

Concept of Simple Proof of Bankruptcy and PKPU Cases for Apartment and Flat Developers Based on SEMA Number 3 of 2023

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/1Abstract

This study aims to determine the formulation of SEMA 3/2023 which states that apartment and flat developers cannot be declared bankrupt because they do not meet the simple evidentiary elements regulated in Article 8 paragraph (4) of the Kepailitan dan PKPU, and how it impacts justice and legal certainty for consumers who act as concurrent creditors. The formulation of the problem is how is the concept of a bankruptcy petition against apartment developers who do not meet the simple evidentiary requirements based on SEMA 3/2023? and, what are the implications for justice and legal certainty for creditors (consumers) if there are limitations on simple evidentiary requirements in SEMA 3/2023? This type of research is normative law with a statutory regulatory approach method. The results of this study are, first, SEMA 3/2023 emphasizes that a bankruptcy petition against apartment and flat developers does not meet the simple evidentiary elements because in practice it is not clear about the type of debt in the case. Second, with the existence of SEMA 3/2023, it is actually a legal breakthrough to guarantee justice and legal certainty for consumers who occupy concurrent creditors. This is considered because consumers are often harmed when developers experience financial difficulties or fail to fulfill their obligations. With the existence of SEMA 3/2023, it can be ensured that consumer interests remain protected.

I. Introduction

The personality of a nation can be influenced by a fundamental factor, namely housing and settlement. Therefore, to meet these basic needs, many companies are found running their business activities to provide offers for the construction of flats and/or apartments (hereinafter referred to as "apartments") with the aim of providing housing at varying prices. Companies engaged in the construction of apartments are referred to as property developers or in this case referred to as apartment developers. This is because the need for housing is increasing due to increasingly rapid population growth and increasingly limited land supplies. Therefore, the construction of apartments is a solution to overcome this problem.

An apartment is a multi-storey building built in a certain area, which is divided into several parts with functional structures both horizontally and vertically. Each part of this building can be owned and used separately, especially for living, and is equipped with common areas, shared facilities, and shared land. In practice in the field, not a few people are willing to buy and make payments in advance even though the building has not been completed. The purchase of the apartment can generally be done by first ordering the apartment unit to be purchased which is then stated in the sale and purchase agreement (PPJB).

In the process of building apartments, not a few apartment developers have obstacles, one of which is due to financing factors and not being able to pay debts before the apartment construction is completed. There are several factors that influence this, one of the causes is the existence of obstacles in financial turnover (carried out by the developer or bad faith in managing the finances) or other reasons because the developer is experiencing losses so that the developer company cannot pay all the company's bills that have fallen due.

Thus, there are also quite a few who take the process of postponing debt payment obligations or bankruptcy as a way out to overcome this problem. Article 1 paragraph (1) of Law No. 37 of 2004 concerning Bankruptcy and PKPU (hereinafter referred to as the "*Bankruptcy Law*") states that bankruptcy is a general seizure of all assets of the Bankrupt Debtor whose management and settlement are carried out by the Curator under the supervision of the Supervisory Judge as regulated in this law. General seizure results in the debtor losing the right to manage assets and being under the guardianship of the Curator.

In the Bankruptcy Law it is explained that in order to be declared bankrupt, the requirements must be met in accordance with the provisions of Article 2 paragraph (1) of the Bankruptcy Law, namely that the debtor must have at least two or more creditors and must not pay in full at least one debt that has matured

and can be collected, and must be declared bankrupt by a court decision, either at his own request or at the request of one or more of his creditors. Not only that, the bankruptcy requirements must fulfill the simple proof stipulated in Article 8 paragraph (4) of the Bankruptcy Law which states that a request for a declaration of bankruptcy must be granted if there are facts or circumstances which prove in a simple way that the requirements for being declared bankrupt as referred to in Article 2 paragraph (1) have been fulfilled.

Regarding the simple evidentiary requirements, Circular Letter Number 3 of 2023 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2023 as a Guideline for the Implementation of Duties for the Court (hereinafter referred to as "*SEMA 2023*"). In the formulation of the civil chamber in the field of bankruptcy and PKPU, it is stated that the application for a declaration of bankruptcy or PKPU against an apartment developer does not meet the simple evidentiary requirements as referred to in Article 8 paragraph (4) of Law No. 37 of 2004 concerning Bankruptcy and PKPU.

