IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL H-030/1995

BETWEEN	STEPHEN HUDSON	PLAINTIFF
AND	UNITED MOTORS LIMITED	DEFENDANT

Ms. Judith Clarke for the Plaintiff.

Donavon St. L Williams instructed by Chancellor & Co. for the Defendant.

Heard on: 15th and 18th January 2001 and 1st July 2003

Campbell J.

In August 1993 the Plaintiff, a tour bus operator and member of Jamaica Union of Travellers Association (J.U.T.A), purchased from the Defendant, a new 1993 Toyota Coaster. He was a member of J.U.T.A. That organization would order buses on behalf of its membership and was granted duty concessions on the vehicles so purchased. The Plaintiff had been a tour bus operator since 1979.

The purchase of the vehicle was secured by a Promissory Note from the Bank of Nova Scotia in the sum of One Million Six Hundred and Seventy-eight Thousand, Five Hundred and Fifty Dollars and Forty Cents ($1,678,550.40) and was to be repaid by installments in the sum of $34,969.80 per month over a period of forty-eight (48) months.

The Plaintiff testified that all the buses that J.U.T.A. ordered had Air conditioning units in them and that "there was a warranty for all parts for a period of six months or thirty thousand miles. He had not yet "covered 30,000 miles. It was therefore still on guarantee."

The Plaintiff testified that when he collected the bus the air conditioner was functioning. However, on the 16th September 1993, whilst transporting a group of tourist from the Donald Sangster Airport to the Seawind Hotel, the bus became suddenly hot. The Plaintiff said that he continued the journey with the windows opened and after discharging the customers, drove it to a branch of Uni-Motors in Montego Bay the same day.

He testified that he spoke to a Mr. Hall, the Manager who "tried the a/c" and as a result of what Hall said, he took the bus to a Mr. Green, who Hall told him "worked for the Defendant."

He was advised by Green that the bus' expansion valve was blocked. The Plaintiff maintained that Mr. Green only examined the a/c, he never worked on it. As a result of what Green said, the Plaintiff testified that he took the bus back to Mr. Hall, who advised him to take the bus to Uni-Motors in Kingston.

At Uni-Motors, in Kingston, the workmen removed the compressor and the Plaintiff observed some black oil in the compressor. He observed

the Garage Manager pour out the blackened oil and in its stead, "poured fresh oil." He then used a vacuum to blow out the system and fitted and loaded it with gas.

The Plaintiff said he felt it cooling, then it stopped. The oil turned black again. He was advised that they (the Defendants) did not have the expansion valve and when one was obtained, he would be advised. He denied in cross-examination that Mr. Pike had told him that what he (the Plaintiff) had done was in breach of the vehicle's warranty. He did not admit to having taken the vehicle to a non-Toyota trained technician. He insisted that Mr. Hall, the Defendant's agent sent him. He also denied that Pike told him that R 12 gas had been placed in the bus and that he had responded by asking Pike what he Pike could do for him to Green. He denied that he was told that the vehicle would be fixed on the basis that J.U.T.A. was one of their leading customers.

Eugene Pike, the Defendant's Service Manager, testified that he had received specialized training in Japan on Toyota vehicle repair; this included the maintenance and servicing of air conditioning units.

He testified that Northern Industrial Garage (N.I.G) is a sub dealer or agent of the Defendant. He testified that only authorized dealers are allowed

to effect repairs under the warranty. Repairs effected by any unauthorized dealer would be in violation of policy, and the terms of the warranty.

In Montego Bay, the sub-agent is N.I.G., managed by one Norman Hall. N.I.G's role in Montego Bay was to provide service for the customers in that region to facilitate the customer and prevent them having to travel into Kingston. He testified that N.I.G. could not do work on air conditioning, diesel fuel injection pump and injectors. They neither had the facility nor the technicians. He was unable to say however, if the purchasers of vehicles were aware of this restriction on the subagents' service.

Pike said he recalled Hudson returning the bus to his company in September 1993. He said that the workshop manager had brought to his attention the contamination of the air compressor oil. He said the oil was coloured black, and he could see small fragments of rubber within the oil. He testified that he "determined that the system was filled with R 12 gas".

He said that the 1985 Protocol had identified R 12 gas as being responsible for the depletion of the ozone layer and HFC 134A was identified as its replacement.

The HFC 134A gas was being introduced in the Toyota line for the first time in 1993. There was a label stating type of gas as HFC 134A on the driver's door. It was also in the engine and over the cone of the compressor.

Pike said he expected that the gas that came with the new vehicle would last for one to two years. There is a heavy residue caused by HFC 134A gas, if the car is parked for two to three weeks. This residue would cause a noise to be generated from the compressor if the vehicle is then started and accelerated.

The Court finds that there was not one scintilla of evidence that the vehicle had been so parked, and it is unlikely that the vehicle which had already gone for its first servicing before the expiration of a month had been idle for two weeks. The commitment to meet his monthly payments at the bank would militate against the Plaintiff leaving the vehicle idle for such a long period.

