

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2002/CLE/gen/02280

IN THE MATTER of the provisions of the Partition Act, Chapter 143.

AND

IN THE MATTER of ALL THAT piece parcel or tract of land situate on the Southwestern Side of the New Harold Road Reservation in the Western District of the Island of New Providence aforesaid comprising Ninety-two and Thirty-three Hundredths (92.33) acres more or less and bounded Northwardly by land the property of the Bahamas Government Northeastwardly by the New Harold Road Reservation leading to John F. Kennedy Drive Eastwardly partly by land property of the Air Ministry partly by other land the property of Nassauvian Limited partly by land formerly leased to the late Hedley Edwards and partly by other land and partly by land reserved for the Bahamas Geodetic Survey southwardly by Crown Land Westwardly partly by land now or formerly the property of The Caves Company Limited and partly by land now or formerly the property of G.A. and S. G. Bostfield which said piece parcel or tract of land has such position shape mars and dimensions as are shown on the diagram or plan attached to a Certificate of Title issued by the Supreme Court of the Bahama Islands to Nassauvian Limited on the 23rd day of February, A.D. 1970 and recorded in the Registry of Records in the City of Nassau in the said Island of New Providence in Volume 1582 at pages 182 to 185 and is delineated on that part which is coloured pink on the said diagram or plan.

BETWEEN

LESHELMARYAS INVESTMENT COMPANY LIMITED

Plaintiff

AND

(1) ALBERT C. HIGGS on behalf of the Estate of KENNETH MCKINNEY HIGGS

**(2) ALBERT C. HIGGS on behalf of the Estate of CLOTHILDA HIGGS, DECEASED,
KENNETH MCKINNEY HIGGS, SENIOR**

Defendants

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: Anthony McKinney KC with Lilnique Murphy-Grant for the Plaintiff
Bridgette Francis-Butler for the First and Second Defendants
Timothy Eneas KC with Ava Laroda for Neely's of Nassau Ltd. (an Interested Party)

