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Study of Unlawful Acts in the Implementation of Fiduciary Execution (Verdict Study No.345/pdt.g/218/PN jkt.sel)

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ABSTRACT: As a form of security derived from law, fiduciary security has been used in Indonesia since the Dutch colonial era. Although the procedure is considered quick, easy, and uncomplicated, this type of collateral is often used in lending and borrowing transactions. Still, it does not provide legal certainty for creditors in their capacity as fiduciary beneficiaries. The author specializes in normative legal research, which is sometimes referred to as doctrinal legal research. Field research is not recognized in normative legal research. Research that looks at laws that are produced and organized based on doctrines that have been accepted by their developers or conceptors is known as doctrinal legal research. The judge granted the plaintiff's claim in counterclaim. The Judge stated that the Defendant in the counterclaim had defaulted to the Plaintiff in the counterclaim. Due to illegal behavior and violation of the subjective rights of others that are legally protected, the defendants' actions can be qualified as unlawful acts.

KEYWORDS: Execution, Fiduciary, and Violating the Law

INTRODUCTION

When two people make an oral agreement through mere speech, the agreement is considered consensual and enforceable. This implies that a promise to give something, to do or perform something, or not to do or perform something is made towards the other party, and the obligation arises as soon as the parties express their consent or agreement on the matters they discussed and will perform. In contrast to a consensual agreement, an oral agreement or understanding between the parties making the promise is not legally binding and does not create an obligation on the part of the parties to give something, do something, or not do something. Moreover, an actual declaration indicates the need for concrete actions to be taken for the parties to the agreement to be bound by it.

Fiduciary was known as Fiducia Cum Creditore in the Roman era, indicating that it was only a surrender as security and not a transfer of ownership (Satrio, 2002). The fiduciary institution was established as a result of a practical need. This need stems from the fact that, by our legal system, the security for a loan must be movable goods and be bound in the form of a pledge, with the aim that the pledged goods can be handed over to the person who receives it (the creditor). However, if the collateral for the debt is immovable property, the collateral must take the form of a mortgage (the current form of mortgage), whereby the debtor retains ownership of the object of collateral rather than surrendering it to the creditor. Nonetheless, there are situations where the loan collateral is still considered a movable asset. Still, the debtor is unwilling to hand over control of the item to the creditor, even when doing so would not cause any problems or interests for the creditor. As a result, there is a need for debt security, where the item is still categorized as movable but the creditor retains control over it. Eventually, a new type of security emerged where the debtor retains control over the movable property, but the creditor does not. We call this a fiduciary promise. Fiduciary law has evolved into a customary legal system ingrained in society as a result of scientific and socio-economic developments, meeting the needs of financial institutions and businesses for security and protection as well as capital loans.

As such, the finance business has grown rapidly, and the automotive industry has followed suit. This is particularly true when it comes to financing the purchase of motor vehicles through finance or leasing companies that use fiduciary guarantees. On February 7, 1974, the Ministers of Finance, Industry, and Trade of the Republic of Indonesia issued a Joint Decree of Three Ministers, Number Kep 122/MK/IV/2/1974, 32/M/SK/2/1974, and 30/Kpb/i/1974, on the Licensing of Business Leasing, which was the first document to regulate the existence of leasing companies. At that time, fiduciaries were often required to sign financing agreements and submit handwritten fiduciary guarantee deeds. Financing agreements made under hand still have shortcomings and are very risky because there is no legal certainty for creditors, so many fiduciary pledged goods are sold or transferred. In addition, if the debtor refuses execution, the creditor cannot seize the goods using the force of law but must file a lawsuit in court, which takes time and money

and can be very detrimental to the automotive and financial industries that use fiduciaries. Therefore, to protect the financial sector, especially multifinance and leasing, the government and the Parliament established a new legal institution known as fiduciary guarantee, which was marked by the promulgation of the Fiduciary Guarantee Law No. 42 of 1999. This law aims to regulate and provide legal certainty for parties involved in property security to pledge objects that are not land and that cannot yet be accommodated by mortgages, mortgages, or pledges.

