

Property Rights of the Unit as the Debt Guarantees

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Abstract

The apartment units can be acquired through a cash purchase and installment. On purchases in installments using the services of the bank in the form of loans. In the execution of the credit agreement as a principal agreement followed accessoir agreement which is binding assurances against the apartment units as collateral. Against the property rights to the apartment units can be used as collateral to secure loans with mortgage. Rightsholder dependents will receive certificates of dependents who have the power eksekutorial. If the debtor defaults and does not perform the repayment of debt, then the certificate-based security rights of the lender may sell the object of the guarantee rights through public tender or sales under the hand. Proceeds from sales of security rights object used to pay off creditors receivables with interest and costs that have been incurred.

Keywords: Unit Housing Project, the Credit Agreement, Guarantee Mortgage.

I. Introduction

Understanding Flats according to Law No. 20 of 2011 on the Flats, are: *story buildings built in an environment, which is divided into sections structured functionally, either in horizontal or vertical direction and the respective units each can be owned and used separately, especially for the shelter, which is equipped with a joint part, objects together, and the land together.*

Flats or in other terms condominium or strata title or joint property or apartment is a form of housing with the operation of the building vertically in the form of residential and non-residential organized by the government or private parties. Implementation must meet the elements perencanaan, construction, control, management and maintenance based on the laws and regulations¹.

Flats or apartments is a multi-storey buildings are erected on land property rights, building rights or the right to use the state and building rights or rights of use over management rights, as explicitly stated in the Act No. 20 Year 2011 on the Flats (UURS) of Article 17 that "bunk house can only be built on land ownership rights, land rights, land use rights on the State or management rights" Based on the type and nature of the use of land for the apartment units can be seen as follows:

- a. Land is the property of flats built on Land Property Rights, must be subjected to Type Properties on the State Land,`
- b. Land Broking originating from the State Land;
- c. Land Broking above ground on Land Rights Management (HGB above HPL);
- d. HGB soil on the land of Waqf.

According to Article 18 UURS, some towers can also be constructed with the use of state property area such as land; or utilization of donated land. Pendayagunaan waqf land done by lease or joint use in accordance with the pledge waqf (Article 20, paragraph 1). If not in accordance with the

pledge endowments, it can be done changing the designation after obtaining approval / permission in writing of Endowments Indonesia (Article 20 paragraph 2).

Land Rights that can not be done Establishment Flats (Strata Title):

- a. HGB Land Properties on the land, on the land of HGB Land Properties Flats can not be established unless there is a lease agreement. But if it has been established Houses of flats, the flats can not be traded, can only be leased.
- b. BOT (Build, Operate, and Transfer).

The agreement for a project that was built by the government / ruler / Landlord (Public / Private) requires substantial funds, which are usually financed from private parties. The government as the owner of the land in this case only provide the land that will be used to build the project. In cooperation with system build operate and transfer (BOT) is the owner of the land handed over the construction of the project to investors to finance the construction within a specified period. The investor was given the concession to manage the buildings concerned to take the economic benefit (or the presentation of profit sharing). After the termination of the period of the agreement, managing the building in question be returned to the land owners in full. BOT agreement can not be extended. Based on that definition, of course, can not be established in BOT Unit Flats.

The nature of ownership of an apartment unit ownership rights that may be owned by an individual (individuals) and legal entities appointed by the government, but no separate ownership from joint ownership. Individual ownership rights in the Unit Flats is a Ownership of space. Certificate of ownership of the apartment units have special characteristics as compared with the certificate of land rights in general sertipikatnya name depending on the kinds of land rights status.

The ownership of the apartment units can be acquired and held by individuals or legal entities appointed by the government through leasing, cash and installments (debt). If the apartment units acquired with cash purchase of the delivery unit apartment unit in the form of building physical and proof of ownership transferred directly, ie ownership certificate Sarusun (SHMSRS) and Building Ownership Certificate (SKBG).

On purchase of flats in installments generally involves the Bank as a financial services provider. Purchase of flats is done by a debt facility or in the form of bank credit, so that the proof of ownership (SHMSRS and SKBG) was not submitted to the rights holder or owner of the apartment units. SKBG SHMSRS and was detained by the developer or the bank as collateral until the redemption of the entire purchase price of the apartment units. Thus, only the physical building that can be controlled by the buyer, while the proof of ownership (SHMSRS and SKBG) retained by the investor or the bank as collateral.