Hearing date(s): 14 May 2024 and 11 June 2024

JUDGMENT

WINDER, CJ

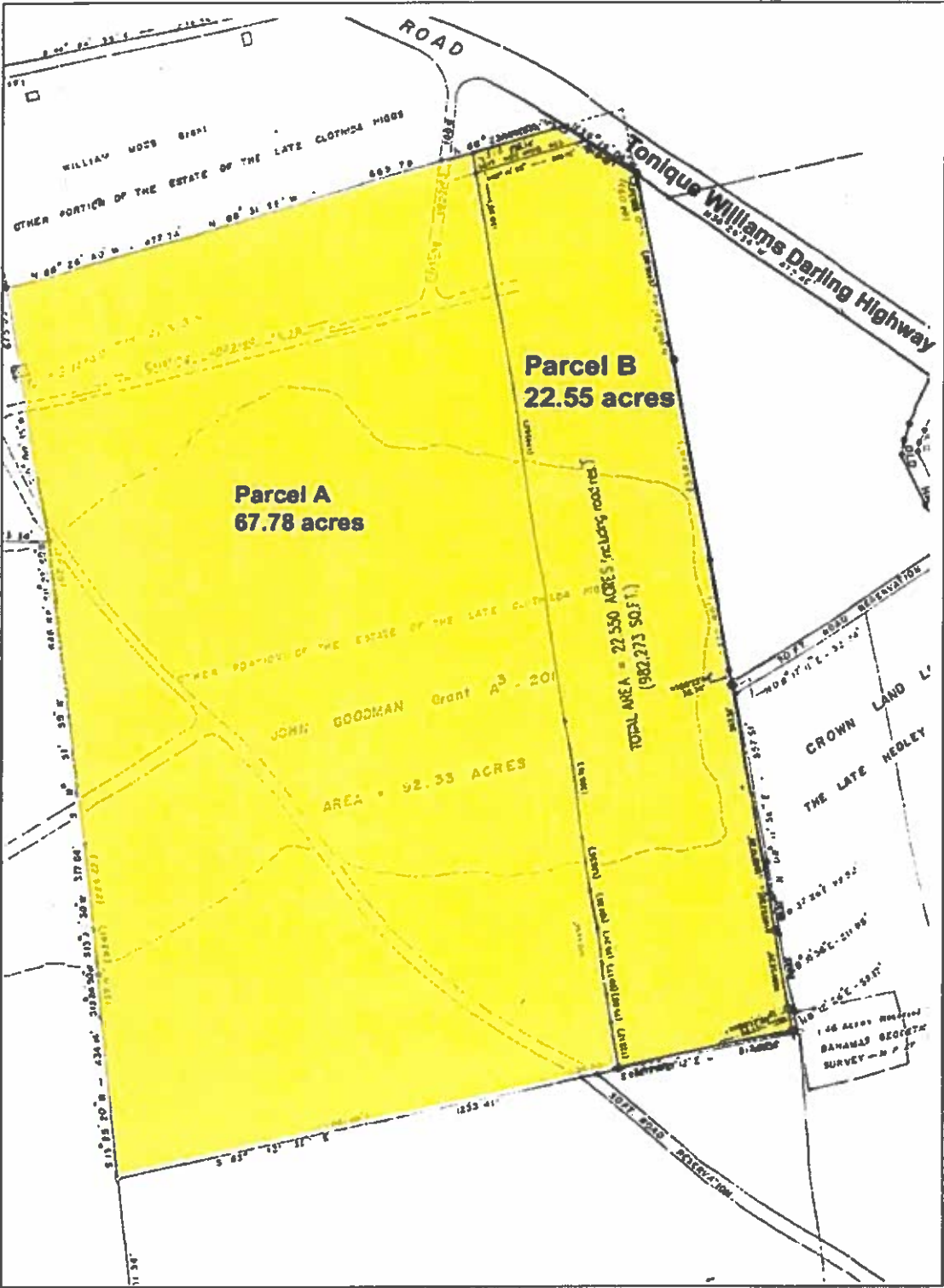
This is a partition action with a storied history brought by the Plaintiff (Leshel) concerning approximately Ninety-two and Thirty-three Hundredths (92.33) acres of land (the Property) in Western New Providence in the vicinity of the old Harold Road.

[1.] The history of the proceedings in this matter is set out in my 4 August 2022 decision on the determination of a preliminary issue.

