SUPREME COURT OF QUEENSLAND

CITATION:	*Grepo & Anor v Jam-Cal Bundaberg Pty Ltd* [2014] QSC 119
PARTIES:	**FRANK GREPO and BERYL DOROTHY GREPO** (plaintiffs) **v** **JAM-CAL BUNDABERG PTY LTD** **ACN 089 493 550** (defendant)
FILE NO/S:	SC No 514 of 2013
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	4 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	19, 20 and 21 May 2014
JUDGE:	Chief Justice
ORDER:	**1. Claim and counter claim dismissed.** **2. Plaintiffs to pay the defendant's costs of and incidental to the claim and the counter claim, to be assessed on the standard basis.**
CATCHWORDS:	REAL PROPERTY – TORRENS TITLE – LEASES – DETERMINATION – EJECTMENT AND RECOVERY OF LAND – the plaintiffs had carried on the business of scrap metal dealing for 16 years – the plaintiffs sold their business and leased part of their land to the defendant company and remained living on the remainder of the land in a residential house – the lease was for a period of 3 years with an option for an additional 3 years – the option required the defendant to have "at all times up to the date of expiration of the term … complied punctually with its obligations" – the plaintiffs allege the defendant breached a number of covenants including the payment of rent and rates, accumulation of rubbish, failing to keep the premises free of pests, production of excessive dust and fumes and sub-letting – the plaintiffs assert the option was not validly exercised and that the tenancy thus transformed into a monthly tenancy – the plaintiffs served notice on the defendant to vacate (either the required statutory notice or acceptance of repudiation) – whether the plaintiffs are entitled to recovery of their land LANDLORD AND TENANT – RENEWALS AND

OPTIONS – RELIEF AGAINST LOSS OF OPTION FOR RENEWAL – the plaintiffs had carried on the business of scrap metal dealing for 16 years – the plaintiffs sold their business and leased part of their land to the defendant company and remained living on the remainder of the land in a residential house – the lease was for a period of 3 years with an option for an additional 3 years – the option required the defendant to have "at all times up to the date of expiration of the term … complied punctually with its obligations" – the plaintiffs allege the defendant breached a number of covenants including the payment of rent and rates, accumulation of rubbish, failing to keep the premises free of pests, production of excessive dust and fumes and sub-letting – section 128 of the *Property Law Act* 1974 (Qld) provides relief against the loss of an option to renew unless proper notice is provided by the lessor – the plaintiffs assert that breaches *after* the valid exercise of an option but before the expiry of the original term can be relied on to deny the defendant the option to renew – the plaintiffs assert that the defendant breached the lease after exercising the option and that the tenancy thus transformed into a monthly tenancy – whether section 128 has any applicability to relieve against breaches of covenants after the purported exercise of the option – whether the defendant was in breach of any covenant at the time the original term elapsed but after the purported exercise of the option to renew

LANDLORD AND TENANT – RENEWALS AND OPTIONS – RIGHT TO EXERCISE OPTION – WHERE LESSEE IN BREACH OF COVENANT – the plaintiffs had carried on the business of scrap metal dealing for 16 years – the plaintiffs sold their business and leased part of their land to the defendant company and remained living on the remainder of the land in a residential house – the lease was for a period of 3 years with an option for an additional 3 years – the option required the defendant to have "at all times up to the date of expiration of the term … complied punctually with its obligations" – the plaintiffs allege the defendant breached a number of covenants including the payment of rent and rates, accumulation of rubbish, failing to keep the premises free of pests, production of excessive dust and fumes and sub-letting – section 128 of the *Property Law Act* 1974 (Qld) provides relief against the loss of an option to renew unless proper notice is provided by the lessor – the plaintiffs assert that breaches *after* the valid exercise of an option but before the expiry of the original term can be relied on to deny the defendant the option to renew – the plaintiffs assert that the defendant breached the lease after exercising the option and that the tenancy thus transformed into a monthly tenancy – whether section 128 has any applicability to relieve against breaches of covenants after the purported exercise of the option – whether the defendant was in breach

of any covenant at the time the original term elapsed but after the purported exercise of the option to renew

