

The Legal Analysis of the Execution of a Buy Back Guarantee Agreement Between Banks and Developers for House Purchases Through Mortgage Loans (KPR - Kredit Pemilikan Rumah)

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ABSTRACT

The aim of this research is first, to analyze the legal relationship between Buy Back Guarantee agreements between banks, developers and consumers when purchasing a house through a mortgage. Second, to analyze the implementation of the Buy Back Guarantee agreement between the bank and the developer in purchasing a house via KPR. This research uses empirical normative legal research methods. The results of the research show, first, the legal relationship between the developer and the implementing bank is in the nature of a partnership (Partnership), namely, the provision of KPR financing facilities where the bank is a commercial bank providing home ownership financing facilities which requires a partnership relationship with the developer who is a housing developer by achieving a The common ground is the aim of this subsidized housing program. The aim of this collaboration is to provide housing financing liquidity facilities or abbreviated as FLPP as regulated in Law no. 1 of 2011 concerning housing and residential areas and PUPR Ministerial Regulation No. 10/PRT/M/2019 concerning criteria and requirements for low income people (MBR) in subsidized home owner credit. And the legal relationship between the bank and the customer is that the bank as a distributor provides funds to buy a house (creditor) while the customer receives a subsidized house purchase loan and borrows and borrows with interest as regulated by Law Number 10 of 1998 concerning Banking.

INTRODUCTION

A house is a basic necessity for humans, as everyone needs a place to live and spend time with loved ones. Due to the high demand for housing, the cost of housing is currently not affordable for many. As a result, only people with middle to upper incomes can meet the need for housing. As stated in the 1945 Constitution, Article 28 H, paragraph 1, it is declared that everyone has the right to live in a place and obtain a healthy and good environment.

In order to meet the need for housing and achieve national development to ensure the welfare and prosperity of the people, which is the goal of the Indonesian nation, the government has provided a subsidy program for mortgage loans (KPR) to help middle and lower-income communities meet their housing needs. In this regard, the government collaborates with financial institutions to distribute subsidies to low-income communities to obtain decent housing with low down payments and installments, as well as a fixed and low margin during the repayment period. The government collaborates with financial institutions in allocating subsidized mortgages because banks, as financial institutions widely recognized by society, play a role as intermediaries in meeting human needs.

According to Article 1, paragraph 1, of the Minister of Public Works and Public Housing Regulation of the Republic of Indonesia No. 21/PRT/M/2016 concerning Facilities and/or Assistance in Obtaining Houses for Low-Income Communities, subsidized housing loans are loans/financing for homeownership that receive assistance and/or facilities for obtaining housing from the government in the form of affordable long-term funds and subsidies for obtaining houses, issued by executing banks, whether conventional or Sharia-compliant.

The implementation of subsidized housing loans involves several parties, including the buyer/consumer, the executing bank (which consists of commercial banks, Islamic commercial banks, and Sharia business units working with the Ministry of Public Works and Public Housing), and developers/companies engaged in the provision of subsidized housing. A developer, or housing development company, is a business involved in the construction of residential properties in large quantities on a residential site equipped with infrastructure and social facilities required by the community. When the credit agreement is signed by the parties, the consumer has the right to own a decent subsidized house, which meets the requirements for infrastructure, facilities, and public utilities, as developed by the developer.

The KPR facilities provided by banks to debtors always carry the risk of default. The risk of default is mitigated by banks through the imposition of collateral on all KPR facilities provided. Article 8, paragraph (1) of Law No. 10 of 1998 on Banking explains that collateral is key to minimizing risk in the provision

of credit facilities. Article 11 of Law No. 10 of 1998 further emphasizes that collateral in credit distribution is an effort to maintain the health and resilience of banks. For housing loans for buildings that are not yet complete and where collateral cannot be perfected with a mortgage, an additional agreement is required. This additional agreement is provided by the developer to the bank, where the developer guarantees to repurchase the collateralized object financed by the bank. This additional agreement is known as a Buy Back Guarantee.

The Buy Back Guarantee is implemented as a mitigation and guarantee effort because the KPR object cannot yet be fully collateralized. Issues arise when a developer becomes bankrupt before the house financed by the bank is fully constructed, and the sale and purchase agreement (AJB) between the buyer and developer has not been executed, as the certificate is still in the developer's name. This means the ownership rights are with the developer and are included in the bankruptcy estate.