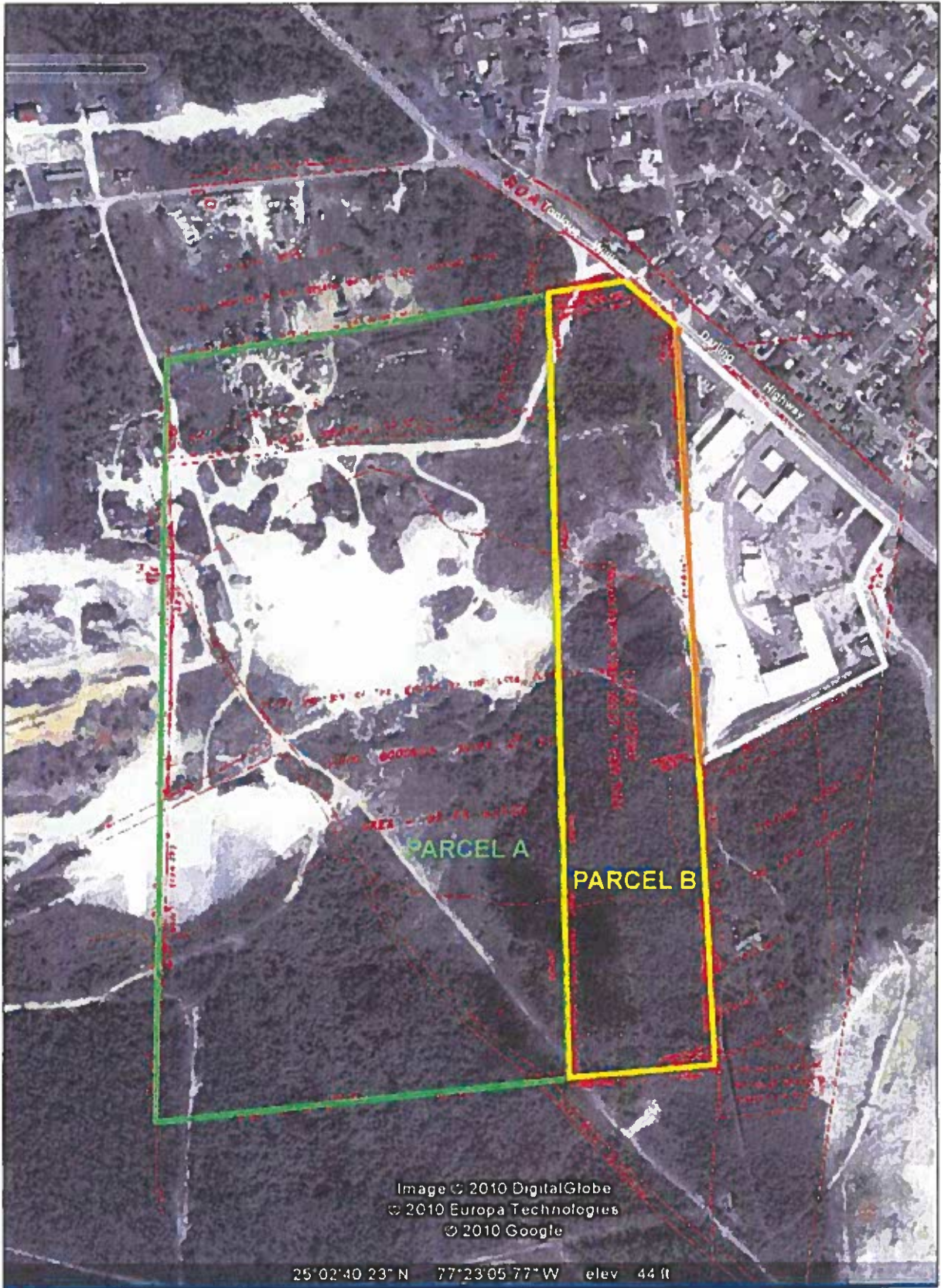
[2.] After its storied past, the action has now resolved itself to a determination of the sole issue of a partition as between Leshel and the First and Second Defendants (collectively the Higgs). It is accepted that Leshel is entitled to a $\frac{1}{4}$ interest in the Property and the Higgs entitled to a $\frac{3}{4}$ interest in the Property. It is also accepted that the land remains undivided and ought to be partitioned as between Leshel and Higgs as neither party wishes a sale and both consent to the partitioning.

[3.] Neely's of Nassau Ltd. (Neely's) is an interested party as a judgment creditor of the Higgs. The Higgs and Neely's have, as between them, an agreement as to the provision to Neely's of a portion of such of the Property as may be partitioned in favor of Higgs in satisfaction of its judgment debt. The agreement provides that Neely's will be entitled to a nine (9) acre parcel to be partitioned out of the northern section of that part of the Property identified as Parcel A or such other property the court determines to be the property of the Higgs.

