

Consumer's Legal Protection Due to the Cancelling of Condominium Construction Whole Sale and Purchase Agreement Already Made Before the Notary (Case Study on Condominium Units in Palembang City)

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ABSTRACT

Palembang City has already developed into one of metropolitan cities in Indonesia, so it has the strategic significance as the main point of growth and development in a region due to economies which are being concentrated therein. These make the development of storeyed housing (flat/apartment) units which are known as Condominium or Apartments which are booming in Palembang City. The purchase of a flat/apartment unit starts from the booking order after viewing the show units offered by (a) developer(s), then, subsequent to the 20% minimum payment which will be followed by the process of entering into Sale & Purchase Agreement which is made before a Notary prior to a Deed of Sale and Purchase which would be finally drawn up after the whole payment process and the condominium units completely built up. Nevertheless, in accordance with the fact finding, after the legally binding of Sale and Purchase Agreement, developers breach of contract or in default which resulted in the condominium units never finished their development, even they just stopped without any clarity. This caused consumers become severely disadvantaged by developers, either materially or non-materially. The law which stipulates the Consumer Protection is deemed not yet totally on the side of consumers, therefore it is expected in the future to make addendum to the rules both referred to the Law and to the developer.

Keywords: *condominium development, notary, default, Sale and Purchase Agreement*

1. INTRODUCTION

Palembang City has developed into one of metropolitan cities in Indonesia, even Palembang City becomes the second biggest metropolitan city in Sumatera Island following Medan. The urban areas, mostly metropolitan cities, certainly have strategic significance as the main point in the development growth of a region, because the point of the concentrated economy is located therein; by being a point of the economic concentration of a region, it will be resulted in the high purchasing power and also the flow of urbanization to the region. In view of this prediction which then makes Palembang City improves itself, it can be predicted that the future would be happened by preparing and providing secured, comfortable, productive and sustainable urban spaces. Other than the role of the Government in Palembang City development, investors are also interested in building the city of Palembang as an investment opportunity in the infrastructure development, hence in 2015 it was commenced the construction of *ApartmentX* or which is also called condominium or storeyed housing in the Rajawali Village complex area and Celentang area.

Although a lot of terms are used for referring to *Apartment/condominium/multi-levelhousing* (flats)/vertical or storeyed resident or housing, however, there is only one term known for them all in Indonesian laws and regulations, i.e. storeyed housing. Its regulations are contained in Law No. 20 of Year 2011 concerning Storeyed Housing. The regulation pertaining storeyed housing sale and purchase transaction are contained in Articles 42-44 of Law of the Republic of Indonesia Number 20 of Year 2011 concerning Storeyed Housing. The purchase transaction of storeyed housing units starting from the potential customers who intend to buy the unit(s) before meeting the developer, then viewing the show unit(s) to be purchase, and visiting the location where the mentioned storeyed housing units are located and with the consent to make a booking order subsequent to the mockups/show units viewing which are marketed by the developer, followed by the Sale and Purchase Agreement whereas the construction process has reached 20% minimum and then the process of Deed of Sale and Purchase (AJB) made before a Notary whereas the apartment project has been officially completed. The Sale and Purchase Agreement of Land (PPJB) and Building becomes a preliminary agreement prior to the signing of

valid Deed of Sale and Purchase (AJB), and commonly set forth the governing provisions regarding the prohibited matters along with the obligations of parties who made them. This agreement is legally binding for buyers who have entered into the Sale and Purchase Agreement. Subsequently, the buyer starts making payments both in full and gradually or in installments to the developer several times in the amounts consented under the previous Sale and Purchase Agreement (PPJB). However, the development process that had been taken place in 2 stages for approximately 2 years from 2015 to 2017 was suddenly terminated and there was alleged fraud or *default* made by the developer against all unit buyers. Sale and Purchase Agreement (PPJB) is a reciprocal agreement whereby one party, the seller, promises to surrender ownership of the goods, while the other party, the buyer, promises to pay the price in return for the acquisition of the said ownership. If compared between reasons of PPJB signing to the sale and purchase understanding, it could be found out that the PPJB has not yet been a sale and purchase agreement, but rather an agreement to bind one another between parties who will sell and purchase, or in other words, the PPJB is a preliminary agreement before the sale and purchase agreement can be implemented.

