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DEFAULT SOLUTION ON SHARIA HOUSING IN THE VIEW OF PRIVATE LAW AND ISLAMIC LAW

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Abstract: *Sharia housing with sharia developer system using cash and in house method without involving the bank is thriving, because in the advert mentioned no fines and confiscations. While every financing there is a possibility of contract breach, such as La Tansa Cluster Malang Housing, there are several users doing breach of contract. This breach of contract can cause problems between developer and user so that solution is needed. The goals of this research are determining factors that led to the breach of contract and the efforts to resolve trade breach of contract in La Tansa Cluster Malang in terms of civil code and Islamic laws. This research uses empirical legal research with a sociological juridical approach, a concept approach, and a legislative approach. Data collected by interviews with developer of La Tansa Cluster Malang and the user, and then analyzed using qualitative descriptive analysis methods. The results showed that breach of contract occurred in La Tansa Cluster Malang due to lack of user candidate analysis, postpone payments, family deaths, business failures, serious illness, and inaccurate financial predictions. According to civil code, the efforts to resolve contract breach of sharia housing trade in La Tansa Cluster Malang are doing deliberation, communication, time extension, PPJB canceling (according to the Article 1338 paragraph (2) of Civil Code), and money returning (according to Article 1267 and Article 1248 of Civil Code). While the efforts to resolve the breach of*

contract in La Tansa Cluster Malang according to Islamic laws are doing deliberation or reconciliation (shulh), communication, time extension (according to surah al-Baqarah (2): 280), PPJB canceling (based on fasakh iqalah), and money returning (based on dhaman al 'aqdi).

Keywords: Breach of Contract, Trade, Sharia Housing

INTRODUCTION

Sharia housing is a housing product based on sharia principles that is currently developing. In sales, it offers two payment methods, namely cash (cash) and credit. The credit system in Islamic housing is divided into two kinds, namely the credit system and the credit system with involving a third party (bank) commonly known as House ownership credit (KPR) of Islamic banks and credit with sharia developer system without involving banks.

Home loans with a sharia developer system can be an alternative solution for people who want to fulfill their home needs in accordance with sharia principles,¹ because the transaction does not involve the bank, without insurance, the house being traded is not guaranteed, no fines, confiscations, and penalties.

Housing with a sharia developer system without involving a bank, is starting to develop in Malang City, because many housing developers are interested in offering sharia housing with this system. One of them is *La Tansa Cluster* as a sharia housing estate with an individual business form which was founded in 2015 by H. Aang Fajar Syafi'i. *La Tansa Cluster* uses a sharia-based payment method that avoids usury, and provides two payment options, namely cash and in-house (installment) with a sharia delivery system, so that there is no bank, withough BI's (Bank of Indonesia) checking, insurance, fines, and confiscation.²

The purchase of housing units in *La Tansa Cluster* is carried out with a written preliminary agreement called the sale and purchase binding agreement (PPJB).³ The buyer's obligations under PPJB can be concluded that every buyer

¹ Hidayah, M. R., Nawawi, K., & Arif, S. (2018). Analisis Implementasi Akad Istishna Pembiayaan Rumah (Studi Kasus Developer Property Syariah Bogor). *Jurnal Ekonomi Islam*, 9(1), 1-12. p.4

² Akhmad Wahyudi, *wawancara*, (Malang, 6 Oktober 2019).

³ PPJB is an agreement between development actors and everyone to carry out the sale and purchase of houses or flats that can be carried out by development actors prior to construction for flats or in the process of construction for single houses and row houses stated in a notarial deed (Regulation of the Minister of Public

is obliged to pay the mortgage after making an advance payment. However, of the total housing units of 128 housing units that have not been sold, 47 units, while for users who are still paying installments as many as 27 people. There were 7 users who bought in-house defaulted, 2 people were unable to carry out their obligations to pay the house installments, 4 people were unable to pay the installments on time, and 1 person ended the house purchase agreement.⁴

A default is a broken promise to the agreement, where every agreement will give birth to rights and obligations for the parties that made it.⁵ Thus, the agreement made by the developer and the user causes legal consequences, such as the developer being obliged to provide the house key after the down payment and the house is completed and the developer has the right to receive payments in the form of advances and installments from the user according to the agreed period of time. On the other hand, the user has an obligation to pay the down payment and installment of the house in accordance with the agreement. The user also has the right to get his house key after paying a down payment and the house is completed.

The agreement agreed upon by the developer and user is regulated in the Article 1388 paragraph (1) of the Civil Code which states that all agreements made in accordance with the law apply as law for those who make them, so that everyone is obliged to respect the contents of the agreement as per the law; thus, it must be obeyed.

Obligations in an agreement that are not fulfilled will cause a problem, such as the developer will have difficulty in regulating the turnover of capital, because this housing uses the developer's personal capital.⁶

The non-fulfillment of the user's obligations listed in the PPJB will also cause problems for the user, because he will be afraid of losing his house when he does not fulfill his obligations to pay the mortgage. Reasonably, in PPJB, it is stated that when the buyer is unable to fulfill his obligation to pay in-full for each stage of payment to the seller more than 3 times the specified time, the seller has the right to cancel this sale and purchase. However, in its

Works and People's Housing of the Republic of Indonesia Article 1 number 2 No. 11/PRT/M/2019 concerning the Preliminary Agreement System for the Sale and Purchase of Houses.

