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Fiduciary Guarantee Agreement in Relation to Constitutional Court Decision Number: 18/PUU-XVII/2019

Ahmad Julyadi Nasution[1], Tan Kamello[2], Hasim Purba[3], Saidin[4]

Abstract

An agreement is an event where a person promises another party to carry out something.. Bank and non-bank financing institutions distribute funds to the public in the form of credit with collateral, one of which is a fiduciary guarantee. When implementing the agreement, defaults sometimes occur. With the issuance of the Constitutional Court's decision Number 18/PUU-XVII/2019, disputes were resolved through a court decision. In contrast, previous disputes without a court decision were resolved by withdrawing the collateral Object based on the deed of agreement and fiduciary guarantee certificate. Based on the description above, the problem of this research is the position of fiduciary guarantee deeds with the issuance of Constitutional Court decision Number 18/PUU-XVII/2019 and the practice of executing fiduciary guarantees carried out by financing institutions. This research method uses normative juridical methods. Fiduciary guarantee deeds and fiduciary guarantee certificates have the power as proof of creditors holding fiduciary guarantees. Fiduciary recipients can immediately execute the ac-tion of collateral. With the Constitutional Court's decision, it certainly slows down execution in practice. Fiduciary guarantee deeds and fiduciary guarantee certificates have the same ex-ecutorial power as court decisions. In the Constitutional Court's decision, the execution of fi-duciary guarantees is carried out based on the court's decision if the fiduciary guarantee deed does not mention default. The fiduciary guarantee deed and guarantee certificate must still be a means of executing the guarantee without going through a court decision.

Keywords: *Agreement, Fiduciary Guarantee Deed, Constitutional Court Decision*

Introduction

Economic development as part of national development is an effort to achieve a just and prosperous society based on Pancasila. In order to maintain and continue sustainable development and move towards a more advanced state, development actors, whether government, community, individuals or legal entities, of course require quite large funds. Bank and non-bank financing institutions as financial institutions can and are capable of providing and distributing funds to people in need through providing credit. The function of banking is as a collector and distributor of public funds, one of which is providing credit.[5] Humans as supporters of rights and obligations start from birth and only end when they die or pass away. Before providing this credit, bank and non-bank financing institutions as creditors will enter into an agreement with the debtor. An agreement is an event where a person or one party promises to another person or party where two people or two parties mutually promise to carry out something. Currently, to meet needs, completing loan facilities is a solution. Financing institutions, banks, to distribute loans make it easy for the guarantees to be provided, one of which is a fiduciary guarantee. Fiduciary collateral is chosen by the debtor as collateral because the debtor can still use the collateral. Creditors and Debtors will sign a fiduciary guarantee deed as the basis that an object has been used as collateral for the creditor.

In order to carry out their function as distributors of funds to the public, bank and non-bank financing institutions carry out their business of providing credit to customers (debtors). The granting of credit by these institutions must be based on confidence in the ability and capacity of the debtor to repay the debt, and must be carried out on the basis of the principle of granting credit that does not harm the interests of

[1] Faculty of Law, Universitas Sumatera Utara, Indonesia, Email: onigioni619@gmail.com, (Corresponding Author)
[2] Faculty of Law, Universitas Sumatera Utara, Indonesia, Email: tankamello@usu.ac.id
[3] Faculty of Law, Universitas Sumatera Utara, Indonesia, Email: hasim.purba@usu.ac.id
[4] Faculty of Law, Universitas Sumatera Utara, Indonesia, Email: saidin@usu.ac.id

[5] Tan Kamello, *Hukum Jaminan Fidusia Suatu Kebutuhan Yang Didambakan*, Bandung, Alumni, 2001, hal.1.

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the financing institution, the debtor and the community who are depositors of funds. This must be implemented, considering that credit provided by bank and non-bank financing institutions contains risks.

Individuals, legal entities as debtors, and bank and non-bank financing institutions as creditors are parties who need each other. Every creditor holding material collateral generally always has the right to precede (or has a priority position over other creditors). This provision is an exception or specialization from the provisions of Article 1131 of the Civil Code which regulates general guarantees. The purpose of a particular creditor's preferential position over other creditors is that if the debtor defaults or breaches his contract, then the creditor holding material collateral has the right to sell through a public auction what is used as collateral according to the applicable laws and regulations with pre-emptive rights from other creditors.

Property rights have special features: 1) Material rights are absolute, that is, they can be defended against anyone. This means that material rights have absolute ownership so that they can be defended against anyone. 2) Material rights belong to zaakgevolg or droit de suite. This means that the right follows the object wherever or in whose hands the object is. 3) Material rights have droit de preference (right of precedence). This means that the holder of material collateral has the right to receive receivables before other creditors (if any) from the proceeds from the sale of the goods guaranteed.

