

# A 25844

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August 15, 1997

Florida Secretary of State  
Corporation Division  
Post Office Box 6327  
Tallahassee, Florida 32314  
Attention: Partnership Records

FILED  
SECRETARY OF STATE  
DIVISION OF CORPORATIONS  
97 AUG 18 PM 3:00

Re: Cancellation of Certificate of Limited Partnership  
of Claughton Island Company, Ltd.

Dear Sir or Madam:

On 6 December 94, the Honorable Marvin R. Wooten, United States Bankruptcy Judge for the Western District of North Carolina, entered a Memorandum of Decision and Judgment dissolving Claughton Island Company, Ltd., a Florida Partnership, pursuant to §620.158 of the Florida Statutes Annotated. A copy of the Memorandum of Decision and Judgment is enclosed herewith. In that Judgment, I was appointed Trustee for the purpose of winding up the affairs of the Partnership. As set forth in the documents, Edward N. Claughton, Jr. is General Partner of the Partnership, and he was in a bankruptcy case pending in the United States Bankruptcy Court for the Western District of North Carolina. Pursuant to the exclusive jurisdiction of the Bankruptcy Court over the interest of the General Partner and the Partnership, I was appointed Trustee as though the General Partner had made that decision. I have now proceeded to wind up the affairs of the Partnership and all assets have been sold and the disbursements made. Enclosed is a copy of my Certification of Disbursement of Proceeds filed 27 February 97. Also enclosed is a copy of a Consent Order filed 30 May 97 which resolved the issue of commissions in the case, the only issue remaining after the disbursements. The affairs of this Partnership are now completely wound up. I have reviewed §620.113 of the Statutes. The name of the Limited Partnership is Claughton Island Company, Ltd. I believe that the date of the filing of the Certificate of Limited Partnership was 26 January 88. The reason for filing the certificate of cancellation is obvious from the documents, that being that the affairs have been wound up. The Bankruptcy Court, and there are no remaining assets. The cancellation should be effective upon the filing of the certificate of cancellation. Since I do not know a form for a certificate of cancellation, I would ask that you treat this letter and the information attached hereto as such a certificate, or that you forward to me the appropriate form and I will provide the required information.

per KB

Asset	Document
Examiner	Examiner
Updater	Updater
Verifier	Verifier
Acknowledgment	Acknowledgment
W. P. Verifier	W. P. Verifier

Florida Secretary of State  
August 15, 1997  
Page Two

I would ask you to treat this document as a certificate of cancellation pursuant to §620.115, as I have been directed by the Court to wind up the affairs of this Limited Partnership.

Again, if you need further documentation or if there is a particular form for the certificate of cancellation, please provide that information to me and I will proceed to comply with the appropriate form.

Sincerely,

A handwritten signature in cursive script, appearing to read "R. Keith Johnson".

R. Keith Johnson

RKJ:mc  
enclosures

**FILED**  
U.S. BANKRUPTCY COURT  
WESTERN DISTRICT OF NC

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

DEC 0 6 1994

IN RE: )  
EDWARD N. CLAUGHTON, JR., )  
Debtor. )  
\_\_\_\_\_)  
BEVERLY A. MIXSON, )  
derivatively in the right of )  
the bankruptcy estate of )  
EDWARD N. CLAUGHTON, JR., )  
Plaintiff, )  
v. )  
CLAUGHTON ISLAND COMPANY, )  
LTD., a Florida limited )  
partnership, CLAUGHTON ISLAND )  
COMPANY, INC., a Florida )  
corporation, EDWARD N. )  
CLAUGHTON, JR., and SUZANNE )  
C. SCHMIDT, )  
Defendants. )

J. BARON GROSHON  
By: [Signature]  
Deputy Clerk

ST-B-92-50132

Chapter 11

Adversary Proceeding  
No. 94-5063

MEMORANDUM OF DECISION

FILED  
SECRETARY OF STATE  
DIVISION OF CORPORATIONS  
97 AUG 19 PM 3:00

**INTRODUCTION**

This is an adversary proceeding brought by Plaintiff Beverly A. Mixson derivatively on behalf of the bankruptcy estate of Edward N. Claughton, Jr. seeking dissolution and winding-up of the affairs of Claughton Island Company, Ltd., a Florida limited partnership, pursuant to Florida partnership law and, in the alternative, the sale of certain real property titled in the name of Claughton Island Company, Ltd. pursuant to 11 U.S.C. § 105. Defendants have counterclaimed seeking a declaration that Plaintiff has no right, title and interest in certain real property titled in the name of Claughton Island Company, Ltd. The issues in this adversary

proceeding were tried by the Court on August 11 and 12, October 24 and November 29, 1994. After considering all the evidence and the arguments of counsel, the Court has concluded that it should order the dissolution and winding-up of the affairs of Claughton Island Company, Ltd. pursuant to Florida partnership law and, in the alternative, the sale of certain real property titled in the name of Claughton Island Company, Ltd. pursuant to 11 U.S.C. § 105 and that it should enter the following findings of fact and conclusions of law.<sup>1</sup>

#### FINDINGS OF FACT

1. Plaintiff Beverly A. Mixson ("Mixson") is a creditor and a party in interest in the above-captioned Chapter 11 bankruptcy case of Edward N. Claughton, Jr. Plaintiff made no demand on Edward N. Claughton, Jr., acting as debtor in possession, to institute this adversary proceeding before filing this adversary proceeding on behalf of the Chapter 11 bankruptcy estate because any such demand would have been futile.

2. Defendant Claughton Island Company, Ltd. (the "Partnership") is a Florida limited partnership with its principal place of business in Miami, Florida, which was formed on January 26, 1988, by filing a certificate of limited partnership with the Florida Secretary of State. By virtue of a deed from Defendants Edward N. Claughton, Jr. and Suzanne C. Schmidt recorded on

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<sup>1</sup>To the extent that the following findings of fact include conclusions of law or mixed findings of fact and conclusions of law, those conclusions are hereby adopted by this Court. To the extent that the following conclusions of law include findings of fact, those findings are hereby adopted by this Court.

February 12, 1988, the Partnership claims to hold undisputed title to approximately 5.3 acres, more or less, of land in Dade County, Florida, referred to herein as "Claughton Island."

3. Defendant Claughton Island Company, Inc. is a Florida corporation with its principal place of business in Miami, Florida. Claughton Island Company, Inc. is a general partner of the Partnership which owns a one percent (1%) interest in the Partnership. Defendant Edward N. Claughton, Jr. owns fifty-five percent and Defendant Suzanne C. Schmidt owns forty-five percent of the issued and outstanding stock of Claughton Island Company, Inc.

4. Defendant Edward N. Claughton, Jr. (the "Debtor") is a general partner and a limited partner of the Partnership. As of February 18, 1992, the date of the filing of his bankruptcy petition, the Debtor claimed to own a fifty-three and nine-tenths percent (53.9%) interest in the Partnership as a general partner, a fifty-five hundredths percent (.55%) interest in the Partnership as a limited partner, and, by virtue of his claimed ownership interest in Claughton Island Company, Inc., an additional fifty-five hundredths percent (.55%) interest in the Partnership. According to the Debtor's schedules of assets and liabilities, his direct and indirect 55% ownership interest in the Partnership is the most valuable asset of his bankruptcy estate.

5. Defendant Suzanne C. Schmidt ("Schmidt") is the Debtor's sister and a general partner and a limited partner of the Partnership. Schmidt owns a forty-four and one-tenth percent (44.1%) interest in the Partnership as a general partner, a forty-

five hundredths percent (.45%) interest in the Partnership as a limited partner, and, by virtue of her ownership interest in Claughton Island Company, Inc., an additional forty-five hundredths percent (.45%) interest in the Partnership. Thus, directly and indirectly, Schmidt has a 45% ownership interest in the Partnership.

6. The most valuable asset of the Debtor's bankruptcy estate other than ownership interest in the Partnership is his 55% ownership interest in Hound Ears Club, Ltd., a limited partnership that owns a residential resort located in western North Carolina known as "The Hound Ears Club". Schmidt owns the remaining 45% interest in Hound Ears Club, Ltd.

7. On January 21, 1976, the Debtor and Mixson were divorced after twenty-four years of marriage. Prior to and since that time, the Debtor and Mixson have been parties to a dissolution proceeding pending in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Prior to the divorce, the Debtor and Schmidt owned Claughton Island in their individual names as co-tenants, with the Debtor holding an undivided fifty-five percent interest in the property. In 1988, the Debtor and Schmidt transferred title to Claughton Island to the Partnership with full knowledge that the Plaintiff claimed that the Debtor's interest in the property was property of the former spouses' marital estate.

8. On April 2, 1991, after years of bitter litigation, the Dade County Circuit Court entered its Final Judgment On Equitable Distribution Issues (the "Equitable Distribution Judgment"), in

which it valued the marital assets and distributed them to the Debtor and Mixson pursuant to the equitable distribution laws of Florida. The Florida trial court awarded Mixson a total of \$3,216,684.50, which the court estimated was approximately equal to one-half of the Debtor's understated 1991 net worth. The Florida trial court found that the Debtor did not have the "financial ability to make a multi-million dollar cash payment or enough income to make installment payments to satisfy the Court's equitable distribution award, but that he [did] have sufficient property to satisfy a substantial portion of this award." Therefore, in satisfaction of approximately \$2,300,000 of that award, the trial court ordered the Debtor to transfer all of his 55% interest in the Hound Ears property to Mixson. The Florida trial court enjoined the Debtor from selling, transferring or encumbering in any fashion his interest in the Partnership and in Claughton Island until the Debtor transferred his interest in Hound Ears to Mixson and ordered that the Debtor's interest in Claughton Island serve as security for his faithful performance of the Equitable Distribution Judgment.

9. On April 26, 1991, to thwart the provisions of the Equitable Distribution Judgment, Schmidt filed a "friendly" lawsuit against the Debtor in the Watauga County, North Carolina Superior Court seeking an injunction to prevent the Debtor's transfer of his interest in Hound Ears to Mixson. With the Debtor's consent, the court entered a temporary restraining order which was later made permanent upon the consent of the Debtor and Schmidt.