The Buy Back Guarantee agreement is only enforceable if the debtor fails to meet their obligations (default). The third party acting as the guarantor will only fulfill the commitment in the Buy Back Guarantee agreement if the debtor is declared in default by the creditor. This means that the agreement contains certain conditions that must be met before the third party is obligated to fulfill the commitment, namely when the debtor fails to pay installments consecutively.

Several issues arise in the implementation of the Buy Back Guarantee agreement, including limited access to information for consumers, violations of consumer rights, and the potential for abuse of power by the developer or bank. Additionally, regulations regarding the Buy Back Guarantee have not been clearly outlined in existing laws, creating legal uncertainty for the parties involved. Regulations concerning the implementation of the Buy Back Guarantee agreement also need to be addressed, as this agreement involves three different parties – the bank, developer, and consumer – each with its own legal interests that must be protected. This research also aims to explore the legal protection available for the parties involved in this agreement, particularly in terms of the developer's and bank's responsibilities, and its impact on consumers.

Based on the background, the research will address several key issues, namely: How is the legal relationship of the Buy Back Guarantee agreement between the bank, developer, and consumer in the purchase of houses through a KPR? And, how is the implementation of the Buy Back Guarantee agreement between the bank and the developer in the purchase of houses through a KPR?

RESEARCH METHOD

Based on the title of the research, the author uses a normative empirical legal research method. Normative empirical legal research (applied research) is a study that examines the implementation or application of positive legal provisions (laws and regulations) and written documents in action (factual) regarding specific legal events that occur within society. The purpose of this study is to determine whether the application of the law in a particular legal event is in accordance with the relevant legal provisions or not. In other words, the study aims to assess whether the legal provisions have been implemented as they should, so that the parties involved achieve their objectives (Muhaimin, 2020, 115).

The approach used in this research is the Statute Approach, Conceptual Approach, and Sociological Approach.

The data collection techniques employed include primary data obtained through interviews using an interview guide. This data is gathered directly in the field and is related to the object of the research. Secondary data is obtained through document study, which involves collecting and reviewing primary and secondary data, such as relevant laws and regulations, as well as books that are related to the issues being studied.

Data analysis is conducted using legal materials obtained from both primary and secondary legal sources. The analysis is descriptive-qualitative, which involves grouping the data collected from field research based on its quality and accuracy, then linking it to legal theories, principles, and rules. This process is aimed at answering the problems formulated in the research. All the legal materials collected are then selected, processed, reviewed, and analyzed in relation to the legal issues at hand, in order to draw a conclusion. The conclusions drawn in this study use an inductive reasoning method, meaning that conclusions are drawn from general problems to concrete issues or from specific events (concrete occurrences) to general matters (events that occur generally) (Salim HS and Erlies Septiana Nurbani, 2015, 129). In this research, the author uses an inductive approach to examine the legal relationship between developers, banks, consumers, and the implementation of the Buy Back Guarantee agreement between the bank and the developer in the purchase of houses through a mortgage (KPR).

DISCUSSION

1. Legal Relationship of the Buy Back Guarantee Agreement Between the BANK, Developer, and Borrower in Home Purchase Through Mortgage (KPR)

a. Legal Relationship Between the Developer and the Implementing Bank

The relationship is characterized as a partnership, where the bank, as a general bank, provides financing for home ownership through a mortgage facility. The developer, as the housing developer, requires a partnership with the bank to achieve a common goal for this subsidized housing program. The purpose of this cooperation is the distribution of housing finance liquidity facilities (FLPP), as regulated in Law No. 1 of 2011 on Housing and Residential Areas, and the Minister of Public Works and Public Housing Regulation No. 10/PRT/M/2019 regarding the criteria and requirements for Low-Income Communities (MBR) in subsidized housing mortgages.

Based on the considerations presented, the bank, as a general bank providing home ownership financing, requires a partnership with the developer. Likewise, the developer seeks to cooperate with the bank. Therefore, both parties, referred to collectively as the parties, agree to draft and sign this cooperation agreement, adhering to the terms and conditions outlined in the agreement document.

