GOOD FAITH ON CONTRACT PERFORMANCE

Umar Haris Sanjaya
Fakultas Hukum Universitas Islam Indonesia
Jalan Taman Siswa No. 158 Yogyakarta
Email: umarharis@ui.ac.id

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Abstrak
Kitab Undang-Undang Hukum Perdata mengatur tentang itikad baik pada pasal 1338 ayat (3). Ketentuan tentang itikad baik mengatakan bahwa suatu perjanjian harus dilaksanakan dengan sebuah kepastian dan masuk akal. Penelitian dalam artikel ini penulis mengambil rumusan masalah apakah perjanjian yang dibuat oleh penjual/pengembang itu telah merepresentasikan prinsip itikad baik sesuai ketentuan 1338 ayat (3) dan apa akibat hukum dari perjanjian jual beli rumah yang melanggar itikad baik? Penelitian ini menggunakan metode penelitian normatif dimana menganalisis dokumen hukum dengan mengkolaborasinya pada ketentuan itikad baik yang dijelaskan secara kualitatif. Hasil penelitian menunjukkan bahwa perjanjian yang dibuat tidak merepresentasikan itikad baik dalam pelaksanaan perjanjian, hal itu dilihat dari beberapa pasal yang semuanya diatur tidak detail. Tidak detail ini menimbulkan pengetahuan baru untuk menafsirkan lebih. Hal ini terjadi karena perjanjian jual beli tersebut dibuat dalam bentuk perjanjian baku. Dari penjelasan diatas, dapat disimpulkan bahwa keberadaan perjanjian baku dalam jual beli perumahan cenderung mengurangi keberadaan itikad baik dalam membuat perjanjian. Itikad baik itu bila perjanjian dimaksud berisi ketentuan yang unreasonable (tidak detail, jelas, dan masuk akal) dan inequity (tidak patut).

Kata kunci: itikad baik, masuk akal, patut

Abstract
Good faith as regulated in article 1338 (3) of the Indonesian Civil Code states that an agreement must be conducted in reasonableness and equity. This research analyzes weather the agreement made by the seller/developer represent the principles of good faith in accordance the provision of article 1338 (3) of Indonesian Civil Code and the legal consequences of the agreement that violates good faith. This study uses a normative research method in which analyzing legal documents by collaborating on good faith provisions that are described qualitatively. The result shows that the agreement made did not represent good faith which can be seen by the provision arranged in no detail. The lack of detail give rise to interpret more. This happens because the sale and purchase agreement is made in the form of a standard agreement. From the explanation above, it can be concluded that the existence of standard agreements in the sale and purchase of housing tends to reduce the presence of good faith. Good faith is if the agreement referred to contains provisions that are unreasonable (not detailed, clear, and reasonable) and inequity (inappropriate).

Key word: good faith, reasonableness, equity
Introduction

House is the primary need for people. House in this context is a shelter for human beings residence. Previously, the function of a house is only as a shelter or place for people. But, now day people are disposed to buy a house for residence or sometimes for investing property. It means that people in buying a house, they do not only fulfill the need of shelter, but also for investing their property. People get a house by buying it from houses provider (developer), and now it is very easy to do. There are many developers which are ready to offer their products to consumer. Those products are divided in many houses, types, location, and additional facilities which accomplish the house.

Sale and purchase of house agreement commits the developer and consumer in the legal act. In this case consumer binds his/her self to house developer in the sale and purchase of house agreement. Before parties enter into agreement, there are some conditions of contract which must be fulfilled. Those conditions of contract are stated in article 1320 of the ICC such as: the consent, capacity, legal cause, and subject certain. Beside those fundamental conditions, the other perspective which is important in making agreement is that the agreement must be performed in good faith, it stated on article 1338 (3) of the ICC.

Generally, good faith is performed to guaranty the implementation of rights and duty exchange distribution. That implementation must be in accordance to the proportional characteristic which had been made by parties. It means that, if the contract fail, the parties which is bound in the contract must know the value of failure proportionally too. Because any failure will breach of the contract performance and it will be disturb the contract performance. Or may be it is a minor problem (simple case), but it can be disturb the whole of contract also. Good faith on contract performance has function to keep and protect the rights and the obligation of the parties. Good faith will also protect the parties from imbalance position, unreasonableness performance, and undue influence from trick or from any losses which may happen in contract.

In the contract performance of sale and purchase of house agreement which is made by Formula Land (developer) for the consumer there are arise any potential problems. That the contract conducted in standardized

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1 Indonesian Civil Code, article 131
2 Ibid., article 1320
3 Ibid., article 1338
6 Ibid., p. 86-87.
7 Developer property in Yogyakarta
term (standard clause’). Secondly, after had examined the terms and conditions of the contract which is provided by the developer, (as standard clause) the writer had an opinion that it contain unfair performance and inequity concept. It is realized that the contract was lack of clause in “transfer of title of the certificate rights to build”. According to the writer, clause of transfer of title must be written in the agreement.

First is, the performance conducted by the developer in article 5 of this pengikatan jual beli of the house. In the title of transfer and guaranty. In this case, the developer should transfer the subject of agreement with all additional facilities such as : all material and specification, consent similar to the design, the house is already built, painted, electricity added with lamp, telephone, and water pump. All the materials are guarantied by the developer. But, the writer knows that the transfer is not enough for subject of the house and facilities. The main problems in this sale and purchase of house agreement is the transfer of title of the house (certificate rights to build) behalf on the name of the consumer.

Clearly, the developer had not determined the time (when), the condition (how), and the place (where) the transfer of title will be conducted after the consumer finished payment (had conducted payment). In other word, the writer can say that the performance of the contract is inequity. The performance of developer were not arranged clearly after complete payment. This kind of performance is not proportionally (inequity), when the consumer had already done his performance, developer did not done his performance completely because there is no clause in agreement which determines clearly about the transfer of title. Actually, the consumer had done full payment to the developer, but the developer still had fully transferred the property. In this case, the house had not representatively possessed without the existence of the certificate of rights to build on behalf of buyer’s name. Thus, the writer believes that the seller still had not performed his performance well.