Legal actions related to the acquisition of apartment units that can be taken by individuals can be selected by means of a cash purchase or purchase in installments. Both methods require the purchase of in-depth study of particular apartment unit as collateral on the purchase of the apartment units in installments through the bank. Related to this problem, so the legal issues discussed in this paper is the first to whether the certificate of ownership of the apartment units can be charged as collateral. Second, how executorial power of property rights on apartment unit as collateral if the debtor defaults.

II. Method of Writing

Research is a fundamental tool in the development of science, including the science of law. The research aim is to reveal the truth in a systematic, methodological and consistent, including legal research. As a science *Sui generis*, legal science is a science of its own kind, which has a distinctive character that it is normative². Thus the method of research in the science of law also has its own

11
² Philip M Hadjan and Tatiek Sri Djatmiati, *Argumentasi Hukum*, Gajah Mada University Press, Yogyakarta, 2005, H.I

method. Methods and procedures of research in the natural sciences and social sciences can not be applied in the science of law³.

Type of research in writing this paper uses the type of normative juridical method normative legal research, which is done by reviewing and analyzing the legal materials and legal issues related to the problems studied. This study was done to solve problems that arise, while the results will be achieved in the form of prescriptions about what should be done to resolve the issue.

The approach used in this paper is the approach of the Act (statute approach), and the conceptual approach (conceptual approach). Approach legislation (statute approach) is done by examining all laws and regulations relevant to the legal issues being addressed. Approach legislation will open up opportunities for researchers to study the consistency and compatibility between a law with other legislation or the legislation with the Constitution of the Republic of Indonesia Year 1945 State of the Republic of Indonesia or between regulation and land law and legislation flats⁴.

The conceptual approach is an approach that depart from the views and doctrines in the science of law. The views and this doctrine will find ideas that gave birth to notions of law, legal concepts and principles of law that are relevant to the legal issues faced in this paper. Sources of legal materials used in this paper is the primary law materials are authoritative legal materials, meaning that the material law with the authority, which consists of legislation, official records or treatises.

In this study, using legislation as the primary legal materials is The Book of the Law of Civil Law (BW), Law No. 5 of 1960 concerning Basic Regulation Basic Agrarian Law No. 4 of 1996 on Mortgage and Law Law No. 20 of 2011 on the Flats. Secondary law covering all the publicity about the law which is not an official document. Publication of this law include text books, theses, dissertations law, legal dictionary, comments on the court decision, and the opinions of legal experts published via journals, magazines or the Internet.

III. Imposition of Property Rights on Unit Flats with Encumbrance

Installment or credit itself actually comes from the Roman namely *Crede* which means belief or creed or *credium* which means I believe. So creditor is someone who has expressed confidence in the debtor⁵. Credit also means lending money or transfer payments. When people claim to buy on credit then it means the buyer does not have to pay on the spot⁶.

Meanwhile, in the Book of the Law of Civil Law credit agreement is an agreement borrowing. According to Article 1754 of the Civil Code, borrowing is "*an agreement whereby one party gives the other party a certain amount of goods that are depleted due to the use, on the condition that the latter would return the same amount of type and quality the same anyway*"

Understanding credit agreements and borrowing in the Book of the Law of Civil Law is an activity lent items that are depleted because of its use, so it must be returned intact. Bank credit agreement is a preliminary agreement on the delivery of money. This agreement is consensual obligatoir, while the delivery of the money is real. At the time of handing over money to do it all the provisions in the credit agreement applies to both parties.

Gambir Sri Melati Hana argued, the credit agreement (PK) is a form of contractual penguanganya, regulated in Law Number 7 of 1992 as amended by Act No. 10 of 1998. Banking law is a *lex specialis*, *lex generalis* while her leaning on the Civil Code Book III Chapter thirteen of Article 1765 of the Civil Code of borrowing⁷.

