

Criminal Aspects Of The Fiduciary Guarantee Transfer As Decision Basis On Criminal Justice Process

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Abstract. The research problems are: What is the criminal aspect to the transfer that occurred on fiduciary as the basis for the decision in the court proceedings? The approach used in this research is normative juridical approach or the written law (*law/statute approach*), This approach is also known by the literature approach, namely by studying books-books, legislation and other documents related to this research.

The study concluded that the diversion of the object fiduciary by the debtor without the consent from creditors including activities that violate the rights of creditors as the recipient of fiduciary protected by the Fiduciary Law, specifically Article 36 of Act No. 42 Of 1999 On Fiduciary.

Keywords: Criminal Aspects; Fiduciary Guarantee Transfer; Criminal Justice.

1. Introduction

Birth of financial institutions actually an answer to the constraints of the developments in the field of financing over the years. Through some public finance institutions that had been difficult to buy goods in cash will be resolved easily and quickly, convenience provided exceeds the convenience provided by the bank. Financing through financial institutions is classified into the sale of credit, because society does not accept cash, but only accept items purchased with the credit for the purpose of consumption.

In the structure of the national economy, credit policy is an inseparable part of the development policies of macro, credit policy is in line with the development objectives, since the purpose of the credit to sustain the pace of construction, lending should be evenly distributed so that all levels of society participate in development. For employers either large employers, medium and small businesses, credit is the lifeblood for business development. Credit here is a need to assist and very helpful in the development of their businesses. In an effort to obtain additional capital through the provision of credit by the bank for entrepreneurs so middleclass not a problem to obtain a credit facility, because they are usually the requirements demanded by the bank they can meet with both the confidence of banks on the character, ability, capital. Business prospects and collateral, as these entrepreneurs have more

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capabilities than with small businesses coupled middleclass entrepreneurs have high ability.⁴

Each development policy by the government, are required to be able to accommodate the needs of law and capable of directing the legal awareness of moving towards modernization in order to achieve order and legal certainty.⁵ Relation to economic development and lending, emerging form of fiduciary (such as trust) that address community needs in credit as a means to obtain capital and consumer needs such as the provision of fiduciary of transportation. Any makes it easy for a search without having to submit credit with collateral physical items as in the pledge. Fiduciary in its implementation and then not used by employers alone, but is also used by the general public. Fiduciary object originally only moving objects in its development but can also be applied to fixed objects.

Fiduciary guarantee is a guarantee individuals, where among providers of fiduciary and receiver fiduciary provide mutual trust, grantor fiduciary hand over ownership rights to the recipient of the fiduciary, but the recipient of fiduciary indirectly have an object that is a guarantee of fiduciary submitted by providers of fiduciary, so that fiduciary is a theory guarantee. Fiduciary guarantee is a guarantee of material on the moving objects both tangible and intangible assets with respect to the accounts payable between creditors and debtors. Fiduciary used for moving objects as well as movable fiduciary. The fiduciary is not born because in practice there are things that can not be accommodated. As for immovable, the object is an object that is not an object of mortgage.

In the Book of the Law of Civil Law or *Burgerlijk Wetboek* (BW), fiduciary as a special form of guarantee which is the object of specific guarantees also objects belonging to the debtor, it's just been appointed in each specific case and is intended for a particular creditor as well. Therefore the object object, then the provisions of this special guarantee arrangements be grouped together into a body of law set forth in the book II BW. Collateral material in BW divided into two namely liens and mortgages. The main difference that the object pawn moving objects, while mortgage immovable object. Often said that the mortgage lien and another is born not as a consequence of the division of movable and immovable.

One manifestation of this special guarantee is fiduciary regulated in Act No. 42 Of 1999 on Fiduciary.⁶ In Article 1, paragraph 1 of Act No.42 of 1999 concerning Guarantee fiduciary, the fiduciary is the transfer of ownership of an object on the basis of trust

⁴ Djuhaedah Hasan, *Lembaga Jaminan Kebendaan Bagi Tanah dan Benda Lain yang Melekat pada Tanah Dalam Konsepsi Penerapan atas Pemisahan Horizontal*, Citra Aditya Bakti, Bandung, 1996, p.184

⁵ Sri Soedewi M, *Beberapa Masalah Pelaksanaan Lembaga Jaminan Khususnya Fidusia di Dalam Praktek dan Pelaksanaannya di Indonesia*, Yogyakarta, Fakultas Hukum UGM, Bulaksumur, 1977, p.1

⁶ Yurizal, *Aspek Pidana Dalam Undang-Undang Nomor 42 Tahun 1999 Tentang Jamina Fidusia*, Surabaya, MediaNusa Creative, 2011, p.18-20

with the provision that the object of the transferred ownership rights remain in the control of the owner of the object.

