



Liability of the Debtor as a Result of the Transfer of the Security Object of the Trust without the Consent of the Creditor in the Consumer Financing Agreement on PT Adira Dinamika Multifinance Tbk, Banda Aceh

Helvandra Busrian; Sri Walny Rahayu; Yusri

Postgraduate School of Law, Faculty of Law, Universitas Syiah Kuala, Banda Aceh, Indonesia

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Abstract

This study aims to elucidate the legal ramifications for the debtor and third parties when the security object of the trust is transferred without the creditor's consent. Additionally, it seeks to examine the liability of the debtor resulting from the transfer of the security object without the creditors' approval. The research methodology employed in this study is the Yuridis empirical approach. The research utilizes primary and secondary legal materials. Primary legal material comprises field data obtained from interviews with respondents and informants. Secondary legal material includes legislative regulations, books, and scholarly works such as journals or articles relevant to the research. The research findings indicate that transferring the object of security without the creditor's consent has legal consequences for the debtor and third parties. Specifically, such actions by the debtor are considered unlawful and a breach of the agreed financing agreement. The creditor has the right to enforce the credit guarantee by utilizing the executive power specified in the trust guarantee certificate. The debtor can be held liable for transferring the security object of the trust without the creditor's authorization, which may result in both civil recompense for damages and criminal culpability.

Keywords: *Legal Liability; Transfer of Security Objects; Without The Consent of Creditors; Security of Trust*

Introduction

The legislation governing consumer finance in Indonesia was established in 1988 with the issuance of Presidential Decree No. 61 of 1988 on Consumer finance Institutions, and Minister of Finance Decree No.125/KMK.013/1988 on the Regulations and Procedures for Financial Institutions. Press No. 9 of 2009 was published on the Financial Institution. The media portrays consumer financing organizations as entities that provide funds to customers for the bulk or indulgent purchase of products.

Consumer finance refers to the financial activity that enables consumers to acquire things through the use of dividends or credit, based on their specific needs. The objective is to assist individuals or corporations in meeting their needs and securing funding, particularly for the acquisition of motor vehicles.

This poses a unique challenge for individuals belonging to the low-income middle-class demographic. These circumstances resulted in the proliferation and enlargement of consumer finance organizations as an alternate means of funding to fulfill consumers' requirements for the goods they desire. Consumer financing offers a convenient and efficient solution for individuals who previously faced challenges in purchasing items with cash.¹

Consumer finance is a form of non-bank financial institutions, aimed at the production, or consumption of goods and services. The activities of these funding institutions are carried out in the form of the provision of goods and funds or goods of capital without drawing funds directly from the society in the form of giro, deposits, savings, and letters willing to pay. Based on the activities carried out by the funding institutions, funding agencies have an important role as one of the potential alternative funding sources to support the growth of the national economy.²

The construction of consumer financing is based on agreements with the basis of freedom of contracting as a legal basis for both parties, then the parties must be more careful in making the agreement so as not to harm the parties or one of the parties in the future and must comply with the principle of fairness. In providing consumer financing facilities, the financing company also requires a guarantee from the consumer or debtor.

It is meant to give confidence and security to the creditor about the existence of a calculation not in accordance with what was promised in the later days. In the Consumer Financing Agreement goods purchased from the financing facility are used as collateral, i.e. the goods are guaranteed to the facility provider, the consumer service company, about the receiver's financing debt.

The provision of financing with the charge of trust guarantees makes it easier for consumers, because, in addition to obtaining loans, they also control the guaranteed goods. If there is a trust guarantee, then a document acceptable to the ownership of the goods in question such as BPKB is held by the creditor until the loan is paid. The guarantee with the trust, which is guaranteed is the right of ownership only of the trust. The trust holder holds and controls temporarily based on the trust of the receiver, while the trust remains in the jurisdiction of the recipient.

The trust as a guarantee institution has been regulated by Act No. 42 of 1999 on the guarantee of trust. (UU Fidusia). Article 4 of the Trust Act states that a trust is an agreement of succession of a substantive marriage that imposes an obligation on the parties to fulfill an achievement.

Article 20 of the Treasury Act states that the security of the treasury remains in the hands of whoever the security is, except for the transfer of supplies that are the object of the security. It is in line with the "Droit de Suite" principle which is part of the Indonesian legislation. Regarding the transfer of trust guarantees, Article 21 of the Trust Act states that:

1. The trustee may move the supplies that are the object of the trustees' security using the procedures and procedures commonly performed in the business.
2. The transfer is not valid when the pledge is failed by the assignee or trustee.
3. The items which are the objects of the trust guarantees that have been transferred must be replaced by the trustee with the same object.