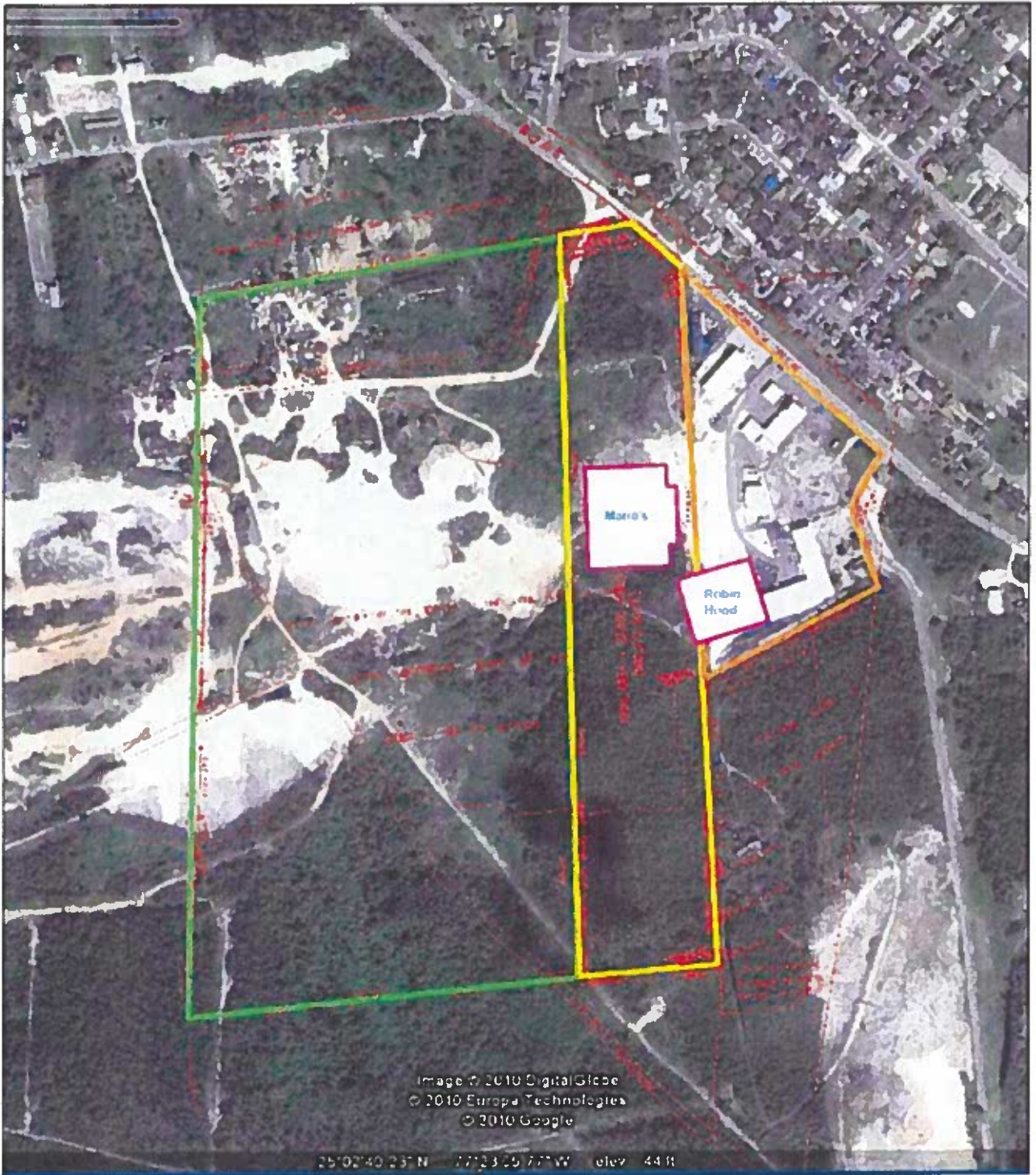
[4.] A survey plan and aerial photos of the Property are set out below:



Plot Plan - (Parcels A and B - 92.33 acres)



Google Image - Parcel A and B



**Google Image – (Parcel B – 22.55 acres)
With approximate Building outline on Parcel B**

[5.] The parties are agreed that a 60 foot road reservation at the northern and western boundary of the Property, where it meets the Tonique Williams Darling Highway, would be appropriate to ensure the highest value per acre upon a division.

[6.] Leshel's case is supported by the Affidavit of Leslie Miller (Director of Leshel) filed on 28 March 2024, the Supplemental Affidavit of Leslie Miller filed on 14 May 2024, the Amended Affidavit of Leslie Miller filed on 23 May 2024 and the Third Supplemental Affidavit of Leslie Miller filed on 28 May 2024.

[7.] The Higgs' case is supported by the Affidavit of Albert Higgs filed on 17 March 2024, the Supplemental Affidavit of Albert Higgs filed on 13 May 2024, the Second Supplemental Affidavit of Albert Higgs filed on 24 May 2024, the Third Supplemental Affidavit of Albert Higgs filed on 28 May 2024 and the Fourth Supplemental Affidavit of Albert Higgs filed 10 June 2024.

