

**CITATION:** KEB Hana Bank Canada v. Gil Shcoylar, 2023 ONSC 2746  
**COURT FILE NO.:** CV-19-00622209-0000  
**DATE:** 20230508

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
 )  
KEB Hana Bank Canada ) Robert Choi, Hayden Trbizan, for the  
 ) Plaintiff  
Plaintiff )  
 )  
– and – )  
 )  
 ) Jessica Frymer, for the Defendant  
 )  
Gil Shcoylar )  
 )  
Defendant )  
 )  
 ) **HEARD:** January 24-25, 2023

**C.J. BROWN J.**

**REASONS FOR JUDGMENT**

- [1] The plaintiff, KEB Hana Bank Canada (the “plaintiff” or “KEB”), brings this action against the defendant, Gil Shcoylar (the “defendant” or “Shcoylar”), for breach of agreements of purchase and sale (the “APS”).
- [2] The plaintiff’s position is that the defendant entered into an unconditional offer to purchase three properties in Bonnechere Valley, Ontario, near Eganville, which the plaintiff was selling under power of sale. KEB accepted the unconditional offer, making the deal firm, after which the defendant advised that he wished to walk away from the deal. As a result, KEB sued for payment and forfeiture of the \$100,000 deposit which had not been made pursuant to the APSs at the time the plaintiff accepted the defendant’s offers.
- [3] The defendant’s position is that KEB should not be entitled to any recovery because, according to the defendant, KEB subsequently sold the property for more than was owing by the previous mortgagee in default. It is the position of the defendant that the action is brought as a result of greed and personal animus which are motivating the plaintiff’s conduct.

## The Proceedings

- [4] The action proceeded by summary trial with the principal parties for the plaintiff and the defendant providing their evidence in chief via affidavit, with *viva voce* cross-examination. The witness for the plaintiff, Ghulamreza (Ray) Rezapour, the defendant's real estate broker, gave *viva voce* evidence in chief and cross-examination.
- [5] The plaintiff amended its pleadings from its original claim of \$170,000 for loss of proceeds of sale (*ie* the amount of the agreed upon sale to the defendant and the ultimate sale to the subsequent purchaser) to claim \$100,000 for breach of contract and forfeiture of the deposit.

## The Evidence

### Young Seok Kim

- [6] Young Seok Kim is the director of KEB Hana Bank Canada. At the material time, he was the VP of Credit Monitoring and Recovery for KEB. He has been employed with KEB for 27 to 28 years.
- [7] On February 5, 2019, the defendant made two offers and APSs with respect to the properties municipally known as 16 Alice St., 28 Alice St. and 8 Foymount Rd. in Bonnechere Valley (Eganville), Ontario. The plaintiff was selling these properties as the mortgagee in possession under power of sale.
- [8] Mr. Kim explained that the purpose of a power of sale is to recover the remaining debt and protect the borrower's right to get the best price for the property. The excess funds from the power of sale are forwarded to the borrower; if there is a loss, the lender will sue the borrower and guarantors. KEB attempted to recoup the losses from the property by going after the borrower and guarantors but found no assets. They then pursued the defendant for the deposit that he had failed to provide pursuant to the APSs.
- [9] The APSs were communicated to the plaintiff through the defendant's real estate broker, Mr. Rezapour, on the instruction of the defendant. The purchase price for 16 Alice St. was \$850,000 and the purchase price for 28 Alice St., which included 8 Foymount Rd., was \$150,000. Pursuant to the APSs, the defendant agreed to provide the plaintiff with deposits in the amount of \$80,000 for purchase of 16 Alice St. and \$20,000 for the purchase of 28 Alice St. and 8 Foymount Rd.
- [10] Pursuant to the APSs, the agreements were unconditional, with deposits due and owing to the plaintiff upon acceptance of the agreements. The agreements stipulated that: "[f]or the purposes of this Agreement, "Upon Acceptance" shall mean that the Buyer is required to deliver the Deposit to the Deposit Holder within 24 hours of the acceptance of this Agreement".

