IN THE TENANCY TRIBUNAL) NO TT 122 of 1996
AT CANBERRA IN THE)
AUSTRALIAN CAPITAL TERRITORY)

APPLICANT:

JUAN CARLOS CABRERA

RESPONDENT:

LEDA COMMERCIAL PROPERTIES PTY LTD

Decision of President John Burns on the 25th day of November 1996

This is an application by Juan and Lisa Cabrera for relief pursuant to the provisions of the Tenancy Tribunal Act 1994 (the Act). Mr Cabrera occupied premises within the Tuggeranong Hyperdome, conducting a business known as "Flakey Jakes". Mr Cabrera and one Anamarie Rozas purchased that business from the previous occupant of those premises, Mr Salvatore Costanzo. The Deed of Consent to Assignment of Lease refers to Mr Cabrera and Ms Rozas as the "new tenants" Mrs Cabrera is not referred to on any of the lease documentation. The respondent company, the lessor of the premises in question, has taken no point on this discrepancy, and nothing appears to turn upon the fact. However, wherever I refer to "the applicant" I am referring to Mr Cabrera.

The Hyperdome is a large shopping mall in the southern district of Canberra. Within the Hyperdome the applicants business was conducted from an area referred to as the "Food Court", being a large open area in which a number of takeaway food outlets were concentrated.

HARSH AND OPPRESSIVE CONDUCT

The dispute referred to the Tribunal by the applicant is based upon the jurisdiction given to the Tribunal pursuant to section 6(1)(b) of the Act to hear claims alleging that a party to a lease has engaged in harsh and oppressive conduct.

The Code in clause 13 provides that parties to a lease shall not behave in a harsh and oppressive manner towards each other. Section 54 of the Act gives the Tribunal power to make any order necessary to enforce the Code.

The term "harsh" received some judicial consideration in A & M Thompson Pty Ltd v Total Australia Ltd (1980) 2 NSWLR 1. That decision considered the provisions of section 88F of the Industrial Arbitration Act 1940. (NSW - now repealed). That section gave power to the then Industrial Arbitration Commission to set aside any contract or arrangement whereby a person performed work in any industry on the grounds that the contract or arrangement was unfair, or harsh or unconscionable. The majority of the Industrial Commission stated in respect of the words "unfair", "harsh" and "unconscionable":

"It has been said that these words are a 'tautological trinity': Davies v General Transport Development Pty Ltd (1967) AR(NSW) 371, but we prefer to take the view that there is a perceptible difference between the meaning of the term 'unfair' and that of the terms 'harsh' and 'unconscionable'. What is unfair may not be so unfair as to be 'harsh'."

It will be observed that section 88 F of the Industrial Arbitration Act incorporates the terms "unfairness" and "harsh" as a test to be applied by the Commission. As both terms are used in section 88F of the Industrial Arbitration Act, it is clear that the legislature intended that the two words be given different interpretations. Thus except in so far as the meaning of the word "harsh" may incorporate the concept of unfairness, the decision in Thompson Pty Ltd v Total Australia Ltd must be approached with some care.

The Oxford English Dictionary defines "harsh" as, inter alia,: "repugnant or roughly offensive to the feelings; severe, rigorous, cruel, rude, rough, unfeeling". In my opinion the term "harsh" as used in the Tenancy Tribunal Act and Code refers to conduct which could be characterised as "severe". The term "severe" imports by necessity some degree of unfairness. The term "harsh" in the Act and the Code refers to a significant degree of unfairness going beyond what is required to protect any legitimate interest of the party whose conduct is the subject of the application.

In so far as the term "harsh" imports a quality of unfairness into the character of the conduct complained of, I respectfully adopt the comments of their Honours Perrignon and Dey JJ, the majority of the Industrial Commission in the case of Thompson at page 13:

"It has been said that fairness is determined by the common sense approach of a jury man, and that it is a moral and not a legal issue (Davies Case). Whether this be so or not, it does seem that, in distinguishing between what is fair and what is not fair, the judge must apply standards which appear to him to provide a proper balance or division of advantage and disadvantage between the parties who have made the contract or arrangement. In doing so, he would always have to bear in mind the conduct of the parties, their capabilities to appreciate the bargain which they had made and their comparative bargaining positions when entering into the contract or arrangement."

