Passive subjective novation in credit arrangement: Legal assurance and protection capability

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A B S T R A C T

The legal vacuum regarding Passive Subjective Novation causes legal uncertainty and creates problems because there are no clear references in terms of understanding, implementing regulations, and standard operating procedures. The purpose of this research is to find out the right arrangement related to Passive Subjective Novation so that it can provide legal certainty and protection. This research is normative juridical research using an analytical approach and a conceptual approach as well as analysis techniques of grammatical interpretation, systematic interpretation and teleological interpretation to analyze primary, secondary and tertiary legal materials. The results of this study indicate that there are two ways of legal protection in the passive subjective Novation case, namely preventive and repressive legal protection. Preventive legal protection can be done by making a new statutory regulation or adding provisions to existing laws and regulations regarding passive subjective novation of credit agreements by using mortgage guarantees. Meanwhile, repressive legal protection can be carried out by giving sanctions to violators of the agreement that has been made related to passive subjective novation of credit agreements by using mortgage guarantees, namely in the form of compensation, fulfillment of achievements, and a combination of compensation and fulfillment of achievements.

Introduction

Novation or renewal of debt is one way of ending an agreement as regulated in the provisions of Article 1381 of the Civil Code. Novation basically occurs when the old engagement is replaced with a new one, the old creditor is replaced with a new creditor, and the old debtor is replaced with a new debtor. On the other hand, novation has a broad meaning, namely an agreement that causes the cancellation of another engagement that was placed in its original replacement (Prodjodikoro, 2000). Based on Article 1413 of the Civil Code (hereinafter referred to as the Civil Code) it is explained that there are 3 (three) ways to carry out novation, namely: “if a debtor makes a new debt agreement for the benefit of the creditor who replaces the old debt, if a new debtor is appointed to replace the old debtor, the creditor is released from the agreement, and if as a result of the new agreement a new creditor is appointed to replace the old creditor, against which the debtor is released from a engagement (Soinim, 2005)."

Basically, the novation was born because of the agreement made by the parties, by means of which the existing agreement was deleted and at the same time a new agreement was made to replace the abrogated agreement. Novation can be one of the efforts to overcome bad loans because with novation the parties on the basis of agreement can make new credit agreements, namely by way of the bank providing new debt loans to creditors which will later become a new credit agreement as a continuation of the old agreement. Thus, the risk of bad credit can be avoided (Setyaningrum et al., 2015). Regardless of the causes of credit congestion experienced by debtors, it is clear that this congestion meets the provisions of the legislation. For each debt, the principal obligation of the borrower is to return the interest loan in the same amount and condition at a predetermined time.

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Experts interpret the provisions as regulated in Article 1413 of the Civil Code as Novation, but in reality there is no single legal regulation that clearly explains Novation, especially Passive Subjective Novation. This legal vacuum regarding Passive Subjective Novation then causes legal uncertainty and creates problems because there are no clear references in terms of understanding, implementing regulations, and standard operating procedures (hereinafter referred to as SOPs). Here the author describes several cases that occurred related to Novation, namely:

Novation problems that occur between PT. BTN to PT. Tiara Futuba, this problem arose because the Novation agreement was unknown or not notified in advance to the original Debtor who had also entered into a relationship with a third party. Debtors (legal entities) engaged in property, sell units of land and buildings to Buyers. The credit is framed with a mortgage guarantee on the land belonging to the developer debtor. What is the problem with the Yasa Griya Credit facility by PT BTN to PT. Tiara Futuba (Suhariningsih, 2020). The case began in April 2019 at the PT. BTN Semarang Branch has provided Yasa Griya Credit facilities to PT. Tiara Futuba Rp. 15.2 billion in which the procedure for granting was carried out against the law, not in accordance with the Circular Letter of the Board of Directors of PT. Bank BTN (Persero), Tbk, resulting in bad loans amounting to Rp. 11.9 billion.

