IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Gispen v. High Grove on the Park Inc*, 2023 NSSM 1

SCCH 510248

Between:

Willem Gispen

Claimant

— and —

High Grove on the Park Inc

Defendants

Adjudicator:	Augustus M. Richardson, QC
For the Claimant:	Willem Gispen, self-represented
For the Defendant:	Tracy Smith
For the Defendant Larry Allen Real Estate Ltd (in companion action)	Natasha Puka
Heard:	December 16, 2022 (by Zoom)
Decision:	January 3, 2023

DECISION

Introduction

[1] Does a buyer of a new home have a claim for damages against the seller/builder who changes the property after the agreement of purchase and sale is executed, but before closing? That is the central question in these proceedings. Based on the facts before me I am satisfied that a buyer in such a case does have a claim.

The Claims

[2] There are a number of claims before me. Two are in effect main actions. The rest are in effect third party or cross-claims by the defendants in the two main actions against each other.

[3] The two main actions both arise out of the purchase by the claimant Willem Gispen and his spouse Claudia Lema Escudero of a new home constructed by the defendant High Grove on the Park Inc ("High Grove") as vendor. High Grove's real estate agent was the defendant Larry Allen Real Estate Ltd ("LAREL").

[4] In the one of the main actions the claimant claims against High Grove and LAREL (SCCH 513012). The claimant says the defendants misrepresented the size of the house. In the other main action (SCCH 510248) the claimant proceeds against High Grove alone. He says that two weeks before the closing date the defendant excavated and removed the useable back yard space affecting the usability and value of the home.

[5] In each of the two main actions the claimant seeks damages of $25,000.00, the limit of this court's jurisdiction, against the defendants. The parties confirmed the defendants' agreement that the two claims were and could be treated as separate and distinct. The defendants agreed, both at the commencement of the

hearing, and at the end of the claimant's evidence, that the claimant was not splitting his claim.

The Hearing (Zoom)

[6] At the hearing I heard the testimony of Mr Gispen. His evidence with respect to both claims was heard together. He was cross-examined.

[7] On behalf of High Grove, I heard the testimony of

a. Andrew Fisher, High Grove's construction supervisor, and

b. Joe Ross, a general contractor who had built roughly 80 custom homes over the past 35 years.

[8] On behalf of LAREL I heard the testimony of Mr Larry Allen, who has been a real estate agent for roughly 23 years, and whose business is comprised mostly of the sale of new homes as opposed to resales.

[9] I also received a fair amount of documentary, pictorial and video evidence.

[10] There was really no dispute amongst the parties on the facts. The dispute rather was on the inferences to be drawn from those facts, and their legal consequences. I will accordingly set out my findings of fact, referring to the testimony of the parties only where necessary to explain a particular finding.

The Facts

[11] The house is at 16 Alpine Drive in Dartmouth, Nova Scotia. Prior to construction High Grove owned the property, and then proceeded to build a custom and high quality home on it.

[12] The house was first listed for sale by a different real estate agent in April 2020 for $959,000.00. The price was reduced in October 2020 to $899,900.00, at which time it had been on the market for 755 days. The listing expired on December 31, 2020. It was relisted on January 7, 2021 at $799,000.00. The listing cut at that time contained the following relevant information:

a. New Construction – Y

b. Construction Status – [no information indicated]

c. Year Completed – [no information indicated]

d. Square footage (MLA) – 2,740

e. Total Fin SqFt (TLA) - 3,731

f. Building Age – 0

g. Yr Built – Unknown

h. Approx Year Built – 2020

[13] That listing and the agency agreement was cancelled on February 1, 2021.

[14] On May 20, 2021 High Grove entered into a Seller Designated Brokerage Agreement with LAREL. The agreement contained at clause 6.3 the following indemnification agreement:

> "Indemnification: The Seller will hold harmless the Brokerage, the Designated Agent, and any co-operating brokerage for any claims that may arise from their reasonable and good faith reliance on

> representations made and information provided by the Seller."