[8.] There was no evidence before me other than on affidavits. While the parties have given evidence in the other iterations of this matter, no cross examination of Albert Higgs or Leslie Miller (the deponents on behalf of the parties) took place before me. The parties were content to rely on the affidavits and other material before the court.

The case of Leshel

[9.] Leshel says that the Higgs have committed egregious destruction of most of the Property and are now asking the Court to ignore all of the activities they have carried out on most of the subject property over the years. Their own evidence in the case against Nassuvians was that they were mining and farming the subject property. They have set out in their affidavits, submissions and pleadings before Thompson J., the Court of Appeal and Privy Council, the activities that they have engaged in on the subject property. The Reports of Island by Design Limited, Wiltshire Bethel and Robin Brownrigg all conclusively detail the destruction of the subject property by the Higgs and their predecessors. They say that the Court ought not to accept any division other than granting to them the area demarcated in the Plan attached to the Judgment of Thompson J.

[10.] Section 3 of the Partition Act provides that the Court should not make any order other than one of Partition where none of the items provided for in Section 3, which would justify the sale of

the property instead of partitioning. is present. As there is nothing that is beneficial to the parties and the Court, in the absence of a request for sale, the Order to Partition ought to be made.

[11.] The Higgs are not disadvantaged in any way with respect to the value of the property that they would be left with. Using the valuation in the report by Robin Brownrigg, the Higgs have land that is considered commercially viable even though they have committed serious damage and destruction on that section of the land. The Higgs have extracted substantial wealth from their mining operation and Leshel (or its predecessors) in no way has benefited from any of the profits that they made over the years. It would be unfair for them to now ask the Court to ignore the wealth they made over the years from the subject property.

[12.] Leshel's position is that it has developed a section of the 22 plus acres that it is seeking and has erected a commercial facility that provides entertainment for any number of Bahamians, as it is the only Bowling Alley together with other entertainment facilities. The Higgs in no way assisted in the development of the entertainment centre.

[13.] Having regard to the judgment of Thompson J, the affidavit filed by Leshel in support of its application for partition and all of the reports tendered by the various appraisers, it is only fair that Leshel be awarded a decree of Partition.

[14.] Leshel denies that it excavated outside of Parcel B or that it breached any injunctive orders made by the Court.

Case of the Higgs

[15.] The Higgs say that Leshel has been solely responsible for mining activities on the northeastern and northwestern portions of the property, while the Higgs occupied exclusive possession and control over the southeastern and southwestern portions of the land. Leshel by its servant or agents depleted the entire area to the southwest of the Bowling Alley to water level and thereupon leaving a ramp with the intent to continue to gain access to the area to which the Higgs occupied to the top of the hill.

[16.] The Higgs complains that Leshel excavated the land to which the Mario's Bowling Alley occupies and the land where the Robin Hood building is situated all while an injunctive order remained in place. That say that Leshel continued unabated to do and take which portion of the Property it desired irrespective to entitlement, value and/or the interest of other co-owners. No regard was had to the injunctive orders in place and they say that Leshel's excavation was not limited to the 22.55 acres in Parcel B.

[17.] The Higgs say that Leshel has depleted a great portion of the land without regard for the future of the land. They say that they have observed the destruction of the Property by Leshel's excavation in excess of 20 acres of the Property. They claim that Leshel has also excavated outside the scope of the 92.23 acres.

[18.] The Higgs agree to a partition of the subject property, however they request the court to have regard to the use and enjoyment of the land, the interest of the parties, its valuation, development and potential future use in assessing whether partition is to be ordered. In light of the value and profits received by Leshel from the Property and in light of the valuation in respect to the acreage occupied by Leshel, when compared to the valuation of the remaining portion of the Property occupied by the Higgs, it is proposed that Leshel's $\frac{1}{4}$ interest in the land ought not to include more than 13 acres adjoining the existing 12.5 acres tract owned by them.

