



## Legal protection for creditors on collateral with expired building rights title

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### Abstract

For the creditor whose Building Rights Title is expired, resulting in the nullification of the Encumbrance right, while the credit has not been repaid, an attempt can be made by making Fiduciary deed upon the building and authorization letter to sell, that prevails temporarily since the building right title is expired until the new right is issued. After the new Building Rights Title is issued, the Encumbrance right is reattached to it.

Another legal protection for the creditor regarding non-performing loan and the absence of Building Rights Title are in article 1131 and 1132 of Civil Code, stating that all debtors' property is general collateral of their debt. Accordingly, Bank, in providing credit facility, should be based on prudential principle, particularly when accepting Building Rights Title as collateral. A preventive attempt can be made before the Building Rights Title expires by writing an authorization letter and statement letter that can be accepted by the land affairs of office to extend the Building Rights Title

**Keywords:** creditors, building, fiduciary, civil, affairs

### 1. Introduction

Banking holds a strategic role to drive the national economy through its intermediary function. Through this function, banking institutions collect and distribute funds <sup>[1]</sup>. Collateral that often used in a credit is immovable object or land due to its high economic value, which never decreases <sup>[2]</sup>.

In accepting Building Rights Title as collateral, the bank should pay attention to its characteristics. The bank should be selective in accepting Building Rights Title (HGB) in accepting collateral by paying attention to the expiration of Building Rights Title and the credit due. This should be performed to prevent bank losses.

Building Rights Title that is used as collateral may be expired before the debt is paid off. Debtor's prolonged repayment process result in problems when the Building Rights Title is expired before the debt is paid off. In some cases, the Building Right Title has expired, yet the debt has not been paid off <sup>[3]</sup>

This occurs due to the bank's imprudence related to the validity of Building Rights Title. This is in line with *accessoir* nature of the Encumbrance Right. Encumbrance Right depends on the secured receivables. If the receivable is deleted due to repayment or other reasons, the Encumbrance Right is necessarily removed.

Accordingly, this makes the creditor loses its legal strength because when the Building Rights Title used as collateral is

expired, the debt is considered finish, too. In this case, the creditor cannot obtain legal protection because when the validity is expired, the secured debt is also annulled. However, if we see article 11 paragraph (2) point d of Act on Encumbrance right regarding the promises that can be attached in Encumbrance Right Transfer deed, one of the promises that can be attached is the promise to provide authority to the holder of Encumbrance Right to secure the object of Encumbrance right, if it is needed for execution or for preventing the nullification of the right of the Encumbrance Right object due to incompliance to the regulation. Encumbrance Right Granting deed aims to give the encumbrance right recipient to auction the object when the encumbrance right giver defaults.

One of the characteristics of Encumbrance right is the easiness the creditor supposes to obtain in taking their fund back from the debtors. This provides legal certainty for the concerning party as regulated in the act of Encumbrance Right. However, it eventually has not been able to provide legal protection for the creditor.

### A. Research Method

The present study was a normative legal research. This study employed statute approach, an approach utilizing legislation and regulation <sup>[4]</sup> and conceptual approach <sup>[5]</sup>. Statute approach was carried out by studying all legislation and regulations regarding the legal issues under study i.e. The legal protection for the creditor on collateral with expired Building Rights Title. In carrying out statute approach, the principle of *lex specialis derogate legi generali* was implemented. This was a descriptive study, this study presented a detailed, systematic, and impartial

<sup>1</sup> Lastuti Abubakar dan Tri Handayani, Implementasi Prinsip Kehati-hatian Melalui Kewajiban Penyusunan dan Pelaksanaan Kebijakan Perkreditasi atau Pembiayaan Bank, *Rechtidee*, Vol. 13, No. 1, Juni 2018, pp. 63, DOI: <http://dx.doi.org/10.21107/ri.v13i1.4032>

<sup>2</sup> Habib Adjie, 2000. *Hak Tanggungan sebagai Lembaga Jaminan atas Tanah*, Bandung: Mandar Maju, hal. 2

<sup>3</sup> Wiwin Yulianingsih dan Dea Syagita Noviana, Perlindungan Hukum Bagi Bank Sebagai Kreditor Pemegang Hak Tanggungan ber-Obyek Hak Guna Bangunan (HGB), *Jurnal Perspektif Hukum*, Vol. 12 No. 2 November 2012, DOI: <http://dx.doi.org/10.30649/phj.v12i2>, pp. 3

<sup>4</sup> Peter Mahmud Marzuki. 2005. *Penelitian Hukum*, Jakarta: Kencana Prenada Media Group, pp. 93.