Asset Management Division (AMD) BTN Head Office in December 2015 conducted a novation (renewal of debt) to PT. Nugra Alam Prima (NAP) with a ceiling value of Rp. 20 billion and without any additional collateral, causing bad loans to return to Rp. 15.6 billion. Then in November 2016, AMD Headquarters BTN carried out Novasi (renewal of debt) unilaterally from PT. NAP to PT. Lintang Jaya Property which is not in accordance with the Standard Operating Procedure (SOP) and without any additional collateral with a credit limit of Rp. 27 billion, this causes bad loans to return to Rp. 26 billion with collectability category. Due to the unilateral Novation process, the process of changing the name of the certificate on behalf of PT. Tiara Futuba to PT. NAP, also cannot be implemented. So even though the Novation was carried out, the collateral has not been fully tied up. Where at the time of doing the novation, PT. Tiara Futuba did not know about this novation, and the certificate has not been changed yet it is still in the name of PT. Tiara Futuba. With this condition, how can you sell the object of a mortgage house (housing loan) to a third party, while the certificate is still in the name of PT. Tiara Futuba. So that even though the innovation has been carried out, it does not provide a solution, because the innovation was carried out without the knowledge of PT. Tiara Futuba.

Reflecting on the case of PT BTN which carried out Novation unilaterally without the knowledge of the original debtor, PT Tiara Futuba, which then had implications for the new debtor of PT. NAP cannot sell the object of collateral to a third party, so there are legal security issues that must be resolved so that the Novation agreement can run without harming the parties and even third parties. Based on the problems as described in the description, a legal problem is formulated, namely about what is the appropriate arrangement related to Passive Subjective Novation so that it can provide legal certainty and protection?

This research method used is normative juridical, namely conceptualizing law as what is written in laws and regulations (law in books) or law as a rule or norm which is a benchmark for human behavior that is considered appropriate (Marzuki, 2009). The approach used in answering the problem is to use a statutory approach, and conceptual approach. The legislative approach is taken by examining all legal regulations in the form of laws and other regulations related to the problem of law. The conceptual approach moves on the views and doctrines that develop in the science of law (Ibrahim, 2011). This approach is used so that researchers can study the opinions and doctrines of legal science related to the terms of the validity of the agreement, so that researchers can use these opinions and doctrines as a basis for creating new concepts related to the meaning of Novation, especially for Passive Subjective Novation.

The legal materials used are primary, secondary, and tertiary legal materials. The procedure for collecting legal materials used in this research is a literature study, namely collecting data by reading laws and regulations, official documents and literature that are closely related to the problems discussed. The technique of analyzing legal materials uses analytical techniques in the form of grammatical interpretation and systematic interpretation (Nisa, 2013). By using grammatical interpretation, the author hopes to know the meaning of passive subjective novation in credit agreements by using mortgages based on the language used by the author in everyday life both in the KBBI and legal dictionaries, and the systematic interpretation used by the author to find out the meaning of passive subjective novation. In credit agreements by using mortgages based on the provisions in laws and regulations, the existence of the enforceability of passive subjective novation in credit agreements using mortgages in the legal system of agreements and guarantees, as well as passive subjective novation arrangements so as to provide legal certainty and protection.

Validity of passive subjective novation (debtor transfer) made to the credit agreement without the knowledge of the old debtor

The implementation of housing is one of the responsibilities of the State in protecting its citizens so that the community can have a place to live and live in decent and affordable houses and in a safe and healthy environment. For people with low incomes, it is very difficult to buy and own a house with cash payments. In this regard, Law Number 1 of 2011 concerning Housing and Settlement Areas was passed (Badruzaman, 2001). In Article 43 paragraphs (1) and (2) of Law Number 1 of 2011 concerning Housing and Settlement Areas it is regulated that: Construction for single houses, row houses, and/or flats, can be carried out on land: property rights; right to use the building, both on state land and on management rights; or usufructuary rights on state land.
Home ownership as referred to in paragraph (1) can be facilitated by credit or home ownership financing. So that the Government provides an alternative by providing a program to be able to buy a house with funding facilities in the form of credit with light installments and low interest rates, namely the so-called Home Ownership Credit (KPR). Home Ownership Credit (KPR) is a facility provided to customers to buy a house with credit payments to the bank. Mortgages are considered profitable because they can help customers own their own homes, although not by means of cash purchases. The principle of KPR is to first finance the cost of buying or building a house, then the funds to pay it back are done by paying the installments (Sudarsono, 2007).

