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LEGAL BASIS FOR REPORTING THE EMBEZLEMENT OF MOTOR VEHICLES (OBJECTS OF FIDUCIARY SECURITY) TRANSFERRED TO THIRD PARTIES BY A FIDUCIARY WITH A GUARANTEE

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Abstract
This research aims to analyze the validity of the pledge agreement for fiduciary collateral objects and also how the fiduciary object is reported to be embezzled by the fiduciary object regarding fiduciary objects transferred by him to a third party. The research method used was normative legal research, with the main data source using secondary data, analyzed normatively qualitatively. This research was conducted because of many cases occurring related to the transfers of fiduciary objects without the consent of fiduciary recipient by fiduciary grantor, leading to such disputes as the embezzlement of fiduciary objects and most people not knowing how to resolve the dispute through legal channels. This research found that the validity of a pawn agreement on fiduciary collateral objects is determined by the preparation of a notarial and registered fiduciary security deed as well as a transfer having received written permission from the fiduciary grantor, then the reporting of fiduciary object embezzlement can be done by the fiduciary grantor based on Article 372 of the Criminal Code (KUHP) rather than on Article 36 of the Fiduciary Law.
Keywords: Fiduciary, Embezlement, Motor Vehicles, Guarantee

Introduction

Economic activities carried out in Indonesia are inseparable from risks, so the practice of providing capital loans run by financial institutions (both banks and non-banks) mostly requires the existence of a guarantee. The development of modern business world must, of course, follow the wishes of debtors, wanting a form of collateral not interfering with their business activities. On the other hand, creditors need a guarantee that can provide a sense of security and legal certainty in returning their receivables. A guarantee institution that can accommodate the wishes of debtors and creditors is fiduciary.

Motorized vehicles in Indonesia are usually purchased through a leasing agreement secured by a fiduciary security. Leasing or hire purchase is a mixed agreement containing elements of a sale and purchase agreement and a rental agreement. In a hire purchase agreement, as long as the price has not been paid completely, the ownership rights to the goods remain to be with the rental seller. Even though the goods are already in the rental buyer's hands, new ownership rights pass from the rental seller to the rental buyer after the rental buyer pays the last installment to pay off the price of goods. (Suharnoko, 2014) However, you need to know that hire purchase is different from buying and selling in installments; the most important difference between the two lies on when the rights are transferred from the seller to the buyer. In a hire purchase, the transfer of rights (levering) occurs when all the installments are paid off. So, before the price is paid off completely, the position of rental buyer will only be that of a renter and will change to a buyer after the installments has been completed. Meanwhile, in buying and selling in installments, the rights to the goods have been transferred (levered) from the seller to the buyer after the transaction occurs, even though the price has not been paid fully. (Munir Fuady, 2006)

Leasing transactions are divided into two categories: finance leases and operating leases. In a finance lease, leasing company, as the lessor, is the party financing the provisionof

capital goods. The lessee selects capital goods needed and places the order on behalf ofthe leasing company as the owner of capital. During the leasing period, the lessee makes periodic rental payments in the amount of purchase plus residual value payments. If thereis a return on the purchase price of financed capital goods and the interest, this will be the leasing company's income. Meanwhile, in an operating lease, the lessor deliberately buys capital goods and then leases them. In contrast to a finance lease, in an operating lease, the total amount of periodic payments does not include total costs incurred to obtain capital goods along with interest. This difference is because the leasing company expects profits from the sale of capital goods leased or through several other leasing contracts. In general, in Indonesia a finance lease is the one generally used.(Siamat, 2004)

Even though there are differences in the rental objects, there are similarities between leasing and ordinary leasing in the position of renter and lessee, namely that they are both users rather than the owners of the item being rented. In a leasing agreement, the party renting capital goods is called lessor, while the party renting capital goods is called lessee. If the lessor is the owner of capital goods, in practice the lessor will often bind thelessee with a fiduciary security. Normatively, fiduciary securitys are required when the goods used as collateral for a debt are under the debtor's control. To prevent the debtor fromtransferring the collateral to a third party, the creditor binds the debtor with a fiduciary security.

Fiduciary collateral is the transfer of property rights to a creditor or fiduciary recipient as collateral for a debt where control and enjoyment of the fiduciary object rests with the debtor or the fiduciary grantor in trust (fiduciary). In Indonesian, sometimes fiduciary is also called" pengalihan *hak milik secara perwalian* (transfer of property rights in trust)", in English it is often called fiduciary transfer of ownership, and in Dutch, it is also called fiduciary *eigendom overdracht*. The concept of fiduciary security is the transfer of property rights (rather than objects) of the debtor to the creditor in trust, meaning that the property rights are with the debtor as the initial owner and then handed over to the creditoras the collateral of debt.