[15] As I understood the evidence, a Residential Input Form was also completed by Mr Allen and signed by Mr Ross on the same date. The form was filled out by Mr Allen and signed by Mr Ross. Some of the information used by Mr Allen came from a collaboration between himself and Mr Fisher. This form was the source of information that would later appear on a listing cut. Under the section titled "New Construction" appears the following relevant information:

a. New Construction - Yes

b. Construction Status - Complete

c. Year Completed - 2020 [The year was required if construction status had been marked complete]

d. Square Footage (MLA) - 2,784

e. Total Fin SqFt (TLA) - 4,296

f. Land Features – Landscaped [Partial Landscaped and Not Landscaped were options]

g. Fence - Partially Fenced

[16] Over the signature page for the form was the following:

> "The foregoing representations respecting the said property are ture to the best of me [Joe Ross's] knowledge, information and belief, and I/we agree to indemnify and save you or any Brokerage or Co-

> operating Brokerage from any claims arising from you, or such Brokerage or Co-operating Brokerage, acting in good faith, upon the representations of fact which I/we have made in this agreement."

[17] LAREL then staged the property and had a professional photographer prepare photographs of the interior and exterior of the house. A high quality video was also prepared. Relevant to the claim against High Grove are the photographs, as well as a brief moment in the video, that show the backyard. To understand what follows it is necessary to know that at the time these photos and the video were taken the yard behind the house consisted of the following:

a. the first 8 to 10 feet from the back wall were under a second story deck that was supported at its outside edge (and thus 8 to 10 feet from the back wall) by large pillars;

b. then about another 8 to 10 feet of sodded land, roughly but not quite flat, that sloped in a gentle incline to

c. a very steep drop (sometimes by counsel called "a cliff") towards the back property line, which abutted the back yard of a house on the street parallel to Alpine Drive.

[18] Also relevant is that the portion of the yard from the pillars to the steep drop, while not flat, did not appear to be unusable as an abbreviated backyard. It could be sat or rested upon or used for some similar purpose. Mr Gispen conceded in his testimony that it might have been necessary or at least appropriate to build a fence between the edge of the flat area and the steep drop off, and that he had considered doing so at the time of the purchase.

[19] Returning to the documentation, after the execution of brokerage documents on May 20, 2021 LAREL proceeded to post a new listing cut on the same date with a sale price of $899,900.00. The relevant features on the listing cut were these:

a. New construction – Y

b. Construction status - complete

c. Year completed - 2020

d. Land features: Landscaped, Partially Fenced, Sloping/Terraced

e. Building Age - 1

f. Approx Yr Build – [no information]

[20] Covid-19 had shut the province and most if not all of the country down in March 2020. The claimant and his family had been living in a condominium in Toronto. Mr Gispen's spouse had received a job transfer to Halifax sometime in early 2021, and he was charged with finding a home to buy. He saw the video, the listing cut and the video. He retained a real estate agent, and had a video showing of the property. On May 23, 2021 he instructed his agent to submit an offer to purchase the property for $825,000.00, with a closing date of June 30, 2021. When submitting the offer by email to Mr Allen the claimant's agent (Don Ranni) stated:

> "As discussed please find my client's offer to purchase, this was a virtual showing but I did make them aware of the things I thought were drawbacks:
>
> 1 Neighbours
> 2 No yard
> 3 No garage
> 4 Time on market

> They are concerned about resale but not enough to deter them from offering, we won't be doing any inspection & they are moving here to take 2 VP jobs one with BMO so financing is only being done as the rate they get is almost free so not using their liquidity for the purchase.
>
> ...
>
> I have been working with them for a number of months looking at placs in Bedford/DT and Chester. So they do have a good sense of the areas and the market here."

[21] I pause here to note that Mr Ranni's comment to Mr Allen that the property had "no yard" was a bit of hyperbole. As already noted, there was some usable backyard, albeit one that was relatively compressed. It may be that in making this comment Mr Ranni was referring to the the rest of the backyard, that being the steep slope down to the neighbour's boundary line, which area was certainly not usable as a yard in any conventional sense.

