IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:	)	BK 83-1864
	)	CV 84-0-562
VEKCO, INC.,	)	
	)	
Debtor.	)	ORDER

This matter is before the Court from a final order of the Bankruptcy Court, dated August 14, 1984, confirming the debtor's first amended plan of reorganization and overruling the Federal Land Bank's objection to confirmation of such plan. After carefully considering the record on appeal and the briefs submitted by the parties, the Court finds that the decision of the Bankruptcy Court should be reversed and remanded.

I. FACTS

On June 30, 1977, the debtor and the Vahles jointly obtained a loan from Federal Land Bank (hereinafter FLB) for the sum of $270,000.00. In order to secure this debt, FLB received a mortgage on a total of 560 acres of farmland, 480 acres of which was owned by the Vahles and located in Thurston County, and 80 acres of which was owned by the debtor corporation located in Cuming County. FLB retained a first lien on each of these tracts of real estate.

On October 27, 1983, the debtor filed a Chapter 11 bankruptcy and the Vahles filed a personal Chapter 11 bankruptcy. The schedules filed showed that FLB had a first lien on the 560 acres, and that Western Cornbelt Agricultural Credit Corp. held a second mortgage on all real estate.

The Vahles' Chapter 11 reorganization plan proposed to convey to FLB the 480 acres in Thurston County, subject to existing leases and real estate taxes. Additionally, the Vahles proposed to surrender stock in FLB valued at $13,500.00. The Vahles later amended this plan to include a payment to FLB in the amount of $11,000.00 to compensate FLB for the loss of its mortgage lien on the debtor's real estate.

The debtor contemporaneously proposed a reorganization plan. This plan stated that the debt to FLB had been totally satisfied. Consequently, under this plan the debtor proposed that FLB would no longer have a first lien on the 80 acres in Cuming County but in fact, Western Cornbelt would be given a first lien on these 80 acres.

FLB objected to both plans, and as a result, the debtor filed a motion requesting that the Bankruptcy Court invoke the "cram down" provisions under 11 U.S.C. § 1129(b) and confirm the plan. The Bankruptcy Court held a trial on August 14, 1984, wherein FLB advised the Court that it had no objections to confirming the Vahle plan other than its preservation of FLB's objection to the debtor's plan. The Bankruptcy Court then entered an order affirming the Vahle plan and tried the issue of FLB's objection to the debtor's plan.

II. EVIDENCE

The parties stipulated that on August 14, 1984, FLB was owed $312,196.00 and interest accruing at $103.41 per day; that the stock given by the debtor to FLB had a value of $13,500.00; and that real estate taxes were delinquent in the sum of $11,325.00.

Consequently, the main issue left for the Bankruptcy Court to decide revolved around ascertaining the value of the 480 acres of Vahle real estate which would be given to FLB under the Vahle plan.

A total of five real estate appraisers, two for the debtor and three for FLB, testified at this hearing. Their testimony, which is crucial to the determination of this issue, can be summarized as follows:

Name	Years Experience	Method Used	Property Valuation per acre/total	Decline in Value
Clyde Maddocks (For Debtor)	30	Market & Income Approaches	$700/$336,000.00*	1% per month
Thomas D. Lambert (For Debtor)	17	Market Approach	$700/$336,000.00**	12-15% per year
John C. Thor (For FLB)	38	Market & Income Approaches	$600/$288,000.00 $581/$279,254.80	Over 1% per month
Marlin G. Krohn (For FLB)	9	Market, Income & Cost Approaches	$625/$300,000.00 Similar Values $677.08 (w/o including management fee)	15% over the last year
Joseph McGill (For FLB)	26	"Thumbnail" Appraisal	$625/$300,000.00 (In 2/84) $562.50 (In 6/84)	Drop of 10% in between Appraisals

*Grain bin valued at $8,500.00.
**Grain bin valued at $12,000.00.

Following presentation of this evidence, the Bankruptcy Court found (1) that the 480 acres in question had a value of $700 per acre, or $336,000.00, less $8,500.00 for the grain bin and dryer; that this property was of sufficient value to satisfy all of the FLB indebtedness; that a five percent real estate commission would be considered as a reasonable expense; that FLB received a benefit through avoiding a foreclosure of its mortgage; and that FLB received the "indubitable equivalent" of its mortgage interest in this property. And last, the Bankruptcy Court concluded that the debtor's proposal was proposed in "good faith" and that FLB was not unfairly discriminated against. FLB appeals these findings.