Those seller performance is related with performance of the buyer. Because of agreement is mutual agreement which arise some obligations. In article 2 clause (1), (2), (5), and (6) it was stated the “price and method of payment”. In this case, developer had determined any condition toward buyer performance as complete as possible. But, in opposite it, the developer had not determined its own performance and conditions for them as clear as buyer’s.

Many conditions in the agreement are clearly arranged by the developer for the consumer. For example is the price and the method of payment, the building, the transfer and the guaranty, the sanction and many others conditions. But, from all those conditions the

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7 In the explanation of Undang-Undang nomor 8 Tahun 1999 Tentang Perlindungan Konsumen, explained that shape of standard clauses is prohibited on the contract which made by parties.

writer had not found the clause of the transfer of title (how and when). How the consumers will know and get their rights (certificate of the land rights to build) if the clause was not arranged in that agreement. Actually, in getting the ownership rights of the house, the consumer must have the certificate. It is not really enough if only gets the receipt with enough legal stamp as the full payment.

This condition happened because of the authority to release certificate of land rights is still in the side of the developer. The consumer who already paid did not know how the arrangement of certificate of it. Consumer only get receipt as evidence. If they only got a receipt, what is the differences between the consumer who paid in cash or in installment? Actually, this problems happened because the certificate of land rights is still in the side of the developer. Thus, the developer has stronger bargaining position.

From the explanation above, we know that those problems happened in the contract between the developer and the consumer. The writer assumes that the contract was performed without good faith. It is conducted in terms and conditions of the contract. Any article determined in unfulfilled objective standard which those are unreasonableness and inequity. If the contract is performed, the consumer will have problems later.

The writer concepted the good faith is the main principle in the implementation of agreement. it means that the contract should be made in fair dan justice. And it must contain clear meaning, equity conduct, and also specifically protect the rights and obligation of the consumer. Thus, contractual relationship must be conducted proportionally and naturally. Based on the context of the study above, the writer can state the statement of the problems belows : (1) Is the contract agreement to sell of the house which is issued by the developer represent the principles of agreement based on the article 1338 (3) of Indonesian Civil Code in reasonable and equity ? (2) What is the legal implication of the contract agreement to sell of the house ?

Discussion

A. The Basic Concept of The Good Faith Principle.

This principle can be found in the article 1338 paragraph (3) of the ICC, which states that all agreement must be performed in good faith. Good faith in contract performance is one of legal institution (rechtfiguur) which is taken from Roman law that had been absorbed to civil law. Even though good faith becomes important principle in legal contract in several system of law such as in United States of

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9 Ibid., article 1338
10 Ibid., article 1339
12 Agus Yudha Hernoko, Op.Cit., p. 72 also refer to Dewi Astutty Mochtar, Perjanjian Lisensi Alih Teknologi Dalam Pengembangan Teknologi Indonesia, (Bandung: Alumni, 2001) , p. 79
America, Australia, New Zealand, and Canada, but good faith doctrine is still raising problem because of the abstract meaning of the term of good faith itself. Thus, definition of good faith is difference which it is depend on the time, place, and people perspectives.\textsuperscript{13}

This matters can be understood because of the arrangement of good faith is minus. Even in civil law states, only few portion which regulates about good faith doctrine into civil code. For example in article 242 BGB, article 1134 paragraph (3) of France civil code, in article 1374 paragraph (3) of Dutch BW and also in article 1338 paragraph (3) of Indonesian civil code. Those are only stated that all contract must be performed in good faith, and there are no clear explanations about the definition of good faith doctrine.\textsuperscript{14}

As the important principle on contract performance, it is still leaves any controversion. Those are determined at least three matters\textsuperscript{15} of them. First is, the definition of good faith is universal characteristic. Second is, parameter from good faith itself, it is need by judge to grade good faith in a contract. Third is, the court comprehension or court implementation towards contract which related to good faith. Thus, in this case the meaning and function of good faith needs to be researched. Actually, to define it must be based on the judge action or legal view from it which settled or decided through case by case.\textsuperscript{16}

Good faith is the basic principle from party who interest in business. It is not only for a good faith, but also fair dealing, reasonable, and equity which included as basic principles. Beside those matters, some scholar tried to connecting good faith as ethics principles. For examples is honestly, loyalty, and commitment accomplishment. Thus, those are the ideal principle which is according to Roman law, that they perform it as a standard for wise people.\textsuperscript{17}

Based on Roman law, good faith prefered into three kind of party performed. First is, that party on contract should be keep his/her promise. Second is, party is prohibited to take any advantages from his act which is mislead or cause where it is make the other party suffer loss. Third is, party obligated to perform his promise even though the obligation which performed did not clearly determined on contract.\textsuperscript{18}

Thus, that interpretation of good faith did not only specified prefered to party, but also prefered to the development of human society.

\textsuperscript{13} Ridwan Khairandy, \textit{Op., Cit.}, p. 128-130
\textsuperscript{14} \textit{Ibid.}, p. 7
\textsuperscript{16} \textit{Ibid.}, p. 8
\textsuperscript{17} Ridwan Khairandy, \textit{Kebebasan Berkontrak dan Facta Sunt Servanda versus Itikad Baik : Sikap yang harus diambil Pengadilan}, Pidato Pengukuhan Guru Besar Fakultas Hukum UII, Yogyakarta pada 8 Februari 2011, p. 25
\textsuperscript{18} \textit{Ibid.}, p.26
Because of good faith is the one of the part in human society, and it is must be reflected justice or equity in society.\textsuperscript{19}

From explanation above, we can conclude that good faith is the standard universal social force. That it is as objective concept, which it is universally applicated in all transaction. It is agreed with postulate from Roscoe Pound that he said “men must be assume that those with whom they deal in general intercourse of society will act in good faith and with carry out their undertaking according to the expectation of the community.”\textsuperscript{20} It means that, people who conducted a good faith as well as objective standard of social custom, that the other people have to conducted also the similar thing which happened on his/her self.

Based on Canonic law, good faith is interpreted as morality. Which it is universally stated as honestly and obligation of people toward God. Some Canonic scholars tries to related it as good conscience, that they included faith on religius term into good faith on law meaning. Thus, concept of good faith in Canonic law used morality or subjective standard, which is it opposite to the meaning of good faith in Roman law.