The rapid growth of the automotive industry is partly due to the high sales of new motor vehicles, 70% of which are financed on credit. Fiduciary guarantees are not the same as fiduciary guarantees that existed before the Fiduciary Guarantee Law. First of all, fiduciary guarantees have a new right in the form of executorial title, which by parate execution can be executed directly by the creditor without the need for a bailiff or a court decision with permanent legal force. Therefore, for the fiduciary guarantee to be enforceable and remain in force in perpetuity, the fiduciary guarantee deed must be registered and a fiduciary guarantee certificate must be issued. Along with the Constitutional Court Decision No. 18/PUU-XVII/2019, which tested the validity of Article 15 paragraph (2) and paragraph (3)7 of Law No. 42/1999 on Fiduciary Guarantee, submitted by the applicants Aprilliani Dewi and Suri Agung Prabowo, the authority to interpret the Fiduciary Guarantee Certificate has changed (Wicaksono, 2020). The Constitutional Court (MK) ruled that all legal proceedings to execute a fiduciary guarantee certificate must be conducted in the same manner as a court decision with permanent legal force, especially in cases where there is no default agreement and the debtor refuses to voluntarily surrender the pledged goods. The Court considers any statement that does not convey this understanding as unlawful.

Likewise, the legal notion known as “promissory estoppel” is deemed unconstitutional unless it is interpreted in such a way that it is clear that the creditor is not the sole party to decide whether or not a breach has occurred. Rather, this judgment must be based on the mutual understanding of the debtor and creditor, or else it must rely on established legal procedures intended to determine whether a promise has been breached. As opposed to letting one party make all the decisions, this interpretation places a strong emphasis on the value of cooperation and equality in contractual partnerships by ensuring that all parties have a say in how possible breaches are resolved. This ruling will revoke the executorial authority of the fiduciary guarantee certificate, which is the same as a court judgment that has obtained permanent legal force. This is what will happen if two important conditions are not met. The first condition is that there must be an agreement on the existence of a breach of promise or default, which indicates a breach of agreement or contract by the debtor. The second is that the debtor must voluntarily give the collateral to the creditor. If these two conditions are not met, then the fiduciary guarantee certificate will not function properly and will not have the expected executorial power (Simamora, 2020).

First, the Court found that equal legal protection between creditors and debtors was not reflected in Article 15 paragraph (2) of Law No. 42 Year 1999. Law enforcement becomes unfair so that it can harm one of the parties. The second problem is that the language in Article 15 paragraph (3) of Law No. 42/1999 does not clearly define when an act of default is considered to have occurred. In addition, the standard does not explain who is authorized to determine when a situation can be categorized as a default, which can lead to misunderstandings and disputes between the parties.

LAW OF ENGAGEMENT

An obligation is a legal relationship that arises between two people as a result of an act, situation, or event (Muhammad, 2004). and obligations are interrelated because obligations are created by agreements. Agreement is formulated in Article 1313 of the Civil Code (KUHPerdata), namely, “an act by which one or more people bind themselves to one or more other people." When two people promise each other something, or when someone promises to another person, it is called an agreement. Agreements and obligations are interrelated because obligations are issued by agreements.

Unlawful Acts

Book III of the Civil Code contains regulations on tort. According to Articles 1365-1380 of the Civil Code, which are part of the obligation, an obligation is a relationship established by law between two persons or parties, the fulfillment of which is the obligation of one of the parties. According to Article 1233 of the Civil Code, obligations may arise from contract or from law. Therefore, obligations are divided into two categories based on their type: obligations arising from contracts or agreements and obligations arising from law. On the other hand, an agreement is a situation when two people commit to each other or to each other to do something (Apriani, 2019). In accordance with the guidelines outlined in Article 1365 of the Civil Code, a tort in civil law must have the following components:

1. The fact that an action occurs
2. These actions are illegal
3. Acceptance of responsibility by the perpetrator
4. Sufferers have suffered losses
5. Actions and losses have a weak relationship

