

The Legal Comparison of Transfer of Object Fiduciary by Debtor to Third Party without Creditor's Approval

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Abstract. *The purpose of this study is to find out about the Fiduciary provider in the Consumer Financing agreement with the Fiduciary Guarantee contained in the Fiduciary Guarantee Deed, it is forbidden to transfer the Fiduciary guarantee object to another party without the approval of the Fiduciary Recipient. This is because in Act No. 42 of 1999 concerning Fiduciary Guarantees there are provisions regarding the prohibition to transfer objects of Fiduciary guarantees without the approval of Fiduciary Recipients to provide legal protection to Fiduciary Recipients. The research in this paper is a normative law research. In the debtor's relationship with a third party, there is no legal relationship because the transfer of the fiduciary object is not valid as stated in Article 1320 of the Civil Code concerning the conditions for the validity of the agreement. Articles 35 and 36 of the UUJF also regulate criminal sanctions that reaffirm the prohibition of transferring, mortgaging, or leasing fiduciary guarantees as objects. In connection with the principle of providing legal certainty, UUJF adopts the principle of registration of fiduciary guarantees. The benefit of a fiduciary agreement made in writing is that the creditor holding the fiduciary guarantee in his interest will demand the easiest way to prove the delivery of the guarantee to the debtor.*

Keywords: Creditor; Debtor; Fiduciary; Transfer.

1. INTRODUCTION

Collateral is one of the important elements in providing credit, one of which is material guarantees. One of the material guarantees known in positive law is fiduciary guarantees. The existence of this fiduciary guarantee was previously based on jurisprudence. Now the fiduciary guarantee has been regulated in a separate law, namely Act No. 42 of 1999 concerning fiduciary guarantees.¹ Fiduciary comes from the word fides which means trust. Fiduciary is the transfer of ownership rights to an object

¹ Tan Kamelo, (2006), *Hukum Jaminan Fidusia: Suatu Kebutuhan yang Didambakan*, Cet ke-1 Edisi Pertama, PT. Alumni, Jakarta, p.2

on the basis of trust provided that the object whose ownership rights are transferred remains in the control of the owner of the object.²

The consumer financing agreement itself is not listed in the Civil Code, but in fact there have been agreements as contained in Article 1338 of the Civil Code: " *All agreements made legally apply as law to those who make them. The agreements cannot be withdrawn other than with the agreement of both parties, or for reasons which are stated to be sufficient by law. Those agreements must be executed in good faith.*"

For debtors who experience payment barriers or default in the future, failure to fulfill these obligations is a risk that must be borne by the creditor. This situation makes financial institutions as creditors feel insecure with the return of funding which is the right of creditors. To minimize this risk, debtors will be required to provide adequate material guarantees to creditors.³

The material guarantee essentially functions to guarantee certainty of the debtor's debt repayment if the debtor fails to fulfill its obligations. With the guarantee in the financing, it can be a protection for creditors that credit loans made by debtors will return.⁴

At first fiduciary was only based on jurisprudence.⁵ Related to this, one of the legal issues that arise in economic activities is the existence of crimes related to the fiduciary guarantee, forms of crime related to the fiduciary guarantee itself, for example mortgaging the object of the fiduciary guarantee, transferring and leasing the object of the fiduciary guarantee, executing the fiduciary guarantee and so on.⁶

The Fiduciary Provider in the Consumer Financing agreement with the Fiduciary Guarantee contained in the Fiduciary Guarantee Deed is prohibited from transferring the object of the Fiduciary guarantee to another party without the approval of the Fiduciary Recipient. This is because in Act No. 42 of 1999 concerning Fiduciary Guarantees there are provisions regarding the prohibition to transfer the object of Fiduciary guarantees without the approval of Fiduciary Recipients to provide legal protection to Fiduciary Recipients.⁷

² Nanin Koeswidi Astuti, Analisa Yuridis Terhadap Tindak Pidana Pengalihan Obyek Jaminan Fidusia Tanpa Persetujuan Penerima Fidusia, *Jurnal Hukum t -r *, Vol. 3 No. 1, April 2017, p.493-503

³ Farah Diana, M Nur Rasyid dan Azhari Azhari, Kajian Yuridis Pelaksanaan Penghapusan Jaminan Fidusia Secara Elektronik, *Syah Kuala Law Journal*/Vol 1 (2) 2017, p.37-38.