Fiduciary securitys appear as a manifestation of the limitations of pawn guarantee institutions as intended in Article 1152 paragraphs (1) and (2) of Civil Code. The shortcomings of pawn institutions lie on the factor of control over collateral objects that must be handed over to the pledge recipient. Initially, fiduciary institutions were known in Roman law as fiduciary cum creditor. In a fiduciary cum creditor agreement, the debtor's goods are handed over to the creditor. The debtor's goods becoming fiduciary cum creditor objects at that time can be either movable or immovable. Even though the goods are handed over by the creditor to the debtor, the creditor cannot act freely. The purpose of transferring ownership of goods is to provide collateral to creditors. If the debtor has fulfilled his obligations, the creditor will hand the collateral back to the debtor. Fiduciary, according to Roman law, is an event where a debtor hands over an object to the creditor by holding a pretend sale and purchase, to receive the object back from the creditor after the debt is paid, so this is a kind of pawn.(Kamello, 2014)

Fiduciary security is regulated in Law Number 42 of 1999 concerning Fiduciary security (hereinafter referred to as Fiduciary Law), this regulation is intended to be a strong legal basis for the binding of movable objects, both tangible and intangible and immovable objects which cannot be encumbered with Mortgage Rights, as collateral for the repaymentof certain debts. The background of Fiduciary Law issuance was the conditions following the 1998 economic crisis. At that time, business world needed a guarantee institution flexible for debtors but still provided legal certainty for creditors. The meaning of flexible

nature contained in the Fiduciary Law is intended to debtors and creditors. To debtors, theflexible nature of fiduciary securitys can be interpreted even if the debtor's debt has not been paid off, but the collateral object can still be controlled by the debtor. Meanwhile, the flexible nature of fiduciary securitys to creditors means that there is a solution that even though the collateral is controlled by the debtor, if there is a failure to pay, the creditor can

still withdraw and sell the collateral.(Satrio, 2002)

The Fiduciary Law is expected to be able to benefit both fiduciary recipients and fiduciary givers. To fiduciary givers, the benefit obtained is the right to use the collateral object. Apart from that, default by the collateral provider will not make the collateral object change its ownership rights. Then, to the recipients of fiduciary securitys, the benefits obtained are the preferential rights over their receivables and the application of *droit de suite on* principle to collateral objects. Apart from that, the principle of publicity in the fiduciary agreement will provide information about the fiduciary objects to third parties. The principle of publicity can be seen in Article 11 of the Fiduciary Law stating that the objects encumbered with Fiduciary securitys must be registered, and in the case of objects encumbered with Fiduciary securitys located outside the Republic of Indonesia's tterritory, the registration obligation remains valid. By this explanation, a notarial fiduciary agreement is not enough, but must still be registered.

Fiduciary recipients or fiduciary creditors can consist of a person or several people together, for example, in providing credit in a consortium as stated in the explanation of Article 8 of the Fiduciary Law. In its actual implementation, the fiduciary creditor is the party most at risk because the collateral is physically under debtor's control. Creditors only control the ownership rights, so the risk of loss or collateral transfer is quite high compared to other collateral institutions. Regulations regarding the transfer of fiduciary objects are contained in Article 23 paragraph (2) of the Fiduciary Law stating that Fiduciary Givers are prohibited from transferring, pawning, or renting to other parties' objects consituting the object of fiduciary collateral, except with the fiduciary recipient's prior written approval. The rules in Article 23 of the Fiduciary Law are often violated by fiduciary givers. Many fiduciary items are pawned to third parties by the fiduciary giver without the fiduciary recipient's consent. The obstacles occurring in law enforcement against the object of fiduciary guarantee and its resolution are insufficient evidence (Witasari, 2021).

Several example cases of fiduciary security object embezzlement have been found.The first case is the embezzlement and transfer of fiduciary security objects in the form of a Honda Beat brand motorcycle, as revealed by the Manado Police Criminal Investigation Unit (Satreskrim). This case was revealed when two perpetrators, HT (30) and ZY (22) constituting Bailang residents, came to report to the Manado Police Office that ZY's Honda Beat motorcycle had been withdrawn by Finance through debt collectors, but during the initial interrogation of the two, the Manado Police Criminal Investigators found irregularities in ZY's story. Feeling that there was something strange about ZY's story, the police immediately contacted the Finance. Finally, ZY admitted that the motorcycle was not withdrawn by Finance, but he had sold it to someone via Facebook for IDR 3.5 million. Apparently, HT and ZY had created a false scenario before the police regarding whereabouts the motorcycle is. Initially the motorcycle belonged to HT which he obtained through the Finance's financing, since April 2022. But over time, the item was sold to ZY for IDR 1 million with the intention that ZY continue to pay installments. But it turned out that ZY sold it back to someone else. The two of them also made up a new story as if the motorcycle had been withdrawn by debt collectors. Both perpetrators were charged with Article 372 of the Criminal Code and Article 36 of Law Number 49 of 1999 concerning Fiduciary Guarantees. (Humas Polda Sulawesi Utara, 2022)

The next case is the embezzlement of fiduciary guaranteed object, in which the Kapuas Police Resmob Unit, Central Kalimantan Police, has arrested the perpetrator of the Criminal Act, in this case the Fiduciary giver who transferred, mortgaged, or leased the object of Fiduciary Guarantee without prior written approval from the Fiduciary Recipient. The perpetrator is MA (26), Farmer / farmer living in Bataguh District, Kapuas Regency, Central Kalimantan Province. There was a financing agreement (fiduciary agreement) between the complainant and the reported party at the Office of PT Nusa Surya Ciptadana (NSC), with the financing facility provided by the reported party amounting to IDR

20,429,711, - (twenty million four hundred twenty nine thousand seven hundred eleven rupiah) with installments of IDR 848 000, - (eight hundred forty-eight thousand rupiah) every month for a tenor of 36 (thirty six) months with a down payment of IDR 2,300,000, - (two million three hundred thousand rupiah) and the collateral for the agreement was 1 (one) unit of Honda Beat-brand motorcycle produced in 2022. Then the reported party paid1 (one) installment and never paid another installment until the time the reporter made a report. Thereafter, an officer of PT Nusa Surya Ciptadana (NSC) checked and clarified the reported party at the reported party's residence but the reported party was always evasiveor uncooperative and the officer was informed that the collateral in the form of 1 (one) unitof motorcycle brand Honda Beat Year 2022 was no longer in the possession of the reported party. For this incident the victim through the reporter objected and felt aggrieved and then reported the incident to Kapuas Police Station. (Kalteng, 2023)

These cases are only a few of cases related to the embezzlement of fiduciary security objects occurring in Indonesia. Many more similar cases still occur because there is still a gap of regulation related to fiduciary guarantees in Indonesia.