Law and Analysis

[19.] Sections 3-5 of the Partition Act provides as follows:

3. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if it appears to the court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them the court may if it thinks fit, on the request of any of the parties interested and notwithstanding the dissent or disability of any others of them direct a sale of the property accordingly, and may give all necessary or proper consequential directions.

4. In a suit for partition where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.

5. In a suit for partition where, if this Act had not been passed, a decree for partition might have been made, then, if any party interested in the property to which the suit relates requests the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property and give all necessary or proper consequential directions; and in case of such undertaking being given the court may order a valuation of the share of the party requesting a sale in such manner as the court thinks fit, and may give all necessary or proper consequential directions.

[20.] As indicated, all of the parties have agreed that they do not wish any order for a sale but rather it has been agreed for the Court to make a division of the property in the proportionate interest of 3:1. The dispute is as to how those proportions would be allocated in terms of actual land. This they have asked the court to determine.

[21.] Leshel says that the Property should be partitioned as provided for in the Judgment of Thompson J dated 24 April 2006. According to Thompson J the 22.55 acre Parcel B adjacent to the property already owned by Leshel ought to be granted to Leshel. Leshel says that the balance of 67.78 acres identified as Parcel A ought to be granted to the Higgs. The Higgs says that the value of the 22.55 acres that was to be granted to Leshel ought not to be granted in its entirety to Leshel as it would acquire the better section of the subject property.

[22.] The parties have caused several appraisals of the Property to be conducted over the years. The appraisals are now all over a decade old. Notwithstanding their vintage it is necessary to analyze each of them, as they are relied upon by the parties.

Appraisal Report of Wilshire Bethell dated 29 March 2011

[23.] According to Wilshire Bethell, the Property is situated immediately west of the Summerwinds Plaza as per interfaced location and survey plans with access approximately 500 feet north-eastwardly of Theodora Lane in the Western District of the Island of New Providence. He described, as Site Improvements, that a large portion of the Property (approximately 38 acres) have been excessively excavated by removal of quarry fill such that the present level is considered to be well below the natural water table. The Property was subsequently refilled with loose rubble re-enforcing steel and concrete rubble from the demolition works from a Paradise Island hotel.

[24.] Bethell says that a portion of the property at the eastern side have been partly developed with encroachment of the Robin Hood Food Store and Mario's Bowling Alley, however, the purpose of this report is to determine the value of the tract of land if vacant. Access to this tract of land is limited to Two Hundred and Thirteen (213.00) Feet on Harold Road approximately.

[25.] The Bethell appraisal was commissioned by Leshel. It identifies 38 acres as being excessively excavated. Notably, the Higgs say that Leshel has excavated in the vicinity of 20 acres, which support the other 18 acres identified by Bethell have been excavated by others. Considering its successful claim to an exclusive occupation and use of the Property by the Higgs this would seem to confirm that they too have extensively excavated the Property.

Appraisal Report of Robbin Brownrigg dated 26 January 2011

[26.] According to Robbin Brownrigg the Property is rectangular in shape and is generally flat land with undulating topography at the rear and contains 92.33 acres.

[27.] According to Brownrigg, no adverse site conditions were noted and no evidence of contamination was found on the subject parcel or neighboring parcel. He accepts however that an engineer would be required to conduct the necessary tests for evaluation. Debris from a demolished hotel on Paradise Island has been placed underground on the Parcel A portion of the site. However this was not visible from the site inspection and would need to be validated by an engineer as to whether this rubble may have an adverse effect on the land value.

[28.] The zoning of both Parcels A and B are designated as Open. The only building on Parcel A (at the time of the appraisal) was a poured concrete office/residence and maintenance building about 50 years old. The building comprising a 2-bedroom 3 bathroom, tool room and storage room was described as in poor condition.

[29.] Brownrigg's appraisal was commissioned by the Higgs. He estimates the value of Parcel A (with road access) 67.78 acres at \$100,000 per acre, Parcel A (without road access landlocked) 67.78 acres at \$50,000 per acre. Parcel B (with road access) 22.50 acres at \$300,000 per acre.

