



AGREEMENT ON THE SALE AND PURCHASE OF HOUSES TO BE BUILT IN CONJUNCTION WITH THE CONSUMER PROTECTION ACT

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Abstract. *In residential buying agreements, contracts governing default are usually common. Default is stated by expressing negligence in two respects, whether it is negligence in payment of instalment or negligence in the delay of settlement of house construction which will be delivered to the consumer. The developer's responsibility is usually related to the delay of the house construction and delivery to the consumer. In the execution of the sale and purchase transaction of the house to be built, consumers rarely gain consumer protection rights as regulated and mentioned in the article on consumer rights and business actor obligations contained in Article 4 and 7 of Law no. 8 of 1999 on Consumer Protection. Furthermore, field practice reality shows that consumers and developers do not have the same bargaining position, where the consumer are usually required to follow the agreement that has been standardized by developers who are legally contrary to Article 18 of Law no. 8 of 1999 on Consumer Protection.*

Keywords: House Sale and Purchase Agreement, Built, Consumer Protection

INTRODUCTION

In the development of housing construction, the principles of consolidation of urban land should be considered, so as not to disrupt the land-use and spatial planning (RUTR) which have been determined so as not to conflict with law-order. Juridically, housing is a set of houses that function as a residential environment equipped with environmental means. Settlements, on the other hand, are part of the environment

outside the protected area, both in the form of urban and rural areas that function as residential environments or activities that have the means to support livelihoods.

The progress of economic development in Indonesia has increased the purchasing abilities of the community and led to the high demand for basic needs which include the needs of clothing, food, and shelter. Residential development industry, especially housing, grows rapidly and becomes a promising commodity in regency and provincial city districts. In its development, the provision of housing grew into a separate industry in line with rising housing demands driven by significant growth in purchasing abilities and number of population, supported by the significant decrease of available land. For housing development companies, this condition becomes a business opportunity, while for the wider community the condition causes obstacles in obtaining shelter.

National development is essentially the development of the whole Indonesians in terms of decent, healthy, safe, harmonious, and orderly housing and settlements as one of the basic human needs which is also an important factor in improving the dignity, the quality of life, and the welfare of the people in a just and prosper society based on Pancasila and the 1945 Constitution. In line with the improvement of dignity, the quality of life and welfare of every Indonesian family, housing and settlement development as part of national development needs to be continuously improved and developed in an integrated, directed, planned, and sustainable manners.

Another obstacle is the problem of funding, especially for those who have fixed income and do not have sufficient funds to buy a house in cash who, thus, require banking services to provide housing credit facilities. This condition usually does not give the community the right to bargain. The public are required to accept all the requirements submitted by the housing developer if they wish to own or buy a home from the developer company. With the institutional strength of the developer association, all developers apply relatively common terms and conditions from one company to another so that people cannot choose better terms and conditions as an alternative if they do not agree with the terms and conditions that one developer company offers them.

The need for homes, especially new homes, creates problems for consumers because in general, developers market and sell homes to consumers in the unfinished

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DOI: 10.30575/2017/IJLRES-2018010408

state. Such conditions might create a powerless bargaining position¹. With the options offered, consumers are forced to accept the circumstances offered by the developers in the home purchase transaction. This situation is commonly referred to as "take it or leave it".

LITERATURE REVIEW

In the development of the housing business, the developer company builds house units to be marketed to the public. In principle, the house to be built functioned as a residence or dwelling and means of fostering the family. Therefore, it becomes the obligation of the development company to provide the comfort of life and certainty for the prospective buyers, either in the physical delivery of the house, or in the case of the transfer of ownership of the house as the juridical aspect of the transaction. If these two aspects are not respected by the developer company, then they are considered to violate the legal norms. In other words, the company has reduced the normative rights of the consumers that can cause harms.

Habit of business development and development of housing done by the developer company is to market the houses in the form of brochures, leaflets, booklets, and others. To attract potential buyers, the developer company creates an ad containing the design of the house and the housing environment to be built, including physical technical specifications, land and legal aspects. Typically, these ads contain developer promises to attract residential customers. In practice, the promises made by the developers are very dependent on their intentions. If the developer company has good intention, then the implementation of the promise will be fulfilled in accordance with the advertised. Such bargaining position resulted in the unbalanced position of the consumer in the agreement (unequal contract) and their normative rights were violated and contrary to the prevailing positive law such as Law Number 8 Year 1999 regarding Consumer Protection (hereinafter referred to as UUPK).