⁴ Akhmad Wahyudi, *wawancara*, (Malang, Februari 2020).

⁵ Zulfikar, A. A. (2020). Kajian Yuridis Tentang Penyelesaian Sengketa Perjanjian Pengadaan Barang Dan Jasa Pemerintah Perspektif Hukum Ekonomi Syariah. *Widya Pranata Hukum: Jurnal Kajian dan Penelitian Hukum*, 2(1), 1-18. 3

⁶ Ang Fajar Syafi'i, *interview*, (Malang, 7 Februari 2020).

advertisement, *La Tansa* Cluster says that it does not use a fine and confiscation system, and this can become a dispute between the parties.

This study was carried out to determine the factors that caused default and efforts to resolve the default of buying and selling in *La Tansa* Cluster Malang in terms of the Civil Code and Islamic Law.

RESEARCH METHOD

This study was empirical legal research using three research approaches, namely sociological juridical approach, conceptual approach, and statutory approach. In collecting data, we conducted interviews against the *La Tansa* Cluster Marketing Office, Malang. Then, the data sources used consisted of two types, namely primary and secondary data. The sources of primary data was obtained by conducting interviews with *La Tansa* Cluster Malang and the buyer (user). Meanwhile, the secondary data used was a literature review that discussed the Civil Code, agreements, buying and selling, *fiqh mu'amalah*, and dispute resolution.

After the data were collected, then the editing process was carried out by checking the suitability of the data obtained with the research, completeness of the data, and the accuracy of the data. We also performed the classification according to the formulation of the problem. After that, verification was carried out by re-checking the truth of the primary data and secondary data. After the primary data were verified, the primary data were adjusted to the Civil Code and Islamic law regarding agreements and dispute resolution. Furthermore, we analyzed the existing problems using a qualitative descriptive analysis method, and in the last stage, the answers from the problem formulation were made into a conclusion.

DISCUSSION

FACTORS AFFECTING THE INCIDENT OF DEFAULT IN LA TANSAL CLUSTER MALANG

The process of selecting prospective users at *La Tansa* Cluster Malang did not regulate the BI checking process, because BI checking instrument *or* SLIK (System of Credit Information Service) that was highly important to identify these customers had turned out to be not accessible to anyone as in the

Article 14 paragraph (1) about Financial Services Authority Regulation Number 18 /POJK.03/2017 concerning Reporting and Requesting Debtor Information through Financial Information Service System which stated that parties who might request Debtor Information were whistleblower; debtor; LPIP; and other parties.

The inaccessibility of BI checking by Islamic housing developers had encouraged a selection of prospective users in buying and selling sharia housing in *La Tansa* Cluster to use a simple interview method. The interviews were not carried out by checking the statements of prospective users.

Without checking the statement from the prospective user, there were several 5C principles (character, capacity, capital, collateral, and conditions) that were not being applied, namely the principle of character and capacity. For example, in assessing character principles, the developers verified data only from interviews; without looking at the reputation of potential users in their work or business environment, and considering BI checking. As though the character and behavior of a person is an aspect of the assessment that is quite difficult to do.⁷ Meanwhile, the principle of capacity was not applied, it can be seen from two people whose default are users who have just started their business, even though in the application for mortgages, there is usually a minimum working period of 2 years.⁸ This lack of analysis of potential users was one of the factors causing default, which caused its inability to predict future facts during the credit period.⁹

Furthermore, the external factors that caused default in *La Tansa* Cluster Malang were intentional elements and unintentional elements. This intentional element was that there was a user who did not immediately pay off the mortgage payment, citing that he did not have fee, but in fact he still had the ability to pay, because he has more movable property. The users' attitude can affect the occurrence of a default. A study stated that one of the factors that caused default was the attitude of customers who did not want to pay for

⁷Agung Herutomo, *Rahasia KPR Yang Disembunyikan Para Bankir*, (Jakarta: PT. Elex Media Komputindo, 2010),133.

⁸D. Leni, S. Anggraini, & M. Muharir. (2021). Mekanisme Pembiayaan Kredit Pemilikan Rumah Syariah Bagi Masyarakat Berpenghasilan Rendah Pada PT Bank BRI Syariah Cabang Kapten A Rivai Palembang. *JIMESHA: Jurnal Ilmiah Mahasiswa Ekonomi Syariah*, 1(1), 21-30. 27

⁹Ismail, *Manajemen Perbankan dari Teori menuju Praktik*, (Jakarta: Kencana, 2013), 125.

the credit.¹⁰ The attitude of users who delay the payments can be the impact of a lack of prudence in verifying the character of prospective debtors.¹¹

The delay in payment made by the user reflects the attitude of not applying the principle of good faith as stated in the Article 1338 paragraph (3) of the Civil Code which states that approval must be carried out in a good faith. It means that the implementation of the agreement must be in accordance with propriety or justice. The Appropriateness in this case is seen from the implementation in accordance with the contents of the existing agreement, while justice can be seen from whether the implementation of the agreement harms one party or it is not in accordance with the contents of the agreement.¹² This means that both the developer and the user must have good faith to carry out the substance of the agreement, both in terms of decency and fairness. The implementation of the agreement by delaying the payment has an indication that the implementation of this agreement is not in accordance with the propriety, because it is not in accordance with the contents of the agreement that the payment should be paid on-time. Delaying the payment means that the implementation of this agreement is not in accordance with justice, because it is detrimental to the developer.