10. In July 1991 Mixson moved for relief from the Equitable Distribution Judgment, alleging that the Debtor had fraudulently concealed material information from the Florida trial court concerning the value of Claughton Island. In October 1991, the Florida trial court found that the Debtor had fraudulently concealed material evidence about the value of Claughton Island in the dissolution proceeding. In December 1991, the Florida trial court conducted a further evidentiary hearing on Mixson's motion for relief.

11. In February 1992, before the Florida trial court could enter its ruling on Mixson's motion for relief, the Debtor commenced the underlying Chapter 11 case by filing a voluntary petition. The Debtor's filing of his bankruptcy petition automatically stayed further proceedings in the dissolution proceeding. The Debtor and Mixson, however, agreed to a consent order allowing the Florida trial court to rule on Mixson's motion for relief.

12. On March 27, 1992, the Florida trial court entered its Amended Final Judgment Pursuant to Rule 1.540 (the "Amended Equitable Distribution Judgment"). In the Amended Equitable Distribution Judgment, the Florida trial court amended the Equitable Distribution Judgment nunc pro tunc, increased Mixson's total award to \$3,976,465 and ordered the Debtor to convey most of his interest in the three remaining portions of Claughton Island identified in the Amended Equitable Distribution Judgment to Mixson "free and clear of all liens, mortgages or encumbrances and the



1991 real estate taxes, subject only to the existing option/sales agreements with the Storta Group" in satisfaction of approximately \$3,100,000 of that award. The Amended Equitable Distribution Judgment provided that, "[e]xcept as specifically modified herein the [Equitable Distribution Judgment] shall remain in full force and effect as well as the injunctions pursuant thereto until the [Debtor] fully complies with the transfers required by this [Amended Equitable Distribution Judgment]."

13. In April 1992, after finding that the Debtor was solvent, this Court lifted the automatic stay to permit the equitable distribution litigation to be completed in the Florida courts and Mixson to receive the specific marital property awarded to her, including the Debtor's interest in certain parcels of Claughton Island and cash held in two escrow accounts. In re Claughton, 140 B.R. 861 (Bankr. W.D.N.C. 1992), aff'd, 33 F.3d 4 (4th Cir. 1994). The Florida District Court of Appeal, Third District, affirmed the Amended Equitable Distribution Judgment in the fall of 1993, Claughton v. Claughton, 625 So.2d 853 (Fla. Ct. App. 1993), and the Florida Supreme Court denied the Debtor's petition for discretionary review in May 1994.

14. In February 1994, the Partnership, the Debtor, Schmidt and Mixson received an offer from Meritage Properties, Inc. to purchase all of the remaining parcels of Claughton Island for \$9,800,000. If the Debtor had accepted that offer, the Debtor would have been able to propose and confirm a plan of reorganization to pay all of his creditors in full. Instead, the

Debtor refused to accept the offer, contending that the value of Claughton Island was substantially greater than the offer and claiming that the offer could not be accepted unless title to Claughton Island was "cleared" of Plaintiff's marital property award. Because the Meritage offer was directed to all parties claiming an interest in Claughton Island, it could have been accepted without the need for any legal action to "clear" the title.

15. On March 2, 1994, the Debtor and Schmidt caused the Partnership to file a quiet title action against Mixson in the Dade County Circuit Court, seeking a declaration that Mixson has no right, title or interest in Claughton Island. Mixson contends that there were at least two purposes for filing the quiet title action. First, the Debtor could delay any sale of Claughton Island until title was "cleared." Second, if the quiet title action was successful, the Defendants believed that Schmidt as a general partner of the Partnership could sell Claughton Island without Mixson's consent and without the approval of this Court.

16. On March 15, 1994, Mixson commenced this adversary proceeding on behalf of the Debtor's bankruptcy estate, seeking an order dissolving the Partnership and winding up the Partnership's affairs by directing the Debtor or a liquidating trustee appointed by the Court to accept the Meritage offer, subject to the approval of that offer by this Court and the right of any party in interest to submit a higher offer on terms substantially equivalent to those contained in the Meritage offer. In the complaint, Mixson also

sought a preliminary and permanent injunction of prosecution of the quiet title action. The parties subsequently agreed that the Partnership would dismiss the quiet title action and refile it as a counterclaim in this adversary proceeding.

17. In May 1994, in an adversary proceeding brought by the Debtor against Metropolitan Dade County, Florida, this Court entered a preliminary injunction pursuant to 11 U.S.C. § 105 prohibiting Dade County from taking any action to collect ad valorem real property taxes on Claughton Island owed by the Partnership. In support of this relief, the Debtor alleged that action to enforce payment of property taxes would have a direct adverse impact on the Debtor's bankruptcy estate, since such action necessarily would reduce the value of the bankruptcy estate's interest in the Partnership. Schmidt was aware of and consented to this Court's granting such relief for the benefit of the Partnership and herself.

18. In July 1994, Defendants filed a motion in this adversary proceeding seeking to establish a trial date in this adversary proceeding to facilitate a proposed sale of Claughton Island, alleging that the sale of Claughton Island would enhance the Debtor's ability to propose and gain confirmation of a plan of reorganization in the underlying Chapter 11 case.

19. On August 12, 1994, the second day of the trial of this adversary proceeding, the parties announced a settlement of all issues in this adversary proceeding and the underlying Chapter 11 bankruptcy case that was contingent upon the sale of all remaining

parcels of Claughton Island to a prospective buyer for \$13,000,000. The sale did not close and the settlement became void by its own terms.

20. The trial resumed on October 24, 1994. After making opening statements and engaging in several hours of negotiation, Mixson and the Debtor announced a proposed settlement of the issues in this adversary proceeding, subject to Schmidt's acceptance. The proposed settlement called for this Court to appoint an independent commercial real estate broker to solicit offers for Claughton Island on behalf of all of the parties to this adversary proceeding, to approve an offer upon motion of any party in interest, and to determine any disputes regarding costs of sale to be paid at closing and any debts of the Partnership to be paid before distribution of the sale proceeds. Schmidt was not present on October 24. However, Mixson and the Debtor agreed that, if Schmidt objected to the proposed settlement once learning about it, Mixson would amend the complaint in this adversary proceeding to seek an order implementing the settlement pursuant to 11 U.S.C. § 105 over Schmidt's objection and the Debtor would join in that request for relief.

21. The Partnership claims to have an "exclusive listing agreement" with Lois Claughton, the Debtor's wife, doing business as "Claughton Realty Co.," entitling her to a four percent (4%) gross sales commission in the event of a sale of Claughton Island. Plaintiff disputes the validity of the agreement. However, when the agreement was announced on October 24, 1994, Lois Claughton,

both individually and as a real estate broker, announced her agreement with the proposed sale procedure.

22. On November 15, 1994, Schmidt served notice of her objection to the proposed settlement. As grounds for objection, Schmidt stated that (a) she opposed giving up control of the sale of Claughton Island to this Court, and (b) notwithstanding Lois Claughton's consent to the proposed settlement, she opposed any procedure that did not pay in full the sale commission allegedly owed to Claughton Realty Co. Thereafter, Mixson amended the complaint in this adversary proceeding to seek an order implementing the settlement pursuant to 11 U.S.C. § 105 over Schmidt's objection.

23. The Debtor's bankruptcy case has been pending over 33 months and the Debtor has made no meaningful progress toward resolution of this case by a Chapter 11 plan of reorganization or otherwise. The Debtor has focused the resources of his bankruptcy estate to the unsuccessful appeals of the marital property litigation with the Plaintiff. First, the Debtor has appealed, without success, to the Supreme Court of Florida, from the Amended Equitable Distribution Judgment. Second, the Debtor has appealed unsuccessfully to the United States Court of Appeals for the Fourth Circuit from this Court's April 27, 1992 judgment granting the Plaintiff relief from the automatic stay to receive her marital property award and refusing to allow the Debtor to use the bankruptcy laws to alter the marital property distribution in the Amended Equitable Distribution Judgment.

24. Based on a finding that the Debtor has sufficient assets to pay in full all of his liabilities, this Court has given the Debtor great latitude in devoting the resources of his bankruptcy estate to the marital property litigation with his former wife. First, in December 1992, the Court entered an order allowing the Debtor to "borrow," over the Plaintiff's vehement objection, \$150,000 of monies held in an escrow fund awarded to the Plaintiff in the Amended Equitable Distribution Judgment. Further, the Court has allowed the Debtor's applications for substantial fees and expenses, the principal amount of which has been devoted to the marital property litigation, over the Plaintiff's objection. The Debtor's outstanding obligations for administrative professional fees approaches \$300,000. In addition, the Debtor has incurred substantial living expenses in the course of his bankruptcy case that he has been unable to satisfy, including obligations to the Internal Revenue Service for post-petition income taxes and mortgage payments on a Florida condominium owned by the Debtor and his wife (and claimed as exempt property) since early 1992.

25. Neither the Partnership nor the two persons who claim to be the partners have been unable to pay ad valorem property taxes assessed against Claughton Island for 1992 and 1993. Plaintiff and the Debtor agree that the disposition of Claughton Island is desirable and indeed necessary to separate the parties and allow the Debtor to pay his debts. The Plaintiff has consented to waiving the benefit of the Florida court's injunction in favor of this Court's exercising jurisdiction over Claughton Island to

accomplish the sale of the property. The Debtor has, at least ostensibly, joined in Mixson's alternative claim for relief under 11 U.S.C. § 105. The partnership agreement gives the Debtor full discretion to dispose of the property without the consent of Schmidt, including disposition by consent to this Court's jurisdiction under Section 105.

26. The Partnership is unable to pay its debts in the ordinary course of business, including ad valorem property taxes for 1992, 1993 and 1994. Without the Court's supervised sale of Claughton Island and the winding-up of the Partnership's affairs, there is no prospect of a resolution within the foreseeable future.

27. Schmidt has taken numerous steps to frustrate the Florida courts and this Court from entering relief resolving the Plaintiff's marital property rights and providing for the Debtor's payment of his debts.

