in the respective PT. [1]

PT possesses the characteristic of the interests of shareholders in the company, which are embodied in shares that are transferable. The transfer of shares does not affect the existence of the PT as a legal entity. Company Law regulates that the transfer of rights to shares is conducted through a deed of transfer of rights.

Based on Article 56 of the Company Law, the sale or transfer of shares can be carried out through agreements (such as gift, sale, exchange) or legal provisions (such as inheritance). In the

[a] Master of Economic Law, Faculty of Law Universitas Indonesia, Jl. Salemba Raya No. 4, Jakarta, 10430, email: siskanadiaid@gmail.com.

[1] Agus Sardjono (et.al.), *Pengantar Hukum Dagang*, RajaGrafindo Persada, Depok: 4th Edition, 2018, pp. 85-86.

transfer of shares through agreements, there is a possibility of indications of legal smuggling conducted by shareholders. The term "*perjanjian semu*" (simulated contract) in Dutch is known as "*Schijnhandeling*," which is then found in judicial practice in Indonesia under the judge's consideration as "*ProForma*." [2]

There are differing views among experts regarding the interpretation of the term. Some experts interpret the term "*Schijnhandeling*" as a "simulated act," while others interpret it as a "simulated agreement."[3] One example of legal smuggling concerning an agreement is the appointment of a dummy commissioner (Nominee Commissioner). The role of a Nominee Commissioner in the banking sector includes, among other things, providing approval for the Maximum Credit Limit (*Batas Maksimum Pemberian Kredit* "**BPMK**") because typically, in the banking sector, the provision of credit above a certain amount must be approved first by the commissioner. This is because the articles of association of banks generally grant the authority to approve or assist directors in carrying out certain legal acts to commissioners, as regulated in Article 117 paragraph (1) of Company Law. [4]

Regarding share ownership in a company, in addition to being related to capital contribution into the company, there is a concept that must be carefully considered by notaries in the establishment as well as the transfer of shares. This concept is known as the nominee shareholder structure. In the common law legal system, the concept of ownership of property for and on behalf of another person is referred to as the nominee structure. [5] The nominee structure in a limited liability company involves the utilization of an individual, typically an Indonesian citizen, as the legal owner of shares, while in fact, the shares are controlled by other investors, usually foreign nationals. This is aimed at circumventing regulations concerning the establishment of companies involving foreign capital. From a regulatory perspective, the Law Number 25 of 2007 regarding the Investment as amended by by Government Regulation in lieu of Law Number 2 of 2022 on the Job Creation (hereinafter referred to as the "**Investment Law**") actually prohibits the practice of forming nominee shareholder structures.

In the nominee shareholder structure, the legal registration within the company only reflects the name and identity of the nominee. Meanwhile, the name and identity of the beneficiary do not appear in any form, whether in share certificates, the Company's Shareholder Register, or any other legal documents listing the names of shareholders of the limited liability company. [6]

The validity of capital contribution into the Company and the presence of the nominee shareholder structure would undoubtedly be closely related and directly implicated in legal

---

[2] Selamat Lumban Gaol, "Keabsahan Akta Perjanjian Pengikatan Jual Beli Tanah sebagai Dasar Pembuatan Akta Jual Beli Tanah dalam Rangka Peralihan Hak atas Tanah dan Penyalahgunaan Keadaan (Misbruik Van Omstandigheden)," *Jurnal Ilmiah Hukum Dirgantara*, Vol. 11, No. 1, 2020, pp. 80-103.

[3] Galih Wicaksono, "Notary Liability for the Sale and Purchase of PT GEI Shares Made Unlawfully (Study of Decision Number 188 PK/Pdt/2020)," *Kosmik Hukum*,Vol. 23, No. 2, 2023, pp. 124-136.

[4] Denny Salim, "Aspek Hukum Pertanggungjawaban Komisaris Nominee dalam Perseroan Terbatas atas Tindak pidana yang Dilakukan Perseroan," *Premise Law Journal,* Vol. 8, 2016, pp. 161-648.

[5] Anggreni, (et.al), "Akibat Hukum Pemegang Komparisi Nominee atas Beneficial Owner Saham dalam Perseroan Terbatas," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal),* Vol. 11, No. 4, 2022, pp. 817-842.

[6] Lucky Suryo Wicaksono, "Kepastian Hukum Nominee Agreement Kepemilikan Saham Perseroan Terbatas," *Jurnal Hukum Ius Quia Iustum*, Vol. 23, No. 1, 2016, pp. 42-57.

transactions such as the sale and purchase of shares within the Company. It is known that the sale and purchase of shares are carried out through the drafting of a share purchase agreement. The share purchase agreement indicates that there are two parties involved, where one party acts as the seller, while the other party acts as the buyer of the shares. The share purchase agreement itself is generally regulated in Article 1457 of the Civil Code ("**Civil Code**").