⁴ J. Satrio, (2002), *Hukum Jaminan Hak Jaminan Kebendaan Fidusia*, Cet.1, Citra Aditya Bakti, Bandung, p.5

⁵ H. Salim HS, *Perkembangan Hukum Jaminan di Indonesia*, cetakan ke-VIII, PT Raja Grafindo Persada, Jakarta, 2014, p. 23-27.

⁶ Muhammad Rusli Arafat, Tindak Pidana Pengalihan Obyek Jaminan Fidusia Oleh Debitur (Tinjauan Yuridis Putusan No.: No. 137/Pid.Sus/2020/PN.Mks), *HERMENEUTIKA* Vol. 6, No. 1, February 2022, p.1-14

⁷ Radhika Bagas Prabowo, Abdul Salam, Akibat Hukum Pengalihan Objek Jaminan Fidusia Atas Nama Pasangan Dalam Perkawinan Sebagai Pemberi Fidusia Oleh Pasangan Lainnya (Studi Kasus Putusan Pengadilan Negeri Pekanbaru No.: 853/Pid.Sus/2019/Pn Pbr), *Jurnal A Salam Indonesian Notary*, 2021, p.1-24

In relation to the fiduciary guarantee above, the rules that apply to fiduciary guarantees are the Fiduciary Guarantee Law. Article 23 paragraph (2) of the Fiduciary Guarantee Law stipulates that "the fiduciary giver is prohibited from transferring, mortgaging, or leasing to another party the object that is the object of the fiduciary security which is not an object of inventory, except with prior written approval from the fiduciary recipient." Furthermore, Article 36 of this law stipulates that "a fiduciary who transfers, pledges, or rents out objects that are the object of a Fiduciary Guarantee as referred to in Article 23 paragraph (2) which is carried out without prior written approval from the Fiduciary Recipient, shall be punished with imprisonment maximum of 2 (two) years and a maximum fine of Rp. 50,000,000 (fifty million) rupiahs. This provision provides an understanding that credit with a fiduciary guarantee may not be transferred. If a loan with a fiduciary guarantee is transferred, it is threatened with a maximum imprisonment of two years and a maximum fine of fifty million rupiah. This provision confirms the prohibition on transferring the fiduciary object to another party. This prohibition does not fully apply in the credit agreement.⁸

That is, on the other hand, the transfer of a fiduciary object is permitted provided that the debtor notifies the financing institution that a fiduciary object will be transferred. If the creditor agrees to the transfer, it can be continued by the debtor to another party.

This fiduciary guarantee is a form of guarantee due to an agreement. The legal relationship between the debtor (fiduciary giver) and creditor (fiduciary recipient) is a legal relationship based on trust. The fiduciary giver believes that the creditor of the fiduciary recipient will return the property rights that have been handed over to him, after the debtor has paid off his debt. Creditors also believe that the fiduciary giver will not abuse the collateral that is under his control and will maintain the collateral and will not transfer or lease it to other parties so as not to violate the agreement made between the fiduciary giver and the fiduciary recipient, because the agreement they make has a power of law like a law (*pacta sunt servanda*).⁹

The purpose of writing in this study is to find out and analyze the legal consequences of transferring fiduciary objects to third parties without creditor approval in criminal law and civil law, and how the legal protection of creditors from the act of transferring fiduciary objects to third parties.