Good faith also have been used in merchantile community which they are need it in the business intercouse. It is happened in commercial relationship, where they are need a merchantile law to regulated a good faith in the commercial transaction which done by them. The focus of it is in mutual consent rights or reciprocity. That the commercial transaction must be done fairly exchange and balance. Thus, based on merchantile law a good faith is the fairness of exchange, and resiprocitvity principle is placed as the basic principle of it.

Generally, good faith principle of Roman law and Canonic law have influenced in several civil law system states. But for the formulation of each state are different, it is depend on that state it self. In article 1374 paragraph (3) Burgelijk Wetboek (BW) Netherland (old) it was stated that an agreement must be performed in good faith.

According to P. L. Wery\textsuperscript{21}, the meaning of good faith performed which is stated in BW it has similar meaning with the good faith concept in Roman law. he gives statement that a good faith performed is where parties applied his performed without any deceive, trick, and it should be for both interest of each party. Hoge Raad also tries to interpreted good faith in his sentence of Hengsten Veregining v. Onderlinge Paardenen Vee case on February 9\textsuperscript{th} 1923. he stated that contract must be performed in good faith, and that is must be performed in reasonable and equity (volgens de eisen van

\textsuperscript{19} Ibid.,
\textsuperscript{20} Ridwan Khairandy, Makna, Tolak Ukur, Pemahaman, dan Sikap Pengadilan di Indonesia terhadap Itikad Baik dalam Pelaksanaan Kontrak, Op.,Cit., p. 8
\textsuperscript{21} P.L. Wery, Perkembangan Hukum Tentang Itikad Baik di Nederland, (Jakarta: Percetakan Negara, 1990), p. 9
Reasonable is the reasoning of every conducted, and equity is the feeling.

Doctrine of good faith which is sentenced by Hoge Raad gives an understanding that parties when performed a contract must be accordance to the objective norm or unwritten norm. Those norms not also preferred to parties interest, but preferred also with general views of good faith. To accomplish good faith meaning in contract, legislator of act gives the new formulation in article 6. 248.1 Burgelijk Wetboek (BW) Nederland (new). Stated on that article reasonable commercial standard of fair dealing which taken from good faith on the meaning of honesty in fact. Actually, BW used the terms of reasonableness and equity to applied good faith than honesty in fact.

Thus, from the explanation above we can conclude that, parties who committed in a contract must be fulfilled his/her performance. Not only for the performance which clearly stated in contract, but also for reasonableness and equity.

Based on the Uniform Commercial Code, section 1-203 provides that every contract or duty within this act imposes an obligation of good faith in its performance or enforcement. UCC section 1-201(11) also provides the definition of good faith at least to mean honesty in fact in the conduct or transactions concerned. According to Farnsworth, he argues that it is a narrow definition. He believed that narrow definition enfeebled the UCC 1-203. He included a broader definition of good faith applicable at least within article 2 of the code on sales of goods, that good faith in the case of “merchant” means honesty and fact and the observance of reasonable commercial standards of fair dealing in the trade. Merchant means a person who deals in goods of the kind to occupied it which is having skill or knowledge.

To make it clear meaning in merchant case, Permanent Editorial Board of UCC promulgated an addition to UCC section 1-203 on good faith. Those additional official comment is to make it clear that doctrine of good faith is merely directs a court toward interpreting contract in the context of commercial conduct in performed or enforced. That it does not create a separate duty of fairness and reasonableness.
Thus, that the good faith means after proposed revision is honesty in fact and the observance of reasonable standards of fair dealing in the conduct of the transaction concerned.\textsuperscript{32} According to Burton, good faith performance occurs when a party’s discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation, and it to capture opportunities that were preserved upon entering the contract, interpreted objectively.\textsuperscript{33}

In Indonesia, good faith provided in the article 1338 (3) of Indonesia Civil Code, that all agreement must be performed in good faith (zie moten te goeder trouw worden ten uitvoer verklaart). This statement continued with article 1339 of ICC which clarify that an agreement not only binding the matters that explicity stated therein, but also to everything that according to the nature the agreement, obligated by courteousness, customary or law.

From the statement above, we can conclude that phase of contract to make it binding such as: 1. The contents of contract, 2. Reasonableness and equity, 3. Customary, and 4. Law. Those conditions are obligated to perform by parties as contractual performance, and it should be represented the good faith existence. Actually, there are no parameter to determined the standard of good faith, it means that the implementation of it is depend on each court and doctrines which developed.

Much discussion in the cases and scholarly commentaries concern whether good faith as well as stated before that it has devided subjective or objective, both of them have different interpretation of each. That subjective standards requiring separate analysis. Good faith might require only an absence of any wrongful motive, dishonesty, or action motivated by impermissible reasons\textsuperscript{34}. And it is depend on moralistic value. Objective side, it is would require a reasonable exercise of discretion that is an action justified by a reason within the reasonable\textsuperscript{35} and customary social expectation\textsuperscript{36}.

Actually, on contract performed is prefered the reason of objective standard. It is because of statement reasonable commercial standard of fair dealing, which it is performed reasonableness and equity. This view requires that a party’s exercise of discretion, that it is act justified by the rights kinds of reasons. Identifying the right kinds of reasons again depends on the contract. A prevailing standard requires that discretion be exercised reasonably\textsuperscript{37} or in commercial contract called as commercial reasonableness.\textsuperscript{38}

\textsuperscript{32} Ibid.,
\textsuperscript{33} Ibid., p. 130
\textsuperscript{35} Ibid.,
\textsuperscript{36} Ridwan Khairandy, Makna, Tolak Ukur, Pemahaman, dan Sikap Pengadilan di Indonesia terhadap Itikad Baik dalam Pelaksanaan Kontrak, Op., Cit., p. 3
\textsuperscript{38} Ibid., see case Leasing Serv. Corp. v. Broetje, 545 F. Supp. 362 (S.D.N.Y. 1982)
Reasonableness in this context should indicate that an action is sufficiently justified in law, and it is appropriate reason was available to justify the action in question, regardless of the actor’s motive.39 And it should be conducted in each phase of contract such as in pracontractual phase, contractual phase, and postcontractual phase40. Because good faith should be performed as it is.