The comments by their honours were, of course, made in the context of legislation dealing with employment arrangements. In respect of the Tenancy Tribunal Act and the Code I would add that the Tribunal in

determining whether conduct is "harsh" will have regard to ordinary commercial standards, that is whether the conduct complained of is ordinary and usual in respect of the relationship between the parties.

It is not enough that the conduct be harsh it must also be oppressive. The term "oppressive" is one which is directed at the results of the conduct. The Oxford English Dictionary defines "oppressive" as, inter alia,: "unjustly burdensome". Thus conduct will be "oppressive" if it results in an "unjust burden" being placed upon a party to a lease.

Conduct will therefore usually be described as "harsh and oppressive" if it is significantly unfair or severe on a party to a lease, resulting in an unjust burden to that party, and in circumstances in which such conduct goes beyond what is required to protect the legitimate interests of the party whose conduct is complained of. In applying this test the Tribunal will apply the standards of ordinary commercial practice, as well as considering issues relevant to each particular case.

THE DISPUTE

The applicant's contention, as I understand it, is that the respondent engaged in harsh and oppressive conduct towards him by allowing competing businesses to operate at the Tuggeranong Hyperdome, which undermined the viability of his business. It is alleged that the respondent's conduct in allowing the competing businesses to operate in opposition to the business of the applicant was, in the special circumstances of the market at the Hyperdome, in contravention of the provisions of the Commercial and Retail Leases Code of Practice (the Code).

It was not easy to ascertain from the applicant which of the businesses that were operating at the Hyperdome were the subject of the complaint. The businesses that were most frequently referred to were "Hungry Jacks", "Stockmans", "Muffin Break" and "Ali Babas".

"Hungry Jacks" is a national chain selling a limited selection of mass produced hamburgers and assorted accompaniments, such as French fried potato chips, drinks etc. "Muffin Break" is a national chain specialising in the sale of muffins, cakes, biscuits etc and drinks, including hot drinks. Stockmans is also a national chain selling pies, burgers, steak sandwiches, hot roast rolls, cakes, biscuits etc and drinks. "Ali Babas" is a national chain specialising in Lebanese food, but in the Hyperdome also selling some Mexican food lines.

The history of the applicant's tenancy is that Mr Cabrera and his then partner commenced occupation of the premises known as "Flakey Jakes" in the Hyperdome on or about 1 August 1994 as a result of an assignment to them of the lease to the previous tenant Salvatore Costanzo. The Deed of Consent to Assignment of Lease (the Deed) is dated 1 August 1994 and is signed by both Mr Cabrera and his then partner. Their signatures are witnessed by Mr Mark William Underwood, a Barrister and Solicitor in the employ of Ryans Barristers and Solicitors of Tuggeranong. Mr Cabrera gave evidence that before he signed the Deed of Consent to

Assignment of Lease he had independent legal advise from Mr Underwood, and understood the terms of the Deed, and his obligations as a tenant.

Clause 3.1 of the Deed provides:

> "3.1 The New Tenant agrees to comply with all the Tenant's obligations under the Lease from and including the Effective Date to and including the date of expiration of the Lease or any period of holding over, extension or renewal as the case may be as if the New Tenant had been named in the Lease as the tenant."

The lease referred to in that clause provided that the tenant may only sell foodstuffs that have been agreed between the lessor and the lessee in the lease agreement. Such an agreement had been reached between the applicant and the respondent and was Annexure "A" to the Deed. The contents of that list of foodstuffs which the parties agreed the applicant would offer for sale was referred to as his "usage" or "list of usage".