Chapter III UUPK regulates the rights and obligations of producers / business actors and consumers. The rule was created to provide legal certainty to guarantee the interests and obligations of business actors and consumers. In buying and selling transactions, UUPK provides protection to housing developer companies as business

¹ Muhammad Abdulkadir, (1980). *Hukum Perjanjian*, Bandung: Alumni. p 145

actors and home buyers as consumers. However, in the application, UUPK legal certainty in buying and selling houses that will be built is often ignored by the developer companies which would certainly result in material and immaterial losses for residential consumers.

The law of agreement in general

The primary legal material, the Civil Code, is reviewed to understand the meaning of agreement. An agreement (*overeenkomst*) is a source of engagement (*verbintenis*) that can be obtained from the law (*wet*). This can be seen in Article 1233 of the Civil Code. From the provisions of Article 1233 of the Civil Code, it can be seen that engagement and agreement are two different things, although many consider them to be the same. Harahap said that the agreement or *verbintenis* implies a legal relationship of property / wealth between two or more persons, which gives the power of right on the one person to obtain the achievement and at the same time obliges the other party to perform the achievement. Carefully examined, the word "agreement or *verbintenis*" indicates that the two words have no difference.²

From the description above, it can be seen that agreement and assent are not the same. By translating the word "*verbintenis*" which means agreement then the word "*overeenkomst*" is translated as assent³. The Agreement, pursuant to Article 1313 of the Civil Code is an act in which one or more persons commit themselves to one or more persons. Understanding this agreement still does not contain the legal sense, seen from the weakness of the law that provides the formulation of the agreement, among others, with the word "deed". The word "deed" contains a broad meaning, not only in terms of the agreement referred to in Book III, but also the treaties which are outside the Book III of the Civil Code. Supposedly, the word "deed" is supplemented by the word "law", so the covenant is a "legal act". The advantage of using the term "legal act" is not only to show that the legal consequences are desired or deemed to be desirable, but in it there is also a conclusion of "agreement" which is a hallmark of the treaty, which cannot be in the *onrechtmatige daad* (Article 1365 KUHPerdata) and *zaakwaarneming* 1354 Civil Code). In addition, the formulation of the agreement set forth by the article has not

² M.Yahya Harahap, (1986). *Segi-Segi Hukum Perjanjian*, Bandung: Alumni. p 19

³ *Ibid.* hlm 23

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provided clarity as to the purpose of the treaty made by the parties. This indicates that the legislator has not yet perfectly formulated the meaning of the agreement, therefore, the meaning of the agreement needs to be reformulated. According to Mertokusumo, the agreement formulation is a legal act known as conventional view.⁴ The new view says that the agreement is a legal relationship between two or more parties based on an agreement to cause legal consequences. The word agreement of the will is an essential element for making the covenant and at the same time the foundation for the law of the covenant to meet the need for the legal construction of a transaction⁵.

This formulation further clarifies the law relating to the agreement, the legal act of the legal subject as well as the legal consequences of the breach of the agreed promises whereby either party will bear the legal risk known as a legal sanction. Legal sanctions in civil terms are referred to as compensation (*schade vergoeding*) (Tan Kamello).

METHODOLOGY

This is literature study with approach of exploring various sources of selling and purchase theory related to problem solving. the researcher conducted in-depth literature review in an attempt to find a suitable model in theory which can then be applied by the people to solve the problems that occur both internally and externally.

FINDINGS AND DISCUSSION

Illegal certainty occurs when a promise to deliver home in accordance with the physical terms and conditions, followed by the fulfillment of obligations of the juridical aspect of Building Permit (IMB) and the submission of a house certificate as proof of ownership of the house to the consumer, cannot be fulfilled by the developer. The agreement in the sale and purchase of houses to be built is carried out in the form of a buy and sell bond on an object whose ownership rights are unclear, held by the developer. This uncertain bond can be categorized as a bond with a suspension. In the sale and purchase agreement of the house to be built, the agreement covers only the object to be built (*toekomstige zaken*), the house to be built with the land on which the

⁴ , Sudikno Mertokusumo. (1995). *Mengenal Hukum*, Yogyakarta: Liberty. p 97

⁵ Yudha Bhakti Ardhiwisastra. (2003), *Hukum Internasional: Bunga Rampai*, Bandung: Alumni. p 55

house will be built, the physical building of the house itself, and the public facilities that are promised to be part of the house such as electricity, telephone lines, water, road, sports, worship, education and shopping, security facilities, certificates (marks of rights), and all forms of licensing pertaining to the construction of such housing. This object is still a plan (site plan) and a promise from developers which has not been a reality a physical and legal reality. The construction of houses to be sold is also still a plan that requires a long follow-up.