Article 23 (2) of the Treasury Act stipulates that the debtor is prohibited from transferring, transferring or leasing to another party the object of the security of the treasury which is not the item of inventory, except by prior written written from the recipient of the trust. According to the provisions, the object guaranteed by the trust may not be transferred to the other party without the consent of the

¹ Sunaryo, *Hukum Lembaga Pembiayaan*, Sinar Grafika, Jakarta, 2008, p. 95.

² *Ibid*, p. 1-2.

receiving party. As a result of the transfer, transfer, or lease of a security object carried out without the agreement of a receiver or creditor, it can be classified as a debtor who has committed an act of non-performance because of a violation of the prohibition in the treaty. In addition, the debtor has violated the provisions of Article 36 of the Trust Act which threatens criminal punishment.

If the debtor moves, transfers, or leases a security item as referred to in Article 23 paragraph (2) without the prior written consent of the recipient of the trust, it is punishable by imprisonment for a maximum of 2 (two) years and a fine of up to Rs. 50,000,000.

The practice occurred in the field, found a trustee (debtor) who transferred the object of the trust guarantee to a third party without the written consent of the recipient of the fidusia (creditor) namely PT. Adira Multifinance, Tbk Banda Aceh. The cases that occurred in the field can be seen in the following table:

Table.Fiduciary Assurance Object Transfer Case Data at PT. Adira *Multifinance*, Tbk in 2019-2022

No.	Customers	Objects	Court Decision	Info	Year
1	Kamidin	Mitsubishi L300	Non	Tort	2019
2	Nurmahdi	Mitsubishi Pajero Sport Dakar 4X2 A/T	Available (No. 5/Pid.B/2022/PN Mrn)	Tort	2022

Source: Preliminary Data

This is the case of PT. Adira Dynamika Multifinance Tbk (Private Limited Company) Banda Aceh, in which the debtor has transferred the object of guarantee of trust to a third party, while the debtor has not paid off his obligation to pay the credit by the agreement with the financing company, namely PT.Adira Dinamika Multifinance, TPB Banda Aceh. This case occurred in the credit agreement of financing with contract number 0642.1620.0218 between PT Adira Dynamic Multifinancing, TPBA Banda Aceh, and his counterpart Kamidin in the financing agreement against one unit of Mitsubishi L300. The debtor transferred Mitsubishi L300 as an object of security of trust for a third person without the approval of the creditor's party, which is PT.

The acts committed by the debtor violate the provisions agreed in the Consumer Financing Agreement with PT. Adira Multifinance, which is the number IX reads: "In connection with consumer negligence, then pay attention to the following things:

- 1.The Billing Visit shall be carried out whenever and when deemed necessary by the MULTI FINANCE ADIRA.
- 2.ADIRA MULTI FINANCE has the authority by authority by the Financing Agreement to accept at any time, anywhere, and anywhere the unit is located and sells the unit on behalf of the consumer in general or under the hands of or with the intermediary of other parties at a reasonable market price and with the terms and conditions deemed good by ADIRA MULTI FINANCE."

According to the above-mentioned Financing Agreement, it is known that the debtor is deemed to have committed a non-performance by having transferred the security object of the trust to a third party without the consent of the creditor. In addition to the above case, there is one more case that has occurred in PT Adira Dynamika Multifinance, Tbk Banda Aceh, namely the transfer of Mitsubishi Pajero Sport Dakar 4X2 A/T as an object of guarantee of trust by Nurmahdi brother with contract number 0642.1951.9973 to third parties without the creditors' prior consent. This is contrary to the rules concerning trust guarantees that relate to the transfer of the object of the trust guarantee must be based on the consent or the knowledge of the debtor.

Research Method

The type of research that is used in this research is the type of juris-empirical research. Juris-empirical research is research by conducting a comprehensive study by performing observations and direct interviews localized research.³ The approach used by researchers in this research is a qualitative approach, in which research will collect data using field observations, interviews, and library surveys so that the data required in the research can be fulfilled. The Qualitative Approach is the study of research to understand the phenomena that will be experienced by the subject of research such as behavior, perception, motivation, actions, and others, holistically and in a way of description in the form of words and language in a natural context and using natural methods.⁴

Discussions

Tan Kamelo argues that the main feature of a trust guarantee is that the guarantee must remain in the debtor's possession. This principle must be fulfilled in the security, for if the security is in the possession of the creditor, then the security agreement of the trust becomes void. However, otherwise, if the debtor fails, the creditors of the recipient of the security have the authority to withdraw the security for sale for the payment of the debtor's debt.⁵

If the debtor does not do what he has promised, it is said that he has done wrong. He is unrighteous or fails, or breaks a covenant, or does that which is not lawful for him to do.⁶ These acts are not acts against the law that are contrary to the law. The debtor of the trustee is obliged to hand over the security for sale.⁷

In every agreement that is legally concluded there will be rights and obligations for the parties that make it. In treaties there is a known basis, the "*Pacta sun servanda*" which means that a treaty legally concluded is valid as a law for those who make it. Therefore the parties are obliged to do what has been agreed in the treaty.

