SUPREME COURT OF QUEENSLAND

CITATION:	*Gration v C Gillan Investments P/L* [2005] QCA 184
PARTIES:	**JUDITH GRATION** (plaintiff/respondent) **v** **C GILLAN INVESTMENTS PTY LTD** ACN 010 616 663 (defendant/appellant)
FILE NO/S:	Appeal No 318 of 2005 DC 359 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injuries – Liability Only
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	3 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	4 May 2005
JUDGES:	Williams JA, Muir and Wilson JJ Separate reasons for judgment of each member of the Court, Williams JA and Wilson J concurring as to the order made, Muir J dissenting
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	LANDLORD AND TENANT – RIGHTS AND LIABILITIES APART FROM COVENANT – UNDER VARIOUS STATUTES – tenant injured when steps of premises gave way because of wood rot – ruling by primary court judge that landlord was in breach of obligation in *Residential Tenancies Act* 1994 (Qld) to ensure the premises are in good repair – whether ruling was an error of law *Property Law Act* 1974 (Qld) *Residential Tenancies Act* 1975 (Qld), s 7(a)(ii) *Residential Tenancies Act* 1994 (Qld), s 38, s 103 *Residential Tenancies Act* 1995 (SA), s68 *Residential Tenancies Act* 1997 (Vic), s 68 *Residential Tenancies Regulation* 1995 (Qld), s 4, s 5 *Austin v Bonney* [1999] 1 Qd R 114, considered *Bassett Realty Ltd v Lindstrom* (1979) 103 DLR (3d) 654, considered *Bond v Weeks* [1999] 1 Qd R 134, followed *Gaul v King* (1979) 103 DLR (3d) 233, considered

Jones v Bartlett (2000) 205 CLR 156, followed
Knuepel v Zarpas [2004] SADC 162, considered
McCarrick v Liverpool Corporation [1947] AC 219
McQuestion v Schneider (1975) 8 OR (2d) 249; (1975) 57 DLR (3d) 149, considered
Northern Sandblasting Pty Ltd v Harris (1996-1997) 188 CLR 313, considered
O'Brien v Robinson [1973] AC 912, considered
Reliance Permanent Building Society v Harwood-Stamper [1944] Ch 362, considered
Uniproducts (Manchester) Ltd v Rose Furnishers Ltd (1956) 1 All ER 146
Watson v George [1953] SASR 219, distinguished

COUNSEL: R J Douglas SC for the appellant
C A White for the respondent

SOLICITORS: Hunt & Hunt for the appellant
Bevan & Griffin for the respondent

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment prepared by each of Muir J and Wilson J; all relevant facts are fully set out therein and there is no need for me to recount them. Those reasons also detail the relevant Queensland legislation. I gratefully acknowledge the summary of the history of a landlord's liability set out in the reasons for judgment of Wilson J.

[2] The change in terminology from s 7(a)(ii) of the *Residential Tenancies Act* 1975 ("the 1975 Act") to that used in s 103(2) of the *Residential Tenancies Act* 1994 ("the 1994 Act") is not without significance. By operation of s 7(a)(ii) of the 1975 Act the landlord was subject to an implied obligation "to provide . . . the dwelling house in good tenantable repair and in a condition fit for human habitation", whereas under the 1994 Act the obligation imposed by s 103(2) (after the amendment in 1998) was to "ensure" that at the start of the tenancy "the premises . . . are in good repair".

[3] In practical terms however there is not much difference between what is involved in providing premises in good repair and ensuring that the premises are at the start of the tenancy in good repair. According to The New Shorter Oxford English Dictionary "provide" in this context means "take appropriate measures in view of a possible event; make adequate preparation; . . . take measures beforehand to ensure that", whereas in this context "ensure" means to "make sure, convince; . . . make certain the occurrence of an . . . outcome". In the Explanatory Notes to s 103 of the 1994 Act it is said that the provision "requires the lessor to provide to the tenant premises that are clean and in a reasonable state of repair at the beginning of the tenancy." The use of the term "provide" therein might at first glance suggest no real change in the obligation from that imposed under the 1975 Act, but a careful reading of those Notes would suggest that it was used in the sense of meaning "take measures beforehand to ensure that" the premises were in a reasonable state of repair at the beginning of the tenancy. Almost identical language to that found in the Explanatory Notes was used by the Minister in his Second Reading Speech: "The legislation will require the lessor to provide the premises in a reasonable state of repair at the beginning of the tenancy . . .".

[4] Such a construction is, in my view, made more obvious when one compares the obligation on the lessor imposed by s 103(2) with that imposed pursuant to s 103(3). Under the former the lessor must "ensure" that the premises are in good repair at the start of the tenancy, whereas pursuant to the latter provision the obligation on the lessor during the currency of the tenancy is put in terms that the lessor "must maintain the premises . . . in good repair." Generally liability of the landlord during the tenancy will be dependent on the tenant giving notice of the defect; see, for example, *Austin v Bonney* [1999] 1 Qd R 114. In my view the legislature deliberately chose a different formula when defining the obligation on the lessor at the commencement of the tenancy from that which applied during the currency of the tenancy.