However, based on the house to be built purchase agreement commonly applied by the developers, although the developer company has not fulfilled the purchase agreement, the buyer / consumer has to pay off the payment, either in cash or by way of credit. The sale and purchase agreement of houses to be built is generally done in the standard contract form prepared by the seller. From the point of view of the seller's interest as the party preparing the standard agreement, the contents of the agreement are mostly more favorable to the seller.

Under the law of contracts stipulated in articles 1313, 1320, 1335, 1337, 1338, 1339 of the Civil Code, the agreement underlying the sale and purchase of houses to be constructed which are applied in the field is contrary to the provisions of the foregoing articles. Thus the basis of the transaction has not fulfilled the juridical elements so that it is not legally binding on the developer company as the executor of the obligation. Therefore, the position of residential consumers in obtaining their rights becomes weak and potentially unpredictable (unpredictable risk). The weak bargaining position of the consumers in the agreement is exploited by the companies, as happened in some cases experienced by housing consumers in Medan⁶. Examples of cases that can be put forward in this regard are:

1. Consumers have paid a certain amount of money in the form of booking fee or down payment, or full payment to the developer company, but the developer company was unable to carry out the construction of the house. Then after being processed by law, the buyers still suffered losses because the money paid could not be returned by the developer because there was no executable assets / assurance of the developer to carry out the court decision;

⁶ Dodi S Adulkadir (2006)., *Tesis*, Bandung: Universitas Padjajaran

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2. Physical delivery of completed houses constructed was not in accordance with the specifications offered to buyers;
3. The developers did not fulfill their obligations to provide the public facilities listed in the bid brochure;
4. The buyers did not receive certificates (proof of rights), either in the form of property rights or building rights, as the developer guaranteed the master certificate from the built houses to the bank as collateral to obtain investment credit facilities or used for confiscation by the third party involved.

The above cases cause some tough legal problems that must be solved in order to protect the rights of consumers as a manifestation of the fulfillment of the community welfare. The sale and purchase agreement with the house to be built is often done with standard clauses agreement clauses determined by the developer company. The developer company places itself in a stronger legal position from the consumer to govern their rights and obligations in respect of default as a business actor, especially if the home purchased in a mortgage system because the developer usually works with the bank as a provider of funds. Considering the conditions that occur in the current buying and selling home transactions where the consumers are in weak positions to protect their interests legally, the consumers must have the vigilance and high caution in choosing a developer company that provides the house.

House purchase agreement

The term buying and selling is often used widely by the public, especially among the businessmen. Business actors or consumers buy and sell daily, ranging from goods that are consumptive or productive, for self-use or resale. The types of goods and prices vary. Some are relatively cheap and some are expensive. The form of the agreement also varies, some are done with sign, spoken and written language. The written form can be a hand-made or authentic agreement. Traffickers may be individuals or corporations. However, most of these traders do not know and understand the juridical sense of the sale and purchase. Therefore, there is a need for legislation that regulates buying and selling. In Article 1457, it says that "buying and selling is an agreement, in which one party binds himself to surrender a material, and the other party pays the promised price".

From this statement, it can be concluded that the sale and purchase is a form of agreement. As an agreement, buying and selling can cause many problems such as problems related to the time of the sale and purchase, the form of agreement, the rules of payment and delivery of goods, when the buyer declared as the owner of the goods, the procedure of transition rights, whether the sale is a nameless agreement, and many other legal issues. Goods and prices become the main element in the sale and purchase agreement. The character of the sale and purchase agreement contained in Article 1457 of the Civil Code is obligatoir in which each party is burdened with legal obligation.⁷

However, the article does not explain the subject of sale and purchase, only mention "one party and the other". These parties may be interpreted as a person(s) and a corporation(s). Similarly, the object of buying and selling, only mention "a material". The notion of this material must be interpreted in relation to Article 499 of the Civil Code. In this article, the so-called juridical property is every item and every right that ownership can control. Thus, the object of sale and purchase is goods and rights. Goods may be interpreted as immovable and movable, tangible and intangible, registered and unregistered, existing and available goods.