As if he can afford the mortgage, but he delays the payment, then that includes being unjust to creditors (developers).¹³ As Rasulullah PBUH says:¹⁴

مَطْلُ الْغَنِيِّ ظَلَمٌ

On the other hand, the external factors were accidental elements, including the death of user's family, the user's business failure, the user experiences serious illness, and the user's financial predictions were less precise. The death of the user's family included the occurrence of default due to no fault. Due to the death of the family of one of these users, it was not an act that was done knowingly and intentionally.¹⁵

¹⁰ K. Maulidatul. (2019). Analisis Faktor Faktor Yang Menyebabkan Kredit Bermasalah Pada Koperasi Serba Usaha (KSU) Syariah Permata Barakah Purwosari. *Jurnal Mu'allim*, 1(2), 279-298.

¹¹ S. D., Indaswari, (2020). Penyelesaian Wanprestasi Dalam Perjanjian Musyarakah (Studi di BPRS Bhakti Haji Malang). *Dinamika: Jurnal Ilmiah Ilmu Hukum*, 26(5), 671-685. 683

¹² Miftah Arifin. (2020). Membangun Konsep Ideal Penerapan Asas Iktikad Baik dalam Hukum Perjanjian. *Jurnal Ius Constituendum*, 5(1), 66-82.

¹³ M. Khomayny & Abdullah, M. W. (2020). Perlakuan Denda Pembiayaan Berbasis Konsep Al-Adl Dalam Menjaga Eksistensi Bisnis Bank Syariah. *Jurnal Iqtisaduna*, 6(2), 91-103. 98.

¹⁴ Muhammad Fu'ad Abdul Baqi, *Shahih Bukhari Muslim*, (Jakarta: PT Elex Media Komputindo), 578.

¹⁵ Yahman, *Karakteristik Wanprestasi & Tindak Pidana Penipuan*, (Jakarta: Kencana, 2016), 84.

The user's inability to do business had found him difficult to pay his mortgage. This happened to two users who had just started their business. This problem arises due to the debtor's lack of ability in managing his business.¹⁶ The failure of the user's business which causes the user unable to pay the house installments, even though they actually want to pay the installments means including external factors in the form of an accidental element, namely the debtor is willing to carry out obligations according to the agreement, but the company's ability is relatively limited, so that they cannot pay the installments.¹⁷ The user's inability to pay the installments due to his business can include a default due to negligence, where a perpetrator knows the possibility of consequences that harm others.¹⁸ When doing a business, the user will be able to predict the possibilities that occur in his business that can harm other people, especially developers.

Severe pain experienced by the user is one of the factors causing default in *La Tansa* Cluster. Severe pain experienced by this user is one of the causes of non-performing loans, in the form of personal disruption of the debtor due to illness.¹⁹ The pain experienced by this user interferes with the user's personal; he becomes unable to work and has to spend a lot of fee for medical expenses, so that he has difficulty paying the mortgage.

The non-payment of home purchase installments, due to illness experienced by the user which causes limited finances, including external factors in the form of accidental elements, namely the debtor is willing to carry out the obligations according to the agreement, but the ability is very limited, so that he cannot pay the installments,²⁰ because the user actually wants to pay, but due to circumstances that make it impossible to pay, the user cannot pay the installments. Severe pain experienced by the user is the reason for the default, because it is without negligence. The pain experienced by this user is not an act that was done knowingly and intentionally; or an act where a perpetrator knows the possibility of consequences that harm others (negligence).²¹

Incorrect financial predictions from users is one of the factors causing default in *La Tansa* Cluster. The user has not been able to make installment

¹⁶ H.R. Daeng Naja, *Hukum Kredit dan Bank Garansi*, (Bandung: PT Citra Aditya Bakti, 2018), 322.

¹⁷ Ismail, *Manajemen Perbankan dari Teori menuju Praktik*, 125.

¹⁸ Yahman, *Cara Mudah Memahami Wanprestasi dan Penipuan dalam Hubungan Kontratul Komersial*, 84.

¹⁹ Subagyo, *Teknik Penyelesaian Kredit Bermasalah*, 53.

²⁰ Ismail, *Manajemen Perbankan dari Teori menuju Praktik*, 125.

²¹ Yahman, *Cara Mudah Memahami Wanprestasi dan Penipuan dalam Hubungan Kontratul Komersial*, 84.

payments for home payments, because the user's financial predictions are not correct, including external factors in the form of an accidental element causing non-performing loans, namely the debtor is willing to carry out the obligations according to the agreement, but the ability is limited, so that he cannot pay installment.²² The user's financial inaccuracy, including default due to negligence is an act where a perpetrator knows the possibility of consequences that harm others,²³ because when predicting his finances, the user can know the possibilities, such as his finances do not go as expected, so that it can harm other people, especially developers who are waiting for installment payments from the user.