[5] Why there should be such a distinction was clearly explained by Gaudron J in *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 359, where she said:

> "If the position is considered at or immediately prior to the commencement of the lease, the relationship is not unlike that of occupier and invitee in that the state of the premises is known to, or can be ascertained by the landlord. Moreover and as in the case of an occupier, the landlord is in a position of control in relation to the premises. In particular, the landlord is in a position to control the state in which the premises are let. . . .
>
> Once a tenancy commences, there is an important change in the features of the relationship which bear on the question of the landlord's liability in negligence. Generally speaking, it is the tenant who is then in a position to ascertain and control the state of the premises. And again generally speaking, if defects develop during the tenancy, the landlord will become aware of them only if informed of their existence by the tenant or by members of the tenant's household."

[6] Much the same was said by her Honour in *Jones v Bartlett* (2000) 205 CLR 156 at 192: ". . . what was reasonable would vary according to whether or not the tenants were in possession. Thus, before the tenancy commences, it was reasonable both to inspect the premises and to remedy existing defects that gave rise to a foreseeable risk of injury." Also in that case McHugh J said at 192; ". . . what was reasonable would vary according to whether or not the tenants were in possession. Thus, before the tenancy commenced, it was reasonable both to inspect the premises and to remedy defects that gave rise to a foreseeable risk of injury."

[7] To the best of my researches only Vaisey J has provided a judicial definition of the term "ensure" when used in a statute. In *Reliance Permanent Building Society v Harwood-Stamper* [1944] Ch 362 at 373 he said, speaking of the term "ensure" used in s 10 of the *Building Societies Act* 1939 (UK):

> "The word "ensure" has puzzled me a good deal. I think it is used in the common and colloquial sense in which "making sure" is used, that is, as equivalent to ascertaining or satisfying oneself, and does not mean anything in the nature of warranty or guarantee."

[8] With respect, I agree with that approach, and would give the word when used in s 103(2) of the 1994 Act the same meaning. On that approach s 103(2) obliges the

lessor to take steps to ascertain and satisfy himself that the premises are in a state of good repair at the start of the tenancy; the lessor cannot sit back and say that as the previous tenant has not complained of any defect therefore the premises must be in a state of good repair. The use of the term "ensure" obliges the lessor to take reasonable steps to ascertain and satisfy himself that the premises are in good repair at the start of the tenancy.

[9] It is interesting to note that the term "ensure" is also found in the comparable statutory provisions in the South Australian and Victorian legislation. Relevantly s 68 of the *Residential Tenancies Act* 1995 (SA) provides:

> "(1) It is a term of a residential tenancy agreement that the landlord -
> (a) will ensure that the premises . . . are in a reasonable state of repair at the beginning of the tenancy and will keep them in a reasonable state of repair having regard to their age, character and prospective life."

[10] Subsection (2) thereof provides that the landlord is not in breach of the obligation to repair unless he had notice of the defect requiring repair and failed to act with reasonable diligence to have the defect repaired.

[11] Again it is significant, in my view, that there is different terminology used in defining the obligation on the landlord at the commencement of the tenancy and subsequently throughout the tenancy. The only case my researches have uncovered on the statutory provision in South Australia is a decision in the District Court of Acting Judge Kitchen: *Knuepel v Zarpas* [2004] SADC 162. That was an appeal from a decision of the tribunal constituted pursuant to the relevant legislation. After referring to the approach of Vaisey J quoted above Judge Kitchen went on to say:

> "If that is the sense in which "ensure" is used in s 68 then before the tenancy begins the landlord (or at least some person on his behalf) must inspect the premises to ascertain the state of repair in order that the landlord is in a position to make sure they are in a reasonable state of repair at the beginning of the tenancy. That state of disrepair which such an inspection would reveal to a reasonable observer, the landlord has notice of."

That to my mind fully and accurately sets out the obligation imposed on a lessor by s 103(2) of the 1994 Act.

[12] Section 68 of the *Residential Tenancies Act* 1997 (Vic) requires a landlord to "ensure that the rental premises are maintained in good repair". My researches have not revealed any decision of Victorian courts defining in more detail the obligation thereby imposed on the landlord.

[13] The approach which I have adopted is, in my respectful view, in accord with the reasoning of Brennan CJ in *Northern Sandblasting Pty Ltd v Harris* at 340 where he said:

> "I would hold the landlord in the present case to have owed a duty of care to the tenants and to their children to see that the premises at the time the tenants went into possession were as safe for their habitation as reasonable care and skill on the part of anyone could make them, excluding defects which could not have been discovered by

> reasonable care or skill on the part of any person concerned with the construction, alteration, repair or maintenance of the premises."

[14] In that case the High Court considered s 7 of the 1975 Act but concluded that it did not avail the plaintiff in that case; the plaintiff succeeded in tort because of the operation of the common law of Australia which did not follow *Cavalier v Pope* [1906] AC 428. The passages which I have quoted from the judgments of Brennan CJ and Gaudron J therein were part of the discussion of the common law position in Australia. Similarly in *Jones v Bartlett* the court concluded that s 42(1) of the Residential Tenancies Act 1987 (WA) - the analogue of s 7 of the 1975 Act - did not avail the plaintiff, and in consequence the judgments therein concentrate on liability in tort under the common law. What is significant, in my view, is that the obligation imposed on a landlord by s 103(2) of the 1994 Act to ensure that at the start of the tenancy the premises are in good repair would be no less onerous than the obligation in tort imposed by the common law of Australia on the landlord at the start of the tenancy.