Based on the understanding in the Civil Code, it is known that in a sale and purchase transaction, the seller has an obligation to deliver the goods, and the buyer is obliged to pay the price. Specifically, the sale and purchase of shares can also be referred to as the transfer of rights to shares. The transfer of rights to shares, according to Article 56 paragraph (1) of the Company Law, is conducted through a deed of transfer of rights. Certainly, the transfer of rights to shares using a notarial deed must comply with the applicable regulations. The first step in the process of transferring shares is to request approval from the General Meeting of Shareholders ("**GMS**"), followed by the drafting of a Share Purchase Agreement.

Numerous cases have arisen concerning share purchases related to Nominee Share Ownership; a practice frequently encountered in Indonesian society. This study focuses on two cases. The first case concerns the deposit, ownership, and sale and purchase of shares carried out by a shareholder of a limited liability company, PT BLI. In this case, it was revealed that the seller was somewhat deficient in legal understanding, prompting the transfer of shares to be initiated by a notary and legal consultant. Subsequently, the seller claimed to have never signed any documents related to the sale and purchase of shares, thus accusing the buyer of forging signatures on the share transfer documents. As the case unfolded in court, it was later revealed during the trial, based on the testimonies of both the plaintiffs and defendants, that the shares sold were actually held under a nominee shareholder arrangement, where the true owner of the shares was Defendant 2, MIG, while the Plaintiff, YSO, merely acted as a nominee who had never made any deposits to the company. Consequently, MIG demanded YSO to provide proof of deposit. Meanwhile, Defendant 1, GBA, was the purchaser and also a nominee of MIG in the purchase of YSO's shares. Furthermore, both the Plaintiffs and Defendants stated in court that the documents signed regarding the share transfer and the nominee declaration were initiated by the Notary and Legal Consultant. Therefore, the parties asserted that the Notary and Legal Consultant, as legal experts overseeing the stock transaction process, should be involved in the trial because the Plaintiffs and Defendants had entrusted the stock transaction process to them. Hence, if any legal irregularities occurred, the Notary and Legal Consultant should be held accountable for the problematic deed.

Meanwhile, in the second case, as indicated by Decisions Number 27/Pdt.G/2017/PN.PLK in conjunction with Decision Number 04/Pdt/2018/PT.PLK and Decision Number 840 K/Pdt/2019 in conjunction with Decision Number 765 PK/PDT/2020, which are legal remedies for Judicial Review. In this case, a commissioner and majority shareholder of PT. Kurnia Alam Sejati, Alexander Rostandy, required capital to conduct business operations. Consequently, Alexander Rostandy borrowed the

sum of Rp. 7,000,000,000 (Seven Billion Rupiah) from Yohan Listiyono Suryadi, who is the defendant in this case. Given that Alexander Rostandy lacked access and relationships with banking institutions, he sought Yohan Listiyono Suryadi's assistance in facilitating the loan application process. To secure approval for the loan application from the bank, Yohan Listiyono Suryadi insisted on having priority shares in PT. Kurnia Alam Sejati. Due to Alexander Rostandy's urgent need for capital, Yohan Listiyono Suryadi's proposal to obtain majority shares in PT. Kurnia Alam Sejati was accepted by Alexander Rostandy. However, Alexander Rostandy did not approve of Yohan Listiyono Suryadi's actions, which portrayed him as the majority shareholder and the Chief Commissioner of PT Kurnia Alam Sejati, in convening an Extraordinary General Meeting of Shareholders (RUPSLB). This disagreement formed the basis for Alexander Rostandy's lawsuit against Yohan Listiyono Suryadi.

Based on these issues, the author is intrigued to discuss these cases by analyzing the Nominee Structure in Limited Liability Company Stock Capitalization and the Validity of Sales and Purchase of Shares Related to Nominee Share Ownership in cases based on Decision Number 3041 K/Pdt/2020 and Decision Number 765 PK/PDT/2020.

METHODS

This writing is normative legal research, which refers to research that examines the applicable laws and regulations or those applied to a specific legal issue. Normative research is often also referred to as doctrinal research, where the focus is on legal documents and literature. This research is conducted through Library Research, which involves the collection of secondary data, including Primary Legal Materials that are binding and Secondary Legal Materials that provide explanations about primary legal materials such as books, research literature, and academic works. The data analysis method used is deductive logic, where a general matter is explained and then drawn into more specific conclusions.[7]

DISCUSSION

The Nominee Structure in the Acquisition of Share Capital of a Limited Liability Company

