IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	)	
	)	
CLARIDGE ASSOCIATES, LTD.,	)	Case No. 94-30551
a Florida limited partnership,	)	CHAPTER 11
	)	
Debtor.	)	
	)	
	)	

MEMORANDUM OF DECISION AND ORDER

THIS MATTER came on for trial before the undersigned United States Bankruptcy Judge on October 6 and 7, 1994 on the issue of whether this Court should enter an order confirming the Plan of Reorganization filed herein by Claridge Associates, Ltd. (the "Debtor").

Factual Background

The Debtor is a Florida limited partnership which was formed on August 30, 1983 for the purpose of acquiring, owning and operating a 202-unit apartment complex constructed in 1973 known as Claridge Apartments which is located on approximately 16.8 acres on Nations Ford Road in Charlotte, North Carolina (the "Property"). The Debtor acquired the Property in September, 1983 from Claridge, Ltd., ("Limited"), a California limited partnership unrelated to the Debtor. At closing, the Debtor paid Limited a total purchase price of $5,250,000.00, consisting of $640,000.00 in cash and the balance of $4,610,000.00 in the form of a wraparound promissory note dated September 27, 1983 (the "Wraparound Note"). The Wraparound Note was secured by a second priority Wraparound

Purchase Money Deed of Trust dated September 27, 1983 and recorded in the Mecklenburg Registry on September 30, 1983 (the "Wraparound Deed of Trust") which encumbers the Property. Under the terms of the Wraparound Note, interest accrued at the rate of (1) nine and one-half percent per annum during the first two years with eight and one-half percent paid currently and one percent accruing without interest to be paid upon maturity of the Wraparound Note, and (2) ten percent per annum thereafter with nine and one-half percent paid currently and one-half of one percent accruing without interest to be paid upon maturity of the Wraparound Note. The Wraparound Note matured on October 1, 1993.

The Wraparound Note is inclusive of a loan from Metropolitan Life Insurance Company ("Met Life") made in 1979. The Met Life loan is evidenced by a Balance Purchase Money Promissory Note dated June 28, 1979, in the original principal amount of $2,960,000.00 (the "Met Life Note"). The Met Life Note is secured by a first priority Balance Purchase Money Deed of Trust and Security Agreement dated June 28, 1979 and recorded on June 28, 1979 in Book 4204 at Page 544 of the Mecklenburg County, North Carolina Public Registry (the "Met Life Deed of Trust"), which encumbers the Property. Under the terms of the Met Life Note, interest accrues on the unpaid principal balance at the rate of nine and one-quarter percent (9.25%) per annum. The Met Life Note is payable in monthly installments of principal and interest in the amount of $24,889.00. On September 30, 1983, when the Debtor purchased the Property, the Met Life loan had an outstanding principal balance of approximately $2,868,900.00. The Met Life Note originally was scheduled to

mature on June 1, 1994, but the maturity was extended by letter agreement between Met Life and the Debtor in January, 1994 to June 1, 1995.

On May 3, 1994, Limited initiated foreclosure proceedings and sought the appointment of a receiver. In response, the Debtor filed this Chapter 11 case on May 3, 1994 thereby staying the foreclosure proceeding.

As of the petition date, the Debtor was current under the terms of the Met Life Note and the unpaid balance of the Met Life Note was $2,267,044.44. As of the petition date, the unpaid balance of the Wraparound Note was $4,223,660.98 which includes the unpaid balance of the Met Life Note.

On August 3, 1994, the Debtor filed its Plan of Reorganization (the "Plan"). The Plan was subsequently modified by documents filed on August 25, 1994 and on September 15, 1994. The pertinent plan provisions can be summarized as follows:

Administrative Claims. These claims are to be paid in full on the later of the Consummation Date or the date of the entry of a final order determining the allowed amount of such claim(s).

Secured Claim of Met Life. The Plan provides for the claim of Met Life to be allowed in the amount of $2,229,396.00 and to be paid in full, with interest at 9%, in 47 consecutive equal monthly installments of $24,808.49 commencing on November 1, 1994 with a final payment being due on October 1, 1998 in an amount equal to the then remaining balance due to Met Life plus attorneys' fees.

Secured Claim of Claridge, Ltd. The Plan provides for the claim of Claridge, Ltd. to be allowed in the amount of

$4,223,660.98 (which amount includes the amount owed to Met Life) and to be paid in full, with interest at 9%, in 47 consecutive equal monthly installments of $31677.46 less the amount of the monthly payment to Met Life of $24,808.49 which leaves Limited a monthly payment of $6,858.97 commencing on November 1, 1994 with a final payment being due on October 1, 1998 in an amount equal to the then remaining balance due to Claridge, Ltd.

