Hyundai Merchant Marine Co. Ltd. v Furness Withy (Australia) Pty [2005] Int.Com.L.R. 05/20

JUDGEMENT : Mr. Michael Crane Q.C. : Commercial Court. 20th May 2005

Background

1. This is a dispute about the meaning and effect of an *"off hire"* clause in a single trip time charter.

2. The vessel in question, the Doric Pride, was hired by the Claimants ("Charterers") from the Defendants ("Owners") under a charter-party dated 30th January 2004 on the NYPE form with various amendments and additional clauses. The agreement was for:
"… one time charter trip via safe anchorage(s), safe berth(s), safe ports always afloat, always Institute Warranty Limits from US Gulf to South Korea with bulk grain, duration of about 65-75 days without guarantee …"

3. On 2nd February 2004 the Charterers instructed the Master to proceed to New Orleans to load a cargo of 45,000 m.t. +/- 10% soybeans for carriage to Inchon and Jinhae in South Korea. On 4th February 2004 the vessel was delivered to the Charterers upon dropping her last outward sea pilot at Hartlepool. On the same day the vessel's agents in New Orleans, Maritime Endeavors, asked the vessel's managing agents whether this was her first trip to the United States indicating that, if it was, they anticipated that the vessel would be designated a *"High Interest Vessel"*, with the result that she would be prevented from entering port until such time as the US Coast Guard had conducted a security boarding. In fact the vessel had been built comparatively recently during 2001 and this was her first trip to a United States port.

4. "High Interest Vessel" was a designation under security procedures introduced in the United States following the attack on the World Trade Center. After the attack the Marine Transportation Safety Act of 2002 was enacted to protect the ports and waterways of the United States from terrorism. Under the Act the United States Coast Guard (USCG) was required to develop a risk based system for evaluating the potential for security violations in US waters. In response, in December 2003, the USCG published Navigation and Inspection Circular 06-03 entitled "*Coast Guard Port State Control Targeting and Boarding Policy for Vessel Security and Safety"*. This circular used the term High Interest Vessel "to describe a commercial vessel intending to enter a US port that may pose a high relative risk to that port". Various matrices were established to assist in assessing the level of risk posed by a given vessel but in any specific instance the decision to board and inspect was a matter for the Captain of the Port or his staff. The reason for any individual decision, and the intelligence data on which it is based, always remain classified. However, the evidence, to which I will return later and as to which there was no material dispute, suggested that, at the time in question, the policy at US Gulf ports, perhaps particularly at New Orleans, was to board and inspect vessels that were first time callers to the United States.

5. On 17th February 2004 the Master of the Doric Pride gave his ETA at the South West Passage to New Orleans as 1430 hours on 20th February. On 19th February 2004 the Master was notified by telex from the USCG that:
"THE COAST GUARD HAS TARGETED YOUR VESSEL AS A HIGH INTERST VESSEL. YOUR VESSEL IS PROHIBITED FROM ENTERING THE LOWER MISSISSIPPI RIVER AND IS DIRECTED TO SOUTHWEST PASS NW APPROACH SAFETY FAIRWAY, POSN 28 DEG 35 'N, 089 DEG 'W AND WILL REMAIN THERE UNTIL FOUND SATISFACTORY BY A COAST GUARD BOARDING TEAM"

   The telex went on to explain that the order had been given under regulations *"promulgated within the territorial waters of the United States*" and described the various sanctions, including forfeiture of the vessel, exercisable in the event of non compliance. When this telex was received the vessel was not in fact within US territorial waters; nor, apparently, was the location to which she had been directed to await inspection within US territorial waters.

6. At 20.00 hours on 19th February a collision between two vessels caused an oil spill which led to the closure of the Mississippi between miles 125.5 and 75. It is common ground on the evidence that this event would not have prevented the vessel from proceeding as had been planned prior to receipt of the USCG inspection order.

7. On 20th February 2004 at 09.20 hours the vessel arrived at the location designated by the USCG for her to await inspection. At that stage it appears to have been anticipated that the inspection would take place during the following day. What happened, however, was a serious collision between two vessels at about 05.00 hours on 21st February which led to the closure of the Southwest Pass from about 06.00 hours on that day. The river was not reopened until 1300 hours on 25th February 2004. Shortly after the collision on the morning of 21st February the vessel was directed by the USCG to move from her original waiting location to await inspection at the Southwest Pass anchorage.