Even though mortgages are so promising, banks will not be careless in distributing their credit. Banks with the prudential principle will not provide credit for a program without a feasibility study of the program plan being preceded. But in reality, there are many customers or debtors of the bank who want to re-transfer the object of the home mortgage to another party for one reason or another or what is also known as debt transfer or known by the public as over credit. Banks take various ways to minimize the occurrence of non-performing loans, one of which is by transferring debtors (Putri, Busro, & Priyono, 2016).

With this transfer of debtors, old debtors whose credit problems will be replaced with new debtors who have received approval from the bank. This means that the creditor frees the old debtor from his debt obligations, so that the new debtor has the obligation to pay off the debt. When viewed from the legal aspect of the agreement, debtor transfer is one way to renew debt or novation. The novation as referred to in Article 1381 of the Civil Code (hereinafter referred to as the Civil Code) is one way to terminate an agreement. Furthermore, in Article 1413 of the Civil Code it is explained that there are 3 (three) ways to carry out novation, namely as follows: if a debtor makes a new debt agreement for the person who owes the debt to him, which replaces the old debt, which is written off because of it; if a new debtor is appointed to replace the old debtor, the debtor is released from his engagement; and if as a result of a new agreement, a new debtor is appointed to replace the old debtor, to whom the debtor is released from his engagement (Muhammad, 2000).

Based on Article 1413 of the Civil Code, if formulated, novation can be carried out in 3 (three) forms, namely: replacing the old engagement with a new engagement (or objective novation); replacement of old creditors with new creditors (or subjective novation); replacement of old debtors with new ones (or passive subjective novation).

It can be said that debtor transfer is a passive subjective novation event due to the replacement of old debtors with new debtors. But it is not necessarily limited to that, the replacement of the debtor must be carried out with the approval of the creditor. The creditor must know and agree that there will be a change in the debtor so that the old debtor can be released from his debt obligations and a new debtor will replace the obligation to pay off the debt. But what happens in the community, the phenomenon of debtor transfer like this is often found without the knowledge of the bank as the creditor. This of course creates new problems for the debtor who is the recipient of the transfer of credit rights, both in terms of legal certainty and from the ownership authority of the recipient of the credit transfer, because during the current credit period and has not been repaid, the debtor receiving the transfer of credit rights does not have the authority and any legal relationship with the creditor bank. Especially if the debtor transfer agreement is only based on a receipt and is made without the knowledge of the bank, which of course has no binding legal force. This means that the phenomenon of the debtor transfer will only lead to new legal problems which are quite complicated because this is related to legal certainty over the ownership of a house and the validity of the form of the debtor transfer agreement itself.

In the process of transferring a debtor, there are terms and conditions that must be met by the old debtor, the new debtor, and the bank. In addition to the conditions relating to the debtor itself, there are also several notarial deed made related to this debtor transfer process. Of course in the future new problems will arise for the new debtor regarding legal certainty and ownership of the debt object itself. Because during the term of the credit, the new debtor does not have any legal relationship and authority with the creditor. When viewed from the legal aspect of the agreement, the phenomenon of debtor transfer or known by the public as over credit, is a passive subjective novation legal act. Passive subjective novation is one way to renew debt. In this way, there is a change of debt from the old debtor to the new debtor accompanied by a statement of release of the transferred debt from the creditor to the old debtor. This is in line with Article 1413 of the Civil Code, which reads as follows:

