Federal Court  Cour fédérale

Date: 20181031

Docket: ITA-11477-10

Citation: 2018 FC 1095

Toronto, Ontario, October 31, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

IN THE MATTER OF THE *INCOME TAX ACT*,

and

IN THE MATTER OF AN ASSESSMENT OR ASSESSMENTS BY THE MINISTER OF NATIONAL REVENUE UNDER ONE OR MORE OF THE *INCOME TAX ACT, CANADA PENSION PLAN, EMPLOYMENT INSURANCE ACT*

AGAINST:

ROCCO R. DIGIUSEPPE (SOMETIMES KNOWN AS RICCARDO DIGIUSEPPE AND RICKY RICCARDO DIGIUSEPPE)
86 LAURENTIAN BOULEVARD
MAPLE, ONTARIO L6A 2V8Erreur ! Signet non défini.

ORDER AND REASONS

I. Overview

[1] By way of motion, Romspen Investment Corporation, the mortgage holder and the Applicant on this motion [Romspen or the Applicant] appeals the February 2, 2017, Order of

Prothonotary Aalto ordering the distribution of funds in the amount of $380,228.32, the surplus from Romspen's sale of two mortgaged properties under power of sale.

[1] Romspen argues that the Prothonotary committed a number of errors in ordering distribution in the amount of (a) $61,039.21 plus interest to Romspen in first priority; (b) $270,057.16 plus interest to Her Majesty the Queen as represented by the Minister of National Revenue [MNR] in second priority in satisfaction of an outstanding tax certificate; and (c) the balance to the Public Prosecution Service of Canada [PPSC] in partial satisfaction of an outstanding fine. More specifically, Romspen alleges the Prothonotary erred in (1) piercing a corporate veil; (2) relying on "similar fact evidence"; (3) prioritizing the claims of the MNR and PPSC over the interests of the legal owners of the mortgaged properties; (4) treating covenants to pay as distinct from the mortgages in issue; and (5) assessing Romspen's claims for legal fees and interest.

[2] The MNR and PPSC, the Respondents on this motion [the Respondents], submit the Order was correct in law and that it does not reflect any palpable and overriding error that would warrant this Court's intervention. I agree, and for the reasons set out below, the motion is dismissed.

II. Background

[3] This matter follows from the 2007 conviction of Mr. Riccardo DiGiuseppe for fraud over $5000. Mr. DiGiuseppe was found to have concealed, diverted, and under-reported revenue from two businesses that he operated; in the process, he defrauded Revenue Canada of approximately

$3.5 million in income taxes and GST. Upon conviction, Mr. DiGiuseppe was sentenced by Justice Peter Tetley of the Ontario Court of Justice to a period of incarceration and a fine of $2 million.

[4] The MNR and the PPSC attempted to recover funds owed by Mr. DiGiuseppe by registering encumbrances against title to properties in which Mr. DiGiuseppe held an interest. Those properties included the two properties at issue in this appeal, referred to in the Prothonotary's Order as the "Orillia" property and the "Roseneath" property [collectively referred to as the Properties].

[5] The sentencing judge in the criminal proceeding, and in turn the Prothonotary, found that Mr. DiGiuseppe had used individual nominees as "front-men" for corporations that he controlled, leaving those individuals potentially exposed to personal liability while he insulated himself from scrutiny.

[6] Mr. DiGiuseppe's reliance on nominees was consistent with the manner in which interests in the Orillia and Roseneath properties were structured. The Roseneath property was held by Mary Margaret Todd [Ms. Todd], and the Orillia property was held by 1642848 Ontario Limited [164]. Ms. Todd was a former employee of Mr. DiGiuseppe, and she was also 164's sole shareholder and officer. The record includes an affidavit from Ms. Todd in which she states she allowed Mr. DiGiuseppe to register property he owned and shares in companies he controlled in her name. She describes having done so as a mistake and attests that she has no interest "whatsoever in any of these properties."

[7] Romspen held mortgages on the Roseneath and Orillia properties. Writs of Execution and Charging Orders on behalf of the MNR and PPSC were subsequently registered on title to both properties. When the mortgages went into default, Romspen exercised its power of sale, obtaining $950,000 for the properties.

