IN THE MAGISTRATES COURT)
AT CANBERRA IN THE) TT. 04 of 1995
AUSTRALIAN CAPITAL TERRITORY)

BETWEEN:

JOHN KYRGIOS
PLAINTIFF

AND:

BURNS PHILLIP TRUSTEE
DEFENDANT

REASONS FOR DECISION OF ACTING PRESIDENT JOHN BURNS,

18 APRIL 1997

The applicant John Kyrgios is a former lessee of the premises described as Shop GSI, Subleasing Plan 918 in the Woden Plaza at Phillip in the Australian Capital Territory ("the subject premises"). The applicant and his brothers George and Nicholas Kyrgios took possession of the premises in early 1989 by way of assignment of the lease held by Wein Holdings Pty. Ltd. The business which was being conducted by Wein Holdings Pty. Ltd., and which the applicant and his brothers continued to operate, was a restaurant/cafe known as "Take 5". Subsequently on 12 March 1990 the applicant and his brothers signed a new lease over the subject premises. This lease was for a period of five years commencing on I May 1990 and terminating on 30 April 1990.

By a deed dated 31 March 1993 the partnership between the applicant and his brothers was dissolved and the applicant purchased the interests of his brothers in the business which they had formerly jointly operated from the subject premises. In that Deed the applicant and his brothers agreed that the value of the business plus the estimated stock

on hand totalled $108,000. Once business liabilities were deducted the net value of the

business was $48,350.56. It was agreed that the applicant and his brothers were each entitled to a 1/3 share of the net value of the business, amounting to $16,116.85 each. The Deed contained provisions specifying a mechanism for the applicant to purchases his brothers shares over a period of time.

At the conclusion of the term of the lease signed on 12 March 1990 the respondent refused to grant to the applicant a further lease and retook possession of the subject premises.

The applicant by a Notice of Dispute dated 16 March 1995 notified the Registrar of the Tenancy Tribunal of a dispute with the respondent, Burns Phillip Trustee Company Limited. Although the original application nominated Lend lease (A.C.T.) Pty Ltd as the respondent, the correct respondent was Burns Phillip Trustee Company Limited who have been subsequently substituted. The original Notice of Dispute read: "Rent has increased from $5088 in May 1989 to $9380 (excluding outgoings) per month. I have always paid my rent on time, but I am not being offered a new lease as it disclaimed my turnover is too low". The Notice further complained that the applicant wasn't being offered compensation in the event that no new lease was offered.

By letter dated 24 May 1995 the then Registrar of the Tribunal invited the applicant to provide material and submissions as to whether the Tribunal had jurisdiction to hear the applicant's dispute. That letter indicated that unless further material was placed before the Registrar on or before 7 June 1995 the Registrar proposed to determine the issue of jurisdiction on the basis that the Tribunal had no jurisdiction in relation to the dispute.

By letter dated 7 June 1995 directed to the then Registrar of the Tribunal the applicant reiterated his assertions that he should be offered a new lease, at a reduced rental or that compensation should be paid to him if he was forced to vacate the premises.

By letter dated 20 June 1995 the Registrar conveyed to the applicant his decision that the Tribunal had no jurisdiction to hear the applicant's dispute.

By a Notice of Appeal dated 18 September 1995 the applicant appealed to the Tenancy Tribunal pursuant to section 73 of the Tenancy Tribunal Act 1994 (the Act) against the decision of the Registrar to take no further action in respect of the dispute. The grounds of the appeal were:

1 That the Registrar was in error in holding that there was no evidence of harsh or oppressive conduct in respect of the tenancy.

2 That the landlord had interfered with the tenants quiet enjoyment of the premises by unfairly and unjustly permitting other businesses in the said centre to the detriment of the tenant's business.

3 That by so permitting such businesses to operate in competition with his business the return from the lessees business had been reduced thereby reducing his ability to pay the rents asked by the landlord.

4 That by so affecting the financial turnover of the tenant's business the tenant was not in a position to afford to upgrade and refurbish the premises as required by the landlord.

5 That the landlord had refused to grant a new lease on reasonable terms and conditions and as a result the tenant would lose the capital he had invested in the business and would lose the opportunity to earn income from it.

6 That by a Notice to Quit dated 25 August 1995 the landlord had required the tenant to vacate the premises by 5.30 pm on Monday 25 September 1995.

7 That as a result the above actions of the landlord constitute conduct towards the tenant that is unconscionable, coercive and or harsh and oppressive.

It is apparent that the Notice of Appeal of 18 September 1995 raised issues that weren't raised in the original Notice of Dispute dated 16 March 1995. The grounds of the Notice of Appeal were ultimately taken to be the particulars of the dispute between the applicant and the respondent. On 7 December 1995 the appeal from the decision of the Registrar was allowed and the matter was remitted to the Registrar to comply with the requirements of section 13 of the Act. Previously on 20 September 1995 an application for urgent interim orders by the applicant pursuant to section 83 of the Act restraining the respondent from requiring the applicant to vacate the subject premises prior to the hearing of the Notice of Dispute had been refused on the grounds that the evidence did not support the making of such orders, and in any event it had not been shown that an order for damages would not be sufficient if the applicant were to be successful on the application.

The ultimate complaint of the applicant is that it was harsh and oppressive of the respondent to refuse to grant to him a new lease at the expiration of the lease of 12 March 1990. As a general principal a lessor is entitled to possession of leased premises in accordance with the terms of the lease and any holding over at the expire of the lease or the termination of the holding over. There is nothing in the Act nor the Commercial and Retail Leases Code of Practice to the contrary.