Previously, a Cooperation Agreement existed between the guarantor/developer and the Bank regarding the provision of home ownership financing facilities (Tapak Sejahtera iB Amanah FLPP), hereinafter referred to as the "Tapak Sejahtera iB Amanah FLPP Facility Agreement." The disbursement of funds is done when the property is completed or through a phased disbursement scheme. To secure the disbursed financing, the guarantor provides a guarantee to the bank in the form of a buy-back commitment for the property purchased with the financing, should certain conditions occur as stipulated in the agreement.

The developer is responsible for repurchasing the housing unit sold to the borrower under the Sale and Purchase Agreement (PPJB) or Deed of Sale (AJB) for an amount equal to the remaining financing balance, plus other administrative costs. This obligation arises if the borrower fails to fulfill the payment obligation within the specified period.

Furthermore, this obligation also applies if the borrower fails to pay the mortgage installment for three consecutive months until the signing of the AJB. However, if the borrower continues to make regular monthly payments as per the Financing Agreement, without any arrears, the developer is not obligated to repurchase the property.

If the borrower purchases the unit in accordance with the mortgage financing procedure but fails to pay for three months within three years from the financing agreement, causing the financing to become problematic or fall into the Non-Performing Financing (NPF) category, the developer is required to repurchase the unit. Alternatively, the developer can pursue debt recovery through mechanisms such as auctions, subrogation, assignment, deed in lieu (DIL), or other procedures as per the applicable regulations. This obligation ensures compliance with the Cooperation Agreement and protects the bank's interests from financing risks.

b. Legal Relationship Between the Developer and the Consumer

This is a sale and purchase agreement, where the developer is the seller and the borrower is the buyer in subsidized housing. According to Article 1457 of the Civil Code, "A sale and purchase is an agreement in which the seller agrees to deliver a good, and the buyer agrees to pay the agreed price."

The seller's obligations include delivering the item for sale in accordance with Article 1474 of the Civil Code and guaranteeing that the item has no hidden defects or third-party claims. The buyer's obligation is to pay the agreed price as per Article 1513 of the Civil Code. The relationship is based on an order system, where the buyer orders the subsidized housing from the developer. Referring to Article 1233 of the Civil Code: "Every obligation arises from either agreement or law."

c. Legal Relationship Between the Bank and the Borrower

The bank provides financing for purchasing a home (creditor), while the borrower receives a loan for subsidized housing. This process follows the Banking Law No. 10 of 1998. The bank's financing is provided to the borrower for the purchase of housing from the developer. The bank agrees to finance the borrower, who will repay the loan through installments or a lump sum at maturity.

The agreement is documented in a written contract (KPR Agreement). The borrower agrees to repay the loan in installments or as agreed in the contract. The borrower is required to provide collateral as stipulated in the agreement, along with proof of ownership, which is held by the bank until the loan is fully paid off. The borrower must assist the bank in securing the collateral as required by law.

In case the borrower fails to meet their obligations, such as failing to make payments on time or submitting false documentation, the bank has the right to take various actions, including sending a warning, selling the collateral, or initiating legal proceedings. If the borrower fails to settle the debt after receiving a warning, the bank can execute the collateral or find a third party to assume the borrower's obligations. The proceeds from the sale of the collateral are used to

pay off the borrower's debt, and any remaining amount will be returned to the borrower. If the collateral does not cover the debt, the bank is entitled to pursue further recovery from the borrower's other assets.

In the event of default or breach of contract, the bank can take actions such as demanding payment, selling the collateral, or transferring the debt to another party, with the borrower agreeing to provide full authority to the bank for such actions. **1. The Implementation of the Buy Back Guarantee Agreement Between Banks, Developers, and Customers in the Purchase of Houses through Mortgages (Kredit Pemilikan Rumah - KPR)**

Based on the author's interview with the General Manager of the Consumer Financing Division, in the case of subsidized housing financing between customers and the bank, all clauses of the financing are determined by the bank, and the customer simply agrees to the available clauses. The matters regulated in the subsidized housing financing clauses include:

- a) Definitions, including the agreement, profit-sharing, financing, distributed income, profit-sharing projections, obligations, bank bookkeeping, partners, arrears, income projections, realized income.
- b) Basic terms of the agreement
- c) Implementation of principles
- d) Conditions for financing realization
- e) Business calculations
- f) Financing payments
- g) Financing withdrawal
- h) Rights and obligations of the parties in the management of business activities
- i) Appointment of the customer as the manager
- j) Obligations of the customer as the manager
- k) Restrictions on the actions of the customer
- l) Business supervision
- m) Correspondence
- n) Others.

