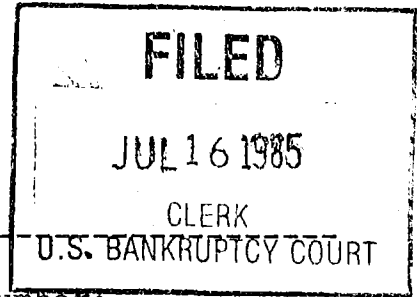


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN



In re:

Case Number:

TELEMARK MANAGEMENT COMPANY, INC.
THE TELEMARK COMPANY, INC.
TELEMARK LAND COMPANY, INC.
HISTORYLAND, INCORPORATED
THAW, INC.

EF7-81-00747
EF7-81-00748
EF7-81-00749
EF7-81-00750
EF7-81-00751

Wisconsin Corporations, d/b/a
Telemark Enterprises,

Debtors.

LAWRENCE J. KAISER, as trustee
for Telemark Land Company, Inc.,

Plaintiff,

Adversary Number:

v.

85-0116-7

JOHN D. ALLISON, et al.,

Defendants.

OPINION AND ORDER APPROVING SALE OF TELEMARK LODGE

The matter presently before this Court arises in a liquidation proceeding under Chapter 7 of the U. S. Bankruptcy Code, 11 U.S.C. § 101 et seq. On June 21 and 24, 1985, the Trustee in this proceeding, Lawrence J. Kaiser, issued notice to creditors and interested parties that he had entered into a "purchase and settlement agreement" with the Telemark Lodge Owners Association (TLOA). TLOA is an association of individuals or entities that purchased an interest in the individual units comprising the

Telemark Lodge. This agreement provides that the Trustee shall convey all of his right, title and interest in the Telemark Lodge, the associated waste water treatment plant, and all personal property relating to the Lodge operation, to TLOA. Pursuant to 11 U.S.C. § 363(b)(1) and (f) such conveyance is to be free and clear of all liens, claims and encumbrances except the long-term leasehold interests of the lodge owners. In addition, the Trustee and TLOA have agreed to dismiss and settle all claims and causes of action between themselves. This includes two adversary proceedings between the Trustee and TLOA which have been initiated in this bankruptcy case.

Objections to the proposed sale and settlement have been made by First Wisconsin National Bank of Milwaukee (which holds individual mortgages on approximately 43 units of the 200 total units, or slightly over 20% of the lodge units, with approximately \$752,000 of indebtedness), and First Wisconsin National Bank of Rice Lake (which owns two Lodge units or 1% of the units involved). Those parties are represented by identical counsel and shall be referred to as "First Wisconsin". The United States Attorney on behalf of the Internal Revenue Service (IRS) has also objected. On July 9 and 10, 1985, a hearing was held before this Court to consider the proposed sale and settlement, and the objections of First Wisconsin and IRS.

A brief discussion of the background of this case is necessary to provide a complete understanding of the issues before the Court. The Debtors in this proceeding, Telemark Enterprises, are

a collection of related Wisconsin corporations. Telemark Enterprises, previous to this liquidation proceeding, owned and operated a resort complex in northwest Wisconsin. This resort complex consists of a lodge, ski hill, golf course and other tourist and resort properties. On April 30, 1981, Telemark Enterprises filed for Reorganization under Chapter 11 of the Bankruptcy Code. This case was converted into the present Chapter 7 liquidation proceeding on May 17, 1984. In re Telemark, 41 B.R. 501 (Bankr.W.D.Wis. 1984).

Upon conversion the present Trustee was appointed by this Court to administer and liquidate the estate. For the fiscal year ending in April, 1984, Telemark Enterprises had a total revenue of \$5.4 million. However, on May 17, 1984, Debtors had virtually no funds on hand. At the hearing on this matter Mr. Kaiser testified that his primary task in the early period was simply to maintain the operation. It was, and still is, the Trustee's position that the estate could be liquidated most profitably as a going concern. No interested party has argued with this position.

As a result of the serious financial difficulties of Telemark Enterprises, the Trustee has engaged in nearly constant, often frenetic, efforts to obtain financing or to market portions of the estate. It is not necessary at this juncture to discuss all the activities that occurred as a result of these efforts. It is necessary, however, to consider the matters which are relevant to the issues before the Court.

