

Transfer Of Legal Protection Against Creditors Fiduciary Insurance Object Without Approval By The Creditors

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Abstract. Fiduciary transfer of ownership rights is an object that made the object of a guarantee on the basis of trust with the provisions fiduciary objects remain in the possession of the owner of the object. However, the implementation of Act No. 42 Of 1999 on Fiduciary for this still requires attention, especially for the protection of creditors. Aiming to analyze the legal protection acquired by the creditor against the acts committed by the debtor, namely the transfer of fiduciary security object without the consent of creditors as well as to determine the legal consequences arising method used in analyzing these issues is normative juridical research. The method is a normative legal research done by researching library materials or secondary materials. Through this method is expected to provide a comprehensive understanding of the relevant legal protection for creditors.

Based on the analysis showed fiduciary creditors as the recipient requires legal certainty to the object as collateral because it will hinder the process of execution when security object transferred by the debtor without the consent of the creditor. Article 23 paragraph (2) of the Act Fiduciary that the debtor may assign without the prior written consent of the Receiver fiduciary. So from these provisions can be considered that the debtor has committed an unlawful act that clearly there are provisions in article 36 of Law Fiduciary related penalties obtained by the debtor.

Keywords: Legal Protection; Creditor; Fiduciary Transfer.

1. Introduction

The economic crisis a few years ago has provided valuable lessons for the Indonesian business people of the importance of the role of the guarantee instruments capable of securing the receivables by giving preference rights on the receivables. Failure of the execution of many assets of the debtor and the fact that a lot of empty assets provided indicates that the economic actors more in need of a flexible form of guarantee which is able to provide access to finance for borrowers without letting go of the aspect of legal certainty. There are few legal guarantees known material in the form of a pledge, a mortgage that has been converted into mortgages regulated by Act No. 4 of 1996, the last is the fiduciary.³

In general, to obtain a credit facility, the lender requires a guarantee from the debtor. In addition, the banking legislation also emphasizes the importance of guarantees (collateral) as a source of credit in order to "distribution" of customer funds collected by him, and to drive the economy.⁴ In 1999, born Act No. 42 of 1999 concerning Guarantee Fiduciary, in Article 1 paragraph 2 states that:

"Fiduciary is the right collateral to the moving objects both tangible and intangible and immovable in particular building can not be burdened Mortgage referred to in Act No. 4

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³ Gunawan Widjaja dan Ahmad Yani, 2001, *Seri Hukum Bisnis, Jaminan Fidusia*, Raja Grafindo Persada, Jakarta, p. 5

⁴ *Ibid*, Gunawan Widjaja dan Ahmad Yani, p. 73.

of 1996 on Mortgage which remain in control of the Borrower, as collateral for the repayment of certain debt, which gives precedence to the Receiver position Fiduciary against other creditors "

Prior to the enactment of Act No. 42 of 1999 on Fiduciary, the existence of a fiduciary practice in Indonesia is based to the jurisprudence of the Netherlands known as Bier Brouwerij Arrest decision, in which the first judge to certify their assurance mechanisms.⁵ Fiduciary guarantee to be able to give privilege or right of preference for the holder, the fiduciary shall be in the form of the Deed of Fiduciary before a notary public and registered with the Registrar of Fiduciary, so that if the debtor in default, then the lender as beneficiary of fiduciary has the right to execute object fiduciary on his power in order to pay off the debtor. But in practice it is often violations in the credit agreement fiduciary, is one of them the transfer of objects fiduciary without the knowledge of the creditors so as to inhibit the creditor in execution fiduciary when the debtor defaults So from these problems the authors are interested in the theme with the title " Transfer Of Legal Protection Against Creditors Fiduciary Insurance Object Without Approval By The Creditors".

Research Methods

The method used in the writing of this paper is normative juridical studies, the methods of legal research done by researching library materials or secondary materials.⁶ This research is descriptive analysis that aims to describe, inventory and analyze theories and regulations related to the problems of the object fiduciary transfer by the debtor without the consent of the creditor. The method used is the approach of law (Statute approach) and the conceptual approach. The approach was to move from the views and doctrines that developed in the jurisprudence.⁷ In this approach, researchers need to understand the hierarchy and principles in legislation. This approach was used to examine in depth the legal protection of creditors against the transfer of fiduciary security object

