UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

Alden Douglas Atwood and
Tamera Chaffee Atwood
Debtors.

Chapter 13
Case # 00-11382

Appearances: *Michael Palmer, Esq.*
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Attorney for the Debtors

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MEMORANDUM OF DECISION SUSTAINING OBJECTION TO CONFIRMATION

FACTS AND PROCEDURAL BACKGROUND:

The debtors filed a Second Amended Chapter 13 Plan (hereafter "the Plan") on April 6, 2001[1] proposing, *inter alia*, to transfer certain lands to Vermont Agricultural Credit Corporation (hereafter "VACC") in full satisfaction of VACC's secured claim. Specifically, paragraph 3.6 of the Plan provides:

> 3.6 *Class VI*: VERMONT AGRICULTURAL CREDIT CORPORATION (f/k/a Vermont Economic Development Corporation [sic]), holder of a claim in the amount of $95,577.31 plus legal fees in the amount of $2,000 arising out of a loan secured by a second mortgage on debtors' real property. Debtors will satisfy the allowed secured amount of this claim as follows: Within 30 days following confirmation of the plan, debtors will convey title by warranty deeds to three surveyed and permitted 10.1 +/- acre building lots in Shoreham Vermont, valued at $97,500 in satisfaction of the full amount of the claim of this class. The order of the Court confirming the plan of reorganization shall authorize the conveyance of this property free and clear of all encumbrances.

On April 12, 2001, VACC filed an objection to this treatment. Consequently, the April 12, 2001 confirmation hearing was adjourned so that an evidentiary hearing could be held to address the valuation of the

[1] Debtors' Second Amended Chapter 13 Plan filed on April 6, 2001 was not signed by the debtors. A fully executed proposed Second Amended Chapter 13 Plan was filed thereafter on April 19, 2001, and relates back to the date of filing of the unsigned proposed plan for purposes of the subject objection.

property the debtors proposed to transfer. Each party filed an appraisal of the property. The parties also filed memoranda of law indicating that in addition to the question of the property's fair market value, there was also a dispute as to what carrying, liquidation and legal fees and costs, if any, VACC was entitled to collect as a part of its secured claim under its loan documents.

An evidentiary hearing was held on July 17, 2001, and continued and completed on July 20, 2001. The Court reserved decision, but indicated that it would rule on the valuation question forthwith and set a date for a hearing on the remaining issues raised by VACC's objection, if a further hearing was deemed necessary.

JURISDICTION

This is a core proceeding and the Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334.

ISSUES PRESENTED

In their chapter 13 plan, the debtors propose to transfer three building lots (totaling approximately 30.3 acres) from their non-residential real property (hereafter "the subject property") to VACC in full satisfaction of VACC's secured claim. VACC has filed a timely objection to the confirmation of the debtors' Plan and, in particular, objects to the debtors' treatment of its claim. VACC does not dispute that the debtors can force it to "take dirt" in satisfaction of its lien. However, VACC argues that the Court should deny confirmation on the following grounds:

(1) The debtors' appraisal of the subject property is erroneously high and VACC's appraisal accurately demonstrates that the fair market value of the subject property is actually less than VACC's claim and therefore a transfer of the subject property is of insufficient value to satisfy VACC's claim in full.

(2) VACC is entitled to collect the costs it would incur in converting the land to cash and therefore even assuming *arguendo* that the subject property's fair market value is equal to the amount due on VACC's secured proof of claim, confirmation must be denied because the value of the property to be distributed to

VACC is not sufficient to cover its carrying and liquidation costs, too.

(3) VACC is entitled to collect its reasonable attorney's fees as part of its secured claim and therefore it seeks an award of attorney's fees by this Court to add to its allowed proof of claim, which would increase the difference between the value of the property and the amount due to VACC.

(4) The debtors' plan is not feasible.