Unlawful acts are found in Article 1365 of the Civil Code, which states: “Every unlawful act that brings harm to another person obliges the person who, through his fault, causes the loss, to compensate for the loss." The definition of unlawful act in Article 1365 of the Civil Code is not explicitly formulated. In legal science, there are 3 categories of unlawful acts as follows (Fuady, 2005):

1. Unlawful act of willfulness
2. An illegal act without fault, which means it does not include intent or negligence
3. Wrong actions caused by carelessness

An act performed by the perpetrator precedes a tort. It is widely recognized that the term "act" refers to both doing something (in the active sense) and not doing something (in the passive sense). For example, he may be legally obliged to make a certain decision, but that decision may also be based on a contract. As a result, unlike in contracts, there is no requirement for "consent or agreement" or "permissible causation" in tort cases (Sari, 2020).

Execution of Fiduciary Guarantee

Law No. 42/1999 on Fiduciary Guarantee, Article 29 to Article 34, regulates the execution of fiduciary guarantees. The collection and sale of goods pledged as fiduciary collateral is referred to as the execution of fiduciary collateral. Execution of fiduciary guarantees is carried out because, despite having received a summons, the debtor or fiduciary grantor does not fulfill his promise or does not carry out his obligations to the fiduciary recipient. If the debtor or fiduciary is in default, execution of the object of the fiduciary guarantee can be carried out using:

1. Execution of executorial title by executorial receiver
2. Public auction at the fiduciary's own power to sell fiduciary security objects
3. If the highest price can be obtained in a manner favorable to both parties, a sale under hand will be conducted in accordance with the agreement of the grantor and the fiduciary.

Therefore, the general rule is that the fiduciary security object must be sold through a public auction to ensure that the highest price can be obtained. An underhand sale can still be conducted if the fiduciary and the fiduciary agree to it and the conditions of the sale period are met, even if the sale by public auction cannot provide the highest price favorable to both parties.

RESEARCH METHODS

The author specializes in normative legal research, which is sometimes referred to as doctrinal legal research. Using a qualitative approach with legal sociology research methodology views law as a social institution that correlates with other social characteristics (Amiruddin & Zainal Asikin, 2006). Research that investigates and discusses practical issues that arise in society regarding the implementation of the obligation to notify the Minister of Law and Human Rights regarding the abolition of fiduciary guarantees.

RESULTS AND DISCUSSION

The Process of Fiduciary Execution in the Case of No.345/pdt.g/218/PN jkt.sel

The plaintiff, Apriliani Dewi, and the defendant, PT Astra Sedaya Finance, entered into a multipurpose financing agreement on November 18, 2016, whereby financing was provided for the purchase of a 2004 Toyota Alphard V Model 2.4 A/T, metallic gray. Plaintiff provided fiduciary security over the car to Defendant I to fulfill its obligations. Considering that Plaintiff is obliged by the Multi-Purpose Financing Agreement to pay a debt to Defendant I for Rp 222,696,000, which will be repaid over 35 months by way of installments for 35 months starting from November 18, 2016. Plaintiff has paid installments to Defendant I of Rp 55,674,000 until July 2017 by paying Defendant I Rp 6,186,000 per month from November 18, 2016, until July 18, 2017. In addition to these installments, the plaintiff also paid a down payment of Rp 42,000,000, administrative costs of Rp 2,500,000, vehicle insurance costs of Rp 5,405,400, and other insurance costs of Rp 3,684,000. Therefore, Plaintiff's total payments to Defendant I up to July 2017 amounted to Rp 109,263,400.

On November 10, 2017, Defendant III came to the Plaintiff's residence disguised as a representative of Defendant I. He brought a power of attorney signed by Defendant II. The Plaintiff's vehicle, a 2004 Toyota Alphard V Model 2.4 A/T, will be taken because the Plaintiff has defaulted. Plaintiff rejects Defendant III from taking the car because Defendant III cannot provide valid proof and can only submit a notarized power of attorney signed by Defendant II. As a result, Defendant III insulted the Plaintiff and the Plaintiff's husband with harsh words and curses in public and threatened to kill them.