[8] At a December 17, 2013 hearing, Romspen sought an order discharging the mortgages and seeking payments of the debt owed. After examining Romspen's accounting, the Court approved a payment to Romspen for the outstanding principal, interest, costs, and administrative expenses of the mortgages to be discharged, although there remained a dispute relating to an invoice for services from Romspen's counsel in the amount of $21,691.43. After the approved payment to Romspen in the amount of $514,273.42 and payment of a number of miscellaneous charges, the surplus funds ($380,228.32) were ordered to be paid into Court pending a hearing to determine priority interests.

[9] In his Order and Reasons dated February 2, 2017, the Prothonotary determined the priority for distribution of the surplus funds as between Romspen, the MNR, and the PPSC, which were the only parties that maintained a claim to the surplus.

III. Order under Appeal

[10] After briefly outlining the background, the Prothonotary set out a basic chronology of events in relation to the mortgages and the claims being advanced. He noted that Romspen had refinanced the mortgages in 2011, knowing that the Respondents had previously registered encumbrances against Mr. DiGiuseppe on title to the properties; Romspen took the position that

the MNR and PPSC encumbrances were meaningless because Mr. DiGiuseppe was not a title holder.

[11] The Prothonotary summarized the affidavit evidence from Ms. Todd, noting "Ms. Todd makes no claim to any interest in the Properties or the sale proceeds." He then summarized the allegations of fact made by Romspen in related litigation to the effect that Mr. DiGiuseppe personally guaranteed the mortgages and then concluded that, notwithstanding the terms of the mortgage documents, Mr. DiGiuseppe was considered by Romspen as the principal debtor on the mortgages under the terms of the guarantee and a Guarantor's clause. The Court further found that the evidence "simply reinforces the fact that Romspen was at all times dealing with DiGiuseppe either directly or through his nominees."

[12] The Prothonotary described the quality of the accounting evidence in support of Romspen's claim that the remaining unpaid sum on the mortgages was $370,116.55, what the Prothonotary described at the outset of the Order as the "entirety of the surplus fund." He then stated:

> [29] As a general statement, it is to be observed that Romspen's accounting of the mortgage debt on the Properties leaves much to be desired. It is confusing, contains double accounting and for various reasons which will be further discussed, is unreliable.

[13] The Prothonotary then summarized the claims being advanced, noting Romspen's position that the Respondents had no interest in the proceeds from the sale as their claims were only in relation to Mr. DiGiuseppe, who in turn had no interest in the properties. He then identified the balances outstanding on the mortgages in December 2011 and December 2013 as

established by Romspen's evidence, noting that on the basis of Romspen's mortgage payout statement, the full amount of the outstanding balance was ordered to be paid to Romspen in December 2013.

[14] The Prothonotary addressed the Respondents' claim that Ms. Todd was a bare trustee for Mr. DiGiuseppe. He found that there was no doubt Romspen knew that Ms. Todd was simply a convenient person to hold title to the Properties and the shares of 164 for Mr. DiGiuseppe.

[15] Having outlined the claims and the evidence, the Prothonotary then addressed the law as it relates to determining the priority of claimants to the proceeds of a sale under a power of sale. He set out the relevant provisions of the *Mortgages Act*, RSO 1990, c M.40, and the *Creditors' Relief Act 2010*, SO 2010, c 16, Sched 4, and noted that at common law, priority is established by a "first in time" principle. He also highlighted the special status of Crown claims as set out in the jurisprudence. The Prothonotary concluded that Romspen held first priority to the surplus fund for "any unpaid principal, interest, fees, or other charges related to the mortgage on the Properties."

[16] The Prothonotary then concluded that the MNR was next in priority and that the PPSC was entitled to any money remaining after the first two claimants were paid.

[17] Having established priorities, the Prothonotary then turned to Romspen's claim. He noted that standard charge terms do not allow mortgagees to recover unreasonable fees or fees incurred after the property is sold. The Prothonotary then examined Romspen's invoices and allowed its

claim for costs related to the enforcement of the mortgages on the two properties but found other invoices involved matters unrelated to the two properties and included periods after the payout of the mortgages.