[30.] It would appear that Brownrigg estimated the value of Parcel B higher than that of Parcel A because it has the Marios Bowling Alley on it. As the Higgs made no contribution to the construction or development of the Bowling Alley they ought not to reap any enhanced value as a result solely of it. Likewise, the value from the Higgs office building, from which their operations on the Property were centered, and which was constructed by them, should inure only to them.

Conclusion

[31.] I begin by stating the obvious which is that disputes of fact cannot be reconciled by competing affidavits. Likewise, appraisals and reports were admitted without the makers of the reports being subjected to any cross examination. Whilst it seems clear that Miller, on behalf of Leshel, has mined the 22.55 acre Parcel B extensively, there has also been mining conducted by the Higgs and they have made use of the Property for decades. The Ariel photos, showing the extensive scarification of Parcel A and B is clearly demonstrative of this. The Higgs likewise

confirm that they did engage in mining of the Property, albeit not on Parcel B. This mining is confirmed in the Higgs' affidavits and by Mrs. Butler, their counsel.

[32.] In fact, as the title of the Higgs to the Property had a considerable possessory element, they must necessarily have been in exclusive use and occupation of a large portion of the property, they say since the early 1970's. Being in exclusive possession and control of the Property, as alleged by the Higgs, it seems more likely than not, they too are largely responsible for the condition which the land, in particular Parcel A, is in.

[33.] Mining activities over the entirety of the Property, not just in the area where Leshel's activity were concentrated, was conclusively demonstrated in the Environment Site Assessment prepared by Islands by Design Ltd. dated 30 January, 2013. Keith Bishop of Islands by Design prepared a site assessment at the instance of Annamae Woodside, a former defendant to this action. It was a very detailed report which included aerial photographs showing development and use of the Property. The following is extracted from the report:

- (1) The landscape is relatively flat on the Northern portion where elevation then increases rapidly to the South yielding to a natural ridge. Extractive activities where evident have physically altered and lowered ridge elevation creating an undulation elevations ... The Eastern section abutting the bowling and entertainment centre of the subject property is abrupt in elevation at the Southeastern corner. Physical alteration due to extractive activities and human disturbance exists primarily along the East and West boundaries. Previous human disturbance is noted abutting undisturbed natural vegetation in the central portion of the parcel.
- (2) An area considered the centre of operations exists at the North constituting a small office, heavy machinery and waste debris that is considered a dumping site where items range from household to industrial. According to a 1975 ordinance survey (Topographical map sheet 1) New Providence, published by the Department of Lands and Surveys, Nassau the elevation of the subject property may have exceeded 50 feet above mean sea level in portions. Lower lying areas at the subject property are present at the North, East and sporadically in the centre of the property.
- (3) Local ground water flow direction may vary due to the topography, site drainage features, the rate of pumping of raw water intake wells and/or other factors. On the subject property a depressed area does contain standing water. Biological observations and simple conductivity testing identify low levels of salinity whereby it is likely that a layer of fresh water, less dense than salt water, may be permeating the surface. Such identification of a potential subsurface fresh water source is not wholly indicative of elevation...