LANDLORD AND TENANT – TERMINATION OF THE TENANCY – REPUDIATION – GENERALLY – the plaintiffs had carried on the business of scrap metal dealing for 16 years – the plaintiffs sold their business and leased part of their land to the defendant company and remained living on the remainder of the land in a residential house – the lease was for a period of 3 years with an option for an additional 3 years – the plaintiffs allege the defendant breached a number of covenants including the payment of rent and rates, accumulation of rubbish, failing to keep the premises free of pests, production of excessive dust and fumes and sub-letting and that such failures were wilful and persistent and amounted to repudiation – the plaintiffs contend they accepted the defendant's repudiation and are entitled to recovery of the land – whether the defendant breached any covenants – whether the defendant repudiated the lease

LANDLORD AND TENANT – TERMINATION OF THE TENANCY – FORFEITURE – RE-ENTRY AND PROCEEDINGS TO RECOVER POSSESSION – GENERALLY – the plaintiffs had carried on the business of scrap metal dealing for 16 years – the plaintiffs sold their business and leased part of their land to the defendant company and remained living on the remainder of the land in a residential house – the lease was for a period of 3 years with an option for an additional 3 years – the option required the defendant to have "at all times up to the date of expiration of the term … complied punctually with its obligations" – the plaintiffs allege the defendant breached a number of covenants including the payment of rent and rates, accumulation of rubbish, failing to keep the premises free of pests, production of excessive dust and fumes and sub-letting – the plaintiffs assert the option was not validly exercised and that the tenancy thus transformed into a monthly tenancy – the plaintiffs served notice on the defendant to vacate (either the required statutory notice or acceptance of repudiation) – whether the plaintiffs are entitled to recovery of their land

LANDLORD AND TENANT – COVENANTS – AS TO RESTRICTIONS ON USE TO WHICH PREMISES MAY BE PUT – the plaintiffs had carried on the business of scrap metal dealing for 16 years – the plaintiffs sold their business and leased part of their land to the defendant company and remained living on the remainder of the land in a residential house – the permitted use under the terms of the lease was to conduct a scrap metal yard and wrecking business – there was no limitation or restriction as to the hours of operation, business size or position within the land in which the business could be conducted – the plaintiffs allege that fumes from the excavator, dust and the general state of the yard breached the

covenants within the lease (annoying and injurious conduct and neat and tidy premises) – whether the defendant's conduct breached the lease

LANDLORD AND TENANT – COVENANTS – AS TO RATES, TAXES AND OTHER OUTGOINGS – AS TO RATES AND TAXES – OTHER CASES – the plaintiffs had carried on the business of scrap metal dealing for 16 years – the plaintiffs sold their business and leased part of their land to the defendant company and remained living on the remainder of the land in a residential house – the defendant was obliged to pay local authority and water rates for the leased land "immediately upon request of the landlord" – the defendant had failed to pay the rates on a number of occasions – the plaintiffs had never requested the defendant make payment of the rates – whether the defendant was in breach of the lease when it had failed to make payment

LANDLORD AND TENANT – COVENANTS – NOT TO ASSIGN OR SUBLET – OTHER MATTERS – the plaintiffs had carried on the business of scrap metal dealing for 16 years – the plaintiffs sold their business and leased part of their land to the defendant company and remained living on the remainder of the land in a residential house – the defendant was not able to sublet the premises or share occupancy of the premises without first obtaining the plaintiffs' consent – the leased land contained a 'granny flat' that had always been occupied by an employee of the defendant – the defendant did not obtain the plaintiffs' consent – whether the defendant, as a company, was required to seek the plaintiffs' consent prior to occupation by an employee or officer of the company – whether the defendant breached the lease

LANDLORD AND TENANT – COVENANTS – OTHER COVENANTS – the plaintiffs had carried on the business of scrap metal dealing for 16 years – the plaintiffs sold their business and leased part of their land to the defendant company and remained living on the remainder of the land in a residential house – the defendant was obliged to ensure there was no accumulation of useless property or rubbish, to not engage in annoying or injurious conduct and to keep the premises free and clear of rodents and termites – the plaintiffs allege the defendant breached the lease through an accumulation of tyres, the use and position of an excavator, the state of the yard and grass, the presence of termites and alleged presence of vermin and presence of dust – whether the defendant's conduct breached the lease

