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Notary's Principle of Prudence in Credit Guarantees in Banking

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Abstract. *This research is motivated by the great responsibility of a notary for the deeds he makes that is attached throughout his life, thus demanding the application of the principle of prudence or thoroughness in every exercise of his authority. The principle of prudence is a legal obligation affirmed in the oath of office and laws and regulations in the field of notary, and has a strategic role in banking practices, especially in binding credit collateral in the form of Mortgage Rights on land. Negligence of a notary who also holds the position of Land Deed Making Officer (PPAT) in analyzing material collateral has the potential to cause legal defects in the deed, eliminate the executorial power of the collateral, and harm the bank and the debtor. This research aims to analyze the legal aspects of the application of the principle of prudence of notaries in banking credit guarantees and the resulting legal consequences. The research method used is normative juridical legal research, which positions law as the prevailing norm (law in books). The approaches employed include the statutory regulatory approach, the conceptual approach, and the case approach. Legal materials, including primary, secondary, and tertiary legal materials, were obtained through literature review and analyzed qualitatively and normatively through legal interpretation and reasoning. The research results show that the application of the principle of prudence by notaries and PPAT is an essential requirement in the preparation of bank credit guarantee deeds. Careful and comprehensive application of this principle results in a valid guarantee deed, has perfect evidentiary force, and provides legal protection for the bank and the debtor. Conversely, negligence in applying the principle of prudence can result in the deed being void or subject to cancellation, the loss of the guarantee's executorial power,* *and give rise to legal liability for the notary, both civil, administrative, and criminal.*

***Keywords**: Credit Guarantee; Mortgage; Notary; Precautionary Principle; PPAT.*

1. Introduction

The responsibility of a notary for the deeds he makes is for the life of the notary concerned, therefore in making a notary must always act carefully or with the principle of caution which is emphasized in the oath/promise and the obligations of the notary, namely Article 4 in conjunction with Article 16 paragraph (1) letter a of the Notary Law which is hereinafter abbreviated as UUJN. The general authority of a notary is to make authentic deeds where to guarantee certainty, order and legal protection, authentic written evidence is needed regarding actions, agreements, determinations and legal events made before or by authorized officials.

Accuracy comes from the word prudent which means wise, careful.[1]The word prudent was absorbed into Indonesian and became a prudential vocabulary.[2]The term "prudential" is closely related to the function of bank supervision and bank management. When viewed from the perspective of the prudent banking principle, this is a principle that states that in carrying out its functions and business activities, banks must act prudently to protect the public funds entrusted to them.[3]The principle of prudence is a principle that states that banks in carrying out their functions and business activities are required to apply the principle of prudence in order to protect the public funds entrusted to them. This is in accordance with Article 2 of Law Number 10 of 1998 concerning amendments to Law Number 7 of 1992 concerning Banking, which states that Indonesian Banking in conducting its business is required to conduct its business based on Economic Democracy by using the Principle of prudence.[4]

Etymologically, the principle of equality comes from the words principle and equality. Principle means a basis or truth that is the basis for thinking and acting, and can also be interpreted as a foundation.[5]Carefulness means being careful, things related to being careful. Careful means being mindful, being frugal, being alert, based on this understanding, it is interpreted that the principle of care is

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[1]John M. Echols and Hasan Shadily, English-Indonesian Dictionary, 21st Edition, (Jakarta: PT Gramedia, 1995), p. 454

[2]Big Indonesian Dictionary

[3]Racmadi Usman, Legal Aspects of Banking in Indonesia, (Jakarta: Gramedia Pustaka Utama, 2001), p. 18

[4]Hermansyah, 2013, Indonesian National Banking Law, Kencana Prena Media Group, 7th Edition, Jakarta, (Hereinafter referred to as Hermansyah I), p. 7.

