



Juridical Consequences of the Centralistic Fiduciary Deed

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Abstract

A centralized Fiduciary Guarantee Deed will make a Notary who performs it suspected and indicated to have committed a violation and this will result in legal consequences and affect the power of proof of the act. The problem in this research is how is the legal effect of centralized Fiduciary Guarantee Deed making, what is the legal consequences of Fiduciary Guarantee Deed registration made by notaries registered by retailers and how to overcome the centralized consequences of making the Fiduciary Guarantee Deed. The method used in this research is juridical empirical. Based on the results of research, the result of the centralized law making the Fiduciary Security Deed is a violation of the Notary Position Law, the Fiduciary Guarantee Law, the Notary Code of Ethics and the PERDKP INI No. 1 of 2017, All Fiduciary Guarantee certificates issued from the registration of a Fiduciary Guarantee Deed carried out by Retail should be declared null and void, because Retail is not regulated in the laws and regulations in Indonesia and is not a legal subject, therefore Retail is not entitled to take legal actions, in this case the registration of the Fiduciary Guarantee Deed. The way to overcome the centralized the creation of the Fiduciary Guarantee Act, which is carried out by the Ministry of Law and Human Rights is in the form of appeals, consultations and outreach to non-bank financial institutions to use Notary services in the regions. The Financial Services Authority does not prohibit Fiduciary centralization because there is no Financial Services Authority Regulation that prohibits it. The Central Honorary Council is still conducting assessments and discussions regarding the making of the Fiduciary Guarantee Deed in a centralized manner so that errors do not occur later. The Notary Central Supervisory Council in dealing with the act of making a Fiduciary deed centrally, namely conducting investigations, providing guidance to Notaries through appeals.

Keywords: *Juridical Consequences; Fiduciary Guarantee Deed; Centralistic*

Background of Research

In practice and according to law in Indonesia, lending and borrowing activities are followed by a guarantee as one of the conditions for providing funds to the community. To guarantee legal certainty between the parties involved in an agreement, binding can be carried out against the object that is guaranteed, one way of binding is to use Fiduciary.

Fiduciary is a 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.¹ One example of the use of Fiduciary institutions in society is through motor vehicle credit at non-bank financial institutions such as financing companies or banking institutions where the Fiduciary guarantees his ownership rights (BPKB) without giving up the physical vehicle, until the credit is paid or has been paid off by the Fiduciary.

Law Number 42 of 1999 concerning Fiduciary is the government's response to the needs of the community for various types of material guarantee institutions, because the forms of loan and borrowing agreements or credit agreements with existing material guarantees such as Mortgage, Mortgage and Pawn are considered not yet accommodate the needs of the community for material guarantee institutions. In addition, Law Number 42 Year 1999 regarding Fiduciary provides a clear status for financial institutions in Indonesia which have been constructed in various forms such as "Buying and Selling with the Right to Buy Back".²

The guarantee that is often used in practice today is the Fiduciary, because what is used as the object of the guarantee is the object of a purchase that is paid in installments or in installments through non-bank financial institutions or through banks³. This fiduciary has a characteristic as a guarantee of handover of ownership, in which the debtor delivers the ownership of the object without giving up the physical property at all to the creditor (constitutum possessorium),⁴ but the debtor is not allowed to transfer the collateral to another party because the debtor has given up ownership rights over the object which be a guarantee to creditors.

To guarantee legal certainty for creditors, a Notary Public Fiduciary Deed is drawn up and must be registered at the Fiduciary Registration Office. This is stated in Article 11 of Law Number 42 of 1999 concerning Fiduciary Security which reads:

1. Objects that are imposed with a Fiduciary must be registered.
2. In the event that the Objects which are burdened with Fiduciary are outside the territory of the Republic of Indonesia, the obligations as referred to in paragraph (1) shall remain in effect.