One of the contributions of the equity legal system to the common law system is the emergence of the institution of trust. In the common law system, the institution of trust occurs when the true owner of an asset (the settlor) legally transfers ownership of the asset to someone else (the trustee) to hold the asset in trust for the benefit of another party (the beneficiary) according to the terms set by the settlor. [8] Based on this statement, the institution of trust involves 3 (three) parties: the settlor, the trustee, and the beneficiary. The settlor transfers the actual ownership rights to the trustee appointed in the form of registered ownership (legal owner), and the beneficiary as the recipient of the benefits of the actual ownership of the asset (beneficiary owner). [9]

---

[7] Zainuddin Ali, *Metode Penelitian Hukum*, Sinar Grafika, Jakarta: 2016, p. 22

[8] Paul Michael Gilmour, "Lifting the Veil on Beneficial Ownership: Challenges of Implementing the UK's registers of Beneficial Owners," *Journal of Money Laundering Control,* Vol. 23, No. 4, 2020, pp. 717-734.

[9] Nabila Meiwindita (et.al.), "Kedudukan Beneficial Owner dalam Korporasi Ditinjau dari Aspek Perjanjian dan Hukum Perseroan Terbatas," *Jurnal Sains Sosio Humaniora* Vol. 6, No. 2, 2022, pp. 273-284.

From the explanation provided, there are three parties, each with a distinct role as subjects in the institution of trust: the settlor, who provides the trust declaration; the trustee, who has the authority to transfer, sell, encumber, pledge, and take any action regarding the assets entrusted in the trust institution; and the beneficiary, a third party who receives the enjoyment or benefits of the property rights granted within the trust institution. Although there are three parties involved in the trust institution, it is possible for the settlor to simultaneously act as the beneficiary. After the settlor performs the act of transferring the relevant asset to the trustee, the settlor then becomes the beneficiary, receiving the benefits from the assets managed by the trustee. [10]

One form of manifestation of the trust institution is through the nominee structure. The term 'nominee' refers to a proposal, or nomination of a candidate for a particular position. In another sense, a nominee can also be understood as a person entrusted to do something limited for someone else according to the authority granted. Beneficiaries have the power to control the nominee secretly, so that the nominee only becomes the registered owner on paper, but in reality, the beneficiary is the one who controls, manages, and benefits from the ownership of the assets. [11]

Briefly, the concepts of the nominee structure and power of attorney may appear similar, as both concepts involve parties acting as grantors and recipients of authority. However, upon careful examination, they are fundamentally different. The nominee structure is inherently a bilateral agreement, where each party has obligations to fulfill as outlined in the agreement related to the formation of the nominee structure. [12] On the other hand, the granting of power of attorney is generally a unilateral agreement because it only grants authority to the attorney-in-fact to represent the grantor without any reciprocal performance. Furthermore, in a power of attorney, the grantor may revoke the authority granted, guided by Articles 1813-1819 of the Civil Code. This is distinct from a nominee agreement, where the authority given is intentionally agreed upon not to be unilaterally revoked by the grantor because it is a bilateral agreement.

The legal system in Indonesia does not recognize the concept of nominee originating from the trust institution because the trust institution is fundamentally unknown in the civil law system, as it is only recognized in the common law system.[13] However, in legal practice conducted in Indonesia, agreements forming nominee structures can indeed be found within society. In its development, although the concept of nominee does not originate from the prevailing legal system in Indonesia, namely Civil Law, this concept can still enter and be applied in Indonesia because of Book III of the

[10] Yosephus Mainake, "Aspek Hukum Reksa Dana Kontrak Investasi Kolektif sebagai Trusts," *Law Review,* Vol. XX*,* No. 2, 2020, pp. 246-269.
[11] Suparji, "Politics of Legal in Nominee Agreement and Its Practice in Indonesia," *J. Advanced Res. L. & Econ,* Vol. 11, No. 1, 2020, p. 196.
[12] Xavier Walthoff-Borm (et.al.), "Equity Crowdfunding, Shareholder Structures, and Firm Performance," *Corporate Governance: an International Review,* Vol. 26, No. 5, 2018, pp. 314-330.
[13] Vladimir A. Boldyrev (et.al.), "Analysis of Nominal Holding of Securities and Nominee Service: Legal Constructions for the Service of Capital," *International Transaction Journal of Engineering, Management, & Applied Sciences & Technologies,* Vol. 9, o. 6, 2018, pp. 573-548.

Civil Code which regulates agreements adopting an open system with the principle of freedom to contract. With this open system in place, parties entering into agreements are free to make agreements with any party, determine terms, implementation, and forms of agreements according to the agreement of the parties, with the limitation that what is agreed upon does not contradict the prevailing regulations and norms.[14]

The open system adopted in contract law in Indonesia is known as the principle of freedom of contract. Article 1319 of the Civil Code implies the existence of two types of agreements: agreements with a specific name and agreements not known by any specific name, with the application of an open system and the principle of freedom of contract, Indonesia recognizes 2 (two) types of contracts: Named agreements ("**Nominate Contracts**") and Unnamed agreements ("**Innominate Contracts**").