[5]Deni Agus Santoso, 2016, "Principles of Caution for Land Deed Officials/PPAT in Handling Letter C Land Transfers", Thesis, Master of Notary Study Program, Gadjah Mada University, Yogyakarta.

the basic principle of thought and action carried out by paying attention to vigilance or caution, the principle of care does not only apply to notaries, but must also be upheld by Land Deed Officials (PPAT) and is a form of implementing the oath of office before the appointment of PPAT, Temporary PPAT, and replacement PPAT as stated in Article 34 of the Regulation of the Head of the National Land Agency Number 1 of 2006 concerning Provisions for the Implementation of Government Regulation Number 34 of 1998 concerning the Regulations on the Position of Land Deed Makers. One of the contents of the oath is that "I will carry out my office honestly, orderly, carefully and with full awareness, responsibly and impartially".[6]

Banks are part of financial institutions whose primary function is as intermediaries, namely bridging the interests of parties with excess funds (surplus units) with those in need of funds (deficit units). In their capacity as intermediaries, banks play a role in collecting funds from the public in various forms of savings, then channeling them back to the public in the form of credit or financing. This intermediary function positions banks as institutions that have a strategic role in maintaining the smooth flow of funds in the economic system, while also being the main drivers of economic activity in society.

Bank credit plays a crucial role in financing the national economy and serves as a driving force for economic growth. Through sound, prudent, and prudent credit distribution, banks not only safeguard their own business interests but also contribute to sustainable economic growth, financial system stability, and the improvement of public welfare at large.

Based on the description above, this research is entitled "The Principle of Notary Prudence in Credit Guarantees in Banking." This research aims toTo find out and analyze the legal aspects of the principle of prudence of PPAT in analyzing credit guarantees for mortgage rights in banking., as well asTo determine the legal consequences of the notary's principle of prudence in analyzing banking credit guarantees.

2. Research Methods

The type of research that will be used is normative juridical research, namely research that deductively begins by analyzing the articles in the laws and regulations that regulate the issue of the Notary's CAUTIONARY Principle in Credit Guarantees in Banking..This research will be compiled using a normative juridical research type, namely research that places law as a norm or rule that applies in society (law in books), not as human behavior (law in action).[7]

This research will be compiled using a normative juridical research type, namely research that places law as a norm or rule that applies in society (law in books), not as human behavior (law in action).[8]This research focuses on examining the

[6]Ibid
[7] Peter Mahmud Marzuki, Legal Research, Kencana Prenada Media Group, Jakarta, 2017, p. 32
[8] Peter Mahmud Marzuki, Legal Research, Kencana Prenada Media Group, Jakarta, 2017, p. 32

application of positive legal rules or norms, where this concept views law as a normative system that is independent, closed and separate from real social life.[9]

In legal research using a normative juridical approach, the type and source of data used are secondary legal data, namely data obtained through library research. This secondary legal data is used to examine, analyze, and interpret legal norms related to the research problem, with an emphasis on applicable positive legal principles.

The data collection method in this study was conducted through library research, considering that this research is a legal study with a normative juridical approach that emphasizes the study of written legal norms. The library study was conducted by tracing, inventorying, and in-depth reviewing various legal materials relevant to the research problem, including primary, secondary, and tertiary legal materials.

The data analysis method in this study was conducted qualitatively and normatively, namely by analyzing the collected legal materials based on the legal approach used. In the legal research used, the analysis was not aimed at processing statistical data but rather at interpreting legal norms, identifying legal principles, and formulating arguments systematically and logically.[10]

The collected primary, secondary, and tertiary legal materials were then analyzed through legal interpretation and legal reasoning. Legal interpretation was used to understand the meaning of legal norms governing the obligations and responsibilities of notaries in the preparation of bank credit guarantee deeds, while legal reasoning was used to draw normative conclusions based on the relationship between legal norms, principles, and principles.[11]

3. Results and Discussion

3.1. Legal Aspects of the Principle of Prudence of PPAT in Analyzing Credit Guarantees for Mortgage Rights in Banking

The principle of prudence is one of the important principles that must be applied or implemented by Notaries and PPATs in carrying out their duties as public officials. The definition of a Land Deed Making Official (PPAT) is contained in several laws and regulations, namely based on Article 1 number 4 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects related to Land (UUHT), which states that, "A Land Deed Making Official, hereinafter referred to as PPAT, is a public official who is authorized to make deeds of transfer of land rights, deeds of encumbrance of Mortgage Rights, and deeds of

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[9] Ronny Hanitijo Soemitro, 1998, Legal Research Methodology and Jurimetrics, Ghalia Indonesia Jakarta, pp. 13-14