As I understand the applicants case he contends that certain servants or agents of the respondent made representations to him prior to and after his entering into possession of the subject premises which led him to believe that he would be allowed to remain in the subject premises either for as long as he wanted to or at least for a further substantial period after the expiration of the five year lease of 12 March 1990, so longas his business was sound and he was a good tenant. He contends that as a result of these representations he expended a considerable sum on the purchase and restoration of the business. He contends that at all times he was a good tenant who always paid his rent and his share of the outgoings, and that in so far as his business became less profitable over the term of the lease of 12 March 1990 this occurred as a consequence of the respondent unfairly allowing competitors to compete against his business in the Plaza, this rendering it harsh and oppressive of the respondent to refuse to grant him a

new lease on the grounds communicated to the applicant by letter dated 8 February 1995 ie. that the respondent did not consider the business to be viable. The applicant further contends that his ability to trade viably was adversely affected by the unfair action of the respondent in refusing to allow him to expand his business into the concourse area outside his business premises and in allowing displays to be set up in
that area.

The applicants contentions are succinctly put in his affidavit sworn 2 April 1996 when he states at paragraph 12:

> "I believe that they (the respondent) have acted in a harsh and unconscionable manner against me in the following regards:
> (a) When entering into the lease we were advised that we would have a continuity of tenure beyond the five year lease given to us and that we would have a renewal of our lease for a further term;
> (b) Acting upon this representation we incurred the expense of renovating the coffee shop;
> (c) The actions of the management in refusing to allow us to place sufficient tables and chairs outside the shop to attract additional custom was an unfair action against us as our competitors were allowed to have ample seating available for their customers;
>
> (d) The use of the space outside our shop for exhibitions on behalf of other tenants and other mall activities operated to our detriment and was an unfair and harsh action against us;
> (e) The opening of Macdonald's in the centre despite the managements advice to us that such an enterprise would not be permitted, operated to the detriment of ourselves and to other competitors .....;
> (f) The rearrangement of the food hall operated substantially to our detriment in as much as our turnover was affected and, therefore, we were not in a position to pay the higher rent demanded by the centre;
> (g) The actions of the management in refusing to allow us to assign the premises at a reasonable rental and the active discouragement of prospective purchasers was a harsh and oppressive action against me which contributed

substantially to my inability to meet the requirements of the centre, which resulted in my being evicted from the premises and losing the value of the fixtures, fittings and other improvements which I carried out to the same;
(h) The refusal of the management to consider my request to reduce the rental or not increase it having regard to the trading conditions generally in the mall and in particular the effects on my business of the refusal to allow me to try and increase the business by placing additional chairs and tables outside my shop."

THE STATUTORY FRAMEWORK

The Tenancy Tribunal has jurisdiction to hear disputes referred to it by the Registrar of the Tribunal: section 35(l) of the Act. The types of disputes to which the Act applies are set out in section 6 of the Act:

"6(l) Subject to section 8, this Act applies to the following disputes:

(a) a dispute caused by an alleged breach of a mediated agreement:

(b) a claim by a party to a lease that another party to the lease has engaged in harsh and oppressive conduct towards the first mentioned party (whether that conduct is unconscionable or not);

(c) a dispute about key money, a multiple rent review clause or a ratchet clause, in relation to a lease or to negotiations for the entering into of a lease;

(d) a dispute about key money in relation to a lease or to negotiations for the entering into of a lease;

(e) a dispute about a multiple rent review clause or a ratchet clause in relation to a lease;

(f) a claim by a party to a lease that another party to a lease has breached or is breaching the Code other than a claim that relates to key money, a multiple rent review clause or a ratchet clause;

(g) a dispute about a lease being a lease prescribed by the Code as suitable for resolution under this Act;

(h) any other dispute about a lease or negotiations for the entering into of a lease."

Section 8 of the Act contains the transitional provisions. It provides, in so far as is relevant:

"8(l) this Act applies to a dispute referred to in paragraph 6(l)(a), (b),(c),(d) or (h) whether the relevant lease is entered into, varied, renewed or extended under an option before, on or after the commencement of section 3.

(4) this Act applies to conduct giving rise to a dispute referred to in paragraph 6(l)(b), (c), (d) or (e) only if that conduct occurs on or after the substantive commencement date.

By virtue of section 8(l) of the Act the Tenancy Tribunal Act applies to a dispute alleging harsh and oppressive conduct by one party to a lease to another party to the lease whether the relevant lease has been entered into before, on or after the commencement of section 3 of the Act.

The relevant conunencement date was I January 1995. Much of the material which was relied upon by the applicant in the present application related to events which occurred prior to I January 1995, however, as I understand the application, the

applicant alleges that when one takes into account the alleged representations made by the respondent to the applicant prior to I January 1995 and the alleged actions of the respondent prior to 1 January 1995, the action of the respondent post I January 1995 in refusing to grant the applicant a new lease and in requiring him to give up possession of the subject premises was harsh and oppressive. The applicant says that as the actions of the respondent in refusing to grant a new lease and in requiring the applicant to give up possession of the subject premises occurred after I January 1995 then the dispute is one over which the Tribunal has jurisdiction and does not offends sub - section 8(4)of the Act.

In principal I see no reason why an applicant for relief under the Act cannot rely upon acts or conduct of the other party that occurred prior to the substantive commencement date of the Act in order to characterise actions or conduct of that party which occurred after the substantive commencement date of the Act as being harsh and oppressive. Such conduct is not alleged to be harsh and oppressive in itself, but is relied upon as evidence which the applicant contends will enable the Tribunal to characterise later acts or conduct to be harsh and oppressive.

Before examining the evidence in the case it is appropriate to examine the concept of harsh and oppressive conduct.

HARSH AND OPPRESSIVE CONDUCT

The concept of harsh and oppressive conduct as used in the Act was examined by the Tribunal in the written reasons for decision handed down in *Cabrera v Leda Commercial Properties-Pty Ltd* (TT 122 of 1996) on 25 November 1996. For the benefit of the applicant in the present case I intend to re-iterate and expand upon what I stated in the case of *Cabrera.*

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) 37 1, 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 "unfair" and "harsh" as separate tests 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 exception 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.