SOLUTION FOR DISPUTES IN LA TANSALAN CLUSTER, MALANG VIEWED FROM CRIMINAL LAW

The process of buying and selling houses in *La Tansalan* Cluster Malang is carried out with an agreement between the developer and the user as outlined in the binding sale and purchase agreement (PPJB). The application of the PPJB is because the entire sale and purchase price has not been paid in full, or the land certificate is in the process of being completed by the competent authority, while the seller and the buyer have agreed to carry out a sale and purchase transaction.²⁴ In *La Tansalan* Cluster Malang, the payment for the house price along with the land rights is not paid directly. The unpaid house price and land rights have made developers and users unable to make AJB, and making PPJB as a solution to this problem.

In this PPJB, there must be achievements that must be carried out by the parties. In the Article 1234 of the Civil Code, the engagement is intended to give something, to do something, or not to do something, so that in this PPJB, the achievement is to give something, namely the user is obliged to pay off his house and the developer is obliged to give the house, land, and administration to the user. The obligations of developers and users are stated in PPJB; one of which contains the price and payment, for the remaining payment starting on the date (.....) an installment column is provided whose

²² Ismail, *Manajemen Perbankan dari Teori menuju Praktik*, 125.

²³ Yahman, *Cara Mudah Memahami Wanprestasi dan Penipuan dalam Hubungan Kontraktual Komersial*, 84.

²⁴ C. N. Atlantic. (2020). Pembatasan Kebebasan Berkontrak dalam Perjanjian Pendahuluan Jual Beli Rumah. *Jurnal Education and Development*, 8(1), 99-99. 101.

amount is based on the selected period (6 months/12 months/18 months/24 months).

The obligation to carry out the performance in the form of payment of the house installments cannot be carried out (default). The achievements that occurred in *La Tansa* Cluster were not carried out, namely seven people who defaulted classified as one person ended the agreement, four people were late in paying the house installments, and two people were unable to pay the installments house until the end of the agreement.

The default on the sale and purchase of sharia housing that occurred in *La Tansa* Cluster Malang was resolved with several efforts, including the first communication between the developer and the user. Some efforts to resolve defaults with this communication include negotiation or consensus deliberation as a form of social interaction when the parties involved try to resolve different and conflicting goals with others.²⁵

By resolving the default by negotiation (*musyawarah mufakat*), the parties have implemented the contents of PPJB number 13 which states that when there is a difference of opinion between the seller and the buyer, both parties agree to resolve it by deliberation and consensus. It means that they have carried out the agreement in resolving the dispute by deliberation and consensus with the principle of good faith which indicated that they have fulfilled the principle of good faith in the form of propriety.

The inclusion of a deliberation dispute resolution in the PPJB shows that this agreement provides preventive legal protection, namely preventing a dispute from occurring.²⁶ Meanwhile, the implementation of dispute resolution by deliberation and consensus in accordance with the contents of PPJB shows that the implementation provides repressive legal protection, namely to resolve a dispute.²⁷

The second effort after communication between the developer and user is to provide an extension of the payment period. The grant of this time extension is based on an agreement between the user and the developer. With

²⁵ Pertaminawati, H. (2019). Bentuk Sengketa Ekonomi Syariah dan Penyelesaiannya. *DIRASAT: Jurnal Studi Islam dan Peradaban*, 14(02), 59-83. 74

²⁶ Philipus M. Hadjon, *Perlindungan Bagi Rakyat Indonesia*, (Surabaya, PT. Bina Ilmu, 1987), 2.

²⁷ Philipus M. Hadjon, *Perlindungan Bagi Rakyat Indonesia*, 2.

an agreement, the agreement is already binding and has legal consequences, so that rights and obligations arise between the parties.²⁸

The extending of the payment period means that the principle of good faith has been applied, where in obtaining his rights, a creditor must pay attention to the interests of the debtor in certain situations. As if the creditor demands his rights at the most difficult time for the debtor, the creditor may be considered to have carried out the agreement not in good faith.²⁹ The application of the principle of good faith makes the developer pay attention to the situation faced by the user, so that when the user experiences the most difficult times, he does not claim his rights, because he can be considered not carrying out good faith as he demands the user to pay.

Granting the payment extension, the time period depends on the character and ability of the user. However, the extension of this payment period is not actually stated in the PPJB. The PPJB only regulates the cancellation of the agreement and the refund of the money that has been paid by the user (see PPJB number 5) which states that when the buyer cannot fulfill his obligation to pay off each stage of payment to the seller more than 3 (three) times, the seller has the right to cancel this sale and purchase agreement; and that the fund that has been paid will be returned with a 3% deduction previously. 3% discount for agreements made before 2020 and 5% for agreements made starting in 2020.

The granting of an extension of the payment period happens when the user has difficulty to pay and it has been included in the addendum agreement.³⁰ This is because the granting of the extension of time is not actually included in the agreement, so that additional provisions are needed to complete the agreement. The issuance of an addendum in the form of an extension of the payment period is a form of repressive legal protection to resolve a dispute.³¹

To have a binding force, an addendum agreement must be agreed upon by the parties who are being bound in the parent agreement based on the Article 1320 of the Civil Code regarding the legal terms of the agreement. In addition, there are many expert opinions which state that there are other special requirements in making an addendum other than the Article 1338 paragraph (1)

²⁸ Ratna Artha Windari, *Hukum Perjanjian*, (Yogyakarta: Graha Ilmu, 2014), 9.