LANDLORD AND TENANT – RENT – PROVISIONS AS TO RENT IN AGREEMENT FOR LEASE OR LEASE – RENT REVIEW CLAUSES – DETERMINATION BY REFERENCE TO MARKET RENTAL VALUE – the

plaintiffs leased part of their land to the defendant company and remained living on the remainder of the land in a residential house – the lease was for 3 years with an option to renew for a further 3 years – if the option was renewed, the lease provided methods for determining the amount of rent for the first year of the renewed term – one method was to engage in a "market rental review" process – the first plaintiff specified a market rent at twice the original rental rate and gave evidence that he had done so to force the defendant from the premises – the defendant did not pay the double rate but continued to pay the original rate - whether the proclaimed market rate (double the original rental) was valid under the lease – whether the defendant was in breach of the lease by failing to pay the increased rent

LANDLORD AND TENANT – RENT – PROVISIONS AS TO RENT IN AGREEMENT FOR LEASE OR LEASE – RENT REVIEW CLAUSES – DETERMINATION BY REFERENCE TO PRICE INDEX, INCREASE IN BASIC WAGE ETC – the plaintiffs leased part of their land to the defendant company and remained living on the remainder of the land in a residential house – the lease was for 3 years with an option to renew for a further 3 years – the lease provided that the initial annual rent was subject to CPI increases for the second and third years of the original term if a determination was made – the plaintiffs never requested CPI increased rent until after the original term had expired – the defendant did not pay the CPI increased rent – whether the defendant lessee was obliged to pay CPI increased rent for the second and third years of the original term – whether the determination for CPI increased rent was required to be done by the plaintiff lessors

Property Law Act 1974 (Qld), s 124, s 128, s 134
Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 32, s 433

Bentley v Chang Holdings Pty Ltd [2012] QSC 366, cited
Healy v Southern Milk Transport Pty Ltd [1954] VLR 448, cited
Leahy v Canavan [1970] Qd R 224, cited

COUNSEL: D P Morzone QC with J J Sheridan for the plaintiffs
A Arnold for the defendant

SOLICITORS: Girgenti Lawyers for the plaintiffs
Dave McHenry & Associates for the defendant

[1] **CHIEF JUSTICE: Introduction – the issues:** The plaintiffs, Mr and Mrs Grepo, jointly own land at 1 Ray Road, Mareeba. The land includes a residential property, on which they reside, and an adjacent area used for industrial purposes. For some

16 years, they carried on business from that adjacent area as scrap metal dealers. Mr Grepo ran that business with some casual assistance, and Mrs Grepo looked after the bookkeeping.

[2] On 11 May 2010, Mr and Mrs Grepo leased that adjacent area to the defendant company, of which Mr Goldsmith was and is sole director and shareholder, the lease to commence on 14 May 2010. A "miner's cottage/caretaker's cottage" had been established on the leased land, possibly for as long as 50 to 60 years (evidence of Mr Geering), and Mr Goldsmith and his wife lived there.

[3] It was a three year lease, with an option to renew for three years, to be exercised by written notice given not less than six months before the expiration of the primary term, and subject to the lessee's having "at all times up to the date of expiration of the term…complied punctually with its obligations" (cl 17.1). Whether that condition was met was the main issue in the case.

[4] The defendant gave the requisite notice under cl 17.1.1 on 5 November 2012, but Mr and Mrs Grepo contend that contrary to cl 17.1.2, the defendant did not thereafter, until the expiration of the primary term on 13 May 2013, comply with its obligations as lessee.

[5] If the plaintiffs have established such non-compliance, then the purported exercise of the option to renew was ineffective, and the lease expired on 13 May 2013. The defendant remained in possession after that date, and is still in possession. On that basis, in light of cl 15.8 of the lease, the defendant became a monthly tenant of the plaintiffs, with the tenancy terminable under Division 4 Part 8 of the *Property Law Act* 1974 (Qld) (that is, by one month's notice: s 134(1)).

[6] If, on the other hand, the plaintiffs have not established that non-compliance on the part of the defendant between 5 November 2012 and 13 May 2013, then (subject to any relevant conduct up to 2 October 2013 – in relation to alleged repudiation) the defendant is legitimately in occupation of the land as lessee for a renewed term which will run until 13 May 2016.