However, although the creditors had to fortify themselves with various regulations there are still debtors who still perform acts contrary to the agreement that they made, problem that often arises in the financing agreements consumers generally when the debtor is negligent in fulfilling his achievements, apart from the failure to meet achievements, problems often arise in consumer financing agreement after a four-wheeled vehicle is the debtor no longer able to carry out his achievements, the debtors tend to transfer, pledge, rent fiduciary guarantee object to another party, without the written permission of the creditor.

Following the issuance of Act No.42 of 1999 concerning further reinforce Fiduciary if there is a default as an example of evasion it has become the area of criminal law. In Article 23 paragraph (2) of Act No. 42 Of 1999 On Fiduciary set about giving the fiduciary may assign, pledge, or lease to another party objects into places Fiduciary who is the object of inventory, except with the prior written consent of the recipient fiduciary.

Based on the description on the background of the above problems, it can be molded formulation of the problem as follows: What a criminal aspect to the transfer that occurred on fiduciary as the basis for the decision in the court proceedings?

Research methods

The research method that will be used in research, provide an overview of the main points very carefully and conditions very tight anyway, so that the research method can keep the knowledge gained from the research results have a high scientific value. The approach used in this research is normative juridical approach or the written law (*law/statute approach*), Normative juridical approach is the approach taken by the primary legal materials by means of studying the theory-theory, concept-concepts, principles-principle of law as well as legislation relationship with this research. This approach is also known by the literature approach, namely by studying books, legislation and other documents related to this research.

2. Results and Discussion

Generally, collateral is always associated with the good credit to financial institutions and non-bank banks, including finance companies. The guarantee referred to here can guarantee material and individual guarantees. Guarantees which generally include ways creditor guarantee the fulfillment of the bill, in addition to the general liability of the debtor against his debts.

In the positive law in Indonesia there are laws which fully regulate on matters related to the debt guarantee. Some of the provisions contained in the Civil Code and the Code

of Commerce, in addition there are also separate legislation that Act No. 4 of 1996 and Act No. 42 of 1999, each set of security institutions in debt underwriting.

Assurance is to ensure compliance with the obligation that can be valued in money arising from a legal bond. Therefore, the law guarantees legal intimately with objects. In principle, every credit must be guaranteed, either collateral or a guarantee in the form of individual objects.⁷

Fiduciary a security agency that has long been known in Roman society, it starts and grows in customary law. This institution originated from a civil law system of western existence and development has always been associated with civil law systems. Mahadi explained that the word "fiduciary" is derived from the Latin. The word is a noun that means confidence in someone or something, a great hope. In addition, there is the word "fido" is a verb that means to trust someone or something.⁸

Fiduciary security as collateral material has the fundamental characteristics of that fiduciary keep abreast of things that become the object of fiduciary in the hands of anyone the object is, unless the transfer of the supply objects that become the object of fiduciary (Article 20 UUF). This provision is the nature of the *droit de suite* of fiduciary and administration of these properties based and contained the intention to give a strong position to the right holder.⁹ In Article 19 Fiduciary Law stipulates that the transfer of rights to claims guaranteed by fiduciary resulted in the shift of void all rights and obligations to the new lender fiduciary recipient or any other party. Transitional objects fiduciary creditor must consent, if not then the action is not justified by the law.¹⁰ It thus comply with the wording of Article 23 paragraph (3) which prohibits providers UUF fiduciary to transfer, pledge or lease to another party objects that become the object of fiduciary that is not an object of supplies, except with the prior written consent of the recipient fiduciary.

The government in an effort to address violations of the Fiduciary that may have adverse effects on creditor has issued a policy of criminal law in the form of Law of the Republic of Indonesia Number 42 Of 1999 on Fiduciary. Although the fiduciary agreement is a private act in a civil but Fiduciary Law also regulates the criminal acts and criminal sanctions contained in Article 35 and Article 36 UUF. That means that criminal sanctions are still needed in terms of private even to regulate public order and public security.

