

IN THE HIGH COURT OF AUSTRALIA

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WESTERN CINIMAS PTY. LIMITED

V.

WESTVIEW (DUBBO) PTY. LIMITED  
AND OTHERS

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## REASONS FOR JUDGMENT

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Judgment delivered at Sydney  
on Thursday, 7th November, 1968

WESTERN CINEMAS PTY. LIMITED

v.

WESTVIEW (DUBBO) PTY. LIMITED  
AND OTHERS

ORDER

Order granting special leave to appeal  
rescinded. No order as to costs.

WESTERN CINEMAS PTY. LIMITED

v.

WESTVIEW (DUBBO) PTY. LIMITED  
AND OTHERS

JUDGMENT

BARWICK C.J.  
McTIERNAN J.  
KITTO J.  
WINDEYER J.  
OWEN J.

WESTERN CINEMAS PTY. LIMITED

v.

WESTVIEW (DUBBO) PTY. LIMITED  
AND OTHERS

This appeal is brought by special leave from an order of the Court of Appeal Division of the Supreme Court discharging a rule nisi for mandamus in the following circumstances.

On 30th September 1965 the appellant, the applicant for the rule, applied under s. 9(1)(a) of the Theatres and Public Halls Act, 1908 to the Under Secretary of the Chief Secretary's Department for a licence "for a drive-in theatre to be erected" on certain land near Dubbo and "intended to be used wholly or mainly for the purpose of exhibiting cinematograph films". A statutory declaration made in support of the application stated that the appellant was the equitable owner of the land the subject of the application.

Part II of the Act contains ss. 5 to 22 and, by s. 9(1)(a) it is provided that such an application may be made by the "owner or lessee of a theatre or public hall" and that "the Minister may . . . issue a license under this Act in respect of the same". Part IIA of the Act, which was added by Act No. 38 of 1954, provided, by s. 22A(2), that the provisions of the Act should apply, mutatis mutandis, "to and in respect of drive-in theatres", and, by s. 22A(4), that references in the Act to theatres and public halls should include drive-in theatres. By s. 5 "the Governor may, by proclamation in the Gazette, apply the provisions of" Part II "to such theatres and public halls as may be named therein, or as may be situate within the localities named or described therein" and the Part is to apply only to such theatres and public halls.

The facts are that on 30th June 1965 the appellant

had entered into a contract to purchase the land in question from its then owner. The land contained about eleven acres and formed part of a farming property on which stood some farm buildings. On 30th September 1965, the date of the application for a licence, the purchase had not been completed by transfer. The application having been made, it was referred by the Minister, under s. 13D(3), to the Theatres and Films Commission, a body constituted under the Cinematograph Films Act, 1935-1938. The Commission, in accordance with s. 13D(4)(a), notified by advertisement the fact that the appellant's application had been referred to it and objections to the granting of the application were lodged by the respondent Company and others under s. 13D(5)(a). On 9th December 1966, after the procedures prescribed by s. 13D(8) had been followed, the Commission determined that the application should not be granted. The appellant appealed against that determination to the District Court under s. 13D(11) and the appeal came on to be heard by Newton D.C.J. The only question argued before his Honour was whether the appellant was, at the date of its application for a licence, an "owner" within the meaning of s. 9(1)(a). The learned District Court Judge ruled against the appellant and held that its application for a licence was invalid. Accordingly he dismissed the appeal. A rule nisi for mandamus was thereupon obtained and, on the application to make the rule absolute, the sole question raised was whether the learned District Court Judge had erred in law in holding that a purchaser under a contract of sale which has not been completed by transfer at the date of his application for a licence, was not an "owner" within the meaning of s. 9(1)(a). The Court was of opinion that the decision of Newton D.C.J. was correct and discharged the rule nisi. It was to test the correctness of this decision of the Court of Appeal that special leave was granted.

The proceedings in the District Court, in the

Supreme Court and in this Court on the application for special leave to appeal were conducted throughout upon the assumption that at all relevant times there was in existence a proclamation by the Governor under s. 5 of the Act applying or purporting to apply the provisions of Part II either to the land in respect of which the appellant sought to obtain a licence or to the "locality" in which that land lay. In the course of the argument before us, however, questions were raised by members of the Court whether ss. 5 and 9(1)(a) were not limited in their operation to cases in which the application was made by the owner or lessee of an already existing theatre or public hall. In the course of the discussion that followed we were referred to the case of Ex parte Epler 11 S.R. (N.S.W.) 209 in which Cullen C.J., with whom Sly J. agreed, had held that under s. 5 the Governor might, by proclamation, apply Part II of the Act to theatres and public halls to be erected as well as to those already in existence. The reference to this decision led the Court to ask counsel what were the terms of the proclamation which, as it was then thought, had been made relating to the land the subject of the appellant's application under s. 9(1)(a) and counsel for the appellant told us that a copy of the proclamation would, if possible, be obtained and furnished to the Court. It appears that the solicitor for the appellant thereupon made enquiries from the Chief Secretary's Department and in the result, and with the consent of all parties concerned, the Under Secretary of that Department sent to the Registrar of the Court a letter in the following terms:

"Dear Sir,

WESTERN CINEMAS PTY. LIMITED RE WESTVIEW (DUBBO)  
PTY. LIMITED & ORS. - FULL COURT No. 101 of 1967

In response to a request made by Mr. David Moore, the Solicitor for Western Cinemas Pty. Limited as to whether 'a proclamation has been made by the Governor under section 5 of the Theatres and Public Halls Act, 1908, as amended, in respect of land owned by Western Cinemas Pty. Limited and described in a certain license

application made by Western Cinemas Pty. Limited on 30th September, 1965 as "off Newell Highway, Dubbo" (being the land in the Parish of Dubbo, County of Gordon, being part of Portion 20 and part of Portion 21 containing 11 acres or thereabouts and being part of the land in Certificate of Title Volume 5640 Folio 5) or in respect of any drive-in theatre proposed to be erected on such land, I desire to advise that no such proclamation has been issued.

Attention is drawn to the fact that section 5 provides that the Governor may, by proclamation in the Gazette, apply the provisions of Part II of such Act to such theatres and public halls as may be named therein, or as may be situated within the localities named or described therein.

The practice of the Department is to issue proclamations in respect of each theatre or public hall and I am unaware of any instance in which a proclamation has been issued as applicable to theatres and public halls in a locality.

Yours faithfully,

(Sgd.) A. G. Kingsmill

Under Secretary. "

In these circumstances the question of the meaning of the word "owner" in s. 9(1)(a) does not arise for decision nor is it necessary to consider whether the view expressed in Epler's Case (supra) is correct. We think, however, that it is proper to say that the terms of Part II of the Act give rise to a number of difficult questions of construction and appear to stand in need of legislative attention.

In the circumstances we are of opinion that the order granting special leave to appeal should be rescinded and no order as to costs should be made.