[10] Soerjono Soekanto and Sri Mamudji, Normative Legal Research (A Brief Review), RajaGrafindo Persada, Jakarta, 2011, pp. 32–33

[11] Peter Mahmud Marzuki, Legal Research, Kencana Prenada Media Group, Jakarta, 2017, pp. 133–136

granting power of attorney to encumber Mortgage Rights according to applicable laws and regulations."[12]

A deed drawn up by a Land Deed Official (PPAT) is authentic evidence that serves to prove the commission of a specific legal act in the land sector. Therefore, the validity and evidentiary power of a PPAT deed depend heavily on the validity of the legal act that served as the basis for its creation. If the legal act is void by law or declared void by a court decision, the PPAT deed in question loses its function as authentic evidence and can no longer be used to prove the existence of the legal act in question.

In banking practice, PPAT has a very strategic role because it must cooperate with the bank in issuing land deeds required in order to create a Deed of Granting Mortgage Rights (APHT) between the bank as creditor and the debtor as guarantor. In general, the bank approaches the PPAT to request assistance in the process of land administration and the creation of deeds in accordance with the authority granted by laws and regulations, with the aim of ensuring that the binding of Mortgage Rights is carried out legally, orderly, and does not cause losses to the interested parties.

The trust placed by banks in PPATs is based on their position as public officials with expertise, integrity, and professional responsibility in the land sector. Through this role, PPATs are expected to anticipate and minimize potential legal issues that may arise in the future, particularly those related to the status of the collateral, the legal entities involved, and the procedures for assigning mortgage rights.

However, in practice, PPATs often lack a comprehensive understanding of this strategic position, resulting in suboptimal application of the principle of prudence. This negligence in being careful and thorough can lead to legal issues, whether related to the object of the deed, the subject of the deed, or other formal and material aspects. This situation not only has the potential to harm banks and debtors but can also threaten the credibility, reputation, and legal responsibility of the PPAT as a public official.

The application of the principle of prudence by a Land Deed Official (PPAT) in drafting a Mortgage Deed is essentially a manifestation of the theory of legal certainty. Legal certainty requires that every legal action be based on clear, valid, and consistent norms, so that the deed drawn up has perfect evidentiary force and can be legally accounted for. The PPAT's thoroughness in examining the subject, object, and credit collateral documents is a primary requirement to ensure that the Mortgage Deed does not contain formal or material defects that could potentially lead to legal uncertainty in the future.

In general, the principle of prudence can be interpreted as a basis of truth that becomes the basis for thinking and acting with a full attitude of caution. 10 The

[12]Article 1 number 4 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land.

principle of prudence in the global scope is known as the prudential principle or precautionary principle. 11 The principle of prudence is a development of the principle of prudence. Black's Law Dictionary defines "prudence" as thoroughness, prevention, attention and objective assessment. as embodied in action or care. This level of care requires urgency or a state that requires a great deal of training. This condition in legal terms is associated with care and diligence as opposed to carelessness.[13]

The definition of prudence was also put forward by Adam Smith in his Theory of Moral Virtue, which provides the definition of prudence as a very careful, very alert and attentive attitude to the most distant consequences of every action, which cannot be something that is pleasant or can be approved for its own sake, but based on the responsibility of the tendency to obtain the greatest good and to avoid the greatest evil.[14].

In the practice of deed preparation, all included documents must meet formal and material requirements, and be legally accountable for their accuracy, as any omissions or inaccuracies can lead to complex problems later on. Inaccuracy in data verification can delay the issuance of the Mortgage Right certificate, the loss of the deed's evidentiary power, and the potential for disputes between creditors and debtors. Therefore, the application of the principle of prudence by PPAT is not merely an administrative procedure, but an essential instrument to ensure legal certainty, protection of the rights of the parties, and the credibility and accountability of the official who prepares the deed.

a. Implementation of Credit Guarantee Agreement Between Creditor and Debtor

Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA) has mentioned the existence of the Mortgage institution as a guarantee for debt or credit, where according to Articles 25, 33, and 39 of the UUPA it is stated that Ownership Rights, Cultivation Rights, and Building Rights can be used as debt collateral with the burden of Mortgage Rights. However, because at that time the law regulating Mortgage Rights did not yet exist, Article 57 of the UUPA explains that as long as the law on Mortgage Rights as mandated in Article 51 of the UUPA has not been formed, thus for the time being the provisions used are the provisions regarding Mortgages and Creditverband.