#### CONCLUSIONS OF LAW

##### I. DISSOLUTION OF CLAUGHTON ISLAND COMPANY, LTD.

In her First Claim For Relief, Plaintiff is seeking an order dissolving Claughton Island Company, Ltd. Fla. St. Ann. § 620.158 provides that:

On application by or for a partner<sup>2</sup>, the circuit court<sup>3</sup>

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<sup>2</sup>Under Bankruptcy Code § 541, all of the Debtor's right, title and interest in Claughton Island Company, Ltd. and Claughton Island as of the petition date became property of his bankruptcy estate. *In re Hunters Horn Associates*, 158 B.R. 729, 730-31 (Bankr. M.D. Tenn. 1993) (collecting cases). Therefore, any request for relief made by the Debtor's bankruptcy estate constitutes an "application by or for a partner" within the meaning of Fla. St. Ann. § 620.158.

(continued...)

may order dissolution of a limited partnership if it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

Section 3 of the Limited Partnership Agreement of Claughton Island Company, Ltd. dated as of January 26, 1988 (the "Partnership Agreement"), provides that the "purpose of the Partnership is to acquire, own and develop [Claughton Island] and to engage in such other activities and business as may be necessary or convenient to promote or carry out such purpose." Section 11 of the Partnership Agreement provides that "[a]ny General Partner shall have full authority to manage the operations and affairs of the Partnership

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<sup>2</sup>(...continued)

Plaintiff's First Claim For Relief is a request for relief by the Debtor's bankruptcy estate because Mixson has brought this adversary proceeding derivatively on behalf of the Debtor's bankruptcy estate. Mixson properly brought this adversary proceeding derivatively on behalf of the Debtor's bankruptcy estate after the Debtor refused to negotiate with Meritage regarding a sale of Claughton Island and initiated the quiet title litigation in the Florida courts for the purpose of attempting to enable Claughton Island Company, Ltd. to sell Claughton Island without this Court's approval. Because any demand by Mixson on the Debtor to file an adversary proceeding seeking dissolution and the winding-up of Claughton Island Company, Ltd. would have been futile, Mixson was not required to make a formal demand on the Debtor before filing this adversary proceeding on behalf of the Debtor's bankruptcy estate.

<sup>3</sup>The term "circuit court" is not defined in Florida's version of the Revised Uniform Limited Partnership Act; however, in Florida's version of the Uniform Partnership Act, the term "Court" means "every court and judge having jurisdiction in the action." Fla. St. Ann. 620.565(1). Because Florida has a lower court system comprised of circuit courts, which are courts of general jurisdiction, and county courts, which have limited jurisdiction and cannot grant equitable relief, the phrase "circuit court" as used in Fla. St. Ann. §§ 620.158 and 620.159 should be construed to mean any court of general jurisdiction, including the power to grant equitable relief.



and to make all decisions regarding the business of the Partnership."

A number of factors make it not reasonably practicable to carry on the business of the Partnership in conformity with the Partnership Agreement. First, the Partnership's ability to engage in business is in doubt because it is unable to pay its ad valorem real property taxes as they become due and the Debtor has had to seek the assistance of this Court to protect Claughton Island from the Dade County taxing authorities. Second, the Debtor testified at trial that the Partnership's goal now is to sell all of Claughton Island for cash. This is also the Debtor's goal because a sale of all of the remaining parcels of Claughton Island is the only reasonably practicable means of proposing and confirming a Chapter 11 plan of reorganization to pay his creditors in full. Therefore, the Partnership no longer intends to "develop" Claughton Island as provided in the statement of purpose in the Partnership Agreement. Finally, while the Debtor steadfastly refused in his testimony to admit that the Florida trial court awarded certain parcels of Claughton Island to Mixson in the Amended Equitable Distribution Judgment, the Debtor did admit that the Florida trial court awarded his partnership interest in those parcels to Mixson in the Amended Equitable Distribution Judgment. To the extent that Mixson has a partnership interest in the Partnership, it is not reasonably practicable, given the history of the relationships and litigation between the Debtor, Schmidt and Mixson, to continue the business of the Partnership in conformity with the Partnership

Agreement. Schmidt testified that she had no desire to be a partner in any business venture with Mixson.

The Court concludes that Plaintiff has established that it is not reasonably practicable to carry on the business of the Partnership in conformity with the Partnership Agreement and that the Court should enter an order dissolving the Partnership.

**II. WINDING-UP OF THE AFFAIRS OF CLAUGHTON ISLAND COMPANY, LTD., INCLUDING A SALE OF CLAUGHTON ISLAND.**

In her Second Claim For Relief, Plaintiff is seeking an order establishing a procedure for winding-up the affairs of Claughton Island Company, Ltd. Fla. St. Ann. § 620.159 provides that, upon dissolution:

. . . [T]he circuit court, upon cause shown, may wind up the limited partnership's affairs upon application of any partner or his legal representative or assignee, and in connection therewith may appoint a liquidating trustee.

"Cause" exists for this Court to wind-up the Partnership's affairs, in lieu of a winding-up conducted by the one or more of the general partners of the Partnership, because, as discussed supra, the Debtor's interest in the Partnership is the most valuable asset of his bankruptcy estate and, given the history of the relationships and litigation between the Debtor, Schmidt and Mixson, the Court does not believe that a winding-up conducted by the Debtor or Schmidt would be conducted in the best interests of the Debtor's bankruptcy estate and his creditors. Therefore, the Court will appoint a liquidating trustee and an independent real estate broker to wind up the affairs of the Partnership pursuant to a procedure set forth by this Court.

### III. SALE OF CLAUGHTON ISLAND PURSUANT TO 11 U.S.C. § 105.

In her Fourth Claim For Relief, Plaintiff is seeking an order establishing the procedure agreed to by Mixson and the Debtor on October 24, 1994 for the expeditious determination and acceptance of the highest and best offer for the sale and purchase of Claughton Island pursuant to 11 U.S.C. § 105 without dissolving the Partnership. Based on the facts and circumstances of this adversary proceeding, including the fact that the majority partner of the Partnership is a Chapter 11 debtor whose ability to propose and confirm a plan of reorganization is directly affected by the terms of sale of the Partnership's sole asset, the Court believes that it has jurisdiction pursuant to 11 U.S.C. § 105 to order the sale of Claughton Island pursuant to a procedure established by this Court. Therefore, will grant the relief sought by Plaintiff in her Fourth Claim for Relief in the alternative.

### IV. DEFENDANTS' QUIET TITLE COUNTERCLAIM.

The relief sought in Defendants' quiet title counterclaim in this adversary proceeding is moot because the Court has determined that it will dissolve and wind-up the affairs of the Partnership.

#### SUMMARY

The Court will enter an appropriate judgment separately ordering dissolution of the Partnership and the winding-up of the Partnership pursuant to Florida partnership law and, in the alternative, the sale of Claughton Island pursuant to 11 U.S.C. § 105, and dismissing Defendants' quiet title counterclaim as moot.

This 6<sup>th</sup> day of December, 1994.

A handwritten signature in cursive script, appearing to read "Marvin R. Wooten", written over a horizontal line.

Marvin R. Wooten  
United States Bankruptcy Judge

*Fishwin*

**FILED**  
U.S. BANKRUPTCY COURT  
WESTERN DISTRICT OF NC

DEC 06 1994

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

J. BARON GROSHON  
By: *CB*  
Deputy Clerk

IN RE:

EDWARD N. CLAUGHTON, JR.,

Debtor.

ST-B-92-50132

Chapter 11

BEVERLY A. MIXSON,  
derivatively in the right of  
the bankruptcy estate of  
EDWARD N. CLAUGHTON, JR.,

Plaintiff,

Adversary Proceeding  
No. 94-5063

JUDGMENT ENTERED ON DEC 06 1994

v.

JUDGMENT

CLAUGHTON ISLAND COMPANY,  
LTD., a Florida limited  
partnership, CLAUGHTON ISLAND  
COMPANY, INC., a Florida  
corporation, EDWARD N.  
CLAUGHTON, JR., and SUZANNE  
C. SCHMIDT,

Defendants.

For the reasons set forth in a Memorandum of Decision filed contemporaneously herewith,

IT IS ORDERED, ADJUDGED AND DECREED:

1. Claughton Island Company, Ltd., a Florida limited partnership (the "Partnership"), is hereby dissolved pursuant to Fla. St. Ann. § 620.158.

2. The Court shall wind up the Partnership's affairs pursuant to Fla. St. Ann. § 620.159. In connection with the winding-up of the Partnership's affairs, the Court hereby appoints R. Keith Johnson, Esq., as liquidating trustee pursuant to Fla. St.

Ann. § 620.159. In furtherance of the appointment of Mr. Johnson as liquidating trustee,

- a. Mr. Johnson shall take possession of, manage and liquidate all of the Partnership's real and personal property, including certain real property located in Dade County, Florida and titled in the name of the Partnership known as "Claughton Island," and collect all rents and profits resulting therefrom;
- b. Defendants and their affiliates shall turn over to Mr. Johnson all rents and other cash in their possession belonging to the Partnership and are hereby restrained and enjoined from making any transfer or other disposition of any rents or other cash they now hold or receive in the future on behalf of the Partnership, except to Mr. Johnson;
- c. As more specifically set forth below, Mr. Johnson is hereby authorized to employ all persons necessary or appropriate to the orderly and efficient management and liquidation of the Partnership's real and personal property upon reasonable notice to all parties to this adversary proceeding and, with respect to professional persons, prior approval of this Court;
- d. Mr. Johnson is hereby authorized to make all necessary and proper maintenance, repairs, renewals, replacements, additions, betterments and improvements to the Partnership's real and personal property and purchase or otherwise acquire additional fixtures and personal property necessary or appropriate to the orderly and efficient management and liquidation of the Partnership's real and personal property;
- e. Defendants and all other persons and entities having notice of this Judgment are hereby restrained and enjoined from interfering with Mr. Johnson in the performance of his duties hereunder;
- f. Defendants and all persons and entities having notice of this Judgment are hereby ordered and directed to turn over to Mr. Johnson, as requested and subject to determination by this Court of any asserted privilege or similar protection, all books, records, contracts, insurance policies, leases and other documents and records relating to the Partnership or the Partnership's real and personal property or the management thereof, and to give Mr. Johnson access to all computer data bases and programs that contain books and records relating to the Partnership or the Partnership's real and personal

property, and Mr. Johnson shall give appropriate receipts and acquaintances for the same;

- g. Mr. Johnson shall serve a copy of this Judgment on all known creditors of the Partnership;
- h. All proper authorities are directed to place Mr. Johnson in immediate possession of all of the Partnership's real and personal property in order that the purpose of this Judgment may be fully carried out; and
- i. Mr. Johnson shall apply to this Court and shall be entitled to compensation for services as liquidating trustee in an amount approved by the Court as reasonable.