[7] The plaintiffs claim the defendant breached the lease in many respects:

(a) failing to pay rent of $3,539.48 (or $3,893.43 including GST) (cll 3.1, 3.2, item 4);

(b) accumulating useless property or rubbish (essentially rubber tyres and plastic) on the property (cll 6.7.2, 6.8);

(c) not keeping the premises neat and tidy (cll 6.7.2, 6.8);

(d) failing to keep the premises free of pests (termites and rats) (cl 5.10);

(e) engaging in annoying and injurious conduct (excessive dust, and fumes from the excavator) (cl 5.3);

(f) underletting etc to employees without the plaintiffs' consent (cl 9);

(g) failing to comply with the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) (cl 5.2);

(h) failing to pay rent of $34,319.97 for the period 14 May 2013 to 14 January 2014 (and $125.40 per day thereafter) (cll 3.3, 17.1.4);

(i) failing in March 2012 to pay $831.68 rates on time, leading to a $78 late fee; and

(j) failing to pay $911.80 rates in August 2013; and failing in February 2014 to pay rates of $843.60, and also in that month failing to pay water rates of $170.41.

[8] The plaintiffs issued a notice to remedy breach on 8 August 2013, under s 124 of the *Property Law Act* 1974 (Qld). (There had been a number of other such notices.) The plaintiffs contend that the defendant failed to comply with that notice.

[9] The plaintiffs also contend that by its "wilful and persistent failures over a lengthy period" to comply with the lease, the defendant repudiated the lease. The plaintiffs say that accepting that repudiation, they terminated the lease on 2 October 2013 by their solicitors' letter of that date.

[10] The plaintiffs claim to recover possession of the leased land, $3,893.43 arrears of rent and $2,003.81 for unpaid rates, late fees and water rates, arrears of rent of $34,319.97 for the period 14 May 2013 to 14 January 2014 (and $125.40 per day thereafter), together with interest and costs.

[11] The defendant counter-claimed for relief against forfeiture, and a declaration as to the due exercise of the option to renew and a consequential order.

[12] It is convenient to mention at this point the provisions of the lease as to payment. Clause 3 concerns rent, payable without demand by equal monthly instalments in advance. The initial annual rent ($41,600) was subject to CPI increases for the second and third years (cl 3.2.1). If the option was validly exercised, cll 3.2.2 and 3.3 provide for the determination of the rental payable for the first year of the renewed term.

[13] In that regard, Mr Grepo specified a "market rental" of $83,200 per annum, in relation to cl 3.3.1, but I conclude that was not what he "believed" to be the market rental, in terms of that provision, but was a rate (twice that previously applicable) designed to force the defendant from the premises. Mr Grepo effectively acknowledged these things in his oral evidence.

[14] The primary issue is whether between the date of the purported exercise of the option, 5 November 2012, and the expiration of the term of the lease, 13 May 2013, the defendant complied with its obligations as lessee. I need to consider, in shorthand terms: payments, tyres, fumes, grass, termites, rats, dust and underletting.

[15] I am aware of the jurisprudence on s 128 of the *Property Law Act* 1974 (Qld) (cf. *Bentley v Chang Holdings Pty Ltd* [2012] QSC 366, para 26), and both parties were content that I focus on what happened after November 2012.

Payment of rent and outgoings

[16] As Mr Grepo acknowledged, the defendant paid the rental due. Mr Grepo had not expressly required payment of the CPI increments. Beyond 13 May 2013, he had not engaged a "market rental review" under cl 3.3.1, for the reason already expressed, so that the rental remained unchanged from the preceding year (cl 3.3.2).

[17] The defendant has paid to its solicitors' trust account the amount of unpaid rental to date, calculated on the rate payable for the last year of the original term (cl 3.3.2), on the basis that CPI increases applied. The defendant did not actually pay that to the plaintiffs because the plaintiffs advance their case on alternative hypotheses – a renewed term, or a monthly tenancy, and see the plaintiffs' solicitor's letter of 30 May 2013. In those circumstances, it would be inappropriate to find that the defendant is in breach in relation to rental payment because actual payment has not been made to the plaintiffs, even though it may have been better that the monies were paid into court. In any case, they are destined for the plaintiffs.

[18] In the period 10 November 2012 to 13 May 2013, the basic rent was paid, but CPI supplements were not. They have now been paid to the trust account, and will be paid to the plaintiffs if the defendant succeeds in the proceeding.

[19] Clause 3.2.1 provides for the basic and increased rentals. The heading of that provision is "rent and annual reviews". The basic rent is the actual amount specified in the "reference data".