- [11] The identical irrevocability clauses in the two APSs provided that the plaintiff had until 11:59 PM on February 13, 2018 to accept the agreements. The plaintiff accepted the agreements on February 12, 2018, within the stipulated acceptance period.
- [12] However, the defendant failed to provide the deposits within 24 hours of the plaintiff's acceptance, as stipulated in the APSs. Instead, the defendant advised the plaintiff that he wished to walk away from the deal.
- [13] The three properties were subsequently relisted and sold for \$880,000. In this action, the plaintiff claims only for payment and forfeiture of the deposits pursuant to the APSs, which stipulated that: "*[i]f the transaction contemplated by this Agreement is not completed as a result of the default of the Purchaser, the Deposit shall be forfeited to the Vendor together with interest thereon, if any, and the Vendor shall be able to assert any other rights or remedies pursuant to this Agreement or at law*".

#### Ghulamreza Rezapour

- [14] Mr. Rezapour was the real estate broker for the defendant. He was licensed in Ontario from 2009. He had acted for the defendant prior to February 2018 on several commercial transactions as either the buyer's or the seller's agent. Since the defendant was a real estate developer, Mr. Rezapour and the defendant had a continuing Representation Agreement. He continued to execute deals for the defendant after February 2018.
- [15] Mr. Rezapour testified that he communicated with the defendant in person, by phone and by email.
- [16] As regards the subject properties, he confirmed that the defendant wanted to purchase the properties in question: 16 Alice Street and 28 Alice Street/8 Foymount Rd., which were a combination of commercial property and adjacent residential property.
- [17] He identified the initials and signature of the purchaser on the subject APSs as those of the defendant. He stated that he witnessed the defendant signing the APSs on February 5, 2018. He also stated that he was familiar with the defendant's initials and signature from the previous deals they had done together. Mr. Rezapour testified that he did not sign for the defendant and had never signed for the defendant in any deal. As a real estate broker, he was not supposed to sign for anyone else.
- [18] Mr. Rezapour stated that he reviewed the agreements with the defendant. He testified that he explained to the defendant that the terms of the deposits were firm with no conditions (*i.e.* unconditional) and that the APSs stipulated that they were irrevocable from February 13, 2018 or when the seller accepted the offer. This meant the defendant could not then back out of the deal.
- [19] Mr. Rezapour forwarded the offer to KEB on the instructions and authorization of the defendant.

- [20] KEB accepted the offer on February 11, 2018. The accepted offer was forwarded by the plaintiff to Mr. Rezapour on February 12, 2018 and forwarded thereafter to the defendant. At that time, the plaintiff requested payment of the deposits owing pursuant to the APSs.
- [21] Mr. Rezapour emailed the defendant to advise that KEB had accepted his offer, and that the defendant was to forward the deposits totalling \$100,000. The defendant then advised Mr. Rezapour that he did not want to proceed with the deal.
- [22] Mr. Rezapour advised the plaintiff's broker that the defendant did not wish to proceed with the deal. He was told that the deal was firm, and if the defendant did not honour the agreements, legal proceedings would ensue.
- [23] Mr. Rezapour communicated this to the defendant. The defendant did not say to Mr. Rezapour that he had not signed the APSs; did not state that Mr. Rezapour had signed them or attempt to accuse him of signing them; and did not say that Mr. Rezapour had done anything wrong or untoward.
- [24] In cross-examination, he stated that he did not remember the witnessing of the APSs on February 5, 2018, due to his depression, but that his business practice is always to witness his client signing the relevant documents and he has every reason to believe that he followed this practice in this case.
- [25] He testified that he had been ill from roughly May 2017 to May 2019, suffering from depression and anxiety. He took medications for these conditions. He did not make any mistakes during this time related to his business. He continued to be licensed throughout this time and his license remained in good standing. He stated that every two years he has to undergo exams in order to renew the license. He stated that he had the support of his family and friends to assist him through the period of depression and anxiety.