The lease which was assigned to the applicant contained clauses governing the use of the leased area. Clause 5.01 and 5.02 of the lease provided:

> "5.01 PERMISSIBLE USE - The Lessee shall not use the Demised Premises or any part thereof or permit the same to be used for any purpose other than the purpose identified in the Reference Schedule hereto without the prior consent in writing of the Lessor which consent may be granted or refused or granted subject to conditions at the discretion of the lessor. The Lessee will not permit the demised Premise to be used for any residential purpose.
>
> 5.02 NO EXCLUSIVE USE - The right to conduct a business of the kind referred to in the proceeding clause is not exclusive to the Lessee and the Lessor may permit other persons to conduct in or from the Centre such businesses as it thinks fit notwithstanding that any such businesses are similar in whole or in part to the business permitted to be conducted in the Demised Premises."

The applicant Mr Cabrera did not deny that he was aware of those clauses and their meaning at the time he signed the Deed. It is no part of the applicant's case that these clauses are illegal or in any other way void or voidable. It is not any part of his case that the applicant did not appreciate the nature or meaning of the document he was executing.

In a document entitled "Application and Preliminary Questionnaire to Lease Retail Premises/Transfer of Lease" dated 16 May 1994 and provided to the respondent and completed by Mr Cabrera (annexure C to the affidavit of Gregory Joseph Adcock sworn 23 may 1996) the following questions were asked, and answers by Mr Cabrera recorded:

"4. FULL DESCRIPTION OF PRODUCTS TO BE SOLD:

Fish, Chips, Salads, Soft Drinks & Mexican Food & All Seafood

.....

14. STATE WHAT YOU FEEL THE "POINT OF DIFFERENCE" IS THAT YOUR BUSINESS WILL OFFER OVER OTHER BUSINESSES OF A LIKE NATURE ALREADY OPERATING IN THE CENTRE:
Unique Service Fish & Chips"

Prior to executing the Deed the proposed list of items which the applicant was to offer for sale was amended to include "Tuna Pie, Tuna Mornay, Coleslaw Salad, Seafood Salad and Burritos". This amendment probably occurred as a result of a letter from the applicant's then solicitors to the respondent (Annexure F to the affidavit of Gregory Joseph Adcock sworn 23 May 1996). That letter is significant because it discloses to the respondent the proposed nature of the business to be run by the applicant. The letter reads, in part:

> "Our client's intention was always to set up a Mexican food and seafood business. Under the present schedule the only Mexican food that they would be permitted to sell would be nachos and two varieties of Mexican pies. Our clients are concerned that they would not be able to hold themselves out as a Mexican food shop with any credibility unless some further items are added to the schedule."

Thus whilst the initial proposal by the applicant was to run a "fish and chips" shop with other lines such as Mexican food, by July 1994 the applicant's plan, as communicated to the respondent, was to operate a "Mexican food and seafood business". The respondent accommodated the applicant's plan by agreeing to the amendments to the list of usage referred to. It is not suggested that any other business plan was ever communicated to the respondent. In my opinion this, in itself, is sufficient to dispose of the aspects of the applicant's case alleging that the respondent was acting in a harsh and oppressive manner by allowing businesses such as "Hungry Jacks", "Muffin Break", "Ali Baba" and "Stockmans" to trade in competition with the applicant. None of the businesses complained of could be conceived of as trading in direct conflict with a Mexican food and seafood business.

I propose however to deal with the applicant's contentions more fully

REPRESENTATIONS

It was the applicant's case that even though he knew that exclusivity over any particular food line was not guaranteed under the lease, he was under the impression that the respondent would not allow any "crossing over" of lines between lessees within the food hall, or between lessees in the Food Court and those within the Hyperdome but outside the Food Court.

Mr Cabrera in his statement dated 11 September 1996 referred to a conversation between himself and Mr Sinclair, the then Centre Manager of the Hyperdome. The date of the conversation is not deposed to, but it must have occurred prior to the applicant executing the Deed of 1 August 1994, as the conversation refers to the amendments to the list of usage (Annexure A) to that Deed. In his statement Mr Cabrera described the conversation in the following terms:

> "I approached Mr Sinclair and discussed with him my plans for increasing my usage to include the Mexican dishes. He said words to the effect of
>
> > 'You should submit a menu and I'll talk to the other tenants to see if they have a problem. I can't see a problem but you may be limited to nachos and burritos, because Mr Spuddy already sells tacos and chilli con carne. You can't cross over with anybody else.'"