DISCUSSION

The seminal statutory provision in this matter is 11 U.S.C. §1325(a)(5)(B)(ii). In pertinent part it provides:

> *[T]he court shall confirm a plan if –*
> *with respect to each allowed secured claim provided for by the plan –*
> *the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such [secured] claim.*

1. The Fair Market Value of the Property

Ultimately, under §1325(a)(5)(B)(ii), the critical question is whether the property being distributed under the plan is "not less than the allowed amount " of VACC's claim. In order to make that determination the Court needs to determine both the value of the subject property and the amount of VACC's allowed claim. The Court will first address the question of the current fair market value of the property since that is critical to the issue of whether this plan can be confirmed, regardless of how the Court rules on the issues of whether VACC is entitled to collect carrying costs or attorney's fees and, if so, in what amount.

The statute makes clear that the valuation of the property being transferred is to reflect the value of the property "as of the effective date of the plan." §1325(a)(5)(B)(ii); *see also* In re Allen, 240 B.R. 231 (Bankr. W.D. Va. 1999). The Court has been presented with two appraisals that purport to present the current value of the subject property. If the Court were to find either of these appraisals reliable, then it would have a valuation as of the effective date of the plan, as required by the statutory parameters of chapter 13.

The debtors' appraiser, Mr. William C. Wisell, prepared an appraisal report dated January 16, 2001 which

concludes that the subject property has a total fair market value of $97,500. By contrast, Haggett Appraisal Service appraised the property on behalf of VACC and its report, dated June 14, 2001, concludes that the subject property has a total fair market value of $86,000. The two appraisers essentially agree on the relative value of the three lots and rely upon the comparable sales valuation technique, but they use different comparable sales and reach different conclusions. Specifically, the appraisals differ as follows:

Parcel	Wisell Valuation (Ds)	Haggett Valuation (VACC)	Difference	
Lot # 1	$35,000	$30,000	$5,000	(14.3 %)
Lot # 2	$37,500	$33,000	$4,500	(12.0 %)
Lot # 3	$25,000	$23,000	$2,000	(8.00 %)
TOTAL	$97,500	$86,000	$11,500	(11.9%)

Interestingly, though, both appraisers testified that as a part of their market research they consulted with a different real estate broker in the Middlebury, Vermont area as to the frequency and average sale price of 10-acre parcels in the subject area and both were told that approximately ten 10-acre lots sold during calendar year 2000. Mr. Haggett testified that his information was that the median price was $30,000 and the average marketing time was 12 months. Mr. Wisell testified that his source of information had told him that these sales had average marketing time of 6 months and an average price of $29,000. Both appraisers also indicated that they believed the three lots comprising the subject property were "typical lots for this area." The fact that these two sources of information reflected a slightly higher price for a longer marketing period is consistent with general real estate marketing and sales principles. The cited information from the two sources would cumulatively support the conclusion that the average sale price for similar, typical 10-acre parcels sold during the most recent calendar year, in this particular geographic area – and hence the average fair market value of 10-acre lots – was between $29,000 and $30,000. Mr. Wisell's appraisal reflects an average per lot value of $32,500 and Mr. Haggett's appraisal reflects an average per lot value of $28,666. It is perhaps not surprising that the debtors' appraisal urges this Court to value the property somewhat higher, and the creditor's appraise urges a value somewhat lower, than the market average each testified to during the evidentiary hearing.

This Court has had the opportunity to evaluate the credibility and demeanor of both Mr. Wisell and Mr. Haggett during extensive testimony with each expert describing their respective qualifications, research, methods and conclusions, as well as observing their composure, confidence and consistency in responding to pointed questions during protracted cross-examination. Although I find both appraisers to be well-qualified and credible, I also find each appraisal to be flawed significantly and thus not independently reliable.

Mr. Haggett's appraisal relies upon the same three comparable sales in valuing each of the subject lots. The Court initially found this tack to be the more sensible approach since, as noted above, both appraisers seemed to indicate that the three lots being valued fit into the category of typical 10-acre lots. But, the quality of Mr. Haggett's work product was called into serious question when other credible testimony revealed that the comparable sale #1 described as the "Bates to Armell" property was in fact not that parcel at all. Mr. Haggett's appraisal had the wrong photograph and the wrong description of the Armell property. This lack of accuracy compelled a determination that the Haggett appraisal, presented in support of VACC's objection, was less than fully reliable.