Law scholars in Indonesia use different terms for treaties. According to Munir Fuady, "the term agreement is a coincidence of the term *overeenkomst* in Dutch or agreement in English.⁸ Achmad Ichsan uses the term *verbinten* for agreements, while Utrecht in his book Introduction to Indonesian Law uses the word *overeenkomst* for agreement.⁹

A performance is an obligation to be fulfilled or performed by the debtor in any alliance, whether the alliance is derived from a contract or by law. The law states that the existence of performance is to give something, do something, and do not do something. The performance as referred to in the article often cannot be done by the debtor as it should.

The inability of the debtor to perform his performance may be due to two things, i.e.:

1. For the fault of the debtor, either intentional or negligent.
2. This is called disobedience, because of circumstances beyond the capacity of the debtor *or overmacht*.

³ Magister Ilmu Hukum Universitas Syiah Kuala, *Pedoman Penulisan Tesis Program Studi Magister Ilmu Hukum*, Darussalam, 2017, p. 9.

⁴ Lexy. J. Moleong, *Metodologi Penelitian Kualitatif*, PT Remaja Rosdakarya, Bandung, 2007, p. 13-14.

⁵ Tan Kamelo, *Hukum Jaminan Fidusia Suatu Kebutuhan yang Didambakan Cet. Pertama*, Alumni, Bandung, 2014, p. 278.

⁶ Subekti, *Hukum Perjanjian*, Cetakan V, Intermassa, Jakarta, 1979, p. 45.

⁷ Tan Kamelo, *Op. Cit*, hlm. 278.

⁸ Munir Fuady, *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis)*, Citra Aditya Bakti, Bandung, 2001, p. 26.

⁹ Titik Triwulan Tutik, *Hukum Perdata dalam Sistem Hukum Nasional*, Kencana, Jakarta, 2008, p. 197.

Article 4 of the Trust Guarantee Act states that the debtor and creditor in a trust agreement are obliged to fulfill the performance. Failure to perform is failure to fulfill or neglect the obligation as stipulated in the agreement concluded between the creditor and the debtor. Hence it can be said that when the debtor or creditor fails to fulfill the obligation to perform performance, he is said to have committed non-performance.

The acts of default often committed by the debtor PT Adira Multifinance Tbk Banda Aceh is to do something that is prohibited in the agreement that is to move or sell the object guaranteed credit to a third party without the written consent of the creditor party namely PT Adira Multifinance, Banda Aceh.

The Consumer Financing Agreement with Contract Number 064219519973 of PT Adira Multifinance, Tbk Banda Aceh states that the debtor is prohibited from transferring in any way, either in whole or in part, goods/benefits to another party unless with the prior written consent of the creditor. Violation of this clause may result in the debtor being brought to criminal prosecution for confinement as stipulated in article 372 of the CEDAW that "Anyone who deliberately possesses and against the law possesses the property of something which is wholly or partly owned by another person, but which is in his possession not because of a crime threatened by confining"

If the debtor fails to fulfill his obligation, the creditor may withdraw or withhold the security for sale to cover the debtor's debt. According to the Treasury Guarantee Act in Article 23 paragraph (2) states that "the trustee shall not transfer, transfer or lease to another party the object of the Treasury Guarantee which is not an object of supply, except with the prior written consent of the recipient of the treasury".

The focus in this interpretation is on the diverting word in the section where what is meant by divert in this study is the debtor selling the object of the financing agreement in this case Mitsubishi Pajero Sport Dakkar 4x1 A/T. When the debtors perform the transfer/seller against the object guaranteed by the trust that is not an object of supply to a third party then the legal consequence of the resulting is an act of non-performance as regulated in the funding contract and is classified as a criminal offense as defined in Article 36 of the Law on the Guarantee of the trust which states that: "The trustee who transfers, divides or leases the object that becomes the subject of the guarantee as referred to in Article 23 Paragraph (2) without the prior written consent of the recipient of a trust, is punished with a penalty of imprisonment of no later than 2 (two) years and a fine of no more than Rs. 50,000,- (fifty million rupees)".