[20] Setting the increased rent for the second and third years requires a calculation leading to a determination on which the landlord intends to act. The plaintiffs did not inform the defendant lessee of the CPI increased rent until 30 May 2013, after completion of the three year term.

[21] Clause 3.4 caters for the situation which arose here, there having been no "determination" of rental for years two and three, with the rate then remaining as per year one. Rental paid at that rate was accepted by the plaintiffs without complaint.

[22] While it is the lessee's obligation to seek out the lessor to pay the rent (cl 3.1 and *Leahy v Canavan* [1970] Qd R 224), the "determination" to which cl 3.4 refers, "of the rent for any lease year", which includes years two and three, must at least in the end be a determination by the lessor, or a determination acceptable to the lessor, and that did not eventuate. The case is different from one where the amount of the rental due is a certain, specified and already known amount.

[23] The notice under s 124 of the *Property Law Act* 1974 (Qld), of 8 August 2013, demanded allegedly unpaid rent in various amounts, which would have left the defendant in a state of uncertainty as to what was being demanded, rendering compliance impossible in the absence of further inquiry. See paras b, c and d on page 2. The defendant was not obliged to comply with that notice. The amount sought in c was based on the $83,200 amount which, as I have concluded, Mr Grepo did not believe reflected market rental, and was advanced for the ulterior purpose of forcing the defendant from the land.

[24] It is convenient to mention here that the defendant contended the demand was far too broadly and uninformatively cast in a number of other respects. I need not deal definitively with that, beyond saying that the notice was fairly criticized in a number of respects.

[25] There was complaint about non-payment by the defendant of outgoings (cl 4.1). They concerned local authority and water rates. These were payable "immediately upon request of the landlord" (cl 4.1). There is no evidence of any failure in this regard on the part of the defendant, because the defendant was not requested to make payment of these amounts. The amounts have all now been brought up-to-date (15 May 2014).

[26] Breach of the lease in the payment of rental and outgoings was not established.

Tyres

[27] The plaintiffs allege that the defendant breached the lease by allowing an "accumulation of useless property or rubbish" (cl 6.7.2), principally an accumulation of tyres.

[28] The photographs show there was a large number of tyres without rims. The environmental conditions required they be stored under cover (to prevent the breeding of mosquitoes).

[29] As at early December 2012, the Environmental Health Officer Mr Le Géar was satisfied as to the storage of tyres undercover. See his letter of 6 December 2012, Ex 9.

[30] I also accepted Mr Hutchinson's evidence that tyres were, in this trade, generally accumulated until there was a pile large enough to attract the semi-trailer of a removalist.

[31] Mr Goldsmith gave similar evidence, which I accepted. Costs considerations also bore on the speed with which rimless tyres were removed.

[32] In these circumstances some latitude should be allowed to the defendant lessee. Also, what amounts to an unacceptable "accumulation" cannot be defined with precision.

[33] (The defendant also disposed of tyres by putting them inside vehicle prior to crushing.)

[34] The evidence is that only once did the defendant have a removalist take the tyres from the property. I am not satisfied however that any accumulation of tyres over this period (November to May) breached the lease.

[35] The lease should be approached with recognition of the nature and realities of the business to be conducted on the land. Mr Le Géar's letter of 6 December 2012 refers to "a few minor non-compliance issues that had been quickly resolved". His objective independent assessments suggested to me there was a level of exaggeration and unreasonableness about the plaintiffs' contentions.

Fumes

[36] This relates to fumes generated by the excavator, which was part of the machinery which passed to the defendant on its purchase of the business. The defendant added

a diffusor to dampen fumes, and he regulated the hours of use. Mr Goldsmith ran the excavator from position D on Ex 4, whereas Mr Grepo said he used to operate it from position P. D was apparently closer to the front porch area of Mr and Mrs Grepo's house.

[37] But there was no limitation in the lease on the position from which the defendant could operate the excavator, or the hours over which the defendant could do so.

[38] I was satisfied with Mr Goldsmith's explanation of the operational reason why the defendant kept the excavator in the D position, and I am satisfied that in working from there, he was not driven by any vindictiveness towards Mr Grepo.

[39] Clause 5.3.2 prohibited the lessee from using machinery generating odours which may "be or grow to the…nuisance…of the landlord" who was also the occupier of "neighbouring premises".