Basically, collateral in providing credit aims to eliminate or at least minimize the risks that might arise if the debtor is unable to carry out his obligations to repay the debt for the credit he has taken. A guarantee is an agreement between a creditor and a debtor in which the debtor promises a certain amount of his assets to repay the debt according to the applicable provisions, if within the specified period there is a delay in paying the debtor's debt. The issue of fiduciary guarantees can be resolved by enacting it in Law Number 42 of 1999 concerning the Fiduciary Guarantee Law.

Law Number 42 of 1999 is the government's effort to provide clear regulations to fiduciary institutions which have long been known and used by the general public in their business activities. This arrangement certainly provides legal guarantees to the parties who will enter into a business activity relationship, namely in the case of debts and receivables with material collateral. In financing agreements, credit carried out at financing institutions, until now the execution of fiduciary guarantees still gives rise to disputes between the parties in the event that the debtor defaults. With the issuance of the Constitutional Court decision Number: 18/PUU-XVII/2019, disputes that occur between the parties are resolved through a court decision. However, before the Constitutional Court issued a decision, the dispute that occurred was resolved without a court decision by withdrawing the object of collateral on the basis of a deed of agreement and a fiduciary guarantee certificate.

Based on the description above, this research will discuss:

- What is the position of the fiduciary guarantee deed with the issuance of Constitutional Court decision Number 18/PUU-XVII/2019?
- What is the practice of executing fiduciary guarantees carried out by financial institutions?

Methods

This research uses normative juridical research methods, namely referring to legal norms contained in statutory regulations. With primary legal materials in the form of statutory regulations, secondary legal materials in the form of books written by legal experts, symposiums, and tertiary legal materials in the form of websites. The data collected is then analyzed qualitatively to answer the problem.

Result and Discussion

The Position of The Fiduciary Guarantee Deed with The Issuance of The Constitutional Court Decision Number: 18/PUU-XVII/2019

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An *authentic deed* is a deed made in the form determined by law by or before a public official authorized to do so in the place where the deed was made. A notarial deed in Indonesian means the encumbrance of objects with fiduciary guarantees, and it is a fiduciary guarantee deed. This deed is one of the requirements to obtain a fiduciary guarantee certificate at the fiduciary registration office. Providing fiduciary guarantees is the trustful transfer of ownership rights over material rights. What is meant by material rights here is the right to an Object that can be owned and transferred. Formally, the objects of fiduciary collateral are movable and immovable goods, tangible or intangible, except regarding mortgage rights, ship mortgages, aeroplane mortgages and pawns.

As a legal system, the courts' first duty is to ascertain certain laws' provisions. Civil law and common law judges will usually have a duty to apply certain legislative regulations strictly if the meaning of the law can be clearly defined. In civil law jurisprudence, what is said to be the literal meaning rule is often referred to as sens clair (real meaning), which is equivalent to the old common law doctrine, which demands that a clear, literal or unambiguous statute receive the only construction in which it is explained. Will become vulnerable. Any inquiry undertaken to ascertain the purpose, background, or legislative history of the law is, in these circumstances, on the face of it, stymied. It will not be implemented if it would lead to absurdity or distaste. Suppose the wording of a statute is ambiguous. In that case, all legal systems need to consider permissible methods for determining the correct construction of the statute to realize the legislative intent.

The dominant legal model is that law is, first and foremost, what a state has prescribed in whatever form as a set of rules that apply to its citizens (and, in many cases, to everyone living within that state's jurisdiction). A broader legal definition also needs to consider the existence of such a fiduciary arrangement. Rules and regulations created by groups of people for themselves and a collection of religious laws and moral and ethical concepts. The theory used in this case is a legal theory related to each other regarding objects in an agreement used as fiduciary collateral. The first theory is related to the theory of legal certainty. The next theory is the legal theory from the utilitarian school known as the theory of utilitarianism, which was pioneered by Jeremy Bentham and followed by John Stuart Mill and Rudolf van Jhering.

The main element that humans need from law is order. By realizing order, various social needs of humans will be fulfilled. Common law decisions often juxtapose law with order or call it law and order. To create order, humans must behave in a certain way, formulated as rules. The order and rules that humans need are orders and rules that authentically create conditions that enable humans to naturally realize their personality as a whole, with which society can develop all of its human potential as it freely wishes (vrijewil). Based on this thought, Thomas Aquinas emphasized that law is an arrangement of thoughts for the common good published by those who care about social order (quaedam rationalize ordination ad bonum commune ab eo qui cura communicates habit promulgate).

The second element, namely law, is justice. In connection with Ulpianus' justice, a legal practitioner of the Roman empire once wrote, "Justice est constans et perpetual voluntas ius sum cuique tribune", which means that justice is a permanent and never-ending will to give each person what is his or her right. In layman's words, the term Shadows of majesty surrounds the law. However, we also know that all legal systems can sometimes fail to produce justice. The obligation to register fiduciaries originates from Article 11 of Law Number 42 of 1999. The obligation to register fiduciary guarantees with the competent authorities is one manifestation of the very important principle of publicity. Before a fiduciary guarantee certificate is issued, of course, a fiduciary guarantee deed is the main requirement that the debtor and creditor must sign. After that, the deed is registered online to obtain a fiduciary guarantee certificate.