The Offer to Purchase

[22] The offer was filled out on a standard form Agreement of Purchase and Sale for New Construction (House and Land), for our purposes the "APSNC".

[23] Clause 4.1 of the APSNC made the agreement subject to buyer's conditions were to be completed by June 2, 2021. It also contained the following relevant conditions:

> **7. Delays**
>
> **7.1** The closing date may be affected if delays occur which are caused by unfavourable weather, strikes, fire, availability of materials and/or labour, decisions of the Buyer or any other causes beyond the reasonable control of the Seller. The Seller shall provide details for the cause of the delay(s) and provide their best estimate to the Buyer

of the effect of such delays shall have on the Seller's work and the closing date. No such extension shall be made for the aforesaid delays unless the Buyer is advised by the Seller, in writing, within seven (7) days of the occurrence of the delay.

8. Pre-Occupancy Inspection

8.1 Prior to closing, the Buyer and the Seller shall establish a date for the pre-occupancy inspection of the Property. The inspection shall include a walk through of the Property and identification of any deficiencies. The Buyer may be assisted by an inspector of their choice at the buyer's expense.

10. Holdbacks

10.1 **Occupancy Permit:** The Seller shall provide the Buyer with a Final Inspection Report and an Occupancy Permit on or before the closing date. The Buyer shall be entitled to hold back funds in an amount agreed to by the parties, until such time as the Occupancy Permit is issued. The funds shall be released when the Occupancy Permit is provided.

10.2 **Deficiencies:** At or immediately following the pre-occupancy inspection, deficiencies shall be agreed to in writing together with an amount to be held, by the Seller's lawyer, for each deficiency item, and the date that which each deficiency item shall be completed. The buyer agrees to cooperate with the seller to complete the deficiencies. The itemized dollar amount designated for each deficiency item shall be released to the Seller upon verification that the deficiency items have been completed.

Should a deficiency item not be completed by the date designated for completion, the holdback for that deficiency shall, at the Buyer's option, be released to the buyer, or held pending

completion of the deficiency item by a newly agreed upon completion date.

The Buyer acknowledges that deficiency items are treated separately from warranty items that arise post closing. The Buyer shall not obstruct or withhold the release of monies held back for deficiency items pending the completion of warranty items.

11. Lot Grading

11.1 On or before closing, the Seller shall provide written confirmation to the Buyer that the requirements of applicable municipal bylaw, relating to lot grading of the Property, have been complied with. Failing which, this shall be considered a deficiency and addressed in accordance with the hold back conditions of this Agreement.

[24] High Grove replied to the offer with a counter of $860,000.00 on May 24th. Mr Allen advised Mr Ranni that High Grove was "into this home for over $1,000,000" as a way of emphasizing how reluctant it was to depart from the listing price. That counter was accepted the same day. The agreement was finalized at a purchase price of $825,000.00, with a closing date of June 30, 2021.

Events After Acceptance of Offer But Before Closing Date of June 30, 2021

[25] On June 7, 2021 the claimant happened to go on ViewPoint, a website unique to Nova Scotia that contains, amongst other things, extensive and historic listing cuts and sales information about properties. He noticed that a prior listing for the property (not the one prepared by LAREL, had shown the square footage of the home as being only 3,700 sq ft as opposed to the 4,296 sq ft shown in LAREL's listing cut. The claimant's agent question Mr Allen about this, and the latter advised that the measurement had come of the plans.

[26] On June 14, 2021 Mr Allen advised Mr Ranni (the claimant's agent) that he and the builder had measured the property again. They had a TLA (total living area) of 4,148 sq ft was, he said, consistent with construction industry standards.

[27] On or about June 17, 2021 the claimant drove by the property and noticed an excavator in the back yard. He then emailed Mr Ranni with a copy to his solicitor on the purchase:

> "I have included pics that I took of the backyard today. What I believe is happening is they have not finalized the permit and one of the outstanding issues was the severe slope. Instead of spending money on a retaining wall, they just reduced the slope by extending further into what little we had. Obviously this was purposely done and being delayed until the last minute because if they had done this while it was listed ... NO PERSON WOULD BUY THIS PROPERTY!"