III. ISSUES

On appeal FLB argues that the Bankruptcy Court's findings constitute an abuse of discretion and are, therefore, clearly erroneous. FLB contends that the Bankruptcy Court committed five grounds of reversible error which include:

1. Whether the evidence supports a factual finding that the Vahle real estate had a fair market value of $700.00 per acre;

2. Whether the Vahle 480 acres provided FLB with the "indubitable equivalent" of its claim against the debtor and the Vahles;

3. Whether the Bankruptcy Court's interpretation of "indubitable equivalent" under 11 U.S.C. § 1129(b)(2)(A)(iii) was error;

4. Whether 11 U.S.C. § 1129(b)(2)(A)(iii) violates the Fifth Amendment; and

5. Whether debtor's plan was proposed in good faith and did not unfairly discriminate so as to properly invoke the "cram down" provisions of 11 U.S.C. § 1129(b).

IV. STANDARD OF REVIEW

As a preliminary matter, FLB argues that a standard more stringent than "clearly erroneous" must be applied to Bankruptcy Judges as they are Article I, not Article III Judges. The Eighth Circuit recently addressed this issue in In re Hunter, Nos. 84-2312 and 84-2363, slip op. at 6-7 f.n. 3 (8th Cir. Aug. 20, 1985). The Eighth Circuit instructs that this Court must apply the clearly erroneous standard. Consequently, FLB's arguments in this regard are without merit.

V. DISCUSSION

A. $700.00 Market Value

FLB argues that the evidence does not support a finding that the market value of the real estate was $700.00. FLB argues that the Bankruptcy Court was clearly erroneous in relying completely on debtor's appraisers. Because this is a factual issue, the test to be applied is whether the Bankruptcy Court was clearly erroneous in valuing the real estate at $700.00 per acre. The reviewing court should uphold a finding if there is evidence to support it. United States v. Gypsum, 33 U.S. 364 (1948). In order to reverse, the reviewing court must be left with a firm conviction that a mistake has been made. Id. at 395.

This Court does not find the Bankruptcy Court's decision to adopt the market value set forth by debtor's experts to be clearly erroneous. Although the evidence is equivocal on some points, there is clearly support for the Bankruptcy Court's finding. First, FLB's experts differed under the income approach on factors which include insurance, the management fee rate, and the

commission rate. Furthermore, Krohn testified that he had recently done a half dozen appraisals for FLB. Thor admitted that he had not personally inspected the back portions of the real estate. McGill testified that he reached his opinion on the basis of a thumbnail appraisal not on the basis of any standard valuation methods.

The debtor's experts, Maddocks and Lambert, both gave appraisals valued at $700.00 per acres. The testimony shows that these valuations were independent of each other. Their appraisals were based on acceptable valuation techniques.

FLB argues that the use of comparable sales by debtor's experts was inappropriate in this case, because the sale relied on involved a sale by relatives. However, upon reading the transcript, it is clear that Maddox relied on other sales of farms in addition to the sale referred to by FLB. Additionally, Maddox also used the income approach in computing the $700.00 per acre figure. Lambert testified that he was aware when he reviewed comparable sales that one that he used involved a family relationship. However, Lambert researched this problem and found the parties involved to be knowledgeable buyers and sellers. Additionally, Lambert considered sales of other comparable tracts of land.

Based on the evidence in this case, the Bankruptcy Court was not clearly erroneous in believing and relying on debtor's experts. Consequently, the Bankruptcy Court's finding that the land in question was worth $700.00 per acre is not clearly erroneous.

B. Indubitable Equivalent

FLB argues that the Bankruptcy Court erred in finding that the debtor's plan provided FLB with the "indubitable equivalent" of FLB's mortgage on debtor's real estate pursuant to 11 U.S.C. § 1129(b)(2)(A)(iii). The phrase "indubitable equivalent" as defined in section 1129(b)(2)(A)(iii) derives its meaning from the case of In re Murel Holding Corp., 75 F.2d 941 (2d Cir. 1935). In Murel Judge Learned Hand stated:

> It is plain that "adequate protection" must be completely compensatory; and that payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safety of his principal will scarcely be content with that; he wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by a substitute of the most indubitable equivalence.