[15] Relevantly Gummow and Hayne JJ said in *Jones v Bartlett* at 215 - 6:

> "Premises will not be reasonably fit for the purposes for which they are let where the ordinary use of the premises for that purpose would, as a matter of reasonable foreseeability, cause injury. *The duty requires a landlord not to let premises that suffer defects which the landlord knows or ought to know make the premises unsafe for the use to which they are to be put*. The duty with respect to dangerous defects will be discharged if the *landlord takes reasonable steps to ascertain the existence of any such defects* and, once the landlord knows of any, if the landlord takes reasonable steps to remove them or to make the premises safe." (my emphasis)

[16] The obligation on the landlord at the time the premises are let were further referred to by their Honours at 227. There was there reference to "defects [which] would have been discoverable by the landlord at the time of the letting of the premises" and it was subsequently observed that some of the defects being considered in that case "were not detectable by a landlord inspecting the property"; in at least one particular instance that was because the defect "did not exist at the time the premises were let."

[17] All of that to my mind reinforces the conclusion that the obligation imposed by the 1994 Act to ensure that at the start of the tenancy the premises are in good repair obliges the landlord, prior to the commencement of the tenancy, to inspect the premises to ascertain the state of repair in order that he is in a position to discharge the duty imposed on him by the statute.

[18] There is nothing in the reasoning of this court in *Austin v Bonney* which suggests that a contrary approach should be adopted. Liability in that case was considered in the light of s 7 of the 1975 Act and the common law. The critical fact was that the tenant had been in occupation for more than 12 months when personal injury was sustained in a fall caused by the bad state of repair of the staircase. There was (as noted at 128 and elsewhere) no evidence as to the condition of the staircase when possession was given to the tenant. The tenant had become aware of a defect some few weeks prior to the fall and the critical issue in the case was whether the notice given to the landlord gave reasonable time to effect repairs prior to the incident.

The case is not concerned with the state of repair at the start of the tenancy, and of course there was no discussion of more specific words used in the 1994 Act.

[19] Here the tenancy agreement was executed on 25 July 2000 and the incident occasioning the respondent's injuries occurred about two weeks later on 6 August 2000. The evidence, set out in some detail in the reasons of Wilson J clearly establishes that the defect would have been present on 25 July 2000, indeed in all probability well before that. Again as the evidence referred to by Wilson J demonstrates, the defect could readily have been ascertained if a simple inspection had been carried out by the landlord, or by someone on his behalf, on 25 July 2000. The evidence establishes that in tropical conditions such as exist in Townsville wood rot is a foreseeable defect in external steps. A reasonable inspection of the steps at the start of the tenancy in question would have revealed the defect.

[20] It was in failing to carry out any such inspection that the appellant breached the obligation he owed to the respondent to ensure that at the start of the tenancy the premises were in good repair.

[21] It follows that the appeal should be dismissed with costs.

[22] **MUIR J:**

Introduction

The respondent/plaintiff was a tenant, together with her husband, in a house in Townsville owned by the appellant/defendant when, on 6 August 2000, one of the treads on the front stairs gave way causing her to fall and suffer injury. She commenced proceedings in the District Court, claiming damages for breach of the appellant's duty of care under the Tenancy Agreement and the *Residential Tenancies Act* 1994.

[23] The learned primary judge found in the respondent's favour. On this appeal, the appellant argues that the learned primary judge erred in law in:

(a) Finding "an absolute contractual obligation" on the appellant to ensure that the premises are in good repair and fit for the tenant to live in;

(b) Failing to find that the contractual and statutory obligations of the appellant extended only to deficiencies of which the appellant "was aware or should reasonably have been aware";

(c) Not finding that a reasonable landlord in the position of the appellant would not have been aware of the defect and was not under an obligation to conduct more than a visual inspection of the stairs with a view to determining the existence of any defect.

Relevant contractual and statutory provisions

[24] The relevant terms of the Tenancy Agreement are:

> "25.1 At the start of the tenancy the lessor must ensure—
>
> (a) the premises are clean and fit for the tenant to live in and are in good repair and;
>
> …
>
> 25.2 While the tenancy continues the lessor must—

> (a) Maintain the premises in good repair and in a way that the premises remain fit for the tenant to live in;
> …"

[25] It was common ground that s 103 of the *Residential Tenancies Act* 1994 applied to the subject tenancy. Subsections (2) and (3) of that section provided at relevant times:

> "**(2)** At the start of the tenancy, the lessor must ensure—
> (a) the premises and inclusions are reasonably clean; and
> (b) the premises are fit for the tenant to live in; and
> (c) the premises and inclusions are in good repair; and
> (d) the lessor is not in breach of a law dealing with issues about the health or safety of persons using or entering the premises.
> **(3)** While the tenancy continues, the lessor—
> (a) must maintain the premises in a way that the premises remain fit for the tenant to live in; and
> (b) must maintain the premises and inclusions in good repair; and
> (c) must ensure any law dealing with issues about the health or safety of persons using or entering the premises is complied with; and
> …"

The respondent's case

[26] The respondent contended that the words in cl 25 and s 103 and, in particular, "ensure" should be given their everyday meaning of "to make sure or certain to occur". Hence, the appellant's obligation at the commencement of the tenancy was to make certain that the premises were "in good repair". That obligation was not qualified by any test of reasonableness. The stairs, by virtue of rot in the tread which gave way, were not in "good repair".

The respondent did not allege breach of the appellant's common law duty of care.

