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Pre-Project Selling Pattern in Sale and Purchase of Housing and Perspectives of Equitable Legal Cohesiveness

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Abstract

Key words:
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A preliminary agreement on sale and purchase of housing is often executed with a pre-project selling system (PPSS), which means marketing or selling a property before it is completed. A PPSS invites litigations and harms consumers when the Buy and Sell Agreement for Land and Building (PPJB) document prepared by the builder does not provide adequate legal protection to consumers due to the lack of principle of balance between the developer and the consumer. This study examines whether equitable relief could be a good solution to resolve the issues; whether it would provide legal cohesiveness in the case of the failure of the PPSS. The study finds that in the Indonesian law, equitable relief is in the form of a rescission of a contract, cancelling all terms and conditions and restoring both parties to their pre-contract position. Such equitable relief provides cohesiveness particularly in property related contracts where either party is unable to bear the monetary compensation. The court can also cancel the contract or give the verdict to sell the property pursuant to the terms of the original contract. The study also found that courts might also order rectification or revision of the contract to ensure legal cohesiveness for both parties. The results also made evident that by attempting legal cohesiveness, there might also be necessary to redefine the intention of both parties and ensure that the rectified regulations of the contract must be fulfilled and no breach or violation of the contract should take place. The study recommends designing a legal protection model for parties entering into a pre-project selling contract to avoid the need of any equitable relief at a later stage.

Introduction

Pre Project Selling system (PPSS) is quite a common phenomenon in Indonesia, according to which project developers conduct the sale of houses and apartments, often which exist only as a plan or picture (Cahayani, 2020; Cahayani et al., 2019). Such pre-project selling (PPS) takes place even before the infrastructure and facilities are actually constructed. A few developers market their property during the PPS phase, using a “pre project selling” sales pattern or strategy, by offering residential units of flats/apartments or housing (Meliana, 2022). The Indonesian Law recognizes PPS as a contracts so long as it is validly made and does not violate the “law, morals, and public order, and bind the parties as an act issued by the government”.

Article 1338 paragraph (1) to Article 1340 of the Indonesian Civil Code classified contracts as two types: ‘named contracts,’ those stipulated under the Civil Code; and ‘unnamed contracts’ those that are not. Both types of contracts have subjective and objective requirements (Arifin, 2022). Subjective requirements require the consent and capacity of the contractual parties while the objective requirements need the existence of a specific object and a legitimate cause. If the subjective requirements are

not met, the contract in question becomes voidable allowing for a renewal of the agreement. However, if objective requirements are not met, the agreement in question would be void ab initio. Pre-project selling is included among unnamed contracts, therefore, the Law faces some problems to seek any protection under the Civil Code (Warda, 2001, 2005).

Despite its recognition as a valid contract system in Indonesia, the provisions of PPSS are not properly defined nor the rights and obligations of the parties are drafted as legal documents in accordance with the prevailing laws or the clauses of the Consumer Protection Act (Lestari et al., 2020). Article 42 paragraph (1) of Law Number 20 of 2011 concerning Apartments (Apartments Law) states that developers can carry out marketing campaigns to sell their apartments before the completion of apartments provided, they consider all the requirements determined by law. Article 42 paragraph (2) further adds that such sale and purchase be documented as Agreement of Sale and Purchase (Perjanjian Pengikatan Jual Beli or PPJB). The PPJB is the only document signed before a notary that aims to bind the two parties to determine their behaviors in their respective roles as buyers and sellers. However, the PPJB remains only a preliminary agreement until the Final Deed of Sale and Purchase (AJB) is signed before the Land Deed Making Officer (PPAT). This AJB is the authentic document that can act as evidence of the transfer of land and building rights and will be required for the registration of transfer of rights or 'return name'. Only after the completion of 'return name' process, the land or building moves from the seller to the buyer.

Legally, contracts where such sensitive issue of transfer of rights of a property is involved, it is not enough to enter into a PPS agreement privately by the parties before a notary (Warda, 2001, 2005). The buyer primarily is not aware and, in most cases, not shared the information such as the real legal status of the land / property in question, whether it is mortgaged at a bank; whether any land and building tax notices are pending; whether the seller possesses the building permit, and so on. Many of these requirements or clauses are not included in the PPS. In the event of disputes, the parties go to the Indonesian Republic's Consumer Protection Court, which also has certain limitations.