There are 3 (three) ways to carry out debt renewal: if a debtor makes a new debt agreement for the person who owes it, which replaces the old debt which is written off because of it; if a new debtor is appointed to replace the old debtor, the debtor is released from his engagement; if as a result of a new agreement, a new creditor is appointed to replace the old creditor, against whom the debtor is released from his engagement. If applied to the phenomenon of debt transfer / over credit of Home Ownership Credit, it means that there is a transfer of the object of the debt (House) purchased using the Home Ownership Credit facility at the bank by the old debtor (transferer) to the new debtor (transferee). So the old debtor who has transferred the Home Ownership Credit to the new debtor, is no longer bound by his credit obligations because the obligation has been transferred to the new debtor and the bank as a creditor has agreed and given an express statement that the old debtor is released from his debt. In this case, the bank as the creditor previously knew of the intention of the debtor to take this debtor transfer action. For this reason, the bank by applying all its prudential principles (prudential principle) takes a stance to finally give approval for legal action to take over the debtor. This event is called passive subjective novation if it is carried out perfectly in contract law.

If examined from the case in the introduction above, the old debtor and the new debtor in entering into the agreement did not involve Bank BTN which should have known and given approval to the intent of the debtor transfer agreement between them. This can happen due to several factors, but what can be seen is that the debtor transfer agreement without the knowledge of Bank BTN as the creditor is to avoid the approval of Bank BTN. So that this is contrary to the legal terms of the agreement regarding a lawful cause.
However, the consideration of the Panel of Judges in this case is that the agreement between the Plaintiff (new debtor) and the Defendant (old debtor) is based on a legal relationship between the sale and purchase agreement over credit on the mortgage house (the object of the case), so that the agreement is based on a lawful cause or with in other words have the right pedestal. This is very unfortunate because the Panel of Judges did not highlight the fact that in order for this debtor transfer agreement to meet the halal requirements, the old debtor and the new debtor should have obtained approval from Bank BTN in accordance with what is required by applicable regulations and laws. The Panel of Judges did not consider how the debtor transfer procedure carried out between the old debtor and the new debtor was in accordance with what was required by the legislation or not. In addition, as regulated in Article 1338 of the Civil Code paragraph (3) that "An agreement must be carried out in good faith.”

This means that the implementation of the agreement must be on the right track, which must heed the norms of propriety and decency. The consideration of the Panel of Judges in this decision stated that the Plaintiff (the new debtor) was a buyer with good intentions because the Plaintiff had purchased a mortgage housing unit for the object of the case by way of over-credit under the hand and the Plaintiff knew for sure that the condition of the object of the case belonged to the Defendant and the object of the case. not currently in confiscation status or encumbered with Mortgage Rights. If we examine the legal action of buying and selling with the transfer of the debtor (over credit) it is a different matter, especially the legal action of the transfer of the debtor is not carried out perfectly and is not supported by the documents and conditions that should be met. Legally, the transfer of land rights only occurs if a sale and purchase has been carried out by signing a deed of sale and purchase before the PPAT and fulfilling the conditions needed to conduct the sale and purchase, until finally the process of transferring the name of the certificate to the buyer's name at the Land Agency office is carried out. National.