²⁹ Suharnoko, *Hukum Perjanjian Teori dan Analisa Kasus*, (Jakarta: Kencana, 2015), 3.

³⁰ L. W., Roficoh. & M. Ghozali. (2018). Aplikasi Akad Rahn Pada Pegadaian Syariah. *Jurnal Masharif al-Syariah: Jurnal Ekonomi dan Perbankan Syariah*, 3(2). 37

³¹ Philipus M. Hadjon, *Perlindungan Bagi Rakyat Indonesia*, 2.

of the Civil Code and Article 1320 of the Civil Code. The legal requirements are made in written form, not unilaterally, and the contents of the addendum agreement are related to the object of the parent agreement.³²

The addendum agreement is regulated in the Article 1338 (1) of the Civil Code and the Article 1320 of the Civil Code. The Article 1338 (1) of the Civil Code states that all agreements made in accordance with the law apply as law for those who make them. This Article emphasizes the principle of freedom of contract, namely that the parties are free to make agreements, the contents of the agreement, as long as they fulfill the conditions of the agreement, are not prohibited by law, in accordance with applicable customs, and the agreement is carried out in a good faith.³³ In this case, the addendum agreement made by the parties is allowed as long as it fulfills the legal requirements of the agreement in the Article 1320 of the Civil Code.

The Article 1320 of the Civil Code states that to get a valid agreement, four conditions need to be met, namely (a) the agreement of those who bind themselves; (b) the ability to make an engagement; (c) a certain subject matter; and (d) a cause that is not prohibited. The agreement regarding the extension of the repayment period for the house installments at *La Tansa* Cluster Malang has been agreed by the parties who are legally capable and are bound by a binding sale and purchase agreement (PPJB). A particular issue in this addendum agreement is the extension of the repayment period for the house installments. This agreement does not conflict with laws that are coercive, general provisions, morals, and decency, and has fulfilled the legal requirements of the agreement as stipulated in the Article 1320 of the Civil Code.

The fulfillment of the legal conditions of the agreement in the Article 1320 of the Civil Code, resulting in a legal effect on the addendum agreement for the extension of the repayment period for the house installments that must be carried out by the parties in accordance with the Article 1338 (1) of the Civil Code. However, there is a condition that has not been fulfilled, namely the agreement regarding the extension of the payment period is not made in writing, but orally.

³² R. Tunggu dan R. G. Marloanto, "Kekuatan Mengikat Perjanjian Addendum Dikaji dari Syarat Sahnya Perjanjian", 11

³³ Munir Fuady, *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis)*, (Bandung: PT. Citra Aditya Bakti, 1999), 30.

The grant of an extension of the payment period at *La Tansa* Cluster Malang does not apply a penalty system when there is a delay in house installments payment. If it refers to the Article 1243 of the Civil Code, the developer can actually apply a fine system when there is a delay, because based on the Article 1234 of the Civil Code, the debtor is required to pay compensation for the losses suffered by the creditor. However, if there is an agreement that the penalty system is not applied when there is a delay, then the agreement applies the principle of freedom of contract as satted in the Article 1338 paragraph (1) of the Civil Code as long as it does not conflict with the law, in accordance with applicable customs, and the agreement is carried out in good faith.³⁴ Therefore, the unreleased penalty system means the application of the principle of freedom of contract, because it frees the parties to determine the contents of the agreement as long as it is not contrary to law.

The third effort to resolve the default on the sale and purchase of sharia housing is to cancel the Sale and Purchase Binding Agreement (PPJB). This effort is carried out only after being given an extension of the payment period, then the steps taken are to cancel the PPJB. The cancellation of this PPJB is based on an agreement of the developer and user carried out verbally after once they have negotiated, and the cancellation of PPJB based on this agreement has implemented the Article 1338 (2) of the Civil Code which states that the agreement cannot be withdrawn other than with the agreement of both parties, or for reasons determined by the law.

The cancellation of PPJB based on the agreement reflects that the parties have applied the consensual principle, so that this agreement is valid and binding as long as the legal conditions of the agreement are met. In the cancellation of PPJB, the conditions for the validity of the agreement have been fulfilled, namely the tone of the agreement from the developer and user to cancel the agreement. Then, they are legally competent, because they are over 21 years old and not under custody. Somehow, the cancellation of PPJB is already binding and has legal consequences, from that moment on, rights and obligations arise between the parties.³⁵

The cancellation of this PPJB has consequences, namely the developer has the right to re-market the house to return the user's money, but during the

³⁴ Munir Fuady, *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis)*, 30.

³⁵ Munir Fuady, *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis)*, 30

marketing period the user's house is still entitled to occupy his house, and the user is obliged to leave his house after getting a refund which was paid with deducted fees. This means reflecting the principle of good faith in the Article 1338 paragraph (3) of the Civil Code. The point is that the implementation of the agreement must be in accordance with propriety or justice. The appropriateness is seen from the implementation in accordance with the contents of the existing agreement, while justice can be seen from the implementation of the agreement to the detriment of one of the parties or not in accordance with the contents of the agreement.³⁶ In this case, the user's right to stay in his house before the sale is carried out in accordance with propriety, namely the implementation of the agreement in accordance with the contents of the agreement and the user's right to remain in his house which reflects that this is in accordance with justice where this does not harm one party, especially for the user, because when the money has not been returned.