The Fiduciary Deed made by a Notary must comply with the provisions of Article 6 of Law Number 42 Year 1999 concerning Fiduciary, which reads:

"The Fiduciary Deed as referred to in article 5 at least contains:

- a. the identity of the Fiduciary Giver and Recipient;
- b. basic agreement data guaranteed by Fiduciary;
- c. a description of the Objects that are the object of the Fiduciary;
- d. guarantee value; and
- e. the value of the Object which is the object of the Fiduciary. "

¹ Marulak Pardede, Implementation of Fiduciary Guarantee in Providing Credit in Indonesia, National Legal Development Agency, National Law Development Agency, Ministry of Law and Human Rights of the Republic of Indonesia, Jakarta, 2006, p. 12-13.

² Lampung Ministry of Law and Human Rights Held a Fiduciary Security Service Outreach written by the Lampung Regional Office on August 17 2017 online at <http://lampung.kemenkumham.go.id/pusat-informasi/artikel/2334-kemenkumham-lampung-sel-Host-socialisasi-layanan-jaminan-Fidusia> accessed on 22 June 2019 at 20.12 WIB

³ Ikhsan Bintang Arya Nurudin et al, Implementation of Online Fiduciary Registration by Fiduciary Creditors (A Case Study at a People's Credit Bank in Semarang City), Volume 5, No. 3, 2019, Dipenogoro Law Journal, p. 2.

⁴ Munir Fuady, Fiduciary Guarantee, PT. Citra Aditya Bakti, Bandung, 2000, p. 5.

The Fiduciary Deed is then registered and after that the Fiduciary Certificate is issued. By carrying out the registration of the Fiduciary Deed, it means that there is legal protection for creditors, in this case as Fiduciary recipients. After the Fiduciary Deed is registered and the Fiduciary Certificate has been issued, then the entire series of Fiduciary registration processes are fulfilled, and the birth of Fiduciary is when registration has been carried out. With the issuance of the Fiduciary Certificate, the parties have submitted to Law Number 42 of 1999 concerning Fiduciary Security. With the registration of the Fiduciary, elements of transparency and elements of legal certainty are expected to be fulfilled.⁵

After the issuance of Regulation of the Minister of Law and Human Rights Number 9 of 2013 concerning Enforcement of Electronic Fiduciary Registration, Regulation of the Minister of Law and Human Rights Number 10 of 2013 concerning Electronic Fiduciary Registration Procedures and Government Regulation Number 21 of 2015 concerning Procedures Registration of Fiduciary and Fiduciary Deed Making Fees, online registration of Fiduciary and no longer manually to the Fiduciary Registration Office has legal certainty. This has become a development in the laws and regulations and legal practice related to Guarantee institutions in Indonesia.

In the online Fiduciary Application, in the Application for Fiduciary Registration Access there is an application for Fiduciary registration which is currently accessible to parties that are not clearly stated in the laws and regulations, namely Retail, but in the online Fiduciary registration system, Retail appears on The online Fiduciary application. This online-based application should not be a reference or legal basis for allowing Retail as a party that can register for Fiduciary Security, because there are no laws and regulations governing Retail. If retail is allowed as the party entitled to carry out Fiduciary Security Registration, then the Government must first make the Prevailing Laws which explain the Retail institution or the Ministry of Law and Human Rights to make or clearly state the Retail authority in the Regulations. invitations related to Fiduciary Security registration.

This raises legal uncertainty about the reasons and the basis for the Ministry of Law and Human Rights in bringing up the Retail options / column in the online Fiduciary Application. In this case, it means that there is a legal vacuum for parties who can access online Fiduciary Security registration, one of which is the retail.

What is registered by retail in the online Fiduciary registration system is a Fiduciary Deed that has been previously made by a Notary Public. Therefore, Retail can only register Fiduciary against the Fiduciary Deed that has been previously made by a Notary Public. Notary is a public official who has the authority to make an Authentic Deed. Without a Fiduciary Security Deed made in advance by a Notary, registration of the Fiduciary will not be possible, so there will be no Fiduciary Certificate as evidence of completing all stages of Fiduciary registration.

