# CASE NOTES

## DOCKERS' LABOUR CLUB AND INSTITUTE LIMITED v. RACE RELATIONS BOARD[1]

For the second time in twenty months, the House of Lords has reversed an unanimous Court of Appeal by narrowly construing section 2(1) of the Race Relations Act 1968,[2] holding that this piece of anti-discriminatory legislation was not intended to penetrate the hallowed sanctuary of the Englishman's club.

In February 1973 in *Charter v. Race Relations Board*,[3] the House of Lords overturned the Court of Appeal and held that the East Ham Conservative Club could legally refuse to admit an Indian to membership as it did not provide facilities to 'a section of the public'. Their Lordships reasoned, that read as a whole, the statute did not apply to domestic situations and that the Club was simply a collection of private persons and that there was no public element.

In October 1974 the House of Lords has again reversed the Court of Appeal in *Dockers' Labour Club and Institute Limited v. Race Relations Board*.[4] Mr Sherrington, a coloured man, was a member of a Working Men's Club which, with 4,000 other clubs in Great Britain, was affiliated to the Working Men's Club and Institute Union Limited. These clubs had some three and a half million members and in time any member could become an associate of the Union, and thus be entitled to use the facilities of any of the affiliated clubs. Mr Sherrington, along with over one million fellow Britons, was an associate, and in 1970, after being admitted to the Dockers' Club on production of his associate member's card was refused a drink and asked to leave as the Club had a committee rule which refused to serve coloured people. The Court of Appeal held that in accepting associates the Dockers' Club could no longer regard itself as a private body. Lord Denning said simply that 'Here numbers count' and that it seemed to him that a group of a million associates is 'a section of the public'.

[1] [1974] 3 W.L.R. 533.

[2] Ch. 71 of 1968 hereinafter referred to as 'the Act'. Section 2.(1) reads as follows:

2.(1) It shall be unlawful for any person concerned with the provision to the public or a section of the public (whether on payment or otherwise) of any goods, facilities or services to discriminate against any person seeking to obtain or use those goods, facilities or services by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public.

Discrimination is defined in section 1.(1) as follows:

1.(1) For the purposes of this Act a person discriminates against another if on the ground of colour, race or ethnic or national origins he treats that other, in any situation to which section 2, 3, 4 or 5 below applies, less favourably than he treats or would treat other persons, and in this Act references to discrimination are references to discrimination on any of those grounds.

For an interesting account of the history of this and earlier Race Relations Statutes see Lester A. and Bindman G., *Race and Law* (1972).

[3] [1973] A.C. 868 reversing *Race Relations Board v. Charter* [1972] 1 Q.B. 545.

[4] Reversing *Race Relations Board v. Dockers' Labour Club and Institute Limited* [1974] Q.B. 503. For an interesting discussion of these two cases see Griffith J., 'Judges, Race and the Law', *New Statesman* (London), 22 November 1974.

The House of Lords, relying on *Charter* unanimously held that associates were not 'a section of the public' within the meaning of the Act. The layman might assert that this is a concerted effort by the House of Lords to protect the privacy of the Pall Mall Clubs and therefore deliberately to narrow the scope of the Race Relations Act, 1968. As lawyers we cannot be a party to such assertions. Nevertheless, we do realise that by using well known canons of statutory interpretation, it is possible plausibly to assert that it was the will of Parliament that the provisions of the Race Relations Act, 1968 were not intended to apply to private clubs, however large their membership. This is in fact what the House of Lords has done. However, the fact remains, that it is also possible to argue, as did the Court of Appeal, without in any way narrowing the ratio of *Charter*, that by voluntarily participating in a scheme whereby more than one million associates were free to pass through its doors, the Club had removed itself from the private and domestic sphere and was providing services to 'a section of the public'.

It is worthwhile examining the reasoning of some of their Lordships to see why they chose the narrower of the two interpretations. Lords Reid and Diplock delivered the two main speeches and Lords Simon of Glaisdale and Kilbrandon were content to concur. Viscount Dilhorne delivered a speech substantially agreeing with Lords Reid and Diplock.