Delegation has not yet occurred, Article 1417 of the Civil Code requires that in order for debt renewal/novation to occur, in this case the replacement of the old debtor into a new debtor must be stated explicitly by the creditor that he releases the old debtor from his obligations/debts. If this is not the case, then what happens is not a novation, but a delegation or an unfinished novation (onvoldighe novatie). When it comes to the case, Bank BTN as the creditor is completely unaware of any debtor transfer events that occurred between the old debtor and the new debtor. This means that Bank BTN does not expressly state and give approval for the transfer of the debtor. As a result, although the obligations/debts of the Defendant (old debtor) have been delegated to the Plaintiff (new debtor). Bank BTN can still collect its debt to the old debtor (Defendant). In this case, it happened that since the old debtor (Defendant) and new debtor (Plaintiff) entered into an agreement to transfer the debtor between them under their hands, the mortgage loan installment obligations (object of the case) and other obligations became the responsibility of the new debtor (Plaintiff). As described above, in contract law, the transfer of the debtor if it is carried out by fulfilling the requirements is a passive subjective novation legal event. In this case, it can be said that the transfer of debtor/over credit has not occurred perfectly because the transfer of debtor between the Plaintiff and the Defendant occurred without the knowledge of Bank BTN, namely only with a receipt, with an agreement that the Plaintiff (a new debtor) who will continue the remaining installments on the object of the case until it is paid off to Bank BTN. In the ignorance of Bank BTN of the occurrence of this debtor transfer event, Bank BTN did not release the debt to the Defendant (old debtor). This is what causes Bank BTN to still consider the Defendant to be the party whose name is contained in the Credit Agreement with Bank BTN in the Home Ownership Loan program and all installments that have been paid are still in the name of the Defendant, so that the Defendant has a legal relationship with Bank BTN until the installment is paid off, and can take the case object certificate.

So in other words, the debtor transfer agreement made between the Defendant (old debtor) and the Plaintiff (new debtor) which was made under the hands without the knowledge of Bank BTN is not a passive subjective novation legal event because it does not meet the requirements to be said to be a perfect novation as which has been regulated in the Civil Code. In this case, regarding the validity of the agreement itself, it also denies the objective conditions of an agreement regarding halal causes and good faith. So the consequence is that such an agreement becomes null and void and has implications for the conditions that were before the agreement was made. In addition, because the debtor transfer agreement in this case is only carried out with a receipt without involving an authorized official, then the legal force is only as an agreement/underhand writing.

An underhand agreement only has power against a third party if it is affixed with a dated statement from a notary or other employee appointed by the law as regulated in Article 1874 in conjunction with Article 1880 of the Civil Code, which reads: Article 1874 of the Civil Code: As writings Underhanded are considered underhanded deeds, letters, registers, household affairs letters and other writings made without the intercession of a public official. By signing a writing under the hand which is equivalent to a thumbprint, affixed with an dated statement from a Notary or another official appointed by law from which it turns out that he knows the person who put the thumbprint, or that this person has been introduced to him, that the contents the deed has been explained to that person, and that after that the thumbprint is affixed in front of the employee. This employee must record the writing.

By law, further regulations regarding the said statement and bookkeeping can be made. Article 1880 of the Civil Code: Deeds under the hand, only without a statement as referred to in the second paragraph of Article 1874 and in Article 1874 a, do not have power against third parties, regarding the date, other than the day it was affixed a statement by a Notary or another employee appointed by law and recorded according to the rules established by law; since the day of death of the signatory or one of the signatories; or from the day it is proven that the existence of the private deed from the deeds made by the public official is proven, or also from the day
that the private deed is acknowledged in writing by third parties against whom the deeds are it is used. In this case, the Panel of Judges decided that the agreement for the transfer of the debtor under the hand as mentioned above is valid and has legal force.

Meanwhile, in essence, a private agreement only has power against a third party if it is affixed with a dated statement from a Notary or other appointed employee, as regulated in Article 1874 in conjunction with Article 1880 of the Civil Code. Moreover, during the trial, the Defendant (the old debtor) as the party who signed the agreement (receipt) was never present, so the legal certainty of the agreement (receipt) could not be ascertained. The Panel of Judges should be able to consider more about the validity and legal force of the debtor transfer agreement under the hand in the form of the receipt itself. Of course it will be different if the debtor transfer agreement is carried out by signing the Novation Deed before a Notary, it will be clear that the legal relationship between the old debtor (Defendant), new debtor (Plaintiff), and creditors will be clear.