A similar flaw was revealed in the Wisell appraisal when it became apparent that the parcel on "Smith Street" that the debtors' appraiser was utilizing to justify the higher value for the subject property was not as he described it. There were fundamental questions as to why this parcel, which sold for over $58,000 - an aberration or at least atypical sale by all accounts – was used when it was evident there were many other typical sales apparently available. But most distressing was the fact that Mr. Wisell testified that the Smith Street property (used as comparable sale #1 in his appraisal of the debtors' lots # 1 and 2) had a lake view and was too far south to be subject to a direct view of the International Paper factory. The view from any of the properties in question was found by both appraisers to be an important quotient of value and hence having a lake view would be an enhancement to value and having a view of the factory would be considered negative. The fact that Mr. Wisell testified that the Smith Street property had a desirable view – and adjusted the valuation of the subject parcels accordingly – when in fact photographs presented by Mr. Atwood credibly demonstrated that the Smith Street property had no view of the lake and instead

had an undeniable view of the factory compelled the Court to conclude that Mr. Wisell's methods were likewise less than meticulous and his conclusions were therefore suspect.

While the Court is troubled by the defects in each of the appraisals, the Court remains persuaded that each of the appraisers is generally competent to render an expert opinion on the value of the subject parcels and that, but for the discrepancies described above, the valuation reports are generally sound. The Court supports this conclusion by reference to the independent market data provided by each of the experts, as well as the testimony and experience of Mr. Atwood, as presented at the evidentiary hearing. Based upon his testimony, the Court concludes that Mr. Atwood is very familiar with his land, having lived there for several decades and having been a licensed real estate broker in the area for a few years, and that his assessment of the value of the subject property – although not given as much weight as the opinion of the professional appraisers – is relevant. Mr. Atwood testified as to a prior sale of a generally similar 10-acre parcel to his brother for $30,000 and evidence was also presented as to varied offers received last year (ranging from $75,000 for all three lots to $30,000 for lot #3), and concluded that he agreed with Mr. Wisell's conclusions, except that he believed the value of lot #3 to be higher than Mr. Wisell's appraisal.

Based upon the evidence presented, the credibility of the witnesses and the exhibits admitted in support of valuation of the subject property, the Court finds that an averaging of the two appraisals is the most reliable indicator of value. *See* Albuquerque Chemical Co., Inc. v. Arneson Products, Inc., 201 F.3d 447, 1999 WL 1079600 (10th Cir. 1999)(upholding bankruptcy court's averaging of experts' appraisals). Although other methods for reconciling these two appraisals clearly exist, the Court is bound to apply a method that yields results consistent with all of the credible testimony of the witnesses. *See* American Valmar International Ltd., Inc v. Commissioner of Internal Revenue, 229 F.3d 98, 101 (2nd Cir. 2000)("particularly strong deference is owed where the trial court bases its findings upon its determination of witness credibility"). [2] In averaging the conclusions of the two experts, the Court

[2] Another option would be for the Court to apply the comparable sales approach, using the comparable sales data of the sales selected by both appraisers and then delete all references and computations utilizing the two flawed properties (the "Smith Street" sale in the Wisell appraisal and the "Bates to Armell" sale in the Haggett appraisal), it would be left with the following indicated values for each of the three lots the debtors propose to

finds the subject lots to have a total current fair market value of **$91,750** (with lot #1 being ascribed a value of $32,500, lot # 2 a value of $35,250 and lot #3 a value of $24,000). Pursuant to §1325(b)(5)B)(ii), therefore, VACC's objection to the debtors' Plan must be sustained if the Court determines that VACC's allowed secured claim exceeds $91,750.

The debtors acknowledge the VACC claim to be $95,577.31 (for principal and interest) in their Plan. Moreover, the Court credits the testimony of Mr. Fitzgerald of VACC as to the amount due, and finds that the principal and interest portion of the VACC claim is **$96,335.36** as of May 30, 2001. Thus, it is clear that VACC's secured claim, even before the allowance of the attorneys fees and other allowable expenses, is well in excess of the value of the property the debtors propose to transfer to VACC in full satisfaction of VACC's secured claim.