[40] The lease, including that provision, has to be construed in its context: the landlord residing next door to the scrap metal yard where metal is to be crushed and moved by the use of machinery. Obviously the tenant nevertheless has to act reasonably.

[41] The obligation on the lessee implicit in cl 5.3.2 is not absolute, and I am satisfied on Mr Goldsmith's evidence that the defendant acted reasonably in this. Significantly, the plaintiffs led no expert evidence as to any unacceptable or injurious level of contamination by fumes etc.

Grass

[42] That the leased premises were not regularly manicured does not establish a breach of the lease. The defendant was obliged to mow the lawns and keep them neat and tidy (cl 6.8.2), but this should be approached on the basis the premises housed a wrecking yard and scrap metal business – not, by contrast, a nursery or garden cemetery.

[43] The photographs of Mr Hutchinson's comparable yard tend to suggest there was nothing abnormal about the way the defendant attended to this aspect of its premises.

[44] Mr Goldsmith mowed the yard from time to time. I accepted his rejection of the contention that he let the state of the land get out of hand.

Termites

[45] The defendant was obliged to keep the premises "free and clear of rodents, termites…" (cl 5.10), at its own cost and expense.

[46] Mr Geering, a licensed builder and pest inspector, at his inspection on 7 May 2013 saw no evidence of conventional termite treatment, including that is by Mr Grepo, which would ordinarily suggest there was no evident problem requiring more than the "bush remedy" he employed.

[47] Mr Grepo said that he took his own measures (kerosene and sump oil) to deter termites, and he acknowledged they were a feature of the region.

[48] The buildings were 50 to 60 years old according to Mr Geering, and there were live, active termites, likely to have been there for years.

[49] Mr Bunworth inspected the buildings at about the commencement of the lease, and early this year. He said that the then current state "reflects natural deterioration of each cottage". He did not report any termite damage to the cottages on the first inspection. On the second inspection, he detected "possible termite penetrations" to a cottage, and termite damage to the weighbridge, to the main workshop and stumps in the yard. Mr Bunworth had no particular pest control qualification however. I would not safely conclude from his limited evidence that the defendant breached its obligations under the lease.

[50] It was not put to Mr Goldsmith in cross-examination that he knew there was active termite activity yet did nothing about it. The inspection of the expert, Mr Geering, did not occur until 7 May 2013, near to the expiration of the primary term of the lease. I would not safely infer from that that the defendant should have known of a termite problem between November 2012 and May 2013 yet did nothing to address it. The obligation under cl 5.10 should be construed in a commercially realistic way, meaning here, to address any evident termite problem. I am not satisfied that the defendant breached that obligation.

[51] In taking this approach, I am conscious of the case authority to which Mr Morzone QC referred me, *Healy v Southern Milk Transport Pty Ltd* [1954] VLR 448, 456, referring to breaches "however trivial" excluding an effectual extension. The issue here is how one construes the contractual obligation under the lease.

Rats

[52] Mr Grepo used Ratsak and the services of a cat to deal with rats, an endemic problem in such areas.

[53] I accepted that the defendant had adequately dealt with this problem, through the five bait stations installed on 18 October 2012, nine metres apart along the back fence (30 to 40 metres long) and the use of Ratsak.

[54] Le Géar identified no problem with rats. I also accepted Mr Goldsmith's evidence that there had been no evidence of a rat problem. He also used a "yard cat".

[55] The premises are near a water course and surrounding bushland, so that rats may be expected, but I am satisfied that the defendant adequately dealt with this prospect for lease purposes.

Dust

[56] This relates to cl 5.3 as to annoying and injurious conduct.

[57] I accepted the evidence of the Environmental Health Officer Mr Le Géar that the defendant adequately watered down the areas which produced dust, using a sprinkler system.

[58] The test is the perception of a reasonable person, allowing for the use expected to be made of the premises.

[59] I am not satisfied the dust was such a problem as would have concerned a reasonable person in those circumstances.

Use of the "granny flat"

[60] Under cl 9.1, the tenant may not underlet the premises, or share occupancy of the premises, with any person, without first obtaining the landlord's written consent, which must not be unreasonably withheld.

[61] The "granny flat" has always been occupied, during the period of the lease and before. Mr Graham is the present occupant, and Mr Hutchinson was there before him. Mr Graham pays $100 per week, really his contribution to outgoings such as electricity and water.