- (4) Commercial Extraction operations.... a mining operation for limestone is active on the site. Active removal of limestone is readily observed on the Southeastern corner and in the West Central portion of the site. Previous and now abandoned limestone removal is noted on the site where exposed limestone is dark gray after prolonged exposure to natural elements. It has not been determined if the mining operation is compliant with the requirements of the conservation and protection of Physical Landscape Act of The Bahamas, 1997.
- (5) Industrial Household Waste ... mostly concentrated on the Northern portion of the site discarded heavy equipment, 55-gallon drums, metal debris, and household waste are present on the site. Additional concrete waste was observed above ground though overgrown by vegetation to the South of a previously operational screening facility. Household waste and concrete was observed in the far Southeastern corner of the property.
- (6) It is evident through visual inspections that leaks, spills, and discharges occurred on the subject property. Hydrocarbon photometer testing confirmed the presence of hydrocarbons. No leak detection system was observed in this location.
- (7) Solid wastes disposal sites (dump sites) were observed on the subject property. Disposal sites are most prominent on the Northern portion of the site with a disposal site also noted on the Southwest corner. Discarded material observed included derelict vehicles, shipping containers, heavy equipment, household waste, and concrete debris.
- (8) Pitts Ponds and Lagoons .. “One depressed area was observed on the subject property with mining operation having penetrated the water table in such quantities as to constitute a classification as a Pond. A review of historical does not definitely identify this pond as a natural formation. The extent of this pond is estimated as less than one acre...”
- (9) Findings and Opinion - The subject property consisting of 92.33 acres near the Tonique Williams Darling Highway has undergone a transformation of use from an undisturbed stated to one of an industrial activity, specifically, mining of limestone. Industrial activity necessitates the use of heavy equipment introducing a potential release of hydraulic fluids and petroleum products. From time to time such equipment may through use and wear experience a hose break and or spill during the transfer of fuel. The improper storage of 55-gallon drums on the property heightens the potential for the release of hydrocarbons as does the amount of heavy machinery observed to be inoperable and therefore considered to be disposed of as solid waste. However evidence for the presence or likely presence of any hazardous substances or petroleum products would be considered a threat to human health or the environment were considered “de minimis”, therefore are not considered recognized environmental conditions...

- (10) Per the request of the client, Islands by Design Limited performed hydrocarbon investigations to identify the presence of hydrocarbons on the subject property. Though over all conditions warranted a finding of no recognized environmental conditions due to “de minimis” conditions, conditions do not present a threat to human health or the environment and generally would not be the subject of an enforcement action if brought (sic) to the attention of the appropriate Government Agencies, the presence of hydrocarbons was confirmed... Islands by Design also used a metal detector to locate the presence of buried concrete associated with the demolition debris. Islands by Design only noted the presence of demolition debris potentially associated with a hotel demarcation due the presence of foreign concrete aggregate material approximately 100 yards South of the abandoned screening equipment. No buried demolition debris was observed...”

[34.] Having given careful and anxious consideration to all of the attendant circumstances of this case, I am not satisfied that I should make any division other than the natural one made by Thompson J. in 2006 giving the $\frac{1}{4}$ or 22.55 acre Parcel B to Leshel. The remaining $\frac{3}{4}$ or 67.78 acre Parcel A ought therefore to now be granted the Higgs.

[35.] On the evidence there is a considerable ridge remaining on Parcel A from which the Higgs may continue their quarrying activities. I therefore found little merit in the suggestion that the land in Parcel B is of greater value per acre than Parcel A. This could only be as a result of the road access and the proximity to the commercial activity of the Bowling Alley. This could be remediated by road access.

[36.] I accepted the assessment of Mr. McKinney KC, for Leshel, that “the Higgs have little if any entitlement to raise the issue of valuation, having regard to the fact that from 1967 and before, when the first action started and continuing on to now, they have been on the property, having been making a living off the property”. I did not accept the suggestion by the Higgs that their prior excavation took place at a time when they were the sole owners of the property and should otherwise not be considered. As this matter has been in the Court system since the 1970’s there is little merit in this submission. The interest of Nassauvian, the predecessor of Leshel, has existed since the 1970’s. Likewise, against this background, I did not accept that the disputed complaint that Leshel may have violated the injunction ought to change the outcome.

[37.] In the circumstances therefore, I order that the Property be partitioned as follows:

- (1) The portion of the Property identified as Parcel A or 22.55 acres to the Higgs.

- (2) The portion of the Property identified as Parcel B to Leshel, save for the road reservation at Tonique Williams Darling Highway which shall vest jointly in the Higgs and Neely's. Leshel shall have an easement to use the said road reservation.
- (3) A 9 acre parcel to be further partitioned out of the northern section of Parcel A to Neely's.

[38.] I will fix a directions hearing for 2 December 2024 at 9:00 am for the parties to work out any details arising as a result of this order.

[39.] I am minded to make an order that each party bear their own costs. If either wish to contend for a different order, submissions should be lodged within 21 days. The other side would have 7 days to reply to any such submission if they wish.

Dated this 18th day of October 2024



Sir Ian R. Winder

Chief Justice