The primary judge's finding of liability

[27] The primary judge accepted the general thrust of the respondent's submission and found:

> "I think the facts in this matter are distinguishable from the cases to which I have been referred. The contract in this case casts an obligation on the defendant to 'ensure' the premises 'are in good repair'. They were not. I find the defendant was in breach of its duty to the plaintiff and I find for the plaintiff. There was high risk of injury if the stairs on this high house failed. The age and condition of the stairs which included at least one observably newer tread, required periodic inspection to satisfy the lessor's contractual obligations. I regard the presence of the word 'ensure' as significant."

[28] His Honour referred only to the respondent's contractual duty. That was because the wording of cl 25.1(a) of the Tenancy Agreement is, relevantly, identical in substance to s 103(2)(a)(b) and (c). It was not submitted to his Honour, and it was

not contended on appeal, that the respondent's obligations under these provisions differed in any way.

The lay evidence on the condition of the stairs

[29] Shortly after the accident, the staircase was replaced by a tradesman, Mr Cumming. He said that in the course of his demolition of the stairs he did not notice any wood rot in the end of the tread which gave way, or otherwise in the stairs. He was asked by the primary judge:

> "And some of the treads when you took them out, did you notice that they didn't have any rot on the end and some did have?"

He responded:

> "Well … most of the treads I took any notice of appear to be reasonable. I did notice that the – in the photographs there appears to be some – some rot, but that's not evidence – given the fact that I think they had been recently painted, you couldn't see a real lot of anything there, sir."

[30] Other evidence relevant to the condition of the stairs and the detectability of rot was given by Mr Gillan, a director of the appellant, and Mr and Mrs Jaggi, the previous tenants who had vacated the premises a few weeks before the respondent and her husband went into possession. The evidence of each of the Jaggis, in substance, was that they frequently used the stairs without observing any signs of rot, movement or deterioration in them. They had been in occupancy for two to three years.

[31] A statement of Mr Gillan was put in evidence but he was unavailable for cross-examination. He said that he had "handyman type experience", had previously worked in the construction industry and did maintenance work at the house. After the Jaggis left, the house was painted inside by him and two other workmen. In the course of their work they carried 20 litre cans of paint up the stairs into the house and in doing so and attending to other maintenance work he did not "observe visible rotting or detect movement in any of the treads of the stairs". After the Jaggis moved out he inspected the house to see what maintenance work needed to be done and, in that process, did not observe any rot in the stairs. He does not specifically state that he subjected the stairs to any particular scrutiny. But he did say that the treads and stringers were covered with many coats of paint which had been applied over the years, obscuring any signs of wood rot.

[32] Neither the respondent nor her husband noticed any defect in the stairs prior to the accident even though it is probable that the respondent's husband preceded her down the stairs immediately prior to the accident.[1]

[33] The evidence does not reveal the height of the stairs but photographs in evidence show that there were eight treads in all. Assuming a height between treads of 16 cm, the stairs were approximately 1¼ m high. That estimate can be verified in a general way by reference to photographs of the front of the house. The stringers and the treads were made of wood.

The expert evidence

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1 R 59-60.

[34] Mr Hanson, an engineer called on behalf of the respondent, in a report dated 19 October 2004, expressed these opinions:

> ". Photograph 2 shows that the ends of the two damaged treads have suffered damage over the years probably from moisture allowing wood rot to progress slightly each time the tread/stringer joint gets wet from rain or cleaning the staircase. The nature of the slotted joint means that moisture cannot evaporate as readily from the joint as it can from the external surfaces of the staircase. Rot will progress causing the timber to weaken with time with the outer surfaces of the mating timber losing strength and allowing movement to occur, this process taking years, not days."
>
> **".** Compelling evidence that such movement occurs can be seen from photograph 4 dated 1 January 1994, at right showing downward movement of the end of the third tread. The rotting timber has allowed the tread to slip in its socket. This tread would also have eventually failed if it had not been replaced or the staircase demolished."
>
> **".** Photograph 4 … also shows evidence of an earlier tread replacement. The fourth tread from the bottom is a noticeably different colour and has a different painting history …"
>
> **".** SMEC[2] can only conclude that a progressive deterioration of the timber in the treads, and to a lesser extent in the stringers, has caused the treads to fail suddenly when the amount of residual, competent timber has reduced to the extent that the end of the treads can no longer hold a person using the staircase in normal, everyday circumstances."
>
> **".** SMEC believes that regular visual inspection by a person with some experience in house maintenance would have revealed the potential for failure of the rotted treads several years before the failure occurred."

[35] In his evidence in chief, Mr Hanson was referred to a photograph of the third tread and the part of the stringer which related to it. He observed:

> "…but the timber missing is – it's difficult to say whether there's rot present or otherwise, the dark elements on the timber would suggest some timber rot. The fact that the timber has split and has – has widened would also suggest some – some decay over the period.
> Yes?- - -----I can see just behind the post the – the newel of the handrail there's also another dark mark, I – I don't know whether that's in the timber or just a dark----".

[36] As is apparent from the above extracts from Mr Hansen's report, it was given by reference to photographs without Mr Hansen having had an opportunity to inspect the steps.

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[2] Abbreviation for SMEC Australia Pty Ltd, of which company Mr Hansen was a director or employee.