Research Problems

Based on the explanation above, researchers can formulate several problems: Firstly, how valid is the pledge agreement made by the fiduciary security to a third party regarding fiduciary collateral objects?; secondly, Does the fiduciary security have the right to report the embezzlement of fiduciary objects transferred done by him.

Research Methodology

The research used is normative legal research, a doctrinal legal research or theoretical legal research, because normative research focuses on written studies, by prioritizing secondary data such as statutory regulations, court decisions, legal theory, and legal principles, legal principles, and the findings of scholars' scientific work , as the sources of study.(Irwansyah, 2022) The author identifies sources of legal material related to the implementation of fiduciary and pawn guarantees. Then, a qualitative normative analysisis carried out using deductive logic to harmonize the norms, theories, doctrines and their application.

Discussion

1. The validity of the pledge agreement entered into by the fiduciary security provider with a third party regarding the fiduciary collateral object

In practice, motor vehicles constituting the object of fiduciary collateral are often transferred by the debtor as a pledge to a third party. If the fiduciary recipient's permissionor written approval has been obtained, this will not be a problem, as long as the fiduciary recipient serving as the creditor who was first involved in the agreement with the debtor takes priority over other creditors. The position intended is that of the fiduciary creditor receiving debt repayment before other creditors also involved in an agreement with the debtor.

In this discussion, we will discuss the transfer of fiduciary collateral objects carried out by the fiduciary giver through pledging, the legal provisions relating to pledging originated from colonial law, as regulated in Book II Chapter XX Article 1150 - Article 1161 of the Civil Code (hereinafter referred to as the Civil Code). Pawning has become a trend in society because its procedures and requirements are so easy and simple that people can withdraw their security deposits easily. It is not uncommon for people to pledge their goodsin pawning activities through illegal pawning, including the transfer of fiduciary objects tothird parties, usually also using illegal pawning.On the other hand, in addition to having many conveniences, illegal pawning has many shortcomings and fraudulent practices, so the government has established an institution in charge of pawning activities expectedly to minimize parties involved in illegal pawning activities. The same applies to pawn

agreements. There is no prohibition for any person to enter into a pawn agreement with another person. That is, making a money lending agreement with the collateral of movable objects with everyone, according to the law, is allowed. However, if it is a business, then the provisions of positive law governing the authority to conduct a pawn business in Indonesia must be considered.

The implication obtained by the pawn holder is that there is a pawn agreement based on the transfer of movable objects to the pawn recipient (creditor). Then, based on Article 1154 of the Civil Code the creditor has the obligation not to be allowed to transfer the pawned goods into his possession even though the pawn giver defaults and to maintain the pawned goods. In addition, based on Article 1156 of the Civil Code, the pledgee shall notify the pledgor (debtor) of the transfer of pledged goods. Recalling his obligation, the creditor must be responsible for the lost pawn object. This can be seen from the paragraph of Article 1157 of Civil Code stating that: "The debtor is responsible for the loss or deterioration of his goods if only it has occurred due to his negligence." The dark pawn also has implications to the pawn giver, namely the estimated value of pawn collateral detrimental to him, as well as high interest, because as we know the pawn agreement is an *acessoir* to the main agreement, borrowing.

The weakness of regulations governing fiduciary guarantees in Indonesia is that the registration of fiduciary guarantees is only carried out for the establishment of fiduciary guarantees rather than covering registration in the event of changes, transfers, and abolition of fiduciary guarantees. Many finance companies still have not carried out their obligations in the process of eliminating the Fiduciary Guarantee. The Fiduciary Guarantee register must be deleted. If it is not deleted, the Consumer (in this case, as a fiduciary) canbe disadvantaged when using the object as collateral to obtain the next financing facility because it can be considered as a re-fiduciary. The use of Fiduciary Guarantee in Indonesia currently does not fully fulfill the aspects of consumer protection. Many Fiduciary Guarantee execution processes are still carried out without complying with the provisions stipulated in the Fiduciary Guarantee Law.

The government established an official institution to carry out pawn guarantees, as regulated in the in Article 7 of Government Regulation Number 103 of 2000, governing the Pegadaian Public Company (Perum) and has now changed into the Pegadaian Public Company (Perseroan) aiming to (1) contribute to improving the welfare of lower-middle-class people especially, through the provision of funds based on pawn law, and other financial services based on applicable statutory provisions; and (2) prevent the public from illegal pawning, usury practices and other unfair loans. In the transfer of fiduciary objects, pawning primarily uses illegal pawning because it does not go through an official pawnshop institution. People pledging their goods in illegal pawning suffer from many losses: the rights of pledger are often unfulfilled, and the obligations of pawn recipient are unfulfilledor vice versa, in addition to the practice of illegal pawning that can also result in high interest rates.