[18] Having addressed Romspen's accounting evidence, the Prothonotary then considered Romspen's argument that the Respondents' claims against Mr. DiGiuseppe did not attach to the funds arising from the Orillia property's sale because the claims did not extend to 164, the corporate title-holder of the property.

[19] The Prothonotary noted the "overwhelming evidence" that Ms. Todd was a mere nominee of the property and shares for Mr. DiGiuseppe and that Mr. DiGiuseppe was the only person Romspen dealt with in any meaningful way. He concluded that the title to and shares in the properties "[were] all 'smoke and mirrors' in a house of cards constructed by DiGiuseppe in which Romspen was a willing participant." Based on the evidence, the Prothonotary concluded that the fact that title to the Orillia property was held by a corporation was "of no moment" and held that the "executions of MNR and PPSC attach to the Properties as if they were both held in the name of DiGiuseppe."

IV. Issues

[20] Romspen has raised the following issues:

A. What is the standard of review?

B. Did the Prothonotary err by:

   i. concluding Romspen was wilfully blind to fraud or improper conduct in relation to the Properties?

ii. piercing the corporate veil of 164?

iii. priming Romspen with respect to the proceeds of the Roseneath property?

iv. treating the mortgage security as distinct from the covenant to pay?

v. disallowing invoice and interest amounts?

V. Analysis

A. *Standard of Review*

[21] The standard against which the discretionary orders of a Prothonotary are to be reviewed was recently considered by the Federal Court of Appeal in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira Healthcare*]. In *Hospira Healthcare*, a unanimous five-judge panel adopted the standard enunciated by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*].

[22] In *Housen*, the Supreme Court held that the applicable standard of review is that of palpable and overriding error for questions of fact and questions of mixed fact and law. Correctness is the standard to be applied to extricable questions of law (*Housen* at paras 8–10, 19–37).

[23] The palpable and overriding error standard is highly deferential; “palpable” means an error that is obvious, and “overriding” means an error that goes to the very core of the outcome of the case (*Cobalt Pharmaceuticals Company v Bayer Inc*, 2015 FCA 116 at para 53 [*Cobalt Pharmaceuticals Co*]). In *Benhaim v St-Germain*, 2016 SCC 48, at paragraphs 38 and 39, the

Supreme Court of Canada described palpable and overriding errors as being obvious errors going to the "very core of the outcome of the case," like a "beam in the eye" rather than a "needle in a haystack":

> [38] It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:
>
> > Palpable and overriding error is a highly deferential standard of review . . . . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [39] Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [translation] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

B. *Did the Prothonotary err in ordering the distribution of the surplus funds?*

(1) Did the Prothonotary err when concluding Romspen was wilfully blind to fraud or improper conduct in relation to the Properties?

[24] Romspen submits that there was no evidence before the Prothonotary to support the conclusion that it acted other than honestly and reasonably in advancing funds based on the security available in the Properties. Romspen submits the evidence did not demonstrate its conduct fell below a generally accepted standard of reasonable conduct within the lending community or that it failed to make inquiries that an honest and reasonable lender would have made. As a result, Romspen submits there was no basis upon which the Prothonotary could

reasonably conclude its conduct was commercially unacceptable or unreasonable and that these findings constitute a palpable, overriding, and reversible error. I disagree.

[25] The Prothonotary made a number of findings in addressing Romspen's conduct. It is not necessary to set out each of those findings; however, it is helpful to identify a sampling of them.

[26] The Prothonotary found that (1) Romspen knew Ms. Todd was simply a convenient person to hold title and shares for Mr. DiGiuseppe (Reasons at para 40); (2) it was a reasonable inference that Romspen knew of the 2008 tax fraud conviction and of Mr. DiGiuseppe's use of nominees to hold property for him (Reasons at para 60); (3) Mr. DiGiuseppe was the only person that Romspen dealt with in any meaningful way and Romspen was a willing participant in the "house of cards" constructed by Mr. DiGiuseppe (Reasons at para 63); and (4) Romspen's claimed lack of knowledge and reliance on a numbered corporation to "protect itself from DiGiuseppe's shenanigans is simply wilfully blind" (Reasons at para 66).