To begin with, the adversary proceedings mentioned earlier were initiated by the Trustee as part of his attempts to liquidate the estate. In the first action, known as Kaiser I, the Trustee has asked this Court to determine the ownership of the Lodge and the interest that lodge owners possess. Trustee's position is that original documents conveyed long-term leaseholds, as opposed to outright ownership, and contained the designation "LEASE". In the second lawsuit, Kaiser II, the Trustee is seeking court approval to sell the Lodge free and clear of those asserted long-term leasehold interests. The purchaser contemplated in Kaiser II is Edward J. Hurley. On April 19, 1985, the Trustee and Mr. Hurley entered into a purchase agreement for the same property included in the TLOA purchase agreement. At an expedited hearing on April 22, 1985, the Court granted preliminary approval of the sale to Mr. Hurley. Final approval was to have been considered at a hearing before the Court on June 11, 1985. However, at this hearing the Trustee recommended that the TLOA agreement be approved over the Hurley offer because it would settle Kaiser I and II, and the issue of distribution of sale proceeds between the Trustee and TLOA. Consequently, the matters before this Court for consideration are the Hurley purchase offer, the TLOA purchase and settlement agreement, and distribution of the proceeds from any approved sale.

The position advanced by First Wisconsin at the hearing is that its interests will not be adequately protected by a sale to

either TLOA or Mr. Hurley. It maintains that inadequate efforts were made by the Trustee to market the Lodge. Therefore, First Wisconsin asserts that the price obtained was insufficient. It also objects to the distribution provided for in the event of a sale to a party other than TLOA. IRS claims that the Trustee's efforts at marketing were insufficient to assure a fair market price. Additionally, it claims that the provided distribution would be inequitable. Finally, IRS maintains that any earnest money deposit which is made should not be given superpriority status.

A trustee may sell estate property free and clear of any interests, provided that one of the disjunctive requirements of sec. 363(f) is satisfied and that any interest of an entity in the property is adequately protected. 11 U.S.C. § 363(e) and (f). Since no interested party has claimed that sec. 363(f) has not been satisfied, the only issue before the Court is whether the proposed sales provide adequate protection to the property interests involved. These property interests include the claimed leaseholds in the Lodge units possessed by the lodge owners. They also entail mortgages on those leaseholds possessed by First Wisconsin.

The term "adequate protection" is not explicitly defined by the Code. However, the Code's legislative history provides valuable insight into what will constitute adequate protection in this type of situation. The analysis of the Bankruptcy Reform Act of 1978 states that:

Most often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale.

Legislative History, Senate Report No. 95-989, p. 56 (1978) U.S. Code Cong. & Admin. News 1978, p. 5842.

Before a court can determine that a property interest is adequately protected by attachment to the proceeds of the sale of that property, it must consider the price obtained and the circumstances of the sale. A price clearly below the fair market value of the property would not provide adequate protection. Such an analysis was performed in In re Circus Time, 5 B.R. 1 (Bankr.D.Maine 1979). The debtor company in that case had such serious cash-flow problems that it could only remain in business for a few more weeks. Id. at 2. Furthermore, there was a real danger that if a sale based on the offer before the court was not consummated shortly, the offer would be withdrawn. Id. The court concluded that the offer contained a fair and reasonable price and, given debtor's difficulties, was the best offer obtainable. Id. Based on this conclusion, the court stated that adequate protection would be provided by having any valid interest attach to the proceeds of the sale. Id. at 3.

The task of the Court in this case, therefore, is to determine whether the price contained in the TLOA and Hurley offers is a fair and reasonable price. If such price provides at least fair market value, the property interests in the Lodge can be adequately protected by allowing them to attach to the proceeds of a sale.

The TLOA agreement and Hurley offer contain nearly identical provisions as to the sale of the Lodge. The Hurley offer provides for a price of \$3 million of which \$300,000 has already been paid as an earnest money deposit. The TLOA purchase price is \$1.5 million with an earnest money deposit of \$350,000. The TLOA offer also provides for a forgiveness of approximately \$300,000 in debt owed by the estate to TLOA. This places the value of the TLOA offer at \$1.8 million. In addition, as mentioned earlier, the TLOA agreement provides for settlement of Kaiser I and II.