#### Gil Shcoylar

- [26] Mr. Shcoylar carries on business as a developer of commercial and residential properties throughout Ontario. He works with his father and partner, Alex Shcoylar. They have a particular focus on gas station properties. The Alice Street properties were apparently gas stations.
- [27] The defendant testified that he had worked with his real estate broker, Mr. Rezapour, on numerous occasions before February 2018, and continued to work with him after the incident in question. He stated that he was experienced in real estate forms and familiar with the OREA forms.
- [28] In cross-examination, the defendant stated that he was a very busy man with multiple businesses, that he made decisions via email and that, in this matter, he had the capacity to give instructions from anywhere.
- [29] In January 2018, the defendant became aware of the plaintiff's sale of the Alice Street properties and, with his real estate broker, Mr. Rezapour, entered into discussions with the

plaintiff, its representatives, real estate agents and counsel for the potential purchase of the properties. A meeting was held between the defendant and the plaintiff's representatives at the plaintiff's offices in Toronto.

- [30] The defendant understood that the plaintiff was entertaining various offers to purchase the subject properties. For that reason, the plaintiff had asked interested purchasers to put forward their best offers. The defendant instructed Mr. Rezapour to put forward an offer to purchase, setting out the defendant's best terms and conditions. The defendant testified that he initialed all pages of the APSs, stating that KEB had instructed that be done, but did not sign the offers to purchase. He confirmed that he told Mr. Rezapour to make a binding offer with the price and terms as stated in the offers adduced at trial. He further instructed Mr. Rezapour to submit the offers to the plaintiff.
- [31] The defendant confirmed the details of the offer that he instructed and authorized Mr. Rezapour to make that were contained in the APSs and that were in evidence in this matter.
- [32] He testified that the subject APSs were not binding agreements, as he had not signed them.
- [33] Further, as regards the signatures, the defendant, in examination in chief, denied that the signatures on the APSs were his. In his Affidavit in Chief, he stated that he met with Mr. Rezapour who acknowledged that he had inserted the signatures. Previously, in discoveries, he stated that Mr. Rezapour admitted to him that Mr. Rezapour had signed the agreements on his behalf. However, at the trial, he stated that he never said that Mr. Rezapour had signed the documents, but logically he was the only one who could have signed them; however, he also stated that he was not saying that Mr. Rezapour did sign the APSs in his stead. Further, in cross-examination, the defendant stated that Mr. Rezapour did not sign the APSs, but subsequently stated that Mr. Rezapour had admitted in a private conversation that he had signed the APSs to save the deal. These statements are, of course, contradictory and I do not accept them.
- [34] The defendant stated that after his offer had been submitted to the plaintiff, he decided not to proceed with purchase of the properties and advised Mr. Rezapour of this. He stated that Mr. Rezapour told him to reconsider this, as it was a good deal. He stated that as of February 12, 2018, he became aware that the APSs submitted to the plaintiff were signed and had been accepted by the plaintiff.
- [35] The defendant further stated, in cross-examination, that he was angry, and that he considered the fact, as he alleged, that Mr. Rezapour had signed the agreements as a forgery. However, he did not report Mr. Rezapour to the real estate governing body or the police, did not sue him and continued to work with him or attempt to work with him after the fact. This evidence is difficult to reconcile.
- [36] The defendant testified that he had never signed the APSs, and therefore was not required to provide any deposit as there was no formal binding offer.
- [37] He further argues that there were no damages sustained by the plaintiff, as the properties were thereafter sold under power of sale. He argues that the plaintiff would likely have

received a surplus following the sale of the Alice Street properties and that no losses were sustained by KEB. The defendant alleges that the plaintiff was acting in bad faith in attempting to extract payment from him. The defendant further argues that the statement of claim was improperly served, and both the plaintiff and its counsel have conducted themselves in a deceitful, malicious and high-handed manner. Based on the evidence at trial, the defendant admitted that the initials on the APSs were his, but denied that the signatures were his. His real estate agent, Mr. Rezapour, who had acted for him in numerous transactions, stated that he knew and was familiar with the defendant's signature and that the signatures on the subject APSs were the defendant's signatures.