In addition Mr Cabrera stated that when he was negotiating to purchase the business then owned by Mr Costanzo he was "advised" by Mr Sinclair, and it was his "clear understanding" that "with some minor exceptions (two coffee shops on different levels of the Hyperdome) the Food Court was the only place where food was to be sold".

Mr Sinclair, who is now employed by Colonial Mutual Life Assurance as a Property Manager, denied ever saying anything to Mr Cabrera along the lines alleged by Mr Cabrera. In addition he detailed a number of establishments outside the Food Court area who were retailing "fast food" or "ready to consume" food at the time Mr Cabrera was negotiating to purchase the business. During the hearing of the matter some time was taken attacking Mr Sinclair's credit on the basis that many of those establishments did not sell "fast food" in the sense of hamburgers, chips, pies etc. In my opinion this cross examination was misconceived. The evidence was called to rebut the allegation by Mr Cabrera that he understood that the Food Court was "the only place where food was to be sold". Even if one assumes that Mr Cabrera meant to refer to "fast food" only, any establishment that markets "ready to consume" food items is in the market place competing with Mr Cabrera. A person purchasing a tub of ready made fruit salad from the deli counters at Coles and eating it in the Hyperdome is a purchaser in the "fast food" market as much as a person purchasing a hamburger, fish and chips or some other item from a food retailer in the Food Court. As such the implied assertion by Mr Cabrera that he was lead to believe that there would be no competition in the fast food market outside the Food Court is simply untenable.

I am not persuaded that Mr Sinclair made any representations to the applicant as alleged. In fact I consider it unlikely in the circumstances that such representations would have been made.

THE PROPOSED SALE TO WONG

Mr Cabrera has alleged that the respondent acted in a harsh and oppressive manner in either unreasonably failing or refusing to approve Mr Andy Wong as a purchaser of his business, or in obstructing the progress of that proposed sale to the extent that it did not proceed. These allegations are inextricably linked with one of Mr Cabrera's ultimate contentions, that the respondent was intent upon forcing him out of business as it wanted to replace individually owned businesses in the Hyperdome, and in particular in the Food Court, with franchises or national chains.

Mr Cabrera alleged that in or about November 1994 Mr Craig Day replaced Mr Sinclair as Centre Manager and called all Food Court shop owners to a meeting. It is alleged that at that meeting Mr Day said: "All I want in this Centre is franchises. I am going to start with the Food Court and work our way around the Hyperdome".

Mr Cabrera further alleged that: "In or about February 1995 another major franchise trading as 'Hungry Jacks' opened up outside the Food Court ...". He then alleged that "as a direct result of this business opening our gross sales dropped dramatically". The applicant alleged that "At about the same time as 'Hungry Jacks' opened" (ie, on the applicant's evidence February 1995) Mr Day called him into the Centre Managers Office and said:

> "Your takings are low, its just a matter of time before you go broke, why don't you surrender your lease".

Mr Cabrera stated that prior to "Stockmans" opening in or about July 1995 he spoke to Mr Day about what "Stockmans" were proposing to sell. He stated that Mr Day said:

> "You don't have to worry, nothing is going to cross your lines."

However Mr Cabrera states that when "Stockmans" opened they sold numerous items such as steakburgers, hamburgers, chips and wedges that directly crossed his usage.

Then in or about November 1995 a new business called "Ali Baba" opened within the Food Court, replacing a previous Lebanese food shop called "Magic Lantern". "Ali Baba" included tacos, nachos and burritos on their menu. According to Mr Cabrera this had a further immediate negative impact upon his sales and profitability.

It was against this background that in November 1995 Mr Cabrera commenced to look for a purchaser for his business. During that month he was introduced to Mr Andy Wong. After negotiations Mr Wong agreed to buy the applicant's business for $80,000. Mr Wong proposed to conduct a business selling Asian curries.