Another important thing is the price. Without any element of price, the sale and purchase agreement cannot be executed. What is meant by the price in buying and selling is money, not goods. If the price is interpreted with the goods, it is no longer a sale and purchase agreement but a barter. In its development, this sale and purchase agreement covers an installment sale and purchase agreement. These two agreements are commonly categorized as sale and purchase agreements with credits in which the payments are made through certain terms.

Terms of house purchase agreement

In the sale and purchase agreement, the law does not clearly specify the requirements to be met. However, from several articles contained in the Civil Code regarding the sale and purchase, it can be concluded that the terms of the sale agreement are:

1. It should meet the terms of the agreement in general.
2. It should meet the specific provisions set forth in certain articles in the Civil Code.

⁷ R. Subekti, (1990). *Hukum Perjanjian*, Jakarta: Intermasa. p 11

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3. There are other requirements added by the parties in accordance with the principle of freedom of contract.

Normally, if a person or a corporation entered into a sale and purchase agreement, then the agreement of the parties who wanted to make a sale is required. For individuals as parties to the agreement, this is not a difficult thing to do, but for corporations, they must comply with the provisions of corporate law such as who is eligible to represent the corporation in the conduct of buying and selling. This means that the trade and sell are only limited to parties granted the authority of the corporation as determined in the articles of association or designated by the General Meeting of Shareholders (GMS).

In addition, the ability to bind themselves to others is also indispensable. This requirement is very important because if this quality does not exist, then the sale and purchase agreement cannot be valid. The laws required competent people who are free from mental disorders, mental disability or immature to do the sale and purchase agreement.

In principle, any material can be used as an object of a sale and purchase agreement except for objects prescribed by the law. The law has banned unauthorized items such as marijuana and other illegal drugs. Furthermore, article 1471 of the Civil Code states that the sale of goods belonging to others is null and void. The sale and purchase agreement may also be void if at the time of sale, the goods sold are destroyed (Article 1472 Civil Code).

Hidden defects in house purchase agreement

The buying and selling of houses to be built by the developer companies is increasing in number as the economy grows. Housing business has a positive and negative sides. On the positive side, developers can provide home for the consumers / buyers by way of installments so as not to incriminate consumers. However, home purchases also have a negative aspect for consumers if the house has hidden defects.

Hidden defects against house purchase agreements built by the developer company can pose legal problems. The contract of sale and purchase of houses to be built is expressly not regulated in the Civil Code. Therefore, as a basis or guideline for analyzing the following chapters, the articles of sale and purchase agreement regulated in the Civil Code can be used instead. The sale and purchase agreement is regulated in

Articles 1457-1518 of the Civil Code which belongs to the named covenant group (benoemd overeenkomst).

It has been said previously that in Article 1457, there are two important elements of goods and prices. The goods sold will be delivered to the buyer. The delivery of goods must be in good condition and free of defect. This submission has a juridical meaning that is quite important for the change of ownership from the seller's property to the buyer's property.

From the description of Article 1457 of the Civil Code, it can be concluded that there are two main obligations of the sale and purchase agreement. The seller's obligation is to deliver the goods to the buyer, and the buyer's obligation is to pay the goods price to the seller. In other words, the deal occurs when the sale and purchase agreement is created. This can be inferred from Article 1458 of the Civil Code. Judging from the type of engagement, the momentum is the obligator bond, which gives rise to rights and obligations for the parties. These rights and obligations still have to be followed up by the delivery of the object(s). Although the purchase agreement has been created, but if the object has not been delivered or received by the buyer, the property rights on it will not be transferred to the buyer. The principle of handover results in the transfer of property rights become very substantive. The principle of delivery of the object in terms of the engagement is included in the attachment of the load.