2. Results and Discussion

2.1. Legal Protection Against Creditors Object Transfer of Fiduciary Without Approval of Creditor

With the divided of agency fiduciary guarantee the existence of fiduciary regulated in Act No. 42 Of 1999 on Fiduciary included into the category as fiduciary preferred, as stated in article 1 paragraph 2 of Act No. 42 of 1999 on Fiduciary affirming that : ".....give preferred position to the recipient of fiduciary against other creditors".⁸

In this regard, it is important also to interpret the meaning of fiduciary according to the legal literature. Fiduciary by Ranuhandoko interpreted as "having control over something or property." While it is the fiduciary sale is "committed buyer purchased goods to the seller. If at a certain time the buyer does not pay it off, these items can

⁵ Salim H.S., 2004, *Perkembangan Hukum Jaminan Di Indonesia*, Raja Grafindo Persada, Jakarta, p. 60.

⁶ Soerjono Soekanto dan Sri Mamudji, 2007, *Penelitian hukum normatif suatu tinjauan singkat*, Raja GrafindoPersada,Cet.2, Jakarta, p. 13.

⁷ Peter Mahmud Marzuki, 2005, *Penelitian Hukum* , Prenada Media Group, Surabaya, p. 138.

⁸Dr.A.A.Andi Prajitno, 2009, *Hukum Fidusa*, Bayumedia, Malang, p. 47.

be confiscated by the seller".⁹ *Fiduciary sale* in practice occurred in transactions called Bire purchase. In Balck Law Dictionary, a fiduciary contract is "an agreement by the which a person delivers a thing to another on the condition that he will restore it to him".¹⁰ That is, a living relationship between two people associated with the business, contract, or a piece of property, or the general affairs or estate or one of them, a characteristic that each must put our trust and confidence in each other and must exercise the level of justice and in good faith in a good relationship. The elements of the fiduciary as follows:¹¹

- The element is the trust of the corner of fiduciary giver
The element of trust is indeed play an important role in the fiduciary and this is also evident from the mention of these elements in the Act Fiduciary sense of trust has been given by practice, is as follows:
 - Debtors insurer believes that the fiduciary objects submitted by him will not actually owned by the creditors of the insured, but only as a guarantee.
 - Debtors insurer believes that creditors against collateral objects will only use the authority he earned just to protect the interests of a creditor only.
 - Debtors insurer believes that ownership of the objects will be returned to the debtor guarantee the guarantor if the debtor's debts where given fiduciary repaid.
- The element of trust from the recipient corner fiduciary, fiduciary receiver here believe that the goods as collateral will be maintained or cared for by a fiduciary giver.
- The element remains in the control of the owner of the object.
- Beradanya impression to the outside fixed objects in the hands of the giver fiduciary assurance.
- Preceding rights (preferred).
- Accessoir nature.

In a fiduciary agreement object as object fiduciary is still in the control of the owner of the object (the debtor) and not controlled by the creditor, so in this case is the delivery of objects without giving up ownership of physical object.¹² Fiduciary entrust creditors object to the debtor to use according to its functions and for using the object collateral debtors are required to maintain and protect the security object. Object fiduciary is not only moving objects, but also includes immovable. These provisions as stated in Article 1 (2) and (4) of Law Fiduciary, that object is a moving object fiduciary both tangible and intangible, do not move that can not be encumbered encumbrance or mortgages.

In the development of the fiduciary has been a shift in the position of the parties at this time of fiduciary receiver not only serves as a guarantee holders only. However, the recipient is obliged to return the property fiduciary if the fiduciary give repay the debt. On this subject, Dr.A Veenhoven states that:¹³

"Property rights are limited to the imperfect nature depending on certain conditions. For the fiduciary, the proprietary rights conditional on breaking up (*ontbindende voorwaarde*). Property rights are imperfect newborn if the provider does not fulfill

⁹George Whitecross Paton, 1953, *Jurisprudence*, Clarendon Press, Oxpod, p. 176.

¹⁰ Henry Campbell Black, 1990, *Black's Law Dictionary*, Sixth Edition, West Publishing Co., St.Paul,Minn, p. 625-626.

¹¹ J. Satrio, 2002, *Hukum Jaminan, Hak Jaminan Kebendaan Fidusia*, Citra Aditya Bakti, Bandung, p. 253 – 254.

¹²Munir fuadi, 2002, *Jaminan Fidusia, Cet. 2*, Citra Aditya Bakti, Bandung, p. 152.