8. It is common ground that, had the vessel not been awaiting inspection, she would have been able to proceed upriver to her loading berth, but the effect of the second collision would have been to delay her passage down river from that berth.

9. Another consequence of this second collision was that the available resources of the USCG were engaged in a search and rescue operation and connected matters. The result was that inspection of the Doric Pride was delayed until 26th February when it was successfully completed at 12.45 hours and the vessel was thereupon cleared to proceed up river to her loading berth. Progress was then further delayed by the queue of shipping that had formed while the river had been closed.

The Issues

10. Clause 85 of the charter-party provides as follows:
"Capture, Seizure Arrest

Should the vessel be captured of [sic] seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended until the time of her release, and any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for Owners account, unless such capture or seizure or detention or arrest is occasioned by any personal act of [sic] omission or default of the Charterers or their agents or by reason of cargo carried or calling port of trading under this charter."

11. The first question is whether the vessel was *"detained"* within the meaning of this clause while awaiting inspection by the USCG. Mr. Philip Edey, who represented Charterers, contended that she was detained between 09.20 hours on 20th February 2004 when, in compliance with the USCG order she arrived at the first of the two designated waiting locations, until 12.45 hours on 26th February when the inspection was completed. Charterers' case, therefore, is that the vessel was off hire during this period. The hire for the period in question has been placed in an interest bearing escrow account pursuant to clause 66 of the charter-party to await the outcome of this dispute. There is no claim for extra expenses incurred as a result of the "*detention*".

12. In contrast, Mr. Nigel Cooper, who appeared for the Owners, contended that the USCG's order to proceed to a designated location to await inspection did not give rise to a detention of the vessel. Although the order prevented her from proceeding on her course, it did not, it was said, prevent her from turning around or from sailing anywhere else outside US territorial waters. The vessel was not within US jurisdiction, that is to say, US territorial waters, when the order was received. Accordingly the vessel could, in theory, have turned back albeit not consistently with Owners' obligations under the charter-party. The prohibition against entering the Mississippi river was an impediment to proceeding, but it did not prevent the vessel from leaving; and some such constraint on movement is intrinsic to the meaning of detention, especially when the word appears in conjunction with, and takes its flavour from, "*capture*", *"seizure"* and "*arrest*". All these words connote a constraint on movement inconsistent with this vessel's ability to turn back in the face of the USCG's direction.

13. Owners go on to say that, even if, in principle, the USCG order could have detained the vessel by preventing her from proceeding on her course, it was the closure of the Mississippi following the second collision, not the action of the USCG in prohibiting her from proceeding which, at least from the time when the river was closed, was the effective impediment to progress. Thus, at least from the time when the river was closed, there was no "detention" by the USCG. I should say that it is common ground that, if the vessel was so detained, the detention was by an "authority" or as a result of "legal process" within the meaning of clause 85.

14. Owners also contend that even if the vessel was detained within the meaning of clause 85, on the facts the clause 85 proviso applies, because the detention was caused by Charterers' order to proceed to and load cargo at New Orleans and was thus "occasioned by … [a] calling port of trading under this charter".

15. Finally Owners argue that if they are wrong thus far and the vessel was off hire during the period in question, they can recover the hire lost by way of the indemnity to be implied in the time charter against any losses or expenses incurred by Owners in complying with the directions of Charterers. In this context, as in relation to the proviso to clause 85, the relevant direction was Charterers' order to proceed to New Orleans.

Detention

16. Was the vessel detained? Owners argue that the vessel was able to turn back and go away in the face of the USCG's prohibition against entering the Mississippi river without first submitting to an inspection; and this freedom, they say, is inconsistent with the element of confinement intrinsic in "detention". This argument has a strong intuitive appeal; but it is clear on authority that, in the context of a charter-party, a vessel is detained when, as a result of some geographical or physical constraint upon her movement, she is prevented from proceeding as directed under the charter-party. If there is some physical or geographical constraint on a vessel's movement which prevents her from proceeding on the course directed by charterers, the fact that she is not prevented from proceeding elsewhere does not negate "detention". As Mr. Justice Kerr held in ***The Mareva A/S.*** [1977] 1 Lloyd's Rep. 368, when considering the meaning of "detention by average accidents to ship or cargo" in clause 15 of the NYPE form: *"I think that it is intended to refer to some physical or geographical constraint upon the vessel's movements in relation to her service under the charter."* [page 382]

    Thus whether or not the vessel's movements are confined depends upon her ability to proceed as directed under the charter, not upon her freedom of movement in a less specific sense.