With the new norm, it shows that apartment developers cannot be filed for bankruptcy or PKPU on the grounds that the debts incurred are not debts that can be proven simply. Of course, this will have its own legal consequences for creditors including consumers or apartment residents. Therefore, the author is interested in analyzing the extent to which SEMA 2023 can provide justice and legal certainty to creditors/consumers if apartment developers cannot be filed for bankruptcy on the grounds that they do not meet the elements of simple proof.

2. Research Method

The research in this study is normative legal research using an analytical approach or a legislative analysis approach. This approach is used to analyze SEMA 2023 which states that apartment developers can no longer be declared bankrupt because they do not meet the elements of simple proof according to Article 8 paragraph (4) of the Bankruptcy Law and its impact on consumers as concurrent creditors. The data sources used in this study are legal materials consisting of primary, secondary and tertiary materials. The author examines data on the elements of simple proof in the bankruptcy process involving apartment developers as the defendant, so as to obtain a conclusion about the reasons why apartment developers can no longer be declared bankrupt because they do not meet the elements of simple proof.

3. Results and Discussion

Implementation Bankruptcy Application Concept Against Apartment Developers Who Do Not Meet Simple Proof Requirements

The Bankruptcy Law is a legal product designed with limited human reason and thought, so that in its implementation it requires the principle of caution by judges so that it is in line with legal certainty. One of the discourses that is currently being debated among experts is the simple proof regulated in Article 8 paragraph (4) of the Bankruptcy Law. This article explains that a petition for a declaration of bankruptcy must be granted if there are facts or circumstances that are proven simply according to the requirements in Article 2 paragraph (1) of the Bankruptcy Law.

If we refer to these provisions, what is meant by simple proof is that it can be proven simply that there is more than one creditor of the debtor who has filed for bankruptcy and that there is a debt that is due and can be collected. The purpose of this simple proof is to grant a bankruptcy petition if the above elements have been met. Therefore, this simple proof becomes an important principle in the bankruptcy process. However, until now after the Bankruptcy Law was passed in 2004, it has not provided an explanation regarding the concrete definition of simple circumstances that are used as a reference by judges in deciding simple evidence in the bankruptcy process. The consequence is that it causes differences and interpretations by judges when deciding on the dispute, resulting in speculation among the public that one decision is inconsistent with another.

In this study, the author will try to describe several commercial court decisions regarding bankruptcy against apartment developers with different verdicts. *First*, Decision No.73/Pailit/2009/PN.Niaga.Jkt.Pst filed by several consumers who ordered Palazzo Kemayoran apartments (applicants) against PT Pelita Propertindo Sejahtera (respondent) as the apartment developer. The panel of judges in the decision granted the applicant's application in its entirety. This means that PT Pelita Propertindo Sejahtera was declared bankrupt by the Central Jakarta Commercial Court. The reason the panel of judges granted the applicant's application was because the respondent had been proven to be simply declared bankrupt, which was proven to have more than one creditor and had debts that were due and collectible. The trial facts showed that the applicant had paid off the apartment unit in its entirety as evidenced by the payment receipt documents submitted in the trial. However, the respondent as the apartment developer did not carry out his performance to hand over the apartment unit that had been paid for by the applicant. This decision attracted public attention at that time because the panel of judges was of the opinion that

the obligation to hand over the apartment could be categorized as a debt as referred to in Article 1 paragraph (6) of the Bankruptcy Law.

With the bankruptcy verdict granted by the Central Jakarta Commercial Court, PT Pelita Propertindo Sejahtera has filed a cassation appeal to the Supreme Court. PT Pelita Propertindo Sejahtera insists that its obligation to hand over the apartment unit cannot be interpreted as a "debt" that can be collected. According to it, the debt referred to in the Bankruptcy Law is something in the form of money and arises from a legal relationship of debt-receivables alone. However, the cassation judge actually upheld Decision No.73/Pailit/2009/PN.Niaga.Jkt.Pst which was decided by the panel of judges of the Central Jakarta Commercial Court. Therefore, PT Pelita Propertindo Sejahtera was still declared bankrupt with the decision upheld at the cassation level. The cassation judge argued that simply PT Pelita Propertindo Sejahtera had met the requirements to be declared bankrupt. According to him, the Bankruptcy Law applies the definition of debt in a broad sense, so that an obligation that is not fulfilled by the seller to the buyer that has been agreed upon is a debt. This obligation can be converted with the total amount of money that has been paid by the buyer to the seller. Therefore, when the seller fails to fulfill his obligations, the seller is the debtor while the buyer is the creditor.