[28] The attached photos show that the roughly level area that had extended out from the deck pillars had been removed right up to the pillars. It was replaced from that point to the end of the property line with a steep slope. This slope, while not quite as steep as the 'cliff' that had been there before, was still clearly unusable for any purpose.

[29] Mr Ranni replied to the claimant at 8:30 p.m. by text as follows:

> Holy f**k.
>
> I can't believe they are doing excavation work on the property.
>
> We were not notified of changes being done and this is completely not acceptable.

> I'll call Suzzane [Mr Gispen's solicitor on the purchase] & speak to her the morning I think we should send a termination on the sq footage & now changing the yard.

[30] He also suggested that Mr Gispen file a complaint against Mr Allen with the Nova Scotia Real Estate Commission.

[31] Mr Ranni then contacted Mr Allen by email on June 18th:

> "Currently there is an excavator on-site taking out the back yard at 16 alpine, this is a firm deal (with a dispute on sq footage) why would your seller be making extensive changes to the property at this time?
>
> Can you please inform us of what is being done & why it's being done also shed some light on why we have not been informed.
>
> Was there an issue that was not disclosed to us?

[32] Mr Allen replied a little over an hour later:

> "Just left the site ...
>
> Final grading plan required a change to the back yard slope.
>
> Engineers had told them previously the yard as is, was what was required, but on final inspection report apparently not.

> As a result the back yard will have less of a slope in the back to the end of the grade and will have approx 8 feet more of grass when put back together.
>
> Please fee free to go and have a look and take pictures once completed."

[33] The claimant's solicitor, Ms Suzanne Robichaud, then emailed the Seller's solicitor, Mr Andrew Wolfson, KC, on June 19th. She noted that after the square footage discrepancy had arisen the claimant had secured a third-party company to measure the home. That had resulted in results—3700 sq ft—that were consistent with the earlier listing cut. In her view it represented a significant discrepancy. She went on to note that her clients had discovered "this week that they have essentially lost the little back yard that existed on the property due to grading issues with HRM." She concluded that as a result the claimant was not prepared to proceed with the purchase unless they were provided with a credit on the purchase price in the amount of $40,000.00. She added that if the Seller did not agree "we will be terminating the offer and expect a full return of their deposit [$10,000.00]."

[34] I was not provided with a copy of any response, if any, from Mr Wolfson at that point.

[35] On June 25, 2021 Mr Allen asked Mr Ranni whether the claimant intended to close. He said that Mr Wolfson was preparing "the documents, deed etc. to be processed for the close on June 30." Mr Ranni replied at 10:02 p.m. the same day. He understood the matter was "in the lawyers hands at this time" and that they were awaiting a response from Mr Wolfson that had been promised for June 25, though none had been received as of 10 p.m. that day.

[36] Mr Allen responded at 10:12 p.m.:

> "He [Mr Wolfson] was waiting on the yard to be finished and for you and/or your client to view this afternoon. The seller's lawyer has asked the question through me to you: Are your clients going to close? There will be no price reduction. The price of $860,000 is the price! The backyard is now better than before. Less slope, more grass and 7 additional trees planted. All at considerable cost to the builder. Please confirm if they are going to close or not."

June 30th, the Date Set for Closing

[37] On June 30, 2021 Mr Wolfson wrote to Ms Robichaud. There appears to have been a list of deficiencies provided by her on June 30th, resulting in the seller being prepared to agreed to a hold back of $2,050.00. He went on to say that High Grove was "ready to close on that basis."

[38] He then dealt with Ms Robichaud's email of June 19th. He noted that High Grove disputed the allegations regarding square footage and the backyard. He relayed its assertion that "the home is the same or substantially the same as what your client intended to purchase." Hence there was no agreement to provide a $40,000.00 credit. He reported that High Grove was prepared to close as per the APSNH, subject to the hold back. He added that in the event the claimant "fails to close, our client will be seeking legal recourse against your clients for their breach of the Agreement of Purchase and Sale, by way of a claim for damages or specific performance."