17. In ***The Jalagouri*** [1999] 1 Lloyd's Rep. 903, Mr. Justice Kerr's definition was applied in a context which required circumstances amounting to detention to be distinguished from those merely causing delay. The reasoning, therefore, is particularly relevant in the present case. ***The Jalagouri*** also concerned the interpretation of special clauses in a time charter on the NYPE form. Under clause 53 of that charter, time lost by reason of the vessel being detained or delayed by any authority was to be treated as off hire. Under clause 72, should the vessel be detained at any port or place, owners were to provide security to effect her release. The requirement to put up security was triggered only by detention or threatened detention and not by circumstances causing mere delay to the vessel. During discharge at Kandla the port authority ordered the vessel from her discharging berth until security was put up for the costs of storing and removing from the port area part of the cargo already discharged, which had been found to be damaged. The vessel was prohibited from returning to her berth until security had been put up. Arbitrators held that, although delay had been demonstrated within the meaning of the off hire clause, Owners were not required to put up security because that requirement was only triggered by detention, and in the circumstances it could not be said that the vessel had been detained.

18. On appeal Mr. Justice Rix, citing Mr. Justice Kerr in ***The Mareva A/S.,*** held that the vessel had been detained notwithstanding that she was not prevented from leaving port because the geographical constraints placed on her movements by the port authority prevented her from carrying out the service required under the charter-party. She could not return to her discharging berth. The circumstances also fell within some of the meanings of detention included in the Oxford English Dictionary, namely, "To *keep from proceeding, to keep waiting: to stop.*" [page 906]. Accordingly, the fact that the vessel was free to leave port did not preclude a finding of detention.

19. The judgment and reasoning of Rix J. were upheld on appeal to the Court of Appeal where Tuckey L.J. saw no reason why the word *"detained"* should be given a restricted meaning and said this:
"Applying the OED definition to the facts of this case: until security was provided the vessel was not permitted to stay at her berth; she was kept from proceeding with her discharge and was sent out to the anchorage; she was kept waiting there outside her berth; she was stopped. This amounted to a physical and geographical constraint upon the vessel's movements in relation to her service under the charter." [2000] 1 Lloyd's Rep. 515, at 519.

20. If the reasoning in ***The Jalagouri*** is applied to the instant case the result must be the same. The Doric Pride was kept from proceeding to her loading port; she was sent to wait at a specific location; she was kept waiting there for about six days; she was stopped. This amounted to a constraint upon her movements in relation to her service under the charter. Subject to the causation question raised by Owners, the vessel was detained within the meaning of clause 85.

21. It is common ground that when the detention by the USCG commenced the Doric Pride's passage up the Mississippi was unimpeded. It is said, however, that from the time when the river was closed on the morning of 21st February, following the serious collision earlier that morning, the vessel was no longer detained by the USCG, because from then on the effective impediment to her proceeding in accordance with the charter-party was the river closure and the effects on shipping caused by the closure. Had the vessel not had to await inspection, the closure of the river would not have interrupted her passage up river to her loading berth, but it would have delayed her passage down river after loading.

22. Were clause 85 a net loss of time clause under which it was necessary to calculate the time lost in net terms as a result of the detention (as distinct from other factors) the extent to which the vessel's progress would have been impeded without the intervention of the USCG might have been a relevant enquiry. But this is a period off hire clause under which, once the commencement of a detention has been established, the vessel remains off hire as long as it lasts. After 09.20 hours on 20th February the vessel remained detained by the USCG (that is to say kept waiting for inspection by the USCG) until 12.45 hours on 26th February. The fact that, had she been released from detention during that period, she would have been unable to proceed or would have been delayed for some other reason, is not relevant. Clause 85 states that should the vessel be detained the payment of hire shall be suspended until the time of her release. It does not require an enquiry into the progress the vessel would have made or delays she would have encountered but for the detention.