Second, Decision No.84/Pdt.Sus-PKPU/2023/PN.Niaga.Sby filed by 2 (two) consumers who ordered/purchased housing units in the Hills Garden Housing Complex, Menganti Gresik (applicant) against PT Graha Orbit Lintas Dunia, a property developer (defendant). In the decision, the panel of judges opined that the fact of the debt that had matured and was not paid was not proven simply. According to him, there was no clarity whether the handover of the housing unit ordered by the applicant to the respondent was a debt that could be collected. In other words, the handover of the housing unit that had been ordered must be further proven whether it was included in the type of debt that could be collected or not. Therefore, with these considerations, the panel of judges at the Surabaya Commercial Court rejected the PKPU application by the applicant against PT Graha Orbit Lintas Dunia.

Third, Decision No.97/Pdt.Sus-PKPU/2024/PN.Niaga.Jkt.Pst. filed by Sky House JO, a collaboration between China State Construction Engineering Co. Ltd and PT Dacheng Engineering Indonesia (applicant) against PT Sunny Garden Property (respondent) as the apartment developer. This decision was issued after the issuance of SEMA 2023. In the decision, the panel of judges argued that because the respondent was the apartment developer and the apartment units were already occupied, they did not meet the formal requirements to submit a PKPU application. The panel of judges used SEMA 2023 as a guideline in deciding the case, so in its decision it rejected the PKPU application by the applicant against PT Sunny Garden Property.

The differences in the above rulings indicate that there are variations in

interpretation among judges regarding simple evidence in the bankruptcy process against apartment developers. This reflects the lack of uniformity in understanding the concept of "simple evidence" as regulated in Article 8 paragraph (4) of the Bankruptcy Law. The variety of interpretations shows that bankruptcy cases involving apartment developers are not always considered simple, so that the Supreme Court then issued SEMA 2023 as a guideline for implementing duties for courts to decide bankruptcy disputes.

Unfortunately, in SEMA 2023, the Supreme Court did not explicitly explain the reasons behind the decision that apartment developers did not meet the requirements for simple proof in bankruptcy cases. However, if we review the decisions that rejected bankruptcy applications for apartment developers above, it is clear that these cases often require proof that is not simple. This is due to several factors that make apartment developer cases much more complex than ordinary bankruptcy disputes. In many cases, in practice, consumers buy and pay for apartment units in advance even though the building is not yet finished with an ordering mechanism that is bound by a Sales Purchase Agreement (PPJB). The provisions regarding PPJB are regulated in KUH Perdata that the agreement is obligatory in nature, meaning that ownership rights will be transferred if it is carried out by leveraging.

PPJB is not proof of transfer of ownership rights, therefore the process of transferring ownership rights to an apartment unit occurs when the consumer has paid in full in good faith to control the object of sale (there has been leverage). If the payment for the apartment unit is not paid in full, it will remain the property of the developer. However, if a Sale and Purchase Agreement has been executed with a Sale and Purchase Deed (AJB) and there is a change in ownership rights, then the apartment unit is considered no longer the property of the developer but has been transferred to the property of the consumer. In practice, apartment development often faces financial constraints that cause developers to be unable to pay their obligations to creditors (consumers). This unstable financial condition results in delayed project completion, so that developers fail to hand over apartment units on time to consumers who have made reservations or even paid part or all of the unit price. These constraints worsen the relationship between developers and consumers, because consumers who have fulfilled their payment obligations do not get units on schedule, while developers have difficulty continuing projects due to liquidity or financing crises.

From this issue, when consumers have ordered and paid for an apartment unit and signed the PPJB/AJB, but the developer has not yet handed over the unit or is late in handing it over, a debate arises as to whether this can be considered a "debt". Is the debt in the form of an obligation to hand over the apartment unit that has been paid for by the consumer, or is the debt in the form of an obligation to return the funds that have been deposited if the unit is not yet handed over?. If we refer to the

definition of debt in Article 1 number 6 of the Bankruptcy Law, it is an obligation that is stated or can be stated in an amount of money, either in Indonesian currency or foreign currency, either directly or which will arise in the future or contingently, which arises due to an agreement or law and which must be fulfilled by the debtor and if not fulfilled, gives the creditor the right to obtain fulfillment from the debtor's assets.