<sup>5</sup> Jhonny Ibrahim. 2006. *Teori dan Metodologi Penelitian Hukum Normatif* Malang: Bayumedia Publishing, pp. 300

data and depiction regarding the issue under study. The Primary legal materials used in this study were Civil Code, act no 5 of 1960 on Basic Agrarian Law and Act no. 4 of 1996 on Encumbrance Right on Land and Objects relating to land. The secondary legal materials used in this study were previous research findings, seminar result, legal work, paper, magazine, and so forth, and other relevant documents and Tertiary legal materials such as encyclopedia, magazines, articles, newspaper, and legal journals. The analyses on the primary and secondary data were made after conducting observation, classification, processing, and evaluation so that its validity is ensured. The final step was the conclusion drawing.

## B. Discussion

Bank's credit or financing contains risks, accordingly in its implementation, a bank should comply with a healthy financing principle. The implementation of these principle aims to prevent or reduce risks. The banking sector is obliged to implement prudential banking principle. The term prudent is closely associated with bank's management and supervision<sup>[6]</sup>.

Prudential principle obliges bank to be careful in carrying out its business. In other words, the bank should be consistent in implementing banking regulation based on professionalism and goodwill<sup>[7]</sup>. Prudential principle itself is the principle of risk control through consistent implementation of prevailing regulation<sup>[8]</sup>. Prudential principle implementation aims to consistently maintain security, health, and stability of the banking system<sup>[9]</sup>.

Article 18 point (d) of Act no. 4 of 1996 on Encumbrance Right states that one of the causes of the nullification of Encumbrance Right is the nullification of right upon land imposed by Encumbrance Right. Every right upon land has its validity period, for Building Rights Title, it is valid for 20-30 years. Based on Article 40 (point a) of BAL, in conjunction with article 35 of Governmental Regulation no. 40 of 1996, it is stated that one of the reasons for the nullification of Building Rights Title is the expiration of the land right. Due to expiration, the Encumbrance Right attached to that land is automatically annulled. This occurs because, for every land of which the Building Rights Title is expired, that land is automatically returned to the State, according to article 36 paragraph (1) of Governmental Regulation no. 40 of 1996<sup>[10]</sup>.

Building Rights Title that is used as the object of Encumbrance right has a time limit, this, of course, results in legal problem. In article 8 paragraph (1) of Act no. 4 of 1996, it is stated that " the granter of Encumbrance right is individual or a legal body who possesses the authority to perform legal action towards the object of the Encumbrance Right." This means that when Building Rights Title that is

used as collateral is expired, its Encumbrance right is annulled and the object of Encumbrance Right is automatically owned by the State<sup>[11]</sup>.

As a consequence, when the HT is annulled, the creditor only acts as a congruent creditor, not preferred creditor anymore so that its receivables does not obtain legal protection from HT. In practice, when it is expired, an Encumbrance Right Authorization Letter (SKMHT) is made. However, this also becomes an issue<sup>[12]</sup>.

With regard to the time limit of Building Rights Title, the regulation has provided two ways allowing the holder of expired Building Rights Title to still become the holder of that Building Rights Title, extension, and renewal. Right extension refers to the addition of time limit without changing the requirement to grant the right. Meanwhile, right renewal refers to the granting of the same right to the holder of Building Rights Title after it is expired (article 1 number 6 and 7 of Governmental Regulation no. 40 of 1996).

For the preferred creditor who holds HT, when there is collateral in which its Building Rights Title status is expired, there are three attempts that can be made:

### 1. Before the credit attachment is made, this is the preventive attempt.

Land with Building Rights Title can be accepted as a collateral if the credit term over before the validity of the right expires, however, it should be done selectively and by remembering the nature of its credit, whether or not it can be revolved as long as it is revolving credit, it is easy for the bank to monitor the due of the Building Rights Title given that it involves Analyst reviews, Taxation, and legal review. Whereas when it is unrevolving, it requires special attention because if the right is expired while the credit has not been repaid, the bank will experience loss since its position only as concurrent creditor. It holds right only upon the building built upon the land, while the right upon land returns to the State.

If the debtor refuses to shorten the loan term due to Building Rights Title due date, the bank holds two alternative ways:

1. Changing Building Rights Title into right of ownership (HM).
2. Extending Building Rights Title soon after the credit attachment is made.