2. RESEARCH METHODS

The research in this paper is a normative legal research, which is research conducted and submitted to various written laws and regulations and various literatures related to the problem. The data used is secondary data consisting of primary legal materials and secondary legal materials. The collected legal materials are then analyzed qualitatively.¹⁰

⁸ Diksa, I Gede Agung Pasek Pertama, Ida Bagus Putu Utama, Pembebanan Benda Bergerak Sebagai Jaminan Fidusia Pada Lembaga Perkreditan Desa di Desa Adat Cemagi Kabupaten Badung. *Kertha Semaya: Journal Ilmu Hukum*, Vol 6, No. 6, (2019), p.1-15.

⁹ Ade Rosadi, Bruce Anzward, Johan's Kadir Putra, Pertanggungjawaban Hukum Terhadap Pemberi Fidusia Yang Mengalihkan Atau Menyewakan Objek Jaminan Fidusia Kepada Pihak Lain Tanpa Persetujuan Tertulis Dari Penerima Fidusia di Balikpapan, *Jurnal Lex Suprema* Volume 2 No. I March 2020, p.887-906

¹⁰ Irwansyah, (2020), *Penelitian Hukum Pilihan Metode dan Praaktik Penulisan Artikel*, Mirra Buana Media, Yogyakarta, p. 65

3. RESULT AND DISCUSSION

3.1. The legal consequences of transferring a fiduciary object to a third party without the approval of the creditor in criminal law and civil law

In the provisions of Article 1 point 1 UUF it is stated that: "Fiducia is the transfer of ownership rights to an object on the basis of trust provided that the object whose ownership rights are transferred remains in the control of the owner of the object." From the "authentic" Fiduciary formulation because the formulation was given by the legislators, it can be concluded that "Fiducia" is an act of transferring ownership rights to an object, provided that the object remains "controlled" by the "Owner of the Object". Because in the last clause of the fiduciary formulation in the UUF above it says "... remains in the control of the owner of the object.", then what is meant by "owner of the object" is "a person who surrenders ownership of an object through fiduciary". Prior to the existence of UUF, property rights that were fiduciary guaranteed were transferred to the creditor of the fiduciary recipient, while physical control of the object remained in the hands of the fiduciary provider on the basis of (title) borrowing and using. The provisions of Article 1 point 1 UUF should be willing to take the meaning of fiduciary based on the doctrine and jurisprudence. Thus, what is referred to as "... remains in the possession of the owner of the object." in the last clause of Article 1 point 1 UUF it should mean "... still physically controlled by the fiduciary giver." This is also appropriate in terms of its social (teleological) goals, because the purpose of holding a fiduciary guarantee institution is to meet the needs of the community by providing guarantees for their debts (or other parties' debts), but the objects that are used as collateral remain in the power of the guarantor, so that they can still be used as collateral. This is to overcome the limitations of the guarantee institution in the form of a pawn, as regulated in Article 1152 of the Civil Code.¹¹

Ownership rights to an object cannot be obtained in any other way, but by ownership, due to attachment, due to expiration, due to inheritance, either according to the law or according to a will, and because the appointment or transfer is based on a civil event to transfer property rights. , carried out by a person who has the right to act freely (authorized) on the object. The provisions of Article 584 of the Civil Code above are general provisions on how to obtain property rights. From which provisions it can be seen that the method of obtaining property rights to an object is determined in principle in a limitative manner in the Civil Code. Even though in this regard scholars (doctrine) are of the opinion that there are other ways of acquiring property rights, other than those specified in Article 584 of the Civil Code, for example merging an object.¹²

The debtor, in making the previous agreement with the creditor, is based on the provisions of Article 1338 paragraph (1) of the Civil Code, which stipulates that all agreements made legally apply as law for those who make them. This means that both parties are obliged to obey and carry out the agreement that has been agreed in accordance with the law.¹³ This agreement only applies to debtors and creditors

¹¹ Petra Kusuma Aji, *Akibat Hukum Perjanjian Jaminan Fidusia terhadap Benda yang Dijaminkan*, <https://pn-lembata.go.id/page/content/588/akibat-hukum-perjanjian-jaminan-fidusia-terhadap-benda-yang-dijaminkan>