If interpreted definitively, the obligation arising from the legal relationship between the developer and the consumer as a creditor can be interpreted as a type of debt. However, in practice it is not easy to prove the type of debt referred to in the case, so it is necessary to prove it in the District Court to find out whether a legal relationship of debt has occurred. Thus it can be concluded that the bankruptcy dispute involving the apartment developer is not included in the simple debt dispute, so it does not meet the elements of the simple proof requirements as referred to in Article 8 paragraph (4) of the Bankruptcy Law.

In the author's opinion, with the issuance of SEMA 2023, the Supreme Court has provided clear guidelines that in bankruptcy disputes involving apartment developers, it is not easy to decide on PKPU or bankruptcy. SEMA 2023 is an important step in emphasizing that bankruptcy cases of apartment developers require more in-depth evidence, considering the complexity of the legal relationship between developers and creditors (consumers). This breakthrough is expected to eliminate differences in interpretation among judges in deciding bankruptcy cases of apartment developers, especially in terms of simple evidence which has often been debated. With these guidelines, in the future it is hoped that there will be uniform decisions that are fairer and in accordance with the principles of consumer protection and the interests of developers.

Implications for justice and legal certainty for creditors (consumers) if the simple proof stipulated in SEMA 2023 is not fulfilled

In the bankruptcy process, the debtor must have at least two or more creditors. The debt repayment to these creditors is not immediately distributed equally to all existing creditors. Creditors in the bankruptcy process are classified into 3 (three) types of levels that receive priority rights to debt repayment. The levels of creditors from the most prioritized level are separatist creditors, preferred creditors, then followed by concurrent creditors. Separatist creditors are creditors who are guaranteed with collateral, pledges, mortgages and other property rights that receive priority in debt repayment in the event of bankruptcy. Then, preferred creditors are creditors who have special rights that receive priority in debt repayment as regulated in Articles 1139-1149 of KUH Perdata. While concurrent creditors are creditors who are not guaranteed and occupy the last level in fulfilling debt repayment.

The legal relationship arising from the ordering/purchase of apartment units by consumers to apartment developers can be categorized as a relationship between creditors and debtors. According to the Indonesian Property Consumer Advocacy Institute, Erwin Kallo, consumers who order/purchase this apartment unit are classified as concurrent creditors, so that when the debtor defaults, it is very possible that they will not receive a portion of the debt repayment because the assets of the bankrupt debtor have been divided between separatist creditors and preferred creditors who have special rights. This can be detrimental to consumers because it is very possible that consumers will not get the apartment unit that has been promised or even not get the money that has been paid.

Article 37 paragraph (1) of the Bankruptcy Law states that if there is an agreement to hand over goods within a certain period of time, and before the goods are handed over the party who must hand them over is declared bankrupt, then the agreement is automatically cancelled when the bankruptcy decision is announced. If another party is harmed because of this, they can file a claim as a concurrent creditor to obtain compensation. This article is the basis for the cancellation of the PPJB made by the consumer with the apartment developer, however, as a further effort, the consumer has the right to submit an application as a concurrent creditor in the form of compensation for the cancellation of the PPJB that has been made between the consumer and the apartment developer.

The Legally, concurrent creditors have the same rights and position towards the debtor's bankrupt assets. However, these rights and positions are measured after deducting the debt payment obligations to the separatist creditors and preferred creditors. The distribution of the debtor's bankrupt assets is carried out professionally and proportionally according to the size of the comparison of the receivables of each creditor, or commonly known as the principle of *pari passu pro rate parte*. However, the problem that occurs in practice is when the process of settling the debtor's bankrupt assets where the amount of debt is greater than the amount of assets owned, especially after the separatist creditors and preferred creditors have obtained their rights. As a result, concurrent creditors will not receive their rights in full. This is certainly contrary to the principle of creditorium parity in bankruptcy law which stipulates that all creditors should be treated equally in terms of debt payments. This is what is considered a weakness of bankruptcy law in Indonesia which does not sufficiently protect the rights of concurrent creditors, which in fact, long before the debtor is declared bankrupt, the debt agreement binding between the debtor and concurrent creditors remains valid and binding even though it is not protected by collateral, mortgage and fiduciary rights.

The provisions in the Bankruptcy Law do not fully provide supervision of the settlement of concurrent creditors' receivables until the end. As a result, there

is often dissatisfaction with the distribution of the debtor's bankruptcy assets by the curator to concurrent creditors. Therefore, concurrent creditors can take other legal measures outside the bankruptcy process such as a lawsuit for default or unlawful acts filed with the competent district court. This situation is considered the most appropriate, considering that the decision of the judge in the district court can assess the objectivity of the debts between the debtor and the concurrent creditors and has a significant impact on the fate of the settlement of receivables from concurrent creditors.