Sutan Remy Sjahdeni put forward more specific, that the inclusion of the words of approval or the borrowing and lending within the meaning of credit referred to the Banking Act can have multiple

³ Peter Mahmud Marzuki, *Penelitian Hukum*, Prenada Media, Jakarta, 2006, p.26

⁴ *Ibid*, p.93

⁵ Mariam Dams Badruzaman, *Perjanjian Kredit Bank*, Penerbit Alumni, Bandung, 1983, p. 4

⁶ Budi Untung.H, *Kredit Perbankan Indonesia*, Penerbit Andi, Yogyakarta, 2000, p.1

⁷ Sri GambirMelati Hana, *Perkreditan dan Tantangan Dunia Perbankan*, Pages in www.legalitas.org, access June 26, 2016

purposes, first, Shaping legislation intends to assert that the credit relationship is a contractual relationship between the bank and customers in the form of loan. The second, former's legislation intended to require the bank credit relationship is based on a written agreement⁸.

The cornerstone of the binding nature of a credit agreement is that the agreement is a legal act by which one or more persons bind himself with one or more persons within the meaning of Article 1313 of the Civil Code. According to Subekti, an agreement is an event where someone promised to another person or in which two people are pledged to carry something. The incident arose from a legal relationship between two people who called the engagement. The agreement was published in the engagement between the two people who made it. In shape, the agreement is in the form of a series of words that contains a promise or ability that is spoken or written⁹.

The credit agreement has several functions, among others:

- a. As a principal agreement, meaning that the credit agreement is crucial birth, null or not an agreement that follows another, such as binding treaty guarantees;
- b. As evidence of the limits of rights and obligations between the creditor and the debtor;
- c. As a tool of credit monitoring.

Lending in the form of loans or debts is accompanied by binding debt guarantee, the purpose is as a complement. In addition it also can function eksekutorial that if in the future the debtor defaulting or going bad credit, goods become collateral can be sold as a substitute for debt repayment.

The term "guarantee" is a translation of *zekerheid* or *cautie*, ie the ability of borrowers to meet or pay off *perutangannya* to creditors. Efforts to fulfill the debtor's debt carried by holding certain objects that have economic value as a dependent on a loan or debt received by the debtor to the creditor¹⁰.

According to Munir Fuady¹¹, a loan guarantee function only as an adjunct, not the main creditors (banks). A fault when a creditor (bank) put collateral material as the main factor for determining confidence in the mortgage payment. The main factor for determining confidence in the mortgage payment depends on many factors. Distrust of the creditor to the debtor can not be replaced with a provision of a debt security. Guarantees for bank debt is not insurance, although collateral can function in order for the creditor can sleep a little more soundly when distributing the funds to debtors.

A debt security that both must meet several requirements¹², namely :

- a. Easy and fast binding process guarantees;
- b. A debt security is not put its creditors to dispute;
- c. Prices of goods such guarantees is assessed;
- d. The value of collateral may be increased, or at least stable;
- e. Loan guarantees do not impose specific obligations for creditors. For example, the obligation to maintain and repair the goods, pay taxes and so forth;
- f. When the non-performing loans, the collateral is executed with a model of executing simple, low cost and does not require the help of the debtor, meaning a debt security must always be in a state of "near cash" (near to cash).

Regarding the apartment units that becomes the object when viewed from the debt security assurance requirements of such debt is feasible and worthy to be the object of a debt security. According to Article 47 paragraph (5) of Law No. 20 of 2011 on Housing said: "*Certificate of Right of Ownership on Housing Unit can be used as collateral to the Mortgage burdened accordance with the provisions of legislation.*"

Before Law No. 20 Year 2011 on the Flats enacted and amended, legal arrangements flats regulated in Law Number 16 of 1985 on the Flats in Article 12 paragraph (1) said, houses bank below

⁸ Sutan Remy Sjahdeini *Kebebasan Berkontrak dan Perlindungan Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Bank Di Indonesia*, Jakarta, IBI, 1993, p. 181

⁹ H.R Daeng Naja, *Hukum Kredit Dan Bank Garansi*, Citra Aditnya Bakti, Bandung, 2005, p.II

¹⁰ Rachmadi Usman, *Hukum Jaminan Keperdataan*, Sinar Grafika, Jakarta, 2008, p.66