Mr Wong then commenced negotiations with the management of the respondent with respect to the menu for his proposed business. I do not propose setting out in detail Mr Wong's version of those negotiations, nor Mr Adcock's, which differed considerably from that of Mr Wong. Mr Wong believed that he had "in principle"

approval of his new menu from Mr Day, only to find that Mr Adcock did not agree when he replaced Mr Day. Further Mr Wong believed that he was ultimately rejected as a proposed purchaser of the applicant's business on "trivial and unreasonable grounds".

In my opinion it is clear even on Mr Wong's version that negotiations with the respondent never progressed beyond a preliminary stage. Mr Wong never presented the respondent with finished architect drawings of the front of his proposed business. Nor, in my opinion, did he pursue the respondent with any great vigour to settle the issue of an appropriate menu. His application did not even reach the stage of providing financial details to the respondent.

It is most unlikely, in the light of subsequent events, that the respondent had any reason to deal with Mr Wong's application on anything other than an ordinary commercial basis. The simple fact is that the premises formerly leased by the applicant was subsequently leased to another person who now operates a business known as "The Curry House", selling many of the lines proposed by Mr Wong. The Curry House is neither a franchise nor a national chain. The owner of the Curry House has one other business, in Belconnen.

Thus, logically the only reason why the respondent would have refused to approve Mr Wong as a tenant would have been for a reason other than the unacceptability of the proposed concept of a curry outlet or the fact that Mr Wong was not proposing to open a "franchise" or a national chain outlet. It is difficult, on Mr Cabrera's case, to see any other alternative than it being part of a deliberate attempt by the respondent not only to force Mr Cabrera out of the Food Court, but also to destroy the business. The difficulty with this hypothesis is that no motive whatsoever has been alleged by Mr Cabrera for any animosity to exist toward him by the respondent or any of its employees.

I do not accept that Mr Wong was unreasonably refused approval by the respondent to purchase the business of "Flakey Jakes".

COMPETITION

As a general proposition there can be nothing wrong with the owner of a shopping mall allowing competition between retailers within the mall. Indeed there are likely to be many benefits to the public and to the retailers themselves from such competition. As a further general proposition I see no reason why the owner of a shopping mall should not have the right to lease premises in the mall to any tenant it choses. There can be nothing wrong with a mall owner leasing premises to a tenant whom the owner considers will maximise the rental return for the premises and enhance the attractiveness of the mall as a whole to the public. I see nothing in the Tenancy Tribunal Act 1994 nor in the Commercial and Retail Leases Code of Practice to the contrary.

However, all general propositions may need to give way to specific situations where facts may exist which render the actions by the mall owner harsh and oppressive in respect of either an individual tenant or a group of

tenants. It is neither desirable nor possible to attempt to fully categorise such situations, but they would include situations where representations were made to the tenant or tenants about material issues such as the level of competition that would be allowed into the mall if the tenant entered into a lease at an above market rental. There may well be many other examples which could be postulated.

For the reasons I have already given I do not accept that any representations were made to Mr Cabrera that he would have exclusive use of any of the items on his list of usage, nor do I accept that he was told that no fast food outlets would be allowed outside the Food Court.

What other circumstances are there then within those raised by Mr Cabrera that are alleged to make the introduction of competitors into the mall harsh and oppressive conduct on the part of the respondent?

Firstly it is alleged that the positioning of competitors outside the Food Court resulted in decreased "traffic flow" through the Food Court, resulting in loss of business to the applicant. Frankly the evidence does not support that proposition. In any event such an action could only be even arguably harsh and oppressive if some representation had been made to Mr Cabrera that competitors would not be allowed outside the Food Court. As indicated, I do not accept that any such representation was made.

Secondly it is alleged by Mr Cabrera that at the same time as the respondent was introducing competitors into the mall it "continued to increase our rent beyond the market rent and well beyond our means to meet the increases". (Statement of Juan Cabrera dated 11 September 1996, paragraph 23). Mr Cabrera here raises two issues ie. the level of rental paid to the respondent and the number and size of rental increases.

In fact there were only two rental increases during the applicant's occupation of the subject premises, and on the evidence each was strictly in accordance with the lease agreement between the parties.

