



LAW RECONSTRUCTION OF REGISTRATION ON FIDUCIARY OBLIGATION BASED ON JUSTICE VALUE

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Abstract

Fiduciary term that has long been known in the Indonesian language. Similarly, the term is used in Act No. 42 of 1999 regarding Fiduciary. In the terminology of the Dutch term is often referred to in full, namely Fiduciare Eigendom Overdracht (FEO), namely the delivery of property rights in the trust. While the English term is called Fiduciary Transfer of Ownership. Background onset of fiduciary institutions, as set out by the experts is because the statutory provisions governing the institution pawn contains many flaws, does not meet based on developments in its history. Fiduciary originated from an agreement that only is based on trust. But over time in practice the necessary legal certainty to protect the interests of the parties and the needs of society.

Keywords: *Fiduciary; Notary Public; Justice Value.*

1. Introduction

Fiduciary is security interests in the moving objects both tangible and non movable³ and immovable in particular building can not be encumbered as to which referred to in Act No. 4 of 1996 on Mortgage which remain in control of the Giver Fiduciary (debtors), as collateral for the repayment of certain amount of money, which gives the position preferred to fiduciary recipient (creditor) against another creditors. Fiduciary obligation accounts payable treaty creditor to the debtor that involves underwriting. The collateral position still in control of the owner of the guarantee. But in order to ensure legal certainty for creditors then made a deed made by the notary and registered with the Registry Office fiduciary. Later creditor will obtain a certificate of fiduciary titled, "Based On Justice Based on God". From the definition given clear to us that the fiduciary is distinguished from Fiduciary, where the fiduciary is a process of transferring titles and Fiduciary is the guarantee provided in the form of a fiduciary⁴.

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⁴ *Ibid.*



Before exiting the Act 42 of 1999 which became the object of fiduciary assurance is moving objects comprising objects in the inventory, merchandise items, accounts receivable, machinery equipment and vehicles with the issuance of Act No. 42 of 1999 objects fiduciary mak given broader sense. Definition of Fiduciary accordance with Act No. 42 of 1999 on Fiduciary⁵ is:

- 1) The transfer of ownership of an object on the basis of trust with the provision that the object of the transferred ownership rights remain in the control of the owner of the object.
- 2) Fiduciary is the right collateral to the moving objects both tangible and intangible and immovable in particular building can not be burdened with security rights as stipulated in Act No. 4 of 1996 on Mortgage which remain in control of the Giver Fiduciary, as collateral for the repayment of certain debt, which gives precedence to the Receiver position Fiduciary against other creditors.

In a fiduciary guarantee registration there is a necessity to include objects that become the object of fiduciary. This is very important because it is exactly what objects can be sold for debt payments fiduciary. Object collateral should be understood as the right fiduciary is the right material attached to the object of fiduciary and will keep abreast of any object in the hands of the object is (*droit de suite*) for the fiduciary has not waived / strikethrough. Thus, bond guarantees and promises of fiduciary be registered and could therefore be the recipient of fiduciary, while legal protection against fiduciary recipient is given through a fiduciary obligation according bind third parties.⁶ In an underwriting agreement, usually is between creditors and debtors agreed certain promises, which are generally intended to give a strong position for the creditors and will be registered after intended to also bind third parties. Therefore it can be interpreted herein that includes registration, both registration and bond collateral objects, then all the promises contained in the deed of fiduciary (which in Article 13 paragraph (2) b is recorded in the book list Fiduciary Registration Office) and binding third party⁷.

Weakness action practical application of the fiduciary agreement in the field, including but not registration, with the object of fiduciary (only stop the manufacture of authentic deeds), for negotiations that provide additional costs for the recipient of fiduciary at the time of executing the object jamainan fiduciary, so the certificate of fiduciary does not provide legal education in community. Not surprisingly, due to such a peaceful practice, cases of slow and difficult execution of fiduciary become a problem, in prasurey writers do, eg in some Rural Bank fiduciary agreement is not effective because of difficult implementation of an execution paradigm.

⁵Sjahdeini. Sutan Remy, 1993, *Kebebasan Berkontrak dan Perlindungan Yang Seimbang Bagi Para. Pihak Dalam Perjanjian di Indonesia*, Institut Bankir Indonesia, Jakarta, p. 98

⁶ Sutopo. H.B. 1998. *Metodologi Penelitian Hukum Kualitatif Bagian II*, UNS Press, Surakarta, p. 247

⁷ *Ibid.*



2. Research Methods

Research methods used is juridical-empirical approach. Juridical approach used to analyze various regulations and legislation governing the fiduciary agreement and fiduciary. While the empirical approach used to analyze the law not merely as a set of rules of law that are normative, but the law is seen as society implicated character and patterned in public life⁸.