T'he words "harsh and oppressive" have also been judicially considered in the context of the former Matrimonial Causes Act 1959. Pursuant to that Act a petitioner was entitled to a decree of divorce if certain specified conditions were met. The only exception (section 37 of the Matrimonial C uses Act) was where the respondent could establish, inter alia, that the making of the decree would be "harsh and oppressive" to the respondent.

In Painter v Painter [1963] 4 FLR 216 in a joint judgment the full Court of the Supreme Court of South Australia after noting that the words "harsh and oppressive" referred to the concept of "injury" to an individual stated:

> "The words 'harsh and oppressive' are, certainly, emphatic, and, in our opinion, they connote some grave or - at the least - some substantial detriment, and some real - as opposed to fanciful - injustice to the respondent .....". (page 220).

In *McDonald v McDonald* (1964) 81 W.N. (Pt. 2) (NSW) 336 Herron C.J., with whom Asprey J. agreed, stated:

> "Each of the two words "harsh and oppressive" must be given its meaning. The test of harshness and oppressiveness is subjective and must relate to the respondent. What is envisaged is not some such concept in the abstract or applying generally to others, or even to the reasonable man or woman. The phrase connotes some substantial detriment to the party before the Court. It is not satisfied by argument based upon generalities or on social philosophy ..... (page 345).

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 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 J.J., the majority of the Industrial Commission in the case of Thomson 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 (Davis 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 term66 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. This test, whilst clearly incorporating objective elements for consideration such as usual commercial pracitice, is to be applied subjectively in the sense referred to in the quoted passage from McDonald v McDonald (ibid), i.e. that the conduct must be showed to be harsh and oppressive to the particular applicant.

This test has received some criticism for its lack of specificity: see "Harsh and Oppressive Conduct or Legislation? - *Cabrera v Leda Commercial Properties Pty*

Ltd" by Mr. T. Johnson in "Ethos", the magazine of the Law Society of the A.C.T.,February 1997. This lack of specificity is unavoidable because of the clear legislative intention in the Act to give the Tribunal wide powers to deal with "harsh and oppressive" conduct without in any way limiting or defining those terms. The factual situations that may give rise to a finding that conduct has been "harsh and oppressive" are limitless, and to attempt to strictly define or limit these terms may actually reduce the ability of the Tribunal to act in deserving cases. Of necessity the width of the terms places a considerable degree of power within the Tribunal.

THE EVIDENCE

The procedure adopted by the Tribunal for the hearing of this matter was that each party was to file affidavits including all material upon which they relied and annexing copies of documents thereto. On 15 March 1996 the matter came before myself in the Tribunal for a directions hearing at which time the matter was adjourned to a date to be fixed. It was ordered that the applicant file and serve all affidavits upon which he relied by 4pm on 2 April 1996. The respondent was to file and serve all affidavits upon which it relied by 4pm on 6 April 1996. The matter was relished for a further directions hearing before myself on the 22 April 1996.

On 22 April 1996 I ordered the Registrar to set a date for hearing, and further ordered that no further affidavits were to be filed without the leave of the Tribunal.

The procedure which was thus adopted was to avoid the possibility of any party being taken by surprise at the hearing of the dispute, and to ensure that each party to the dispute would be aware of the evidentiary material to be placed before the Tribunal.

In compliance with the directions that were given the applicant filed two affidavits sworn by himself. The first was sworn on 12 March 1996, and the second on 2 April 1996. In addition he filed an affidavit sworn by his brother George Kyrgios sworn 2April 1996. The applicant subsequently swore a further affidavit dated 16 December 1996.

I will examine the applicants evidence under headings relevant to the issues raised and the particulars of the dispute, being: (a) tenure; (b) unfair competition; (c) proposed assignment of the lease; (d) rental increases; and (e) refusal to allow seating on the concourse.

TENURE

The first affidavit sworn by the applicant on 12 March 1996 makes no reference whatsoever to any alleged representations being made to the applicant by any servants or agents of the respondent as to the prospects of renewal of his lease.

In the second affidavit sworn by the applicant on 2 April 1996 the only reference toany alleged representations on the issue of tenure or renewal of the lease is contained within paragraph 12(a) which states;

> "When entering into the lease we were advised that we would have a continuity of tenure beyond the five year lease given to us and that we would have a renewal of our lease for a further term;

No particulars of this alleged advice are deposed to by the applicant in this affidavit. The author of the advice is not specified nor is the time and place given. This oblique and unhelpful reference to alleged facts which were clearly of central significance to the applicants case is inexplicable.

The matter came on for hearing on 27 November 1996. At that time Mr. Crossin appeared for the applicant and Mr. Refshauge for the respondent. The matter did not conclude on that date and the dispute was further adjourned part heard to a date to be fixed. The hearing was continued on 19 December 1996 at which time Mr. Crossin on behalf of the applicant sought leave to file with the Tribunal and to rely upon an affidavit sworn by the applicant on 16 December 1996. In that affidavit the applicant states, in so far as is relevant,:

"2. On Thursday 28 November 1996 1 telephoned my solicitor and said "I just remember we had some discussions with Mrs. Draper about an option for renewal of the lease"

3. The conversation took place in Mrs. Drapers office. We had a number of conversations there about the venture. This was before we paid the money to Wein Holdings to purchase the business.

4. 1 said to Mrs. Draper, "we want a five year lease with an option. We would like another five years but will accept three;". She said, "The lease will soon be up and we are willing to give you a new lease. The plaza doesn't give options to renew leases, but it is up to you. You should be able to get your money back and if you are a good tenant you should have no problem with getting a renewal of your lease. We have tenants who have been here for years since the Plaza opened".

The applicant was cross examined on his affidavits. He was taken to items numbered 6 and 7 on the Reference Schedule to the lease, dated 12 March 1990 which specify respectively the commencement date of the lease as I May 1990 and the termination date as 30 April 1995. The applicant was asked what he understood those Items, in combination, to mean, and said:

"Well, when we were negotiating with this - well, at the time we were looking at also refurbishing the place. Now we asked the management at the time, are we going to have tenure after '95 because we were very concerned about the rate - the way the business was going, the way the rates were going up at the time, we were very concerned if we spent any more money in there that we would still have tenure after 1995. Now we were told that we still would as long as we did the right thing. And we did the right thing all the way through. We stayed by the code."