The existence of a pledge guarantee must fulfill two absolute elements. Firstly, there must be a pledge agreement (pawn agreement) between pledger (debtor himself or a third party) and pawn holder (creditor). The form of legal relationship is not determined in this pledge agreement, whether it is made in written or just spoken form; this is given up to the agreement of the parties. If it is made in written form, it will be stated in a notarial deed or just a private deed, but the most important thing is that the pawn agreement can be provento exist. The provisions in Article 1151 of the Civil Code state that the agreement to pledge is proven by all means approved. Based on the provisions in article 1151 of Civil Code, the pledge agreement is not required to be in a specific form, it can just be made by following the main agreement format. The second condition is that the mortgaged property is handed over from the debtor (pledge giver) to the creditor (pawn holder). In other words, the

pawned object must be under the creditor (pawn holder)'s control. Thus, in the case of a pawn agreement is not followed with the handing over of pawned object to the creditor (pawn holder) that is then under the creditor (pawn holder)'s control, then the pawn right is considered invalid or it is not a pledge and consequently, it does not give rise to a lien.(Usman, 2008)

Very influential on the validity of pawn agreement in the case of the transfer of fiduciary objects to a third party is the preparation of a notarial fiduciary security deed and the registration of fiduciary deed as well as the fiduciary recipient's written permission. The Fiduciary Law in Article 5 states that a fiduciary security deed must be made with a Notarial Deed in Indonesian. The requirement to make a fiduciary security deed with an authentic deed or notarial deed is related to the issue of evidence and the proof process. A deed functions formally in the sense that it complements or accomplishes a legal act, and functions as evidence. An authentic deed is the one made by an authorized official according to the provisions specified. Authentic deeds mainly contain information from an official explaining what he did or saw before him.(Mertokusumo, 1985) Apart from that, the fiduciary security deed must be made notarially because the application of fiduciary security registration requires a copy of notarial deed regarding the imposition of fiduciary security. This is regulated in PP No. 86 of 2000 concerning Procedures for Registration of Fiduciary securitys and Costs for Making a Fiduciary security Deed. Making a fiduciary security deed using a notarial deed is also related to the imposition of fees in making the deed and is one of the requirements for the registration of a fiduciary security deed at the fiduciary registration office.

Practical implementation in the field found that many fiduciary providers carried out acts of transferring fiduciary objects without notification or permission from the fiduciary recipient; this is certainly not permitted. Following up on this situation, it is very necessary to carry out the registration function of fiduciaries. By registering, a fiduciary certificate is issued which is a copy of fiduciary registration book. Basically, by the

provisions of Article 14 paragraph (3) of the Fiduciary Law, a new fiduciary security is born on the same date as the date the fiduciary security is recorded in the fiduciary register book and the creditor will receive a fiduciary security certificate in the name of "For the sake of Justice Based on Belief in One Almighty God." " By obtaining a fiduciary security certificate, the creditor or fiduciary recipient immediately has the right of direct execution, as happening in lending and borrowing in banking. The legal force of certificate is as same as that of a court decision already having permanent legal force. However, by the mandate of the Fiduciary Law, to obtain legal protection as regulated in the Fiduciary Law, the encumbrance of objects with a fiduciary security deed must be made with an authentic deed and recorded in the fiduciary register book. If these provisions are not fulfilled, the rights of fiduciary creditors will not be protected as specified in the Fiduciary Law.

Registration in a fiduciary security has consequences for third parties. Through registration, the third party is deemed to know the characteristics inherent in the object in question and the existence of a collateral bond with the characteristics aforementioned, and if the third party fails to pay attention to or control the register or the list, the third party must bear its own risk of loss. Registration has significant consequences for third parties, including pawn holders, having good intentions.(Satrio, 2002) Consequently, the third party, as the recipient of the pawned item, is not protected by law, regardless of whether or not the third party knows that the item has been used as fiduciary collateral. This is because in principle the provisions regarding the prohibition of pawning fiduciary collateral have been regulated in law. Thus, everyone is deemed to know it and because the fiduciary security has been registered, it is assumed that everyone can check it at the Fiduciary Registration Office. Apart from that, if the granting of pledge is approved in writing by the fiduciary recipient because fiduciary collateral is also a material right, the

principle of material rights will likely be applied, meaning that material rights that were born first have a higher position, so that the legal consequences for the third party pledging the objects used as fiduciary collateral is that there is no definite legal protection for the pledgee to take full payment from the execution of collateral if the debtor defaults.