[62] The defendant did not obtain Mr Grepo's consent to this. Mr Goldsmith assumed he could use the cottage for his benefit.

[63] As I have said, cl 9.1 of the lease prohibited underletting or sharing of occupancy without the landlord's written consent. When the defendant took the lease, Mr Hutchinson was in possession of the "granny flat", as Mr Grepo's employee, inferentially with Mr Grepo's consent. Mr Hutchinson stayed on for about six months then Mr Graham moved in on a comparable employee basis. There would seem to have been no basis on which consent, if necessary, could reasonably have been withheld.

[64] But those aspects aside, the critical point in the end in that the lessee is a company, the defendant company. The company is the occupant, and may enjoy that

occupancy through its employees and officers. The provision in cl 9.1.3 is primarily directed towards a natural person lessee, not a company.

[65] There was complaint about non-compliance with legislative requirements, under the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld). But this was not a rental situation to which that legislation would apply, because the reality here is that it was a shared occupancy rather than a tenancy. Mr Graham contributed to outgoings rather than paying rent. Mr Graham would appear to be a "lodger" under s 32 of that Act, and I had had regard to the considerations in s 433. I infer that the employees who preceded Mr Graham were there on a comparable basis.

Mr Grepo

[66] Mr Grepo was a most unsatisfactory witness. Under cross-examination he was antagonistic and cantankerous. He refused to answer many questions. At one stage he angrily left the witness stand. His conduct in court corroborated his extremely poor relationship with the defendant's director Mr Goldsmith.

[67] Unfortunately I had to conclude that Mr Grepo exaggerated any problems arising from the defendant's conduct of its activities on the land. His drive and motivation was "wanting him (Mr Goldsmith) out of the yard".

[68] Much of what has transpired is I believe referable to Mr Grepo's failure to expect the development of the business which followed the granting of the lease. The business grew substantially from Mr Grepo's limited operation (himself and a casual with Mrs Grepo doing the bookkeeping), with the defendant engaging eight staff and conducting the business on a much larger scale.

[69] Mr Grepo was not expecting a busy operation of that expanded proportion. I surmise that his dismay at what has occurred has fed a sense of grievance and has led to his exaggerating in his own mind his concerns, as resident next door neighbour, over such a business.

[70] A critical point here is that the lease did not limit the scale of operations of the defendant as lessee.

[71] Regrettably, I found myself having to reject the evidence of Mr Grepo where it conflicted with the evidence of Mr Goldsmith.

[72] On the other hand, I found Mr Goldsmith's evidence credible. He was responsive to questioning and apparently reasonable in his answers. He was prepared to accept adverse positions put to him where appropriate. I am conscious that the dramatic contrast between the demeanours of Mr Grepo and Mr Goldsmith should not of itself warrant acceptance of Mr Goldsmith's evidence. The fact is, however, that I found Mr Goldsmith's evidence to be reliable and honestly given.

[73] I accepted the evidence of the other witnesses also.

Disposition of the case

[74] I am not satisfied that the defendant breached the lease between the date of the purported exercise of the option and the expiration of the initial term. Obviously also, I am not satisfied that the defendant repudiated the lease, on the basis of the circumstances between November 2012 and May 2013, and the continuing circumstance up to 2 November 2013 when the plaintiffs purported to terminate what they then contended was a monthly tenancy.

[75] I accordingly conclude that the defendant validly exercised the option of renewal under cl 17.1 of the lease.

[76] The defendant is validly in possession of the property under a renewed lease with a term to expire 13 May 2016.

[77] As to rental, because of the non-engagement of cl 3.3.1, the rent presently payable, for the lease year commencing 14 May 2013, is the same rent as was payable in the preceding lease year, that is, the year commencing 14 May 2012, which is the original set rental increased by CPI, as per the plaintiffs' solicitors' letter of 30 May 2013.

[78] The claim and counter claim should be dismissed. The counter claim should be dismissed because there has been no need to consider the claim for relief against forfeiture.

[79] As to costs, subject to any further necessary consideration (which I suggest proceed on written submissions), there should be an order that the plaintiffs pay the defendant's costs of and incidental to the claim and counter claim, to be assessed on the standard basis.

Formal orders

1. Claim and counter claim dismissed.
2. Plaintiffs to pay the defendant's costs of and incidental to the claim and the counter claim, to be assessed on the standard basis.