The only evidence that the rental under the lease was above market levels, aside from the assertions of the applicant, was found in a report from Mr H. P. Street, the Director of Client Property Services for J.C.Service Pty Ltd, Property Consultants and Development Manager. That report also contains material that the applicant contends supports the proposition that introduction of competition within and outside the Food Court was "harsh and oppressive". In his report dated 30 August 1995 Mr Street makes the following comments:

(a) the Food Court is too large for the volume of traffic generated;
(b) the proliferation of food outlets outside the Food Court does not auger well for the Food Court;
(c) "it would appear that the rental passing is now in excess of the true market rental".
(d) that the rental and costs "currently passing" represents 41.84% of turnover which was "well in excess of the suggested turnover figure in the lease which applies in respect of turnover rent, namely 15%".

(e) that the introduction of "Stockmans" and "Hungry jacks" has resulted in a downturn of turnover for the applicant;

(f) that the placement of ready to eat food outlets outside the Food Court is "poor practice" and does not show support of a centralised Food Court.

Based upon his opinions it is Mr Street's view that the open market value of the premises as at 1 November 1994 would be less than the original rent of $52,000 and should be less "to reflect the introduction of new competition outside the confines of the Food Court". Mr Street places that value at $40,000 per annum.

A number of factors negatively affect the credibility of Mr Street. During cross-examination Mr Street represented to the Tribunal that he did not understand what was meant by a "formal valuation" when it was suggested to him that his report of 30 August 1995 was not a formal valuation. He was forced to resile from that position when Mr Purnell referred him to his addendum report of 28 October 1996 which states, in reference to his earlier report: "Ms(sic) Adcock noted that our valuation is not a formal valuation but an opinion of rental value at a point in time, this is correct". His explanation, ie. that all valuations are opinion, was not convincing.

The statement by Mr Street that, referring to his calculations of the rental and associated costs as constituting 41.84% of the plaintiff's average monthly turnover, "this is well in excess of the suggested turnover figure in the lease which applies in respect of turnover rent, namely 15%..." is mystifying. His statement appears to postulate some form of equivalence between the percentage fixed for turnover rent and the annual rental figure as applied from time to time in accordance with the lease agreement between the parties. Nothing could be more inaccurate. The lease between the parties sets a minimum annual rent for the first year of the lease ($52,000). Alternatively, if 15% of the applicant's gross receipts for that year exceeds the figure of $52,000, then the tenant agrees to pay the lessor that higher amount. There is no warrant at all for attempting to equate the turnover rental percentage for the purposes of turnover rent with the percentage of rent and associated costs to actual turnover. Such a comparison is meaningless.

Mr Street was unable to produce any figure or statistics for rentals for comparable properties to support his opinion. Also, no statistics, figures or studies were produced by Mr Street to establish what was the "volume of traffic" generated by the Food Court, in which case it is difficult to understand how he can conclude that the Food Court is "too large" for that volume.

In addition Mr Street's assertion, not supported by any form of empirical evidence, that placing ready to eat food outlets outside the Food Court is not customary and constitutes "poor practice" is refuted by the evidence submitted to the Tribunal by Mr Adcock in his affidavit of 8 October that this is precisely what occurs at Bankstown Square, Westpoint Blacktown, Westfield Burwood and Westfield Chatswood in Sydney, and at Westfield Belconnen, Woden Plaza and the Canberra Centre in the Australian Capital Territory.

Much cross-examination was directed towards Mr Adcock suggesting that the purpose of clause 5.01 of the lease is to protect the tenants' business from competition. This was based upon a complete misconception of the lease and that particular clause. The purpose of clause 5.01 is to ensure the attractiveness of the mall as a whole to the public and to retailers who are tenants, or prospective tenants, in the mall. This is merely a variety of "lease purpose" clause, which is common to many leases. The purpose of such clauses is invariably to protect the lessor, not the lessee. As noted earlier, it was not suggested that the inclusion of that clause in the lease was in any way improper.

The list of usage agreed between the parties may be varied with the consent of the parties. In an ordinary street-front environment where, for reasons of competition, the lessee of premises finds his or her business to be uncommercial they may change the nature of their business or the lines offered for sale. This may require the consent of the lessor depending upon the nature of any lease purpose clause involved. In that respect I can see no marked difference between a street-front tenancy and the present case. There is no evidence that the applicant ever formally proposed to the respondent a charge in the nature of his business, to make it more competitive.