With the presence of an open system and the principle of freedom of contract in Indonesia as a country adhering to the civil law system, the concept of nominee structure becomes possible to be applied as a form of innominat agreement. The adoption of an open system in contract law in Indonesia can be seen from the provision of Article 1338 paragraph (1) of the Civil Code, which distinguishes the nominee structure known in common law countries from that applied in Indonesia as a civil law country. In countries with a common law legal system, the nominee structure is based on a legal rule originating from the trust institution, so the nominee structure is binding on the parties and third parties. Whereas the nominee structure applied in Indonesia is based on an agreement made possible by the freedom to contract, so the nominee agreement is only binding on the parties who make it and not binding on third parties. This is limited if the agreement forming the nominee structure made by the parties meets the requirements of a valid agreement.

Article 1319 of the Civil Code stipulates that all agreements are subject to the general rules contained in the second and first chapters of Book III of the Civil Code. Therefore, although innominate agreements are not specifically regulated in the Civil Code, in practice, innominate agreements must comply with the principles contained in the Civil Code related to contract law, including the requirement for a valid agreement as stated in Article 1320 of the Civil Code. One of the requirements for a valid agreement is a "valid cause." The provision regarding a valid cause is in accordance with Article 1335 of the Civil Code, which states that if an agreement is made without a cause or with a false or prohibited cause, the agreement will not have legal force.[15]

Legal issues that may arise due to agreements forming a nominee structure can occur when the agreements made by the parties do not meet the requirements for a valid agreement as stipulated in Article 1320 of the Civil Code. If the requirements for a valid agreement are not met, it will result in the nullity of the agreements made by the parties.

---

[14] Henry Aspan (et.al.), "Perjanjian Nominee dalam Praktik Jual Beli Tanah," *Journal of Syntax Literate,* Vol. 8, No .6, 2023, pp. 4042-4049.

[15] I Dewa Agung Dharma Jastrawan dan I Nyoman Suyatna. "Keabsahan Perjanjian Pinjam Nama (Nominee) oleh Warga Negara Asing dalam Penguasaan Hak Milik atas Tanah di Indonesia," *Kertha Semaya: Journal Ilmu Hukum*, Vol. 7, No. 12, 2019, pp. 1-13.

The creation of agreements forming a nominee holder structure entails certain validity and legal consequences within the Company. The validity of agreements forming such nominee structures can affect their enforceability in legal proceedings. This validity consequently impacts the legal consequences arising from the creation of shareholder nominee agreements, as outlined in this subsection. Regarding the structure of shareholder nominee holders, the Company Law stipulates that the ownership of Company shares must be in the name of the actual owner. Thus, shares must be registered in the name of the actual shareholder and cannot be registered under a different shareholder's name who is not the true owner. This aligns with the recognized type of shares under the Company Law, namely registered shares (*op naam*). Although regulated as such, this provision does not directly address shareholder nominee holder structures. Instead, it primarily regulates the issuance of Company shares, mandating that shares must be issued in registered form, with prohibitions against the issuance of bearer shares. This is also related to the explanation provided in Article 48 paragraph (1) of the Company Law.

The Company Law permits joint ownership of shares by multiple individuals, but it requires the appointment of one person as the joint representative. In this context, the position of the beneficiary as the actual owner of the shares held in the name of the nominee differs from the regulation governing the ownership of shares by more than one person. If shares are owned by more than one person, each individual must still be registered as a shareholder in the share certificate and/or the Company's Shareholder Register, as well as other documents listing the names of the Company's shareholders. Subsequently, for joint ownership, one representative must be appointed to exercise representation rights arising from those shares. However, in the structure of shareholder nominee holders, the beneficiary is not recorded as a shareholder of the Company; only the nominee's name is recorded as the Company's shareholder.

Referring to the provisions within the Company Law itself, there is no explicit prohibition regarding the nominee shareholder structure. The nominee structure as an agreement is only valid and binding between the parties who enter into the agreement and does not bind third parties, including the Company issuing the shares. However, upon further examination, the establishment of a Company is not only subject to the provisions of the Company Law but also to the provisions of the Investment Law, especially when a Company involves investment, whether foreign or domestic. The Investment Law explicitly prohibits the practice of nominee shareholder structures.