⁷ Badruzaman, Mariam Darus, *Bab-Bab tentang Credietverband, Gadai dan Fiducia*, Alumni, Bandung, 1987, p.227-265

⁸ Kamello, Tan, *Hukum Jaminan Fidusia Suatu Kebutuhan Yang Didambakan*, Alumni, Bandung, 2014, p.139

⁹ Yusrizal, *Gambaran Penggunaan Obat Dalam Upaya Swamedikasi Pada Pengunjung Apotek Pandan Kecamatan Jati Agung Kabupaten Lampung Selatan Tahun 2014*, Jurnal Analis Kesehatan : Volume 4, No 2, September 2015, p.15

¹⁰ *Ibid*, p.72

Diversion of the object fiduciary by the debtor without the consent from creditors including activities that violate the rights of creditors as the recipient of fiduciary protected by the Fiduciary Law, specifically Article 36 of Act No. 42 Of 1999 On Fiduciary set as follows:

- Giver fiduciary (debtor) pledge, assign or sublet without permission object fiduciary recipient (creditor).

If Giver Fiduciary proven acts that pledge, assign or sublet the object of fiduciary without the consent of the recipient fiduciary, against such acts, Article 36 of Act No.42 of 1999 has set the penalty of debtor pawning or divert the object of fiduciary without the consent of the creditor, namely :

"Giver Fiduciary transfer, pledge, or lease objects that become the object of fiduciary referred to in Article 23 paragraph (2) which is carried out without the prior written consent of the recipient fiduciary, shall be punished with imprisonment for a period of 2 (two) years and a fine many Rp.50.000.000 (Fifty Million) ".

On the other hand, if the debtor divert the objects fiduciary conducted under the hands of the other party can not be charged under Fiduciary Law, because it was illegal or legal agreement fiduciary guarantee that without the knowledge of the creditor can be reported on embezzlement charges in accordance with Article 372 of the Criminal Code by creditors. Article 372 of the Criminal Code:

Whoever intentionally and unlawfully possession of something that is wholly or partly belonged to someone else, but it is in his power not because of crimes punishable as fraud, with a maximum imprisonment of four years or a maximum fine of nine hundred rupiah. "

- Giver Fiduciary deliberately faking, Modify, Remove or Deliver Remarks With Whichever Way By Misleading.

To ensure the implementation of a fiduciary that is good and true and certain, then by the Act Fiduciary regulate criminal provision is not only contained in Article 36 of Fiduciary Law assurance alone but also criminal provisions contained in Article 35 which contains the following provisions:

"Any person who intentionally fabricate, modify, eliminate or in any way provide information in a confusing manner, that if it was discovered by one of the parties does not give birth to the agreement fiduciary, shall be punished with imprisonment of a minimum of 1 (one) year and a maximum of 5 (five) years and a fine of at least Rp.10.000.000, - (ten million rupiah) and Rp. 100.000.000, - (one hundred million rupiah) ".

If the fiduciary is not burdened with the fiduciary registration to the registration office, it may be subject to criminal fraud Article 378 of the Criminal Code, which reads: "Whoever with the intent of going to benefit themselves or others against

right, both with a false name or state false, both with reason and guile, and with a bouquet of words lie, persuading people to give a product, create a debt or abolish receivables, convicted of fraud, with a prison sentence of four years for all eternity". With the inclusion of the provisions of Article 36 are contained in UUJF can be concluded that the apparent transfer of objects fiduciary without prior appointment is a criminal offense under the Act Fiduciary No. 42 of 1999, with the exception of this provision is that the giver of the fiduciary may divert on inventory objects that become the object of fiduciary.¹¹

In theory put forward Hasanuddin guarantee, a guarantee is provided by the dependents of the debtor and the creditor or a third party for the debtor has an interest that a borrower must fulfill its obligations in an engagement. So that the parties have done credit to the debtor, the debtor must return or meet its obligations in accordance with the agreed, if the debtor can not fulfill its obligations then the creditor can withstand such guarantees.¹²

Although individual morality and social issues and aim to protect the parties acting in good faith, either to individuals or to corporations then in Act Fiduciary loaded penal provisions. Criminal aspect described in the above article on Fiduciary Law as a legal certainty in the implementation of civil relationships that result in losses of one party.

Related legal certainty, according to Kelsen law is a system of norms. Norm is a statement that emphasizes the aspect of "should" or *das sollen*, to include some rules about what to do. The norms are products of human and deliberative action. Act contains rules that are general guidance for individuals to behave in society, both in relationships with other people and in relation to society. The rules that set the boundaries for the community in encumber or otherwise act against the individual. The existence of the rule and that this regulation raises legal certainty.¹³

With the threat of crime in the implementation of the fiduciary, provide basic verdict in the trial of criminal cases by looking at the aspects of crime listed in the Act fiduciary. With the criminal aspect, fiduciary as one of the security agency is expected to serve as an ideal security institutions that provide a sense of security and a dream for everyone concerned. Fiduciary Law governing the transitional provisions. This provision is intended to provide clarity and legal certainty to the existing fiduciary has been based on Jurisprudence, as well as to anticipate the legal consequences arising after the enactment of Fiduciary Law.