The Consumer Protection Court analyzes the types of Legal Protection available under various laws that are applicable to consumer protection (Lestari et al., 2020). The consumer court clarifies its situation by stating that it can intervene in any conflict or dispute neither before the PPS agreement (no conflict / pre purchase) stage nor after the transaction (conflict/post purchase) stage. The rationale behind this is that there is no question of offering any legal protection to consumers before the transaction (no conflict / pre purchase) stage as each consumer is expected to initiate a voluntary self-regulation, which requires the consumers to first be aware of all legal regulations related to consumer protection applicable to PPS contracts prior to the transaction, and remain alert and cautious while conducting any transactions such as PPS contracts. Hence, there is

no such protection or legal rescue for consumers prior to any transaction occurs ([Lestari et al., 2020](#)). However, if the consumers require legal protection conducted after the occurrence of a transaction (conflict / post purchase), this can be provided by the District Court or outside the Court by the Consumer Dispute Settlement Agency (BPSK), the choice is left to the parties of the dispute.

The post purchase conflicts can occur only due to the failure of the PPSS. As stated, the either party has the choice to settle such disputes either in the district court or outside through BPSK. In most cases, the consumers demand to cancel or nullify the PPS contracts and repayment of the margin money and, in some cases, compensation for the mental and financial damage. Such a legal consequence is also mentioned in Article 42 paragraph (2) of the Housing and Settlement Laws, in case of the non-fulfillment of the PPJB or the Buy and Sell Agreement for Land and Buildings. The Article 42 paragraph (2) clearly states that non-fulfillment of the requirements of PPJB is enough to nullify it and the consumer must be appropriately compensated.

Such a situation could also give rise to a situation that can be described as equitable legal cohesiveness or equitable relief. Equitable, literally means to be 'fair' or 'impartial'; however, legally it relates to "equity" and often stands opposed to "law". This distinction between equity and law originated in England, where there are two types of courts: courts of equity and courts of law, each having different purpose ([Arifin, 2022](#)). A court of equity gives equitable relief, which is a kind of relief representing a remedy apart from monetary compensation for damages, for example, passing a verdict for the losing party to comply with the contractual agreements. In other words, the verdicts of a court of equity are based on fairness and justness rather than legal complications, which happens when the verdict comes through courts of law ([Horwitz, 1975](#)).

The verdicts in the courts of equity is rightly called equitable relief since the court grants fair and just remedies requiring a party to act as per an agreement or refrain from performing a particular act that might violate an agreement ([Swetasoma, 2021](#)). In the case of PPSS, an equitable relief would be asking the builder or promoter to adhere to the facilities and assets promised in the PPS contract. An equitable relief is preferred where a legal remedy may not provide sufficient restitution. In the context of PPS, an equitable relief mostly preferred is the canceling of the PPS contract, ending all terms and conditions, allowing both parties to return to their pre-contract status and/or refraining the builder from modifying arbitrarily the conditions set in PPS contract and providing a relief or remedy to the consumers in the event of a breach of contract.

This study aimed to examine what legal remedies are available to the consumers if any damages are incurred to the consumers due to the failure of pre-purchase selling (PPS) agreements and whether equitable relief can provide legal cohesiveness in such cases of the failure of the PPS

agreements. The study also examined the provisions stated under various Indonesian laws including Law Number 8 of 1999 concerning Consumer Protection, Civil Code, Housing Act 1/2011 and any other regulation concerning buying and selling practices or pre-project selling in Indonesia.

Problem statement and Theoretical framework

Currently, there is a great challenge faced by PPSS since not all sales under the PPSS method run smoothly, but face many hurdles such as delays in completion, incompatibility with what was offered in the agreement, disputes in transfer of land rights, and like. In some cases, the consumers file complaint for receiving misleading information about the projects, or related to land ownership, building specifications, thus violating buyers' rights to information. The PPJB document is also prepared by the builder without involving the buyers, unilaterally and thus violating the principle of balance (Cahayani, 2020; Lestari et al., 2020; Maria et al., 2022). In most cases, the PPJB document shows developer's position more dominant than that of the consumers. Consequently, there are legal cases filed by consumers. They challenge the PPJB document that was prepared by the developer in the court.