[37] With regard to the quality of evidence available to the experts, Dr Jenkins, the engineer called on behalf of the appellant, observed in his report:

> "As a general comment, however, the distance from which the photographs were taken, and the quality and sharpness, significantly limit the ability to make any certain pronouncements regarding the condition of the timber components or the cause of that condition.
> With respect to the general structural integrity of the staircase, based on the photographs, it is possible to see that the majority of the treads are located in the rebates in the stringers as intended, and without misalignments or gaps. The exception is the third tread from the bottom, which displays significant misalignment at the side remote from the house …".

[38] He continued his explanation of why, "the ability to determine the condition of the stairs before the accident by reference to the photographs is severely limited":

> "If, as is possible, the treads from the second and third positions did show signs of rot, which resulted in the treads being weakened to the point where they broke or pulled out of the rebates in the stringers, it is still quite possible that no sign of this rot was visible to the naked eye immediately before the accident. … With the exception of the third tread from the bottom, there are no signs visible on the photographs of the assembled, in-situ staircase which would indicate the presence of rot."

[39] Dr Jenkins gave the following evidence of warning signs of the presence of rot:

> "When rot does occur at the ends of treads which are located in rebates in outdoor stairs, this occurs over a long period of time and the wood gradually decays. As this occurs the tread often drops under the influence of the loads placed upon it. In addition, the rot often proceeds more rapidly at the edges of the tread than in the centre, and particularly so at the end enclosed in the rebate, which does not drain so freely. This results in localised weakening of the wood at the edges, which allows the tread to rock, while being supported on the stronger portion at the centre of the edge of the tread.
>
> This rocking and tendency of the tread to move when a person steps onto it is a common indicator of the presence of rot, and hence the need for repair."

[40] Mr Hanson, who had read Dr Jenkins' report, did not criticise these parts of it.

Applicable principles of law

[41] The appellant's argument relied heavily on the decision of the High Court in *Northern Sandblasting Pty Ltd v Harris.*[3] In that case the court considered the meaning of s 106 of the *Property Law Act* 1974 and s 7(a) of the *Residential Tenancies* Act 1975. The former section provided:

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3 (1996-1997) 188 CLR 313.

> "(1) In a lease of premises for a term of three years … there is an obligation –
>
> (a) on the part of the lessor, in the case of a lease of premises for the purpose or principally for the purpose of human habitation, to provide and maintain the premises or such part as is let for such purpose in a condition reasonably fit for human habitation …".

[42] Sections (7)(a) of the *Residential Tenancies Act* 1975 provided:

> "Notwithstanding any agreement between a landlord and tenant, in every tenancy agreement entered into after the commencement of this Act there shall be implied obligations –
>
> (a) on the part of the landlord –
>
> …
>
> (ii) to provide and, during the tenancy, maintain the dwelling-house in good tenantable repair and in a condition fit for human habitation;
>
> …".

[43] Gummow J concluded that the obligations imposed by these provisions, although contractual in nature, and giving rise to a duty on the landlord to perform the contract,[4] were not absolute but were directed to providing "reasonable standards for the rental premises to which [they] applied, rather than to render lessors insurers".[5]

[44] In order to reach that conclusion, his Honour drew heavily on the development of the law in relation to equivalent provisions in the United Kingdom and Canada.

[45] In *O'Brien v Robinson*,[6] one of the authorities discussed by Gummow J, Lord Diplock, with whose reasons Lord Reid, Lord Simon of Glaisdale and Lord Cross of Chelsea agreed, traced the development of the law in respect of a landlord's statutory obligation to provide and maintain a premises "reasonably fit for human habitation" or "in all respects fit for human habitation". His Lordship concluded that the authorities had developed in such a way that no obligation was imposed on a landlord by such provisions unless the landlord had notice of the defect. It is implicit in his Lordship's reasons that such notice exists where "a reasonable landlord would have been put 'upon enquiry' as to whether works of repair were needed".

[46] Referring to the Canadian cases of *Gaul v King*[7] and *Bassett Realty Ltd v Lindstrom*[8] Gummow J said:[9]

> "Moreover, in both the Nova Scotia decisions, the local statute was so construed as not to impose an absolute liability and as not to cover latent defects which could not be discovered by the exercise of reasonable care and skill. In *Gaul v King*, Jones JA said:

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4 See per Gummow J at 377 referring to *O'Brien v Robinson* per Diplock LJ at 927.
5 At 385.
6 [1973] AC 912.
7 (1979) 103 DLR (3d) 233.
8 (1979) 103 DLR (3d) 654.
9 At 381.

> 'This is consistent with the test under the English legislation. This will not impose an undue hardship on the landlord and will afford a reasonable measure of protection to the tenant. It should be noted that the Ontario provision requires the landlord to repair notwithstanding a state of non-repair when the premises were leased. The object of the legislation is to provide reasonable standards for rental premises. This does not mean that the Legislature intended that lessors should be insurers.'"

[47] The provision of the *Residential Tenancies Act* under consideration in *Gaul v King* provided:

> "The landlord shall keep the premises in a good state of repair and fit for habitation during the tenancy …".

[48] Gummow J did not expressly identify the duty imposed by such provisions on a landlord but he referred to the following reasons of MacKinnon JA in *McQuestion v Schneider*,[10] with approval:

> "In my view, s 96(1) does not impose an absolute liability upon a landlord for any injuries or damages that may be caused by a latent defect, of which the landlord has no knowledge, nor could reasonably be expected to have had such knowledge. …
> In the circumstances we can find no failure on the part of the landlords to exercise reasonable care in providing and maintaining the rented premises in a good state of repair and fit for habitation."