In the lawsuit response, it is stated that Plaintiff has acknowledged that the payment of their obligations to Defendant I was only made for 9 (nine) months, from November 18, 2016, to July 18, 2017. The plaintiff's evidence in point 4 and other points indicates that the plaintiff has committed a breach of contract (broken promise). From August 2017 until now, Defendant I have even issued 3 (three) written warning letters to Plaintiff, specifically on August 25, 2017, August 29, 2017, and September 2, 2017. The plaintiff has stopped making installment payments to defendant I. Although three warning letters have been issued, the plaintiff still fails to fulfill their obligations. Therefore, it is requested that the panel of judges declare that the plaintiff has committed a breach of contract.

In his lawsuit, plaintiff did not explain the reason for defendant III's arrival at his home to retrieve the vehicle still in plaintiff's possession. The arrival of Defendant III was caused by Plaintiff's negligence in fulfilling their obligations to Defendant I. Plaintiff did not mention that from August 2017 until now (for a year), they have not made any payments to Defendant I and that Defendant I has sent three written warning letters as well as contacted the Plaintiff several times by phone. Furthermore, Plaintiff did not elaborate that Defendant I's internal team has visited Plaintiff twice and politely requested that Plaintiff hand over their vehicle, but

Plaintiff refused. The plaintiff merely depicts that Defendant I suddenly assigned Defendant III to retrieve the vehicle through a power of attorney from Defendant II on November 10, 2017, in a manner deemed unlawful.

Defendant II finally appointed Defendant III to tow the plaintiff's car on November 10, 2017. Every procedure carried out by Defendant II has been by the applicable legal provisions. The power of attorney and statement sent by plaintiff to defendant I on November 18, 2016, served as the basis for defendant III to repossess the vehicle. The grantor authorizes ACC to retrieve the vehicle from the possession of the grantor or from a third party that has control over it to carry out the fiduciary execution by the power of attorney. This power can be transferred to a third party.

The Process of Carrying Out the Execution is Said to be an Unlawful Act

Due to the lack of response and good faith from Defendant I, Plaintiff wrote to Defendant I on December 8, 2017, requesting an explanation regarding the actions of Defendant III and inviting Defendant I to resolve the issue at Plaintiff's home. For the same reason, Plaintiff sent a second invitation to Defendant I on December 14, 2017. Defendant I did not come to Plaintiff's home until December 23, 2017, to explain the actions of Defendant III, and Defendant I did not offer an apology for what happened on November 10, 2017, or December 1, 2017. By the Regulation of the Chief of the Indonesian National Police Number 8 of 2011 concerning the Security of Fiduciary Guarantee Execution, Article 7 paragraph (1) and Article 8 paragraph (1) letter c, the fiduciary recipient or their legitimate representative must submit a formal execution request to the Chief of Police accompanied by a warning letter to the debtor to fulfill their obligations. However, as the debtor, Plaintiff has never received a letter like this from Defendant I regarding the installment payment requirements.

As stated in Article 49 of OJK Regulation No. 30 of 2014 concerning "Good Corporate Governance for Financing Companies," financing companies are allowed to collaborate with other legal entities that have received approval from the Indonesian Financing Company Association as certified experts and possess the necessary licenses to carry out debt collection. However, defendants I, II, and III could not prove the professional qualifications of defendant III or demonstrate the legal validity of defendant III. Furthermore, stamp duty is imposed on the following types of letters based on Law Number 13 of 1985 concerning Stamp Duty, Article 2 Paragraph (1) letter a, namely: agreements and other letters intended as evidence of acts, events, or circumstances of a civil nature. According to the Multi-Purpose Financing Agreement between Plaintiff and Defendant I, the action of Defendant III in seizing the car from Plaintiff's residence is a civil act, thus it must use a power of attorney with a stamp. The power of attorney given by Defendant II to Defendant III turns out to be unstamped, thus failing to meet the provisions of Article 38 of OJK Regulation Number 1 of 2013 concerning Consumer Protection in the Financial Services Sector. As a result, the power of attorney does not have legal force, which states: Financial service providers are required to do the following after receiving consumer complaints: (a) to internally examine the complaint competently, accurately, and objectively; (b) to conduct an analysis to determine whether the complaint is valid; and (c) to issue an apology and, if the complaint is valid, to provide compensation and/or restoration and improvement of the product and/or service. In reality, Defendants I and II never responded to Plaintiff's complaints regarding the actions of Defendant III, never apologized, and never provided compensation or restitution to Plaintiff.