During 2014-2016, for example, the Indonesian Consumers Foundation (YLKI) had received at least 440 complaints related to housing, the majority of which were related to PPSS, where consumers alleged of lack of consistency between what was promised and what has actually been built. These complaints were about the unbalanced position between the developer and the consumer. The questions were raised for the imbalance or inconsistency in the status of joint land ownership, building specifications, and regarding the real market value of the asset in purchase (Cahayani, 2020; Lestari et al., 2020). In spite of such a large number of litigations, in practice, the Indonesian Consumers Foundation or the Law Number 8 Year 1999 about Consumer Protection does not provide any adequate legal protection to consumers in the sale and purchase of apartments under the PPJB system. There is a separate Law Number 20 of 2011 concerning Apartments (Apartments Law) whose article 42 paragraph (1) only regulates requirements of signing a preliminary Agreement on the Sale and Purchase (PPJB) to be signed in the presence of a notary.

It is therefore essential to examine the PPSS and the extent to which it can potentially harm consumers. In order to ensure legal protection to consumers in PPSS, it was necessary to analyze the extent to which the PPSS complies with the Law No. 8 of 1999 about Consumer Protection. There is a need to formulate regulations that govern it and can streamline its legal implementation. Besides, it is also important to investigate what legal measures could protect consumers' rights, both pre- and post-purchase of a property, while business transaction is done through a PPS agreement or PPJB (Kallo, 2009).

Literature review

- *Concept of pre-project selling*

Kallo (2006; 2009) defined pre-project selling as a sale done before the property has been built completely. The builders usually sell apartment and units through brochures that contain the layout plan, unit design, facilities, unit price lists, and payment methods (Maria et al., 2022). The potential buyers agree to make a down payment even though the property is non-existing. A few builders, responding to the local demands and to act conventionally, carry out PPS of the incomplete and semi-constructed flats or apartments, i.e., before the projects are completed. As a marketing strategy, PPS serves as a market test for the property being marketed.

The pre-project selling (PPS) is known to have been very popular in Europe. France was the first country to devise a special kind of legal contract which dealt with the sales of a building to be constructed' (*vented'immeublea'construire*). This legal contract was a special type of agreement, recognized by the French law, which involved a buyer and a seller, wherein the buyer paid a down payment to the seller, and paid the consecutive payments as the construction progressed and the house was completely built and the ownership transferred to the buyer. The French Law protected the buyer if the seller failed to finish the building. The seller was also entitled to complete the building in the promised duration for which he could obtain funds from financial institutions.

In order to get funds from the financial institutions, it is also required that the construction of the building in question under PPS agreement should have reached 20% (twenty percent) of the volume of construction. The requirement of 20% construction is a legal provision vested in the Article 1320 of the Civil Code, as well as in Article 42 paragraph (2) of the Indonesia Law number 1 of 2011 concerning Housing and Settlement Areas. Moreover, Indonesia being an Islamic country, the observance of halal terms is also a condition to be fulfilled (Sekarmadji et al., 2021). If not, the PPS contract is declared invalid because it violates the objective conditions of an agreement. Article 1335 to 1337 of the Civil Code also reiterate the point that if an agreement has been made for a false or forbidden reason, it has no validity and the law prohibits such contracts both on moral and legal grounds. Such contracts also violate the equitable legal cohesiveness which is a major objective of the Indonesian judiciary (Warda, 2001, 2005).

Habitat (2008) has studied the government intervention in many countries into property / housing sector, with a view to transform it into a business sector, profitable and useful for the economy of the country. The results of their study revealed that there is a state participation in most Asian countries in the housing systems, as this sector has monopolized the

market for many decades and contributed to redesigning the economic system.