¹¹ Munir Fuady, *Hukum Jaminan Hutang* Erlangga, Jakarta, 2013, p.4

¹² *Ibid*

ground where the building stood and other objects that are installed on the ground can be made with the debt guarantee: a, *Burdened with mortgages, If the land is land ownership rights or the right to build.* b. *Burdened~duciary, if the land is the land use rights on state land."*

Basic changes to these provisions is the issuance of Law No. 4 of 1996 on Mortgage of Land along with objects related to land (Act Mortgage) in which a security interest mortgages are not used anymore because it does not fit the needs of the world's credit and with the development of Indonesia's economic governance. The provisions of Article 27 of the Law Encumbrance which basically includes:

- a. After the entry into force of UUHT, Flats were no longer possible secured by Mortgages and Fiduciary, because that becomes the object of a guarantee by the Mortgage and Fiduciary in UURS has become the object of collateral that can be loaded with Encumbrance by Act Mortgage.
- b. Security rights can only be imposed on rights ownership of the apartment units for the person who is the ownership of objects that stood on the land together.

In line with the enactment of legislation to pass the security rights of the legal unification (unification) against security rights over the land. Article 27 of the Law Guarantee Rights states that: *"the provisions of this law a/so apply to the imposition of security rights over flats and ownership of the apartment units."* Under these provisions, the unit of flats or apartments can be used as security for a debt or guarantees with mortgage loans.

In this case the object of credit guarantees and tied with the Mortgage is not land but the ownership of the house susunnya unit along parts together objects together by the owner's part ownership of the apartment units. As a holder of property rights on apartment units whose ownership is evidenced by Certificate Properties Flats, the landlord can apply for credit by making ownership of apartment units held as collateral.

Need to understand that the object of Encumbrance is not land but the title to the home unit susunnya are therefore in addition to the apartment units concerned is also part of joint, common good and common land by the owner's part ownership of the apartment units. It was stipulated in Article 46 paragraph (1) of the Act Flats which states that: *"The right of ownership over the properly rights on sarusun sarusun are individual separate from the collective rights over the parts together, objects together, and the land together"*

IV. Upper Unit Executorial Power Flats Debt as Collateral

Default is derived from the Dutch word "wanprestatie" which means not fulfill the obligations. Definition of default on the engagement is not the fulfillment of obligations by the debtor to the creditor that has been set in the engagement, either engagements arising from the engagement maupaun

agreement arising from legislation. Default a debtor can be: a) do not meet achievement, b) does not fulfill his achievements cash, c) late for an achievement, d) mistakenly fulfill his achievements.

The credit agreement is an agreement in principal that was followed by an agreement in this regard accesoir Haminan agreement with mortgage. Imposition and administration of encumbrance is done by making Granting Mortgage Deed (APHT) by PPAT (Land Deed Official) according to the legislation in force.

In general explanation of the numbers 7 Act Mortgage said that the process of loading Encumbrance implemented through two stages, namely:

1. Stage Award Mortgage, namely by granting Mortgage Deed made by the Land Deed Official, which was preceded by an agreement that guaranteed debts;
2. Phase registration by the Land Office, which is the time of the birth of the Encumbrance charged. Registration is done at the Land Office district/municipality.

Encumbrance certificate l~ssued by the Land Office irah load-irah with the words "FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD". Thus encumbrance certificate has

executorial title or executorial power. Meaning encumbrance certificate has permanent legal force equal to a court decision. If the debtor defaults, then the certificate of the security rights to do the execution.

Execution of security rights, including the execution of the apartment units, should be preceded by legal events which prove that the debtor defaults. If the debtor in default, the holder is entitled to sell the object Encumbrance referred to in Article 6 of Act Mortgage. Based executorial title contained in the encumbrance certificate referred to in Article 14 paragraph (2) of the Act Mortgage, the Mortgage object can be sold through a public auction in accordance with the procedures specified in legislation. The public tender conducted for settlement of accounts receivable Mortgage holders with the rights of creditors ahead of others.

The agreement of providers and holders of Mortgage, Mortgage sale of an object can also be carried out under hand if so it will be obtained the highest price that benefits all parties. Sales under the hand can only be made after the expiration of one (1) month since notified in writing by the provider and / or holders of Mortgage to the parties concerned and published at least in two (2) newspapers circulating in the area in question and / or local mass media, as well as no party raised objections.