Many financial institutions and banks (commercial and credit banks) provide financing for consumers (consumer finance), leasing, and factoring. They generally use agreement procedures including a fiduciary security for the object of fiduciary security, but ironically it is neither made in a notarial deed nor registered at the Fiduciary Registration Office to obtain a certificate. Such a deed can be called a private fiduciary security deed. If the fiduciary security deed is neither made notarially nor registered, the pledge agreement made between the fiduciary and the third party remains valid and will take priority in repayment, because there has been no legal fiduciary security so that it does not violate the provisions of the Fiduciary Law that transfer must be carried out with written approval from the fiduciary recipient (the creditor), preferential rights or prior debt repayment are not given to fiduciary recipients in unregistered fiduciary agreements. These agreements can be compared to private agreements. Consequently, they cannot be executed directly. If the debtor defaults, the execution process must be carried out by filing a civil suit in the District Court through the normal procedural legal process until the court decision is issued.(Sunggono, 1995)

The transfer of fiduciary collateral objects from fiduciary collateral that have been made using a notarial deed and have been registered must require written permission from the fiduciary recipient. This has been regulated in Article 23 paragraph (2) of the Fiduciary Law, stating that fiduciary givers can pawn the objects used as fiduciary collateral, provided there is written approval from the fiduciary recipient. The transfer of fiduciary objects with written permission from the fiduciary giver will make the agreement to transfer the fiduciary object to a third party with a pledge valid or not violating the Fiduciary Law. Thus,

if the provisions regarding pledge guarantees has been fulfilled, the guarantee to pledge the fiduciary object to a third party will run. However, fiduciary securitys and pawn guaranteeshave material rights, so the principle of material rights will apply, meaning that the material rights born first will have a higher position. However, J. Satrio still questions this becausethis principle has only been applied so far to the same type of material rights, such as first, second, and subsequent mortgages, first, second, and subsequent mortgages, first, second, and subsequent mortgages. So, the legal consequences for third parties of pledging objects having been used as fiduciary collateral are that there is no definite legal protection for thepledgee to take full payment from the execution of collateral if the debtor defaults.

The fiduciary recipient's approval must be made in writing so it is not just conveyed verbally, and in obtaining this approval, not all fiduciary recipients will give approval to allow the fiduciary giver to mortgage the object of their fiduciary security. This is due to the fiduciary recipient's concern that the fiduciary will commit an act of default.Therefore, if there is no written agreement regarding the transfer of fiduciary objects from the fiduciary recipient or creditor, the pledge agreement will be null and void because it violates the provisions of Article 23 paragraph (2) of Fiduciary Law. In the realm of civil practice, the concept of nullity is known in the context of contract law, according to article 1320 of the Civil Code. For the validity of an agreement, four conditions are required: the agreement of those who bind themselves; being competent to agree; regarding a certain matter; a legitimate cause. The first two conditions are called subjective conditions because they concern the people or subjects agreeing, while the last two conditions are called objective conditions because they concern the agreement itself or the object of legal action carried out. (Subekti, 1990)

If the objective conditions for the validity of an agreement are not fulfilled, the agreement will be null and void. If so, legally from the beginning there was no agreement and there was no agreement whatsoever between the parties intending to agree. Even though the term is "null and void", it will not mean that an agreement not meeting the objective requirements is automatically void. The judge is required to state that there was never an agreement or agreement, of course after a certain party files a lawsuit against the validity of the agreement in question. This is by the legal principle that applies in civil procedural law, namely "Judges are Waiting". Based on articles 118 HIR and 142 Rbg, the judge is waiting for a rights claim to be submitted to him, so whether or not a lawsuit or rights claim will be filed is left entirely up to the interested parties. The agreement cancellation can be requested to the agreement by one of the parties feeling disadvantaged. Cancellation of an agreement can be requested if:

a. The agreement made violates the subjective conditions for the validity of agreement as regulated in Article 1320 Paragraphs 1 and 2 of the Civil Code, namely that the agreement was born due to a defect of will (*wilsgebreke*), including due to error, coercion or fraud, or due to the incompetence of the parties to the agreement (*ombekwaamheid*) so that the agreement can be canceled (*vernietigbaar*).

b. The agreement made violates the objective conditions for the validity of the agreement as regulated in Article 1320 paragraphs 3 and 4, the agreement made does not meet certain object requirements or has reasons that are not permitted, such as being contrary to law, public order and morality, and thus making the agreement null and void (*nietig*).

The principle can be canceled; as long as the agreement has not been submitted for cancellation to the competent court, the agreement is still valid.(Khairandy, 2013) Whether or not the agreement will be canceled is completely up to the parties who enter into the agreement or contract. Cancellation can only have legal consequences after there is a judge's.

decision canceling the legal action; before there is a decision, the decision on the legal action remains in effect. (Pramono, 2012)

There is a dispute between the parties regarding the breach of an agreement or contract resulting in the filing of a lawsuit to the competent court based on arguments that describe the existence of a civil relationship underlying or describing a claim accompanied by a claim as a request from the plaintiff to the judge who feels that his interests have been harmed. The party who felt aggrieved asked the judge to declare the agreement null and void. The judge, as one of the lawmakers, through his decision in responding to the lawsuit, is obliged to explore the substance of case in the form of arguments put forward by the plaintiff along with his demands in the form of agreement cancellation or the agreement considered null and void, whether or not it is truly based on good faith in implementing the agreement.