PPJB is not an agreement as stipulated in the Civil Code or in other words, PPJB is an anonymous agreement. In accordance with Herlien Budiono, PPJB is a support agreement which is functioned as a preliminary agreement that the parties are free to determine its form.¹ In an agreement if one party because of his/her mistake did not perform what was promised, consequently it was said that the party was in default or breach of contract. Therefore, in the event of violation against the consented agreement, the default lawsuit could be filed, because there is a contractual relationship between the party that caused the loss and the party who suffered the loss. A very important consequence of failing to fulfill the agreement is that compensation can be claimed for costs, losses and interest incurred, default caused by *force majeure*. A number of the storeyed housing unit consumers who have signed the PPJB began to report this alleged fraud case by bringing evidences in the form of proof of payment as well as the document concerning notarized Sale and Purchase Agreement. In proving a civil case, what is sought explicitly the formal truth, that is, a truth based on evidences which are submitted by the litigation parties. Therefore, generally a written proof specifically a letter or document is deliberately made by the parties for the purpose of proof if there is a dispute later. In proving a civil case, Article 1866 of (Indonesian) Civil Code has stipulated types of evidence in the civil procedural law, accordingly if it is based on the first point regarding the letter evidence, PPJB which has been made can be functioned as evidence for the victims to sue the developer. The PPJB contains of such element of force of an absolute and binding proof, so that the truth is perfect and no other evidence needed to prove it and legally

applicable. With the PPJB signed in the condition of new buildings up to 20%, it is very possible to disturb the convenience, security and safety of consumers in terms of owning the goods and services as intended. In addition, with the contents of a closed PPJB agreement or the PPJB was made only based on an agreement between the Notary and the developer, it will make the consumer's access in terms of correct, clear and honest information about the condition of the goods or services to be used becomes violated as well. The lack of available information regarding the procedures that should be followed, along with the protection to consumers of storeyed housing units (or in this case are apartments) sold prior to building completion and has already gone through the payment process as well as PPJB signing, moreover when the developer does not provide a refund option that has been deposited by potential buyers, or if he had a refund option, in fact the developer does not have a reserve fund for the compensation process. Until now, the apartment units which were estimated to be completed in 2017 have never been completed, resulting in legal uncertainty and the buyers experiencing both non-material and material losses.

1.1. Related Work

According to the research that has been done, I determined the results into some parts:

1.1.1. Form of Research

An empirical juridical approach is used in this research which means that in analyzing the problem done by combining legal materials which are secondary data with primary data obtained in the field.

1.1.2. Research Typology

The typology of legal research in this study is empirical juridical which in other words is a type of sociological legal research and can also be referred to as field research, which examines the applicable legal provisions and what happens in reality in the community. Or in other words, that is a study conducted on the actual conditions or real conditions that occur in the community with the intention to find out and disclose the facts and data needed, after the data needed is collected then leads to the identification of problems that ultimately lead to the settlement problem.

1.1.3. Data Types

In this study, the type of data collected is divided into 2 types, namely primary and secondary data.

a. Primary data

Primary data is data that comes from the original or first source. This data is not available in compiled form or in the form of files. This data must be sought through sources

or in technical terms the respondent, that is, the person we made the object of research or the person we used as a means of obtaining information or data.

b. Secondary Data

Secondary data is a data source that does not directly provide data to data collectors. This secondary data is data that is in nature supporting the needs of primary data such as books, literature and readings relating to the implementation of the Binding Agreement of Sale and Purchase.

1.2. Our Contribution

This paper presents some facts from the many events that often occur regarding legal issues related to the construction of condominium along with criticisms and suggestions for the government, notaries and the community to prevent this from happening again.

1.3. Paper Structure

The rest of the paper is organized as follows. the background of the problem and its resolution as well as criticism and suggestions to the parties involved to prevent this problem arising in the future.