Each of the offers does not include the purchase of the golf course, coliseum, ski hill, cross-country acreage, etc. Both offers contemplate use of said amenities which may be by lease of the Trustee's interest or purchase. Mr. Hurley and TLOA have each offered \$600,000 for the amenities which do not include Hayward Historyland land area. The amenities are mortgaged in excess of \$8,000,000, including delinquent interest. The Hurley offer requires the Trustee to obtain by purchase or through Kaiser I the interests of the lodge owners and the release of their mortgages.

The major thrust of First Wisconsin and IRS in this case has been that the Trustee engaged in inadequate marketing of the Lodge. First Wisconsin contends that this resulted in a price which does not reflect fair market value. The testimony in this case by Mr. Kaiser, Benjamin Morgan (Telemark Director of Resort

Operations), James Sullivan, (the management consultant hired by Mr. Kaiser to operate Telemark), and David Fitzgerald, (a real estate broker), outlined numerous efforts to market the Lodge. The Trustee concedes that he did not advertise the premises. However, he claimed that this was due to a lack of financial resources and the myriad of title and claim problems he encountered. Mr. Kaiser and his employees, and Mr. Fitzgerald, contacted a number of individuals and investment and real estate companies. Approximately 43 entities expressed an interest in the purchase of Telemark and received a packet of information concerning the resort from the Trustee.

Although the marketing efforts undertaken in this case may not have been ideal, they were certainly sufficient. This is especially so considering the financial and logistical barriers encountered by the Trustee. The strongest evidence of the adequacy of the marketing done by the Trustee is the TLOA and Hurley offers. The fact that those offers provide a fair market price, as will be shortly discussed, provides the surest proof of adequate marketing. The logical purpose of marketing property is to obtain a buyer willing to pay fair market value. If this is accomplished, one can hardly argue that the marketing was inadequate.

At the hearing on this matter, the Trustee introduced testimony from Craig Solum, a real estate appraiser, that the market value of the Lodge, assuming free and clear title and access to the ski hill, golf course and other amenities, was

between \$1.5 and \$2 million. Neither IRS or First Wisconsin discredited this appraisal or offered a contrary appraisal.

Based on Mr. Solum's testimony and Mr. Sullivan's consistent estimate of value, the Court concludes that both the Hurley and TLOA offers are within the range of fair market value for the Lodge. This conclusion is bolstered by the fact that an independent offer from the Centennial Group of Dallas, Texas, was \$3.8 million dollars for the entire Telemark Enterprises, including the amenities, free and clear. Given the evidence of the Solum appraisal, and the Centennial Group offer as comparison, it would be difficult to conclude that the 3 million dollar Hurley offer was not within fair market value for the Lodge alone. The same must be said regarding the TLOA offer when the added value of settling complicated litigation is added to it. Based on the significant financial and other problems of Telemark Enterprises and the physical condition of the Lodge, the Court concludes that a better price for the Lodge could not be obtained. Since the Court has concluded that either offer provides a purchase price within the fair market value of the Lodge, and that a better price could not be obtained, both First Wisconsin and the lodge owners are adequately protected.

The Court must next consider whether a sale at this time to either TLOA or Mr. Hurley is in the best interests of the Debtors and creditors. The testimony of Mr. Kaiser and his employees has demonstrated that the task of maintaining Telemark as a going concern has, for more than a year, been excruciatingly difficult.

The testimony also bears out the fact that if Telemark closes, its value will decline significantly. Both Mr. Vortanz (Telemark's Controller), and Mr. Kaiser have testified that in all likelihood Telemark cannot operate beyond early Fall without an infusion of capital. Given the almost constant financing rejections Trustee has encountered, it appears that the only way to keep Telemark operating is to approve a sale to TLOA or Mr. Hurley. Based on these circumstances and the adequacy of the price of both offers, the Court concludes that it is in the best interests of the Debtors and all creditors to approve these sales.¹

Based on the exigencies of the case that have been discussed previously, and the overall benefit to be obtained by a sale under either the TLOA or the Hurley offer, the Court will approve a sale under both offers but will give one offer preference as requested by the Trustee. Upon careful consideration of both offers, the Court determines that the TLOA offer is the better offer. The single overwhelming factor in the Court's determination is the provision settling all claims between the Trustee and TLOA. Kaiser I and II involve complicated, novel issues of bankruptcy law. The Court is convinced that a full