2. VACC's Entitlement to Carrying Costs, Liquidation Costs and Attorney's Fees

The question raised specifically by the creditor in this case is whether VACC is entitled to a distribution of property which is at least equal to the amount of its allowed claim **plus** its carrying and liquidation costs and the

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distribute to VACC:

LOT # 1:	Haggett comp sale # 2	$30,800
	Haggett comp sale #3	$30,000
	Wisell comp sale #2	$27,750
	Wisell comp sale #3	$30,000
	AVERAGE VALUE:	**$29,638**
LOT #2:	Haggett comp sale 2	$33,600
	Haggett comp sale 3	$33,000
	Wisell comp sale #2	$27,750
	Wisell comp sale #3	$30,000
	AVERAGE VALUE:	**$31,086**
LOT #3:	Haggett comp sale 2	$23,800
	Haggett comp sale 3	$22,500
	Wisell comp sale #1	$25,000
	Wisell comp sale #2	$22,750
	Wisell comp sale #3	$25,000
	AVERAGE VALUE:	**$23,810**
TOTAL VALUE OF SUBJECT PROPERTY:		**$84,534**

However, since this yields a total value which is less than either appraisal and less than the figures given for recent sales of similar property this approach is rejected.

reasonable attorney's fees and legal costs it has incurred to date in connection with their claim against the debtors. VACC claims it will incur carrying and liquidation costs of approximately $11,000, and therefore if the debtors are to satisfy the VACC claim through the transfer of property, the property must have a value equivalent to its claim *plus* $11,000 *plus* the amount of attorney's fees allowed by this Court. This is a question of law and the parties have fully briefed the issue, and thus it will be determined at this time, without further testimony.[3]

The Court finds no governing authority either in the Bankruptcy Code or case law mandating that a debtor pay to a creditor the costs of carrying or liquidating property distributed to it in a chapter 13 plan. In rejecting VACC's claim for including these extraordinary expenses in its claim, this Court relies on In re Kerwin, 129 B.R. 375 (Bankr. D.Vt. 1991), *aff'd*, 996 F.2d 552 (2nd Cir. 1993). In Kerwin, this Bankruptcy Court (Conrad, J.) clearly held that the mortgage documents control as to the question of what costs and fees the creditor can collect as a part of its secured claim. As this Bankruptcy Court clearly stated: "if its not in the parties agreement, the creditor does not get it." In re Kerwin, 129 B.R. at 386. While the mortgage documents here address the issue of recoverable fees and expenses in excess of the outstanding balance due on the mortgage, the pertinent provisions fail to embrace the liquidation costs being sought by VACC.

[3] Debtors' counsel asked to be allowed the opportunity to be heard on this issue at the July 20th hearing and the Court indicated that it would provide that opportunity. However, in reviewing the memoranda of law on file it is clear that both parties have fully addressed this matter and the Court has concluded that this is a question purely of law and there is no testimony that would be relevant or useful on this point.

The provisions VACC relies upon are:

> *Attorneys Fees* *If an Event of Default occurs pursuant to the Loan Agreement, the Borrowers agree to reimburse Lender for all reasonable attorney's fees and expenses and all other reasonable fees and expenses incurred by Lender in connection with the default, including any legal action taken by the Lender in order to protect its right in the Secured Property or if the Borrowers file a Petition in Bankruptcy under Chapter 7 or Chapter 12 or a Petition in Bankruptcy is filed against Borrowers under Chapter 7 or Chapter 12 or a Petition is filed in bankruptcy or for reorganization by or against Borrowers under any other provision of the Bankruptcy Code or in any other insolvency proceedings.*

[Loan Agreement dated February 14, 1966, between the Atwoods and Vermont Economic Development Authority (VACC's assignor)].