In conclusion, there are elements of objective standards which is give an overview41 of it such follow as:

a. The informal behaviour of contracting parties and their individual expectations;
b. The nature and requirements for the particular transaction at issues;
c. The fairness of the customary commercial or social standard for measuring conduct;
d. The modern commercial policy of flexibility in commercial intercourse;
e. The effect of the court’s decision on commerce or society;
f. The conceptual history of good faith from such sources as the law merchant, common law, equity, and civil law system.

In contract law, there are three function of good faith42. First is, entirely contract must be interpreted based on a good faith. It has mean that it is interpreted that a contract should be performed in equity or fair.43 Second is, the additional or complement function. It may be added the contents or words in contract, which if it is happened unclearly rights or duties between parties. Third is, to restricted or to nullified function. It means that a contract should be limited in implementation if there are any content which explicitly cannot receive by parties because of unfair conduct. This function may applied if there is the deviation toward pacta sunt servanda in contract. Thus, good faith should be interpreted well between parties as well as it function. Also parties should be in cooperatif toward interpretating.44

B. Implementation of Good Faith Principle in Agreement to sell of
The House which is conducted by Developer.

Sale and purchase agreement began from the buyer who need to buy a house. And it is should be phase the process of negotiation before the parties make a consent. In the negotiation process45, seller offered the draft of contract which is consist of conditions of contract. The buyer must be considerate the negotiation around 1 week until 1 month to be analyze or negotiatted. The concept of the

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39 Ibid.,
40 Ridwan Khairandy, Op., Cit., p. 190
41 Ibid.,
42 Ibid., p. 216-264
45 Alfiian, Interview related about Procedures which conducted before sale and purchase of house agreement, Legal Staff of Formula Land, last interviewed on 25th October 2010.
contract which is offered is “win-win solution” process, which means that the buyer and the seller concept is mutual consent. Considering the draft of the contract which is offered, a buyer who agreed with the draft the contract made a consent into an agreement. Thus, there was a meeting of consent between the seller and the buyer because of the offer was agreed. In conclusion, the negotiation of sale and purchase agreement was conducted because of the consent between parties.

The meeting of consent conducted after the negotiation between parties. And it is written in the draft of contract agreement to sell which was offer by seller and it is agreed. Thus, before parties enter into sale and purchase of the house agreement, both are consent must be put in the contract agreement to sell of the house agreement.

In this case, the draft of agreement to sell prepared by seller. And it is formed in the standardize of contract. It is perform by seller because of they need to keep and protect rights and obligation between parties. Thus, seller provide the draft of contract in standardize of contract.

The process of agreement to sell which is performed or offered divide in two method. First is, the contract which made in private deed. And it is legalize in front of public notary (as the witness) as soon as a contract signature by parties. Second is, the contract which made in authentic deed (notary deed). The reason of seller make a contract in private deed, because of it is simple and easier than authentic deed (notary deed). Until this time, Formula Land performed and prefer in private deed for transaction of contract agreement to sell of house. Basically, this process must be depend on the will of parties which is preferred in the contract.

In this case, parties were not prefer to authentic deed because of the process in contract making. Only few buyer who prefer an authentic deed in contract making. Actually, buyer prefer to use private deed because of simple and easier than must be notary deed. Thus, in the contract which is analyze by writer is the contract in private deed.

The purpose of parties made a contract in agreement to sell is because of the object of contract still incomplete yet. In this case, the object of contract is the house which is build still unfinished yet. However, agreement to sell conducted to keep the promise or the consent of parties as well as negotiation before.

Agreement to sell of the house is need to perform because of the object of contract (house) still process of build. And it is need time or period for finishing the house building. The reason of this contract is the seller performance (house) still cannot be transfer or deliver to buyer. To keep the consent between buyer and seller in sale of house, both parties made an agreement in agreement to sell as the promise to do sale and purchase of house agreement.

For the clear analysis, writer will explain
the process of contract performance from the object of contract, method of payment, the house construction process, until the finished performance of contract.

The contract determined the subject of agreement is the house. And it is located in Kaliurang street KM. 9 Gandok, Tambakan, Sinduharjo, Ngaglik, Sleman. This house is categorized in the name of Bale Hinggil Residence Complex. The house is in the process of build. The house building will be construct if the down payment or first installment already paid. At least it would be construct after first installment.

Method of payment in this contract used the installment payment. The installment paid maximum four times. In the last installment, buyer must be paid the redemption after last installment. Seller also provide the KPR (kredit pemilikan rumah) to buyer if buyer cannot pay for the redemption. It means that, buyer may request to the Bank to fulfill the redemption. KPR facilitation only performed after buyer paid in the last installment. Thus, buyer cannot use the KPR facilitation if he did not paid until fourth installment (redemption). In this analysis buyer did not use KPR facilitation to fulfill the payment. Thus, the payment directly paid to seller.

The house construction will be finished for period of 12 month. And it is build after buyer paid the first installment. The building process also accordance with the installment payment which buyer paid. In the first installment, building process only build 30 %. The second installment, house build until 60 %. The third installment, the house provide by the roof. The fourth installment, the building process is finished, and the house fulfill by, electric, lamp, telephone, water pump and painted. And the last installment is the redemption payment. In the last installment, seller will provide the sale and purchase agreement which is conducted in AJB (akta jual beli). Process of sale and purchase of house agreement conducted in front of Land Deed official.

The house transferred after full payment of installment. And it is represent by transfer of the key of the house. The transfer should be informed around 1 month since the house already build. The seller give a transcript of transfer as the evidence of it. The guaranty of the house is 100 days after the transcript of transfer signatured.

Beside the house construction, Formula Land provides the environment maintenance and security system. It means that, Bale Hinggil residence maintenance coordinated by developer. The maintenance included for the environment maintenance, security, residence keeping, and public facilities of Bale Hinggil residence. All of these maintenance is obligation for buyer to paid. Thus, every buyer of the house in Bale Hinggil obligated to pay for maintenance of public facilities which is buyer coordinated.