3. Mr. Johnson is hereby specifically authorized to hire the Miami, Florida office of CB Commercial Real Estate Group, Inc. ("CB Commercial"), as the exclusive listing agent for the sale of certain real property located in Dade County, Florida and titled in the name of the Partnership known as "Claughton Island," pursuant to the Exclusive Sales Listing Agreement attached hereto as Exhibit A, with the following modifications:

- a. Paragraphs 1 and 7 are modified to provide that the only terms acceptable to Seller are cash at closing.
- b. The first sentence of Paragraph 2 is modified to provide that CB Commercial shall be paid a listing commission and a sale commission in accordance with the terms of this Judgment as set forth below. The second sentence of Paragraph 2 is modified to provide that the commission to be earned by CB Commercial if the conditions in (b), (c) or (d) of that sentence occur shall be subject to approval by the United States Bankruptcy Court for the Western District of North Carolina as being reasonable if CB Commercial claims that such commission exceeds the two percent listing commission.
- c. Paragraph 11 is modified to limit Mr. Johnson's obligation thereunder to those things of which he has actual knowledge.
- d. Paragraph 13 is modified to provide that the amount of any forfeited earnest money to be paid to CB Commercial shall be determined by the United States Bankruptcy Court for the Western District of North Carolina.

- e. The first sentence of paragraph 14 is modified to provide that the irrevocable assignment of sale proceeds to CB Commercial to the extent necessary to pay CB Commercial's listing or sale commission is subject to the approval, if necessary, of those commissions by the United States Bankruptcy Court for the Western District of North Carolina.
- f. Paragraphs 16, 17 and 18 are deleted.
- g. The Schedule of Sale Commission is deleted.

CB Commercial shall market and solicit offers for Claughton Island on behalf of Mr. Johnson as liquidating trustee. CB Commercial's listing agreement shall be for a term of twelve months, subject to cancellation by this Court at the end of six months for cause shown upon the motion of Mr. Johnson or any party to this adversary proceeding or sua sponte. CB Commercial shall be entitled to a listing commission of two percent of the gross sales price of Claughton Island if Claughton Island is sold during the term of CB Commercial listing agreement. In addition to the listing commission, if CB Commercial procures a purchaser for Claughton Island, CB Commercial shall be entitled to a sale commission of two percent of the gross sales price. If a cooperating broker procures purchaser in connection with the sale of Claughton Island, then the cooperating broker shall be entitled to the two percent sale commission. CB Commercial shall bear its own expenses. Notwithstanding the foregoing, if within fifteen days of the date of entry of this Judgment, Mr. Johnson and Stockbridge Corp. execute a mutually acceptable contract conditioned upon approval of this Court for the purchase and sale of Claughton Island for a gross sales price of at least \$12,500,000



that contains a due diligence period of no more than sixty days, CB Commercial, Claughton Realty Co., and Armer E. White shall receive commissions of one percent, two percent and two percent, respectively, of the gross sales price of Claughton Island if the sale to Stockbridge Corp. closes.

4. If CB Commercial receives an offer to purchase Claughton Island, CB Commercial shall promptly provide a copy of such offer to Mr. Johnson and all of the parties to this adversary proceeding. Any party to this adversary proceeding may move that this Court, after ten days' notice to all other parties to this adversary proceeding and Mr. Johnson and a hearing, approve Mr. Johnson's acceptance of such offer. In evaluating any such offer, the Court will review all of the terms of such offer in determining whether acceptance of the offer is in the best interest of the parties to this adversary proceeding. During the nine months after entry of this Judgment, the Court will not approve a sale of Claughton Island for less than a gross sales price of \$12,000,000 in cash, unless all parties to this adversary proceeding consent to such a sale. If this Court approves the sale, then the Court will enter an order:

- a. approving acceptance of the offer and ordering that Claughton Island be sold to the buyer free and clear of all liens, claims and encumbrances, with all such interests to attach to the net sale proceeds;
- b. providing that the costs of sale and the sellers' share of ad valorem property taxes on Claughton Island be paid at closing;
- c. providing that all Partnership debts shall be paid at closing from the sale proceeds, unless an objection to one or more Partnership debts made in accordance with

paragraph 5 below is pending on the date of closing, in which case an amount of cash equal to such disputed debts shall be held in escrow by Mr. Johnson pending resolution of such objection; and

- d. requiring that (i) 45% of the sale proceeds after payment or escrow of the amounts set forth in (b) and (c) above shall be distributed to Defendant Suzanne C. Schmidt, and (ii) the remaining 55% of the sale proceeds be placed in escrow (the "Remaining Proceeds").

5. Within sixty (60) days of the date of this Judgment, Mr. Johnson shall prepare and file a list of debts of the Partnership to be paid upon the sale of Claughton Island. Within fifteen (15) days after Mr. Johnson files and serves the list of Partnership debts, any party to this adversary proceeding may file proposed modifications or additions to the list. Within thirty (30) days after Mr. Johnson files and serves the list of Partnership debts, any party to this adversary proceeding may file an objection to any debt listed by Mr. Johnson or any modification or addition proposed by any other party to this adversary proceeding. Any dispute among the parties to this adversary proceeding regarding the costs of sale and Partnership debts to be paid at closing shall be determined to the extent possible by the Court prior to the closing of the sale.

6. Within twenty (20) days of the closing of the sale of Claughton Island, Defendant Edward N. Claughton, Jr. (the "Debtor") and Plaintiff Beverly A. Mixson ("Mixson") shall file with this Court and serve on one another statements alleging in good faith the portions of the Remaining Proceeds distributable to each other under the property award to Mixson in the Amended Final Judgment Pursuant To Rule 1.540 (the "Amended Final Judgment") entered on

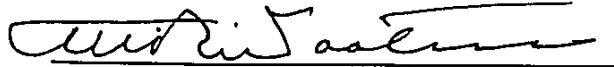
March 27, 1992, by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in Claughton v. Claughton, Case No. 75-16610. To the extent that there is no dispute about the distribution of the Remaining Proceeds or any portion thereof, then the proceeds, or such portion thereof that are not the subject of dispute, shall be divided and distributed pursuant to the statements of the Debtor and Mixson, with the Debtor's share to be subject to distribution to the Debtor's creditors, including to Mixson on her money judgments, pursuant to the Bankruptcy Code. Upon distributions from the Remaining Proceeds of undisputed amounts to the Debtor and Mixson on the property award, this Court shall refer to the judge presiding in the pending equitable distribution proceeding between the Debtor and Mixson the issue of the distribution of any remaining sale proceeds pursuant to the Amended Final Judgment (with the request that this determination be made as soon as possible). Upon the Florida court's determination of Mixson's share of the sale proceeds on her property award, such proceeds shall be released from escrow to Mixson.

7. Upon distribution of any amount of the Remaining Proceeds to the Debtor--whether such distribution be of the undisputed Remaining Proceeds or upon the Florida court's determination of the Debtor's share of the sale proceeds--this Court will determine promptly after each such distribution, pursuant to the provisions of the Bankruptcy Code, how to distribute those proceeds in satisfaction of the allowed claims against the Debtor's bankruptcy

Claughton Island, and distribution of the sale proceeds are hereby entered pursuant to 11 U.S.C. § 105.

12. All relief sought by Defendants in their Counterclaim is hereby denied at this time as moot, and Defendants' Counterclaim is dismissed without prejudice.

This 6<sup>th</sup> day of December, 1994.



Marvin R. Wooten  
United States Bankruptcy Judge

State of FLORIDA, and is hereby described as TRUST ATTACHED  
HERETO

References herein to the Property shall be understood to include portions of the Property.