- [38] The defendant admitted that he initialed the pages of the APSs, dictated the terms of the APSs to Mr. Rezapour and authorized him to submit the APSs to the plaintiff. He further admitted that there were no financing or due diligence provisions included in the APSs, such that the agreements were unconditional. He moreover admitted that he intended to purchase the properties by submitting the agreements.
- [39] Mr. Rezapour emailed the APSs to the plaintiff on February 7, 2018. KEB relied on the APSs and on the representations of the real estate broker. The defendant never advised KEB that the real estate broker did not have authority to act on his behalf. The agreements were unconditional.
- [40] The purchase price offered by the defendant for 16 Alice Street was \$850,000 and for 28 Alice Street/8 Foymount Road, together, \$150,000. The defendant confirmed these amounts.
- [41] Pursuant to the APSs, the defendant was to provide a total of \$100,000 in deposits for the three properties, \$80,000 for 16 Alice Street and \$20,000 for 28 Alice Street/8 Foymount Road. These deposits were owed immediately as the agreements were unconditional.
- [42] The APSs stated that “[f]or purposes of this Agreement, ‘Upon Acceptance’ shall mean that the Buyer is required to deliver the Deposit to the Deposit Holder within 24 hours of the acceptance of this Agreement”.
- [43] The agreements contained identical irrevocability clauses that gave the plaintiff until 11:59 PM on February 13, 2018 to accept the agreements. KEB accepted the agreements on February 12, 2018.
- [44] The defendant failed to pay the deposits within the 24 hours stipulated and advised KEB, through his real estate agent, that he was walking away from the deal.
- [45] KEB relisted the properties and sold them for \$880,000, \$120,000 less than the agreements made with the defendant.
- [46] The defendant stated in his Affidavit that the plaintiff had commenced an action against the mortgagors and guarantors of the subject properties for the amount owing on the mortgage of \$586,895.67, such that the plaintiff would have recovered a gross amount of approximately \$586,895.67, before deduction of all fees and expenses. The Discharge

Statement, calculated to December 12, 2018, amounted to \$737,229.47, inclusive of legal fees of \$58,927.52, as well as costs and interest, with a per diem interest of \$78.63. The Statement also stated that “[a]dditional legal fees may be added upon closing”. The defendant concludes therefore that the plaintiff would have received a surplus of at least \$142,000 following payout of its outstanding debt of \$737,229.47.

- [47] The defendant argues that the plaintiff is attempting to profit from a power of sale by seeking that the defendant pay the deposits which it failed to do pursuant to the contract, which the plaintiff argues would then be forfeited also pursuant to the APS.

### **Credibility**

- [48] I found Mr. Kim to have provided his testimony in a clear, straightforward manner. He did not attempt to avoid answering questions, did not obfuscate and was not contradictory in his evidence or the evidence he gave in relation to the documentation produced. I found him to be both credible and reliable.
- [49] I found the evidence of Mr. Rezapour to be honest. He admitted that he did not recall certain details and dates, and he explained that this was because he was being asked about events that occurred while he was under treatment for depression and anxiety. I am satisfied that he did recall specific important evidence regarding how the APS documents were generated and signed. His uncertainty on other evidence was, in my view, explained by virtue of the fact that it was not of seminal importance to the formulation, signing and offering of the transactions in question. I found him to be credible and the specific evidence that he did recall was reliable and consistent with documentary evidence and business practice.
- [50] I found the evidence of Mr. Shcoylar to be problematic. He insisted that he had not signed the documentation, although a buyer’s signature appeared on each page of the APS. Mr. Rezapour stated that he had witnessed the defendant’s signing of the APS documents throughout. The defendant, while denying that he had signed any of the documentation, and denying that the signature was his, did not produce evidence of a handwriting expert in this regard to support his claim.
- [51] Further, as regards the defendant’s signatures on the APSs, the defendant gave several contradictory statements about whether Mr. Rezapour had signed for him, which were inconsistent, contradictory and not able to be relied on or believed. I do not accept his statements in that regard.
- [52] I find Mr. Shcoylar’s evidence to be lacking in credibility and reliability.
- [53] Where his evidence differed from that of the other witnesses, I accepted their evidence unless I indicate otherwise.

### **The Issues**

- [54] The issues to be determined are as follows:

1. Was there a valid and binding agreement; and
2. Where a deposit in a real estate transaction is agreed-upon but not paid on acceptance, can the amount of said unpaid deposit be awarded against the party that refuses to pay.