¹³ Gunawan Widjaja and Ahmad Yani. Op. cit. p. 132.

fiduciary obligations. The opinion had not really clear, especially regarding clarity of fiduciary receiver position for breaking the terms has not happened. "

To comply with the provisions of the insurer specified in the credit agreement, the giver of fiduciary and receiver have agreed and disagreed, it entered into an agreement referred to in Act No. 42 Of 1999 regarding Fiduciary. Fiduciary rights occur in the process as follows:

- Agreement fiduciary provision in Article 5 Paragraph (2) of Act No. 42 Of 1999 on Fiduciary covered by notarial deed or deed of fiduciary.
- Registration fiduciary in Fiduciary Registration Office (KPF), but currently has registration can be accessed directly through the official website AHU.

Of these provisions there are some rights that need to be considered in a fiduciary that promise to deliver the goods guarantees, promises that as fiduciary consensual obligator. It contains the promise to surrender fiduciary obligation.¹⁴ With fiduciary juridical functions stated in the deed of fiduciary reinforce debtor position as a preferred creditor. According to the provisions of Article 1133 of the Civil Code, the creditor holders of mortgages, liens, including fiduciary and privilege to have a higher eminence and precedence of other receivables. The right to precedence that arise because of two things:¹⁵

- Deliberately agreed beforehand that the creditor's receivables would be ahead of fulfillment than any other receivables, for example on mortgages, liens and fiduciary.
- Determined by law.

Further provisions in the preferred position Fiduciary Act can be found in Article 27, it is stated that:

- Recipients fiduciary discount precedence to the rights of other creditors.
- The rights that take precedence as referred to in paragraph
- Is the recipient of fiduciary right to repayment of its receivables co-opted on the results of the execution objects that become the object of fiduciary.
- The rights that take precedence over fiduciary recipient does not remove because of their fiduciary giver bankruptcy or liquidation.

Additionally receiver fiduciary creditor will obtain certainty about the return of the debt of the debtor. So if proven acts of fiduciary giver that pledge, assign or sublet without consent object fiduciary recipients, based on Article 23 paragraph (2) of Act No. 42 Of 1999 on Fiduciary expressed that:

"The debtor may assign, pledge, or lease to another party objects into objects Fiduciary who is not an inventory of objects, except with the prior written consent of the Receiver fiduciary."

So from these provisions, it can be considered that the debtor has committed an unlawful act. Abdulkadir Mohammad said that the elements of an unlawful act, namely:¹⁶

- The act should be against the law
- The act should result in losses
- The act was only done by mistake

¹⁴ Mariam Darus Badruzaman, 1978, *Bab-bab Tentang Creditverband, Gadai dan Fidusia*, Citra Aditya Bakti, Bandung, p. 25.

¹⁵ Sri Soedewi Masjchoen Sofwan, 1977, *Beberapa Masalah Pelaksanaan Lembaga Jaminan Khususnya Fiducia di Dalam Praktik dan Perkembangannya di Indonesia*, Faculty of Law, Gadjah Mada University, Yogyakarta, p 76.

¹⁶ R. Wirjono Prodjodikoro, 2003, *Perbuatan Melanggar Hukum*, Sumur, Bandung, p.73.

- Between actions and loss of a causal relationship.

The provisions in Article 36 of Act No. 42 On Fiduciary decisive:

"Debtor transfer, mortgage or lease objects that become the object of fiduciary referred to in Article 23 paragraph (2) were carried out without prior written approval from recipients fiduciary, in criminal imprisonment of 2 (two) years and a fine of Rp 50,000,000, - (fifty million rupiah) ".

3. Closing

3.1. Conclusion

From the description that has been delivered then there are a number of things that can be inferred, among others:

- Material rights fiduciary discount preference nature in the sense that the material guarantees the right to give precedence to the creditor position guarantees rights holders against other creditors. Further provisions in the preferred position Fiduciary Act can be found in Article 27 of these are related to the interests of creditors of the fiduciary object. The role of the good faith of a debtor is extremely important. Debtors who are not acting in good faith can be abused his power against the security object and cause harm.
- Fiduciary giver proven acts that pledge, assign or sublet without consent object fiduciary recipients, based on Article 23 paragraph (2) of Act No. 42 Of 1999 on Fiduciary then the lender is entitled to sue for damages.

3.2. Suggestion

- It is expected the government to take a special arrangement in terms of Operasystem of objects related fiduciary understanding of rights and responsibilities of the parties in fiduciary so that no breaches of fiduciary Security Act.
- To disseminate to the public with the aim to increase public knowledge of the fiduciary, fiduciary and benefit from the advantages gained in carrying out fiduciary guarantee registration.

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