- ***Concept of equitable legal cohesiveness***

In order to establish an enabling environment for equitable legal cohesiveness, there are a few conditions to make available an effective and equitable legal system to the victims of PPSS or those who wish to exit out of the PPS contracts. First, and foremost, it is important that core state legal institutions including the legislatures, government agencies, and enforcement bodies (prosecutors, regulators, police, prisons), must integrate together to minimize legal complications into an amicable, fair and transparent environment (Arifin, 2022; Karpik, 2011). Once an appropriate enabling environment is built, the next step is to make available all functional institutional systems and rules, and financial, human, and material resources to the population, as evidence of fairness and transparency, and generate trust. Additionally, the courts should also act independent of political pressure, and remain accountable and effective in giving verdicts and complying with the regulations. Hence judicial independence, accountability, and effectiveness are the three mantras of ensuring an environment of legal cohesiveness.

The empirical and theoretical literature have pointed out several instances of providing equitable relief to victims by developing equitable legal institutions. For instance, Hadfield and Weingast (2013) have examined the non-compliance of contracts during the Californian gold rush; and Greif (2006) showed how to resolve the contract enforcement dilemmas of traveling merchants. Dixit (2004) opines that socio-economic factor may differ but a formal state legal system is a universal mechanism to resolve issues related to failures of contracts. Isser (2011) views such legal mechanisms as effective factors to establish equity within a state legal system.

- ***Legal provisions***

In 2011, Indonesia passed the Housing and Settlement Act of Republic of Indonesia Number 11 of 2011, for single houses, row houses, and / or flats (hereafter Housing Act 11/2011), According to Article 42 (1) of Housing Act 11/2011, any house or property in the development process stage can be marketed through the preliminary sale and purchase agreement system (PPSS), provided certain requirements vested in Article 42 paragraph (2) of Housing Act 11/2011 are followed. The PPS strategy is legally possible prior to the construction of the apartment, so long as it also fulfills requirements laid down in Law No. 20 of 2011 on Apartments which includes obtaining the necessary permits, rights over the land, and signing a contract to give a legitimate possession of the apartment to the buyer; and the PPS contract is in accordance with the provision Article 42 paragraphs (1) and (2) of Law No. 1 of 2011 on Housing and Residential Areas which includes submitting the proof of land ownership, the existence of an object of transaction, acquisition of a building permit, the availability

of infrastructures and public utilities, and completion of the residential area by at least 20%.

Fuady (2003) considers these requirements as minimal factors without which no buyer should enter into PPS agreement. If any of these factors or requirements is unfamiliar to any of the two parties, or if the terms and conditions forming the content of the PPS agreement are written in fine print; or if the terms and conditions are drafted unilaterally without both parties involved; or if sufficient time is not allowed to either party to think and take a decision, this amounts to other party's lack of knowledge about the content of the PPS agreement and keeping the other party out of the bargaining position. Such contracts violate the principle of balance (Arifin, 2022; Atiyah, 1988; Macmillan, 2010) and are standardized, mostly to benefit one party, which in case of PPS contract is the developer or builder. The buyer or the consumer, since he is normally not involved in the drafting of the PPS contract, remains unaware of its content until the end.

Methods

This empirical legal study adopted a statutory approach, stated suitable for subjects related to a social phenomenon (Huberman et al., 2002) or a system (Cohen, 2010) and administrative law (Coglianese, 2002). Using the in-depth observation methods, the data was collected from secondary material obtained from legal archives, libraries, books and research studies. Apart from this, the study also collected empirical data from the Indonesian people's understanding about PPSS and the related laws. The analysis was performed qualitatively by focusing on the requirements set for the PPSS by different Laws and regulations. During the process, various social, political, and economic factors were also paid attention that influenced the PPS related conflicts.

Results

The study was conducted with a legal perspective, to examine whether PPSS can potentially harm consumers and what legal protection is available to consumers under the Law No. 8 of 1999 about Consumer Protection or any other Laws. The Indonesian law allows each individual to sell or buy a property but since pre-project selling involves a property which has no existence, the laws applicable to property do not apply here. though pre project selling contract may be a valid transaction as a sale and purchase agreement, but considering the rights and obligations of the parties involved, it is evident that buyers are usually in disadvantageous position. This has made the Indonesian government put pre-project selling under surveillance. A Decree was issued by the Minister of Housing No. 11/KPTS/1994 (Surat Keputusan Menteri Perumahan Rakyat No.11/KPTS/1994) which stated the Guidelines about the Formation of Apartment Unit Sales Contracts. These guidelines required that any property involved in pre-project selling must be owned or legally possessed by the developer and the developer must have obtained

necessary permits to build the project and that the project transaction should comply with these guidelines.