In the last interviewed47, writer get an information that buyer who cannot pay the

47 Ibid., last interviewed on Saturday 9th April 2011.
installment for 3 month continually is given a sanction to pay the fine. And it is account for every late of the installment per month of late. In this late, seller still give a tolerant to pay the installment. If the late more than 5 month, seller will stop the contract, they should terminated it as null and void.

According to Mr. Alfian*, the next phase after made agreement to sell of house agreement is performed sale and purchase of house agreement. It is application in the form of AJB (akta jual beli) which made in front of Land Deed Official. But, before it perform, each parties need to finished the performance which is consent in agreement to sell of house agreement.

Sale and Purchase agreement made to transfer of the rights of the land which is sale from seller to buyer. And also it as the receipt for the buyer. AJB (akta jual beli) used to registry the transfer of tittle of the land rights which it as the legal effect of sale and purchase. The registration of land rights entitled to Sleman Land Affairs Agency.

Beside made a contract in agreement to sell, Formula land ever do the transaction without made agreement to sell of house agreement, but directly sale and purchase agreement. It is happened because of buyer will buy the example house (the house which is build as the example of the residence) by the cash payment. And it is already finished build. Thus, the transaction directly conducted in sale and purchase agreement which is made in front of Land Deed Official. It is happened because of the parties obligation can be perform as soon as the contract is made. Seller performance (house) is finished build. And buyer pay cash for the house. In this case, both parties only to do transfer of tittle.

In the research, writer is informed that certificate of rights to build arrangement has been finished. In this case, certificate rights to build already exist. Thus, it is only need to transfer of tittle on behalf of buyer name after sale and purchase of house agreement done.

From the research above, writer analyzes agreement to sell of the house agreement which is issued by developer. It is represent the principles of agreement based on Indonesian Civil Code article 1338 (3) or did not represent it?

Agreement to sell of the house agreement conducted after the meeting of consent between parties. And it is placed in the contract which is make by both of parties. In the contract determined terms and conditions of rights and obligations of parties. Contract is conducted between seller and buyer, and it is committed in agreement to sell of house agreement.

The contract determined the subject of agreement is the house, which is located in Kaliurang street KM. 9 Gandok, Tambakan, Sinduharjo, Ngaglik, Sleman. This house is categorize as Bale Hinggil Residence housing complex. The house facilities, method of payment, the building realization, transfer of

48 Ibid.,
property and guaranty those are determined as well as buyer and seller agreed.

Actually, terms and conditions of this agreement created to keep rights and obligation of each party. All of them put in conditions such as: article 1 is the subject of agreement, article 2 is the price and method of payment, article 3 is the building realization, article 4 is the condition to reform the house and specification, article 5 is the transfer and guaranty, article 6 is the security and maintenance residence cost, article 7 is the sanction, article 8 is the force majeure, article 9 is the closing. Thus, conditions of each party clearly determined on those articles, and it is should be perform by parties.

From the explanation above we can conclude that each party has give the statement of agreement to perform his promise (consent) in sale and purchase of house agreement.

After analyze terms and conditions of contract agreement to sell which is determined the rights and obligation of parties, writer get several clauses which are conducted inequity and unreasonable. Those article stated in this contract such as:

Stated in contract article 2 clause (1), (2), (5), and (6) in the matters of price and method of payment. it is the buyer obligation. In article 2 clause (1), (2), (5), and (6) stated that:

“(1). First party and second party are agreed for the price of the house which is determined in article 1 (one) for Rp..., (2). The price which is determined in clause (1) included with electricity system of ...watt, building permit (IMB), fee of transfer of title (BBN) certificate rights to build and telephone line system, (5). first party and second party are agreed in the house sale and purchase, second party pay for it by downpayment early. And the chance would be perform by installment. And maximum installment for three times before full payment. The payment by second party to first party can be transfer in account: ...,(6). First party gives a receipt complete with duty sticker as legal evidence to second party”.

Relating with buyer obligation, writer analyzes the seller obligation also which it stated in article 5 clause (1) and (2), in transfer and guaranty which is stated that:

“(1). The definition of transfer in this context is the transfer of building result which finished physically (all material and specifition, sketch similar with the consent, the house already build, painted, electric, lamp, telephone, water pump) (2). As long as not committed in additional agreement (addendum), first party would be finished the house building before on date... and first party obligated to inform writtenly to second party. if it is impossible writtenly, may used a text (short massage) by mobile phone. In period arround of 1 (one) month after the information, the house should be transfer to second party which is followed by transfer of the house key. For the transfer, each party would be signed the transcript of house transfering. And second party obligated to receive the transfering from first party.”
From the explanation of article above, we can know that each party already stated the performance to be perform. Buyer pays seller for the house and seller transfer the house to buyer.

In the seller side, it has obligation to transfer and also to guarantee (vrijwaring) the house from any claim or burden. It is based on article 1474 of ICC, which is stated that seller shall has two main obligation, those are to deliver the property and to guaranty it. The meaning of deliver in this article is devided into two kind of delivery such as : juridical transfer (juridische levering) and real transfer (feitelijke levering). Thus, compare between ICC to this article 5 clause (1) and (2), seller performance conducted unreasonableness performance as well as the consent of parties.

In article 5 clause (1) and (2) the transfer of property conducted only by the real transfer, which is represent by transfer the key of the house. And it is happened after the house already finished.

In the sale and purchase of house agreement, the transfer is not only conducted real transfer (possession), but also it is need the transfer of title (ownership rights) as the juridical transfer⁴⁹. Because of the house is the immovable property rights⁵⁰. It means that seller did not fulfill enough his performance to buyer because of transfer of property did not completely conducted. On that article did not clarified any conditions that buyer will receive certificate rights to build of the house. And it is undetermined the time (when) or the place (where) buyer get his certificate on behalf of buyer name. Thus, related with the conditions of article 5 clause (1) and (2) of this contract, the consent of seller is breach by lack of performance in the transfer of title. In this case, parties must be determined the time and the place of transfer the certificate after finished performance.

Based on new regulation of Act No. 5 year 1960 of Agrarian Law and Government regulation No.10 year 1961 stated that people who performed sale and purchase of the land (immovable property) should be proven by authentic deed or private deed which is made by Land Deed Official. It means that seller performance is not enough for transfer of the key of the house, but also it is need the transfer of the authentic deed (certificate of rights to build).