The applicant further stated:

> "The leases have been around for a long time now, everybody expects them to be renewed if you do the right thing." (transcript p.6).

Counsel for the respondent later suggested to the applicant that:

> "Q. During the negotiations with Ms. Draper at the beginning of the lease do you recall Ms. Draper saying: 'there are no guarantees that your lease will be renewed after the initial five year period. It all depends on how your business is performing.'?"
>
> "A. She said - yes, I think she mentioned something to that effect.". (transcript p.34).

In reference to that conversation with Mrs. Draper the applicant was asked the following question and made the following reply:

> "Q. She told you that in early '89, there were no guarantees that the lease would be extended after the initial five year term? ANSWER: she assured us that - she showed us - when we used to visit her, they used to have a model of the Stage 3, they called it, of the Plaza, right, which was going to be a future plan. And we had to keep - see we were buying a key position in the Plaza, that's one of the reasons we went in there. Because that was meant to be the best position in the Plaza. So, we thought we have the best position, you know, we can't go wrong. She assured us that we would always have this position because we were worried too. Like if they were talking about other plans of other people being moved, because they mentioned to us things that Woolworths were going to get moved and come around that side too. So, that's going to be the focus of the whole area. You know, it's going to be on that end of the mall. And we thought, you know, this is all going great, you

know, the future plans look good because, you know, we're going to be holding a key spot there. So, we went ahead". (transcript pp.35 - 36).

The lease which the applicant signed, together with his brothers, on 12 March 1989 clearly provides for a term of occupancy of five years, commencing on I May 1990 and terminating on 30 April 1995. The applicant and his brothers had access to legal advice before entering into the lease, and were legally represented in the execution of the lease. No statements were submitted to the Tribunal from the applicant's solicitors, nor did the applicant assert that he had ever complained to his then solicitors that the terms of the lease of 12 March 1990 did not reflect the representations that had been made to him and his brothers by the respondent.

On behalf of the applicant an affidavit, sworn 2 April 1996, was filed by George Kyrgios, the brother of the applicant (sworn 2 April 1996). In that affidavit Mr. George Kyrgios stated that he was present with his brother John and his younger brother Nick at a time when they were negotiating to purchase the Take Five shop at Woden Plaza. He stated that they had a conference with Ms. Katherine Draper who was the manageress at the time. They had a number of conferences with Ms. Draper atone of which Mr. George Kyrgios says Ms. Draper said: "We need to keep this coffee shop going to service all the boutiques in this area,". He further stated that Ms. Draper said: "We require a good operator who can service all these boutiques around here and who can provide an upmarket type of service.". In addition Mr. George Kyrgios stated that Ms. Draper showed him and his brothers plans of the future development of the Woden Plaza and said to them: "When this is completed you'll still be tenants hereand will be doing a lot more business. Woolworths will be moving to stage three which will mean a lot more traffic on your side of the Plaza.".

In his affidavit Mr. George Kyrgios stated that Ms. Draper said to him and his brothers: "You will get a new lease when the present lease expires. We want somebody there who will be with us for a long while and who will service this area. You'll have to renovate the place and you'll be able to stay there for as long as you like.".

The respondent relied upon an affidavit of Katherine Draper sworn 16 April 1996. Ms. Draper was the center manager at Woden Plaza shopping center from mid 1988 to the end of 1989. In that position she was responsible for the day to day management of the center on behalf of the respondent. Ms. Draper deposed that she has been a shopping center manager for more than ten years, managing shopping centers in Sydney Canberra and Darwin. She is currently employed by another employer as the center manager at the Westpoint shopping center in Sydney. Ms. Drapers affidavit did not deal with the contents of the applicants final affidavit sworn 16 December 1996, for obvious reasons. Ms Draper did, however, address the allegation made by Mr. GeorgeKyrgios in his affidavit about representations made by Ms. Draper where he alleged that while negotiating with the applicant and his brothers she had made representations to the effect that they could expect to stay in the premises as long as they liked. Ms. Draper deposed that to the best of her recollection she did not make any such representation to the applicant or his brothers or anyone else in respect of the lease of the premises. She deposed that she did recall saying to the applicant;

> "There are no guarantees that your lease will be renewed after the initial five year period, it will depend on how your business is performing.".

Ms. Draper gave evidence via telephone to the Tribunal and was cross - examined by Mr. Crossin about the applicants allegation in his affidavit of 16 December 1990. Ms. Draper stated that she did not recall any conversation in which she had told the applicant or his brothers that "they should be able to get their money back" during the term of the lease, and that if they were "good tenants" they should have no problems getting a renewal of their lease. Ms. Draper stated that she agreed she had told the applicant and his brother that there were tenants in the Plaza who had been there for lengthy periods, but that she would not have indicated that the renewal of the lease would be automatic. Ms. Draper said that she would have told the applicant and his brothers that there would be no guarantees about the renewal of the lease, and that the issue would have to be examined at the termination of the existing lease. Although Ms.

Draper could not recall the alleged conversation, she stated that this was the standard response given to any request for tenure beyond the standard five year lease.

The applicant supported his contention that he and his brothers had expected a renewal of their lease at the termination of the term of the lease of 12 March 1990 by refer-ring to the amount of money which they expended on renovations of the subject premises subsequent to entering into that lease. The applicant and his brothers deposed that they'd spent more than $90,000 on the refit of the premises required by the lease of 12 March 1990. In his affidavit sworn 2 April 1996 the applicant deposed that at the time of carrying out of the renovations he had a conversation with Mr. Derrick Leyland. whom he had described as the "Tenancy Coordinator" in which he asked Mr. Leyland" Will this refit last us for our lease", and Mr. Leyland replied "Yes, when your lease comes up for renewal you wont have to spend any more money." The applicant then asked Mr. Leyland "Are we doing the right thing in spending this amount of money...to which it is alleged Mr. Leyland responded "Yes".