[27] In reaching these findings, the Prothonotary had the benefit of an extensive record including affidavit evidence from Ms. Todd, Mr. DiGiuseppe, and Romspen's mortgage administrator, Mr. Mucha. He also had before him Romspen's credit file or underwriting file.

[28] The evidence establishes the existence of a business relationship between Romspen and Mr. DiGiuseppe in the years prior to 2006. The evidence also establishes that Mr. DiGiuseppe was involved in the 2006 loan of $1.25 million, a loan that was to be secured against first mortgages on the Properties, a third property, and the personal guarantee of Mr. DiGiuseppe.

[29] The Prothonotary found Romspen was aware that Mr. DiGiuseppe was the real borrower of the funds advanced against the security of the Properties and a willing participant in the scheme. In doing so, the Prothonotary summarized the contents of the Romspen underwriting file. The summary notes that key documentation was addressed to Mr. DiGiuseppe and that there was an absence of any evidence in the underwriting file to indicate Romspen was interested in the financial viability of either Ms. Todd or 164. The Prothonotary also noted that Ms. Todd did not retain counsel and was of the understanding that the counsel corresponding with Romspen was representing Mr. DiGiuseppe.

[30] The Prothonotary also referred to documents signed by Mr. DiGiuseppe; records showing payments having been personally made by Mr. DiGiuseppe; and an underlying promissory note signed by Mr. DiGiuseppe in December 2011 in support of further advances from Romspen. The Prothonotary further noted that Romspen maintained a single ledger account relating to all of its dealings with Mr. DiGiuseppe and his related parties, including Ms. Todd and 164. The Court noted that payments, advances, and charges relating to all properties, including the Roseneath and Orillia properties, were commingled. All of this evidence was consistent with and corroborated the evidence of Ms. Todd.

[31] There was ample evidence on the record to support the inferences drawn and the findings made. The inferences and findings of the Prothonotary do not reflect any palpable and overriding error (*Cobalt Pharmaceuticals Co* at para 53).

(2) Did the Prothonotary err in piercing the corporate veil of 164?

[32] In arguing that the Prothonotary erred in piercing the corporate veil of 164, the Applicant relies on a corporation's separate legal identity and the principle that the corporation's separate legal personality should only be disregarded in exceptional circumstances.

[33] The Applicant submits that, to pierce the corporate veil, the two-part test set out by the Ontario Superior Court of Justice in *Yaiguaje v Chevron Corporation*, 2013 ONSC 2527 [*Yaiguaje*] must be satisfied. *Yaiguaje* addressed the relationship between a parent corporation and a wholly owned subsidiary. At paragraph 95(ii), the Court set out the following test:

A. the alter ego exercises complete control over the corporation or corporations whose separate legal identity is to be ignored; and

B. the corporation or corporations whose separate legal identity is to be ignored are instruments of fraud or a mechanism to shield the alter ego from its liability for illegal activity.

[34] The Applicant makes no submissions with respect to the first part of the test, and its relevance is unclear where, as here, the relationship in issue does not involve a parent corporation and a wholly owned subsidiary. However, in respect of the second part of the test, the Applicant submits there is nothing improper about holding real estate in a single-purpose corporation for the purpose of insulating it from claims by creditors of the corporation's shareholders; that the evidence does not link 164's incorporation to Mr. DiGiuseppe's tax fraud

or some other improper use; and that there was no evidence of Romspen's complicity in such schemes.

[35] I agree with the Applicant's submissions to the effect that the jurisprudence reflects the view that the veil created by a corporation's separate legal personality should only be pierced in limited circumstances (*Clarkson Co Ltd v Zhelka* (1967), 64 DLR (2d) 457 at 469–70 (Ont H Ct J) [*Clarkson*]). Those circumstances include situations where the corporation is incorporated for an illegal, fraudulent, or improper purpose or where, subsequent to incorporation, those in control expressly direct wrongful conduct (*Clarkson* at 470; *Shoppers Drug Mart Inc v 6470360 Canada Inc*, 2014 ONCA 85 at para 43 [*Shoppers Drug Mart*]).