The Novation Deed made before a Notary is an authentic deed, so that the legal certainty will be more clearly visible. In this case, no notarial deeds were made at all, nor was the credit agreement made between the old debtor (the Defendant) and Bank BTN not made before a Notary, as it turned out based on the evidence presented in the trial, namely a photocopy of a copy of the KPR Account Statement issued issued by Bank BTN Cirebon Branch. The object of the case which is also the object of collateral under the Home Ownership Credit Program is also not burdened with Mortgage Rights.

The right arrangement regarding passive subjective novation so that it can provide legal certainty and protection

Normative legal certainty is when a regulation is made and promulgated with certainty because it regulates clearly and logically. It is clear in the sense that it does not cause doubt (multi-interpretation) and is logical. It is clear in the sense that it becomes a system of norms with other norms so that they do not clash or cause norm conflicts. Legal certainty refers to the application of a clear, permanent, consistent and consequent law whose implementation cannot be influenced by subjective circumstances. Certainty and justice are not just moral demands, but factually characterize the law. An uncertain and unjust law is not just a bad law. Legal certainty arises as the implementation of the rule of law, both in the form of laws and unwritten laws, thus, contains general rules that serve as guidelines for individuals to behave in social life, both in relation to fellow individuals and in relation to society. Syahrani, (1999). Collateral in the Debt and Receivable Agreement, the author assumes that every debt relationship between the parties is based on a written agreement. The loan agreement is regulated in the Civil Code (KUH Perdata), specifically Article 1754 of the Civil Code which in full reads: “Lending and used up is an agreement, which determines that the first party submits a number of goods that can be used up on the second party on condition that the second party will return similar goods to the first party in the same amount and condition.” In addition, Article 1131 of the Civil Code states that: “All movable and immovable property belonging to the debtor, both existing and future, becomes a guarantee for the debtor's individual engagements.” Based on the sound of these articles, accounts payable are agreements in which the debtor's objects become collateral for the debts. Salim (2008) states that guarantees submitted to creditors are material and immaterial guarantees.

Material guarantees are guarantees in the form of material rights, such as guarantees for movable objects. Immaterial guarantees are non-material guarantees. The types of collateral that apply are: Pawn; Mortgage right; Fiduciary guarantee; Mortgages on ships and aircraft; Borg or underwriting; responsibilities; and warranty agreement. Still based on the same book, the scope of the guarantee is divided into two, namely general guarantees and special guarantees. There are two types of special guarantees, namely material guarantees and personal guarantees. Material guarantees include guarantees for movable objects and guarantees for immovable objects, including mortgage rights (Sulistyo & Harahap, 2019).

Collateral in the form of Mortgage, the author assumes that the house guarantee that you describe is based on the mortgage regulated in Law Number 4 of 1996 concerning Mortgage on Land and Objects Related to Land (UUHT). Article 1 point 1 UUHT explains that: “Security Rights on land and objects related to land, hereinafter referred to as Mortgage Rights, are security rights imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Regulations. Agrarian Principles, including or not including other objects which are an integral part of the land, for the settlement of certain debts, which give priority to certain creditors over other creditors.”

The giver of mortgage is an individual or legal entity that has the authority to carry out legal actions against the object of the mortgage in question. The mortgage holder is an individual or legal entity domiciled as the party owed. In our opinion, your uncle is the giver of the mortgage, because he has the authority to take legal action against the object of the mortgage. Meanwhile, the bank is the holder of the mortgage which is domiciled as a creditor or party who owes debts. Subrogation in Accounts Payable, for example: the presence of A (first creditor) who pays off your Uncle's debt to the bank can be called subrogation. Referring to Article 1400 of the Civil Code (KUH Perdata) it is explained that the subrogation or transfer of creditor rights to a third party who pays to the creditor can occur due to approval or due to the provisions of the law.