The Validity of Sale and Purchase of Share Related to Nominee Share Ownership in Cases Based on Decision Number 3041 K/Pdt/2020 and Decision Number 765 PK/PDT/2020

In Decision Number 765 PK/PDT/2020, concerning the case at hand, the Plaintiff claimed to be one of the founders of PT. BLI, as evidenced in Deed Number 39 dated September 6, 2010, executed before Dradjat Darmadji, SH., a Notary in Central Jakarta, which has been approved by the Minister of Law and Human Rights. As previously stated, the Company is a legal entity that is a capital

partnership, established based on an agreement, conducts business activities with its entire capital divided into shares, and complies with the requirements stipulated in Company Law and its implementing regulations. A capital partnership indicates that the primary source of a company is the accumulation of capital, resulting in the formation of a capital association called a limited liability company. Regarding the capital itself, under the Company Law, the company's capital consists of the entire nominal value of shares.

According to Article 33 paragraph (1) of the Company Law, a portion of 25% (twenty-five percent) of the authorized capital must be allocated and fully paid up at the time of establishment. Furthermore, Article 33 paragraph (3) of the Company Law states that if there is additional capital placement, the additional capital must be fully paid up. The term "fully paid up" is a regulation that clearly and explicitly regulates that the essence of acquiring shares in a company is capital payment. Therefore, this regulation is aimed at ensuring that share acquisition is accompanied by full payment. Consequently, there are certain consequences for not fulfilling this full payment requirement. After the establishment deed of the Company is signed, according to Article 7 paragraph (2) of the Company Law, the founders are required to acquire shares in the Company, so that all the allocated capital is indeed paid up in the Company before obtaining the Company's establishment approval from the Minister. [16]

In the establishment deed, the Plaintiff is recorded as holding 108,000 shares or the equivalent of Rp10,800,000,000.00, which constitutes 90% (ninety percent) of the total issued shares of the Company as stated in the Amendment Deed Number 16 dated September 30, 2015, executed before Dewi Sugina Mulyani, S.H., a Notary in North Jakarta. This information has been notified and registered through the Notification Acceptance Letter of Company Data Changes at the Ministry of Law and Human Rights of the Republic of Indonesia Number: AHU-AH.01.03.0970221. Meanwhile, the remaining 10% (ten percent) of the Company's shares are held by the Third Defendant, who also serves as the Director of PT. BLI. With the declaration that in this case, PT. BLI in its establishment deed and amendments has obtained approval and confirmation from the Ministry of Law and Human Rights, it can be concluded that in the process of establishing and amending PT. BLI's deeds, all have gone through the reporting mechanism to the Ministry of Law and Human Rights, where one of the requirements in this reporting process is related to the attachment of proof of payment to the ministry. In this reporting process, unlike the role of a notary in making other agreements, the notary acts as the attorney for the founders and shareholders of the limited liability company. Furthermore, the Notary, as the attorney for the founders and shareholders, submits an application to obtain a legal entity approval decision from the Minister in accordance with the provisions regulated in Minister of Law and Human Rights Regulation Number 4 of 2014 through the SABH (*Sistem Administrasi Badan Hukum*).

The General Provisions of the Company Law require that the capital contribution must be made in full, both for the shares allotted before the Company obtains its approval, and for the shares issued thereafter for capital increases, and must be evidenced by valid proof of payment. The valid proof of

[16] Yahya Harahap, *Hukum Perseroan Terbatas*, Sinar Grafika (Bumi Aksara), Jakarta: 2021, p. 173.

payment for the establishment of a Company is regulated in Article 11 of the Minister of Law and Human Rights Regulation Number 14 of 2014 concerning Procedures for Submission of Legal Entity Approval Requests and Approval of Changes. Regarding capital contributions, this takes the form of the Company's Capital Deposit Receipt, which may consist of deposit slips, expert assessments, or the company's balance sheet. However, for the establishment process, this deposit proof can be replaced by a statement of deposit from the founders. From the aforementioned proof of capital deposit, in practice, it appears that in the limited liability company establishment process through the SABH system, it is possible to only upload a statement of deposit from the founders. This creates a loophole because after uploading the statement of deposit, the approval for the limited liability company is issued.

In this case, the disputed proof of deposit during the establishment should have been further addressed by the Plaintiff. Although in the establishment process, the proof of deposit can be replaced with a statement of capital contribution, in this case, there was a change in the articles of association that altered the capital structure of PT. BLI, namely Amendment Deed Number 16 dated September 30, 2015, executed before Dewi Sugina Mulyani, S.H., a Notary in North Jakarta, and has been notified and registered through the Notification Acceptance Letter of Company Data Changes at the Ministry of Law and Human Rights of the Republic of Indonesia Number: AHU-AH.01.03.0970221. Unlike the requirement for capital contribution at the establishment of PT. BLI, which can be replaced by the use of a statement of capital contribution, in the deed of amendment to the articles of association related to changes in the capital structure, especially regarding capital increases, the submission of such changes to the Ministry of Law and Human Rights must be accompanied by valid proof of payment, either in the form of deposit slips to PT. BLI's account or with PT. BLI's signed balance sheet by the company's director. The Defendant further questions the Plaintiff's failure to elaborate precisely and clearly on how the Plaintiff became a founder or owner of PT. BLI. Shares represent the shareholder's contribution to the company's capital, granting rights to dividends and the remaining proceeds from the company's liquidation, which can only be issued in the owner's name. It is important to note that the rights to these shares remain with the shareholder as the shareholder.