3. Closing

¹¹ H. Salim HS, *Perkembangan Hukum Jaminan di Indonesia*, Raja GrafindoPersada, Jakarta, 2004, p.88

¹² Hasanuddin Rahman, *Aspek-aspek Hukum Pemberian Kredit Perbankan di Indonesia*, Bandung: Citra Aditya Bakti, 1995, p.175

¹³ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Kencana, Jakarta, 2008, p.158

3.1. Conclusion

Diversification of the object fiduciary by the debtor without the consent from creditors including activities that violate the rights of creditors as the recipient of fiduciary protected by the Fiduciary Law, specifically Article 36 of Act No. 42 Of 1999 On Fiduciary set:

- Giver fiduciary (debtor) pledge, assign or sublet without permission object fiduciary recipient (creditor), Article 36 of Act No.42 of 1999;
"Giver Fiduciary transfer, pledge, or lease objects that become the object of fiduciary referred to in Article 23 paragraph (2) which is carried out without the prior written consent of the recipient fiduciary, shall be punished with imprisonment for a period of 2 (two) years and a fine many Rp.50.000.000 (Fifty Million) ".
- Giver Fiduciary deliberately faking, Modify, Remove or Deliver Remarks With Whichever Way By Misleading, Article 35 of Act No.42 of 1999;
"Any person who intentionally fabricate, modify, eliminate or in any way provide information in a confusing manner, that if it was discovered by one of the parties does not give birth to the agreement fiduciary, shall be punished with imprisonment of a minimum of 1 (one) year and a maximum of 5 (five) years and a fine of at least Rp.10.000.000, - (ten million rupiah) and Rp. 100.000.000, - (one hundred million rupiah) ".

2. Suggestion

- Need the rule of law in the law On the reporting requirement for creditors who do not have a fiduciary warranty deed for Fiduciary Law which more material cautions to debtors under the criminal provisions;
- To the notary who made the imposition of fiduciary deed much better in completion breach fiduciary agreement can be included the settlement of disputes by means of Alternative Dispute Resolution (ADR) in which to minimize the use of criminal tools to solve the problems of the private.

4. References

Books

- [1] Badruzaman, Mariam Darus, *Bab-Bab tentang Credietverband, Gadai dan Fiducia*, Alumni, Bandung, 1987
- [2] Djuhaedah Hasan, *Lembaga Jaminan Kebendaan Bagi Tanah dan Benda Lain yang Melekat pada Tanah Dalam Konsepsi Penerapan atas Pemisahan Horizontal*, Citra Aditya Bakti, Bandung, 1996

- [3] Hasanuddin Rahman, *Aspek-aspek Hukum Pemberian Kredit Perbankan di Indonesia*, (Bandung: Citra Aditya Bakti, 1995)
- [4] H. Salim HS, *Perkembangan Hukum Jaminan di Indonesia*, Raja GrafindoPersada, Jakarta, 2004
- [5] Kamello, Tan, *Hukum Jaminan Fidusia Suatu Kebutuhan Yang Didambakan*, Alumni, Bandung, 2014
- [6] Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Kencana, Jakarta, 2008
- [7] Sri Soedewi M, *Beberapa Masalah Pelaksanaan Lembaga Jaminan Khususnya Fidusia di Dalam Praktek dan Pelaksanaannya di Indonesia*, Yogyakarta, Fakultas Hukum UGM, Bulaksumur, 1977
- [8] Yurizal, *Aspek Pidana Dalam Undang-Undang Nomor 42 Tahun 1999 Tentang Jamina Fidusia*, Surabaya, MediaNusa Creative, 2011

Legislation

- [1] Constitution of the Republic of Indonesia 1945
- [2] Book of the Criminal Justice
- [3] Act No. 42 Of 1999 On Fiduciary

Journal

- [1] Yusrizal, *Gambaran Penggunaan Obat Dalam Upaya Swamedikasi Pada Pengunjung Apotek Pandan Kecamatan Jati Agung Kabupaten Lampung Selatan Tahun 2014*, Jurnal Analis Kesehatan : Volume 4, No 2, September 2015