[36] Turning to the impugned decision, the Prothonotary identified the applicable law, citing and quoting from *Shoppers Drug Mart.* Having done so, the Prothonotary then found that the evidence demonstrated improper conduct of the part of Mr. DiGiuseppe and knowledge on the part of Romspen:

> [68] The facts here are overwhelming regarding DiGiuseppe's conduct and intentions. He was in the midst of his fraud trial when Romspen was blithely advancing monies in the guise of DiGiuseppe's nominees. One need only look at the chronology to see that Romspen entered into the promissory note and advanced further funds to DiGiuseppe's nominees after he had been convicted of tax fraud in excess of $3.5 million. While the fraud is specifically related to his strip club businesses, nonetheless Romspen knew full well of DiGiuseppe's *modus operandi*. Thus, the executions of MNR and PPSC attach to the Properties as if they were both held in the name of DiGiuseppe.

[37] The Prothonotary does not misstate the law, and I can find no fault with his findings.

[38] The Applicant submits that in this case, there was a "reverse veil piercing" that effectively imports a beneficial owner's liability onto a corporation. Relying on the decision of the Supreme Court of Connecticut in *Commissioner of Environmental Protection v State Five Industrial Park, Inc*, 304 Conn 128 (Conn Sup Ct 2012), the Applicant argues the reverse piercing raises unique concerns that include the bypassing of normal judgment collection procedures; allowing a judgment creditor to access corporate assets of one shareholder to the detriment of others, including innocent creditors; and injecting uncertainty into the corporate structure. The Applicant also submits that prior to lifting the corporate veil, there was a need to ensure third-party creditors of the corporation were not prejudiced (*Winnipeg Enterprises Corporation v 4133854 Manitoba Limited*, 2006 MBQB 186).

[39] The concerns that the Applicant has identified are matters that would be addressed and assessed within the context of the facts and circumstances before the Court. In this case, the evidence was that Ms. Todd, despite being the registered owner of the Roseneath property and the holder of the shares in 164, made no claim to any interest in the Properties or the shares in 164. There is also no evidence that the interests of any innocent third-party creditors or shareholders were in play. The Applicant's submissions that Romspen was an innocent party is contrary to the findings of the Prothonotary, findings that I have already concluded were not in error. The Applicant does not argue that the reverse piercing of the corporate veil is unlawful, and any unique concerns that might arise in the case of a reverse piercing simply have not been demonstrated on the facts as presented.

[40] The Applicant also argues the Prothonotary improperly relied on Mr. DiGiuseppe's personal guarantee of the mortgage and Justice Tetley's reasons in the tax fraud proceeding to conclude Mr. DiGiuseppe was the real borrower. I am not persuaded by these submissions.

[41] Contrary to the Applicant's submissions, the Prothonotary did not infer bad conduct from Justice Tetley's decision. Instead, the Prothonotary pointed to the evidence on the record supporting the conclusions he reached in this regard and in respect of Romspen's knowledge. Similarly, the Prothonotary did not rely on the personal guarantee as a basis for piercing the corporate veil but rather identified it as further evidence of the fact that Romspen was dealing with Mr. DiGiuseppe either directly or through nominees.

[42] The Prothonotary did not err in piercing the corporate veil of 164.

(3) Did the Prothonotary err by priming Romspen with respect to the proceeds of the Roseneath property?

[43] Romspen argues that, as a *bona fide* purchaser for value of a trust property without notice of the trust, it is immune from any interest Mr. DiGiuseppe may have had in the Roseneath property.

[44] I have already found that the Prothonotary did not err in concluding that Romspen had knowledge of Mr. DiGiuseppe's interest in the Properties. It follows that Romspen was not a *bona fide* purchaser for value without notice. This argument is of no merit.

(4) Did the Prothonotary err by treating the mortgage security as distinct from the covenant to pay?