The sale and purchase agreement according to the Civil Code has its own system as disclosed by Subekti as follows: The Civil Code embraces the system that the sale and purchase agreement is only an "obligator", meaning that the new sale and purchase agreement places the rights and obligations of mutuality between both parties where the seller has the obligation to submit property rights of the goods he sells, as well as granting him the right to demand payment of the agreed price and the buyer has the obligation to pay the price of the goods in exchange for his right to claim the transfer of ownership of the goods he buys. In other words, the sale and purchase agreement according to the Civil Code has not transferred ownership right. New ownership moves by levering, which is a juridical act to transfer ownership⁸.

The two legal acts that became the focus of this sub-discussion is associated with the existence of hidden defects attached to the object. Normatively, an object seller has

⁸ *Ibid.* p 11

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an obligation to surrender and fulfill other obligations, such as: first, to free homes for sale against all demands and executions beslag; second, to free the house from any third party charges; third, fix or show defects in the house to be submitted. Under the treaty law, an explanation on a hidden defect can be seen in Article 1504 of the Civil Code which states that the seller is obligated to show hidden defects contained in the goods, which makes it unfeasible for its intended use or reduces the optimization of its use which, if known to the buyer, the price or even the transaction might change.

The word "hidden disability" in civil law terms is called "verborgen gebreken" (Dutch) or "hidden defects" (English). The law does not provide a of hidden defects, but from the normative picture given in the above article it can be drawn a sense that hidden defects are a condition whereby a tradable vehicle cannot be used perfectly for its intended purpose or its usefulness is reduced. However, it is not easy to see a defect when the sale and purchase agreement occurs. Is the defect known to the seller or buyer? Whose obligation is it to investigate the defect?

In connection with this, Harahap commented that either the seller knows or not, the seller must remain responsible for any hidden defect in the goods he sells.⁹

Furthermore Harahap gives understanding of hidden defects as defects that result in the use of goods "not aligned" with the intended use.¹⁰ On the contrary, Subekti gives the "hidden" notion an interpretation that the defect is not easily seen by a normal buyer, rather than an exceedingly careful buyer, because it is very likely that a very meticulous person will find the defect.¹¹

Based on the theory of legal system developed by Friedman, it is known that there are three legal substances of product responsibility which become the basis of consumer compensation claim. The three basic demands are claims for negligence, demands for breach of warranty, and demands based on the theory of absolute liability.¹²

Kelly, Cs explains that negligence is a tort. Tort is a wrongful act against an individual or corporate body which gives rise to a civil action, liability is based on fault.

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⁹ M.Yahya Harahap, (1986). *Segi-Segi Hukum Perjanjian*, Bandung: Alumni. hlm 198

¹⁰ *Ibid.* p 198

¹¹ R. Subekti, (1990). *Hukum Perjanjian*, Jakarta: Intermedia. hlm 15

¹² Jethro K. Lieberman dan George J. Siedel, (1989). *Legal Environment of Business*. Harcourt: Brace Jovanovich. p 264

¹³ David Kelly (2002). *Business Law*, London: Cavendish Publishing Limited. p 251

From this opinion it can be concluded that the essence of negligence is a behavior based on the principle of wrongdoing of a person or legal entity that raises the rights for other parties to claim compensation. Responsibility based on negligence is a principle of responsibility that is subjective, that is a responsibility determined by the behavior of business actors (in this case the developer company). Based on this theory, the negligence of business behavior that results in the emergence of consumer losses is a determining factor of the right of consumers to file a claim against the developer. In addition to the errors made by the developer, the claim for compensation based on the negligence of the developer can also be filed with other evidences, namely the defendant is a business actor who actually has an obligation to take an action that can avoid the occurrence of consumer losses, the business actor does not perform his duty to guarantee the quality of its products in accordance with standards that are safe for consumption or use, consumers suffer losses, and the negligence of business actors is a factor that results in the loss of consumers (causality between negligence and loss of consumers). (Arthur Best, 1997: 269).

The mistakes often made by developers in building housing can be seen from the stages of housing construction is the design of the house as different from that promised in the brochure and is not in accordance with the consumers' expectations. On this side, developers also often do not take into account the physical security of the house. Second, the stage of production error. In the construction of the house, the developer does not pay attention to his obligations as a business actor who should maintain the quality of the built house so as not to disappoint the consumer. A developer are expected to have a legal attitude by running the residential business well. Ideally, developers should not only pay attention to the economic benefits but also, their legal obligations as responsible people on behalf of a residential corporation.