To respond to that argument, it can be stated that on November 10, 2017, defendant III came to plaintiff's location to take a car that was pledged as collateral for a debt to defendant I. Defendant III arrived at Plaintiff's place carrying an official assignment letter from Defendant II. Defendant III was tasked with retrieving the plaintiff's car that had been pledged as collateral for a debt to Defendant I. This was because defendants I and II had failed in their internal legal efforts to reclaim the car. Since the plaintiff, or the debtor, had been in arrears for more than 90 (ninety) working days, Defendant III took the car from Defendant II. The truth is that since August 2017, the plaintiff has not made any installment payments for the car. Defendant III is a certified Fiduciary Guarantee Object Execution Officer (PEOJF). Defendant I and Defendant III are coworkers who are legally bound at the company where Defendant III works. The reasons put forward by Plaintiff questioning whether the power of attorney from Defendant II to Defendant III is stamped are unreasonable and merely serve to justify Plaintiff's argument that a stamp is not necessary for the Power of Attorney. The main purpose of stamp duty, as stated in Article 1 paragraph (1) of Law No. 13 of 1985 concerning stamp duty ("Law 13/1985"), is to collect a tax on documents for certain letters by the state. An agreement or statement that is not stamped does not automatically become void. However, stamp duty will still be imposed if you plan to use that statement or agreement as evidence in court.

The plaintiff argues that defendant III is aware of how valuable it is to maintain a person's honor and reputation, as these are irreplaceable assets. However, the purpose of the statement made by Defendant III is to undermine the honor and dignity of the plaintiff. As a result, Plaintiff has been belittled, humiliated, and defamed in public, and the actions of Defendant III are contrary to the norms of propriety, caution, and prudence that should be observed in social interactions. Before saying something that could hurt the feelings of the plaintiff or cause negative consequences, defendant III should think it over first.

Based on the provisions of Article 49 paragraph (4) of OJK Regulation Number 30 of 2014 concerning Good Corporate Governance for Financing Companies, which states: "Financing companies are fully responsible for any impacts arising from cooperation with other parties," it follows that Defendant I and Defendant II are obligated to bear the consequences or impacts resulting from the actions of Defendant III. According to common knowledge, the co-defendant is an independent institution with the authority to carry out consumer protection, supervision, inspection, and investigation, as well as other actions against financial

service institutions, actors, and/or supporters of financial service activities as stipulated in the legislation in the financial services sector. In addition, based on Article 9 letter c of Law No. 21 of 2011 concerning the Financial Services Authority, the co-defendant may impose administrative sanctions on parties that violate regulations in the financial services sector. Lastly, the co-defendant should be more proactive in efforts to protect consumers, oversee, inspect, and investigate. In reality, the defendants never asked Defendant I to examine or investigate the plaintiff's complaint by the legal authority granted to him. The negligence of the defendants and co-defendants in responding to the plaintiff's complaint indicates that they did not act in good faith to protect the plaintiff's rights as a consumer and to obtain legal certainty, in addition to violating the principles and provisions of the aforementioned regulations. The actions of the defendant have contradicted Article 4 of Law No. 8 of 1999 concerning consumer protection, which states: Consumer rights include: advocacy, protection, and proper dispute resolution efforts in consumer protection; access to obtain advocacy, protection, and a voice to express opinions and complaints about the goods and/or services used.