2. Owner agrees to pay Broker a sales commission in accordance with Broker's Schedule of Sale and Lease Commissions (the "Schedule"), a copy of which is executed by Owner, attached hereto and hereby made a part hereof. This commission shall be earned for services rendered if, during the Term: (a) the Property is sold to a purchaser procured by Broker, Owner or anyone else; (b) a purchaser is procured by Broker, Owner, or anyone else who is ready, willing and able to purchase the Property at the price and on the terms above stated, or on any other price and terms agreeable to Owner; (c) any contract for the sale of the Property is entered into by Owner; (d) Owner removes the Property from the market or the Property is transferred due to eminent domain or the threat thereof, foreclosure, or conveyance in lieu of foreclosure; (e) Owner contributes or conveys the Property to a partnership, joint venture or other business entity; (f) Owner is a corporation, partnership or other business entity and an interest in such corporation, partnership or other business entity is transferred, whether by merger, outright purchase or otherwise, in lieu of a sale of the Property. Broker is authorized to co-operate with and to share its commission with other licensed real estate brokers, regardless of whether said brokers represent prospective purchasers or act as Broker's subagents.
3. As used in this Agreement the term "sale" shall include an exchange of the Property, and also the granting of an option to purchase the Property. Owner agrees that in the event such an option is granted, Owner shall pay Broker a sales commission in accordance with the Schedule on the price paid for the option and for any extensions thereof. This commission shall be paid upon receipt by Owner of any such payment(s). In the event such an option is exercised, whether during the Term or thereafter, Owner shall also pay Broker a sales commission on the gross sales price of the Property in accordance with the Schedule. Notwithstanding the foregoing, to the extent that all or part of the price paid for the option or any extension thereof is applied to the sales price of the Property, then any commission previously paid by Owner to Broker on account of such option payments shall be credited against the commission payable to Broker on account of the exercise of the option.
4. Owner further agrees that Owner shall pay Broker a commission in accordance with the Schedule if, within one hundred twenty (120) calendar days after the expiration or termination of the Term, the Property is sold to, or Owner enters into a contract of sale of the Property with, or negotiations continue, resume or commence and thereafter continue leading to a sale of the Property to any person or entity (including his/her/its successors, assigns or affiliates) with whom Broker has negotiated (either directly or through another broker or agent) or to whom the Property has been submitted prior to the expiration or termination of the Term. Broker is authorized to continue negotiations with such persons or entities. Broker agrees to submit a list of such persons or entities to Owner no later than fifteen (15) calendar days following the expiration or termination of the Term, provided, however, that if a written offer has been submitted then it shall not be necessary to include the offeror's name on the list.
5. OWNER FURTHER AGREES THAT (a) IF A LEASE OF THE PROPERTY IS ENTERED INTO DURING THE TERM TO ANYONE, OR (b) IF, WITHIN ONE HUNDRED TWENTY (120) CALENDAR DAYS AFTER THE EXPIRATION OR TERMINATION OF THE TERM, THE PROPERTY IS LEASED TO, OR OWNER ENTERS INTO A CONTRACT TO LEASE THE PROPERTY WITH, OR NEGOTIATIONS CONTINUE, RESUME OR COMMENCE AND THEREAFTER CONTINUE LEADING TO THE LEASE OF THE PROPERTY TO ANY PERSON OR ENTITY AS DESCRIBED IN PARAGRAPH 4 ABOVE, OWNER SHALL PAY BROKER A LEASING COMMISSION IN ACCORDANCE WITH THE SCHEDULE.
6. Commissions shall be payable hereunder when earned or at closing of escrow, recordation of deed, lease execution, or taking of possession by the purchaser or tenant.
7. Unless otherwise provided herein, the terms of sale shall be, at the option of the purchaser, either cash or cash to any existing loan. Any offer may contain normal and customary contingencies such as those relating to the condition of the Property, title report, and timing of closing.
8. Owner and Broker agree that the Property will be offered in compliance with all applicable anti-discrimination laws.



EXCLUSIVE SALES LISTING AGREEMENT

CB COMMERCIAL REAL ESTATE GROUP, INC.  
BROKERAGE AND MANAGEMENT  
LICENSED REAL ESTATE BROKER

EXHIBIT

A

1. In consideration of the listing for sale of the real property hereinafter described (the "Property") by CB COMMERCIAL REAL ESTATE GROUP, INC. ("Broker"), and Broker's agreement to use its best efforts to effect a sale of same, the undersigned ("Owner") hereby grants to Broker the exclusive right to sell the Property for a period commencing DECEMBER 5, 19 94, and ending midnight DECEMBER 4, 19 95 (the "Term"), at a price of FOURTEEN MILLION FIVE HUNDRED THOUSAND Dollars (\$ 14,500,000.00) upon the following terms: ALL CASH AT CLOSING OR TERMS ACCEPTABLE TO SELLER

The Property is situated in the City of MIAMI, County of DADE, State of FLORIDA, and is further described as IN 'EXHIBIT A' ATTACHED HERETO

References herein to the Property shall be understood to include portions of the Property.

2. Owner agrees to pay Broker a sales commission in accordance with Broker's Schedule of Sale and Lease Commissions (the "Schedule"), a copy of which is executed by Owner, attached hereto and hereby made a part hereof. This commission shall be earned for services rendered if, during the Term: (a) the Property is sold to a purchaser procured by Broker, Owner or anyone else; (b) a purchaser is procured by Broker, Owner, or anyone else who is ready, willing and able to purchase the Property at the price and on the terms above stated, or on any other price and terms agreeable to Owner; (c) any contract for the sale of the Property is entered into by Owner; (d) Owner removes the Property from the market or the Property is transferred due to eminent domain or the threat thereof, foreclosure, or conveyance in lieu of foreclosure; (e) Owner contributes or conveys the Property to a partnership, joint venture or other business entity; (f) Owner is a corporation, partnership or other business entity and an interest in such corporation, partnership or other business entity is transferred, whether by merger, outright purchase or otherwise, in lieu of a sale of the Property. Broker is authorized to co-operate with and to share its commission with other licensed real estate brokers, regardless of whether said brokers represent prospective purchasers or act as Broker's subagents.
3. As used in this Agreement the term "sale" shall include an exchange of the Property, and also the granting of an option to purchase the Property. Owner agrees that in the event such an option is granted, Owner shall pay Broker a sales commission in accordance with the Schedule on the price paid for the option and for any extensions thereof. This commission shall be paid upon receipt by Owner of any such payment(s). In the event such an option is exercised, whether during the Term or thereafter, Owner shall also pay Broker a sales commission on the gross sales price of the Property in accordance with the Schedule. Notwithstanding the foregoing, to the extent that all or part of the price paid for the option or any extension thereof is applied to the sales price of the Property, then any commission previously paid by Owner to Broker on account of such option payments shall be credited against the commission payable to Broker on account of the exercise of the option.
4. Owner further agrees that Owner shall pay Broker a commission in accordance with the Schedule if, within one hundred twenty (120) calendar days after the expiration or termination of the Term, the Property is sold to, or Owner enters into a contract of sale of the Property with, or negotiations continue, resume or commence and thereafter continue leading to a sale of the Property to any person or entity (including his/her/its successors, assigns or affiliates) with whom Broker has negotiated (either directly or through another broker or agent) or to whom the Property has been submitted prior to the expiration or termination of the Term. Broker is authorized to continue negotiations with such persons or entities. Broker agrees to submit a list of such persons or entities to Owner no later than fifteen (15) calendar days following the expiration or termination of the Term, provided, however, that if a written offer has been submitted then it shall not be necessary to include the offeror's name on the list.
5. OWNER FURTHER AGREES THAT IF ANY SALE OF THE PROPERTY IS ENTERED INTO DURING THE TERM TO ANYONE, OR WITHIN ONE HUNDRED TWENTY (120) CALENDAR DAYS AFTER THE EXPIRATION OR

- and future zoning and environmental matters affecting the Property and the condition of the Property, including, but not limited to structural, mechanical and soils conditions, the presence and location of asbestos, PCB transformers, other toxic, hazardous or contaminating substances, and underground storage tanks, or about the Property. Broker is authorized to disclose any such information to prospective purchasers or tenants.
12. Owner represents that it is the owner of the Property and that, except as may be set forth in an addendum attached hereto, no person or entity who has an ownership interest in the Property is a foreign person as defined in the Foreign Investment in Real Property Tax Act (commonly known as "FIRPTA").
  13. If earnest money or similar deposits made by a prospective purchaser or tenant are forfeited, in addition to any other rights of Broker pursuant to this Agreement, Broker shall be entitled to one-half (1/2) thereof, but not to exceed the total amount of the anticipated commission.
  14. To the extent permitted by applicable law, Broker is authorized to deduct its commissions from any deposits, payments or other funds, including proceeds of sale or rental payments, paid by a purchaser or tenant in connection with a transaction contemplated by this Agreement, and Owner hereby irrevocably assigns said funds and proceeds to Broker to the extent necessary to pay said commissions. Broker is authorized to provide a copy of this Agreement to any escrow or closing agent working on such transaction, and such escrow or closing agent is hereby instructed by Owner to pay Broker's commissions from any such funds or proceeds available. Owner shall remain liable for the entire amount of said commissions regardless of whether Broker exercises its rights under this paragraph.
  15. Owner acknowledges that Broker is a national brokerage firm and that in some cases it may represent prospective purchasers and tenants. Owner desires that the Property be presented to such persons or entities and consents to the dual representation created thereby. Broker shall not disclose the confidential information of one principal to the other.
  16. In the event that the Property comes under the jurisdiction of a bankruptcy court, Owner shall immediately notify Broker of the same, and shall promptly take all steps necessary to obtain court approval of Broker's appointment, unless Broker shall elect to terminate this Agreement upon said notice.
  17. In the event that the Property becomes the subject of foreclosure proceedings prior to the expiration of this Agreement, then this Agreement shall be deemed suspended until such time as Owner may reacquire the Property within the Term. If this Agreement is suspended pursuant to this paragraph, Broker shall be free to enter into a listing agreement with any receiver, the party initiating the foreclosure, the party purchasing the Property at a foreclosure sale, or any other person having an interest in the Property.
  18. In the event of any dispute between Owner and Broker relating to this Agreement, the Property or Owner or Broker's performance hereunder, Owner and Broker agree that such dispute shall be resolved by means of binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court of competent jurisdiction. Depositions may be taken and other discovery obtained during such arbitration proceedings to the same extent as authorized in civil judicial proceedings in the state where the office of Broker executing this Agreement is located. The arbitrator(s) shall be limited to awarding compensatory damages and shall have no authority to award punitive, exemplary or similar type damages. The prevailing party in the arbitration proceeding shall be entitled to recover its expenses, including the costs of the arbitration proceeding, and reasonable attorneys' fees.
  19. In the event that Owner lists the Property with another broker after the expiration or termination of this Agreement, Owner agrees to provide in the subsequent listing agreement that a commission will not be payable to the new broker with respect to transactions for which Owner remains obligated to pay a commission to Broker under paragraph 4 or 5 hereof. Owner's failure to do so, however, shall not affect Owner's obligation to Broker under paragraph 4 or 5.
  20. Each signator to this Agreement represents and warrants that he or she has full authority to sign this Agreement on behalf of the party for whom he or she signs and that this Agreement binds such party.
  21. This Agreement constitutes the entire agreement between Owner and Broker and supersedes all prior discussions, negotiations and agreements, whether oral or written. No amendment, alteration, cancellation or withdrawal of this Agreement