In the article on Cessie's Problems and Subrogation, it is explained about the subrogation due to the agreement regulated in Article 1401 of the Civil Code and subrogation because the law is regulated in Article 1402 of the Civil Code. The article cites Suharnoko, et.al who stated that subrogation according to the law means that subrogation occurs without the need for approval between a third party and the old creditor, or between a third party and the debtor. In addition, Article 16 paragraph (1) of the UUHT reads: “If the
receivables guaranteed by the Mortgage are transferred due to cessie, subrogation, inheritance, or other reasons, the Mortgage is also transferred by law to the new creditor. Therefore, if the receivables guaranteed by mortgage are transferred due to subrogation, the mortgage rights will also be transferred by law to the new creditor. The transfer of mortgage rights must then be registered by the new creditor with the land office. Then, the transfer of the mortgage right to a third party shall take effect on the day of the recording in the land book, which is the seventh day after the complete receipt of the documents required for registration of the transfer of the mortgage or the following day if the seventh day falls on a holiday.

Elucidation of Article 16 paragraph (1) of the UUHT explains that the transfer of mortgage rights occurs by law, so it does not need to be proven by a deed made by the Land Deed Making Official. It is sufficient to register based on a deed that proves the transfer of guaranteed receivables to a new creditor. Thus, if it is true that there is a transfer of receivables through subrogation between the first creditor and the bank, it is necessary to: Deed proving the transfer of guaranteed receivables to the new creditor; and Registration of the transfer of mortgage right by the land office by recording it in the land book of mortgage rights and the book of land rights on the object of the mortgage as well as on a copy of the mortgage certificate and the certificate of title to the land concerned (Kansil et al., 2009).

Renewal of Debt, Renewal of debt is one of the reasons for the annulment of the engagement as regulated in Article 1381 of the Civil Code. Article 1413 of the Civil Code explains that there are three kinds of ways for debt renewal, namely: “If a debtor makes a new debt agreement for the benefit of the creditor who replaces the old debt, which is written off because of it; If a new debtor is appointed to replace the old debtor, which is released by the creditor and the engagement; If as a result of a new agreement a new creditor is appointed to replace the old creditor, against which the debtor is released and his engagement. Based on the article, in our opinion, subrogation is the reason for the renewal of the debt between your uncle and the first creditor, so that the relationship between your uncle and the bank becomes null and void.

Therefore, the time limit for payment of debt in the new agreement between your uncle and the first creditor does not currently follow the time limit applicable in the agreement between your uncle and the bank that has been abolished, because the agreement between your uncle and the first creditor is a new agreement, otherwise. from the engagement with the bank. According to the author, the renewal of the debt and the time limit causes the first creditor to not be able to immediately execute the object of the mortgage guarantee (the house), but must continue to agree and make a new agreement with your uncle regarding the payment of the debt along with the new time limit. Unlawful Acts and Default, Actions committed by the first creditor who suddenly take control of the house without your uncle's knowledge can be referred to as an unlawful act.

Article 1365 of the Civil Code explains that: “Every act that violates the law and brings harm to others, requires the person who caused the loss because of his mistake to replace the loss.” Munir Fuady in his book Acts Against the Law: “The Contemporary Approach explains that unlawful acts include: Acts that violate applicable laws; Which violates the rights of others guaranteed by law; Actions that are contrary to the legal obligations of the perpetrator; Acts contrary to decency; or Acts that are contrary to good attitudes in society to pay attention to the interests of others.”

In our opinion, the act of the first creditor can be categorized as an unlawful act if there is no registration regarding the renewal of mortgage status at the land office and/or there is no new agreement between your uncle and the first creditor, but the first creditor has occupied the house that became mortgage object. Quoted from the article Do You Need Notification to the Debtor in the Transfer of Receivables?, You can also file a lawsuit for default as regulated in Article 1243 jo. Article 1238 of the Civil Code if the debt agreement between your uncle and the bank includes a clause regarding the terms of the transfer of rights and obligations based on the agreement.

In practice, there is a clause which states that if there is a transfer of rights and obligations either as a creditor or debtor, the party transferring the rights and obligations must/must notify the other party or even obtain approval from the other party. If the transfer of mortgage occurs without your uncle's knowledge and/or permission, the bank is in default. Each form of transfer of receivables has different arrangements. Some require notification to the debtor, some do not. Is there a clause that obliges the party who transfers the rights and obligations under the credit agreement to notify or seek approval from the other party.