The cancellation of PPJB due to inability to pay the installments has actually been stated in the agreement.³⁷ The inclusion of the rules regarding this default in the PPJB as a form of legal protection to prevent the occurrence of default. Meanwhile, the implementation of the settlement of default in accordance with the contents of the agreement by canceling the PPJB means that the cancellation of the PPJB as a form of repressive legal protection is a legal protection that aims to resolve a dispute.³⁸

The last effort to resolve the default in the sale and purchase of sharia housing is to return the money that has been paid by the user with deducted fees. This effort is carried out only if the marketed house is sold, then the user has the right to receive a refund that he has paid to the developer with a deducted fee. The amount of the discount is stated in the PPJB, the cost-cut is based on the price in the agreement, such as 3% before 2020, while 5% in 2020. The cuts are for marketing fees, operational costs, and investment considerations or opportunities.

In this case, the efforts made by *La Tansa* Cluster in resolving the default by the user by canceling the PPJB and refreeing the fee that has been paid by the user with a deducted fee in accordance with the Article 1267 of the

³⁶ M. Arifin. (2020). Membangun Konsep Ideal Penerapan Asas Iktikad Baik Dalam Hukum Perjanjian. *Jurnal Ius Constituendum*, 5(1), 66-82. 80.

³⁷ Philipus M. Hadjon, *Perlindungan Bagi Rakyat Indonesia*, 2.

³⁸ Philipus M. Hadjon, *Perlindungan Bagi Rakyat Indonesia*, 2.

Civil Code which states that the party to whom the engagement is not fulfilled, can choose or force the other party to comply with the agreement. Based on this article, it means that what *La Tansa* Cluster Malang does is to demand the cancellation of the agreement with compensation for costs and losses.³⁹

In this case, the fee returned to the user is deducted by 3% or 5% of the price agreed upon in the agreement according to the Article 1248 of the Civil Code. It means that the cost-cut is for marketing fees, operational costs, and investment considerations or opportunities, the costs for this marketing fee have been issued by the developer when the user first made a house purchase which is no longer possible to be withdrawn to the marketing and operational costs.

Refunds that have been paid by the user with deducted fees reflect that this is in accordance with the principle of a good faith in the Article 1338 paragraph (3) of the Civil Code. It means that the implementation of the agreement must be in accordance with propriety or justice. It is appropriate to see the implementation in accordance with the contents of the existing agreement, while justice is seeing the implementation of the agreement harming one of the parties or not in accordance with the contents of the agreement.⁴⁰ Refund that have been paid by the user with deducted fees have been in accordance with the principle of a good faith.

The regulation regarding the refee of the user's fee by deducting the cost after the agreement is canceled, because the user is unable to pay. It means that the inclusion of rules regarding this default as a form of preventive protection, namely legal protection that aims to prevent a dispute from occurring.⁴¹ Meanwhile, the implementation of user Refund with reduced costs in accordance with the contents of PPJB as a form of repressive legal protection is a legal protection that aims to resolve a dispute.⁴²

SOLUTION FOR DISPUTES IN LA TANSA CLUSTER, MALANG VIEWED FROM ISLAMIC LAW

³⁹ Ratna Artha Windari, *Hukum Perjanjian*, 38

⁴⁰ Miftah Arifin (2020). Membangun Konsep Ideal Penerapan Asas Iktikad Baik Dalam Hukum Perjanjian. *Jurnal Ius Constituendum*, 5(1), 66-82. 80.

⁴¹ Philipus M. Hadjon, *Perlindungan Bagi Rakyat Indonesia*, 2.

⁴² Philipus M. Hadjon, *Perlindungan Bagi Rakyat Indonesia*, 2.

In Islam, the handling of defaults varies depending on what factors cause it. As if the factor that causes it is the difficulties, the solution is by giving an extension of time; otherwise, if the owner of the house has any fee, but he does not pay, he may be subject to sanctions with (*ta'dzīr*). In this case, sanctions and fines are also allowed based on applicable habits.⁴³ The settlement of the default problem that occurred in *La Tansa* Cluster Malang was carried out by consensus deliberation which is included in *shulh* as a type of contract or agreement to end a dispute/quarrel between two disputing parties peacefully.⁴⁴

The choice of resolving the problem of default in the sale and purchase of sharia housing in *La Tansa* Cluster has been stated in agreement number 15 that if there is a different opinion between the seller and the buyer, both parties agree to settle it by deliberation and consensus at the Malang City District Court Office. Carrying out what was agreed means having applied the principle of justice (*al-is*), namely the parties are correct in expressing their will and circumstances, fulfilling the agreement they have made, and fulfilling all their obligations.⁴⁵

According to the majority of scholars, there are four pillars of *shulh*, namely both parties who perform *shulh*, the pronouncement of consent and acceptance, having disputed cases, and peace agreed by both parties.⁴⁶ In the implementation of this *shulh*, there are two parties who perform *shulh* (developers and users), there are pronouncements of consent and *kabul* carried out verbally in term of making a consensus (peace) in the problem of default in the sale and purchase of sharia housing.