The binding of credit collateral with Mortgage Rights is carried out when a customer or debtor who obtains credit from a bank, makes immovable property in the form of land (land rights) including or not including objects that are not related to the land (for example buildings, plants, statues, and so on) as collateral without the debtor physically handing over the collateral to the creditor (bank). This means that the collateral is physically still controlled by the person

[13]Henry Campell Black, Black's Law Dictionary: Definitions Of The Terms And Phrases Of American And English Jurisprudence, Ancient And Modern, In Ius Quia Iustum Law Journal No. 3 Vol. July 24, 2017, p. 487.

[14]Adam Smith in Sonny Keraf, Free Markets, Justice and the Role of Government (Yogykarta: Kanisius, 1996), p. 107

concerned and its ownership remains with the original owner, but because it is used as debt collateral by making a Mortgage Rights agreement so that the authority of the Mortgage Rights provider to carry out legal actions with third parties or other actions that result in a decrease in the value of the collateral is limited by the Mortgage Rights owned by the bank as the holder of the Mortgage Rights.

Thus, the ownership of the land remains with the original owner or the grantor of the Mortgage, while the bank only has the Mortgage Right which gives the right to receive payment of its receivables before other creditors. The implementation of this collateral binding is the result of a principal agreement, namely a credit agreement, therefore the implementation of the collateral binding can only be carried out after the credit agreement is completed.[15]

b. Power of Attorney Imposing Mortgage Rights

In the General Explanation number 7 and the explanation of Article 15 paragraph (1) of the UUHT it is stated that the granting of Mortgage Rights must be carried out by the Mortgage Grantor himself by being present before the PPAT. Only if for some reason he cannot be present in person before the PPAT, he must appoint another party as his proxy, with a Power of Attorney to Charge Mortgage Rights (abbreviated as SKMHT) in the form of an authentic deed. The making of the SKMHT is not only by a Notary but also assigned to the PPAT, because this PPAT's presence reaches the sub-district level in the context of equalizing services in the land sector. The contents of the SKMHT must meet the requirements of Not containing power to carry out legal acts other than not charging Mortgage Rights, Not containing substitutions, Clearly stating the object of the Mortgage Rights, the amount of debt, and the name and identity of the creditor, the name and identity of the debtor if the debtor is not the Mortgage Grantor.

Thus, if a Notary is authorized to make a SKMHT for land throughout Indonesia, then a PPAT may only make a SKMHT for land within his/her area of office, especially in places where there is no Notary on duty. The Power of Attorney must be given directly by the grantor of the Mortgage Rights and must fulfill the requirements regarding its contents as stipulated in Article 15 paragraph (1) above, then the Power of Attorney in question is null and void by law, meaning that the Power of Attorney cannot be used as a basis for making a Deed of Grant of Mortgage Rights.

c. Deed of Encumbrance of Mortgage Rights

A Deed of Granting a Mortgage Right contains mandatory substance, namely regarding the name and identity of the holder and grantor of the Mortgage Right, the domicile of the parties concerned, a clear designation of the debt or debts guaranteed, the value of the collateral, and a clear description of the

[15]HA Chalik and Marhainis Abdul Hay, Several Legal Aspects in the Credit Sector (Jakarta: UPN Veteran Family Development Foundation Publishing Agency, 1983), p. 69.

Mortgage Right. In addition, in the Deed of Granting a Mortgage Right, the parties can also include optional promises, which aim to protect the interests of the creditor as the holder of the Mortgage Right. Although these promises are optional, they are always included in the Deed of Granting a Mortgage Right.

According to Gerungan Valentino Januar, implementing the principle of prudence in drafting a Deed of Grant of Mortgage Rights (APHT) is crucial. Complying with statutory provisions will undoubtedly act as a shield or protection for Land Deed Officials (PPAT), the officials authorized to issue APHTs.