The concept of civil law states that the seller including the developer is burdened with legal obligations to deliver the goods sold and guarantee the quality of products that are free from hidden defects. The goal is that consumers do not experience financial losses. The responsibility of the developer cannot be excluded by making an exception in a housing contract even though the nature of the legal relationship between the developer and the consumer is to regulate (aanvullendrecht). In the UUPK, it is stipulated that the responsibility of the developer is to guarantee the quality of the house produced and / or traded under the provisions of the prevailing house quality

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standards. House quality standards are principally known to developers not by consumers. Therefore, based on the principle of caveat vendors, a housing developer is obliged to have a cautious attitude to maintain the quality of the house to be delivered to the consumer. It is not appropriate if the consumer should be more careful in buying the housing by examining the home products that will be received. This is because most consumers do not have adequate knowledge about housing.

In addition to filing a lawsuit for the negligence of the business actor, the law also allows a lawsuit against a breach of warranty. The default liability is contractual liability.¹⁴ Thus, when a product is damaged or resulted in a loss, the consumer must refer to the contents of the contract or agreement or guarantee which is part of the contract, whether written, spoken or gesture. In written contracts, developers and consumers should make a strict agreement on breaches. If this is not made in a housing agreement, then such agreement shall be construed in accordance with the articles of the Civil Code which govern the treaties as described in the previous chapter.

Section 241 Restatement provides a benchmark for determining whether an act has met the achievement principally. An act is not yet classified into material achievement if:

- a. The losing party loses the expected profit;
- b. Persons suffering losses will be reimbursed properly for part of the lost profits;
- c. Parties that fail to meet or offer fulfillment will be subject to fines;
- d. Persons fulfilling or offering fulfillment will correct their failures by considering all circumstances;
- e. The conduct of the party failing to perform or offering fulfillment must be in accordance with good intentions and fair endeavors.¹⁵

The advantage of the principle of responsibility for default is the application of an absolute obligation, which is an obligation that is based on the efforts of business actors to fulfill their promises. If the business actor has attempted to fulfill his promise but the

¹⁴ Inosentius Samsul, (2004). *Perlindungan Konsumen: Kemungkinan Penerapan Tanggung Jawab Mutlak*, Jakarta: Universitas Indonesia. p 71

¹⁵ Hardijan Rusli, (1996). *Hukum Perjanjian Indonesia dan Common Law*. Jakarta: Pustaka Sinar Harapan. p. 133

consumer still suffers a loss, then the business actor still has the legal responsibility to replace the losses suffered by the consumer.

In business practice, a default lawsuit gives less protection to the interests of the consumer. This is due to several matters, such as: the time limit of the lawsuit, the notification, the possibility of a denial, and the requirement of a legal relationship between the consumer and the business actor. This legal relationship is very dependent on the bargaining position of the parties when determining the contents of the sale and purchase agreement of the house. The bargaining position of consumers is nearly applied, in practice. Business actors tend to restrict their rights by including exoneration clauses.

In a housing sale agreement, a contract governing the issue of default is included. The interpretation shall remain implied by expressing the negligence in two cases: a negligence in installment payment, and a negligence in the delay of the completion of the construction of the house. The developer's responsibilities include only the delays in home construction and delivery to consumers. If the developer fails to fulfill the achievement, they will be fined in the form of some amount of money. The developer's responsibility prior to the contract, for example at the payment order of booking fee, is not regulated. The legal reality in the case in Medan and Bogor shows that the developers were not responsible in completing the housing construction. The developers fled after taking advantage of the booking fee. Meanwhile, the consumers did not know where to find the compensation. Consumers could only complain about developers' actions to the local police and, usually, such cases are categorized into criminal fraud instead of a default. Consumers could not sue developers legally because they only had the receipts without contracts of sale.

CONCLUSION

The responsibility of business actors on consumers' losses on the breach of to be built housing purchase agreement include:

- a. Compensation for material losses resulting from the practice of default because the house is not built, the specification of the house is not in accordance with the promised or certificate of proof of home ownership is not accepted by the consumers;

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- b. Replacement of immaterial losses because the consumer loses the promised advantage of a housing environment that can provide comfort or because consumers lose their honor.
- c. Criminal liability if there are elements of criminal acts committed by the developer.

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