As is known in the Law of Privacy, a legal liability created is when there is an element that is damaged by the actions of others, while between the injured and the injury party does not occur or does not exist a contract or a binding legal relationship, then based on the law and there is a legal relationship between the person that causes the loss itself.

Article 1365 of the Code of Civil Procedure Law states that every offender, who causes harm to another person, shall oblige the person who, by his fault, publishes such harm, to compensate for such harm.

Legal liability in the sphere of public law presupposes the responsibility of the State administration and criminal law liability, whereas in the area of private law, that is, legal responsibility in civil law can be liability based on performance and responsibility based on acts against the law.¹⁰

The concept of liability was also proposed by the founder of the pure legal theory, Hans Kelsen. According to Hans, "The concept of legal liability is essentially related, but not identical to the concept of a legal obligation". A person is legally obliged to behave in a certain way if his otherwise behavior constitutes a condition for the imposition of an act of coercion. However, this act does not have to be

¹⁰ Van Apeldoorn, *Pengantar Ilmu Hukum*, Pradnya Paramita, Jakarta, 2000, p. 174.

directed at the person who is compelled to be “the perpetrator” but can be targeted at another person associated with the first person in the manner prescribed by the law. The person subject to the sanction is said to be “responsible” or legally responsible for the violation.¹¹

In civil law, liability is the responsibility of a person for acts that are contrary to the law. Acts against the law have a broader scope than criminal acts. Acts against the law include not only acts that are contrary to the criminal law but also acts that conflict with other laws and even with unwritten provisions of the law. The provisions of the law of acts against the law are intended to protect and compensate the injured party.¹²

The liability of the debtor for the transfer of the object of security without the consent of the creditor is a consequence of the occurrence of the event. In the case of the transfer or transfer of the right of ownership, the applicable legal system of security shall be referred to, that is, that the guarantor or creditor is not entitled to be the full owner of the thing, which means that the creditor's authority is only the authority of the holder of the item of security in this case only the transferred ownership while the object of security is still in the control of the debtor. Legal consequences If a problem arises or a lawsuit arises due to the fault (deliberate or negligent) of the debtor in connection with the use or transfer of the security of the trust, then the trust recipient is exempt from liability. In other words, the debtor is fully responsible.

This is affirmed by Article 24 of the Trust Guarantee Act, the debtor is prohibited from performing re-trust on the object that has already become the object of security that has been registered. In addition, it is also forbidden to transfer, redeem, or lease to another party of the object that has been the subject of security of trust that is already registered unless there is a written agreement from the recipient of the trust. The debtor is obliged to surrender the object of the security to enforce the enforcement of security by the provisions of Article 30 of the Law on the Guarantee of the Treasury and to receive an excess of the result of execution that exceeds the security value, but if after the execution is not sufficient to settle the debt, the debtor remains liable for the unpaid debt. A deferral by a debtor who has not paid his debt is an act against the law.

It is said that the act is unlawful because the act of the transfer brings losses to the creditor. After all, the object of the trust is a security of the debtor's debt to the creditors, so that the creditor can demand the debtor to provide compensation for the loss and immediately repay all the remaining debt. Article 1365 of the Covenant stipulates that “every act against the law resulting in loss to another person, obliges the person who commits the act to compensate for the loss”.

Even if the object of the credit has been transferred to a third party, it is the debtor owed to the leasing that remains responsible in the settlement of the debt, as the transfer is made under the hand without the knowledge of the creditor. Otherwise, if the transfer is made legally, or the renewal of the financing agreement between PT Adira Dynamika Multifinance and the third party, then the debtor is the new debtor.

The consequences of the debtor's act of removing the security object of a trust without the creditors' consent can be prosecuted through civil and criminal offenses as provided for in sections 35 and 36 of the Trust Guarantee Act. The losses suffered by the creditor are materially clear, that the creditors have lost the amount of the security provided plus the interest that has been determined and agreed jointly between the creditor and debtor. If the creditor has suffered a loss, he will be entitled to reclaim or withdraw from the debtor who has caused the loss. Such an effort can be through legal efforts, either ordinary legal efforts or extraordinary legal efforts.

¹¹ Hans Kelsen, *Teori Hukum Murni*, Nusamedia, Bandung, 2008, p. 136.

¹² Komariah, *Hukum Perdata*, Edisi Revisi, Universitas Muhammadiyah Malang, Malang, 2001, p. 12.