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The result of the research shows that the legal protection given to the consumer in the system of PPSS when viewed in conformity with the prevailing laws such as Law Number 8 / 1999 about Consumer Protection is very contradictory. The concept of pre project selling was intended as a market test to know how potential consumers would react to property products marketed. The developer would offer attractive discounts over the pre launching or pre-sale of these housing products and potential customers would be tempted to buy at that price. However, at a certain stage, when the bookings were made in excess, the developers went a step ahead in signing the PPS agreements and even ignored the business ethics including the provisions of legal protection to consumers. As a result, several consumers suffered losses, both financial and psychological, sending a few of them into a traumatic state. The state government felt the need to evaluate the PPS contracts and reinstate legal protection to consumers under Law Number 8 of 1999 concerning Consumer Protection. The government officials found several PPS contracts as invalid as the developer had not followed all the requirements and the PPS agreements and had violated the major conditions mentioned in Article 1320 of the Civil Code of existence of a lawful thing which was possible only when a housing unit had completed 20% of the construction. It was also noticed that the developer also did not fulfill the provisions as stipulated in Article 42 paragraph (2) of the Housing and Settlement Laws. The violation of requirements was the main cause of ordering a surveillance of all the PPS agreements of developers to ensure the compliance of the required provisions.

Owing to the PPS agreements declared invalid, the land deed officers also refused to perform the transfer of rights and title from the developer to the buyer, even if there existed no pre or post purchase conflicts. The conclusion is that even if a PPS agreement fulfills all the requirements and meets all the legal conditions, it still remains a preliminary agreement, and not eligible for the transfer of land rights to the consumer.

There can be two types of claims when there is a violation of PPS agreements: legal and equitable. In the legal claim, the plaintiff (consumer) may ask for a monetary compensation, while in the equitable claim, the court can be asked to either prompt or stop a particular act or event. The equitable claim aims at preventing a future harmful action for which a money award may not be a satisfactory solution. The equitable relief is sought by asking the court to mandate the developer to adhere to the PPS contract and only in the extreme circumstances if it is difficult to provide a legal remedy or restitution, the equitable relief may take the shape of the cancellation of the PPS contract, allowing both parties to return to their pre-contract status. Such type of equitable relief may however fail to provide any legal cohesiveness and satisfy the either party. On the contrary, a legal claim is different from equitable relief as it mostly results

in monetary compensation or passing the verdict to prevent the breach of contract or indulgence in any other offense. The idea is to provide a legal remedy to the plaintiff in the form of a court injunction which, if not complied, can result in civil or criminal penalties. A legal claim also aims at telling the court how the defendant's breach has caused the plaintiff to suffer a loss which, if not prevented, may occur again in future. If the plaintiff wins the legal claim, the court can order for the monetary compensation to the plaintiff for loss or injury.

In cases related to PPS contracts, it is yet to be seen in the Indonesian courts whether they allow the plaintiff (consumer) to seek either the legal or the equitable relief asking the court for an injunction, thus requesting the court to compel the other party (developer) to fulfill the rightful and legal requirements of the PPS contract or refrain the developer from violating the rightful and legal requirements of the PPS contract. A jurisdictional clause, however, exists in all types of equitable reliefs that an acknowledgment between both parties should be included in the contract to accept the legal remedies provided by equitable relief verdicts in the case of a breach of contract or if the breach results in irreparable damages or injury to either party. It is also required to be agreed by both parties that in the event of the breach of contract, the either party can deny equitable relief if the offended party fails to act in good faith or delays unnecessarily the remedy or the compliance of the contractual conditions.

In some countries, there are also incidents of hybrid cases, where the court may accept a lawsuit to include both legal and equitable claims. The plaintiff may choose to file a petition for hybrid claims if he suffers a loss due to the defendant's act or behavior. Hybrid cases are mostly common employment law cases where both legal and equitable claims can be sought: the legal claim seeks recovery of lost wages while the equitable claim asks for the change in the company's recruitment policy that resulted in the plaintiff's loss to avoid any future recurrence. In the context of PPSS, the hybrid claims can also be experimented.