Pike said that the contamination could only have been caused by the introduction of R 12 gas into the system. He came to this conclusion because there was no other material there. Pike said that the Plaintiff had met him in the workshop and he asked the Plaintiff, who had put in R 12 gas and he said he had taken the bus to a man in Montego Bay. Pike said he told the Plaintiff that this could not be covered by the warranty. The Plaintiff, according to Pike then asked, "What can you do for me?"

The Plaintiff has denied that this conversation took place. In any event, this is not inconsistent with what the Plaintiff say happened, save and

except that Mr. Green, to whom the bus was taken, was on the evidence of the Plaintiff, taken on the direction of the defendant's agent N.I.G. The Court did not have the benefit of hearing from Mr. Hall who, from Pike's evidence, is still the Defendant's agent. Neither have we seen the agency's agreement to see if such a direction, if it did happen, is inconsistent with the agency's agreement.

Pike did not conduct any test to determine whether R 12 gas had been introduced and relied solely on the fact that the rubber had disintegrated. He offered as an explanation as the cause for the new air conditioning unit malfunctioning, the depletion of the gas. He testified that he would deduce that from the air condition blowing of hot air. This gas, on his own evidence, should have lasted two to three years. The gas had been depleted. He had no way of knowing if the manufacturers had sufficient gas in.

There is no explanation on Pike's evidence for the initial breakdown of the air conditioning unit. Why should a motorcar just weeks old malfunction in the first instance? Even if it had been parked for two to three weeks (and I have found that it had not been so parked), the resulting disability would have been a noisy compressor, not a failure of the air conditioning unit to cool. There was no evidence of a noise from the compressor before the unit stopped cooling. Mr. Pike did say that leakage of

the gas could cause it to stop cooling. In re-examination, he said such a leak would be identified by a leak detector. What then on Mr. Pike's evidence could have caused this 'brand new vehicle' to malfunction. He says that manufacturer's defects are possible, but pre delivery procedure would detect such a defect. It is unchallenged that the vehicle malfunctioned, in the order of things 'brand new vehicles' that are still within the warranty period are not expected to malfunction in this fashion. Res ipsa locquitur.

The Plaintiff unchallenged evidence that the vehicle's a/c malfunctioned in the manner it did has cast the evidential burden upon the Defendant, which he has not discharged. Moreover, the Defendant's conduct in repairing the air conditioning unit is more consistent with the Plaintiff's claim of a defect identified as being in accord with the warranty than with a customer who had breached the warranty as the Defendant asserts.

Pike's conclusion that R 12 gas has been introduced is devoid of scientific support or any objective test. He offers no evidence to justify his claim that R 12 gas was introduced. Neither is there a satisfactory explanation tendered for the contamination of the oil after pure oil was inserted by the Defendant's a/c repairman. Why did Pike allow pure oil to be introduced and the a/c restarted if it was he was sure that the rubbers had

been eroded by the R 12 gas? I find that the malfunctioning of the air conditioning unit on the 16th September 1993 was due to the Defendant having sold to the Plaintiff a unit "not equipped with a new air conditioning unit in good condition and without defects."

The Plaintiff's evidence is that with a proper functioning air conditioning unit, he could get tour jobs to pay him $8,000 per day. Those jobs he gets on Thursday, Saturday and Sunday – cruise ships days. He says without the air conditioning unit, he does not get tour jobs. He says he pays statutory deductions and taxes and that the earnings he stated are net. He is in fact a member of J.U.T.A. and pays a membership fee to that organization. The Defendant has contended that, other than his oral testimony, there is no support for his claim of loss of income. He provided the Court with no proof of his earnings. Although recognizing that notwithstanding the absent or lack of strict proof of loss of income there are a line of cases which holds that in certain circumstances, a Court may still make a reasonable award. Harris v Walker SCCA 40/90, delivered on 10th December 1990 and Walters v Mitchell (1992), 29 JLR, where Wolfe J. said:

> "That there was nothing vague about the evidence, neither can it be said that it was quite impossible to calculate the damages."

In this case, although it is difficult to calculate the Plaintiff's loss, his evidence is quite clear; calculation of loss is not an impossibility.

The measure of his loss may be arrived at by determining his average income. The difference between the maximum of $8,000 with a functioning air conditioning unit on the three cruise days and the average of $3,500, (when he is forced to resort to "flat-foot Jamaicans"), that is [$8,000 x 3 + (3,500x4)] ÷ 7 = $5,400 per day. The loss would therefore be computed at $5,400 for days when the entire income was loss and $2,000 for the partial loss days.

The award is in relation to the period ending 4th November 1995.

For five days to September 30, 1993	$2,000x5 = $10,000	
September 30 –		
October 1 – November 3, 1993	$(2,000x34)	$ 68,000
Four days in November 1993 (full loss)	(5,400x5)	$ 27,000
November 28, 1993 – January 29, 1994	(2,000x86)	$172,000
Four days between January 29, 1994 and February 2, 1994	(5,400x4)	$ 21,600
TOTAL		$298,600

Interest at 3% from 3rd February 1994 to July 2000, thereafter 6% to 1st July 2003.

Cost in accordance with schedule A of the Judicature Rule of Court (Attorneys' fees and costs) Act.