All of the clauses in the subsidized housing financing agreement are prepared by the bank in advance and cannot be modified, added to, or reduced by the customer. Based on the author's analysis, the Buy Back Guarantee is considered an additional agreement, which arises due to the principle of freedom of contract, and this agreement is needed as a risk mitigation for bad credit.

In the Buy Back Guarantee agreement, the bank and the developer apply this agreement only within a 3-year period. After this period, it no longer qualifies as a Buy Back Guarantee, and the developer is no longer bound by the agreement, leaving only an agreement between the bank and the customer, with no further responsibility for the developer.

According to the data obtained by the author, in practice, the Buy Back Guarantee occurs when a customer fails to fulfill their obligations for two consecutive months, prompting the bank to issue SP1, SP2, and SP3. When this happens, the customer will be called by the bank for accountability. Before the Buy Back Guarantee is triggered, the customer has usually performed a takeover, which should not be allowed as it violates existing regulations, and the bank has the right to adjudicate this matter in court. However, this practice is common in house purchases through credit, and many banks allow this to occur, though informally (Interview results).

The specific provisions regarding the Buy Back Guarantee have not yet been regulated in Indonesia's legislation. This is different from guarantees such as mortgage rights, fiduciary, and pledges, which are regulated by law, and their implementation requires authentic deeds, either in the presence of a Notary or a Land Deed Official (PPAT). For example, a mortgage right must be established through a Mortgage Deed (APHT) by a PPAT, or a fiduciary deed must be created by a notary, so that these guarantees have a clear legal basis and enforceable legal consequences for financial institutions in case of default due to clear legal regulations.

Meanwhile, the Buy Back Guarantee between the bank and developer occurs when the land/house is not yet certified, and the Sale and Purchase Deed (AJB) or Mortgage Deed (APHT) and Mortgage Certificate have not been executed, so the Buy Back Guarantee is made based on an agreement. Contract law is one of the legal instruments in the Civil Code (KUHPerdata) used in business activities. Sudikno Mertokusumo explains that a contract (*overeenkomst*) is a legal relationship between two or more parties based on an agreement, which results in legal consequences (Sudikno Mertokusumo, 2015, p. 97).

If we relate the Buy Back Guarantee to Article 1519 of the Civil Code, which states that the seller has the right to repurchase the goods sold by returning the money paid by the buyer, it is also stated in Article 1532 that the seller is not only obliged to return the entire purchase price but also to compensate for all the costs incurred during the purchase and delivery, and other costs that have increased the value of the sold goods. Based on these articles, it is inaccurate to equate the Buy Back Guarantee with the repurchase agreement in the Civil Code. This is due to differences in the purpose of the obligation and the legal relationship involved.

In the Buy Back Guarantee, it is not only about protecting the seller's right to repurchase the goods sold, as in Article 1519 of the Civil Code, because the Buy Back Guarantee also involves legal obligations that protect the interests of not only the seller (developer) and the buyer (debtor) but also the creditor (bank). Furthermore, the right of repurchase only has legal consequences for the seller and buyer, while in the Buy Back Guarantee, the obligations create legal consequences between the third party and the creditor as well as the debtor.

The repurchase guarantee agreement in the Buy Back Guarantee is not regulated in the Civil Code but is a common practice between the bank and developer. In contract law discussed in the Civil Code, every business actor is free to create agreements based on their needs as long as it does not conflict with legal provisions. The freedom to create such agreements is stated in Article 1338, paragraph (1) of the Civil Code, which states, "All agreements that are valid shall be binding as laws for those who make them."

Based on the above article, it can be understood that the parties can freely create an agreement, which is valid and binding as a law for those parties (Munir Fuady, 2015, p. 240).

Therefore, the Buy Back Guarantee clause agreed upon between the developer and the bank is notified to the debtor, indicated by a statement letter that the debtor agrees to have their house repossessed by the developer if they default or experience bad credit, and the debtor also signs the Buy Back Guarantee deed made by the developer to the bank. This serves as proof that the debtor has acknowledged the agreement, so that when the Buy Back Guarantee clause is executed, the debtor cannot refuse, as the debtor is already bound by the bank through the credit agreement and the mortgage guarantee on the house purchased through the mortgage.