[45] Romspen makes the following submissions at paragraph 72 of its written submissions:

> The Prothonotary accepted the validity of Romspen's mortgage security over Orillia and Roseneath. It is trite law that a mortgage includes a covenant on the part of the mortgagor to yield possession of the mortgaged property as well as a covenant on the part of the mortgagor to pay the mortgage debt. In *The Huron & Erie Mortgage Corporation v Longo*, Barlow J. quoted from Falconbridge as follows:
>
> > A mortgagee who has brought an action to recover the mortgage money and for possession of the mortgaged land may also exercise the power of sale. There is nothing inconsistent in the two proceedings. Possession will be needed in the event of a sale being made. The amount realized from the sale must be applied towards the payment of the mortgage debt. If enough is realized from the sale, the claim upon the covenant to pay will be satisfied; if the proceeds of the sale are insufficient, the personal judgment for the unsatisfied amount will be needed. [Emphasis added]

[46] The extract from the decision in *The Huron & Erie Mortgage Corporation v Longo*, [1944] OR 424 (Sup Ct), establishes that where a mortgage debt is fully satisfied from the proceeds of a sale, the claim on the covenant to pay will be satisfied.

[47] It is clear from the Order that the Prothonotary recognized Romspen's priority pursuant to section 27 of the *Mortgages Act.* It is also evident that the Prothonotary ordered the payment of all fees and disbursements related to the debt that were agreed upon or otherwise determined to be eligible.

[48] Romspen can, and has, taken issue with the Prothonotary's assessment of the claimed expenses, a question I address below. However, Romspen does not take the position that the Prothonotary erred in finding that Romspen was first in line to the surplus fund.

[49] Having concluded that Romspen was first in line, the Prothonotary reviewed and considered Romspen's claim to the funds based on its priority. As a result of that analysis, the Prothonotary ordered payment of those claims not in dispute or otherwise determined to be owed as a result of Romspen's efforts to enforce the mortgages on the Properties. The effect of the Court's December 2013 and February 2017 Orders, absent any error in assessing Romspen's claimed expenses, was full satisfaction of the debt secured by the Properties.

[50] In summary, Romspen exercised the power of sale and realized sufficient funds from the sale to fully satisfy the mortgage debt. As a result, the covenant to pay was satisfied. The Prothonotary did not err by treating the mortgage security as distinct from the covenant to pay.

(5) Did the Prothonotary err by disallowing invoice and interest amounts?

[51] Romspen submits the Prothonotary (1) incorrectly interpreted the law by disallowing invoices from Romspen's legal counsel, and (2) misapprehended evidence when determining that Romspen was only entitled to recover $50,510.03 of its legal costs in relation to the administration of the mortgage. Romspen argues that the Prothonotary erred by interpreting section 27 of the *Mortgages Act* much too narrowly and limiting recovery to those expenses directly related to the property. Romspen further argues that even in the absence of an error in law, the Prothonotary's decision to disallow fees relating to enforcement of mortgage in some

cases and allowing them in others makes it impossible to reconcile the treatment of the amounts claimed on any reasoned or consistent basis.

[52] In addressing Romspen's accounting in support of its claim to the surplus funds, the Prothonotary noted that the invoices setting out the accounts of Romspen's legal counsel were produced in a redacted form to the MNR and the PPSC to protect solicitor-client privilege. Those invoices and accounts were provided to the Court in an unredacted form.

[53] In considering the claim, I am unable to conclude, as the Applicant argues, that the Prothonotary erred in interpreting the law as it relates to the recovery of costs and expenses under section 27 of the *Mortgages Act*.

[54] The Prothonotary relied on two decisions of the Ontario Superior Court interpreting section 27, *1427814 Ontario Ltd v 3697584 Canada Inc* (2004), 35 RPR (4th) 182, (Ont Sup Ct) and *Chong & Dadd v Kaur*, 2013 ONSC 6252 [*Chong*]. In reliance on these decisions, the Prothonotary concluded that there was authority to support the proposition that fees incurred after the sale of a property are not recoverable from the mortgage proceeds and fees incurred in enforcing a mortgage must be reasonable.