[39] The evidence as to what happened on the date set for closing, or thereafter, was not particularly clear. The best that I could make out on the testimony of Mr Gispen as well as the exhibits filed by High Grove was

a. the claimant's family were not able to move in on June 30th;

b. they and their furniture had to stay elsewhere for a week or two;

c. they were eventually ‘allowed’ to move into the home upon their agreeing to pay the cash portion of the purchase price ($162,303.22) to High Park’s solicitor in trust;

d. the holdup was in part due to High Grove’s failure to obtain various permits and/or clearances for the property including, as of July 28,

    i. permit application for the retainment and parking space, including the cost of a survey of the retainment;

    ii. repair and adjustment to the street curb,

    iii. light pole placement, and

    iv. an engineer sign-off for the exterior stair; and

e. the lack of an occupancy permit until one was issued on August 20, 2021 “with condition that all outstanding civil works be complete, as approved, by May 11, 2022.

[40] I pause here to note in this regard that the listing cut’s representation that construction was “complete” or that the house had been completed in 2020 the house were not accurate—and that in fact as of June 30, 2021 much still had to be done before legal title could be transferred to the buyer.

[41] It appears that the formal transfer of title happened sometime after August 31, 2021, when Mr Wolfson wrote to Ms Robichaud enclosing various documents, including High Grove’s undertaking to the HRM to complete a number of the matters listed above. The claimant thought the transfer of title was sometime in

September. For purposes of these reasons it is not necessary to pin down the exact date in September, other than to note that whatever the date, it was well after June 30, 2021.

[42] The claimant obtained two estimates for the cost of excavating the backyard in order to build a retaining wall and then regrade the backyard up to the wall to reclaim the flat space that had been lost. One. dated November 24, 2021, was for $73,370.00; the other, dated April 11, 2022, was for $40,718.05.

Submissions of the Claimant

[43] Mr Gispen combined his submissions with respect to his claims against LAREL and High Grove. He argued that the evidence established that the house was 3,700 sq ft rather than the listed 4,300. He noted that it had sat on the market at the previously listed 3,700 sq ft for over a year, and implied that the increase in the number had been designed to make the property more saleable. He said he and his wife purchased the property based on the size and the quality of the finish (the latter of which he did not doubt). He said that it was only after the buyer's conditions were satisfied that High Grove suddenly and without notice began to excavate the back yard. He noted that he had asked for the yard to be put back into the state it was when he purchased it, but that request was denied—as was any credit for the change. He said a retaining wall would enable the return of what he had purchased, which was a backyard with at least some useable space.

Submissions on Behalf of High Grove

[44] Counsel relied heavily on the principle of *caveat emptor*. The claimant knew of the issues yet chose to close. She also emphasized that High Grove was obligated under the terms of the APSNH to provide a house that complied with all applicable bylaws and regulations. In this case, that included grading of the backyard that complied with building code or HRM requirements in such situations. She also pointed out that his agent had told him there was 'no backyard.' She submitted that in fact there never had been a backyard, at least as one might understand the term in common parlance. She added that if the claimant had thought the change was material he could have refused to close and sued for damages.

[45] With respect to the claim for damages based on the cost of a retaining wall, she noted that no witness had attended to give evidence. As well, a retaining wall would create a betterment. She added that there was no evidence to suggest that what the claimant received by the time the sale closed was worth any less than what he paid for it.

Submissions on Behalf of LAREL

[46] Counsel advised that she was relying on her pre-hearing submissions.

[47] Then, turning to the square footage issue, she noted that the listing cut contained a disclaimer which urged a prospective buyer to check for themselves. The claimant had received copies of the house plans before closing and there was nothing to suggest that they were inaccurate. As well, there was nothing to suggest that Mr Allen's calculation was inaccurate. There was no evidence to say how it should have been calculated and hence nothing to suggest that his number was negligent.

[48] She relied as well on *caveat emptor*.

Reply

[49] There was no reply.