For ongoing credit, it is possible for the debtors to change the status of their land (from Building Rights Title to Right of Ownership). This is allowed by Minister of Agrarian Affairs/ Head of National Land Agency no. 6 of 998 on the Granting of Right of Ownership upon Land for residence. Another preventive attempt can be made by considering the debtor's loan performance.

The bank can also ask for additional or substituting collateral. This step can be taken by the bank when the collateral provided by the debtor is not enough, due to other reasons that require the bank to ask for additional or substituting collateral. Additional collateral is asked by the bank because the debtor's main collateral is not enough to secure his debt. Usually, this addition is in the form of

<sup>6</sup> Permadi Gandapradja, 2004. *Dasar dan Prinsip Pengawasan Bank*, Gramedia Pustaka Utama, Jakarta, pp.21

<sup>7</sup> Hermasnyah, 2008. *Hukum Perbankan Nasional*, Kencana, Jakarta; pp. 135

<sup>8</sup> Daeng Naja, 2005. *Hukum Kredit dan Bank Garansi*, Citra Aditya Bakti, Bandung, pp. 293.

<sup>9</sup> Peraturan Otoritas Keuangan Nomor 7/POJK.03/2016 Tentang Prinsip Kehati-Hatian Dalam Melaksanakan Kegiatan Structured Product Bagi Bank Umum, Pasal 15 ayat (1)

<sup>10</sup> Pasal 36 ayat (1), Peraturan Pemerintah Nomor 40 tahun 1996 tentang Hak Guna Usaha, Hak Guna Bangunan Dan Hak Pakai Atas Tanah, lembaran Negara Republik Indonesia Tahun 1996 Nomor 158, Tambahan Lembaran Negara Republik Indonesia Tahun 1996 Nomor 3643

<sup>11</sup> Purwahid Patrik and Kashadi, 2008. *Hukum Jaminan, Edisi Revisi dengan Undang-Undang Hak Tanggungan*, Fakultas Hukum Universitas Diponegoro, Semarang, pp. 64

<sup>12</sup> Hasanuddin Rahman, 1995. *Aspek-Aspek Hukum Pemberian Kredit Perbankan di Indonesia*, Bandung: PT Citra Aditya Bakti, pp. 174

movable objects such as car, or assets such as machine/stock. The binding is done through fiduciary or in the form of deposit that allows creditor to block, extend, or to withdraw the deposit.

Substituting collateral is asked by the bank since the debtor's collateral cannot be accepted as collateral. The bank can also ask for substituting collateral when the Building Rights Title of the collateral is near the due date.

## 2. Before the Credit Attachment is done by PPAT

Before making APHT, according to article 39 of Governmental regulation no 24 of 1997, in conjunction with Article 97 of Ministry of Agrarian Affairs Regulation / Head of National Land Agency no. 3 of 1997, Land Deed Official (PPAT) is obliged to examine the list in the local land affairs office. PPAT examine whether or not the right holder is authorized to perform a legal act, both for himself, other people (through authorization letter), or for the spouses (husband/wife) to guarantee mutual property. After that, PPAT binds the collateral by making APHT. With regard to the making of deed by PPAT, in general it is regulated in article 101 of Minister of Agrarian Affairs Regulation/ Head of Land National Agency no. 3 of 1997.

## 3. Aspects after the Agreement is made.

Act on Encumbrance Right (UUHT) becomes the legal basis for collateral, the standing of collateral towards the debt, anyone who can give or receive collateral, and how to transfer and receive collateral. This is in line with Ralf, Jan Peter Krahnén who states that:

*On the basis of a strong collateral position, and privileged access to information about the borrower, the bank is expected to play a more active role in the restructuring of distressed borrowers. Collateral is modeled either as a risk compensation device in both types of model, collateral is seen as outside collateral*<sup>[13]</sup>.

As Encumbrance Right holder, the bank keeps securing the position of the given credit and the collateral given by the debtors by considering the debtor's interest, also if the debtors want to change their Building Rights Title to Right of Ownership. many debtors who use their land as collateral change their Building Rights Title to Right of Ownership.

For the bank interest, in order to secure the repayment of credit, the attachment should be done completely towards the collateral in the form of Building Rights Title. It is important to bind the collateral completely to gain preference right in taking the repayment from the sales of Encumbrance right object execution, this is in line with the principle of *droit de preference*<sup>[14]</sup>.

Based on the prevailing regulation, the binding of that land right should be carried out through Encumbrance Right Institution, which is made by Encumbrance Right Transfer Deed (APHT). The binding of collateral through this Encumbrance Right provides legal certainty both for the bank and other concerning parties. Besides, the binding in the form of Building Rights Title through encumbrance

right is proven by encumbrance Right Certificate (SHT). SHT issued by the Land Affairs Office after the process of transfer of Encumbrance Right is satisfied by the bank as preferred creditor<sup>[15]</sup>.