In this case seller performance is opposite with buyer performance, which buyer is pay the for the agreed price. And the payment included for the fee of transfer of title certificate rights to build. But, seller did not determined the transfer of title of certificate rights to build.

From explanation above we can conclude that sale and purchase of house agreement conducted imbalance performance between buyer and seller. Thus, seller obligated to transfer of title as juridical transfer of ownership rights to buyer.

From the chapter above explained that sale and purchase agreement is obligatory characteristic. Because this agreement is rise an obligation to parties to performed\(^1\). It means that, seller obligated to transfer or deliver the property. Thus, based on obligatory characteristic, seller not only transfer of property, but also must be transfer of ownership rights of the property (certificate of rights to build).

As well as stated in article 1482 of ICC such as “the obligation to deliver a property comprises everything, that belongs thereto and is intended for its permanent use, including the certificates of ownership, if any”.

Beside those article, writer also gets clauses which is conducted inequity and unreasonable. It is stated in article 6 in the matters of security system and environment maintenance. That article stated such as:

“(1). After the transcript of transfer the house signatured by both of parties, the second party has the obligation to pay the maintenance cost of public facilities, cleanliness, and security system of the residence. Those are should be coordinated by first party, even the house domiciled or not.
(2). The maintenance cost of public facilities, cleanliness, and security system of the residence is Rp.../month, and for later will be determined as well as parties agreed in meeting.
(3). In the matters of second party late to pay the cost of maintenance public facilities, cleanliness, and security system of the residence. First party has rights to stop the electricity sytem and telephone line system of second party until second fulfill the payment which is rise.”

The unreasonableness and inequity conducted in clause (1) and (2) of article 6. It is happened unproportional performance in the rights and obligation. The unreasonable stated in obligation of buyer to pay the cost of maintenance public facilities, cleanliness, and security system of the residence which is manage by seller. In that article did not clarify the seller’s obligation after the buyer pay the cost. What is the recompense to buyer, If seller did not fulfill his performance in present the security and maintenance of residence ? This question rises, because of buyer has an obligation to pay the maintenance, and he possible to get sanction if he late to pay it. This consequences opposite with the seller obligation. Seller performance did not comprehensible determined to maintenance and keep the security. Thus, in this case there are no fairly exchange in performance.

The inquity performance also stated in that article. Specifically in clause (3) of article 6 such as:

(3). In the matters of second party late to pay the cost of maintenance public facilities, cleanliness, and security system of the residence. First party has rights to stop the electricity sytem and telephone line system of second party until second fulfill the payment which is rise.”

In this case, according to writer conducted inequity performance. Because of the sanction which is applied in this article contradict with the tittle of article. Showed in the word of “first party has rights to stop the electricity sytem and telephone line system”. There is no correlation within maintenance system and the sanction which is applied. We know, that electricity system and telephone is important things in the house. Thus, first party conducted inequity performance in appilicated the sanction article 6.

According to doctrine of good faith, the contract must be perform by good faith. In this matters good faith is the equity. This statement according with Hoge Raad in his artist de labourer arrest that they stated “the contract performance must be good faith and it should be perform in equity. It means that Hoge Raad make the similarity between good faith and equity. Thus good faith in this case is that contract should be perform in equity and reasonable\(^{52}\).

Based on merchantile community in the business intercouce or commercial relationship. They regulated a good faith in the commercial transaction. The focus of it is in mutual consent rights or resiprocity. That the commercial transaction must be done fairly exchange and balance. Thus, based on merchantile law, good faith is the fairness of exchange, and resiprocity principle which is placed as basic principle. Thus, the performance in article 6 which is performed unreasonable and inequity similar with the unfair exchange and imbalance as well as good faith.

Those statement also supported with the act in Germany and Deutch which is interpret the good faith on contract perform. Both of state make available contract in good faith and it is interpret according to the court which is court give a interpretation as reasonable and equity.\(^{53}\)

It is similar with the article 1339 of ICC which is stated about an equity in contract performance such as: “an agreement not only binding to the matters that explicitly stated therein, but also everything that according to the nature of the agreement, obligated by courteousness, customary or law”.

Also writer gets unreasonableness and inequity performance in article 7 in the matters sanction of parties. Stated in this article such as:

“(1). Second party who did not fulfill his obligation according to article 2 clause (4) for three (3) month continually will be get the sanction of fine ...% / month.
(2). If did not fulfill his obligation for 5 (five) month continually , this agreement is null and void. And first party should pay back the payment after reduced administration fee.
(3). If the paying of the debt done by banking credit, and this credit rejected, second party must be pay cash for the debt. If banking credit

\(^{52}\) Ridwan Khairandy, Op., Cit., p. 208
\(^{53}\) Ibid., p. 217
rejected, and second party cannot pay the debt cash the agreement should be null and void. And first party should pay back the payment after reduced administration fee.

(4). First party who late to transfer the house according to article 1 above should be give the compensation Rp…/ day of the late.

Based on law, the agreement made accordance to consent of parties, and it is cannot be void unilateral. In this article, seller tried to void the agreement by unilateral if buyer cannot fulfill the obligations which is stated. Thus, this agreement is voidable. Unfortunately the cancellation of agreement done automatically by seller without the statement agreement from buyer. It is opposite with article 1338 (2) of ICC provides : “an agreement is not revocable except with the consent of both parties, or for the reasons that by the law are sufficient there for”.

Also this regulation supported by the supreme court decision in his decision No. 244/K/Sip/1973 on September 24th 1973 which is decide that agreement cannot be revocable except with the consent of both parties or any reasons that by the law are sufficient there for. Thus, in this article 7 conducted the unreasonableness and inequity in the unilateral decision which stated by seller.

This case is similar with the case Sperry Rand Arest, HR April 29th 1983, NJ 1983, 627. Hoge Raad give a statement that the condition to void a contract unilateral is contradict with good faith. This statement applied by Hoge Raad in the case Sperry Rand Arest, HR April 29th 1983, NJ 1983, 627 which is Hoge Raad give a limitation on the contract perform as the good faith implementation. And the limitation is related with the void of contract which is conducted unilateral. Thus, in this case, the void of contract unilateral is inequity“.