The execution of the house in the Buy Back Guarantee does not always go smoothly in reality. There are obstacles that occur in the implementation of the Buy Back Guarantee. For the developer, the most common obstacle in executing and vacating the house collateral arises from debtor mistakes. Sometimes, the debtor refuses to vacate the house, or the debtor runs away, making their whereabouts unknown while the house still contains the debtor's belongings. In this case, the debtor does not act in good faith and is uncooperative.

The developer needs to take a persuasive approach with the debtor to encourage them to vacate the house, and the developer will refund the down payment and pay the principal financing that the debtor has paid to the bank. If the debtor refuses to vacate the house, the developer must issue a warning letter or summons to the debtor. This step is important for the developer to affirm that the house has returned to the developer's possession before pursuing further legal action. If this step is also ignored by the debtor and no resolution can be reached between the debtor and the developer, then litigation and non-litigation processes are pursued.

On the other hand, obstacles may also arise from the debtor and bank's side, particularly when the debtor has not been informed and the Buy Back Guarantee agreement is not specifically made through an authentic or informal deed in the mortgage financing process. The debtor should agree to the execution and signing of the Buy Back Guarantee agreement and sign the deed, even if they are not a party to the deed. In practice, sometimes the debtor is not asked to make a specific statement, indicating that in case of bad credit, they agree and do not

object to the repossession of the house by the developer after calculation and voluntary surrender.

Based on the conditions explained above and to provide legal certainty for all parties involved in this sale-purchase mechanism, a written agreement in the form of a deed with legal proof is needed. Generally, the bank only makes informal agreements with the developer regarding the Buy Back Guarantee. The deed with the highest legal power is the authentic deed as stated in Article 1886 of the Civil Code, which states that a deed created according to the provisions of applicable laws, created by or before authorized officials, with due regard to their jurisdiction, is legally valid.

CONCLUSION

The legal relationship between the Developer, Consumers, and the Implementing Bank is outlined in Article 1457 of the Civil Code (KUHPperdata). The legal relationship between the developer and the Implementing Bank is of a **partnership** nature, where the bank is the general bank providing housing financing facilities, and the developer is a housing developer, both parties working together to achieve common goals in the subsidized housing program. The legal relationship in the agreement between the developer and the consumer is a **sale and purchase agreement**, where the developer acts as the seller and the consumer as the buyer in the subsidized housing scheme.

The purpose of this cooperation is to channel liquidity for housing financing, known as **FLPP** (Fasilitas Likuiditas Pembiayaan Perumahan), as regulated by Law No. 1 of 2011 on Housing and Settlement Areas and the Ministry of Public Works and Housing Regulation No. 10/PRT/M/2019 on the criteria and requirements for low-income communities (MBR) in subsidized home ownership loans.

The legal relationship between the bank and the consumer involves the bank, as the lender, providing funds to purchase a house (the creditor), while the consumer borrows funds for purchasing a subsidized house, which is subject to interest as regulated by Law No. 10 of 1998 on Banking. This fund distribution is carried out through loans provided by banks to the public.

The implementation of the **Buy Back Guarantee** in Indonesia's legal system can be equated with the **guarantee agreement (borgtocht)**, which is a third-party guarantee to secure the debt of someone else, with payment to occur at a specified time. This is because it meets the elements of a guarantee agreement as set out in Article 1820 of the Civil Code. The agreement is an **accessory contract** because it cannot stand alone. In the Buy Back Guarantee agreement, a third party (the developer) agrees to cover the debtor's debt to the creditor if the debtor defaults. The Buy Back Guarantee is provided by the developer to the bank and is documented in an agreement linked directly to the main agreement, which is

the mortgage loan (KPR). Therefore, in creating the Buy Back Guarantee agreement, the debtor must be informed, agree to, and sign the agreement.

Notaries play a crucial and significant role in the implementation of the Buy Back Guarantee, especially concerning legal certainty regarding the fulfillment of the parties' rights involved. This is because, in practice, the Buy Back Guarantee is often executed as an informal agreement between the bank and the developer. As such, the involvement of a notary is needed to create an authentic deed that can be used as legal evidence of the parties' rights, serving as the primary legal evidence in accordance with Article 1866 of the Civil Code. The Buy Back Guarantee agreement is a standardized agreement made by the bank, which is regulated by Article 1338 of the Civil Code, stating that all valid agreements shall be binding as laws for the parties that make them.

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