Every promise to carry out the execution Mortgage in a manner contrary to the provisions of Law Mortgage Article 14 paragraph (1), paragraph (2) and (3) null and void. Until recently issued an announcement for the auction, the sale referred to in paragraph (1) can be avoided with the repayment of debt secured by the Mortgage and its execution costs that have been incurred¹³.

Execution objects with the power to sell the security rights can be reached in two ways, namely:

a. *parate* Execution

In Article 20, paragraph 1 in conjunction with Article 6 UUHT said if the debtors default, the holder of Encumbrance first to be able to sell the object security rights over the power of our own with the request to the Office of the auction state or auction house private to public tender based on the determination of the Chairman of the District Court related to title eksekutorial attached to the certificate of encumbrance.

b. Sales under the hand

Sales object security rights to do under the hand according to Article 20, paragraph 2 and 3 which basically can be done on the basis of mutual consent both the giver and Mortgage holders. It can be done if in this way is believed to get the highest price and benefit all parties. In UUHT determined the terms implementation of sales ie after the expiry of 1 (one) month since notified in writing by the provider and / or holders of Mortgage to the parties concerned and published in at least two (2) newspapers or the mass media published in area concerned, and there is no any party raised objections.

Encumbrance can remove if there are circumstances or certain things as stipulated in the law. Similarly, the encumbrance imposed on property rights on Sarusun, can remove in the event of certain circumstances or peristiwa.

According to Article 18, paragraph 1 UUHT, can remove security rights for the following reasons:

1. Termination of the debt that is guaranteed by the Mortgage;
2. Release of Mortgage holders Encumbrance;
3. Cleaning Encumbrance be determined by the ranking by the Chairman of the Court;
4. Termination of rights on land subject Mortgage.

Sales of apartment unit buildings as collateral security right is a transition activity (buying and selling). The transition of buying and selling is their inherent right for owners, it means somebody discount legal authority to transfer goods as owner has. The basic principle of the transition of ownership of the apartment units, namely their inherent rights as owner, either as a resident or landlord. Thus the sales under hand over the apartment units are used as collateral in the form of a security interest to do if it gives an advantage to both parties, namely the owner of the apartment units and the bank as a creditor.

The first is the certificate of ownership of the apartment units can be charged as collateral. Second, how executorial power of property rights on apartment unit as collateral if the debtor defaults.

V. Conclusion

From the discussion of the legal issues that have been reviewed in this paper can be concluded as follows:

1. Purchase on apartment units through installments usually use banking services. Lending by banks because banks do with assurance using the precautionary principle, function as an additional guarantee is not the main requirement of credit agreements. The guarantee referred to in installments over the apartment units is a guarantee of material which according to legislation can be used as collateral with fiduciary and encumbrance. The provisions of Article 27 of the Law Mortgage apply to the imposition of security rights over the apartment units. In Article 47 Paragraph 5 UUHT sarusun stated that SHM can be used as collateral with the encumbered encumbrance appropriate legislation and regulations. There are two types of certificate attached to the building flats that can be encumbered with mortgage, the land title certificates (together) and Hak Milik on Unit Housing Project (HMSRS) which is individual.
2. Unit flats bound with mortgage automatic status and legal position becomes the object of encumbrance. Stage Award Mortgage, Deed Granting stems from Mortgage (APHT) by the Land Deed Official, which was preceded by an agreement that guaranteed debts. While Phase registration by the Land Office district / municipality.

Encumbrance certificate issued by the Land Office irah load-irah with the words "FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD". Encumbrance certificate has executorial power, namely the power eksekutorialnya equalized with a court ruling is final. Encumbrance certificate holder has the right to sell the object of a security interest in two ways, namely parate execution and sales under the hand. Parate execution pursuant to Article 20 paragraph 1 in conjunction with Article 6 UUHT an act of the holder the right to sell on its own authority through public tender. While sales under the hand under Article 20, paragraph 2 and 3 UUHT, on the basis of agreement of both parties both the giver and the holder Encumbrance if ways are believed to be beneficial to both parties.

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PAGE 1

PAGE 2

PAGE 3

PAGE 4

PAGE 5

PAGE 6

PAGE 7