Regarding shares, the Company Law stipulates that the company is only allowed to issue shares in the name of the owner, so the owner of the company's shares is the party whose name is listed on the share certificate and/or Shareholder List (*Daftar Pemegang Saham* or "**DPS**").[17] From the statement above, it can actually be inferred that the ownership of shares by the Plaintiff in PT. BLI can be sufficiently proven by the deed that lists the Plaintiff as the shareholder of PT. BLI and is reinforced by the DPS that registers the Plaintiff's name as the shareholder of PT. BLI. Thus, it can be concluded that the validity of ownership of shares is not only dependent on the proof of deposit at

[17] Kevin Pahlevi (et.al.), "Analisis Yuridis terhadap Penggunaan Saham Pinjam Nama (Nominee Arrangement) Ditinjau dari Peraturan Perundang-undangan di Indonesia," *Diponegoro Law Journal*, Vol. 6, No. 1, 2017, pp. 1-19.

the establishment of the company, but also the registration of shareholders in the DPS is one of the pieces of evidence that strengthens the validity of ownership of shares in the company.

The consideration of the panel of judges at the district court level in Decision Number 259/Pdt.G/2017/PN Jkt Sel. regarding the argument that the Plaintiff owns 90% of the shares in PT. BLI, turned out to be merely a nominal ownership (formality) or pro forma, because based on evidence in the form of a Statement Letter dated by the Plaintiff, it appears that the Plaintiff has acknowledged that indeed he owns 90% of the shares in PT. BLI only to represent Defendant 2, and the actual owner of the shares and the company's commissioner is Defendant 2. This statement letter was made based on an agreement between the Plaintiff and Defendant 2 as evidenced by an email from the Plaintiff to Defendant 2 dated April 15, 2012, at 20:50, so it is clear that the Plaintiff was aware of the plan to change the board of directors of PT. BLI and the Plaintiff has admitted that the shares owned by the Plaintiff actually belong to Defendant 2, and the Plaintiff is willing to do anything for the good of PT. BLI.

The consideration by the judge above is an erroneous opinion because it appears to indirectly endorse the making of a statement declaring that the shares owned by the Plaintiff in PT. BLI actually belong to Defendant 2. This clearly constitutes a statement forming a nominee shareholder structure, which is explicitly prohibited by Article 33 paragraph 1 of the Investment Law and must be declared null and void according to Article 33 paragraph 2 of the Investment Law. This error was then rectified in the decision of the appellate court, which stated that the clear errors of fact (*judex factie*) of the First Instance judge, which were contradictory and confused regarding the legal status of the comparison's share ownership, even ratified the status of shares in the name which is prohibited by the applicable law. With the consideration of the appellate court, the error in the first instance court has been corrected.

The erroneous consideration by the first-instance court did not result in a different decision in the appellate court's decision. Although in its considerations, the panel of judges of the district court seemingly endorsed the statement forming the nominee shareholder structure, in its judgment, the district court rejected the defendant's exception and rejected the plaintiff's claim. Thus, regarding the ownership of shares by the Plaintiff in PT. BLI, overall, the panel of judges did not find evidence to support that the Plaintiff had correctly deposited capital into PT. BLI; however, conversely, the panel of judges also did not find strong evidence to support the exception that the shares of PT. BLI were not validly owned by the Plaintiff. This appellate decision was then upheld at the cassation level in Decision Number 3041 K/PDT/2020.

After concluding that the court still considers the Plaintiff to be entitled to 90% of the shares in PT. BLI, it follows that the authority to transfer ownership of 90% of the shares in PT. BLI lies with the Plaintiff. Therefore, the validity of the sale and purchase of shares between the Plaintiff and Defendant 1 will be analyzed. In this case, the Plaintiff stated that without their knowledge and involvement as a Shareholder and Commissioner of PT. BLI, ownership of the shares and the position of Commissioner of the Company held by the Plaintiff had entirely transferred to Defendant 1. As previously explained, the sale and purchase of shares in a company must go through a lengthy

process. This is unlike the sale and purchase of tangible goods, which is immediate. Thus, to prove their argument regarding the invalidity of the sale and purchase conducted between the Plaintiff and Defendant 1, strong evidence is required to demonstrate flaws in the sale and purchase process so that the transaction can be annulled by the court.