Ordinary legal action can be obtained through state courts, high courts, and cassation levels, while extraordinary legal effort can be made through the reconsideration process of all existing cases. As a preventive measure, the financing agreement between creditors and debtors always contains the following clauses:

1. Prohibition of transfer of the security object for the duration of the financing agreement still in force, and
2. Notification of any action against the security item in writing, such as the legal act of renting and borrowing a security item

By analogy, any act of law without the knowledge of the creditor cannot be recognized by a creditor. So the pledge between the creditor and the debtor remains a reference to the credit agreement that was signed at the beginning of the financing agreement. Any form of liability for the disbursement of financing on the creditor cannot be transferred in a way underhand. The debtor remains responsible for the depletion of the financing facility. If the debtor is unwilling to fulfill such liability, the creditor shall have the right to take legal action to carry out the invoice, both against the object of the security and against the entire debtor's property.

This is because after the execution of the transfer in a way under hand there is a possibility that the debtor does not master the object of security. Under such circumstances, the creditor remains entitled to execute the security through a lawsuit in the state court. As far as the claim is based on Article 1131 of the Covenant, this article states that "All rights of the debtor, whether moving or unmoving, whether existing or new in future, shall be the liability of any individual association". What is worse for the debtor is the wealth that will be thereafter, which will be the guarantee of the payment of the debtor's debt to the creditor.

Funding agencies that register trust-guaranteed objects will get a trust guarantee certificate. This certificate is to be used as proof of ownership by the creditor that he is the owner of the security object guaranteed by the debtor, even if the security item is in the possession of the Debtor. In the case of a security object transferred by a debtor so that at the time of execution the security thing was not found in the debtors then the debtor must be responsible for the loss of the guarantee object.

Based on a trust guarantee certificate held by the financial institution as a creditor, he has the right to obtain a refund on the object of the guarantee. The debtor is responsible for paying all his debts to the creditor. The creditor as the recipient of the trust is not liable for negligence committed by the debtor.

This is emphasized in Article 24 of the Trust Guarantee Act which stipulates that "The trust recipient shall not be liable for the consequences of the debtor's actions or negligence arising either from a contractual relationship or arising from an unlawful act in connection with the use and transfer of the object of the trust guarantee". According to the above provisions, there is protection against the rights of the creditor, i.e. the liability of the debtor to return the transferred security object and the imposition of fines and penalties for the deliberate transfer of security object without the creditors' consent.¹³

If the billing and warning have been made by a financial or financial institution, the debtor will not hesitate to assume accountability for the credit incurred. Subsequently, the financing or finance institutions begin to consider the possibility of settlement through the withdrawal of the security object or execution. The liquidation of a security guaranteed by a trust guarantee which is the right of the creditor by Article 29 of the Trust Guarantee Act is using a financing institution or bank to auction the secured goods without the need for the approval of the President of the State Court. As a principle applicable in

¹³ Lidya Mahendra, RA Retno Murni, and Putu Gede Arya Sumertayasa, "Perlindungan Hak-Hak Kreditor Dalam Hal Adanya Pengalihan Benda Jaminan Oleh Pihak Debitor," *Acta Comitatus: Jurnal Hukum Kenotariatan*, Vol. 1, No. 2, 2015, p. 275.

the law of trust guarantees, liquidation is carried out by the way of sale of such a security object, either at auction or underhand.

Execution requests submitted directly by the bank based on the Trust Guarantee Certificate which according to the provisions of Article 15 paragraph (2) of the Faith Guarantee Act has enforceable force, is carried out by attaching such a trust guarantee certificate.

Conclusions

1. The legal implications for the debtor and third parties as a result of the transfer of the security object of the trust without the consent of the creditor, i.e. the Debtor is deemed to have committed acts contrary to the law and a failure to perform the financing agreement that has been agreed between the parties. The creditor is entitled to execute against the object of the credit guarantee based on the executive force contained in the certificate of trust guarantee. The creditor may sue the debtor with a criminal suit of foreclosure as provided for in Article 372 of the Code of Criminal Procedure Jo article 36 of the Trust Guarantee Act.
2. The form of liability of the debtor as a result of the transfer of the security object of the trust without the consent of the creditor can be done with compensation for civilian losses and criminal liability.

Suggestions

1. The creditors are advised to file a lawsuit and report the debtors for transferring the objects of the trust.
2. The creditor is advised to increase the preventive measures in the financing agreement to avoid the transfer of the object of the security of the trust that may cause losses to the creditor.

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