Unsecured Claims. The Plan provides for the payment of these claims in full on the later of the Consummation Date or the date of the entry of a final order determining the allowed amount of such claim(s).

Interests in the Debtor. The Plan provides that the equity holders retain their interests in the Debtor as they existed on the petition date.

Limited filed an Objection to Confirmation and filed a ballot in which Limited voted against the Plan.

Discussion

Limited contends that the Plan does not comply with several provisions of Section 1129 of the Bankruptcy Code (hereinafter "the Code"):

1. Section 1129(a)(7).

Subsection (A)(ii) of Section 1129(a)(7) requires that the holder of an impaired claim "will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were

liquidated under chapter 7 of this title on such date."

The Plan specifies that the claim of Limited is impaired. Limited presented testimony through its expert witness that the Property has a fair market value of $4,100.000.00; the Debtor contends that the fair market value of the Property is $4,365,000.00. Given the amount of the secured debt encumbering the Property and the likelihood that transactional cost which would be incurred in selling the Property would approximate 3% of the Property's value, this court need not make a finding of the value of the Property - even using the higher value estimate presented by the Debtor, there is little or no equity in the Property. Inasmuch as the Debtor's value witness testified that the "fire-sale" value of the Property was $4,365,000.00, the claim of Limited would likely be paid in full on liquidation.

Given the foregoing and the fact that the Plan proposes to negatively amortize the loan of Limited, this court concludes that as to the claim of Limited, the Plan does not comply with the provisions of Section 1129(a)(7)(A)(ii).

2. Section 1129(a)(11).

This section mandates as follows:

Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

This section is frequently referred to as the "feasibility" requirement.

Limited contends that the Plan is not feasible for the following reasons:

1. The losses incurred by the Debtor in each of the years 1991 through 1993 totalling $617,383.00;

2. The need for substantial improvements to the Property and the lack of any commitment on the part of the Equity Holders to provide funding for such improvements; and

3. The uncertainty of the prospects of the Debtor being able to sell or refinance the Property within four years for an amount sufficient to pay the claim of Limited in full as is provided in the Plan.

Evidence presented at the hearing by Limited showed that between 36 and 48 of the stairwells on the Property were in need of being replaced over the next 18-24 months at a cost of approximately $7500.00 each and the need for additional improvements which would necessitate an annual budget of between $150,000.00 and $200,000.00. This amount is approximately double the amount budgeted by the Debtor for repairs and capital improvements. There is no source other than cash flow from the Property for such repairs and improvements, thus raising a significant possibility that such repairs and improvements will not be made in a timely fashion.

As previously discussed, the value of the Property is directly tied to the rise and fall of interest rates in the future. Because of the uncertainty of the track which such rates will follow, there is at least a significant possibility of the need for

further financial reorganization of this Debtor in the future.

For the foregoing reasons, the Court concludes that the Plan does not meet the requirements of section 1129(a)(11).

3. Section 1129(b)(1)-(2).

This is the so-called "cram-down" provision which provides:

> (b)(1) Notwithstanding Section 510(a) of this title [relating to enforceability of subordination agreements], if all of the applicable requirements of subsection (a) of this section other than paragraph (8) [requiring that each impaired class accept the plan] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.
>
> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides --
>
> (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totalling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

Initially, this Court notes that the authority in this Circuit is that while a plan which adjusts only the interests of one creditor is not, per se, impermissible, the court must carefully scrutinize the equities involved. (See, e.g., In re Bryson Properties, XVIII, 961 F.2d 496 (4th Cir. 1992) (hereinafter "Bryson").

In Bryson, the claims of all creditors, other than the claim of Travelers, would be paid in full under the Plan. In this case, although the Plan provides for full payment of Limited, only Limited's claim is at risk of not being paid under the terms of the Plan. This fact, coupled with the non-recourse nature of the Limited loan, the unwillingness of the Equity Holders to contribute anything of value through the plan or in any other manner, and the risk of a drop in value being placed solely on the shoulders of Limited leads this Court to conclude that the Plan is not "fair and equitable." This Court need not reach the issue of whether the proposed treatment of Limited meets the standard of section 1129(b)(2)(A). As stated by the Bryson Court:

> A plan must be fair and equitable in a broad sense, as well as in the particular manner specified in 11 U.S.C. section(b)(2). Here, the debtors have carried their opportunity for self-dealing too far.

Bryson at 505.

Likewise, this Court need not consider the absolute priority rule.

The Debtor has the burden of proof on the elements of Section 1129 - for the reasons stated, it failed to meet this burden. Confirmation of the Plan is, therefore, denied.

Done and ordered at Charlotte, North Carolina this the _____ day of January, 1995.

J. CRAIG WHITLEY
United States Bankruptcy Judge