* * * *

> *If Borrowers default in this Note, Borrowers agree to reimburse Lender for all reasonable attorney's fees and expenses and all other reasonable fees and expenses incurred by Lender in connection with the default as provided in the Loan Agreement.*

[Note from Atwoods to VEDA dated February 14, 1966]

* * * *

> *In the event of such acceleration, the Mortgagee may immediately start proceedings to protect its interest. If the Mortgagors default, they hereby agree to pay all the reasonable costs and charges of any such proceeding including, but not limited to foreclosure proceedings.*

[Mortgage Deed]

The Loan Agreement provision entitled "Attorneys Fees" is the primary source for VACC's request for recovery of its anticipated costs to liquidate the subject property. While the heading of this provision is somewhat misleading as it fails to reference the recovery of liquidation costs upon default, this inaccurate description standing alone is not fatal to the requested relief. The language of the provisions itself, however, is unclear and inadequate to warrant recovery of the request for the liquidation. Hence, the question: Are the considerable costs of carrying and liquidating the property to be distributed to VACC by the debtors within the "*reasonable attorney's fees and expenses and all other reasonable fees and expenses incurred by Lender in connection with the default, including any legal action taken by the Lender in order to protect its right in the Secured Property or if . . . a Petition is filed in bankruptcy or for reorganization by or against Borrowers* ?" This Court finds that the costs

sought by VACC are beyond those reasonably contemplated by the parties or articulated under the entangled language used by the Lender in this provision.

While VACC also directs this Court's attention to the remedy provisions contained in the above-referenced Note and Mortgage Deed, these provisions are ineffective standing alone to authorize recovery of these extraordinary costs and expenses. The Note provision merely references VACC's right to recover attorneys fees and costs, with no mention of liquidation expenses, in connection with the default; it makes no reference to any bankruptcy, and only allows recovery of attorneys fees and costs to the extent provided in the Loan Agreement. If the liquidation expenses are not provided for in the Loan Agreement, then they cannot be obtained under the Note. The Mortgage Deed is equally unavailing because it limits recovery of all reasonable costs and charges related to proceedings started by the mortgagee upon acceleration. The liquidation and carrying costs VACC seeks do not arise from any action that VACC initiated, but rather derive from the terms of Plan filed in a case commenced by the debtors. Since neither provision specifically embraces the liquidation costs associated with a surrender of property pursuant to a bankruptcy proceeding started by the mortgagors, this Court has no authority to direct the debtors to pay them to VACC in their Plan.

Furthermore, it is noted that allowance of attorneys fees and expenses in bankruptcy is governed by the agreement between the parties and should be strictly construed. *See* In re Schultz, 58 B.R. 945 (Bankr. E.D. Penn. 1986); *cf*. In re Sokolowski, 205 F.3d 532, 535 (2nd Cir. 2000)(when the litigated issues involve not basic contract enforcement issues, but rather issues peculiar to federal bankruptcy law, attorney's fees generally will not be awarded unless there is an adequate showing of bad faith or harassment by the losing party); In re Fobian, 951 F.2d 1149 (9th Cir. 1991); In re Ryan's Subs, Inc., 165 B.R. 465 (Bankr.W.D.Mo. 1994). As noted above, the contract determines the latitude and scope of the right to recover attorneys fees and expenses incurred by a creditor. In re Kerwin, 129 B.R. at 385-386; *cf*. In re Ryan's Subs, Inc., 165 B.R. 469; In re Westview 74th Street Drug Corp., 59 B.R. 747, 757 (Bankr.S.D.N.Y. 1986). In this instance, upon a strict construction of the remedy provision set

forth in the subject Loan Agreement, the language does not appear to be specific enough to encompass the full spectrum of liquidation costs and expenses in a §1325(a)(5)(B)(ii) distribution of property under a chapter 13 plan as requested by the creditor. The provision itself limits recovery of reasonable attorneys fees and expenses and all other reasonable fees and expenses to those "*incurred* by Lender in connection with the default." VACC is not only seeking recovery of any actual fees and expenses which it has incurred, but also seeks projected or anticipated future liquidation costs and expenses that may be incurred by VACC as a result of its determination to market and sell these parcels at some future date.

The conclusion that a strict construction of the subject Attorney's Fee provisions of the Loan Agreement do not warrant recovery is likewise consistent with the general guidepost in this Circuit that a bankruptcy estate is not concerned under the Code with the value that the transferred collateral actually yields on liquidation but, rather, that upon the transfer of the property, the secured claim is deemed to be satisfied and the lien removed from the retained collateral. *See* In re Kerwin, 996 F.2d 552 (2nd Cir. 1993).