The unreasonableness and inequity clause also conducted in article 8 in the matters of force majeure. This article stated that :

“force majeure or overmacht is the condition of force which is rise out of directionary and it cannot be predictable as soon as the contract signatured. The matters of force majeure gives an impact to interfere the house building and / destroy the house building before it transfer to second party, thus first party and second party agreed to settled this problem by deliberation. And any risk which is rise from force majeure will be guarantee by both of parties”.

Actually, this article contradict with the regulation which is provide in article 1244 ICC such as :

“If there is any reason for such, the debtor must be punished to compensate for the costs, damages and interests, if he cannot prove that the unfulfilling, or the unpunctual fulfilling of the agreement was caused by an unpredictable fact, and cannot be imputed on him, although he has no bad faith”.

Also in article 1444 of ICC provides about force majeure such as :

54 Ibid., p. 249
“If a certain property which serve as the object of an agreement, is obliterate, cannot be sold or disappear, as such that it is entirely unknown whether the property is still exist, then the agreement is eliminated, provided that such obliteration or disappearance is not the fault of the debtor and before he neglects to submit it”.

According to both article 1244 and article 1444 of ICC, developer cannot be influence any risk which is rise form force majeure toward second party. It is because of the property did not transfer yet to second party. Thus, there is no responsibility to second party to guarantee it. The responsibility of the property should be on behalf of first party.

This condition of force majeure also applied by *Hoge Raad* in the case of *Strok v. NVHaarlemsche Katoen Maatschappij*. In this case, *Hoge Raad* give a sentence according to article 1374 (3) and article 1375 BW that “an agreement not only binding to the matters that explicitly stated therein, but also everything that according to the nature of the agreement, obligated by courteousness, customary or law”. It means that contract must be in equity. Thus, the force majeure should be restricted because of good faith.

From the explanation above we can conclude that, several clauses of sale and purchase agreement which is made by developer still conducted unreasonableness and inequity. It can be perform by lack of good faith.

Good faith principles provides in article 1338 paragraph (3) of ICC, which is stated that all agreement must be performed in good faith. Good faith in contract performance is one of legal institution (*rechtssfiguur*) which it performance is according to time, place, and people persepctives.

According to P. L. Wery, meaning of good faith performed which is stated in BW it has similar meaning with the concept of good faith in Roman law. Also *Hoge Raad* tries to interpreted good faith in his sentence of *Hengsten Veregining v. Onderlinge Paardenen Vee* case on February 9th 1923. he stated that contract must be performed in good faith, and that is must be performed by reasonableness and equity (*volgens de eisen van redelijkheid en blijkheid*). Actually, BW used the terms of reasonableness and equity to applied good faith than honesty in fact.

Basically, article 1338 (3) of Indonesia Civil Code continued with article 1339 of ICC which is to make clear it. That an agreement not only binding the matters that explicity stated therein, but also to everything that according to the nature the agreement, obligated by courteousness, customary or law. Thus, we can conclude that phase of contract to make it binding which is according to good faith such as : 1. The contents of contract, 2.
Reasonableness and equity, 3. Customary, and 4. Law.

Actually, on contract performed prefered the reason of objective standard. It is because of statement from reasonable commercial standard of fair dealing, which it is performed reasonableness and equity. Reasonableness in this context should the indicate that an action is sufficiently justified in law, and it is appropriate reason was available to justify the action in question, regardless of the actor’s motive⁵⁹.

To know paramater of good faith, it should be conducted in each phase of contract such as from pracontractual phase, contractual phase, and postcontractual phase⁶⁰. Because of it the good faith is performed.

In contract law, good faith devided into three function⁶¹. First is, entirely contract must be iterprated as a good faith. Second is, the additional or complement function. Third is, restricted or nullify function. This function may applied if there is in contract the deviation toward pacta sunt servanda.

C. The Legal Effect of the Contract Agreement to sell of the house which is conducted Unreasonableness and Inequity

Basically, article 1339 of ICC gives an explanation that phase of contract to make it binding which is according to good faith is depend on: 1. The contents of contract, 2. Reasonableness and equity, 3. Customary, and 4. Law.

However, after we analyze this agreement to sell, there is an article in this contract show the lack of good faith principle. And it is related with the parties performance which is the performance is obligation for each parties. After analyze the contract, writer gets several contents of the contract which is conducted unreasonable and inequity. Those articles are article 2 in the price and method of payment, article 5 in the transfer and guaranty, article 6 in the security and maintenance residence cost, article 7 in the sanction, article 8 in the force majeure.

From this research, writer tries to analyze the legal effect of this contract, if the contract which issued conducted unreasonable and inequity. And also what is the legal consequences of this contract?

In contract law, good faith divided into three function⁶². First is, entirely contract must be iterprated as a good faith. Second is, the additional function or complement function. Third is, restricted or nullify function. These function may applied if there is in contract the deviation toward pacta sunt servanda. The implementation of contract interpretation only taken by the court. How ever the implementation of these function of good

⁵⁹ Stenven J. Burton, Eric G. Andersen, Op., Cit., p. 85
⁶⁰ Ridwan Khairandy, Op., Cit., p. 190
⁶¹ Ibid., p. 216-264
⁶² Ibid., p. 216.
faith still create the problems in the court proceeding\textsuperscript{63}. The first function is the contract interpret as a good faith. It means that the contents of contract and consent of parties must be interpreted clearly. It is accordance with the article 1338 (3) of ICC which is provide that all agreement must be performed in good faith. It is similar with the Netherland law system that interpreted a contract is in good faith. Thus, every content of the contract must be interpreted as well as reasonable and equity.

For the example is, the contract interpretation must be closed toward the consent of the parties, and it is should be not interpreted literally (\textit{letterlijk}). It means that, the interpretation used the consent theory\textsuperscript{64} (historical-psycological) as the basic principle to interpretate the contract\textsuperscript{65}. If in common law system, consent theory interpret in the element of intentions of parties. Based on article 1383 of BW (old), the contract interpretation not only conducted in literally but also depend on customary. Thus, to interpretate the contract as a good faith is not only perform in the literally, consent of parties, but also customary of society.