An agreement that is declared null and void has a legal aspect to the agreement that has been entered into by the parties, and no longer has legal consequences binding the parties who agreed with the law. The agreement entered into is no longer valid or is considered never existed and is returned to its original state as it was when the agreement was not implemented. In principle, the fiduciary security remains with the object constituting the object of the Fiduciary security regardless in the hands of whoever the object is in, except for the transfer of inventory items constituting the object of Fiduciary security. This is called the "*droit de suite"* principle. The principle of "*droit de suite"* is enough to guarantee that if the fiduciary is in default and the goods used as the object of fiduciary security can still be executed even though the goods have changed hands to another party, through either pawning, renting or buying and selling. So, in general it can be concluded that even though the object of fiduciary security has changed hands to a third party with a pledge, the fiduciary creditor can still exercise his right to execute if the debtor breaks his promise.(Jamil,

2021) So, if a dispute occurs and the fiduciary object under the fiduciary's control is transferred to a third party, the fiduciary recipient can execute the fiduciary object wherever the object is located, and the pledge holder cannot be guaranteed the repayment of receivable. When tracing the provisions of property law, several principles of property law can be found, creating the basis of property law norming, as follows:

a. Property law is a compelling law (dwingen recht) that cannot be waived (waive) bythe parties. (Hadisoeprapto, 1984)

As a compelling law, the provisions contained in the law of property having been regulated in the law cannot be deviated or negated by someone or the parties. This means that a person or party cannot create a property right over a certain object, other than what has been determined or stipulated in the law. In other words, only can the law create a property right giving a person direct authority over an object. Only can a property right be created over an object. These property rights will not authorize anything other than what is specified in the law. It means that theparties' will cannot affect the content of property right.

b. Transferable or Assignable

In principle, all property rights can be transferred or assigned to anyone, provided that the person concerned is authorized to do so. This is in accordance with the nature of property rights; therefore the parties cannot determine otherwise that the property rights cannot be transferred/assigned to other parties. That is, as long as it is not excluded otherwise, by nature all property rights can be transferred.

c. Principle of Individuality (Individualiteit)

Based on this principle of individuality, every object of property rights is always an item that is individueel bapaald, an item that can be determined. That is, the object of property rights is always on goods that can be determined and is a unity.(Usman, 2011)

d. The principle of totality or the whole of object (totaliteit)

This principle states that an individual's ownership of an object means the comprehensive ownership of every part of the object. In this context, for example, a person cannot have a part of an object, if he himself does not have the title of objectownership as a whole.

e. The principle of inseparability (onsplitsbaarheid)

This principle is a legal consequence of the principle of totality, where it isstated that a person is not allowed to relinquish only part of his right to the ownership of an intact property. Although an owner is authorized to encumber his property rights with other limited property rights (jura in re aliena), the encumbrance carried out can only be charged against the entire property belongingto him. So jura in re alenia cannot be granted for part of the object, but it can be forthe entire object as a whole.

f. Principle of prioriteit

In the description of the principle of onsplitsbaarheid, it has been said thata property can be granted jura in re aliena giving limited property rights over the property. This limited property right is given a position of priority between one right and another by the law. Remember that there are general property rights and limited property rights. Above the right of ownership may be charged with the right to use the results, which on the right to use the results maystill be charged with a mortgage.

g. The principle of mixing (vermenging)

This principle is also the principle of continuation of the granting of jura inre aliena, where it is said that the holder of a property right over a property that isgranted a limited

property right (jura in re aliena) cannot be the holder of the limited property right. The limited property right falls into the hands of the property right holder of the property; then the limited property right is nullified bylaw.(Hadisoeprapto, 1984)

h. The principle of publicity (publiciteit)

The principle of publicity relates to the announcement of an ownership of an immovable object to the public. Basically, the transfer of ownership and encumbrance of an immovable object is carried out through registration in the public register so that it is known to the public (general society).Meanwhile, for movable objects, in principle, the transfer of ownership and encumbrance is not required to be registered. This implies that the transfer of a movable object ownership is sufficient with real control and delivery, without the need for being registered in the public registry, unless otherwise provided by law.(Riabchinska, 2021)

i. Different arrangements and treatment of different objects

This is in accordance with the distinction of objects carrying the consequence of different arrangements and treatment against different objects. This means that matters relating to control (bezit), delivery (leavering), encumbrance (bezwaring), passage of time (verjaring) of each object will be different. The same applies to the jura in re aliena of each object. For example, leavering of movable objects is sufficient for real (physical) delivery, while leaveringof immovable objects is carried out by deed of name transfer.

j. The nature of agreement as a property agreement

The nature of the agreement is present in each of procurement or formationof property rights. Basically, every agreement law also contains the principle of property and every property right is also attached to the nature of agreement law in it. The nature of this agreement becomes increasingly important in the granting oflimited property rights (jura in re aliena), as made possible by law. Property rights give birth to zakelijk agreements (zakelijk overeenkomst), the ones resulting in orcreating property rights. Then, according to legal science, the main signs of property are as follows:

1) Property rights are absolute, meaning that this right can be defended against everyone. The right holder has the right to sue anyone who interferes with his rights;

2) Property rights have an indefinite term;

3) Property rights have droit de suite, meaning that the right follows the object in the hands of whoever the object is. If there are several propertyrights placed on an object, the strength of the rights will be determinedby the order of time;

k. A property right grants broad powers to its owner.

The right can be transferred, placed as collateral, leased or used alone. Onthe basis of these characteristics, then, the collateral object on the property security rights must be transferable objects and have a sale (economic) value.

2. The entitlement of the provider of fiduciary securities to report the embezzlement of fiduciary objects transferred by them to third parties.