### Analysis

#### 1. *Was there a valid and binding agreement?*

- [55] The defendant was a sophisticated and experienced real estate developer who had been involved in many purchases and sales of mainly commercial real estate. He testified that he focused mainly on gas stations, and this was a transaction involving the purchase of gas stations in Bonnechere Valley.
- [56] I am satisfied based on all of the evidence, documentary and *viva voce*, that the APSs were both initialed and signed by Mr. Shcoylar. I do not accept his protestations and denials of signing the APSs. While he insisted that the signatures were not his, there was no expert handwriting evidence to establish this. I accept the evidence of Mr. Rezapour that it is his usual business practice to witness the signature of an agreement of purchase and sale in person and that he did so in this case as well. He further stated that he knew the defendant's signature from past deals that he had worked on for the defendant.
- [57] While the defendant took the position that Mr. Rezapour had been ill during the material times and that his evidence could not be relied upon, including his evidence that he had witnessed the defendant sign the APSs, Mr. Rezapour very candidly stated that he had been experiencing some difficulties. However, he noted that he had the support and backing of friends and family to help him through the difficult times of his depression and anxiety; that his license had never been an issue; that he had not made any business errors or had any claims made against him as a result of the transactions he undertook during that period of time; and that he continued to practice during and after that period of time. He further stated that he worked on other deals for the defendant after the material time.
- [58] I find that the defendant initialed and signed the offers to purchase the subject properties and that said APSs were valid and binding.
- [59] The evidence indicates that the defendant and his real estate broker attended at a meeting at KEB with respect to the purchase of the subject properties. The evidence further indicates that the defendant directed Mr. Rezapour to submit the offers to purchase the subject properties, instructing him as regards the price, the amount of deposit and all other details to be included in the offers. The defendant instructed and authorized Mr. Rezapour to submit the offers. The offers were submitted to KEB's real estate agent pursuant to the instructions and guidance of the defendant. The APSs contained the standard OREA provision relating to the authority of the agent to bind the principal. Consistent with the law of agency, KEB was entitled to rely on the authority of Mr. Rezapour as agent for the defendant: see *Rockland Industries, Inc. v. Amerada Minerals Corp. of Canada Ltd.*, [1980] 2 S.C.R. 2, at p.15; *Rand v. MacDonald* (1995), 45 R.P.R. (2d) 239 (Ont. Gen. Div.), at para. 44.



2. *Can an unpaid, unconditional deposit be forfeited?*

- [60] In this action, KEB seeks damages for breach of contract and the payment and forfeiture of the deposits pursuant to the provisions in the APSs, as follows: “[i]f the transaction contemplated by this agreement is not completed as a result of the default of the purchaser, the deposit shall be forfeited to the vendor together with interest thereon, if any, and the vendor shall be able to assert any other rights or remedies pursuant to this agreement or at law”.
- [61] The defendant’s position is that there can be no forfeiture where the deposit, even an unconditional deposit, is not paid following acceptance of the offer.
- [62] While the defendant argues that the subsequent sale and mortgage of the properties must be taken into account in this action, I do not agree. This action is based on the agreements concluded between the plaintiff and defendant, the provisions regarding the deposits being owed unconditionally and payable within 24 hours of acceptance by KEB, and the defendant’s failure to pay the deposits on the acceptance by KEB of the offer on February 12, 2018.
- [63] The defendant relies, *inter alia*, on the case of *Benedetto v. 2453912 Ontario Inc.*, 2019 ONCA 149, 86 B.L.R. (5th) 1, at para. 7, and the statement therein that “a deposit is not part of the contract of purchase and sale”, it is “something which binds the contract and guarantees the performance.” The defendant submits that without the deposit being paid the agreements are not binding, and, when coupled with the fact that they were not properly signed by the buyer, they are not legally valid. The defendant argues that the elements of a valid binding agreement are not in place. The defendant’s intentions, or what he did, or did not authorize his agent to do, is not what matters. In the end, all that matters is that there is no binding agreement.
- [64] I note that the case of *Benedetto* does not address the legal question of the law governing deposits that secure contracts for the purchase and sale of real property, but rather how that law interacts with s. 21(4) of Ontario’s *Business Corporations Act*, R.S.O. 1990, c. B.16, which governs pre-incorporation contracts. That is, of course, not the situation involved in this case, and is not applicable.
- [65] Prior to addressing the interaction of the *OBCA* with the law governing deposits in a purchase and sale of real property, the court set forth the law with respect to the basic legal question of the law governing deposits that secure contracts for the purchase and sale of real property, which principles are applicable. In that regard, I quote the following paragraphs:

The Court of Appeal in *Benedetto* stated at paragraphs 5, 6 and 7, as follows:

[5] Where a payer (usually the purchaser) gives a vendor a deposit to secure the performance of a contract for purchase and sale of real estate, the deposit is forfeit if the purchaser refuses to close the transaction, unless the parties bargained to the contrary: see *Howe v. Smith* (1884), 27 Ch. D. 89 (C. A.); *March Bothers & Wells*

*v. Banton* (1911), 1911 CanLII 74 (SCC), 45 S.C.R. 338. In *Howe v. Smith*, Fry L. J. Stated at p. 101:

Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case, no terms are expressed and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.

[6] The deposit stands as security for the purchaser's performance of the contract. The prospect of its forfeiture provides an incentive for the purchaser to complete the purchase. Should the purchaser not complete, the forfeiture of the deposit compensates the vendor for lost opportunity and having taken the property off the market in the interim, as well as the loss in bargaining power resulting from the vendor having revealed to the market the price at which the vendor has been willing to sell: *H. W. Liebig Co. v. Leading Investments Ltd.*, 1986 CanLII 45 (SCC), [1986] 1 S.C.R. 70, at pp. 86-87.

[7] The motion judge provided a helpful summary of the law: a deposit is not part of the contract of purchase and sale, but "stands on its own as an 'ancient invention of the law designed to motivate contracting parties to carry through with their bargains', 'something which binds the contract and guarantees its performance', and is an 'earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract'": see *Tang v. Zhang*, 2013 BCCA 52, 41 B.C.L.R. (5th) 69; *Comonents Inc. v. Hetherington Welch Design Ltd.*, 2006 CanLII 33779 (Ont. S.C.); *Howe v. Smith*.

- [66] I do not find the Defendant's caselaw to be on point as regards the issues in this case.
- [67] The plaintiff relies, *inter alia*, on the case of *Argo Ventures Inc. v. Choi*, 2020 BCCA 17, 442 D.L.R. (4th) 139. *Argo Ventures* involved a similar situation of a clause contained in an agreement of purchase and sale which provided for payment of a specified deposit which was unconditional upon acceptance of the agreement of purchase and sale. While the purchaser, who had repudiated the agreement argued, on appeal, that the deposit could not be forfeited because it had never been paid, the British Columbia Court of Appeal awarded judgment in an amount equal to the unpaid deposit.
- [68] I am satisfied that that case, and the cases cited therein, are relevant to the issues in this case, and apply that case herein.
- [69] As noted above, I have already found that there is a binding agreement between the parties.

- [70] The unconditional deposit that was to have been paid pursuant to the binding agreement in the amount of \$100,000 is to be paid by the defendant to the plaintiff and forfeited to the plaintiff, KEB.
- [71] As a result of the foregoing, I make no findings with respect to the issues raised by the defendant concerning the previous mortgagees and subsequent purchaser.
- [72] The defendant has made unnecessary and unproven allegations against both the plaintiff and the plaintiff's counsel, including allegations of maliciousness, deliberate dishonesty and a serious abuse of the court's process. It has further made allegations of attempts to extort false and nonexistent amounts owing. These allegations are to be condemned to the greatest extent as there was no evidence to establish any of these untoward and unnecessary comments. As admitted by the defendant, if these allegations were not proven, they would attract costs consequences.
- [73] In the end, I find the APSs valid and binding and the deposit of \$100,000 to be owing by the defendant to the plaintiff, and to be forfeited to the plaintiff as agreed upon in the APSs.

**Costs**

- [74] I strongly urge the parties to settle the issue of costs between themselves. In the event that they are not able to do so, I will entertain their costs submissions in three pages or less, including their bill of costs, within 60 days of this decision.

C.J. Brown J.

**Released:** May 08, 2023

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Plaintiff

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**REASONS FOR JUDGMENT**

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C.J. Brown J.

**Released:** May 08, 2023