1.3.1. Legal Protection of Consumers Due To the Cancelling of the Condomium Construction Even Though the Notarized Sale and Purchase Agreement Has Been Made.

In principle, the provisions concerning legal protection of consumers are stipulated in Law Number 8 of 1999 pertaining Consumer Protection (hereinafter referred to as the Consumer Protection Act), whereas the enactment of the Consumer Protection Act purposes to regulate the interests of both consumers and business actors. Therefore in this research, consumers are people who have made transactions for the purchase of condominium units / storeyed housing units */apartments* and have made payment previously by consent either in full or installment to the developer and have been set forth in the PPJB made before the notary. Derived from the research which has already been conducted in Palembang City in connection with the construction of 2 units of multi-level housing namely condominium X and XX researcher has carried out interviews with condominium unit consumers namely A and B, each consumer gives statement of having paid an amount of money that was done in installment. Consumer A has paid own money 16 times in stages, as a result the total payment commencing 2013 turned into approximately Rp500,000,000 (five hundred million rupiah), accordingly the purchase of the condominium unit was declared paid off, the developer of X condominium promises to consumer A of the condominium key

handover carried out in 2017. However, the construction was forcibly to halt until no time limit to be known with certainty because the developer's claim about facing difficulties in funding issues, so the promise that condominium would be completed in 2017 but until current 2019 it has not yet realized. Whereas Consumer B stated that had made payment with own money a nominal amount which reluctantly specified save for the payment made of approximately 50% of the condominium consented purchase value. Both consumers said that they had entered into Sale and Purchase Agreement (PPJB) before different Notaries. In terms of settlement of this case, each consumer said that the resolution offered by each developer, consumer A explained that the developer of Condomonium X since the beginning had given an oral promise that if the developer was unable to meet the achievements as previously promised then the developer would be fined; while consumer B explained that in the mentioned PPJB there are no clause setting forth the legal consequences in the event of default by the developer of condominium XX. Consumer A explained that until the interview with researcher, to be precise on June 20, 2019, the developer of Condomonium X, in addition to unfulfilling its achievements in the key handover, the developer also did not fulfill his achievement at all to pay the consented fine. The party gives the certificate of strata title (???) in the form of land and buildings as an assurance which turns out that after being examined by consumer A the market value of the land and building is not proportional to the nominal value paid by consumer A to the developer of condominium X. Whereas consumer B absolutely obtained no assurance and each consumer A and B were directed to wait for the construction of the two condos to be completed because each developer is trying to find new investors and it is not known exactly when the two condominiums will be completed. Legal protection for consumers if the developer in defaults prior to the drawn up of PPJB can be done through deliberations for consensus. If the word of consensus cannot be reached, then the consumer can file a lawsuit through the general court, or if no legal action, ordinarily the disputes settlement could be through arbitration. If the consumer filed a lawsuit to a public court, so based on the provision of Article 1338 paragraph (1) Indonesian Code Civil, every agreement that has been legally made should be valid as a law for those who draw it up. Therefore, even if PPJB had not yet been made, the confirmation of the purchase orders for the storeyed housing made between the developer and consumers would have been already binding upon both parties. Each party should be obliged to carry out the contents of the covenant. This study, along with analysis of the author, includes achievements in doing nothing, which is indicated if the developer did not make his achievements to build condominium X and XX, then consumers entitled to claim compensation consisting of expenses, loss and interest. In addition, consumers could also claim penalty payment (*dwangsom*) by suggesting that the developer did not meet its obligations. The consent in Sale and Purchase Agreement is also subject to the provisions of Article 43 paragraph (1) of the Law on

Storeyed Housing which regulates the sale and purchase process of storeyed housing units prior to the completion of its construction which can be done through Sale and Purchase Agreement made before a Notary. The notary can also indicate potential conflicts by ensuring that all promises contained in the Sale and Purchase Agreement of Sale would be possibly provide legal certainty or can be implemented. The legal certainty in the deed of the Sale and Purchase Agreement is absolutely an obligation for parties to be abided by and if it cannot be obeyed then the provisions of Article 1328 of the Civil Code prevailing, the debtor should be declared negligent by a warrant or by a similar deed, or based on the legal force of the agreement itself, that is, if this legal binding caused the debtor considered negligent subject to the deadline. The legal certainty of the multi-level housing transaction agreement and its legal protection has been guaranteed by the Act through the criminal law stipulated in the Consumer Protection Act and the provisions of Article 378 of the Criminal Code and civil law protection through the Sale and Purchase Agreement of the purchase of storeyed housing units.