Following *accessoir* nature of Encumbrance Right, its existence depends on the receivables which of repayment is guaranteed. If the receivables are annulled due to repayment or other reasons, the Encumbrance Right is automatically annulled. When Building Rights Title that is used as an object of Encumbrance Right expires and is extended before the due date, Encumbrance Right is still attached to that object<sup>[16]</sup>.

There are debtors who do not repay their debt due to default. This condition can be caused by various factors such as decreasing sales, bankruptcy, and so forth. Usually, in order to overcome such a problem, the creditor issues a warning so that the debtors fulfill their responsibility. In practice, There is a case where the Building Rights Title is expired, while the credit term is still in progress, and the debtor defaults before the Building Rights Title expires. the debtors defaults due to prolonged repayment, accordingly the concerning parties do not know the expiration of Building Rights Title.

For the right holder, when Building Rights Title is not extended or renewed, according to article 37 of governmental regulation no. 40 of 1996, he should remove his building and properties on the land and hand it to the state no more than one year since the Building Rights Title is expired<sup>[17]</sup>.

This regulation, of course, leads to problems for the Bank as the Encumbrance right holder since their receivables no longer possess legal protection from encumbrance right. In this case, creditor's position is no longer a preference, they act as concurrent creditor who does not possess right to take the repayment before other creditors. For such a creditor, their receivables are not secured by a certain right upon an object

The banking institution should implement prudential principle when analyzing the prospective debtors, when making credit attachment and its collateral, and when observing the credit performance. This observation should be carried out continuously given that non-performing loan may occur due to deliberate credit abuse. This may be done by a debtor with no goodwill.

The nullification of right upon land used as the object of Encumbrance Right harms the holder of the encumbrance right if the encumbrance right giver does not attempt to regain the ownership right upon the land used as the object of encumbrance right. Article 11 paragraph (2) of Act on Encumbrance Right (UUHT) allows the holder of encumbrance right to make an agreement in APHT made by PPAT. The agreement may state that the creditor is given authority and power of encumbrance right holder to the creditor, while the debtor is responsible for the cost to maintain and secure the object of Encumbrance Right.

Preventing nullification of right upon the object of

<sup>13</sup> Elsas, Ralf, dan Jan Pieter Krahnén, 2002, Collateral, Relationship Lending and Financial Distress: An Empirical Study on Financial Contracting, Department of Finance, Goethe Universität Frankfurt, JEL Classification: G21

<sup>14</sup> Fransisca Kusuma Aryani Perlindungan Hukum Bagi Kreditur Pemegang Hak Tanggungan Terhadap Sengketa Agunan Yang Mengakibatkan Batalnya Perjanjian Kredit, *Jurnal Hukum Adigama*, Fakultas Hukum Universitas Tarumanagara

<sup>15</sup> Evani Rahayu, 2014. Perlindungan Hukum Bagi Kreditur Pemegang Hak Tanggungan Atas Pemberian Kredit Dengan Jaminan Hak Guna Bangunan Terhadap Debitor Yang Wanprestasi, Program Studi Magister Kenotariatan, *Jurnal Fakultas Hukum Universitas Brawijaya*

<sup>16</sup> St. Nurjannah, 2018. Eksistensi Hak Tanggungan Sebagai Lembaga Jaminan Hak Atas Tanah (Tinjauan Filosofis) *Jurisprudentie | Volume 5 Nomor 1 Juni 2018*

<sup>17</sup> Santoso, Urip, 2006, Hukum Agraria dan Hak-Hak Atas Tanah, Prenada Media, Jakarta. Notonagoro

Encumbrance Right is necessary to prevent the decrease of the object value.

According to the regulation, when a Building Rights Title that is used as an object encumbrance right is expired, the encumbrance right is automatically annulled and the object is automatically owned by the State. From legal perspective, Both the giver and the recipient of the Encumbrance right do not have authority towards expired Building Rights Title. Authorization in SKMHT or APHT made by PPAT cannot also be implemented.

The absence of particular guarantee held by the bank for a credit is not a problem if the debtor fulfill his responsibility properly. However, since bank is agent of trust where the fund they distribute comes from the third-party, bank should implement banking prudential principle as the form of responsibility. In other words, when there is no particular security, bank can be indicated not adhering to the prudential principle and article 8 of Banking Act.