¹² *Ibid*

¹³ Suparman, Jesse Adam, and Suatra Putrawan. Kekuatan Pembuktian Akta Dibawah Tangan Yang Telah Dilegalisasi Oleh Notaris. *Jurnal Kertha Semaya* 4, no. 3 (2016), p.1-12

(financing institutions) as parties who make them. In connection with the transfer of the object of this fiduciary guarantee, the debtor has two relationships. The first relationship is the debtor with the creditor (financing institution).¹⁴ In this relationship, the debtor is the party that gives the fiduciary object while the creditor is the recipient of the fiduciary. While "the second relationship is the debtor with a third party. In this relationship, the debtor is no longer the party providing the fiduciary object but as the seller of the fiduciary object and a third party as the buyer of the fiduciary object."¹⁵

Both of these relationships apply to debtors only or do not apply to creditors or third parties. On the basis of the relationship owned by the debtor, the debtor is obliged to take legal efforts in carrying out his obligations because in each relationship there are obligations imposed on the debtor. The relationship created in the transfer of the object of the fiduciary guarantee between the debtor and the creditor is a legal relationship because it is based on a credit agreement and has legal force. While the debtor relationship with a third party does not have a legal relationship because the transfer of the fiduciary object is not valid as stated in Article 1320 of the Civil Code concerning the terms of the validity of the agreement.¹⁶

Article 23 paragraph (2) of the UUJF states: "Unless there is a prior written approval from a fiduciary guarantee, a fiduciary guarantee may not transfer, mortgage, or rent out goods that are not in stock as a fiduciary safe object." One form of legal protection requires a rule of law. Because, when the debtor defaults, the creditor usually loses, including when the fiduciary guarantee is transferred. According to the principle of obedience, promises must be kept, thus what is the obligation of one party, the rights of the other party must be fulfilled. In addition to these provisions, Article 36 of the UUJF also regulates criminal sanctions that reaffirm the prohibition of transferring, mortgaging, or renting out fiduciary guarantees as objects. The subject of the guarantee as referred to in Article 23 paragraph (2) of UUJF without prior written approval from the guardian shall be punished with imprisonment of 2 (two) years and a fine of Rp. 50,000,000 (fifty million).¹⁷

Article 35 states that: "Anyone who deliberately falsifies, changes, removes or in any way provides misleading information, which if it is known by one of the parties does not result in a Fiduciary agreement, shall be punished with imprisonment for 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) at most Rp. 100,000,000, - (One hundred million rupiah)."¹⁸

¹⁴ Nurkhaliza, Adena, I Made Udiana, Sutra Putrawa, Eksekusi Barang Jaminan Sebagai Penyelesaian Kredit Macet Pada Lembaga Pembiayaan. *Kertha Semaya: Journal Ilmu Hukum* 7, No. 6, (2019), p.1-16

¹⁵ Kharismawan, I Wayan; I Wayan Novy Purwanto, Kewajiban Pemberi Fidusia Dalam Hal Obyek Jaminan Fidusia Dirampas Negara. *Kertha Semaya: Journal Ilmu Hukum* 7, No. 9, (2019), p.1-13

¹⁶ Rony Chandra Siagian, Upaya Hukum Debitur Dalam Pengalihan Objek Fidusia Di Kabupaten Badung, *Jurnal Kertha Negara* Vol. 9 No. 10 Tahun 2021, p.834-844

¹⁷ Intan Shania, Sanusi, Darmawan, Akibat Hukum Debitur yang Menyewakan objek Jaminan fidusia Tanpa Persetujuan tertulis Kreditor, *Diversi Jurnal Hukum*, Volume 8 No. 1 April 2022, p.55-78

¹⁸ M. Yasir, Aspek Hukum Jaminan Fidusia, *SALAM:Jurnal Sosial & Budaya Syar-I*, Vol. 3 No. 1 (2016), p.75-92