An affidavit was filed by Mr. Derrick Leyland, sworn on 16 April 1996. Mr. Leyland deposed that he was the property manager at the Woden Plaza from mid 1987 to the middle of 1992. In that position he was responsible for running the operational side of the center (eg: engineering, security). He was also involved in the refit of the shop "Take Five" acting as the primary point of contact between the shopfitters and the Plaza. Mr. Leyland is presently employed by another employer as an operations manager in Sydney.

Mr. Leyland refers to the applicants affidavit of 2 April 1996 and the allegation that in 1990 he made certain representations as to whether the applicant would be required to undertake a further refit when his lease came up for renewal in 1995. Mr. Leyland deposed that to the best of his recollection he did not make any such representation to the applicant or anyone else involved in the lease of the subject premises. Mr. Leyland deposed that as he was the property manager, with no knowledge of, or responsibility for, lease administration he had no reason or authority to make any such representation

and he believed that it was highly unlikely that he would have made any such representation.

It is conceded by the applicant and his bother that the subject premises were in sub standard condition when they took possession. It would be surprising if a refit of the premises were not contemplated by the parties both at the date of assignment of the lease from Wein Holdings and at the time of entering into the lease of 12 March 1990. Indeed the applicant testified to the Tribunal to that effect: "That was one of the reasons we were buying it, to improve it and fit it out". Thus the fact that a fit outcosting approximately $90,000 was carried out does not lead to any inevitable inference that the applicant and his brothers either expected, or had been guaranteed, a lease beyond that which they ultimately executed. It was accepted by the applicant(transcript p. 34) that he was advised by Mrs. Draper that "if a new lease is granted in 1990, you will be required at your won expense to do a fit out." Presumably the necessity for a renovation of the subject premises was reflected in the purchase price the applicant and his brothers negotiated for the business with Wein Holdings. Additionally, the cost of such a fit out was presumably tax deductable.

One further matter requires mentioning before reaching a conclusion on this aspect of the case. Mr. George Kyrgois cannot be described as an entirely independent witness. In addition to his family relationship to the applicant, he also has a potential economic interest in the outcome of these proceedings. The monies necessary for the applicant to buy out his brothers share of the business pursuant to the Deed of 31 March 1993 have never been paid to Mr. George Kyrgois, and the strong inference is that the applicant will only be able to pay his brother that amount, in the foreseeable future at any rate, from any damages awarded by this Tribunal.

On the evidence before the Tribunal I accept that the applicant and his brothers did approach Ms. Draper to attempt to negotiate a lease in excess of five years, or with an option at the conclusion of the five year term. So much is obvious even from the statements of Ms. Draper. However it seems unlikely that any representation was made to them that they would be automatically granted a renewal of their lease, or that they

would otherwise be entitled to remain within the premises subsequent to the expiration of the lease of 12 March 1990.

It appears to me to be inherently unlikely that experienced restaurateurs such as the applicant and his brothers would not have understood the plain terms of the lease of 12 March 1990. Indeed it was not suggested that they did not understand the tenure granted by that lease. It is therefore inexplicable that if that lease granted them less than the security of tenure that they say they were promised (and which had led there to substantially alter their position by taking the assignment of the lease from Wein Holdings Pty. Ltd.) they took no steps to protest this in writing to the respondent, nor to raise the matter with their then solicitors, even for the purpose of simply getting advice. The applicants evidence, that, in essence, he expected the respondent to protect this (ie: the applicants) interests in that regard is not convincing, especially when the applicant had only recently been involved in a dispute with his landlord at his previous premises at Dickson. The applicant did not even so much as write to the respondent confirming his understanding of the issue of the ultimate renewal of the lease. In that respect his behaviour is more consistent-with someone who has been advised, in essence, that no guarantee of renewal would be given, but that it would depend upon how his business was performing. In addition, even on the applicants version, no negotiations took place about the terms of any tenancy that was to be entered into subsequent to the expiration of the lease of 20 March 1990. There was no discussions to the further terms of any such tenancy, or the rental to be paid or the mechanism for determining that rent. The lack of any such negotiations itself suggests that there's no representation made by Ms. Draper, and relied upon by the applicant, as to theapplicants tenure of the subject premises beyond 30 April 1995.

1 am therefore not persuaded that representations were made to the applicant or his brothers that tenure of the subject premises would be guaranteed beyond the expiration of the lease of 12 March 1990.

UNFAIR COMPETITION

In his affidavit of 12 March 1996 the applicant stated that in 1988/89 when his brothers and he were proposing to purchase the business from Wein Holdings Pty. Ltd.Ms. Draper had said to the applicant and his brother:

> "There will be no more competition for you as there are enough food outlets at the present time to serve the people in the Plaza".

In her affidavit sworn 16 April 1996 Ms. Draper deposed in relation to that alleged conversation:

> "To the very best of my recollection I did not make any such representation to the applicant or anyone else involved in the lease of the premises. Further, as an experienced shopping center manager, aware of how quickly shops can change I say it is almost impossible that I would have made representations to the applicant or anyone else involved in the lease of the premises as to the mix of tenancies in the center for any period of time into the future."

It is significant that in his affidavit sworn 2 April 1996, the applicants brother Mr. George Kyrgios does not make any reference to any representation by Ms. Draper that there would be no further competition allowed to operate opposing the applicants business in the Woden Plaza.