Meanwhile, in Decision Number 765 PK/PDT/2020, the cooperation agreement between Yohan Listiyono and Alexander Rostandy was only registered in the collection of notarial deeds in a notarial deed registry (*waarmerking*). Therefore, since it is registered as a notarial deed, its evidentiary value is not as strong as an authentic deed. This makes the cooperation agreement subject to challenge by either party regarding its authenticity, especially since the signing of the cooperation agreement was not done in the presence of a Notary Public. This differs from legalization, where the signing of the agreement is directly done in the presence of a Public Notary.

In Article 6 of the aforementioned cooperation agreement, it states, "The shares transferred by 65% must be returned to Alexander Rostandy as the actual shareholder, without the knowledge of the Bank. If discovered by the Bank, then PT. Kurnia Alam Sejati (the First Party) and the Second Party are prepared to bear the risk of repaying all loan facilities from the Bank, including any penalty fees incurred." Thus, the shares that have been transferred to Yohan Listiyono must be returned to the actual shareholders, in this context, Alexander Rostandy and other shareholders. Furthermore, if discovered by the bank, the parties are prepared to bear the consequences. Consequently, it can be concluded that this cooperation agreement has a legal flaw in that it is knowingly and intentionally designed to violate the law (unlawful act). The plaintiff's reason for entering into this cooperation is because the plaintiff lacks access and relationships with the Bank, as stated in point 3 of their claim, which, of course, is highly unreasonable considering that the plaintiff possesses several assets in the form of land certificates ready to be used as collateral.

Therefore, there is an indication of an unlawful act regarding the actions taken by the plaintiff and defendant, knowingly and intentionally creating an agreement in which the defendant appears to be the party holding shares in PT. KAS with the intention of deceiving the bank regarding the disbursement of credit funds to PT. KAS. However, the unlawful act stipulated in Article 1365 of the Civil Code regulates the form of compensation to be imposed on the injured party and the person causing the damage. Compensation arises from a fault, not the contract itself. In short, if this agreement causes harm to others (third parties), both civil and criminal unlawful acts can be claimed for damages.

From both cases above, it is evident that the practice of sham transactions, especially concerning shares, occurs due to hidden motives initially known only to the parties involved. This is done, of course, to gain profit for the parties involved until eventually, when issues arise, as in the case of Yohan Listiyono Suryadi and YSO, greed emerges after acquiring the majority of shares, driving them to seek control over all the company's wealth by leveraging their position to alter the management structure of PT. This practice is common in society because as long as each party has

good intentions, it will not cause problems. However, problems arise when sham agreements are motivated by ill intentions, resulting in lengthy and exhausting legal proceedings.

The principle contained in Article 1338 of the Civil Code serves as a safeguard for parties entering into agreements. Agreeing to a contract based on deception or motivated by certain motives is as absurd as a husband trying to annul a marriage contract on the grounds of a sham marriage. Therefore, a false condition or deception in international civil law is known as "legal smuggling," which is never based on good faith towards the agreement, and the parties involved are obligated to bear the resulting legal risks. Additionally, in practice, one party often exploits the courts as an avenue for proving disputes between the parties.

CLOSING

In Company Law, there is no explicit prohibition concerning the structure of nominee shareholders. However, in the Investment Law, provisions prohibiting the structure of nominee shareholders are explicitly stated in Article 33, paragraphs (1) and (2). The absence of a clear prohibition has led to the continued occurrence of nominee share transactions, as seen in cases based on Decree Number 3041 K/Pdt/2020 and Decree Number 765 PK/PDT/2020. The panel of judges in these rulings declared that Share Sale Transactions related to Nominee Share Ownership are invalid and constitute an act against the law because they contradict Article 48 paragraph (1) of the COMPANY LAW, which stipulates that companies must issue shares in the name of their true owners. However, in PT. Kurnia Alam Sejati, there was an error in the judge's consideration at the district court level through Decision 259/Pdt.G/2017/PN.Jkt.Sel, which was overturned at the appellate level through Decision Number 04/Pdt/2018/PT.PLK, upheld at the cassation level through Decision Number 765 PK/PDT/2020 jo. 840 K/Pdt/2019, which declared the share sale between the Reconciliation Plaintiff and the Reconciliation Defendant legally valid. On one hand, the ruling made by the district court judge is somewhat inaccurate if solely based on the COMPANY LAW, as the share acquisition by the defendant (Yohan Listiyono) was obtained through a legitimate acquisition referring to COMPANY LAW Article 56, while on the other hand, it does not comply with Article 1338 of the Civil Code.

Based on the cases of Decision Number 3041 K/Pdt/2020 and Decision Number 765 PK/PDT/2020, it is advisable for the Government, law enforcement officials, and academics to interpret the provisions in the COMPANY LAW considered as prohibiting nominee shareholders, namely Article 48 paragraph (1), not as broadly as possible without understanding the intended meaning of the provision. Simply put, in the explanation of Article 48 paragraph (1) Company Law, the intention of the provision is that a company can only issue shares in the name of their rightful owner, and the shares must be recorded accordingly in the company's records. This does not necessarily mean prohibiting the concept of nominee shareholders.