Analysis and Decision

[50] Having considered the evidence and submissions of counsel I am satisfied that the claim against LAREL must be dismissed for two reasons.

[51] First, while square footage may be an element in the marketing of residential property, it is rarely a deciding feature, particularly because in ordinary course a buyer has inspected the property before purchase. I appreciate that in this case the claimant's presence in Toronto meant that he could not visit the property before he made the offer. However, the room dimensions were included on the listing cut, and there was no evidence that those measurements were inaccurate. The case might have been different if there was evidence that the claimant had a real, concrete and actual need for a specific amount of space. But there was no such evidence. I note too that the claimant first raised the concern based on his viewing the former listing cut—not because he had experienced any practical difficulty arising from the different in square footage.

[52] Second, and in any event, the evidence as to the actual square footage of the house was not clear. The best that could be said was that there were two (or three if the third-party's figure is accepted). No witness was able to say how or why the older figure was arrived at; or that it was the correct figure. I was accordingly unable to determine on a balance of probabilities that the older figure was the more accurate one. Since the claim against LAREL hinged on the claimant's allegation that the older figure was correct the claim had to fail.

[53] Given this finding the claim against LAREL and High Grove, and those for contribution by High Grove against LAREL and LAREL against High Grove must be dismissed.

[54] I turn now to the claim against High Grove, where the result is different.

[55] I commence by observing that my recollection of first-year property law is that upon the execution of an agreement of purchase and sale the buyer acquires the beneficial, or equitable, title to the property, although legal title does not pass until the deed is transferred—which is to say, on closing. On the facts of this case then, the claimant acquired equitable title to the property on May 23, 2021 when the APSNH was executed. That equitable title was to the property and the land (including the backyard) in the state it was ***on that date***. That in turn means that when High Grove commenced excavation work on the property it was 'damaging' (in the sense of altering) property that, at least in an equitable sense, already belonged to the claimant—and that it was acting without notice to, or the consent of, the holder of the beneficial title.

[56] I acknowledge that Clause 11.1 (Lot Grading) required High Grove to provide confirmation on or before closing with confirmation that HRM's requirements with respect to lot grading had been complied with. High Grove was accordingly under an obligation to correct the grading if it wanted to insist on closing. In my view the grading issue—that is, High Grove's inability to provide written confirmation on or before closing—was a deficiency. And as such, clause 11.1 provided that in the event such confirmation could not be provided as of closing then "this shall be considered a deficiency and addressed in accordance with the hold back conditions of this Agreement."

[57] The difficulty here is that on the evidence there were in fact *two* deficiencies. One was the fact that the backyard was not being conveyed in the shape and form it was in as of May 23, 2021. The other—the one High Grove relies upon—was the inability as of closing to provide confirmation as to the

grading. High Grove's ability in the end to secure that confirmation addressed the second, but not the first, deficiency.

[58] There were at least two ways to correct that first deficiency—that is, to secure the written confirmation that needed to be provided with respect to the second deficiency. One was to install a retaining wall at some point between the property line and the existing relatively flat area that ran for 8-10 feet out from the pillars. That option would have provided the claimant with what he had purchased, and what he had received equitable title to in May 2021. The other option—the one chosen by High Grove—was to do what it did. While there was no evidence on this point I am prepared to find on the evidence that the second option was cheaper by far. But while this second option enabled High Grove eventually to satisfy the deficiency with respect to grade confirmation, it did not provide or maintain what the claimant had purchased and had already acquired equitable title to. In short, High Grove was providing something less than what it had agreed to provide (a house with at least some backyard) on May 23, 2021.

[59] In my view High Grove can escape the consequences of its actions only if there was something in the APSNH that allowed it to change the property in such a material way after May 23, 2021.

[60] Clause 7.1 (Delays) does not assist High Grove. It applies only in the case of delay that occurs because of "causes beyond the reasonable control of the Seller." The problem with the backyard grade was something that was well within the ability of High Grove to have rectified long before May 2021. High Grove had had the opportunity since at least 2020 to determine whether it could obtain an occupancy permit—and hence to determine whether the grading of the backyard slope was acceptable to HRM. But High Grove appears to have taken no steps to obtain an occupancy permit before it entered the APSNH with the claimant in May 2021, even though it marketed the house as being 'complete' since 2020.