In addition to the pillars, there are some conditions for the validity of the *shulh* (peace agreement), namely: the parties performing a consensus (peace) must be capable of acting and have the power to waive their rights or matters related to peace.⁴⁷ In this case, the parties, both users and developers

⁴³ N., Umam & E., Hariyanto. (2020). Perbandingan Penyelesaian Sengketa Ekonomi Syariah Pada Masa Nabi Muhammad SAW. dan di Era Reformasi. *Al-Huquq: Journal of Indonesian Islamic Economic Law*, 2(2), 160-174. 214.

⁴⁴ M., Muaidi. (2017). Penyelesaian Sengketa dalam Hukum Ekonomi Syari'ah. *TAFALQQUH: Jurnal Hukum Ekonomi Syariah Dan Abwal Syabsyah*, 2(2), 1-23, 1.

⁴⁵ A. Hulaify. (2019). Asas-Asas Kontrak (Akad) Dalam Hukum Syari'ah. *At-Tadbir: jurnal ilmiah manajemen*, 3(1). 49.

⁴⁶ Imam Jauhari, *Penyelesaian Sengketa di Luar Pengadilan Menurut Hukum Islam*, (Yogyakarta: Deepublish, 2017), 63.

⁴⁷ N., Umam & E., Hariyanto. (2020). Perbandingan Penyelesaian Sengketa Ekonomi Syariah Pada Masa Nabi Muhammad SAW. dan di Era Reformasi. *Al-Huquq: Journal of Indonesian Islamic Economic Law*, 2(2), 160-174. 163.

are legally proficient as evidenced by having an ID card and NPWP as administrative requirements in making PPJB. Besides, they have the authority to carry out a peace agreement, because the user and developer are the parties to the sale and purchase agreement.

Second, the object of peace must meet the following conditions in the form of assets (both tangible and intangible) that can be valued, handed over, useful; and known clearly so as not to cause ambiguity and obscurity which can lead to new disputes over the same object.⁴⁸ In this case, the object in the form of a house is in the form of tangible assets that can be valued, then the house can be handed over, and has benefits as a place to live and invest. Thus, the house which is the object of this peace agreement has been clearly identified from its physical form, type of house, location, and administration in the form of SHM and IMB.

Third, Islamic jurists agree that issues that can and may be reconciled are only in the form of property disputes that can be assessed and limited to human rights that can be replaced.⁴⁹ In this case, the problem of default in the sale and purchase of sharia housing, including the form of property disputes in the form of houses that can be assessed as well as human right that can be replaced, is not an irreconcilable right of God, so that the default in the sale and purchase of sharia housing can be reconciled.

Third, is *Ijab* and *Kabul*. *Kabul* must be in line with *Ijab*. If the acceptance is different from the consent, then the peace is not valid.⁵⁰ *Kabul* and consent are the same. For example, the developer states that he gives an extension of the payment period and the user receives the extension of the payment period, or the developer said that he could not continue the sale and purchase agreement, because even though he was given an extension of time, the user still could not pay, so that the developer offers a peace by selling the house by the agreement of the user.

The implementation of the peace agreement can be carried out in two ways, outside the court session or through the court session. Outside the court session, dispute resolution can be carried out either by themselves without involving other parties, or asking for an assistance from others to mediate.

⁴⁸Mujahidin, *Prosedur Penyelesaian Sengketa Ekonomi Syariah di Indonesia*, 140.

⁴⁹A. T. Zahra, A. T., & M. Naim (2019). Analisis Hukum Penyelesaian Sengketa Murabahah di Pengadilan Agama. *Jurnal Justisia Ekonomika: Magister Hukum Ekonomi Syariah*, 2(2).5.

⁵⁰Jauhari, *Penyelesaian Sengketa di Luar Pengadilan Menurut Hukum Islam*, 64.

Meanwhile, the implementation of the peace agreement through a court is carried out while the case is being processed in a court trial.⁵¹ In this case, the implementation of the agreement is carried out out of court is carried out by the developer and user without the help of another person as an intermediary.

The communication made by the developer and user reflects the application of the principle of equality as a principle of agreement that puts the parties in the same position. Then, the communication made by the developer and user reflects the application of the principle of justice, namely the developer keeps the agreement. When there is a delay of payment or problems regarding the continuation of the agreement, the user communicates with the developer.

The second effort is to provide an extension of time if the user makes a late payment, because he is experiencing difficulties, such as illness, unsuccessful business, or his financial matter. The time period given by the developer depends on the character and ability of the user. About the granting of allowance in payment, Allah the Almighty has said clearly in al-Baqarah (2): 280 “*And if (the debtor) is in distress (if he will not be able to pay his debt), then let there be postponement until he is in ease. And for you to remit (it) as alms is better for you if you knew*”.