3. The Amount of Carrying Costs, Liquidation Cost and Attorney's Fees Allowed

Based upon the rationale set forth above, the Court finds that VACC is not entitled to collect any funds from the debtors, or increase the size of its allowed secured claim, based upon the carrying and liquidation costs it anticipates it will incur if required to accept a distribution of the subject property at this time. The creditor bears the risk upon distribution pursuant to a confirmed chapter 13 plan. Thus, there is no need for the Court to rule upon the question of the amount of carrying costs that must be taken into account in determining if the value of the subject property is at least equal to the VACC secured claim.

However, the language of the loan documents clearly does authorize VACC to collect its reasonable attorney's fees and other reasonable professional expenses as a part of the debt secured by the collateral in this bankruptcy case and hence requires this sum to be added to the amount of the allowed secured claim for purposes of deciding if the requirement of §1325(b)(5)(B)(ii) have been met.

If the parties wish to have the Court make a determination as to the amount of attorneys fees and other professional costs and expenses VACC is entitled to as a part of its allowed secured claim it will do so as soon as the issue is fully submitted . This issue has already been partially submitted by VACC, but the creditor has requested the opportunity to present further evidence on the question of the reasonableness of the fees sought. The debtors have also requested the opportunity to present evidence on this issue. In light of the volume of papers, evidence and exhibits already filed in this matter, and the debtors' need to be able to determine if and how they can move forward with their reorganization efforts, I believe it appropriate that any further litigation on this objection be concluded within the next thirty days. Accordingly, if both parties wish to proceed further on this matter, the Court will permit each party to present their evidence on this issue, but limit such evidence and argument to one hour total per party. The Court will also consider a memorandum of law and/or any pertinent affidavits either party would like to file, provided that the new arguments are limited to the professional fees question and the written submissions do not exceed 5 pages total per party, and are filed by August 2, 2001.

If there is to be a continued hearing on this matter it will be held on August 10, 2001 at 9:00 am at the U. S. Bankruptcy Court, The Opera House, Merchant's Row, Rutland, Vermont and that hearing will focus exclusively on the costs and professional fees to be allowed to VACC , consistent with this decision. Thereafter the Court will issue a decision on the costs and professional fees that may be allowed as part of VACC's secured claim, and if the debtors have found a way to treat the VACC claim which they believe to be consistent with §1325(b)(5)(B)(ii), on proper notice the Court will also consider the feasibility of the Plan,

4. Feasibility

The debtors are directed to file the Amended Plan that they presented at the July 20th hearing, or a revised plan which complies with this decision, no later than July 30th, including the detailed information as to the operating income and expenses required by the official forms I and J so that the Court and VACC can assess feasibility.

The confirmation hearing is generally adjourned until August 16, 2001 at 2:30 p.m., at the U. S. Bankruptcy

Court, The Opera House, Merchant's Row, Rutland, Vermont. Any remaining or new open matters involving confirmation of the debtors' Plan and the viability of the debtors' chapter 13 case will be addressed at that time.

CONCLUSION

In sum, the Court finds:

(1) the subject property has a total current fair market value of $91,750;

(2) pursuant to 11 U.S.C. §1325(b)(5)(B)(ii) if the debtors wish to distribute land to VACC in full satisfaction of VACC's allowed secured claim, as set forth in their Plan, they must distribute property to VACC with a current market value at least equal to VACC's allowed secured claim;

(3) VACC is not entitled to recover, as a part of its secured claim, the expenses it anticipates it will incur in carrying or liquidating the subject property being distributed under the Plan;

(4) VACC is entitled, under its loan documents and the controlling case law in this Circuit, to recover its reasonable attorneys fees and other reasonable professional expenses as part of its secured claim;

(5) the principal and interest portions of VACC's secured claim are allowed in the amount of $96,335.36; and

(6) the issues of the amount of attorneys fees and other expenses that will be allowed, as well as Plan feasibility, will be addressed, if the parties wish to pursue these issues, after further evidence is submitted consistent with this decision.

Based upon these findings the Court rules that the proposed Plan fails to comply with 11 U.S.C. §1325(a)(5)(B)(ii) and cannot be confirmed in its present form.

/s/ Colleen A. Brown
Colleen A. Brown
U.S. Bankruptcy Judge

July 24, 2001
Rutland, Vermont