1.3.2. The Role of Government in Providing Consumers with Law Protection due to the Cancelling of the Condomium Construction which Has Been Made the Sale and Purchase Agreement before the Notary

The rapid growth of the property business in Indonesia has not yet been supported by adequate regulations, especially those issued by the Government, despite the issuance of Law Number 1 of Year 2011 concerning Housing and Residential Areas, and Law Number 20 of Year 2011 concerning Storeyed Housing. However, the supporting regulations and the implementing regulations have not yet been completed or the technical regulations are no longer in line with the developments in the communities. For example, Minister of Housing (Menpera) Decree No. 111 of Year 1994 concerning guidelines for the sale and purchase agreement of multi-level housing unit which are not in accordance with the Law on Storeyed Housing. The existing laws and regulations cannot fulfill the principle of balancing interests for the parties involved in a PPJB on Storeyed Housing. Often consumers are required to sign the PPJB even though the construction of towers are just on land acquisition or just the ground breaking stage as in the case of the construction of condominiums X and XX in the City of Palembang, the mentioned construction is still in the initial stage. Although the construction of the said condominium was still in its early stages and there is no building yet, but the developer has already dared to offer condominium units to prospective consumers and even dared to promise the completion due date of the construction and the prospective consumers were eventually paid up a sum of money as a down payment and were required to sign PPJB as predetermined by the developer. As a matter of

fact, until this moment the construction of the condominium has not been completed even some have not been continued because the management is in shortage of funds for the next stage of development. This legal violation could be occurred because consumers are not in equal position with the business actors. There is no application of the equality principle between businesses and storeyed housing consumers based on the principle of balance in the storeyed housing PPJB. A study on 2 sale and purchase agreements showed that business operators unilaterally designated PPJB as a standard agreement albeit its contents are biased and very detrimental to consumers. There are even a number of consumers who have expressed their objections but in the end they are still required to sign the same PPJB with other consumers. This can be a loophole for developers to carry out the promise of injury, even though the developers themselves from the beginning did not have the intention to be in default, but with the weak position of consumers and covenants made by the Notari(es) as the parti(es) who made and issued PPJB documents and the developers who controlled the contents of the PPJB, this could be result in consumers being harmed. As in the case of the construction of condominium X and XX, there was not set forth such detailed clauses in the PPJB if each party breached of contract and about its settlement. Though Law No. 8/1999 on Consumer Protection has clearly set forth that business actors or managers are required to provide with compensation or indemnity in the event there were loss(es) arising from the traded goods and if the traded goods are utilized not in accordance with the agreement. However, this provision does not stipulate the obligations of the business actor to give compensation or whatever if the business actor breaches the promise; with the weakness of the existing legal regulations because it is considered not burdensome for the business actors who committed the default, it also results in the business actors in this case being the developers to be in default without a must to provide with compensation in the form of recompense to the consumer. This also coincides with the Consumer Protection Act, which absolutely does not regulate the compensation or recompense which must be provided by the developer. If this had been happened, hence the consumer returning to be the injured party, anyway being harmed on account of the developer breach of contract by not fulfilling the agreement to build condominium on time, also the consumer cannot claim compensation or recompense for the default committed by the developer because this was not regulated in the Consumer Protection Act. Once this was stipulated in a PPJB made by the developer and issued by a Notary to provide with compensation or recompense for the default committed by the developer, but the consumer keep on impossibly claim a great deal if the developer repeatedly to breach of contract by not paying the penalty as previously consented in PPJB given that there was no clause governing what if the developer did not pay the penalty. In the case of a dispute between the developer and the consumer, consumers cannot make many claims, especially to government agencies; in this case the government agencies

