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**NOTICE TO PARTIES OF THE COURT'S
MEMORANDUM OF REASONS FOR JUDGMENT**

PARISH COURT APPEAL NO COA2019PCCV00011

BETWEEN	DONALD KING	1ST APPELLANT
AND	LURETTA THELWELL	2ND APPELLANT
AND	CHICKEN MISTRESS LIMITED T/A ISLAND GRILL	RESPONDENT

TAKE NOTICE that this matter was heard by the Hon Mr Justice F Williams JA, the Hon Miss Justice Straw JA and the Hon Mrs Justice V Harris JA on 26 April 2023, with Ms Debby-Ann Samuels instructed by Debby-Ann Samuels & Co for the appellant and Monroe Wisdom and Miss Jaavonne Taylor instructed by Nunes, Scholefield, Deleon & Co for the respondent.

TAKE FURTHER NOTICE that the court's memorandum of reasons as delivered orally in open court on 27 April 2023 by the Hon Mrs Justice V Harris JA is as follows:

[1] Mr Donald King and Ms Loretta Thelwell (the 1st and 2nd appellants, respectively) are appealing the decision of Her Honour Miss Annette Austin (Ag) (the learned judge of the Parish Court) given on 28 February 2019. By that decision, the learned judge of the Parish Court gave judgment for the respondent, Chicken Mistress Limited, trading as Island Grill, and ordered that each party bear their own costs.

[2] On 11 May 2017, Mr King purchased two fish burgers from Island Grill located at Centrepont, Montego Bay, in the parish of Saint James ('Island Grill') and went home. He gave one of the fish burgers to his tenant, Ms Thelwell, who resided in the same house as he did but in separate quarters. While eating, they both realised the fish burgers did not taste good. Within a few hours, they began to experience abdominal pain and diarrhoea, among other things.

[3] The appellants attributed their maladies to the fish burgers since, on their account, neither of them had eaten anything prior to or after having the fish burgers. Accordingly, Mr King returned to Island Grill on 13 May 2017 with a partially eaten fish burger and complained to the shift manager. Four days after consuming the fish burgers, both appellants visited the office of Dr San Lwin due to their continued illness. Upon examining them, Dr Lwin made a provisional diagnosis of acute gastroenteritis.

[4] Subsequently, on 24 January 2018, the appellants filed a claim in the Saint James Parish Court for damages for negligence in the sum of \$1,000,000.00 plus interest and costs. Following the trial of the consolidated claims, the learned judge of the Parish Court made the orders stated at para. [1] above.

[5] The appellants are seeking to challenge that decision on the basis that the learned judge of the Parish Court erred in her determination of the matter since the evidence before her was sufficient to support a finding that the respondent breached their duty to provide food fit for consumption and that breach caused injury to the appellants. Counsel Ms Samuels also argued on the appellants' behalf that their evidence was credible since the inconsistencies in Mr King's testimony were slight, unlike the respondent's evidence.

[6] On the other hand, counsel for the respondent, Miss Taylor, submitted that the appellants failed to prove on a balance of probabilities that the food purchased from Island Grill was the cause of their injuries. Counsel also argued

that the learned judge of the Parish Court treated with the issue of credibility correctly, as there were several inconsistencies in the appellants' case.

[7] In an appeal against the findings of fact by a judge at first instance, this court will only interfere if satisfied that the judge erred in her analysis of the evidence and was plainly wrong in arriving at her conclusion (**Watt (or Thomas) v Thomas** [1947] 1 AC 484 and **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21).

[8] It is well-settled, as observed by the learned judge of the Parish Court, that to prove the tort of negligence, it must be established that a duty of care existed between the parties, the respondent breached that duty, as a result of that breach, the appellants experienced injury or harm, and that the injury or harm was reasonably foreseeable (**Donoghue v Stevenson** (1932) AC 562).

[9] In the instant case, two of those elements were not in dispute, namely that the respondent had a duty of care to the appellants to serve food fit for consumption and that, at the material time, the appellants experienced what Dr Lwin provisionally diagnosed as acute gastroenteritis and the resulting abdominal pains and diarrhoea. Consequently, the learned judge of the Parish Court correctly identified that the only questions for her resolution were whether the respondent breached their duty of care to the appellants and whether that breach caused them the injury or harm complained of. In determining those questions, she considered the issues of causation and credibility, and upon a detailed assessment of the evidence and the authority of **Marvin McCarley and Ellyse McCarley v West Quality Food Service d/b/a Kentucky Fried Chicken** (No.02S01-9610-CV-00085), a case from the Supreme Court of Tennessee in the United States of America, she concluded that the evidence was not sufficient to substantiate the claims. Accordingly, the singular issue for our consideration in this appeal is whether the learned judge of the Parish Court was plainly wrong in arriving at that decision.

[10] The appellants' case was that the fish burgers were either spoiled or improperly prepared. They identified the power outage during the week the food was purchased as a possible reason. However, the learned judge of the Parish Court accepted the evidence of the respondent's witnesses that Island Grill had a generator, which would ordinarily turn on within five minutes of a power outage. Mindful of the inconsistencies in their evidence, she also noted that both witnesses agreed that the generator provided electricity to the refrigerators. She ultimately found that the respondent's evidence was more credible than the appellants.

[11] In an effort to establish the causal link between the consumption of the fish burgers and the symptoms of gastroenteritis experienced by the appellants, the commonalities between them were highlighted. That is, on the day in question, for their first meal, both appellants ate fish burgers purchased from Island Grill, and subsequently, they experienced similar symptoms. Notwithstanding, there were certain deficiencies in the evidence, which the learned judge of the Parish Court identified. For instance, the medical evidence of Dr Lwin was that he was unable to make a final diagnosis of gastroenteritis or confirm that the consumption of the fish burgers was the cause, although it was a possibility. In order to do so, he would have needed to take samples from the food and the patients' stool and have them tested. Regrettably, those tests were not done. We believe another element that significantly weakened the appellant's case was Dr Lwin's evidence that there are several potential causes of gastroenteritis, such as person-to-person contact, interacting with contaminated objects and drinking contaminated water. Those factors, as potential sources of their illness, were not excluded on the appellants' case.

[12] Before concluding, we wish to note that while Ms Samuels sought to distinguish the facts in the present case from those in **Marvin McCarley and Ellyse McCarley v West Quality Food Service d/b/a Kentucky Fried Chicken** (and we agree that there are several distinguishing features), a critical

distinction in the latter case, concerning the issue of causation, was that the plaintiff Marvin McCarley had blood tests or cultures done, which revealed the presence of a bacteria (campylobacter) that could have been in the chicken he had eaten and caused his diagnosed illness of food poisoning. The court also pronounced in **McCarley** that in cases of this nature, "causation may be established by either expert testimony or **through a combination of both expert and lay testimony**" (emphasis added). In the present case, it is a fair observation that the combination of the appellants' and Dr Lwin's evidence was insufficient to establish, on a balance of probabilities, that the fish burgers were the source of their illness.

[13] Having considered the authorities provided by both parties as well as the helpful submissions of counsel, we are of the view that the learned judge of the Parish Court's findings of fact cannot be impugned. Bearing in mind the evidence before her and the advantage she had of observing the witnesses' demeanour, the learned judge of the Parish Court was entitled to conclude that, in the circumstances, the appellants failed to prove on a balance of probabilities that the consumption of the fish burgers resulted in the injury they suffered. For those reasons, the appeal is dismissed, with costs of \$50,000.00 to the respondent.