3.2. Legal protection for creditors from the act of transferring the object of fiduciary security to third parties

Fiduciary guarantees are related to contract law and property law which are included in property law as regulated in the Civil Code (KUHP), material law regulated in Book II of the Criminal Code and contract law is regulated in Book III of the Criminal Code. All agreements made legally apply as law for those who make them as regulated in Article 1338 of the Civil Code.¹⁹ The parties who make the agreement cannot cancel the agreement they made unilaterally because the agreement has fulfilled the conditions for the validity of the agreement as stipulated in Article 1320 of the Criminal Code, namely the agreement of those who bind themselves, the ability to make an agreement, a certain thing and a lawful cause. The agreement made by the parties must be carried out in good faith as regulated in Article 1338 paragraph (3) of the Criminal Code. As with the fiduciary guarantee agreement, both the creditor (fiduciary recipient) and the debtor (fiduciary giver) must carry out the contents of the fiduciary guarantee agreement appropriately and properly.²⁰

Legal protection for creditors (fiduciary recipients) is provided by UUJF if the object of the fiduciary guarantee has been registered at the Fiduciary Registration Office. Third parties who have good intentions who receive the transfer of the object of a fiduciary guarantee get legal protection based on Article 1997 paragraph (1) of the Civil Code, namely: "Anyone who controls movable goods that are not in the form of interest or receivables that do not have to be paid on appointment, is considered the full owner". However, as long as the object of the fiduciary guarantee has not been or is not registered at the Fiduciary Registration office.²¹

Material rights are born if the creditor supports the debt agreement with the material agreement. This agreement is carried out by binding the debtor's property. A material guarantee agreement is an absolute right to a certain object that is used as an object of collateral for a time that can be cashed for repayment or payment of debt if the debtor defaults.²²

In connection with the principle of providing legal certainty, UUJF adopts the principle of registration of fiduciary guarantees. The benefit of a fiduciary agreement made in writing is that the creditor holding the fiduciary guarantee in his interest will demand the easiest way to prove the delivery of the guarantee to the debtor. The most important thing is to anticipate the possibility of things happening against our will. Without a valid deed it will be difficult for creditors to prove their rights. The deed will be able to include special promises between debtors and creditors governing the legal relationship between them. The registration is expected to provide legal certainty to fiduciary givers and recipients as well as to third parties, which are generally intended

¹⁹ R.Subekti dan R.Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek)* cet.41, PT. Balai Pustaka, Jakarta, 2016. P.21

²⁰ Nanin Koeswidi Astuti, *Op.Cit.*p.494

²¹ *Ibid*

²² Djuahenda Hasan, *Lembaga Jaminan Kebendaan Bagi Tanah dan Benda Lain yang Melekat pada Tanah dalam Konsepsi Penerapan Asas Pemisahan Horisontal*, Cetakan Ke-2, Citra Aditya Bakti, Bandung, 2011, p.236.

to provide a strong position for creditors and later after being registered are intended to also bind third parties.²³

An agreement is not only binding on strict matters but must also be in accordance with the nature of the agreement and must be based on propriety, custom or applicable law. In detail, a fiduciary guarantee agreement that is not registered with the Fiduciary Registration Office is a civil agreement of a loan and borrowing agreement, in accordance with the provisions of Article 1754 of the Civil Code explaining the meaning of borrowing and lending, among others: "Lending and borrowing is an agreement where one party gives to the other party: otherwise a certain amount of goods which are exhausted by their use, on the condition that the latter will return the same amount of the same kind and condition."

4. CONCLUSION

The relationship created in the transfer of the object of the fiduciary guarantee between the debtor and the creditor is a legal relationship because it is based on a credit agreement and has legal force. Meanwhile, the debtor's relationship with a third party does not have a legal relationship because the transfer of the fiduciary object is not valid as stated in Article 1320 of the Civil Code concerning the conditions for the validity of the agreement. Article 36 of the UUJF also regulates criminal sanctions that reaffirm the prohibition of transferring, mortgaging, or leasing fiduciary guarantees as objects.

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²³ *Ibid*

- Kitab Undang-Undang Hukum Perdata, (2009), diterjemahkan oleh R. Subekti: Pradnya Paramita, Jakarta;
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