Finance companies implementing fiduciary securitys often experience problems in the field, sometimes the debtor deliberately transfers the fiduciary object by pawning it toa third party, and then the third party holding the pledge commits embezzlement. Embezzlement is defined as the act of using (money, goods, etc.) illegally. The objective elements of embezzlement include the act of possessing an object partly or wholly belonging to another person under his control notbecause of a crime. Subjective elements include deliberate embezzlement and unlawful embezzlement. As explained in the case of embezzlement in Article 372 of the Indonesian Criminal Code, “Any person who

intentionally and unlawfully owns something wholly or partly belonging to another person but under his control not because of a crime, is considered as embezzlement " (Soerodibroto, 2007) In the concept of criminal responsibility in the sense that the maker is punished, there are several conditions to be met:

a. Error

For criminal liability to exist, a condition is required that the maker must beguilty. Someone can't be held accountable if they have no mistake.

b. Intentional

The Criminal Code (*Crimineel Wetboek*) of 1809 stated: "The word intentional means the will to do or not to do acts prohibited or ordered by law". In the Minister of Justice's *Memorie van Toelichting (MvT)* when submitting *Criminiel Wetboek* in 1881 (which became the Indonesian Criminal Code in 1915), it was explained: "The word intentional" is defined as "consciously committing a certain crime". Deliberation or intentionality is the second subjective element in determining whether or not a person can be held accountable for a criminal actcommitted. Another term for deliberate is *opzet or dolus*.(Wiyanto, 2012)

Article 36 of the Fiduciary Law restricts that the person prohibited from transferring is the fiduciary giver. If embezzlement of fiduciary objects is carried out by the fiduciary giver, this article will be subject to criminal sanctions. Article 36 of Fiduciary Law states "A Fiduciary Giver who transfers, pawns or rents objects constituting the object of Fiduciary security as intended in Article 23 paragraph (2) without prior written consent from the fiduciary recipient, shall be punished with 2 (two)-year imprisonment maximally and an IDR 50,000,000 (fifty million rupiahs) fine maximally." Based on the legal principle of *Lex Specialis Derogat Legi Generalis*, more specific or specific provisions cover the application of general legal norms, so theoretically, Article 372 of the Criminal Code (hereinafter referred to as the Criminal Code) can no longer be applied to bail cases. Fiduciary concerns the fiduciary transferring fiduciary objects without the fiduciary recipient's written consent, considering that it is specifically regulated in Article 36 of the Fiduciary Law.

It becomes interesting if there is a third party constituting a pawn of fiduciary object embezzling the fiduciary object pawned by the fiduciary. In principle, those who can report embezzlement by a third party to the police are the injured party and the interested party. Two parties have an interest in fiduciary objects: the giver and the recipient of fiduciary. If the fiduciary is registered and then transferred and embezzlement occurs by a third party, the giver and the recipient of fiduciary can report the embezzlement based on Article 372 of the Criminal Code, and then the recipient of fiduciary can also report the fiduciary if the transfer is made to the third party without the fiduciary recipient's written consent by Article 36 of the Fiduciary Law.

Ordinary embezzlement or principal embezzlement is the one regulated in Article372 of the Criminal Code (KUHPidana). Ordinary embezzlement is the one committed by a person deliberately unlawfully controlling an object constitutingthe property of anotherperson either wholly or partly, but the person obtains the object in his control not due to acrime. Article 372 of the Criminal Code (KUHPidana) is the main form of the embezzlement crime. The elements are:

a. Objective elements:

1) Have

2) Goods wholly or partly belonging to another person

3) The goods are in his possession or controlled not because of a crime.

b. Subjective elements:

1) Intentionally

2) By going against the law. (Anwar, 1986)

The criminal act of embezzlement in all its forms, either ordinary or other forms, is a very serious type of criminal act. Viewed from the consequences and the influence or impact arising on society, not only is it detrimental to the party who is the victim of the crime, but it also seriously disrupt public order and peace. The existence of these provisionscan be used as a reference for judges to impose criminal sanctions on the perpetrators of embezzlement crime. For the imposition of criminal sanctions to be appropriate and proportional in the context of crime prevention efforts, the judge in imposing criminal sanctions on the perpetrator must consider various aspects, including the substance of criminal sanctions and regulations. Here we can see the freedom of a judge to impose criminal sanctions in each decision.

The embezzlement crime is the one related to moral or mental issues and a belief in someone's honesty. Therefore, this criminal act begins with a party's belief that the perpetrator of embezzlement crime has committed it. The crime of embezzlement is a type of crime against human property regulated in the Criminal Code. The crime of embezzlement itself is regulated in the second book on crimes in the provisions of Article372 - Article 377 of the Criminal Code. Based on this description, it can be seen that the embezzlement crime is an unlawful act due to intentional and unlawful possession of something wholly or partly belonging to another person but within his control not because the crime is called embezzlement.

The Fiduciary Recipient does not bear any liability for the consequences of actions or the negligence of Fiduciary Giver, arising from either a contractual relationship or unlawful acts in connection with the use and transfer of objects constituting the object of Fiduciary security. A fiduciary security based on trust is very dependent on the good faith of both parties, both buyers in installments (credit) and finance as guarantors. The potential embezzlement of motor vehicles is due to buyers having bad intentions. The fiduciary trust guarantee system is a system in which even though the buyer has not paid off the two-wheeled vehicle, based on trust, the goods are already controlled by the buyerwho is not yet the owner. The term embezzlement, as commonly used by people to refer tothe type of crime in Book II Chapter XXIV of the Criminal Code, is a translation of the word "*verduistering"* in Dutch. This qualified offense or what is called embezzlement is regulatedin Article 372. Many elements constitute the offense of theft; however, the presence of thegoods intended to be owned (*zich toeegenen*) the perpetrator of embezzlement's hands is not the same as theft. (Lamintang, 1997)