Legal protection can be divided into 2 (two) namely preventive legal protection which is legal protection given before a violation of the law is committed. This protection is basically intended to minimize the occurrence of violations of the law. In the problem of passive subjective novation of credit agreements with mortgage guarantees, according to the author, preventive legal protection can be done by making a new legislation or adding provisions to existing laws and regulations regarding passive subjective novation of credit agreements by using collateral. mortgage right. This regulation basically explains that (Sidharta, 2006):

i. A passive subjective novation of a credit agreement using a mortgage guarantee must be made based on a written agreement between the parties;

ii. The first agreement is made by the old debtor with the creditor which states that if there are indications of bad credit and to avoid the risk of default, the creditor can change the debtor to the new party without the knowledge of the old debtor. eliminate the obligation of the old debtor to pay debts to creditors;
iii. Another clause in this first agreement states that if there is a renewal of the debt as referred to in point 2, the mortgage guarantee will automatically transfer due to its accessor nature to the debt of the new debtor. Thus, if the new debtor is able to pay off the debt, the object of the mortgage guarantee will automatically become the right of the new debtor;

iv. The second agreement is made between the creditor and the new debtor, which contains the new debtor willing to accept the transfer of debt from the old debtor. On the other hand, the creditor guarantees that if the new debtor has paid his debt, the object of the mortgage guarantee will become the property of the new debtor.

The regulations as explained by the author in the discussion above must be made clearly and firmly so that there is no language that creates multiple interpretations so as to create legal certainty as one of the objectives of the law. Another legal protection is repressive legal protection, namely protection given when an unlawful act has been committed. This aims to provide a deterrent effect on the perpetrators so as not to repeat their actions again. In this case, repressive legal protection can be carried out by giving sanctions to violators of the agreement that has been made related to passive subjective novation of credit agreements by using mortgage guarantees, namely in the form of compensation, fulfillment of achievements, and a combination of the two between compensation and fulfillment of achievements.

Conclusion

The passive subjective novation of credit agreements with mortgage guarantees does not exist in the legal system of guarantees in force in Indonesia. This is due to the legal vacuum that regulates passive subjective novation of credit agreements with collateral rights so that they do not have factual, normative or evaluative validity. Preventive legal protection can be carried out by making a new statutory regulation or adding provisions to existing laws and regulations regarding passive subjective novation of credit agreements by using mortgage guarantees. Meanwhile, repressive legal protection can be carried out by giving sanctions to violators of the agreement that has been made related to passive subjective novation of credit agreements by using mortgage guarantees, namely in the form of compensation, fulfillment of achievements, and a combination of compensation and fulfillment of achievements.

It is better if the debtor wants to transfer the debtor/over credit for the Home Ownership Credit, the debtor should inform the bank as the creditor in advance about the intent and purpose of the transfer of the debtor. The bank will then guide and facilitate the intention of the debtor, so that in the end the process of implementing the transfer of debtors and the procedures related to transferring the debtor can be fulfilled in accordance with the applicable rules. For banks as creditors, it is better if during the process of providing credit to debtors they can provide socialization that if one day they want to transfer a debtor, the bank is open to facilitate the debtor's intentions and educate the debtor that in terms of making an underhand agreement related to credit, the debtor can from the bank, there are risks like this, especially if the bank does not know about making the agreements. In order to avoid problems in the future, it is advisable for the bank to make a Standard Operating Procedure (SOP). It is recommended to the PPAT Notary to provide the best possible legal advice to the client in connection with any deed including the process of deleting Mortgage in order to create administrative order and there are no obstacles whatsoever. The government and the House of Representatives as legislators must make a new provision that specifically regulates the novation, especially the passive subjective novation so that there are legal provisions that can provide assurance for the parties related to the passive subjective novation.

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References


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