When a bank experiences loss due to troublesome financing, in this case is losing collateral, it can be said that the bank fails to implement prudential principle and it can be classified as criminal banking action. Accordingly, the bank should be prudent in accepting Building Rights Title as collateral. Bank should perform actions that prevent themselves from loss due to debtors' default. The bank's attempt to settle troubled credit also depends on the condition of the credit. In order to settle the troubled credit, the bank has two strategies, litigation and non-litigation.

In handling the non-performing loan, the bank firstly collects customer information regarding their relation, potential management, financial statement, the bank's legal strength and weaknesses, the customer's legal strength, and other creditor's position. This is important to locate the problems and the bank's position in that case.

After the information is collected, the bank analyzes the problems to determine the customer's sustainability prospect, number, and quality of business factors, as well as the customer's strategy to solve the non-performing loan. In this case, the bank should always adhere to the prudential principle and risk management. Then, based on the analysis result, the bank determines either to settle the non-performing loan administratively by non-performing loan recovery or through legal institution mentioned in the credit agreement.

The bank will examine whether or not the problem can be solved using non-performing loan recovery. It is important because through recovery, the bank is in safe position. However, if the customer is found to be uncooperative, the bank will solve the problems through litigation.

Non-litigation dispute settlement is carried out by conducting discussion between creditor and the debtor by lightening up the requirements in credit agreement. This attempt does not involve any legal institution since the debtor is still considered cooperative, and his business prospect is feasible. Accordingly, through this non-litigation attempts, win-win solution is expected. With regard to recovery of non-performing loan, it can be carried out based on Bank Indonesia Circular no. 26/4/BPPP dated 29 May 1993 stating that in order to recover non-performing loan, before making any legal attempt, the alternatives that can be done are rescheduling, reconditioning, and restructuring.

When credit recovery is performed, the bank and the debtor are obliged to attempt to recover the Building Rights Title. The land of which Building Rights Title is expired

automatically returns to the State, however it does not mean that the right holder immediately completely loses his right. The state will prioritize to grant land right when they apply for it, in this case, the right holder, along with the creditor can negotiate and apply for the Building Rights Title to the Land Affairs Office.

The application is made to gain new Building Rights Title. However this application will result in new Building Rights Title Certificate Number although the object, the owner, and the types of right is still the same. This new certificate number results in disconformity with the object mentioned in credit agreement. Accordingly, Encumbrance Right is attached on the concerning right when the Building Rights Title is extended.

Whereas when the Building Rights Title is renewed, the Encumbrance Right should be re attached following the prevailing regulation. This is important considering the Specialty principle of Encumbrance right determining that Encumbrance right is attached on a certain right specifically through certificate number, among others.

When a debtor does not fulfill his responsibility, the creditor can issue warning and if the condition is still the same, the debtor is considered default. Another attempt to settle non-performing credit is through litigation. This is important because to state that the debtor defaults, it should be done through court decision with permanent legal force.

Problems relating to credit dispute is categorized into civil case, thus, the Civil Code applies. The bank, as the creditor, will file a lawsuit on default against the debtors whose credit is non-performing to the local District Court. However, this depends on the clauses of the credit agreement, whether or not there is a clause stating that court can be used to settle the credit dispute. Creditor files a lawsuit to the debtors due to debtor's default on credit agreement. If in the court decision instruction states that the debtor defaults If the decision has attained permanent legal force, the creditor is allowed to sell the collateral. The absence of executable special collateral does not mean that the creditor receives no compensation.

Article 1131 of Civil Code state that All movable and immovable properties of the debtor, either present or future, serve as securities for the personal obligations of the debtor. In other words, all of debtor's property acts as collateral for their creditors. In this case, the bank loses its preference due to the absence of encumbrance right. Litigation attempt is made to minimize the loss experienced by the bank.

#### **D. Conclusion**

For the creditor whose Building Rights Title is expired, resulting in the nullification of the Encumbrance right, while the credit has not been repaid, an attempt can be made by making Fiduciary deed upon the building and authorization letter to sell, that prevails temporarily since the building right title is expired until the new right is issued. After the new Building Rights Title is issued, the Encumbrance right is reattached to it.

Legal protection for the creditor exists in article 1131 and 1132 of Civil Code. Accordingly, Bank, in providing credit facility, should be based on prudential principle, particularly when accepting Building Rights Title as collateral. A preventive attempt can be made before the Building Rights Title expires by writing authorization letter and statement letter that can be accepted by the land affairs of office to extend the Building Rights Title. PPAT is expected to be

helpful

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