9. Owner agrees to cooperate with Broker in bringing about a sale of the Property and to refer immediately to Broker all inquiries of anyone interested in the Property. All negotiations are to be through Broker. Broker is authorized to accept a deposit from any prospective purchaser and to handle it in accordance with the instructions of the parties unless contrary to applicable law. Broker is exclusively authorized to advertise the Property and, exclusively, to place a sign(s) on the Property if, in Broker's opinion, such would facilitate the sale of the Property. Owner and its counsel will be responsible for determining the legal sufficiency of a purchase and sale agreement and other documents relating to any transaction contemplated by this Agreement.
10. In the event the Property is removed from the market due to the opening of an escrow or acceptance of an offer to purchase the Property during the Term, or any extension thereof, and the sale is not consummated for any reason then, in that event, the Term shall be extended for a period of time equal to the number of days that the escrow had been opened and/or the Property had been removed from the market, whichever is longer, provided that, in no event shall such extensions(s) exceed one hundred eighty (180) calendar days in the aggregate.
11. Owner agrees to disclose to Broker and to prospective purchasers any and all information which Owner has regarding present and future zoning and environmental matters affecting the Property and regarding the condition of the Property, including, but not limited to structural, mechanical and soils conditions, the presence and location of asbestos, PCB transformers, other toxic, hazardous or contaminated substances, and underground storage tanks, in, on, or about the Property. Broker is authorized to disclose any such information to prospective purchasers or tenants.
12. Owner represents that it is the owner of the Property and that, except as may be set forth in an addendum attached hereto, no person or entity who has an ownership interest in the Property is a foreign person as defined in the Foreign Investment in Real Property Tax Act (commonly known as "FIRPTA").
13. If earnest money or similar deposits made by a prospective purchaser or tenant are forfeited, in addition to any other rights of Broker pursuant to this Agreement, Broker shall be entitled to one-half (1/2) thereof, but not to exceed the total amount of the anticipated commission.
14. To the extent permitted by applicable law, Broker is authorized to deduct its commissions from any deposits, payments or other funds, including proceeds of sale or rental payments, paid by a purchaser or tenant in connection with a transaction contemplated by this Agreement, and Owner hereby irrevocably assigns said funds and proceeds to Broker to the extent necessary to pay said commissions. Broker is authorized to provide a copy of this Agreement to any escrow or closing agent working on such transaction, and such escrow or closing agent is hereby instructed by Owner to pay Broker's commissions from any such funds or proceeds available. Owner shall remain liable for the entire amount of said commissions regardless of whether Broker exercises its rights under this paragraph.
15. Owner acknowledges that Broker is a national brokerage firm and that in some cases it may represent prospective purchasers and tenants. Owner desires that the Property be presented to such persons or entities and consents to the dual representation created thereby. Broker shall not disclose the confidential information of one principal to the other.
16. In the event that the Property comes under the jurisdiction of a bankruptcy court, Owner shall immediately notify Broker of the same, and shall promptly take all steps necessary to obtain court approval of Broker's appointment, unless Broker shall elect to terminate this Agreement upon said notice.
17. In the event that the Property becomes the subject of foreclosure proceedings prior to the expiration of this Agreement, then this Agreement shall be deemed suspended until such time as Owner may reacquire the Property within the Term. If this Agreement is suspended pursuant to this paragraph, Broker shall be free to enter into a listing agreement with any receiver, the party initiating the foreclosure, the party purchasing the Property at a foreclosure sale, or any other person having an interest in the Property.
18. In the event of any dispute between Owner and Broker relating to this Agreement, the Property or Owner or Broker's performance hereunder, Owner and Broker agree that such dispute shall be resolved by means of binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court of competent jurisdiction. Depositions may be taken and other discovery obtained during such arbitration proceedings to the same extent as authorized in civil judicial proceedings in the state where the office of Broker executing this Agreement is located. The arbitrator(s) shall be limited to awarding compensatory damages and shall have no authority to award punitive, exemplary or similar type damages. The prevailing party in the arbitration proceedings shall be entitled to recover its costs and fees, including the costs of the arbitration proceeding.



From: Michael D. Klotz To: Garland Cassada  
12/02/94 14:08 305 - 462

Date: 12/2/94 Time: 13:38:40  
CB COMMERCIAL

Page 3 of 5  
2002

shall be valid or binding unless made in writing and signed by both Owner and Broker. This Agreement shall be binding upon, and shall benefit, the heirs, successors and assignees of the parties. In the event any clause, provision, paragraph or term of this Agreement shall be deemed to be unenforceable or void based on any controlling state or federal law, the remaining provisions hereof, and each part, shall remain unaffected and shall continue in full force and effect.

22. The parties hereto agree to comply with all applicable federal, state and local laws, regulations, codes, ordinances and administrative orders having jurisdiction over the parties, property or the subject matter of this Agreement, including, but not limited to, the 1964 Civil Rights Act and all amendments thereto, the Foreign Investment In Real Property Tax Act, the Comprehensive Environmental Response Compensation and Liability Act, and The Americans With Disabilities Act.

The undersigned Owner hereby acknowledges receipt of a copy of this Agreement and the Schedule.

R. KEITH JOHNSON, TRUSTEE

a(n)

Owner

Accepted:

CB Commercial Real Estate Group, Inc.  
Licensed Real Estate Broker

By: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Title: SR.V.P., MANAGING OFFICER

By: \_\_\_\_\_

Title: \_\_\_\_\_

Address: 777 BRICKELL AVE., SUITE 1000

Address: \_\_\_\_\_

MIAMI, FL 33131

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Telephone: 305-374-1000

Telephone: \_\_\_\_\_

**CONSULT YOUR ADVISORS** - This document has legal consequences. No representation or recommendation is made by Broker as to the legal or tax consequences of this Agreement or the transaction(s) which it contemplates. These are questions for your attorney and financial advisors.



**SCHEDULE OF SALE COMMISSION**

CB COMMERCIAL REAL ESTATE GROUP, INC.  
BROKERAGE AND MANAGEMENT  
LICENSED REAL ESTATE BROKER

FOR PROPERTY AT CLAUGHTON ISLAND, MIAMI, FLORIDA FURTHER DESCRIBED IN  
EXHIBIT 'A'

Broker's commission shall be 4 % of the gross sales price. Gross sales price shall include any and all consideration received or receivable, in whatever form, including but not limited to assumption or release of existing liabilities. This commission shall be paid when earned or at the close of escrow through escrow, or if there is no escrow, then upon recordation of the deed; provided, however, if the transaction involves an installment contract, then payment shall be made upon execution of such contract. In the event Owner contributes or conveys the Property or any interest therein to a joint venture, partnership, or other business entity, the commission shall be calculated on the fair market value of the Property, less the value of the interest in the Property retained by or transferred to Owner, as the case may be, and shall be paid at the time of the contribution or transfer. If Owner is a partnership, corporation or other business entity, and an interest in the partnership, corporation or other business entity is transferred, whether by merger, outright purchase, or otherwise, in lieu of a sale of the Property, and applicable law does not prohibit the payment of a commission in connection with such sale or transfer, the commission shall be calculated on the fair market value of the Property, rather than the gross sales price, multiplied by the percentage of interest so transferred, and shall be paid at the time of the transfer.

The provisions hereof are subject to the terms and provisions of any Exclusive Sales Listing Agreement, or other agreement to which this Schedule may be attached and which is executed by the parties hereto.

In the event Owner fails to make payments within the time limits set forth herein, then from the date due until paid the delinquent amount shall bear interest at the maximum rate permitted in the state in which the office of the Broker executing this Schedule is located. If Broker is required to institute legal action against Owner relating to this Schedule or any agreement of which it is a part, Broker shall be entitled to reasonable attorneys' fees and costs.

Owner hereby acknowledges receipt of a copy of this Schedule and agrees that it shall be binding upon its heirs, successors and assignees. In the event Owner sells or otherwise disposes of its interest in the Property, Owner shall remain liable for payment of the commissions provided for in this Schedule and any agreement of which it is a part. The term "Owner" as used herein shall be deemed to include the owner of the Property, a party under contract to acquire the Property and a tenant under a ground lease.

Approved this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

R. KEITH JOHNSON, TRUSTEE

Owner

By: \_\_\_\_\_

Title: \_\_\_\_\_

CB Commercial Real Estate Group, Inc.  
Licensed Real Estate Broker

By: \_\_\_\_\_

By: \_\_\_\_\_

S. V. F. MANAGING OFFICER

Title: \_\_\_\_\_

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

IN RE:

EDWARD N. CLAUGHTON, JR.

SSN: 266-22-1187

Debtor

Case No. 92-50132

Chapter 11

**FILED**  
U. S. Bankruptcy Court

FEB 27 1997

J. Baron Greshon, Clerk  
Deputy Clerk

BEVERLY A. MIXSON, derivatively in  
the right of the bankruptcy estate  
of EDWARD N. CLAUGHTON, JR.,

Plaintiff,

vs.

CLAUGHTON ISLAND COMPANY, LTD.,  
a Florida limited partnership,  
CLAUGHTON ISLAND COMPANY, INC.,  
a Florida corporation,  
EDWARD N. CLAUGHTON, JR. and  
SUZANNE C. SCHMIDT,

Defendants.

Adversary No. 94-5063


CERTIFICATION OF DISBURSEMENT OF PROCEEDS

R. Keith Johnson, Trustee appointed by the Court for the liquidation of Claughton Island Company, Limited, a Florida Limited Partnership, comes now before the Court and certifies that all closing proceeds received by him, with the exception of an escrow account in which funds have been placed prior to determination of a trustee commission, have been disbursed. The Trustee would show to the Court that, pursuant to the closing statement, he received a wire transfer from the closing attorneys in the total amount of \$628,821.20. From that fund, the Trustee has disbursed the following amounts:

<u>Check No.</u>	<u>Made Payable</u>	<u>Amount</u>
4115	Robinson, Bradshaw & Hinson, P.A.	\$ 88.00
4116	Suzanne C. Schmidt	\$ 93,000.00
4117	White & Case	\$ 74,636.00
4118	Adorno & Zeber	\$ 59,122.00

4119	Hixson, Marin, Powell & DeSanctis	\$ 15,975.00
4120	R. Keith Johnson, P.A.	\$ 301,000.20
4121	Kennedy, Covington, Lobdell & Hickman	\$ 70,000.00
4122	Claughton Company, Inc.	\$ 15,000.00
TOTAL DISBURSEMENTS		\$ 628,821.20

This the 27<sup>th</sup> day of February, 1997.