[55] This is not inconsistent with the Ontario Superior Court's decision in *30724453 Nova Scotia Company v 1623242 Ontario Inc*, 2015 ONSC 2105, upon which the Applicant relies. In that decision, Justice Price states at paragraph 116 that "[t]he costs to be held by the mortgagee,

in the case of a power of sale proceeding, or paid to the mortgagee or into court, in the case of a mortgage foreclosure, are the costs then due, not future costs."

[56] As was stated in *Chong*, a mortgagee is entitled to indemnification for the costs incurred in response to a default. However, those costs must be reasonably and properly incurred, and "[a] mortgagee must be able to ascertain, assert and finally defend its right to legal fees in connection with the mortgage debt" (*Chong* at para 40). In this case, the Prothonotary concluded Romspen had failed to assert and finally defend its right to the fees claimed. I see no error in that conclusion that would warrant this Court's intervention.

[57] The Prothonotary engaged in an extensive review of the evidence provided by Romspen, flagging examples to support the finding that the evidence was confusing, contained double accountings, and was unreliable. The Prothonotary noted that Romspen maintained only one ledger account relating to all its dealings with Mr. DiGiuseppe and his related parties, which include Ms. Todd and 164. He further noted that payments, advances, and charges were commingled, with no account relating specifically to the Properties.

[58] The Prothonotary addressed the 43 invoices submitted in support of Romspen's claim for fees and expenses related to legal services. The Reasons note that a significant portion of the claimed fees were incurred after the discharge of the mortgages and that they did not indicate the time spent in respect of the actions recorded, requiring the Court to engage in rough approximations of the time reflected in the invoice.

[59] The Prothonotary also noted that of the 43 invoices, 28 predated the Court's December 2013 Order, which paid Romspen its principal, interests, and costs related to the Properties. The Prothonotary found that Mr. Mucha's explanation of inadvertence to justify the late submission of the invoices was not reasonable and that this, coupled with Mr. Mucha's acknowledgement of errors in the prior calculations of the mortgage debt, called into question the very accuracy of the accounting upon which the December 2013 Order was based.

[60] The Applicant argues that the decision is unreasonable because it is impossible to reconcile amounts allowed and disallowed on any reasoned or consistent basis. If there is any merit to this argument, it arises in the context of an evidentiary record that the Prothonotary described as confused and built on "shifting sands."

[61] The Applicant has not disputed the Prothonotary's findings as they relate to the quality and accuracy of the evidence. The Prothonotary's findings are owed significant deference. Neither the parties' submissions nor a review of the record discloses any error that would suggest the Court's intervention on appeal is justified.

VI. Conclusion

[62] The motion is dismissed.

[63] The Respondents seek and shall have their costs on this motion to appeal. To the extent that any party may seek to have costs in the proceeding before the Prothonotary paid from the surplus, the parties are to comply with the Order of the Prothonotary.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed;

2. The Respondents on this motion shall have their costs in accordance with Column III of Tariff B of the *Federal Courts Rules*; and

3. To the extent that any party may seek to have costs in the proceeding before the Prothonotary paid from the surplus, that party is to comply with the Order of the Prothonotary dated February 2, 2017.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	ITA-11477-10
STYLE OF CAUSE:	IN THE MATTER OF THE *INCOME TAX ACT* IN THE MATTER OF AN ASSESSMENT OR ASSESSMENTS BY THE MINISTER OF NATIONAL REVENUE UNDER ONE OR MORE OF THE *INCOME TAX ACT, CANADA PENSION PLAN, EMPLOYMENT INSURANCE ACT* AGAINST: ROCCO R. DIGIUSEPPE (SOMETIMES KNOWN AS RICCARDO DIGIUSEPPE AND RICKY RICCARDO DIGIUSEPPE) 86 LAURENTIAN BOULEVARD MAPLE, ONTARIO L6A 2V8
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 4, 2018
ORDER AND REASONS:	GLEESON J.
DATED:	OCTOBER 31, 2018

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Fozia Chaudary	FOR THE RESPONDENT ON THE MOTION (MINISTER OF NATIONAL REVENUE)
Concetta Zary	FOR THE RESPONDENT ON THE MOTION (PUBLIC PROSECUTION SERVICE OF CANADA)

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