Although there is disagreement among the various courts as to whether the issue of "adequate protection" is a factual or legal question, the Eighth Circuit has held this to be a factual question. In re Martin, 761 F.2d 472, 474 (8th Cir. 1985).[1]

The Court in In re Martin states:

> The concept of adequate protection was designed to "insure that the secured creditor receives the value for which he bargained." S. Rep. No. 989, 95th Cong., 2d Sess. 53, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5839 (emphasis added); see also H.R. Rep. No. 595, 95th Cong., 2d Sess. 339, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6295. Congress explicitly stated that

[1] It is noted that neither the Bankruptcy Court nor the parties had the benefit of In re Martin at the time of the hearing or at the time the briefs were submitted to this Court.

> value was to be considered a flexible concept "to permit the courts to adapt to varying circumstances and changing modes of financing," and that such matters "are [to be] left to case-by-case interpretation and development." H.R. Rep. No. 595 at 339, 1978 U.S. Code Cong. & Ad. News at 6295; see also S. Rep. News No. 989 at 54, 1978 U.S. Code Cong. & Ad. News at 5840. Because Congress intended that value was to be determined on a case-by-case basis, that which is designed to protect value, i.e., adequate protection, must also be determined on a case-by-case basis, permitting the debtors "maximum flexibility in structuring a proposal for adequate protection." In re American Mariner Industries, Inc., 734 F.2d 426, 435 (9th Cir. 1984).

Id. at 474. The Eighth Circuit does state, however, that the Bankruptcy Court must also apply the correct legal standard. Id. at 475.

The Eighth Circuit then discusses at length adequate protection as it applies to the indubitable equivalent language set forth in 11 U.S.C. § 361(3). The Court states:

> In order to encourage reorganization, the courts must be flexible in applying the adequate protection standard. This flexibility, however, must not operate to the detriment of the secured creditor's interest. In any given case, the bankruptcy court must necessarily (1) establish the value of the secured creditor's interest, (2) identify the risks to the secured creditor's value resulting from the debtor's request for use of cash collateral, and (3) determine whether the debtor's adequate protection proposal protects value as nearly as possible against risks to that value consistent with the concept of indubitable equivalence. See Ruggiere Chrysler-Plymouth, 727 F.2d at 1019. ("In determining whether a creditor's secured interests are so protected, there must be an individual determination of the value of that interest and whether a proposed use of cash collateral threatens that value.")

Id. at 476-77. Indubitable equivalence, states the Court, "requires 'such relief as will result in the realization of value.' See In re Sheehan, 38 B.R. 859, 864 (D. S.D. 1984)." Id. at 477. One of the Congressional goals is to afford a secured creditor the benefit of its bargain. Id. at 478; In re American Mariner Industries, Inc., 734 F.2d 426, 434-35 (9th Cir. 1984).

Applying In re Martin to the facts at hand, it is clear that the Bankruptcy Court failed to comply with numbers (2) and (3) above. The Bankruptcy Court failed to identify and consider the risks of the FLB's value in two respects. First, the uncontroverted evidence shows that the value of the land was declining at a minimum rate of 1% per month.[2] Second, the testimony of Lambert, debtor's expert, indicated that there was little chance that this land could be sold in the next few months. Consequently, the value placed on the land by the Bankruptcy Court did not express the true worth of this land. These two factors clearly operate to the detriment of FLB's interest and clearly impair FLB's value. Prior to the confirmation, FLB's value in the 560 acres satisfied the mortgage indebtedness. Subsequent to confirmation, FLB no longer had that security for full payment.

---

[2]The Bankruptcy Court discusses the interest issue in terms of the FLB's right to foreclose. The Bankruptcy Court concluded that the Bank's right "to receive the property in 11 days" and consequent right to immediately sell the property was more advantageous than foreclosing. However, the Bankruptcy Court failed to consider the lack of marketability of the property for at least 90 days to six months, nor did the Court consider that after a foreclosure action FLB would be entitled to 560 rather than 480 acres.

Because the Bankruptcy Court failed to properly evaluate the risks involved, this case must be reversed and remanded for further proceedings consistent with this order and with In re Martin.[3]

Accordingly,

IT IS ORDERED that this matter should be and hereby is reversed and remanded for further proceedings consistent with this order and with In re Martin.

DATED this 3rd day of October, 1985.

BY THE COURT:

C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE

[3]Because remand is required on the issue of adequate protection, FLB's remaining issues need not be addressed.