The Provisos to Clause 85

23. In ***Royal Greek Government v Minister of Transport*** [1948/9] Lloyd's Rep. 196 Lord Justice Bucknill described as a "*cardinal rule*" of interpretation the proposition that the charterer will pay for the hire of the ship unless he can bring himself clearly within the exceptions (page 199). Clause 85 of the time charter is one such exception and, as I have held, subject to the application of the provisos, on the facts Charterers have brought themselves clearly within it. In contrast, by the end of the hearing before me, it had become common ground that, once Charterers had demonstrated that the vessel had been detained, the onus of proof as to whether the provisos applied was upon Owners. This was certainly the view of Rix J. in ***The Jalagouri*** as is evident from the dictum at page 909 of the report at the top of the right hand column.

24. Whilst there was agreement on burden of proof there was no consensus as to the proper approach to interpretation. Owners argued that, as clause 85 was an exception to the cardinal rule that hire is payable throughout the time charter, any ambiguity in the meaning of the clause, including as to the provisos, is to be resolved against Charterers. In contending for such an approach they derived support from the judgment of Staughton L.J. in ***The Berge Sund*** [1993] 2 Lloyd's Rep. 453 in which it is apparent that a distinction was made between interpretation of the meaning of an off hire clause, where ambiguities are to be resolved against charterers, and the onus of proving facts that fall within the clause. As to the latter, once charterers have clearly demonstrated circumstances that fall within an exception to the requirement to pay hire, it is for owners to prove that one or other of the provisos to that exception is applicable. This is the approach both as to construction and onus of proof that I have sought to follow. However, as to construction, I ought to say that I have treated the proposition that ambiguities are to be resolved against Charterers as somewhat of a last resort "default rule". Although interpretation of the relevant parts of the provisos to clause 85 has not been easy, I have been able to reach a conclusion as to its meaning without recourse to this rule.

25. The difficulties in interpreting the provisos to clause 85 largely derive from the use of classic time charter clauses in what is essentially a voyage charter transaction. The result is something of a hybrid, or at least a contract in which there is tension between the type of commercial relationship contemplated by the legal terms and that actually transacted. The form of the single trip time charter with which I am concerned is largely back to back with the two 3 year time charters that overlie it, both of which were fixed on the NYPE from with amendments and additional clauses in most, but not all, respects identical to those in the single trip time charter. Thus on 10th

October 2003 the vessel had been time chartered for 3 years by Ocean Pride Navigation Inc. to A. Oetker KG on the NYPE form and on the same day sub chartered on essentially the same terms, save as to hire, by Oetker to the Defendants. Clause 85 is common to all three charter-parties. In contrast, the charter-party that underlies the single trip time charter with which I am concerned, under which the Charterers let the vessel as disponent owners to Shindongbang Corporation Inc., is in form as well as in commercial reality a voyage charter.

26. The purpose of clause 85 in a classic time charter setting is fairly clear. In such a transaction the vessel will come under the direction of charterers for an extended period. Charterers will typically assume a wide ranging discretion as to the manner in which the vessel trades: this may extend to the nature of the cargoes loaded as well as the identity of the ports to be visited. In return for submitting the vessel and her master to the directions of charterers, the owners, either expressly or by implication, ordinarily obtain an indemnity against the losses or expenses they incur as a result of complying with charterers' instructions. The implied indemnity against losses caused by complying with orders and directions given by charterers to the vessel's master under clause 8 of the NYPE form is a well recognised example of this.

27. The proviso to clause 85 fits fairly comfortably into this sort of context. Thus, in principle, if the vessel is arrested or detained by any authority or legal process the risk is for the owners and she comes off hire while the arrest or detention lasts. But if the arrest or detention turns out to have been occasioned by an act or omission of the charterers or those for whom they are responsible (the first limb of the proviso) hire remains payable. Similarly, if the arrest or detention is shown to have resulted from the cargo carried or a "*calling port of trading*" the vessel remains on hire: the nature and condition of the cargo carried along with the identity of the ports visited for trading purposes are, in a classic time charter context, within the discretion and control of charterers and thus, in the context of an off hire clause such as this, are taken to be their responsibility. In these respects the proviso to clause 85 seems to me to reflect and reinforce the indemnity to be implied against losses incurred by complying with charterers' orders and directions under clause 8 of the NYPE form.