[49] In *Gaul v King*, Jones JA, who delivered the judgment of the court, concluded:

> "While it can be argued that the mandatory language of the Act does impose strict liability, I think the appropriate test to apply under our *Residential Tenancies Act* is the common law duty of care. I do not think that the Legislature intended to impose liability without providing lack of care or diligence on the part of the person on whom the duty is imposed. In my opinion the landlord has a duty to see that the premises are as safe as reasonable care and skill can make them. This is not an absolute liability and does not cover defects, such as latent defects, which could not be discovered by the exercise of reasonable care and skill. As the landlord is responsible under the Act to keep the premises in good repair he will be liable for defects which are discoverable by the exercise of reasonable care and skill."

[50] The above passage from the reasons of the Court in *Gaul v King*[11] was referred to with approval by Kirby J who concluded that the Legislative provisions under consideration did not impose on the landlord "an obligation to do something of which it was reasonably unaware".

[51] Gaudron J agreed with Gummow and Kirby JJ that s 106(1) of the *Property Law Act* 1974 and s 7 of the *Residential Tenancies Act* 1975 created contractual duties but could not be construed as imposing absolute liability.

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10 (1975) 8 OR (2d) 249.

11 At 242.

[52] In *Bond v Weeks*,[12] the court observed that the concession made by counsel of the appellants that there would be a breach of the obligations in s 7(a)(ii), (iii) and (iv) of the *Residential Tenancies Act* 1975 "only if there was a failure to repair defects of which the landlord was aware or should be aware" was properly made. The concession was made in the light of the dicta of Gummow and Kirby JJ in *Northern Sandblasting Pty Ltd*.

[53] Although the use of the word "ensure" in s 103 of the 1994 Act introduces a note of emphasis absent from s 7(a) of the 1975 Act, I am unable to accept that its use was intended to change the substance of the obligation imposed by the former provision which gave the landlord an express obligation "to provide" a dwelling-house in good tenantable repair. Read literally, it imposed an absolute and unqualified obligation. Framing the new provision in terms of *ensuring* that the premises be of a specified standard does not appear to me to result in any more than a semantic change. Construed literally, the obligation imposed by s 103 is absolute and unqualified as was the case with the obligation imposed by s 7(a).

[54] I do not attach any significance to the fact that "ensure" is used in sub-section (2) but not in sub-section (3)(a) and (b). It is difficult to accept that the obligations imposed by the latter provisions, prefaced by the word "must", were intended to be of a lesser quality than those imposed by sub-section (2). And I note that "ensure" is used in sub-section 3(c).

[55] As earlier discussion shows, there is a long tradition in Australia, the United Kingdom and Canada of not construing provisions of the nature of those under consideration so as to impose absolute obligations. That approach is consistent with the development of the common law in this area. In *Jones v Bartlett*[13] Gummow and Hayne JJ observed that the landlord's duty to the tenant at common law did not "exceed the content of statutory requirements in various Australian jurisdictions". They defined the common law duty as:

> "Broadly, the content of the landlord's duty to the tenant will be conterminous with a requirement that the premises be reasonably fit for the purposes for which they are let, namely habitation as a domestic residence."

[56] Their Honours expanded on the duty of care as follows:

> "The duty requires a landlord not to let premises that suffer defects which the landlord knows or ought to know make the premises unsafe for the use to which they are to be put. The duty with respect to dangerous defects will be discharged if the landlord takes reasonable steps to ascertain the existence of any such defects and, once the landlord knows of any, if the landlord takes reasonable steps to remove them or to make the premises safe. This does not amount to a proposition that the ordinary use of the premises for the purpose for which they are let must not cause injury; it is that the landlord has acted in a manner reasonably to remove the risks."

[57] If the Legislature had intended to increase the obligations of lessors to such a substantial degree it is unlikely in my view that it would have chosen language which, at its highest, only hints at the possibility of a change of substance. Also, the

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12 [1999] 1 Qd R 134.

13 (2000) 205 CLR 166 at 215.

contractual provision ought be construed in the light of the long established construction of similar provisions.[14] It is relevant also that the contractual obligation would appear to have been worded so as to conform with the wording of s 103 and, presumably, with the intent that the contractual and statutory obligations coincided.

Application of the principles to the facts

[58] The matters which appear to have influenced the primary judge to reach his conclusion were:

(a) the fact that one of the treads had been replaced "at some stage";

(b) Mrs Hansen's evidence that "regular visual inspection by a person with some experience in house maintenance would have revealed a potential for failure of the rotted treads several years before the failure occurred";

(c) Dr Jenkins' evidence that "a common means of searching for rot in timber is to probe with a slender (but not necessarily pointed) tool or instrument such as a screwdriver. Such probing would reveal the presence of rot or decayed timber (or white ant attack) close below the surface"; and

(d) the fact that the stairs were exposed to the weather and that "deterioration in the structural integrity was to be anticipated and was clearly capable of being discovered".

[59] I am unable to accept that, of itself, the replacement of one tread in an old staircase provides useful evidence of the potential for failure of the remainder of the treads. There can be any number of explanations for the replacement of a tread, including warping or bowing of the tread, looseness or an unacceptable degree of splintering.