  
 R. Keith Johnson, Trustee for  
 Claughton Island Company, Limited  
 NC State Bar No. 8840

R. KEITH JOHNSON, P.A.  
 Suite 600, Builders Building  
 312 West Trade Street  
 Charlotte, North Carolina  
 (704) 372-3867

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT  
SUITE 600, BUILDERS BUILDING  
312 WEST TRADE STREET  
CHARLOTTE, NC 28202

FOR Claughton Island  
Company, Ltd partnership  
debt

4115

66-393  
530

PAY Eighty-Eight and 00/100's

DOLLARS

DATE	TO THE ORDER OF
1/15/97	Robinson Bradshaw-Hinson, P.A. (claughton)

CHECK AMOUNT
88 00

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT

R. Keith Johnson  
VOID IF NOT PRESENTED WITHIN NINETY DAYS

BRANCH BANKING AND TRUST COMPANY-CHARLOTTE, NC

⑈004115⑈ ⑆053003931⑆ 1561095201⑈

⑈0000008800⑈

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT  
SUITE 600, BUILDERS BUILDING  
312 WEST TRADE STREET  
CHARLOTTE, NC 28202

FOR Claughton Island  
Company, Ltd partnership  
debt

4116

66-393  
530

PAY Ninety-Three Thousand and 00/100's

DOLLARS

DATE	TO THE ORDER OF
1/15/97	Suzanne C. Schmidt (claughton)

CHECK AMOUNT
93 000 00

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT

R. Keith Johnson  
VOID IF NOT PRESENTED WITHIN NINETY DAYS

BRANCH BANKING AND TRUST COMPANY-CHARLOTTE, NC

⑈004116⑈ ⑆053003931⑆ 1561095201⑈

⑈0009300000⑈

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT  
SUITE 600, BUILDERS BUILDING  
312 WEST TRADE STREET  
CHARLOTTE, NC 28202

FOR Claughton Company  
Ltd partnership debt

4117

66-393  
530

PAY Seventy-four Thousand Six hundred thirty-six and 00/100's

DOLLARS

DATE	TO THE ORDER OF
1/15/97	White & Case (claughton)

CHECK AMOUNT
74 636 00

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT

R. Keith Johnson  
VOID IF NOT PRESENTED WITHIN NINETY DAYS

BRANCH BANKING AND TRUST COMPANY-CHARLOTTE, NC

060767549 01-22-97 051 1516 04

⑈004117⑈ ⑆053003931⑆ 1561095201⑈

⑈0007463600⑈

20  
R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT  
SUITE 600, BUILDERS BUILDING  
312 WEST TRADE STREET  
CHARLOTTE, NC 28202

FOR Cloughton Island  
Company, Ltd. par' orship  
debt

4118

66-393  
530

PAY fifty-nine thousand One hundred Twenty-Two and 00/100's DOLLARS

DATE	TO THE ORDER OF
1.15.97	Adorno & Zeder (Cloughton)

CHECK AMOUNT
59,122.00

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT

BRANCH BANKING AND TRUST COMPANY-CHARLOTTE, NC

R. Keith Johnson  
VOID IF NOT PRESENTED WITHIN NINETY DAYS

⑈004118⑈ ⑆053003931⑆ 1561095201⑈

⑈0005912200⑈

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT  
SUITE 600, BUILDERS BUILDING  
312 WEST TRADE STREET  
CHARLOTTE, NC 28202

FOR Cloughton Island  
Company, Ltd. partnership  
debt

4119

66-393  
530

JAN 20 1997

PAY Fifteen Thousand Nine hundred Seventy five and 00/100's DOLLARS

DATE	TO THE ORDER OF
1.15.97	Hixson, Marm, Powell & De Sanctis (Cloughton)

CHECK AMOUNT
15,975.00

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT

Ac 183-2

BRANCH BANKING AND TRUST COMPANY-CHARLOTTE, NC

R. Keith Johnson  
VOID IF NOT PRESENTED WITHIN NINETY DAYS

⑈004119⑈ ⑆053003931⑆ 1561095201⑈

⑈0001597500⑈

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT  
SUITE 600, BUILDERS BUILDING  
312 WEST TRADE STREET  
CHARLOTTE, NC 28202

FOR ID #56-1578801

4120

66-393  
530

PAY Three hundred One Thousand and 20/100's DOLLARS

DATE	TO THE ORDER OF
1.15.97	R. Keith Johnson, P.A. Cloughton

CHECK AMOUNT
301,000.20

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT

BRANCH BANKING AND TRUST COMPANY-CHARLOTTE, NC

R. Keith Johnson  
VOID IF NOT PRESENTED WITHIN NINETY DAYS

⑈004120⑈ ⑆053003931⑆ 1561095201⑈

⑈0030100020⑈

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT  
SUITE 600, BUILDERS BUILDING  
312 WEST TRADE STREET  
CHARLOTTE, NC 28202

ON Claughton  
partnership debt to  
Ed Claughton

4121

66-393  
530

AY Seventy Thousand and 00/100's

DOLLARS

DATE	TO THE ORDER OF
15-97	Kennedy, Covington, Lubdell & Hickman

CHECK AMOUNT
70 000 00

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT

BRANCH BANKING AND TRUST COMPANY-CHARLOTTE, NC

R. Keith Johnson  
VOID - NOT PRESENTED WITHIN NINETY DAYS

⑈004122⑈ ⑆053003931⑆ 1561095201⑈

⑈0007000000⑈

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT  
SUITE 600, BUILDERS BUILDING  
312 WEST TRADE STREET  
CHARLOTTE, NC 28202

FOR Claughton Island  
Company Ltd partnership  
debt

4122

66-393  
530

AY fifteen Thousand and 00/100's

DOLLARS

DATE	TO THE ORDER OF
15-97	Claughton Company, Inc

CHECK AMOUNT
15 000 00

R. KEITH JOHNSON, P.A.  
TRUST ACCOUNT

BRANCH BANKING AND TRUST COMPANY-CHARLOTTE, NC

R. Keith Johnson  
VOID - NOT PRESENTED WITHIN NINETY DAYS

⑈004122⑈ ⑆053003931⑆ 1561095201⑈

⑈0001500000⑈

### CLOSING STATEMENT

SELLER: EDWARD N. CLAUGHTON, JR., BEVERLY A. MIXSON, SUZANNE C. SCHMIDT and BELL, DAVIS & PITT, P.A., as Intermediary

BUYER: SWIRE BRICKELL THREE INC., a Florida corporation

PROPERTY: SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF

CLOSING DATE: January 14, 1997

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#### CREDITS TO SELLER:

Purchase Price	10,780,000.00	
Total Seller's Credits		\$10,780,000.00

#### CREDITS TO BUYER:

Deposit	1,250,000.00	
Proration of real estate taxes (based on fully discounted 1996 taxes of \$220,813.37 ÷ 365 = \$604.97 per diem x 10 days)	8,469.58	
Brokerage Fee	220,000.00	
Documentary Stamps on Deed	64,680.00	
Surtax on Deed	48,510.00	
Payoff of Princ. Of Existing Loan	1,243,918.10	
Payoff of Int. Of Existing Loan (\$340.80 per diem x 75 days from October 31, 1996)	25,580.00	
Title Evidence and Recording Orders	500.00	
Survey	7,074.14	
Advance of Closing Proceeds	304,321.38	
TOTAL BUYER'S CREDITS		\$3,173,033.20
CASH TO CLOSE		<u>\$7,606,966.80</u>
TOTAL SELLER PROCEEDS (with \$1,250,000.00 Deposit)		<u>\$8,856,966.80</u>



NOTES

1. Seller hereby directs Greenberg Traurig et al. As disbursing agent for the subject transaction to disburse the TOTAL SELLER PROCEEDS (with \$1,250,000.00 Deposit) to Seller as follows:

- (a) \$1,600,000 to BELL, DAVIS & PITT, P.A., as Intermediary, to be wire transferred to:

Branch Banking and Trust Co., Wilson NC  
further credit to the Boone office  
ABA# 053101121  
Acct # 5116945584  
Name: Intermediary Funds in benefit of  
Suzanne Schmidt

- (b) \$2,286,285.86 to SUZANNE C. SCHMIDT, to be wire transferred to:

BB & T Bank Wilson NC  
further credit to the Boone office  
ABA# 053101121  
Acct # 5116888429  
Name Suzanne Schmidt  
PO Box 188  
Blowing Rock NC 28605

- (c) \$113,993.25 to EDWARD N. CLAUGHTON, JR., to be wire transferred to:

NATIONSBANK, N.A.  
CHARLOTTE, N.C.  
MAIN BRANCH  
Acct Name: Kennedy, Covington, Lobdell & Hickman, L.L.P., Trust  
Account  
Acct. No. 001072271  
ABA # 053000198  
Please contact Elaine Freeze-Forbes, Kennedy,  
Covington, Lobdell & Hickman (704) 331-7403  
When Funds Are Placed on the Wire

- (d) \$4,227,866.49 to BEVERLY A. MIXSON, to be wire transferred to:

Bank: NationsBank, N.A.  
Acct. Name Robinson Bradshaw & Hinson, P.A.  
Trust Account  
Acct. No. 001493733  
ABA# 053000198  
Upon receipt of wire contact Joanna Swindall at  
(704) 377-2536

- (e) \$628,821.20 to R. KEITH JOHNSON, P.A., TRUST ACCOUNT to be wire transferred to:

R. Keith Johnson, P.A., Trust Account  
Acct. No. 1581085201  
Branch Banking and Trust Company  
200 South College Street  
Charlotte, NC  
(704) 954-1199 Attn. Mary Bowens  
ABA# 053003831

2. Buyer has delivered to Greenberg, Traurig et al. the amount of \$1,243,918.10, being the principal of the existing mortgage loan, to replenish the deposit escrow account.
3. Buyer has delivered to Greenberg, Traurig et al. the amount of \$113,416.50 to be paid to the Clerk of the Circuit Court, Dade County for payment of the following recording costs:

(a)	Recording Deed	28.50
(b)	Documentary Stamps on Deed	64,680.00
(c)	Surtax on Deed	48,510.00
(d)	Recording Orders	<u>\$ 198.00</u>

Total \$113,416.50

4. Buyer has delivered to Greenberg, Traurig et al. the amount of \$41,831.14 representing the following title charges and services:

(a)	Owner's Title Insurance Premium	\$33,875.00
(b)	Survey Expense	7,074.14
(c)	Title Search Charges	382.00
(d)	Title Examination Fees	<u>500.00</u>

Total \$41,831.14

5. Simultaneously herewith, Buyer has delivered to Greenberg, Traurig, et al. a check made payable to CB Commercial Real Estate Group, Inc., in the amount of \$220,000.00, as payment in full of all brokerage commissions due and payable with respect to this transaction.
6. The parties agree that in the event of any mathematical errors in this Closing Statement, at the request of either party, the parties will make the appropriate adjustments hereto and remit any monies which may be determined to be owing.