28. But in a single trip time charter the role of the *"calling port of trading*" proviso is much less clear, or at least its scope for application is much less apparent. Here the charter-party itself provided for a voyage from the US Gulf to South Korea with a cargo of bulk grain to be loaded at a US Gulf port. Accordingly, the vessel's proceeding to a US Gulf port for the purposes of loading bulk grain was not the result of the exercise of some trading discretion reserved to charterers: on the contrary it was the subject of mutual agreement recorded in the charter-party. Thus features characteristic of the US Gulf ports generally, including the legal regime common to such ports, are taken to involve risks to which Owners assented in contracting to undertake carriage of cargo from the US Gulf to South Korea. On the other hand, within the description *"safe anchorage, safe berth, safe port … US Gulf"* there is a limited choice of loading port reserved to Charterers. Were the detention in question to be shown to have been the result of some feature of the legal regime or process or of some propensity of the authorities peculiar to the port selected by Charterers within the description *"US Gulf",* the proviso to clause 85 might well be triggered.

29. On this analysis the meaning of clause 85 and its proviso is consistent with that which it bears in the overlying time charters, but, given the nature of the voyage transacted under the single trip time charter, the scope for application of the proviso is, necessarily, much more limited. I see nothing surprising in this.

30. Thus I accept Charterers' argument that exposure to the regulations or to the legal regime common to US Gulf ports is a risk which Owners are taken to have accepted in contracting, albeit on time charter terms, to carry cargo from the US Gulf to South Korea. Conversely, I reject the argument advanced on behalf of Owners that the express contractual provision for loading bulk grain in the US Gulf was akin to a charterers' nomination of calling port under clause 8. Charterers nominated New Orleans as the loading port (an option that was open to them within the designated range within the description "US Gulf") but they did not nominate the US Gulf: that was a matter of mutual prior agreement.

31. It is also apparent that, in so far as the detention can be shown to have been caused by Charterers' nomination of New Orleans, as distinct from some other Gulf port, I see no reason in principle why the proviso to clause 85 should not bite. Accordingly I reject Charterers' secondary argument that a detention occasioned by *"calling port of trading"* in the proviso to clause 85 can only refer to a detention attributable to the vessel having previously called at a particular port, that is to say, to a detention resulting from a previous call at a port of trading. In my view there is nothing in the language of the proviso that supports a limited construction of this sort nor is there any justifying commercial rationale. Once one accepts, as I have done, that *"detention*" in clause 85 may mean prevention from entering a port as well as confinement at a port or other location, there is no reason why a prohibition against entry imposed by the authorities at a loading port, should not trigger the proviso to clause 85 if shown to be attributable to Charterers' nomination of that port.

32. Does the evidence demonstrate that the detention of the vessel by the USCG was the result of Charterers' nomination of New Orleans as the loading port? In my judgment it does not. The regulations and legal powers under which the USCG acted were common to all US Gulf Ports and indeed to the United States generally. The risk that the vessel might be subject to a security boarding under these regulations involved a risk of detention to which Owners are taken to have assented in contracting expressly for carriage from the US Gulf. This was a generic feature of US ports rather than a peculiarity of New Orleans. In no sense can this risk and its consequences be said to have arisen from Charterers' nomination of New Orleans.

33. I accept on the evidence that any decision to target a vessel and to board is made by the Captain of the Port or his staff and thus depends upon a local exercise of discretion. It also seems probable on the evidence (although ultimately it remains a matter of speculation) that this vessel was stopped simply because she was a first time caller to the United States. The evidence on this was summarised as follows by Captain Katsaros, the managing director of the vessel's local agents in New Orleans:

"It has also been my experience of vessels calling at U.S. Gulf ports and in particular at New Orleans, since the September 11th terrorist attacks in 2001 that first time vessel callers to the United States are designated HIV."

This is consistent with other evidence called by Owners, particularly that of Captain O'Brien who had 32 years' service in the USCG. It seems that while the policy of inspecting first time callers to the United States is by no means specific to New Orleans the particular security threat posed by inland ports means that the New Orleans COTP has a reputation for being particularly active in inspecting vessels. Very sensibly, given the sums of money at stake and the broad consensus on the evidence, live witnesses were not called and I was asked to determine the matter on the basis of the witness statements. The effect of that evidence was that the vessel was probably stopped because she was a first time caller to the United States, and, in so far as there was a USCG policy of inspecting first time callers, the policy was general to Gulf ports rather than specific to New Orleans. If this is right the vessel would probably have been stopped at any Gulf port on her first visit to the United States albeit inspection might be regarded as even more likely if New Orleans is the nominated port.