The extension of the payment period provided by the developer is carried out without applying a fine. When there is a delay in paying and an extension of the payment period is given, the user is not subject to a fine by the developer. The penalty system is not implemented, because the developer considers that fines include usury. Fines include *jahiliyyah* usury, namely: any addition to the debt that has matured, because it cannot be paid at the specified time.⁵²

The granting of an extension of the payment period by the developer is based on the principle of freedom (*al-hurriyah*), so that the parties are free to make agreements as long as they do not conflict with the Shari'a, and that the granting of an extension of the payment period is not against the Shari'a, but the principle of willingness (*al-ridha*). The granting of time extension is on the basis of mutual consent that is carried out verbally.

⁵¹Nasrulloh. (2021). *Islah Dan Tahkim Sebagai Penyelesaian Sengketa Perbankan Syariah*. *Al-Munqidz: Jurnal Kajian Keislaman*, 9(1), 98-112. 102

⁵²M. Al Mustafa (2020). *Penetapan Denda Terhadap Pembiayaan Bermasalah Pada Perbankan Syariah*. *At-Tijarah: Jurnal Penelitian Keuangan dan Perbankan Syariah*, 2(2), 159-175. 161

The fourth attempt to resolve this housing sale and purchase default is by canceling the sale and purchase binding agreement (PPJB) based on the agreement of the parties, so that in accordance with the principle of willingness (*al-rida*), the cancellation of the agreement is because the agreement of the parties included in the *Faskh Iqalah*, namely the actions of the parties based on mutual agreement to end a contract that they have closed and remove the legal consequences, so that the status of parties return as before the contract is decided.⁵³

With the cancellation of the PPJB of this house, it is expected that the developer can resell the house that has been purchased by the developer to return the user's fee that has been paid, because Islam does not allow to sell goods that have been purchased by others. Rasulullah PBUH said “*Dari Ibnu Umar bahwasanya Rasulullah saw bersabda: janganlah sebagian kamu menjual sesuatu penjualan sebagian yang lain.*” (HR. Muslim)⁵⁴ In another *hadith* that discusses buying and selling things that have been bought by other people, Rasulullah PBUH said, “*Dari Ibnu Umar dari Nabi saw., beliau bersabda: janganlah seseorang menjual barang yang telah dijual kepada saudaranya dan janganlah meminang orang lain kecuali jika ia mengijikannya.*” (HR. Muslim)⁵⁵

In this case, the resale of the house carried out by the developer with the agreement of the user is allowed, because in the *hadith*, it is stated that it is not permissible to sell other people's goods unless the owner of the goods allows it.⁵⁶ With the termination of this sharia housing sale and purchase agreement, the developer has the right to resell the house that has been purchased by the user. The house whose sale and purchase agreement was canceled was re-marketed by the marketing party of *La Tansa Cluster Malang*. During the marketing of this house, the user still has the right to live in the house. The user's right to continue to occupy his house when his house has not been sold reflects the application of the principle of equality, namely placing the developer and user in the same position, so that when the user has not received the fee from the developer, he is still entitled to occupy his house.

⁵³ Z. Wahidah. (2020). Berakhirnya Perjanjian Perspektif Hukum Islam dan Hukum Perdata. *Tabkim*, 3(2), 21-37. 25.

⁵⁴ Muhammad Fu'ad Abdul Baqi, *Shahih Bukhari Muslim*, 560.

⁵⁵ Ibid.

⁵⁶ I. F. Cahyadi. (2018). Sistem Pemasaran Dropship dalam Perspektif Islam. *Tawazun: Journal of Sharia Economic Law*, 1(1), 24-43. 36.

If the marketed house is sold, the user has the right to receive a refree of the fee he has paid to the developer with a deduction of costs, the amount of the discount is stated in the PPJB of the house. For example, the 2015-2019 agreement is 3% of the house price, while starting in 2020 the amount of the discount is 5% of the house price. The cuts are for marketing fees, operational costs, and investment considerations or opportunities.

Refree of fee that has been paid by the user, with a deduction of fees is the application of the principle of justice in the agreement, namely fulfilling the agreement made, where if the PPJB cannot be continued, the agreement is canceled and the fee paid by the user is returned, but is deducted by a fee, such as a 5% from the agreed price.

In Islamic law, compensation for violating the contract is called *dhaman al-'aqdi*, while compensation for violating the law is called *dhaman 'udwan*.⁵⁷ With holding of user's fee as reimbursement of costs, including compensation as a result of default on the PPJB of the house. This compensation includes civil liability due to default on the agreement called as *dhaman al 'aqdi*.

CLOSING

A default in *La Tansa* Cluster Malang occurred due to several factors, namely lack of analysis of prospective users, delay in payments, death of user's family, business failure, serious illness, and inaccurate financial predictions. Then, efforts to resolve defaults on the sale and purchase of sharia housing in *La Tansa* Cluster Malang (according to the Civil Code) was carried out by deliberation and consensus with communication between the developer and user, extension of time, canceling PPJB in accordance with the Article 1338 paragraph (2) of the Civil Code, and returning the fee that has been paid by the user with a deducted fee in accordance with the Article 1267 and the Article 1248 of the Civil Code. Meanwhile, efforts to resolve defaults in *La Tansa* Cluster Malang according to Islamic law are carried out by deliberation to reach consensus or *shullh*.

⁵⁷M. Lubis. (2019). Studi Komparasi Ganti Rugi Menurut Hukum Perdata dengan Hukum Islam. *Pelita Bangsa Pelestari Pancasila*, 14(1). 19.

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