The issuance of SEMA 2023 is an important step by the Supreme Court in responding to the realities of practice in the field, especially regarding the bankruptcy of apartment developers. SEMA 2023 shows the Supreme Court's sensitivity to the dynamics faced by consumers who are often harmed when developers experience financial difficulties or fail to fulfill their obligations. By issuing these guidelines, the Supreme Court is trying to ensure that in bankruptcy cases, consumer interests remain protected, especially those who have paid for apartment units but have not received their rights. This is a legal breakthrough that not only considers written regulations, but also pays attention to justice for parties who are often in a weak position in apartment purchase agreements.

Moreover, SEMA 2023 also shows the Supreme Court's efforts to reduce differences in interpretation among judges regarding simple proof in the bankruptcy of apartment developers. Before these guidelines were issued, there was often uncertainty regarding the limits of proof required to grant or reject a bankruptcy application against a developer. With clear guidelines, it is hoped that the legal process will run more consistently and can provide certainty for consumers, who are often in a difficult position due to confusion regarding their rights in such disputes.

With the issuance of SEMA 2023, the Supreme Court seems to have taken the position that bankruptcy cases for apartment developers are not merely a matter of fairness or unfairness, but rather more about protecting the interests and needs of the wider community. Apartment developers, as parties who carry out housing development for consumers, have a great influence on the housing and property sector which involves many parties, including individual consumers who have paid for units that have not been handed over. Given the involvement of the wider community's interests, SEMA 2023 serves as an affirmation that there is special protection for companies that have a significant impact on the lives of many people, such as apartment developers.

The author argues that this is in line with the new regulation in Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector (PPSK Law), which limits the authority to file bankruptcy and/or PKPU applications for certain companies only by the Financial Services Authority (OJK). According to the

PPSK Law, only OJK can file bankruptcy applications for entities such as banks, securities companies, insurance companies, and cooperatives. This limitation is made with the consideration that some types of companies involve many consumers and investors, so that bankruptcy against them will not only have an impact on the company itself, but also on the financial and social stability of society at large. Thus, this precautionary principle ensures that bankruptcy decisions do not harm more parties.

Apartment developers, although not financial institutions, have similarities in terms of the involvement of many parties' interests and their wide-ranging impacts. When a developer is declared bankrupt, unfinished projects will be stalled, and the rights of consumers who have paid in advance will be disrupted. Therefore, SEMA 2023 is a balancing act to ensure that bankruptcy actions are not carried out hastily against apartment developers. Although this decision may be considered unfair by some, the Supreme Court prioritizes the protection of the interests of consumers who are already tied up in unfinished apartment projects.

4. Conclusion

The author presents two conclusions, *first*, the concept of simple proof regulated in Article 8 paragraph (4) of the Bankruptcy Law is still a debate among legal practitioners in Indonesia, including judges who decide bankruptcy disputes against apartment developers so that there are different decisions related to the dispute. With the birth of SEMA 2023, it indirectly provides guidelines for judges to align the interpretation of the concept of simple proof in the bankruptcy process of apartment developers. SEMA 2023 emphasizes that bankruptcy applications against apartment developers do not meet the elements of simple proof because in practice it is not clear about the type of debt in the case. The type of debt in question is whether the debt is to hand over the apartment unit that has been ordered by the consumer or the return of funds that have been deposited by the consumer, so this requires proof that is not simple through the District Court. *Second*, with the existence of SEMA 2023 which regulates that apartment developers cannot be declared bankrupt because they do not meet the elements of simple proof, it is actually a legal breakthrough to guarantee justice and legal certainty for consumers who act as concurrent creditors. This is considered because consumers are often harmed when developers experience financial difficulties or fail to fulfill their obligations. With this SEMA, it can be ensured that consumer interests remain protected.

The suggestions that can be given in this study are, first, for legal practitioners, especially judges who decide on bankruptcy disputes, it is hoped that they can apply SEMA 2023 properly so that there are no differences in legal interpretation regarding simple evidence against apartment developers. Second, for the government as a policy maker, it is hoped that they will design the latest version of the Bankruptcy Law, especially regarding bankruptcy requirements and simple elements of evidence because they are considered no longer relevant to current developments.

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