Due to the following reasons: (i) violating the law; (ii) infringing on the legally protected subjective rights of others; (iii) contradicting the legal obligations of the perpetrator; (iv) violating morality; and (v) being contrary to the prevailing norms in society, the actions of the defendants are considered unlawful acts. The provisions of Article 7 paragraph (1) and Article 8 paragraph (1) letter c of the Regulation of the Chief of the Indonesian National Police Number 8 of 2011 concerning the security of fiduciary guarantee execution have been violated by Defendant I in the case at hand. Furthermore, the provisions of Article 49 of the Financial Services Authority (OJK) Regulation Number 30 of 2014 concerning good corporate governance for financial services business actors have been violated by Defendant I, Defendant II, and Defendant III in the case at hand. Defendant I, Defendant II, and Defendant III have also violated the provisions of Article 2 paragraph (1) letter a of Law Number 13 of 1985 concerning stamp duty, as well as the provisions of Article 38 of OJK Regulation Number 1 of 2013 concerning consumer protection in the financial services sector. Defendant I, Defendant II, and Defendant III have also violated the provisions of Article 4 of Law Number 8 of 1999 concerning Consumer Protection; (ii) Article 4 of Law Number 8 of 1999 concerning Consumer Protection states that the Plaintiff has the subjective right to obtain advocacy, protection, and proper dispute resolution efforts in consumer protection. In this case, the defendant's actions in ignoring the plaintiff's complaint have violated that right; (iii) the third defendant's attitude of insulting and referring to the plaintiff and the plaintiff's husband with vulgar language in front of many people contradicts the legal obligation of the perpetrator to uphold the honor and good name of the plaintiff. This also shows that the honor and reputation of the plaintiff were not upheld. (iv) The third defendant in the case a quo violated decency by behaving immorally and using foul language. (v) In the case a quo, the actions of defendant III entering the plaintiff's land without permission, removing the fuse to cut off the electricity, insulting the plaintiff and her husband with foul language and threats, and finally leaving the plaintiff's house by locking the gate from the outside are actions that are deemed inappropriate in the eyes of society. Based on the information provided earlier, it has been proven that the defendants have violated the law by causing harm to the plaintiffs. Therefore, they are required by Article 1365 of the Civil Code to compensate the plaintiff for all losses incurred.

CONCLUSION

The plaintiff has committed a breach of contract (broken promise). Since August 2017 until now, the plaintiff has completely ceased making installment payments to defendant I, PT. Astra Sedaya Finance. In fact, regarding this matter, Defendant i has sent three written warning letters to the plaintiff: the first warning letter on August 25, 2017, the second warning letter (warning notice) on August 29, 2017, and the third warning letter (final warning) on September 2, 2017. However, even though three warning letters have been issued, the plaintiff still has not fulfilled their obligations to Defendant I. Then Defendant II assigned Defendant III to repossess the plaintiff's vehicle. The repossession of the vehicle carried out by Defendant III was entirely based on the Power of Attorney and Statement that had been given by Plaintiff to Defendant I dated November 18, 2016. "In connection with the execution of the fiduciary, the declarant/authority hereby grants Power of Attorney to ACC, which may be substituted to a third party, to take the vehicle from the hands of the declarant/authority at the address of the declarant/authority or from the hands and location of other third parties who possess the vehicle in the context of fiduciary execution".

The defendant's actions constitute an unlawful act as they contradict the legal obligations of the perpetrator. The honor and reputation of an individual must be upheld; however, the behavior of Defendant III, who uttered harsh words and insults towards the Plaintiff and the Plaintiff's husband in front of others (the Plaintiff's neighbors) and threatened to kill the Plaintiff and her husband, demonstrates a lack of respect for the honor and reputation of the Plaintiff. This is contrary to decency. In this case, Defendant III's use of vulgar language and insults is indeed contrary to decency and reflects a lack of caution that should be exercised in society. In this matter, Defendant III's act of entering Plaintiff's yard without permission, cutting off the electricity to Plaintiff's home by removing the fuse, insulting Plaintiff and her husband with harsh words, and then leaving Plaintiff's home by locking the gate from the outside is entirely contrary to the caution that should be exercised in society.

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