3. Results And Discussion

a. Fiduciary

According to Dr. A. Hamsah and Senjun Manulang, Fiduciary is: A way of transfer of property rights of the owner (the Borrower) based on their agreement in principal (loan agreement receivables) to creditors, but submitted only right course in Juridical Levering and solely owned by the creditor trust only (as collateral for the debtor) while the goods are still controlled by the debtor but not anymore as *eigenaar* (owner) and *beziter* (master) but only as Detentor or Holder and on behalf of the creditor *eigenaar*.

Some of the main principles and the fiduciary is as follows⁹:

- 1) That in real terms, the fiduciary holder works only guarantee holder only, not as the owner of the truth.
- 2) Fiduciary rights holders to execute a new guarantee product exists if there is a default of the debtor
- 3) If the debt is paid, then the object fiduciary must be returned to the giver fiduciary.
- 4) If the proceeds of sale (execution) fiduciary goods exceeds the amount of the debt, the remainder of the proceeds shall be returned to the giver fiduciary.

When examined above legal construction is the hallmark of a fiduciary agreement, that is the essence of a fiduciary agreement is an agreement of an object (material), title transfer of rights as a condition for agreement details at once to translate their legal guarantees. In a fiduciary agreement, the authority of the master objects, which referred to the delegation of authority to control objects assurance, but this needs to be underlined the authority of mastering not be the same as the will of the master, because the will to master a part which is prohibited in the fiduciary agreement, delegation of authority over a part of responsibility given to the recipient of fiduciary fiduciary giver to complete the loan by selling the

⁸ *Ibid.*

⁹ *Op.cit*, p. 76



collateral object, surrender is more symbolic as handover constitutum possessorium for moving tangible objects, or by cessie for accounts payable.

Against handover constitutum possessorium, note that known some form of handover is not real, that is¹⁰ :

- 1) *Traditio Brevi Manu*, a form submission where the goods are to be delivered because of something that is already in the possession of the parties will accept delivery, such as delivery of the lease-purchase. Tenant-purchase for the lease-purchase it already controlled goods while the ownership remains in the seller, if the price of leasing, it was paid the then party seller delivers (*in traditio brevi manu*) goods to tenant-purchase and later became his
- 2) *Longa traditio Manu*, a form submission where the goods are to be delivered in the possession of third parties.

For example, a buy a car from B on the condition that his car had turned over a week after the contract of sale was made. Before the one-week period had passed A sell more cars to C was B was told by a car that was later handed over to C only. Form of buying and selling these have been wont to do. for businesses, will be established fiduciary guarantee agreement.

Although the practice of a fiduciary is not new in Indonesia, but the provisions of the new laws being in 1999 with nya UUJF on September 30, 1999 and on that day was also enacted in the state number 168. aran Lemb UUJF not appear out of nowhere, but is a reaction on the needs and the implementation of the fiduciary practices that had been running, then it would be easier for us to understand the provisions UUJF, if we understand the practice and practical problems which have ada¹⁰. The reaction is one of them is the slowing down of the economy at the time, where the need for high capital not dimbangi by providing sufficient capital, so in order to capital efficiency then the loan is only limited to the purchase of the means of production that does not exist, while the means existing production no longer need to be refurbished but still used at once as part of the collateral for the loan debt for a business, the concept is a reaction to the inefficiency of the security agreement a pledge that has been known in practice, where the object guarantee must be in possession perierima pledge, thereby inhibiting conditions for the business world, then dibentulah fiduciary agreement. Article 1 of Law fiduciary provide limits and understanding the following¹¹:

b. Fiduciary Procedures Based on Indonesian Government Regulation (PP) No. 21 of 2015

¹⁰ Mr. W.M. Klyn. *Ikhtisar Hukum Benda Belanda .Suatu Karangan dalam Compedum Hukum Belanda's--Graavenhage*. Yayasan Kerjasama Ilmu Hukum Indonesia-Belanda. 1978, p.31.

¹¹ BP.Cipta Jaya. Peraturan Pelaksana Undang-Undang Jaminan Fidusia Tahun 2000, p. 84-85



In Article 2 of the Indonesian Government Regulation No. 21 of 2015 About Registration Procedures And Cost Manufacture Fiduciary Fiduciary Deed states that "Fiduciary registration application, the application for a certificate improvements Fiduciary, request changes Fiduciary certificates and certificate takedown notice Fiduciary submitted by the Recipient Fiduciary, power of attorney or his deputy to the Minister "¹².