Lord Reid began by pointing out that there had never been any doubt that the Act did not apply to discrimination in the domestic sphere. *Charter's* case showed that where there is a genuine selection process a club will be taken to be within the private sphere. But it is not only where there is a process of selection that a club is within the private sphere. Just as a father who does not select his children's guests may nevertheless not go outside the private sphere even when he discriminates against any one of the guests, so certain clubs may remain within the private sphere when they discriminate against persons whom they have had no choice in selecting either because they are guests of members or associate members. Finally, Lord Reid felt that the attendance of associates did not in any way alter the private character of the club. In answer to Lord Denning's assertion that 'numbers count' Lord Reid said that the fact that a million associates could come if they wanted to was 'too theoretical to be of any importance'.

After discussing the attitude to discrimination of the common law courts in medieval times, Lord Diplock brought the whole problem into the twentieth century by saying that 'the arrival in this country in recent years of many immigrants from disparate and distant lands has brought a new dimension to the problem of the legal right to discriminate against the stranger'. Lord Diplock then went on to point out that the legal process could not effectively eliminate discrimination and any forceful attempt to do so would interfere with the freedom to order one's private life as one chooses. 'No one has room to invite everyone to dinner' said Lord Diplock and 'the law cannot dictate one's choice of friends'.

If as we have seen there are two plausible ways of interpreting section 2 of the Act and neither way can be taken to be an abrogation of the parliamentary legislative intention, how ought a court to proceed in such a matter? In weighing possible interpretations of statutory language a court ought to turn its mind to the immediate and long term effects of its decision, especially when interpreting legislation which has a wide social impact. We believe, for three reasons, that the House of Lords took the wrong fork in the road when they narrowly construed the Race Relations Act, 1968.

First, such clubs, as the Dockers' Club or East Ham Conservative Club are usually licensed and thus under law have a privilege to sell liquor. Indeed, without a license to sell liquor very few such clubs would exist. Furthermore, the proliferation of such clubs in a defined area may diminish the number and variety of other licensed premises in the district, thus reducing the recreational choices of those discriminated

against.[5] Clubs which seek legal advantages such as licenses to sell liquor ought not to be regarded as being within the private sphere.

Secondly the members of such clubs, (though perhaps not in the case of the Dockers' Club) may obtain valuable business and social advantages which will be denied to those minority groups unable to become members on racial grounds. Thirdly, as most clubs are licensed it is difficult to see why they should be treated as a private household. Let us emulate Lord Reid and turn our minds once more to the domestic scene. If a father offers a glass of whisky to his ten year old son in his own living room the law will not intervene. But suppose a wayward father takes his son to a club like the Dockers' Club and asks the barman to give the child a glass of whisky, the law most certainly would intervene and the licensee would have committed an offence against the Licensing Act. Is it not reasonable to suggest therefore that licensed premises are essentially within the public sphere.

It should be added, however, that not all the law lords took the narrow view which has been the subject of our criticism. Indeed, in *Charter*, Lord Morris of Borth-Y-Gest delivered a powerful dissenting speech which makes his absence from the bench in the *Dockers'* case all the more regrettable. It is also unfortunate that the subtle intellect of Lord Wilberforce did not have a chance to explore the problems inherent in *Charter's* case and in *Dockers'* case.

Furthermore the British Government has recently made it clear that it is unhappy with the restrictive interpretation of the Act by the law lords. In a White Paper presented to Parliament in September, 1975[6] the government argued that most recreational clubs should be unable to discriminate on racial grounds for the following reasons:

> The Government considers that it is right that all clubs should be allowed to apply a test of personal acceptability to candidates for membership, but it considers that it is against the public interest that they should be entitled to do this on racial grounds. The Government believes that the relationship between members of clubs is no more personal and intimate than is the relationship between people in many situations which are rightly covered by the 1968 Act; for example, the members of a small firm or trade union branch, children at school, or tenants in multi-occupied housing accommodation. In principle it is justifiable to apply the legislation in all these situations because of the inherently unjust and degrading nature of racial discrimination and its potentially grave social consequences. In practice the objectives of the legislation will be seriously undermined if its protection does not extend beyond the work-place and the market-place to enable workers and other members of the public to obtain entertainment, recreation and refreshment together on the basis of equality, irrespective of colour or race.
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> The Bill will therefore make it unlawful for a club or other voluntary body to discriminate as regards the admission of members or the treatment accorded to members. Subject to this the Bill will not, of course, affect the right of such a body to withhold membership or facilities from someone who does not qualify for them in accordance with its rules. Small voluntary bodies will be exempted from this provision so as to avoid interference with the kind of regular social gathering which is genuinely private and domestic in character. In addition, there will be an exception to enable bona fide social, welfare, political and sporting organisations whose main object is to confer benefits on a particular ethnic or national group to continue to do so.[7]

Legislation which attempts to penetrate the confines of clubs and associations will, of course, create complex problems in the balancing of public and private rights. We believe that the British Government's proposals are fair and reasonable. One may be

[5] The British Government when examining discrimination in licensed clubs in its recent White Paper argued that: 'In some towns they have replaced public houses as the main providers of facilities for entertainment, recreation and refreshment', *Racial Discrimination* (H.M.S.O., London, 1975, Cmnd. 6234), para. 72, p. 18.

[6] *Racial Discrimination* (H.M.S.O., London, 1975, Cmnd. 6234).

[7] *Ibid.* para. 72-3, p. 18.

inclined to tolerate, as a private household, an ethnic club which has only say one hundred members, but when a club such as the Dockers' club has a potential patronage of one million members, discriminatory practices on the basis of colour will deprive those discriminated against of valuable social and business advantages.

The Australian Government has recently enacted the Racial Discrimination Act 1975,[8] s. 13 of which makes it unlawful to discriminate on racial grounds in the provision of goods or services 'to the public or to any section of the public'.[9] If liberally interpreted it is arguable that s. 13 could very easily embrace licensed premises particularly in the case of Australian clubs with such large potential patronage as the Working Men's Club & Institute Union Limited. However, it is likely that the Australian courts would follow the lead of the House of Lords and hold that licensed clubs are within the private and domestic sphere.

At present the British Government is preparing to amend its Act to legislatively reverse the decision in the *Dockers'* case. Though it is usually inadvisable to amend recently enacted legislation before it has been interpreted by the courts, we believe that the Australian Act should be promptly amended to make it clear that its provisions apply to large clubs (which receive licensing and other privileges), thus preventing them from practicing the archaic and morally indefensible practice of racial and ethnic discrimination.

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## RILEY v. PENTTILA[1]

In this case Gillard J. had occasion to consider the nature of an easement, and the concepts of adverse possession and abandonment as such are applicable to land registered under the Transfer of Land Act 1958.

On a plan of subdivision a number of allotments backed onto and surrounded a common area known as 'Outlook Park Reserve'. A right to use and enjoy the reserve 'for the purposes of a recreation or a garden or a park' was expressly granted to each transferee of the lots by the registered proprietor of the reserve and original subdivider. In 1967, thirty nine years after all the allotments were transferred by the subdivider, the defendants[2] purchased lot No. 36, and in 1971 commenced an

[8] Act No. 52 of 1975. See also Prohibition of Discrimination Act, 1966-70, (S.A.). The weaknesses of the South Australian legislation are discussed by Ligertwood A. in Nettheim G. (ed.) *Aborigines, Human Rights and the Law* (1974) p. 23-7.

[9] Section 13 of the Act reads as follows:

13. It is unlawful for a person who supplies goods or services to the public or to any section of the public —

(a) to refuse or fail on demand to supply those goods or services to another person; or

(b) to refuse or fail on demand to supply those goods or services to another person except on less favourable terms or conditions than those upon or subject to which he would otherwise supply those goods or services,

by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person.

See Evans G., 'New Directions in Australian Race Relations Law', (1974) 48 *Australian Law Journal* 479, 484.

[1] [1974] V.R. 547. Supreme Court of Victoria. Gillard J.

[2] Mr and Mrs Penttila, registered joint proprietors of lot No. 36 of Plan of Subdivision No. 6665 lodged in the Office of Titles.