[60] What Mr Hansen meant by his opinion that regular visual maintenance by an experienced person would have revealed the potential for failure of the rotted treads is not immediately obvious. It is implicit in the words used that the "potential for failure" may not have been capable of detection by a person lacking some relevant expertise. His report does not suggest the existence of any reason why a person observing the steps would have been alerted to the presence of rot except by the existence of a replacement tread and the appearance of the third tread. It is reasonable to infer that Mr Hanson attached considerable weight to the state of the third tread as the observations under consideration are made in conjunction with reference to the replacement tread and the "compelling evidence of the progressive nature of the failure" provided by the movement of the third tread from the bottom. Yet, as his Honour pointed out, the state of that tread must be disregarded having regard to the possibility that it may have been dislodged after the accident.

[61] Any assessment of what a person inspecting the stairs could see, ought reasonably to have seen or ought reasonably to have done, must be made in light of the fact that the expert evidence was given by reference to photographs, small in scale and indistinct. Observations based on those photographs, necessarily, contain a large element of speculation. They are a poor substitute for contemporaneous eyewitness accounts, not least because they are made by an expert witness with all the advantages that hindsight provides.

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[14] Cf *Uniproducts (Manchester) Ltd v Rose Furnishers Ltd* (1956) 1 All ER 146 and *McCarrick v Liverpool Corporation* [1947] AC 219.

[62] Whilst I am reluctant to depart from the views expressed by a judge with the practical experience and judgement of the primary judge in a matter such as this, I am encouraged to do so by my conclusion that his determination was based on the application of an erroneous principle of law. In my view, it is plain from paragraph [24] of his Honour's reasons that his Honour was applying an absolute standard rather than that required by the application of the principles expressed in *Northern Sandblasting*.

[63] Whatever the import of Mr Hansen's evidence about regular visual inspection, it does not appear to mean that a visual inspection conducted at the commencement of the tenancy by the landlord would have revealed the existence of dry rot or "the potential for failure of the rotted treads". No defect in the stairs was apparent to the respondent and her husband or to previous tenants who used them regularly. Nor was any defect seen by Mr Gillan, who, together with his workmen, subjected the stairs to heavy use a few weeks prior to the accident.

[64] There was no challenge to the evidence that the timber on the steps was covered by paint obscuring the presence of rot. Also as Dr Jenkins pointed out, the movement of a tread is a common indicator of the presence of rot. That warning sign was absent here and there were no others, apart from indications of age, for what they are worth.

[65] In my view, there was no failure to repair any defect of which the appellant was aware or of which he ought reasonably to have been aware.

[66] It would impose an unusually onerous burden on a landlord of domestic premises to require it, before the commencement of a tenancy, to have the premises inspected for defects by an appropriately qualified tradesman or tradeswoman unless there existed some evidence of a defect or defects of which the landlord was aware or ought reasonably to have been aware, or unless there were circumstances which would have caused a reasonable landlord to have such an inspection carried out. Of course, such a requirement may be imposed by appropriate statutory or contractual language. But for the reasons I have given, I do not accept that the Tenancy Agreement or s 103 imposed any such burden on the appellant.

[67] I would order that the appeal be allowed, that the orders at first instance be set aside, and that the respondent pay the appellant's costs of and incidental to the proceedings.

[68] **WILSON J:** On 6 August 2000 the respondent plaintiff was descending the front steps of the house in Townsville where she and her husband lived when two of the steps gave way because of wood rot. She fell about 2 metres to the ground and landed on her bottom, sustaining injuries.

[69] She sued the landlord (the appellant) in the District Court, where she succeeded in obtaining judgment for $96,350.00. This is an appeal against the trial judge's decision on liability.

[70] The respondent and her husband were tenants of the property pursuant to a tenancy agreement executed on 25 July 2000. The term of the agreement was 2 years from 9 July 2000, and the rent was $160-00 per week.

[71] The house was old. It was high set, and constructed of timber with an iron roof. It had 3 entrances, and 3 sets of stairs. The front steps, which consisted of nine hardwood wooden treads slotted into wooden stringers, were exposed to the weather. One or more of the treads had been replaced, and the paint on the newer treads was different from that on the older ones.

[72] The appellant acquired the property as a rental property in about 1997. At that time Dr and Mrs Jaggi were in occupation as tenants. They remained until mid 2000, when they left after renting the property for 6 or 7 years. While they were in occupation, Mr Gillan on behalf of the appellant visited on various occasions, and if he saw anything needing repair he either attended to it himself or had someone else do so promptly. He did not receive any report of the stairs being in any way unsafe or potentially so. In a statement made on 30 August 2004, Dr Jaggi said he could not recall being concerned about the condition of any of the 3 staircases. Specifically he could not recall any problems with the front stairs – he could not recall any of the treads being wobbly, any problems with the railings, any signs of rot or any other indication of problems with the stairs. He said the stairs did not show any signs of rot in the treads or the stringers.

[73] When the Jaggis left, Mr Gillan inspected the property to see what maintenance work (if any) was needed. He took away a lot of rubbish and cut back all the trees. He and 2 other men fully painted the house internally over about 7 days, and he also did some minor repair work to some of the internal walls. They used the steps, carrying 20 litre cans of paint up into the house. Mr Gillan did not observe any visible rotting or detect movement in any of the treads.