3.2. Legal Consequences of the Notary's Principle of Prudence in Analyzing Bank Credit Guarantees.

Based on the provisions of Article 8 and the explanation of Article of the Banking Law, Banks are required to pay attention to the conditions in granting credit, in addition to having confidence that the debtor has good intentions and has the ability to pay, banks are required to pay attention to the conditions called "the 5 C's analysis of credit", including collateral or guarantees. As explained in the Decree of the Board of Directors of Bank Indonesia No: 23/69/Kep/dir dated February 28, 1991 concerning guarantees, it is stated that the guarantee for granting credit is the bank's confidence in the debtor's ability to repay the credit in accordance with the agreement.

Banks must apply the principle of prudence, which is a principle that serves as a guideline for smooth business operations and as a guideline for banks to assess potential debtors. The principle of prudence (prudent banking principle) is a principle or principle that states that banks in carrying out their functions and business activities must act carefully (prudently) in order to protect the public funds entrusted to them.[16]

Legal protection related to credit agreements essentially protects the rights of the bank as creditor and the bank's debtor as debtor. In credit agreements, banks need to ensure the repayment of funds (credit) from debtors, while debtors also require protection of their rights as debtors in the implementation of the credit agreement. To secure and ensure the repayment of credit granted to debtors, banks will always request collateral. The collateral requested by banks is usually specific, namely collateral that refers to specific objects owned by the debtor. This collateral can be in the form of movable or immovable objects such as land. However, banks generally prefer collateral in the form of land bound by a mortgage.

a. Legal Consequences If the Precautionary Principle is Applied Correctly

If the Notary has implemented the principle of prudence optimally, then the legal consequences are that the Guarantee Deed has perfect evidentiary power, legal protection for the parties, the Notary is protected from legal responsibility, the

[16]Rachmadi Usman, Legal Aspects of Banking in Indonesia, Gramedia Pustaka Utama, Jakarta: 2001. p. 18

Notary cannot be held responsible for civil, criminal or administrative matters because he has worked according to professional standards..

b. Legal Consequences If the Precautionary Principle is Not Applied

The negligence of a notary in analyzing credit guarantees can result in various serious legal consequences, the deed can be null and void and can be cancelled, the notary's civil liability so that the notary can be sued based on several things, administrative liability to the notary in the form of sanctions, criminal liability that can befall the notary, and can cause losses to the creditor (bank)..Thus, the failure of a Notary to apply the principle of prudence not only creates legal uncertainty regarding the validity and enforceability of the guarantee deed, but also violates the parties' sense of justice. This situation demonstrates that the principle of prudence is a legal instrument that bridges the gap between legal certainty and justice in the practice of bank credit guarantees.

3. Conclusion

Based on the results of the research and discussion that has been conducted, the following will be presented the conclusion of the results of the research conducted, Based on the results of the research and discussion regarding the application of the principle of prudence of notaries in analyzing bank credit guarantees, it can be concluded that the principle of prudence is a legal obligation that is not only attached to the bank as a creditor, but also to the notary as a public official authorized to make a deed of credit guarantee. In practice, PPAT must apply the principle of prudence and pay attention to the procedures in making the Deed of Granting Mortgage Rights (APHT). The procedure, which in English is called procedure, while in Dutch it is called de procesvoering is the procedure in granting APHT. The procedure has been determined in Article 10 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land. Examining all the completeness and validity of the evidence or documents shown to the PPAT, as well as hearing the statements or statements of the appearers must be done as a basis for consideration to be included in the deed. Notaries and Land Deed Officials (PPAT) are advised to apply the principle of maximum and consistent caution in every stage of the creation of a credit guarantee deed, particularly by conducting a thorough examination of the legal status of the collateral object, the authority of the parties, the suitability of the documents, as well as the time period and contents of the SKMHT if it is used as a basis for creating an APHT. The application of this cautionary principle is not only a professional obligation, but also a legal obligation to prevent the deed from being cancelled or being cancelled and to protect the reputation and responsibility of the Notary and Land Deed Officials (PPAT).AndBanks, as creditors, are advised to improve coordination and cooperation with notaries and landowners (PPAT) in the credit collateral binding process. Banks need to ensure that all documents submitted to notaries and landowners (PPAT) are complete, accurate, and factually accurate. This ensures that the SKMHT and APHT (Deed of Land Deed) preparation process can be carried out carefully and avoid future legal issues that could potentially harm the bank due to unenforceable collateral.

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