I am not persuaded that the level of rental agreed between the applicant and the respondent was significantly, if at all, above the market rental for the premises. In that respect it is also important to note that when the premises were relet by the respondent, it was at a higher rental than had been agreed between the respondent and the applicant. There is simply no evidence that the number of rental increases was anything other than as agreed between the parties.

EFFECT OF COMPETITION

Even if the Tribunal were to accept that the leasing by the respondent of premises to "Hungry Jacks", "Stockmans" and "Ali Babas" was, in the circumstances, capable of constituting harsh and oppressive conduct on the part of the respondent, there is still an issue as to whether the decline in the applicant's business can be connected to that conduct.

Much discussion during the formal hearing of the matter centred around the sales figures for "Flakey Jackes". Based upon those sales figure I am satisfied of the following matters:

(a) that the business during the period that it was conducted by the applicant never achieved the level of turnover achieved by the previous owner/s;
(b) that turnover for the business fluctuated widely from month to month;
(c) that between August 1994 and April 1996 (ie 21 months) in only 3 months did the applicant record an increase in takings over the same month for the preceding year, with the average decrease in monthly turnover in the remaining months being 27.41% from the turnover of the same month for the preceding year, and

(d) that the trend for turnover of the business was down over the period.

It was initially the applicant's assertion that "Hungry Jacks" had commenced operations in the mall in February 1995, having an immediate dramatic effect upon his trading. In fact "Hungry Jacks" did not commence sales, due to fitout problems, until May 1995. The figure for turnover in May 1995 of the applicant's business shows a reduction from the same figure for the proceeding year, but by virtually half the average figure for the 21 months period referred to. And in July and August 1996 the applicant achieved increases on turnover from the same months of the proceeding year (8.5% and 11.08% respectively). It is significant to note that July 1995 was also the month in which "Stockmans" commenced operations.

It would be naive to suggest that the introduction of "Hungry Jacks" and "Stockmans" could have had no effect on the applicant's business. But in so far as they enhanced the attractiveness of the mall as a whole and attracted more customers to the mall, there were potential benefits for the applicant. It would not be uncommon for some members of a family, for example, to want to eat a "Hungry Jacks" hamburger, whilst other members may prefer fish and chips, or even a non-mass produced hamburger.

The figures show a reduction in trading. Based upon them alone, however it is impossible to lay that reduction at the door of the respondent.

SUMMARY AND CONCLUSION

The Tribunal does not accept the proposition that representations were made to the applicant by employees of the respondent that he would have some degree of exclusivity over some or any of the lines of usage agreed in the lease. Mr Cabrera signed, and knew he signed, a written agreement that specifically guaranteed no such thing. He made no written or formal complaint referring to the alleged representation at the times when competitors selling items in competition with his lines commenced trading.

Once the issue of the alleged representations are disposed of, the balance of the applicant's case is based upon a fundamental misconception of the nature of the lease agreement. In entering a lease in the nature of that between the applicant and the respondent, all the applicant was purchasing (and all he was guaranteed) was a right to occupy the premises in accordance with the terms of the agreement and the opportunity to conduct a business, the nature of which had been agreed with the respondent, from those premises.

In ordinary circumstances such an agreement does not import any warranty by the lessor that the lessee will face no competition, much less that he will be successful. The lessee is purchasing an opportunity to compete within that marketplace. It is a matter for the lessee, using such judgement and experience as he or she possesses together with such independent advice he or she deems necessary, to make a commercial decision whether or not to enter into the lease. This decision is made in the knowledge that within the mall environment, as is the case outside that environment, freedom from competition is not guaranteed.

Each case must be decided upon its own facts. There may well be cases in which the actions of a lessor in introducing direct competition to a lessees business may constitute harsh and oppressive conduct, based upon prior actions or statements by the parties. This is not such a case. The Tribunal declines to make any order of relief in this case. I will hear the partied on the issue of costs.