In determining whether or not representations were made to the applicant and his brothers as to the level of competition which he could expect within the Plaza, it isi nstructive to look at the documentation leading up to the applicant signing the lease of12 March 1990, and the terms of the lease itself. By letter dated 24 July 1989 Ms.Draper on behalf of the respondent offered the applicant and his brothers a tenancy over the subject premises on terms and conditions contained within the respondents current form of lease. The applicant and his brothers signed a clause at the end of that letter accepting the offer and acknowledging the terms and conditions contained in the standard form of lease would apply to the subject tenancy. In addition, by signing that letter of offer the applicant and his brothers made the following acknowledgment:

> "I/we acknowledge that no promise, representation warranty or undertaking has been made to me/us in relation to the potential of the premises to be leased and I/we acknowledge that the permitted usage does not imply any form of exclusivity."

That acknowledgment was made by the applicant and his brothers on 18 August 1989.A copy of the standard form of lease accompanied the letter of offer.

Clause 5.3 of the lease of 12 March 1990 provides:

> "The lessee acknowledges and declares that no promise, representation, warranty or undertaking has been given by or on behalf of the lessor, otherwise than contained in this lease, that other lessees have leased or will continue to lease or will lease premises within the center or that the lessee has any exclusive right to carry on the type of business described in Item 10 of the Reference Schedule within the center, it being agreed that the lessor reserves the right to lease other premises within the center to lessees carrying on the same type of business as that permitted to be carried on by the lessee."

It was not suggested before the Tribunal that the applicant and his brothers were unaware of the terms of clause 5.3 to the lease. It could not, of course, be suggested that they were unaware of the existence of the acknowledgment to the letter of 24 July 1989, as they signed that very acknowledgment. Nor was it suggested that they did not understand the import of that acknowledgment or clause 5.3 of the lease. It is inexplicable why the applicant and his brothers would sign such an acknowledgment and a lease containing such a clause without even voicing concern or complaint to their solicitors, or to the respondent, when they allege that by signing these documents they're being given less than they had been guaranteed.

On the basis of all of the evidence before the Tribunal it appears unlikely that any representations were in fact made to the applicant and his brothers as to the level of competition which they could expect in the Plaza.

Leaving aside the issue of representations as to the degree of competition which the applicant and his brothers could expect within the Plaza, the evidence simply does not support the applicants contention that many new competitors were brought into the market place of the Woden Plaza to compete with the applicant during the period of the applicants tenure. In his affidavit sworn 12 March 1996 the applicant stated:

> "In April to June 1995 the new food hall was opened. This comprised fifteen additional shops selling food in direct competition with my business."

The applicants statement that the food hall incorporated fifteen "additional" shops competing with his business is clearly untenable. The evidence before the Tribunal, largely accepted by the applicant in cross examination, was that most of those businesses which entered into the food hall when it opened were businesses which were already operating in the Woden Plaza. In addition there was unchallenged evidence that the number of food retailers within the Woden Plaza remained relatively constant throughout the period of the applicants lease. Some retailers closed their businesses, either because they were not profitable or because their lease had come to an end, and other retailers opened businesses. However the end result was that the number of food retailers within the Woden Plaza remained relatively constant.

The opening of the new food hall was itself the subject of complaint by the applicant. It was his evidence, supported by his brother, that the opening of the food hall, together with the commencement of trading by Macdonalds in the Woden Plaza, resulted in down turn of trading and profit for his business. With respect to the issue of theopening of the food hall it is important to bear in mind that the applicant and his brothers were initially attracted to the position of the subject premises because of its proximity to other apparently popular retailers. That situation was not changed by the

opening of the food hall. Nor was the overall level of competition within the mall increased by the opening of the food hall.

A further complaint by the applicant and referred to in the affidavit of his brother, related to the decision to allow a McDonalds hamburger outlet at Woden Plaza. In his affidavit sworn 12 March 1997 the applicant deposed:

> "3. In 1992 Michael O'Brien, the then manager of the Plaza, had a series of meetings with the tenants at which I was present. During one of these meetings he was specifically asked whether McDonalds would be allowed in the Woden Plaza centre and he said "No!"."

Mr. O'Brien swore an affidavit on 16 April 1996 in which he deposed that, to the best of his recollection, the issue of a McDonalds outlet entering the Woden Plaza had never been raised at a tenants meeting in his presence, nor had it otherwise been raised with him by the applicant or his brothers.

The Tribunal cannot be satisfied that it is more likely than not that any such representation was made to the applicant. In any event the alleged representation was allegedly made long after the applicant and his brothers had signed the lease of 12 March 1990. There is no evidence that the alleged representation was the subject of consideration from the applicant to the respondent so as to constitute an enforceable contract, nor is there any evidence to suggest that the applicant in any way altered his position in reliance upon the alleged representation so as to raise an issue of estoppel. For present purposes such a representation would be irrelevant, even if it could be proved that it was made.

Additionally the evidence in relation to the alleged downturn in trading suffered by the applicants business as a result of the opening of McDonalds is unsatisfactory. In his affidavit sworn 2 April 1996 Mr. George Kyrgios deposed:

"In 1991/92 the gross takings dropped from $459,000.00 to $423,000.00. 1 say that this drop - off in our turnover was directly related to the fact that McDonalds had opened."

In fact, the McDonalds outlet at Woden Plaza did not commence trading until 26 September 1992, well after the close of the 1991/92 financial year. That however doesn't fully answer the applicants contention, because the trading figures for the business show an even greater downturn in the 1992/93 financial year. The turnover figures from 1989 to 1995 are:

Year Ended 30 June	**Turnover**	**Rental**	**%**	**Turnover, 20% of Rent**
1989	390,594	90,768	23.23	453,840
1990	389,000	101,136	25.9	505,680
1991	457,000	108,960	23.8	544,800
1992	423,779	116,436	27.4	582,180
26 September 1992 Macdonalds commenced business.				
1993	364,457	126,876	34.8	634,375
1994	358,246	132,444	36.9	662,220
1995	261,716	132,546	50.64	662,700

There may well have been other factors, such as expansion of other competing shopping centres and the movement of Public Service offices away from Woden that contributed to the applicants downturn in turnover in the 1992/93 financial year, but it would be naive to deny the likelihood that the opening of the McDonalds outlet played a part in that downturn. However it is impossible to quantify the part that the opening of McDonalds at the Plaza played in the downturn of the applicants turnover. In any event merely establishing that the introduction of competition into the Plaza resulted ina downturn to the applicants turnover does not establish that such competition was unfair per se.