Agreed and Accepted by:

SELLER:

BUYER:

SWIRE PACIFIC HOLDINGS INC.,  
a Delaware corporation

By: \_\_\_\_\_  
Stephen L. Owens  
Vice President

R. Keith Johnson, Trustee  
R. Keith Johnson, Trustee

[CORPORATE SEAL]

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

IN RE:

EDWARD N. CLAUGHTON, JR.

SSN: 266-22-1187

Debtor

BEVERLY A. MIXSON, derivatively in  
the right of the bankruptcy estate  
of EDWARD N. CLAUGHTON, JR.,

Plaintiff,

vs.

CLAUGHTON ISLAND COMPANY, LTD.,  
a Florida limited partnership,  
CLAUGHTON ISLAND COMPANY, INC.,  
a Florida corporation,  
EDWARD N. CLAUGHTON, JR., and  
SUZANNE C. SCHMIDT,

Defendants.

Case No. 92-50132 '97 MAY 30 P102

Chapter 11

Adversary No. 94-5063

CONSENT ORDER

THIS MATTER came on for consideration before the undersigned United States Bankruptcy Judge upon the Motion for Approval of Commission, and for Order Discharging Trustee filed in this case on 23 December 96 by R. Keith Johnson, Trustee appointed by this Court to liquidate the Claughton Island Company, Ltd. partnership (hereinafter "Johnson" or "Trustee"). The Trustee filed his Motion seeking approval of a commission for the work performed as ordered by this Court and for reimbursement of expenses, and further sought an order discharging him from further duties in this case. In his Motion, the Trustee sought approval of a commission in the amount of \$354,300, and reimbursement of actual costs in the approximate amount of \$8,500. The Motion of the Trustee was filed in

Copy to Clerk  
in 10/1/96  
5/2/97

anticipation of a closing of the sale of property owned by the partnership being liquidated by the Trustee, which closing did occur in early January, 1997. Subsequent to the closing of the sale, the Trustee filed on 27 February 97 Notice of Hearing on his Motion for Approval of Commission that had previously been filed. Hearing on the Motion was set for 18 March 97. However, at the request of Suzanne C. Schmidt (hereinafter "Schmidt") this Court entered its order delaying the hearing on the Motion of the Trustee for Approval of Commission and for Order Discharging Trustee from 18 March 97 to 8 April 97.

The only response from a party in interest to the Motion of the Trustee was that of Schmidt. At hearings in this Court concerning other matters, the Trustee had advised the Court that, as between the Trustee and Beverly A. Mixson (hereinafter "Mixson"), and as between the Trustee and Edward N. Claughton, Jr. (the "Debtor" herein), an agreement had been reached as to the amount and payment of commissions, and that no controversy existed between those parties and the Trustee as to his commissions or expenses to be paid from funds that would otherwise go to Mixson or the Debtor.

After hearing the arguments and contentions of Johnson and Schmidt at the hearing on 8 April 97, this Court announced its decision from the bench approving the commissions as requested, and approving expenses up to \$8,500. The Court indicated that it would not discharge Johnson from his duties as Trustee, until after completion of the necessary documentation for dissolution of the partnership in Florida. The Court instructed Johnson to prepare a proposed order for consideration, and further instructed Johnson to provide a copy of that order to Schmidt.

The Court provided that Schmidt would have seven (7) days after receipt of that proposed order within which to comment and propose changes.

Prior to the submission of a proposed order to the Court, the parties have informed the Court, as shown by their consent to this document, that they have reached an agreed resolution as to the payment of commissions and expenses to Johnson from the funds currently on hand.

In connection with the closing of the sale, the Court approved an escrow of \$400,000 from which Trustee commissions would be paid. As Schmidt has a forty-five percent (45%) interest in the proceeds of sale, her interest in the escrowed funds would be forty-five percent (45%), or \$180,000. As Johnson and the other parties having an interest in the proceeds have previously resolved any questions as to commission and expenses, the total funds held in escrow in connection with the commissions to be paid from proceeds otherwise payable to Schmidt is \$180,000. Additionally, the Trustee has on hand approximately \$16,000 resulting from settlement of a contract claim of the partnership, said amount remaining after disbursement of other amounts from the settlement of the contract dispute, the \$16,000 being approximately forty-five percent (45%) of the total settlement amount.

By their consent hereto, the parties have advised the Court that they have agreed to the following:

1. Johnson shall retain the approximately \$16,000 in the separate escrow account representing proceeds from settlement of the contract action on behalf of the partnership;

2. Johnson shall retain from the escrowed funds for payment of commissions the sum of \$125,000, with the remainder of the funds, and any pro-rata interest earned thereon, being paid to Schmidt;

3. Johnson shall be responsible for payment of \$5,000 to Randy Carter, for Carter's financial assistance in the preparation of documentation leading to the closing of the sale of the property on Claughton Island;

4. The funds retained by Johnson shall include any claim that Johnson may have against Schmidt for reimbursement of expenses;

5. Upon disbursement of the balance of the funds in the escrow account to Schmidt, Schmidt agrees to release Johnson from any and all claims that she may have against him, as Trustee or otherwise, of any nature arising from his service, except any claim as against Johnson that directly results from lack of amendment (as relates to the like-kind exchange of part of Schmidt's interest) to the Contract between Johnson and Swire Pacific Holdings, Inc. for the sale of the property on Claughton Island, to the extent that the lack of amendment results in actual damages to Schmidt arising from a claim of the IRS in connection with the like-kind exchange of part of Schmidt's interest in the Claughton Island property;

6. Upon disbursement of the funds as provided herein, Johnson shall release Schmidt from any and all claims that he, as Trustee in this case or otherwise, may have against Schmidt, as a partner of the partnership or otherwise, for any claims of any kind or nature whatsoever arising in connection with his service as Trustee in this case;

7. Upon disbursement of the funds as provided herein, Schmidt agrees that she will not appeal this order providing for disbursement of the funds as set forth herein;

8. Schmidt and Johnson agree that they will cooperate in preparation of the necessary documentation to complete dissolution of the partnership pursuant to the Florida Statutes;

9. The parties agree that the disbursements contemplated by this Order will occur immediately upon entry of this Order by the Court, as it is the agreement of the parties that no appeal will be taken from this Order.

Based upon the agreement of the parties as provided herein, an exhaustive review of this case, and the desirability of completing dissolution of the partnership and the closing of this bankruptcy case, this Court is of the opinion that the agreement reached between the parties is reasonable in all respects, and that it should be implemented and memorialized by this Order.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED as follows:

1. Of the original \$400,000 held in escrow by the Trustee for the payment of commissions, the Trustee shall retain, from the balance of \$180,000 remaining, the sum of \$125,000, with the balance of the \$180,000 escrow, plus any pro-rata interest earned thereon, being distributed to Schmidt;

2. The Trustee shall retain any balance remaining in the escrow account established for the escrow of proceeds from the settlement of a contract action, originally in the principal amount of \$35,000;

3. Johnson is authorized and directed to pay to Randy Carter the sum of \$5,000 for Carter's assistance in preparation of documentation leading to the closing of the sale of the property on Claughton Island;

4. As to the funds retained by Johnson as a result of this Order, said funds shall be in full payment of any and all claims for commission or reimbursement of expenses that Johnson may have as against Schmidt and her interest in the partnership, and upon completion of disbursements Johnson shall be deemed to have released Schmidt from any and all claims that he may have, as Trustee or otherwise, against her, as partner or otherwise, of any nature whatsoever arising out of this bankruptcy case, or Johnson's service as Trustee therein;

5. Upon completion of disbursements, Schmidt shall be deemed to have released Johnson, in Johnson's capacity as Trustee or otherwise from any and all claims that she may have of any nature whatsoever (as limited above in Paragraph 5), in her capacity as partner or otherwise, that are in any way related to the service of Johnson as Trustee in this case.

IT IS FURTHER ORDERED that the Court has determined that the agreement as declared herein is reasonable in all respects, and that same is hereby approved.



This 30<sup>th</sup> day of May, 1997.

*Marvin R. Wooten*

Marvin R. Wooten  
United States Bankruptcy Judge

TO THE ENTRY OF THE FOREGOING,  
WE CONSENT:

*Suzanne C. Schmidt*  
Suzanne C. Schmidt

*R. Keith Johnson*  
R. Keith Johnson, Trustee

CERTIFIED TO BE A TRUE AND  
CORRECT COPY OF THE ORIGINAL  
U. S. BANKRUPTCY COURT  
J. PERRY GROSSMAN  
WESTERN DISTRICT OF N. C.  
BY: *Crystal G. Galt*  
DEPUTY CLERK  
DATE: 5-30-97