34. All this falls far short of demonstrating the necessary causal link between the nomination of New Orleans, as distinct from some other Gulf port, and detention by the USCG. In my judgment the evidence leads to the conclusion that the risk of boarding and inspection by the USCG under laws enacted after the World Trade Center attack was a risk general to any vessel calling at any U.S. Gulf port, particularly if she was calling at a U.S. port for the first time. This risk did not flow from an act or omission of Charterers or from their nomination of a particular loading port. It was a risk inherent in the voyage agreed in the single trip time charter.

Implied Indemnity

35. Clause 8 of the NYPE form provides for the captain to be under the orders and directions of the charterers as regards employment and agency. It was confirmed by the Court of Appeal in ***The Island Archon*** [1994] 2 Lloyd's Rep. 227 that, in a typical time charter relationship, business efficacy will ordinarily require the implication of an indemnity in favour of owners against loss incurred by complying with charterers' orders and directions; and that this will be the case notwithstanding that charterers have acted lawfully under powers conferred by the time charter in giving the order or direction in question. The indemnity will not, however, extend to cover risks which the owners have agreed to run, and what risks owners have agreed to run will depend upon the true construction of the charter-party and its application to the particular circumstances of the loss. At page 236 of his judgment in ***The Island Archon*** Evans L.J. said this:

"Secondly, the loss although a consequence "in a broad sense" (Wilford p. 241) may have arisen from a risk which the shipowner has agreed to run, hence the exclusion of navigation risks and also the distinction which has been held to exist between time and voyage charter-parties (per Mr. Justice Devlin, in ***The Ann Stathatos*** *and and Mr. Justice Mustill, in* ***The George C. Lemos*** *…). This does not mean that a rigid distinction between time and voyage charters must always be made. If the question is whether the shipowner has accepted the risk to which in the event the vessel has been exposed, there could be voyage charters giving the charterer a wide range of options to choose a cargo or port where it would be "reasonable" for the shipowner to expect the indemnity to apply, and conversely, time charters with a narrow range e.g. charters for the period of a specified voyage or "trip" where it would not."*

36. The criterion for applying the implied indemnity to single trip time charters is of obvious relevance in the instant case. Whether the implied indemnity extends to the risk in question depends upon a construction of the charter-party directed to revealing whether it was a risk which the shipowner agreed to run. In single trip time charters "*with a narrow range*" the trading discretion reserved to charterers is correspondingly narrow and the scope for operation of the implied indemnity against losses caused by compliance with charterers orders is, accordingly, much less. Thus where, in a single trip time charter, the loading ports have been agreed and identified within a narrow range, the general risks ordinarily associated with the range of ports in question are likely to be regarded as risks which the owner has agreed to run under the charter-party. In this case, therefore, by agreeing to carry cargo from the U.S. Gulf, Owners agreed to run the risk of being stopped for inspection under whatever laws applied generally to US Gulf ports. Such a risk was an ordinary incident of trading at the range of ports in question.

37. The implied indemnity on which Owners rely cannot apply so as to reverse an allocation of risk agreed expressly in the charter-party. If, as I have held, in the circumstances in question clause 85 expressly allocates the risk of detention to Owners, an implied indemnity cannot operate so as to reimburse Owners in damages what they have lost in hire. It is axiomatic that there is no scope for implying a term in a contract where the implied term would be inconsistent with a term expressly agreed by the parties. On my findings as to the meaning and operation of clause 85 that would be the position here were I to have accepted Owners' argument.

Conclusion

38. The result is that Charterers are entitled to a declaration that the vessel was off-hire between 09.20 hours on 20th February 2004 and 12.45 hours on 26th February 2004. Charterers are also entitled to be paid out of the escrow account the sum of U.S.$ 257,732.77 along with any interest accrued on that sum.

Philip Edey (instructed by Holman Fenwick & Willan) for the Claimant
Nigel Cooper (instructed by Bentleys Stokes & Lowless) for the Defendant