REFERENCES

Book

Agus Sardjono (et.al.), *Pengantar Hukum Dagang*, RajaGrafindo Persada, Depok: 4th Edition, 2018.

Yahya Harahap, *Hukum Perseroan Terbatas*, Sinar Grafika (Bumi Aksara), Jakarta: 2021.

Zainuddin Ali, *Metode Penelitian Hukum*, Sinar Grafika, Jakarta: 2016.

Journal

Anggreni (et.al.), "Akibat Hukum Pemegang Komparisi Nominee atas Beneficial Owner Saham dalam Perseroan Terbatas," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal),* Vol. 11, No. 4, 2022.

Denny Salim, "Aspek Hukum Pertanggungjawaban Komisaris Nominee dalam Perseroan Terbatas atas Tindak pidana yang Dilakukan Perseroan," *Premise Law Journal,* Vol. 8, 2016.

Galih Wicaksono, "Notary Liability for The Sale and Purchase of PT GEI Shares Made Unlawfully (Study of Decision Number 188 PK/Pdt/2020)," *Kosmik Hukum,* Vol. 23, No. 2. 2023.

Henry Aspan (et.al.), "Perjanjian Nominee dalam Praktik Jual Beli Tanah," *Journal of Syntax Literate*, Vol. 8, No. 6, 2023.

I Dewa Agung Dharma Jastrawan dan I Nyoman Suyatna, "Keabsahan Perjanjian Pinjam Nama (Nominee) oleh Warga Negara Asing dalam Penguasaan Hak Milik atas Tanah di Indonesia," *Kertha Semaya: Journal Ilmu Hukum*, Vol. 7, No. 12, 2019.

Kevin Pahlevi (et.al.), "Analisis Yuridis terhadap Penggunaan Saham Pinjam Nama (Nominee Arrangement) Ditinjau dari Peraturan Perundang–undangan di Indonesia," *Diponegoro Law Journal*, Vol. 6, No. 1, 2017.

Lucky Suryo Wicaksono, "Kepastian Hukum Nominee Agreement Kepemilikan Saham Perseroan Terbatas," *Jurnal Hukum Ius Quia Iustum*, Vol. 23, No. 1, 2016

Nabila Meiwindita (et.al.), "Kedudukan Beneficial Owner dalam Korporasi Ditinjau dari Aspek Perjanjian dan Hukum Perseroan Terbatas," *Jurnal Sains Sosio Humaniora* Vol. 6, No. 2, 2022.

Paul Michael Gilmour, "Lifting the Veil on Beneficial Ownership: Challenges of Implementing the UK's registers of Beneficial Owners," *Journal of Money Laundering Control*, Vol. 23, No. 4, 2020.

Selamat Lumban Gaol, "Keabsahan Akta Perjanjian Pengikatan Jual Beli Tanah sebagai Dasar Pembuatan Akta Jual Beli Tanah dalam Rangka Peralihan Hak atas Tanah dan Penyalahgunaan Keadaan (Misbruik Van Omstandigheden)," *Jurnal Ilmiah Hukum Dirgantara*, Vol. 11, No. 1, 2020.

Suparji, "Politics of Legal in Nominee Agreement and Its Practice in Indonesia," *J. Advanced Res. L. & Econ*, Vol. 11, No. 1, 2020.

Vladimir A. Boldyrev (et.al.), "Analysis of Nominal Holding of Securities and Nominee Service: Legal Constructions for the Service of Capital," *International Transaction Journal of Engineering, Management, & Applied Sciences & Technologies*, Vol. 9, No. 6, 2018.

Xavier Walthoff-Borm (et.al.), "Equity Crowdfunding, Shareholder Structures, and Firm Performance," *Corporate Governance: an International Review*, No. 5, Vol. 26, 2018

Yosephus Mainake, "Aspek Hukum Reksa Dana Kontrak Investasi Kolektif sebagai Trusts," *Law Review*, Vol. XX, No. 2, 2020.

Legislation

Indonesia Civil Code (*Burgelijk Wetboek*).

The Constitution of the Republic of Indonesia Year 1945.

Law Number 2 Year 2014 concerning Amendments to Law Number 30 Year 2004 regarding the Notary Positions.

Law Number 25 of 2007 regarding the Investment as amended by by Government Regulation in lieu of Law Number 2 of 2022 on the Job Creation.

Law Number 40 of 2007 on the Limited Liability Company as amended by Government Regulation in lieu of Law Number 2 of 2022 regarding the Job Creation.