However Netherland BW (new) did not regulated anymore the article which is stated the contract interpretation. It happened because of article of contract interpretation is too general. Thus, the contract interpretation is on behalf of the development in the court proceeding or since\textsuperscript{66}. In conclusion, to interpret the contract as a good faith only taken by the court. And it is on behalf of court proceeding to interpret the contract performance in good faith.

The second function is, the function to add. It means that, good faith can add to the content of the contract and words to complement the contract. It is used to make clear rights and obligation of parties in the contract performance which both are did not clearly determined.

The third function is, the function to restricted and nullify. It means that the contract may put in aside if the contract performance unreasonable or inequity. Because of unreasonable or inequity, the contractual performance can be restricted, or even nullified on behalf of good faith. Several scholar still refuses to this function. Because of Indonesia did not follow \textit{iustum pretium} principle in the Indonesian Civil Code. The objection of this function not only come from scholar, but also because of it is contradict with article 1320 of ICC and article 1338 (1) of ICC (\textit{pacta sunt servanda}).

Standardize contract is the contract which is made because of the position of party in the business. Generally, the party in his business act to determined clauses in a contract which is made (\textit{legio particuliere wetgever}).\textsuperscript{67} The

\textsuperscript{63} Ibid.
\textsuperscript{64} Ibid., p. 218.
\textsuperscript{65} Ibid., p. 227
\textsuperscript{66} Ibid., p. 220.
standardize of contract is prevailed and legal to perform by parties. But, it is need to objective in the clauses of contract. Generally, the performance of it is imbalance performance, even in reasonableness of clauses or in obligation of parties\textsuperscript{68}.

The implementation of good faith principle performed, if in the standardize of contract conducted unreasonable and inequity. And it is happened in the contract performance. The parameter of good faith in standardize of contract is the equity\textsuperscript{69}. In Indonesia the standardize of contract regulated in Act No. 8 year 1999 about Consumer Protection. And it is clear determined in article 18 clause (1), (2), and clause (3)\textsuperscript{70}. This regulation provides that standardize of contract should be performed in legal or permissible cause. If it does not performed (breach article 18 clause (1) and (2)), according to article 18 clause (3) the contract should be null and void.

In conclusion, the function of restricted or nullified can be performed if the contents of the contract unreasonable or inequity. And it is on behalf of the judge interpretation in court proceeding. Thus, the judge need to examine the contract performance.

In the good faith principle on contract perform applied the reasonable and equity. Both of these are need to perform in every agreement. Writer believes that the agreement to sell is performed as well as parties consents. But in this case, it happened the condition where it is conducted the unreasonable and inequity in the contents of contract.

The contents contract are not conducted as a good faith. It is undoubtedly happened in terms and conditions of article 2 in the price and method of payment, article 5 in the transfer and guaranty, article 6 in the security and maintenance residence cost, article 7 in the sanction, article 8 in the force majeure.

Those condition happened because of conducted unbargaining position between parties. And it is make the contract performance is unreasonable and inequity. Based on first function of good faith, the contract performance must be interpret in good faith. It means that, only the judge of the court which is has the competency to interpret it.

In this case, the judge must be research and interpret the clauses of contract which is unreasonable or inequity. If it is proven, the clause of the contract can be restricted or nullified. Based on third function of good faith, the unreasonable and inequity must be restricted and nullified to performed.

In conclusion, this agreement to sell still run and legally binding as well as possible. But in this case, buyer may sued it to the court because of imbalance performance. And the judge of the court may examine the contract on behalf of good faith principle. If it is proven imbalance condition between buyer and seller because of imbalance condition, the

\textsuperscript{68} Ibid., p.101.
\textsuperscript{69} Ibid., p.103.
\textsuperscript{70} Ridwan Khairandy, Op.,Cit., p. 248-249.
judge must restricted or nullified the contract on behalf of good faith principle. Good faith is the instrument of the judge to restricted or nullify the contract toward the pacta sunt servanda\(^7\). Moreover, good faith becomes a super eminent principle in contract law\(^7\). And it is depend on the situation and condition of the court proceeding.

**Conclusion**

Basically, a contract made by principle freedom of contract. And it is must be based on good faith principle. Good faith provides in article 1338 (3) of ICC. According to this principle, an agreement must be conducted in reasonableness and equity. In the contract *pengikatan jual beli* of the house which writer research is conducted unreasonable and inequity. The contract performed unfairness performance between parties. The writer believe if the seller and buyer still performed the contract well, but unfortunately it is conducted unfairness in performance. It is clear determined in article 2, 5, 6, 7, 8 of the contract *pengikatan jual beli* of the house. Those article consist of unreasonable and inequity condition which describes in method of payment of the house, the transfer of property which is unclerly determined, the security system and maintenance, the sanction of parties, and force majeure. This condition performed because of imbalance bargaining between parties. Thus, the writer believes if the contract committ unfairness. From the explanation above, we can conclude that this agreement conducted lack of good faith principle. Thus, according to the writer this contract *pengikatan jual beli* of the house is unreasonableness and inequity.

The legal effect of the contract which is performed unfairness is the judge must apply the function of good faith. the first is, contract must be interprated based on a good faith. Second is, the additional function or complement function. Third is, restricted or nullify function . Thus, according to the function of good faith, the contract must be reasonable and equity. And each parties must performed the standard of fair dealing and justice in contract implementation.

Agreement is a promise which is rise legal consequences in rights and obligations and also it is establish a mutual relationship between parties. Thus, every party who bind his/her self to an agreement, should be know or understand any terms and conditions which is put it on contract. And also parties should be care in the drafting of contract before it perform. It is hope from the unfairness in contract performance. And also in the contract drafting, the content is prohibited to write ambiguities. Thus, the contract must be write consistent with the meaning of that contract which consent by parties. The writer hopes to parties which are consent in standardize of contract must be carefully. However a

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72 Ibid.
little problems which is careless will become a problem in the contract performed. And it is will make losses to each party. It is hoped to every parties cares to prefer good faith on contract performance, which is care and intention in precontractual until contractual performance. Thus, the contract performance is possible in fairness dealing.

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