The fiduciary guarantee certificate states "FOR JUSTICE BASED ON THE ALMIGHTY GOD", where the certificate has the same executorial power as a court decision that has obtained permanent legal force. The fiduciary guarantee certificate is proof for the creditor that the creditor is the holder of the fiduciary guarantee. Based on the executorial title, fiduciary recipients can directly carry out executions through public auctions for fiduciary collateral objects without going to court. Apart from executing objects that are the Object of fiduciary collateral based on executorial title, the Fiduciary Law makes it easier to carry out executions through the execution of separate institutions.

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The fiduciary guarantee deed certainly contains what is meant by default and breach of contract. Before signing the fiduciary deed, of course the creditor has clearly explained the obligations and prohibitions, rights of the debtor and vice versa towards the creditor. After signing the fiduciary guarantee deed, of course a fiduciary guarantee certificate is issued. A fiduciary guarantee certificate has the same executorial power as a court decision that has permanent legal force. When the fiduciary guarantee deed has been made and the fiduciary guarantee certificate has been issued, the creditor should be able to immediately execute the object or object of the fiduciary guarantee, but with the Constitutional Court's decision this can certainly slow down execution in practice, because the Constitutional Court's decision seems to only pay attention to rights. Debtor without paying attention to his obligations to creditors. Considering that if the fiduciary guarantee deed does not explain in detail what constitutes a default, a broken promise. This is of course a gap regarding what to do with the fiduciary guarantee certificate that has been issued, because according to the Constitutional Court's decision, all of it must go through court execution in its implementation. The practice of executing fiduciary guarantees is of course carried out referring to Article 29 paragraph 1 and paragraph 2 of Law Number 42 of 1999, where the execution is carried out one month after being notified in writing by the fiduciary recipient (creditor) to the fiduciary giver (debtor) or interested party and announced in two newspapers circulating in the area concerned. Things like this are sometimes ignored by creditors with the explanation that the existing regulations have been implemented but have not received attention from the debtor (who has an interest).

After the fiduciary guarantee is registered, a legal fictitious law applies that everyone will be deemed to know about the granting of the guarantee, so that the recipient of the guarantee can retain the object of the guarantee to anyone, and as a continuation of this principle of publicity, the party holding the guarantee can execute the object of the guarantee in the hands of anyone who has the object. The obligation to register a fiduciary guarantee will result in criminal consequences if the financing institution has charged a registration fee to the consumer, but it turns out that it has not carried out the registration after a period of thirty days has passed since the deed of granting the fiduciary guarantee was signed by the parties. Unless previously the financing institution did not charge a registration fee to the consumer, then even though the registration is merely an obligation, it will not result in criminal consequences for either embezzlement or violation of the order to deposit non-tax state revenue.As a debtor, of course what the debtor's obligations and rights are, the creditor will be asked when dealing with an official who has the right to act to execute the fiduciary guarantee deed for the signer of the fiduciary guarantee deed. Fiducia ry obligations:

- fiduciaries are prohibited from lending, renting, transferring or handing over control, use or changing use of the collateral object;
- The fiduciary is obliged to pay all debts as agreed;
- The fiduciary is obliged to maintain the collateral object as well as possible;
- All taxes, duties, levies and other charges on the collateral object (if any) are the burden and responsibility of the fiduciary;
- The fiduciary giver guarantees the fiduciary recipient from all claims filed by third parties in connection with the object of guarantee;
- The fiduciary is obliged to manage, resolve and pay such claims, lawsuits or bills at the expense and responsibility of the fiduciary;
- The fiduciary does not have the right to re-fiduciary, the object of collateral is not permitted to encumber in any way or transfer in any way the object of collateral to another party.

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Handing over the collateral object to the fiduciary recipient if they do not fulfill their obligations carefully as specified in the deed or financing agreement. If the debtor is negligent in his obligations then:

- The fiduciary must bear all risks of damage, loss, accident, damage, etc. to the object of guarantee;
- The fiduciary must relinquish rights to the object of the Fiduciary Guarantee;
- The fiduciary giver is obliged to hand over the object which is the fiduciary guarantee in order to carry out the execution of the fiduciary guarantee;
- The fiduciary has the right to directly take or withdraw (control) the Collateral object.

Conclusion

That the fiduciary guarantee deed and the issuance of a fiduciary guarantee certificate based on the fiduciary guarantee law have the same executorial power as a court decision that has obtained permanent legal force, Constitutional Court Decision Number: 18/PU-XVII/2019; in this case, the execution of fiduciary Object guarantees is carried out based on a court decision if the fiduciary guarantee deed does not include default. The fiduciary guarantee deed agreed upon by the parties is valid and has perfect binding force, with the issuance of a fiduciary guarantee certificate. This must continue to be implemented in practice because it is regulated in the Fiduciary Guarantee Law. In practice, the execution of fiduciary guarantees should be carried out without a court decision considering the binding power of the registered guarantee deed and fiduciary guarantee certificate.

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