Discussion

The study had made evident a few characteristics about PPSP and the related instruments like PPJB and the related laws like Consumer Protection Act and the Indonesian Civil Code. The study revealed that the PPSP has two dimensions: one, when the apartment(s) involved in pre-project selling is under construction or not yet completed; and, second, it exists only as a plan, idea or an image/ drawing which has been sued to buy and sell it. Article 1334 paragraph (1) of the Civil Code states the first type of flats/ apartments can be treated as the legal object since it will be available in future and it is also an of the pre-project agreement. Secondly, the Civil Code ascertained it to be carrying an economic value whose ownership rights can be transferred. However, in the second type of apartments, where transactions between the developer and the consumer

takes place for an object that does not exist at all, there is a relatively larger risk and the legal action could be taken only for the land on which the apartments are to be built, and not on the single units that exist in the plan. The regulations related to the land will be applicable in such a scenario.

Looking back at the first scenario once again, the Apartments Law states that PPJB is valid only if it has fulfilled the construction requirements of at least 20% of the total construction of the building for which the PPS agreement was prepared. The 20% construction completed offers a certainty to the consumer that the construction of apartments is going to be completed. In such a scenario, the Law plays its role and the Apartment Act guarantees that the construction of the apartment will be completed in due course. There is another aspect of this problem. Most of the PPS agreements are unilateral and prepared by the developers with obligations that are more favorable to them. There are very few obligations which can be called consumers' rights. In other words, no power is granted by the developer to the consumer, and the entire risk is borne by the consumer. This argument is consistent with thewho also regarded PPJB model is not beneficial for consumers as they only must carry out the obligations imposed on them. For example, a consumer is governed by the clause force majeure, which regulates that in the event of any losses or damage or destruction of the object of the agreement (that is, the flat or apartment), the developer is not obliged to bear the risk, but all costs of the agreement etc. are the responsibility of the consumer. If any of these obligations is not fulfilled, the agreement can be terminated and the object of the agreement returns to the developer.

Equitable relief is often recommended when there is a breach of contract, the most common form of equitable relief being requesting the court for the rescission of a contract, that is, cancelling all terms and obligations and restoring both parties to their pre-contract position. Such a form of Equitable relief is preferred in property contracts because the personal value of property often extends beyond monetary compensation; however, the court may also order to sell the property pursuant to the terms of the original contract. considering the property as the legal object of conflict. In some cases, the plaintiff an also ask the court for the rectification or revision of the PPS contract. if it is suspected that the contract does not reflect the true intention of both parties or the terms and conditions of the contract vary from what had been initially explained. The court may also be asked to issue the verdict that the obligations of a contract should be fulfilled as initially drafted, otherwise it may be termed as breach of the contract.

Conclusion

It is generally evident that in transactions related to buying and selling apartments with a pre-project selling system are unbalanced, violating the principle of balance. It means the developers have a stronger and more dominant position as consumers only sign the agreement previously

prepared by the developer unilaterally, without the involvement of the consumer. Such a state might be due to the lack of legal accountability, lack of legal cohesiveness and poor government oversight. The Indonesian Law does not provide protection to consumers because the state-enforced laws related to PPSS insist on the consumers to get aware of requirements related to PPSS prior to signing such agreements. It means literally that the buyer should be aware of the consequences and damages that might occur in such transactions. Hence, the Indonesian Laws take a precautionary approach rather than a legal juristic approach, by assuring the consumer to provide justice in case of any damages.

Prior to signing a PPS agreement, the government expects the consumers to investigate whether the developer has fulfilled all administrative and technical requirements. These requirements are already a part of the related laws and must be adhered to by developers while they market the property. The law also states that the developer must compensate if the apartment is not built-in accordance with the PPJB or there is a noncompliance of the Article 19 paragraph (1) and (2) of the Consumer Protection Act.

The study recommends the government intervention in all types of PPSS with the aim of ensuring protection for consumers. Such regulations need to be stipulated that ensures the PPS business to be carried out in an open, participatory and fair manner. The government also needs to modify new rules of licensing and legal permission for PPS contracts. The study also recommends to design a legal protection model for parties entering into a pre-project selling contract to avoid the need of any equitable relief at a later stage.

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