In the absence of any guarantee of exclusivity of trading lines, or a guarantee that applicant would be free of competition in the Plaza generally, or from McDonalds in particular, I cannot see how the decision of the respondent to lease premises to McDonalds can be characterised as harsh and oppressive. It is well known that the presence of a McDonalds outlet in a Plaza or similar situation attracts customers to the Plaza. In particular it attracts families, some of whom may wish to eat at McDonalds and some of whom may wish to eat at other premises, such as those of the applicant.

In addition, people attracted to the Plaza by the presence of the McDonalds may patronise other businesses within the Plaza. If one was to hypothesise a situation where a lessor had to refuse a lease to an Organisation such as McDonalds because it would be introducing competition into the Plaza, the ridiculous situation might arise where on - food retailers may complain that the decision not to grant a lease to McDonalds is harsh and oppressive. This example highlights a fundamental flaw in the argument of the applicant. It appears to be the applicants contention that the lessor has some form of obligation to protect the financial interests of their tenants, and in some way to ensure the viability of their businesses.

One only has to state this proposition to observe that it simply cannot be correct. The interests of all tenants within the Plaza will not always coincide. Indeed they will often conflict. If the lessor is to make decisions as to whom to allow to trade in the Plaza based upon the effect it might have on the existing tenants, it would quickly occur that

the lessor would have no viable options for new tenancies. I reiterate what I said in *Cabrera v Leda Commercial Properties Piy. Ltd*. (unreported decision of the Tribunaldated 25 November 1996):

> "In entering a lease in the nature of that between the applicant and 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 has been agreed with the respondent, from those premises.
>
> In ordinary circumstances such an agreement does not import any warranty by the lessor that he 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 that lessee, using such judgment and experience as he or she possesses, together with such independent advice as 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 mail environment, as is the case outside that environment, freedom from competition is not guaranteed."

The applicant was attracted to the business because of its position near the popular retailers. In fact its physical location, removed from the food court and the vicinity of McDonalds would, if anything, have lessened the effect of competition from these sources. There is nothing in the evidence before the Tribunal to suggest that the applicant faced other than normal competition within the Plaza during his period of occupancy.

PROPOSED ASSIGNMENT OF THE LEASE

This aspect of the case is easily disposed of. No real evidence was put before the Tribunal to support the applicants assertion that the respondent refused permission to the applicant to assign his lease, or that the respondent in any way discouraged prospective purchasers of the applicants business.

The one concrete allegation by the applicant relates to an alleged action by Mr. Atkins, the Retail Manger at the Plaza from 1 October 1994 to I October 1995, in telling a prospective purchaser that he was "paying too much for the business and the rent was too high". No statements were produced to support this contention, and Mr. Atkins testified to his recollection that no such conversation had occurred.

I am not persuaded that the respondent refused any proposed assignment of the applicants lease, or in any way discouraged prospective purchasers of the applicants business.

RENTAL INCREASES

In evidence before the Tribunal the applicant testified that before taking the assignment of the lease from Wein Holdings Pty. Ltd. he had been told by Catherine Draper that" the rental market has peaked", which he took to mean that the rent on the premises would only increase in future in accordance with inflation.

It will be observed that this representation does not come within any of the designated terms of the dispute before the Tribunal. It is desirable that the Tribunal place some imit on the ambit of its hearings, both from the point of view that parties should not beam bushed by material which they had no notice to meet and from the point of view that, although not a body of strict pleading, the Tribunal should not become a commission of inquiry into matters not a part of the designated dispute.

In the present case the applicant made no reference to any such alleged representations in any of his affidavits. As it is clearly outside the ambit of the dispute before the Tribunal and was never notified to the respondents as being part of any dispute I decline to make any ruling upon the alleged representation.

The same objection could probably be made to the balance of the applicants complaints in respect of rental increases. These complaints were that the rental increases that

occurred during the term of the lease of 12 March 1990 were unjustified and were made despite the objections of the applicant. However the applicant at least raised the issue in his affidavit of 2 April 1996. Accordingly I will deal with it.

The documentary evidence before the Tribunal is that the applicant signed a letter dated 24 July 1994 accepting the offer from the respondent of a 5 year lease commencing on 1 May 1990. The rent agreed to by the applicant in that regard was:

"Rent: First Year $84,300.00

Second Year $91,000.00

Third Year $98,280.00

Fourth Year Review to market

Fifth Year Year four plus 8%."

In addition the provisions of the First Appendix to the lease of 12 March 1990 gives the lessee the right to object to the lessors assessment of market value, in which case a market rental valuation is to be undertaken by independent valuers. There is no evidence that any of the rental increases for the second and third years of the lease were in any way different to those that the applicant had agreed to in the lease. For the fourth year the respondent reviewed the rental and advised the applicant of the New market rental. The applicant alleged that he complained to representatives of the respondent about this review, it being his view that the rent demanded was too high. The applicant suggested that he was not aware of his right to object to the valuation and to have an independent valuation undertaken. He testified that his lawyer did not explain his rights in this regard to him when he signed the lease of 12 March 1990, nor did his accountant advise him of his rights in that regard, even thought the applicant says his accountant accompanied him to the offices of the respondent to complain about the rental review. It was accepted by the applicant that the accountant had been showed a copy of the lease before attending with the applicant.

In fact the applicant signed a letter dated 31 March 1993 in which he agreed that the amount assessed by the respondent as the market value was correct. When confronted

in cross examination with that documentary evidence the applicant stated that he had been told by management that if he did not sign the document he would forfeit his lease. This allegation had not previously been made by the applicant in any of Ws affidavits.