In this case the format of the petition must contain the elements as defined by the PP, the elements that should be included among others¹³:

- 1) The identity of the giver and the recipient of fiduciary Fiduciary;
- 2) Date, Fiduciary deed number, the name and domicile of the notary who made the deed Fiduciary;
- 3) Data principal agreement which guaranteed the fiduciary;
- 4) A description of the object which is the object Fiduciary;
- 5) The value of the guarantee; and
- 6) Value objects into an object Fiduciary.

The petition shall be filed after 30 (thirty) days from the making of fiduciary warranty deed. If it fulfills the conditions, then the applicant would obtain evidence which contains elements signup¹⁴:

- 1) Registration number;
- 2) Date of filling the application;
- 3) Applicant's name;
- 4) Fiduciary registration office name;
- 5) The type of application; and
- 6) Fiduciary registration fee.

The petition will be recorded electronically after the applicant completed the administrative costs of registration. Fiduciary shall be deemed to have been born at the time of recording

¹² Satrio J., *Hukum Jaminan Hak Jaminan Kebendaan Fidusia*, PT. Citra Aditya Bakti, Bandung 2002, p. 76

¹³ Tunggal. Amin Widjaya dan Arif Djohan Tunggal. 1994, *Aspek Yuridis dalam Leasing*, Rineka Cipta, Bandung, p. 25

¹⁴ Widjaya, Gunawan dan Ahmad Yani, 2000, *Seri Hukum Bisnis: Jaminan Fidusia*. Rajawali Pers, Jakarta, p. 90



by the electronic media. If it has been recorded, then the applicant can print it online and be used as evidence that the Fiduciary has been registered.

Tekait at a cost of Creation Deed of Fiduciary as defined in Article 18 of the Indonesian Government Regulation No. 21 of 2015 About Registration Procedures Fiduciary And Cost Creation Deed of Fiduciary explained that the creation deed Fiduciary charged the amount determined by the value of the guarantee, with provisions following¹⁵:

- 1) Guarantee amount up to USD 100,000,000.00 (one hundred million), the cost of making the deed at most 2.5% (two point five percent);
- 2) Guarantee amount over USD 100,000,000.00 (one hundred million rupiah) up to 1,000,000,000.00, (one billion rupiah), the cost of making the deed at most 1.5% (one point five percent); and
- 3) Guarantee amount over USD 1,000,000,000.00 (one billion rupiah), the cost of making a notary deed by agreement between the parties, but not to exceed 1% (one percent) of the object that created the act.

c. Law Reconstruction Of Registration On Fiduciary Obligation Based On Justice Value

Article 372 of the Criminal Code emphasizes: 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.

By creditors, but this could be a blunder because it can each report since most of the goods become the property were both debtors and creditors, it takes civil decisions by local courts to mendudukan portion of each owner of the item for both sides. If it is taken there will be a long legal process, laborious and not cost you a bit. Consequently, the company's margins to be achieved is not realized even possible loss, including loss of time and thought.

These financial institutions that do not register themselves fiduciary actual loss because they have no legal right to eksekutorial. Poblem businesses that require speed and excellent customer service are not always in line with the logic of existing law. Perhaps because of a legal vacuum or the law is not always as fast as the times. Imagine, the fiduciary must be made before a notary public while making agreements and financing institutions in the field of fiduciary transactions in a relatively quick time.

Today many financial institutions to execute on the object that bears fiduciary goods that are not registered. Can be called remedial, rof coll, or remove. During this time the finance company they feel safe and smooth action alone. According to the authors, this is the case because it is still weak bargaining power of customers to creditors as the owner of the

¹⁵ *Ibid.*



funds. Plus the legal knowledge society is still low. This weakness exploited by the financial industry businesses, especially financial institutions and bank sector practicing fiduciary with deed under the hand.

The author is also concerned about the alleged misappropriation of state non-tax revenues in accordance with Act No. 20 of 1997 on Non-Tax State Revenue, because millions of financing (consumption, manufacturing and industrial) with the fiduciary is not registered and has the greatest potential financial harm state revenues.

4. Conclusion

In order to ensure legal certainty for creditors then made a deed made by the notary and registered with the Registry Office fiduciary. Later creditor will obtain a certificate of fiduciary titled, "Based on Justice Based on God". Thus, it has the power immediately if the debtor executorial rights violations fiduciary agreement to creditors (parate execution), in accordance with Act No. 42 of 1999 About Fiduciary.

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9) Code of Civil law.

10) Basic Agrarian Act No. 5 of 1960.

11) Act No. 42 of 1999 on Fiduciary.

12) Act No. 30 of 2004 on Notary.

13) Indonesian Government Regulation No. 21 of 2015 on Registration Fiduciary