The debtor hands over his ownership rights in trust as collateral for the debt to the creditor, according to fiduciary theory, but the transfer of ownership rights over the fiduciary collateral is not perfect like the transfer of ownership rights in a sale and purchase agreement. The creditor has limited debt collateral, by guaranteeing the property rights of the object constituting an object of fiduciary collateral as debt repayment. The authority of fiduciary debtor as the owner of collateral property rights of object constituting an object of fiduciary collateral is no longer intact; as a result, his authority over the fiduciary collateral is limited, just like a borrower-user of a fiduciary security object that has been pledged as collateral. This is because the juridical property rights are in the hands of creditors receiving the fiduciary; meanwhile the debtor giving the fiduciary only has economic ownership rights to the fiduciary collateral having been pledged, so that the fiduciary no longer serves as "*eigenaar* of fiduciary collateral", but as the detenter.".(Mangunkusumo, 1981)

Furthermore, what about motor vehicles that have not yet been renamed in the BPKB and later made fiduciary, should the interested parties report the embezzlement ofmovable

objects that are already under their control? Article 509 of the Civil Code states that objects are movable because they are objects that can be moved or moved. The Civil Code, in Article 1459 of, states that "The ownership rights to goods sold are not transferred to the buyer, as long as the delivery has not been made according to Articles 612, 613 and 616". Leveraging is one of the most common ways of obtaining property rights in society. Delivery is the transfer of an object by its owner or on behalf of another person so that the other person obtains material rights to the object. For example, in buying and selling, the sale and purchase only create rights and obligations (obligatory), but do not transfer property rights.

Ownership rights are only transferred to the buyer if the object is handed over by the seller to the buyer. So, delivery is a juridical act of transferring property rights. In a sale and purchase agreement, grant, gift giving, exchange, and delivery transfer property rights. However, other agreements such as renting, borrowing, custody, occupancy, collateral, and handover do not transfer property rights but only concern the right of control (*bezit*) over the object. The type of delivery depends on the object to be handed over, whether it is tangible movable object, intangible movable object, or immovable object. The delivery of tangible movable objects as regulated in Article 612 of the Civil Code can be done in several ways, as follows:

a. done hand to hand

b. This is done by handing over the key to the warehouse where the object is stored

c. Done with *brevi manu* (shorthand) tradition, if the object is already under the control of person entitled to receive it, for example the handing over of ownership rights to the lessee or user,

d. This is done with *constitutum possessorium*, if the object remains under the control of original owner, for example in a house sale and purchase agreement, the seller as owner remains in control of the house based on a lease with the buyer

in relation to motor vehicle ownership rights, simply follows the provisions of Article 612 above by handing over the BPKB and vehicle keys to the buyer. Levering motor vehicles by handing over the BPKB and valid vehicle keys, and providing fiduciary collateral in the form of motor vehicles that have not been transferred to the name of fiduciary can be carried out in practice in a notarial manner. However, to provide a greater sense of security for the party receiving the fiduciary, it would be better for the credit agreement to use fiduciary collateral with a motor vehicle collateral object having not been renamed in the name of fiduciary, includeing a clause stating that the creditor during the fiduciary registration process for the object has the right to rename. The motor vehicle is in the name of the fiduciary.

Conclusion

1. The fiduciary security deed must be executed using a notarial deed as required by Fiduciary Law. Additionally, a copy of the fiduciary security deed notarized by a notary is required for registering a fiduciary security. If the fiduciary security is not lawfully registered, it will not hold legal validity. To pawn a duly registered fiduciary object to a third party, formal approval from the fiduciary recipient is required to ensure the legal validity of the pledge agreement between the fiduciary and the third party. If the fiduciary object is transferred without the written authorization of the fiduciary recipient, the pledge agreement between the fiduciary and the third party holding the pledge shall be considered null and void due to its violation of the rules of Fiduciary Law. Third parties with liens on fiduciary objects are not assured repayment of their debts due to the droit de suit concept in fiduciary securities, which allows the fiduciary recipient to sell the pledged object. Third party lienholders may not be assured repayment of their debts due to the droit de suit

principle in fiduciary guarantees. This principle allows the fiduciary recipient to enforce the mortgaged fiduciary object's execution regardless of its location, preventing the mortgagor from reclaiming the object or stopping the execution ofthe fiduciary guarantee.

2. Reporting of embezzlement regarding fiduciary collateral objects can be carried out using Article 372 of the Criminal Code and Article 36 of the Fiduciary Law as the legal basis. The reporting based on Article 36 of the Fiduciary Law is only limited tothe embezzlement committed by fiduciary givers, while the reporting of embezzlement to third parties constituting the pawn holders of the object of fiduciary security that is mortgaged is based on Article 372 of the Criminal Code.

Suggestion

In the future, better regulations need to be made regarding the pawning of fiduciary objects to third parties holding the pawn so that the third parties holding the pledge will be protected better in the repayment of their debts. In addition, it is necessary to strictly regulate illegal pawning in Indonesia so that there will be no secret transfer from the giverof fiduciaries to third parties by using pledges, and legal knowledge regarding the risks of accepting a pledge from fiduciary objects need to be given to the people interested in fiduciary objects, that the pawn holders of fiduciary objects will not be guaranteed for the repayment of their receivables.

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