¹ Regrettably, every creditor of Telemark Enterprises will not receive payments from this sale. However, the entirety of the post-conversion operating expenses and the administrative expenses will be covered. In addition, after all Chapter 7 debts are paid, according to the testimony of Mr. Kaiser, under a sale to TLOA \$150,000 to \$175,000 will remain to pay pre-conversion creditors.

litigation of those actions could take years, consume tremendous amounts of money, and cast an ominous cloud of uncertainty over Telemark and any sale that was attempted. There is a real possibility that any sale could be blocked or overturned. This uncertainty in the fragile environment in which Telemark Enterprises now exists would almost inevitably be disastrous. Because of the settlement that would remove this uncertainty and nearly certain monumental cost, the Court concludes that the TLOA offer should be given preference even though it is for \$1.2 million less than the Hurley offer.²

In the event that TLOA is unable to secure necessary financing, it has agreed that a sale to Mr. Hurley or another party may take place provided the sale price is not less than \$3 million. The Trustee and TLOA have in their agreement provided for a distribution that is to occur after a sale to Mr. Hurley or another party. Both IRS and First Wisconsin have objected to the distribution provision. Based on the evidence in this case, the Court finds that the amount to be given to TLOA fairly reflects the value of its claims in the Lodge. In order to assure that the interest of First Wisconsin as a mortgagee on the leaseholds is adequately protected, this Court will direct

² The Court is cognizant that individual lodge owners who dissent from the TLOA agreement, or who are not members of TLOA, possibly may attempt to carry on the battle outlined in Kaiser I. Nevertheless, TLOA as an organization has been the guiding force establishing the lodge owners' position. At the very least, a settlement with TLOA will go a long way in removing uncertainty and has a tremendous value alone.

that its interest will attach to the pro-rata share of money going to lodge owners who have mortgages with First Wisconsin. Likewise, individual lodge owners who are not TLOA members shall be entitled to a pro-rata share of the sale receipts. With these added conditions, the Court concludes that the allocation provided for between Trustee and TLOA is fair and proper.

The final issue before the Court concerns the propriety of granting superpriority status under sec. 364 of the Code to the earnest money deposit to be made by TLOA. The factors discussed earlier which warrant Court approval of the proposed Lodge sale also justify granting superpriority status to the TLOA earnest money deposit. Most significantly, the factors demonstrating adequate protection which the Court discussed earlier also demonstrate adequate protection in the granting of superpriority status.

ORDER

IT IS ORDERED THAT:

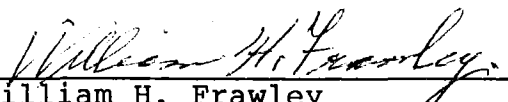
- (1) The Court approves the sale of Telemark Lodge free and clear of other property interests pursuant to 11 U.S.C. § 363(b) to either TLOA or Mr. Hurley according to the offers before the Court;
- (2) The TLOA purchase offer be given preference over the Hurley offer;
- (3) TLOA and Mr. Hurley shall, as previously ordered, submit to the Court by August 15, 1985, financing commitments,

with closing contingencies, for the full amounts due under their respective offers;

- (4) A hearing, as previously ordered, shall be held on August 16, 1985, at 10:30 a.m. to consider the sufficiency of financing commitments; the party whose financing commitment is approved, if any, shall have the approved offer as of that time;
- (5) The party possessing the approved offer following consideration of financing shall, as previously ordered, have until October 4, 1985, to close unless that date is modified by further order of this Court;
- (6) The provisions for the distribution of sale proceeds between the Trustee and TLOA, as contained in their agreement, are approved with the clarifications contained in the Court's opinion;
- (7) The earnest money deposit of \$350,000 to be made by TLOA will have superpriority status under 11 U.S.C. § 364.

Dated: July 16, 1985.

BY THE COURT:


William H. Frawley
U. S. Bankruptcy Judge

cc: Atty. Lawrence J. Kaiser
U. S. Atty. John R. Byrnes
Atty. Leonard G. Leverson - Atty. James O. Huber
Atty. Howard A. Patrick - Atty. Stephen H. Cohen
Atty. William C. Lewis, Jr. - Atty. Jack De Witt
Atty. William A. Adler
Atty. Jeffrey W. Guettinger
Atty. Gary E. Sherman
Atty. Thomas G. Kissack
Atty. Steven J. Ledin