The irresistible inference from the above is that the applicant simply chose not to challenge the rental review for reasons of his own. Subsequent to the respondents decision not to renew his lease over the subject premises the applicant has decided to raise this issue, including the alleged threats, as a result of what he perceives to be the injustice of the respondents decision. I am not satisfied that any such threats were made to the applicant, nor am I satisfied that the respondent behaved in anything other than a proper, lawful manner in setting the rent of the subject premises from year to year.

REFUSAL TO ALLOW SEATING ON THE CONCOURSE

The applicant complained that he was not allowed to install an "appropriate number" of tables and chairs on the concourse outside his shop. In his first affidavit, sworn 12 March 1996, the applicant deposed:

> "10. My attempts to increase the turnover of the business were not assisted by the management of the Plaza and in particular I was not allowed to install an appropriate number of tables and chairs on the concourse outside my shop so as to attract further customers. Other shopkeepers were allowed to do this and benefited correspondingly.
>
> I 1. Immediately opposite my shop was a Donut Shop. The proprietors of this Donut Shop were allowed to place tables and about eighty chairs outside the shop, in the concourse. When commenced our lease we had no outside chairs. We were told when we went in that as business improved we would be allowed to have tables and chairs outside the shop and I was eventually allowed to have

five tables, each with four chairs. These were placed against the railing, outside my shop.

> I built the business up and in 1993 1 then asked Mr. Phil Heany and Mr. Murray Bell, who were then Managers of the Plaza, for permission to install more chairs. There was plenty of room outside my shop. MurTay Bell required me to reduce the number of tables to three. I complained and he said "You can't have any more chairs and if you're not happy with that we'll take them away altogether". I was required to push the chairs up against the wall. Ben said to me, "You'll have to keep them back against the wall". He wanted more space in the concourse. There was more space on my side of the hall than there was on the side outside the Donut Shop but he was allowed to have many more chairs than I."

What right did the applicant have to expect that he would be able to situate tables for his business on the concourse outside the subject premises? Certainly there is nothing in the lease to give the applicant any such expectation. 'Me applicant relies on alleged representations by agents of the respondent, and upon what he understood to be the position with other tenants in regard to seating on the concourse.

In his affidavits the applicant did not name the person who allegedly told him that "as business improved we would be allowed to have tables and chairs outside the shop". When cross examined before the Tribunal the applicant stated:

> "When we first negotiated for the first lease, right, we asked Graham Rowe, he said, if you fix up the place we'll get you seating".

That is the only conversation deposed to by the applicant as a representation that he would be allowed to conduct his business on the concourse outside the subject premises. On the face it is not clear that this would be a representation that he would be allowed to conduct his business on the concourse outside the subject premises. Onits face it is not clear that this statement by Mr. Rowe, if made, is a representation to

the effect contended by the applicant. There must, in any event be some doubt about the applicants evidence about this conversation as it was never revealed in the affidavits that the conversation was with Mr. Rowe. By the time that was revealed, in cross examination, the respondent had been denied any real chance to call evidence to rebut it.

The applicant has alternatively alleged that his request to have the tables and chairs on the concourse was dealt with by the respondent in a discriminatory manner. In his affidavit sworn on 2 April 1996 the applicant deposed in regard to the respondents alleged refusal to allow him to place seating on the concourse:

> "I say that Lend Lease's (sic) actions in this regard were discriminatory against me in the sense that right up until the date when I vacated the shop the Donut Shop opposite my shop was still allowed to operate with a substantial number of tables and chairs outside it and I was detrimentally affected by this." (paragraph 7(l)).

The reference to Lend Lease is an obvious error, and I understand the applicant to be referring to the respondent. The difference between the applicants position and that of the Donut Shop is amply revealed in the affidavit of Mr. Phillip Heaney, sworn 16 April 1996. Mr. Heany has been the Center Manager at the Plaza since May 1993 and deposed:

> "24. The Donut Shop referred to in paragraph 1 1 of the First Affidavit has no inside seating and a formal licence to occupy part of the common area. The rent paid by the proprietor of that business includes a component that reflects the value of the licence. Attached and marked "G" is a true copy of a floor plan to scale of part of the Centre showing the respective locations of the Premises (marked in red) and the Donut Shop (marked in green). As can be seen from Annexure "G" there is much more space in the common area immediately in front of the Donut Shop than was available in front of the Applicant's shop, so that placing tables there does not interfere with the passage of shoppers

through the mall. This retail arrangement has been in effect for approximately ten years.

25. On the concourse outside the Applicants shop is a space available for short - term occupation for a fee and for use by community groups at no charge. This space has been available and used for these purposes since well before the Applicant, Nick Kyrgios and George Kyrgios took over the Premises. Contrary to comments in the First, Second and Third affidavits I say that such displays in fact attracted people to the area and made their use of the Premises more likely."

During the course of the hearing before the Tribunal the applicant suggested that theconcourse area outside the subject premises was larger than that outside the DonutShop. Reference to the plan of that area of the Plaza, and my personal knowledge ofthe areas involved, leads me to reject this suggestion.

By allowing the applicant to use three tables outside the subject premises without any charge the respondent was in effect increasing the floor space available to the applicant and therefore reducing his rent on a square meter basis. Also the tables and chairs were the property of the respondent and no charge was made for their use. The applicant did not have any licence or lease to conduct his business on the concourse; the area of the concourse outside the subject premises was smaller than that outside the Donut Shop, and the respondent wished to use part of the area for its own purposes, as it was entitled to. In that regard I do not accept that the occasional display conducted on the concourse outside the subject premises restricted access to the premises or in any way materially affected the operation of the applicants business.

Accordingly I do not accept the applicants complaint about this matter to be legitimate.

CONCLUSION

The Tribunal is not satisfied that the respondent has engaged in harsh and oppressive conduct towards the applicant, and declines to make any orders for relief

If any party wishes to make submissions on the issue of costs, they may approach the Registrar to have the matter re-listed for argument.