In its development, there is a policy of certain individuals who are allegedly giving work to certain Notaries in making a centralized notarial Fiduciary Guarantee Deed including online registration of Fiduciary Security, which has caused anxiety for some Notaries due to policies of certain individuals. The Notary Public who gets a job inappropriately and excessively and is not in accordance with the Law on Notary Position must immediately refuse. Apart from having a monopoly element, it also affects the legality of the deed made. Indeed, this is a human right to provide work to anyone, but it must be accountable legally in the State of Indonesia.⁶

After the centralization policy for making the Fiduciary Guarantee Act appeared, namely for the first time at the end of 2016, those who appointed a Notary who would make a Fiduciary Guarantee Certificate were Central or Retail Financing Companies that had collaborated with Financing Companies.

⁵ Munir Fuady, *Op.Cit.*, p. 34.

⁶ Nurhan, *Juridical Analysis of Fiduciary Guarantee Registration to Strengthen Legal Certainty*, Faculty of Law, Indragiri Islamic University, 2018, p.9, online at <http://jurnal.utu.ac.id/jcivile/article/viewFile/472/391> accessed on 16 September 2019 at 12.42 WIB.

The centralization policy referred to above can cause only a few Notaries in Indonesia to be able to make a Fiduciary Security Deed, because with this centralization policy, each financing agreement will only be given to a few Notaries who cooperate with central financing institutions or with retailers.

Thus, the Notary who makes the Fiduciary Security Deed will receive a request to make a Deed in a large number until it exceeds the fairness limit of a Notary who can make a deed in a day. This can lead to actions that can be categorized as monopolistic actions.

The absence of regulations related to the centralization policy of the Fiduciary Guarantee Act, has made companies, in this case non-bank financial institutions, able to make a policy in carrying out their business activities that are considered to be beneficial to their company, even though the policy has the potential to harm other parties. Regarding the centralized Fiduciary Guarantee Deed, the non-bank financial institutions should also think about the consequences of the implementation of the centralization policy on the Notary who is authorized to make the Fiduciary Guarantee Deed.

Moreover, in the case of the centralization of Fiduciary, non-bank financial institutions cooperate with retail parties that do not expressly stipulate in the laws and regulations as the party registering the Fiduciary Guarantee deed. This means that these two things have in common, namely, the policy of centralizing the Fiduciary Guarantee Deed and Fiduciary Guarantee Certificate of registration carried out by the retailer has no legal basis and of course will have consequences on the related parties.

Notary Yualita as the General Chairperson of the Indonesian Notary Association and his staff at the Indonesian Notary Association's Central Management stated that centralization would trigger a violation of the office area stated in Article 17 of Law Number 30 Concerning the Position of a Notary and the potential to violate the Notary's Code of Ethics, including practice job monopoly. Notary Yualita hopes that the Ministry of Law and Human Rights will make policies and regulations in order to inhibit centralized practices in providing work to make notary Fiduciary Security Deeds and registration to certain notary persons.

With the centralization of the Fiduciary Guarantee Act, of course it will trigger pros and cons among academics and practitioners in the field of law, including Notaries who are the authorities in the making of the Fiduciary Guarantee Deed. Then the Centralization policy will cause something that is deemed not in accordance with ethics in carrying out work and position as a Notary.

Of course there are considerations and reasons why the centralization policy is enacted and of course every policy will have an impact on the parties involved. Based on the description above, the author wants to do research with the title "**Juridical Consequences of the Centralistic Fiduciary Deed**".