[61] Turning to Clause 11.1 (Lot Grading). it required High Grove to provide on or before closing with written confirmation that HRM's requirements with respect to lot grading had been complied with. High Grove was clearly in breach of that obligation as of June 30th (notwithstanding its earlier insistence that the claimant close the deal) inasmuch as it did not have such confirmation at the time of closing. High Park, while not acknowledging that it was in breach as of June 30th, relies on the second sentence of clause 11.1: "Failing which, this shall be considered a deficiency and addressed in accordance with the hold back conditions of this Agreement." That in turn takes us back to clause 11.2 (Deficiencies).

[62] As discussed above this clause really only addresses the second deficiency (the lack of confirmation), not the first (the change to the property). And even if clause 11.2 extends to cover changes to the property, as I read the clause, its legal effect depends upon there being agreement in writing between the Buyer and the Seller as to the deficiency; the cost of correcting that deficiency; and the date for completion of that deficiency. The difficulty here is that there never was any agreement as to the deficiency in issue (that is, the loss of the backyard), nor of the cost of correcting that deficiency. The claimant had never agreed to the change, and indeed had not even been consulted before High Grove commenced excavation. The claimant continued to object to the loss of the backyard right up until the final closing in September 2021, and High Grove continued to insist that it was not a deficiency and, in fact, as Mr Allen said on June 25, 2021 "[t]he backyard is now better than before. Less slope, more grass and 7 additional trees planted. All at considerable cost to the builder."

[63] In the end High Grove has only the actual fact of closing in September 2021 to support its defence. That is to say, the objection might be that by closing in September the claimant gave up any right he had to complain about the fact that he was receiving something other than he had agreed to purchase. I was not persuaded that this was a viable argument on the facts of this case. His acceptance of legal title did not alter or excuse the damage that had been done to his equitable interest. High Grove's actions placed him between a rock and hard place: either refuse to

close on June 30, 2021 and risk a law suit that was stridently threatened by High Grove; or try to make the best of a bad situation by taking possession a week or two later, still without legal title, while High Grove tried to fix the deficiencies with the property that it had had more than a year to correct. All the while he objected that High Grove was doing him wrong; and all the while High Grove dismissed his objections. There was no evidence that the claimant agreed, expressly or impliedly, to waive his complaint about the loss of his backyard when High Grove was finally able to provide the various compliance and occupancy permits it was required to produce. I am accordingly satisfied that the claimant's claim was not extinguished by the closing in September 2021.

[64] What then are the damages? As earlier noted, High Grove had at least two options to correct the deficiency regarding the lot grading: a retaining wall, which would have preserved the backyard; or what it ended up doing, at a lesser cost but at the expense of what backyard there had been. There was nothing in the agreement that entitled High Grove to choose the cheaper option, especially since that option deprived the claimant of what he had agreed to purchase. I am satisfied then that High Grove ought to have chosen the retaining wall option. While the exact cost of that option is not clear, what is clear is that whatever it was at the time would have been well in excess of this court's monetary jurisdiction of $25,000.00. I accordingly award that amount to the claimant as against High Grove.

[65] For these reasons I will make the following orders:

a. in SCCH 510248 (*Gispen v. High Grove on the Park*) I will order High Grove to pay the claimant $25,000.00 plus costs;

b. in SCCH 513012 (*Gispen v. Larry Allen Real Estate Ltd*) I will order the claim to be dismissed; and

c. orders of dismissal will be entered in SCCH 514815 (*Larry Allen Real Estate Ltd v. High Grove on the Park Inc*) and SCCH 516223 (*High Grove on the Park Inc v. Larry Allen Real Estate Ltd*).

DATED at Halifax, Nova Scotia,
this 3rd day of January, 2023.

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Augustus M. Richardson, KC
Adjudicator