are the National Land Agency (BPN) and the Housing and Residential Area Office which is simply as an intermediary for granting permission to build condominium X and XX. In an interview conducted on C as a representative of the National Land Agency Office of Palembang City stated that the BPN only makes the checking on administrative files submitted relating to the construction of the condominium. In case of the issuance of location and checking permits carried out by BPN, previously the developer must have obtained the permit from another agency; as well as related permits issued by the Housing and Residential Office, of course the developer has carried out a series of administrative procedures in accordance with those specified so that the developer get permission to build the condominium. However, the role of government agencies is limited only to giving permission for erecting condominium applied by the developer, whereas relating to disputes between the developer and consumers are certainly not the authority of both government agencies because the government is not involved in the condominium development agreement; the agreement contract is only between the developer and the consumers. For this reason, the two agencies cannot be prosecuted for providing accountability; about accountability is actually more specifically regulated in the Consumer Protection Act which set forth that the settlement of disputes arising between the developer and consumer must be initially holding deliberation and consensus. This is what ultimately makes consumers can only wait for certainty and promises given by the developer. Actually, if between the developer and the consumers was not found a consent for dispute settlement like this, consumers can file a lawsuit to the court, but there remains many consumers who are worried about filing a lawsuit to the court, while, in fact the deliberations conducted are still considered burdensome to consumers. Of course this kind of thing frequently happens in the process of selling and purchasing condominium which has not been completely constructed, not only the construction project is stalled, there are several other problems including the incompatibility of condominium units or properties built by the developer, but still consumers cannot claim a great deal of things especially relating to compensation for disadvantage. The developer seems to have no other options and consumers must accept the existing condition even though consumers suffered losses either materially or non-materially. The weakness in PPJB regulations between developers and consumers and the weak law and regulations governing this problem have led to awfully massive condominium projects in development, so that there are many cases of default made by developers and disadvantaged consumers cannot demand much; legal uncertainty and the lack of supervision makes the large and small developers simultaneously practicing detrimental practices to consumers. The Consumer Protection Act tries to provide protection with the three interests of the consumers mentioned above. Nevertheless, in the field implementation, consumers have not yet maximally obtained fair and just legal protection.

The rise of contract breaching practices committed by developers seemed to be necessary to reconstruct the principle of balance in the PPJB, should potential customers be involved in determining clauses contained in the PPJB, even the need for legal counsel provided by the developer to provide legal counseling and to conduct supervision against legal regulations made by both parties, in this case the PPJB. The large number of consumers who are lay person of the law and who have not been given legal counsel beforehand in the drawing up of PPJB resulted consumers in being vulnerable to material and non material losses. Additionally, the legal renewal on the sales and purchase agreement between business actors and consumers of storeyed housing needs to be included a number of points in the amendment to the Law on Storeyed Housing. The objective is in order that the Law on Storeyed Housing maintains the principle of balance at all stages of contractual relations, both in the precontractual and drafting contract phases and afterwards (implementation of the contract). By the enactment of such a Law will bind the developers in responsibility to consumers not only prior to the sale and purchase practice, but if there were problems relating to the condominium units provided by the developer, consumers are remaining protected by the law to make claims either to the trial or just obtaining compensation for disadvantage. The government must also truly use authority when finding standard clauses in PPJB of storeyed housing that are very detrimental to consumers. The National Consumer Protection Agency (BKPN) urged the government to immediately issue Government Regulations derived from Law Number 20 of Year 2011 concerning Storeyed Housing. The said regulation is considered important to protect the owners and residents of storeyed housings in Indonesia. Both before the handover of the condominium unit and after the handover if there are problems involved therein.

2. CONCLUSION

Sale and Purchase Agreement (PPJB) in buying and selling units of storeyed housing made by the developer before the Notary is often made with standard clauses and without adjusting to the interests of each consumer. So that consumers who object to the contents of the PPJB cannot voice their rights, there are many clauses in the PPJB that do not regulate sanctions or relating matters if the developer in default of the construction of the condominium / storeyed housing units which from the beginning had not yet complete their construction until it was at risk for problematic and the developer seems to break away from obligations.

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