Research Method

In conducting this research, the author uses a juridical empirical approach which relies on primary data or results from field research and secondary data. The juridical approach, namely in making an approach, the principles and regulations that are still in effect are used in reviewing and seeing and analyzing the problems that are the object of research, starting from the analysis of the laws and regulations, namely Regulation of the Minister of Law and Human Rights Number 10 of 2013 concerning Electronic Fiduciary Registration Procedures and Government Regulation Number 21 of 2015 concerning Procedures Registration of Fiduciary

While the definition of empirical approach is an approach arising from patterns of thinking in society and then obtained a truth which must be proven through real experiences in the community. This method is used by considering that the problems studied range in the legislation that is the relation of the regulations with other regulations with its application in practice.

Result of Research

Basically, this centralized Fiduciary Deed is the desire of certain non-bank financial institutions and does not come from the Ministry of Law and Human Rights. This is a dynamic that occurs after the online registration of the Fiduciary is carried out. In the formulation of making an online Fiduciary registration application, the party entitled to carry out normative registration is the Fiduciary recipient, his attorney or representative, and most of them are dominated by their attorney or representatives.⁷

The Ministry of Law and Human Rights has prepared the possibility of who will be the attorney or representative, namely Notary, Corporation and Retail. Notary here is a notary who has actually completed all stages and can carry out all his duties and positions. For Corporations, here are non-bank financial institutions registered with the Financial Services Authority. Retail is the general public, it can also be in the form of a legal entity or a business entity that is not included in a corporation. Meanwhile, according to Mohamad Taufik, the Financial Services Authority has no specific response to retail and there is no consensus within the Financial Services Authority regarding what retail is.⁸

According to Yudi Yuliadi's explanation, actually the reason the Ministry of Law and Human Rights put the Retail editorial in the online Fiduciary registration application is only a differentiator from the Corporation column, because what is meant by Corporations here are those that have been registered with the Financial Services Authority, but there are other parties who will register. to the application that has not been registered or business entities or individuals from the general public who will register. If a "individual" column is made while there is a business entity that is not a corporation and also an individual, the Ministry of Law and Human Rights will make a decision to generalize all parties who are not included in the Notary Public and the Corporation into Retail.

The act of making a centralized Fiduciary \ Deed will have the potential to indicate a violation of the Notary Position Law and other related regulations. In practice, the Fiduciary Deed is carried out continuously in large numbers. Law enforcers are of the opinion that in making a deed that exceeds the fairness, it is indicated that there is a violation of the Notary Position Law, this violation is related to the formal aspects or requirements in an authentic deed. With the centralized implementation of the Fiduciary Deed by non-bank financial institutions, several allegations of violations have emerged which are indicated to have the potential to be committed by a Notary, namely:

- a. Violation of the Law on Notary Position.
- b. Violation of the Fiduciary Guarantee Act.
- c. Violation of the Notary Code of Ethics.
- d. Violation of the Notary Honorary Council Regulation.
- e. Violation of the Law on the Prohibition of Monopolistic Practices and Unfair Business Competition.⁹

If the indication or alleged violation that occurred due to the centralized Fiduciary Deed is proven, then the juridical consequence of the Fiduciary Deed that is made centrally is that the Fiduciary Deed only has the power of proof as a deed under hand or the Fiduciary Deed is null and void by law .

All Fiduciary certificates that were born through the registration of a Fiduciary by Retailers should be declared null and void, because Retail is not regulated in the laws and regulations in Indonesia

⁷ Results of an interview with Yudi Yuliadi (Head of the Fiduciary Evaluation and Reporting Section of the Directorate General of General Legal Administration), Jakarta, March 16, 2020.

⁸ Mohamad Taufik Syaifudin Prajitno (Staff of the IKNB 2B Supervision Department, Sub Division of 4A Financing Institution Supervision, Financial Services Authority of the Republic of Indonesia).

⁹ Result of interview with Notary Public & PPAT Fardian (member of the Notary Central Supervisory Council), Jakarta on March 23, 2020.

and Retail is not a legal subject, therefore Retail is not entitled to perform legal actions, in this case the registration of the Fiduciary Deed.

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