[74] While the painting was under way the respondent and her husband inspected the property. Mr Gillan showed them around briefly, and then left them to inspect the house for themselves. They were anxious to secure the property, and so entered into the tenancy agreement with effect from 9 July 2000, even though they were unable to go into occupation until 20 July 2000 because of the maintenance work being undertaken by the appellant.

[75] In the short time the respondent and her husband occupied the property before her accident, they did not observe anything to indicate that any of the treads were loose or out of alignment.

[76] The tenancy agreement contained the standard terms prescribed under s 38 of the *Residential Tenancies Act* 1994 by the *Residential Tenancies Regulation* 1995 s 4 and s 5. They included –

> **25 Lessor's obligations – s 103**
>
> 25.1 At the start of the tenancy, the lessor must ensure –
>
> (a) the premises are clean and fit for the tenant to live in and are in good repair: and
>
> (b) the lessor is not in breach of a law dealing with issues about the health and safety of persons using or entering the premises.
>
> 25.2 While the tenancy continues, the lessor must –
>
> (a) maintain the premises in good repair and in a way that the premises remain fit for the tenant to live in; and

(b) ensure any law dealing with issues about the health and safety of persons using or entering the premises is complied with; and

(c) keep any common area included in the premises clean.

In this clause –

"premises" include any common area available for use by the tenant with the premises.

26 Tenant's obligations – s 106(1A) and (2)

26.1 The tenant must keep the premises clean, having regard to their condition at the start of the tenancy.

26.2 The tenant must not intentionally, maliciously or negligently damage, or allow someone else to intentionally, maliciously or negligently damage, the premises.

... …

32 Notice of damage – s 125

32.1 If the tenant knows the premises have been damaged, the tenant must give notice as soon as practicable of the damage.

32.2 If the premises need routine repairs, the notice must be given to the lessor.

32.3 If the premises need emergency repairs, the notice must be given to-

(a) the nominated repairer for the repairs: or

(b) if there is no nominated repairer for the repairs or the repairer can not be contacted – the lessor.

[77] The trial judge found –

> "The contract in this case cast an obligation on the defendant to "ensure" the premises "are in good repair". They were not. I find the defendant was in breach of its duty to the plaintiff and I find for the plaintiff. There was high risk of injury if the stairs on this high house failed. The age and condition of the stairs which included at least one observably newer tread, required periodic inspection to satisfy the lessor's contractual obligations. I regard the presence of the word "ensure" as significant."

[78] At common law a tenant of residential premises was largely at the mercy of his or her landlord. In *Austin v Bonney* [1999] 1 Qd R 114 Helman J summarised the position at common law in these terms (at 130) –

> "The general rule at common law was that in the absence of express stipulation in a tenancy agreement a landlord was under no liability to a tenant to put demised premises into repair at the beginning of a tenancy, or to do repairs during the continuance of the tenancy: see *Halsbury's Laws of England*, 4th ed. re-issue, volume 27(1), para. 328, p. 308. On the letting of an unfurnished dwelling house, therefore, there was no implied warranty on the part of the landlord that it was in a reasonably fit state for habitation: *Hart v. Windsor*

> (1843) 12 M. & W. 68 at 86; 152 E.R. 1114 at 1122. To that general rule there was an exception when a furnished house was let: in such a case there was an implied condition that the house was in a fit state for habitation at the beginning of the tenancy: *Smith v. Marrable* (1843) 11 M. & W. 5 at 8; 152 E.R. 693 at 694. There was, however, no implied condition or warranty that the premises would remain fit for habitation throughout the term: *Sarson v. Roberts* [1895] 2 Q.B. 395."

[79] The position of tenants was ameliorated by social reform legislation introduced in England from the mid to late 19th century. Sometimes restrictive interpretations of such legislation and changing social attitudes resulted progressively in further legislative interventions adjusting the rights of landlords and tenants. See generally Reynolds "Statutory Covenants of Fitness and Repair: Social Legislation and the Judges" (1974) 37 Mod L Rev 377.

[80] Of particular relevance to the present case are three statutes of the Queensland Parliament – the *Residential Tenancies Act* 1975 ("the 1975 Act"), the *Residential Tenancies Act* 1994 ("the 1994 Act") and the *Residential Tenancies Amendment Act* 1998 ("the 1998 Amendment Act").

[81] By s 7(a) of the 1975 Act –

> **"7. Implied obligations in tenancy agreement.** Notwithstanding any agreement between a landlord and tenant, in every tenancy agreement entered into after the commencement of this Act there shall be implied obligations –
>
> (a) on the part of the landlord -
>
> (ii) to provide and, during the tenancy, maintain the dwelling-house in good tenantable repair and in a condition fit for human habitation;
>
> (iii) to maintain during the tenancy fixtures, fittings, goods and chattels let with the dwelling-house in good tenantable repair;
>
> (iv) to comply with all lawful requirements in regard to health and safety standards with respect to the dwelling-house;"

Those provisions were accepted as obliging a landlord to repair only defects of which he or she knew or ought to have known: *Bond v Weeks* [1999] 1 Qd R 134 at 139; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 375 – 385; 414 - 416 per Gummow and Kirby JJ. See also *Austin v Bonney*; *O'Brien v Robinson* [1973] AC 912. The landlord's obligation was not absolute, but subject to a limitation of reasonableness. In *Bond v Weeks* [1999] 1 Qd R 134 the Court of Appeal said (at 138) –

> "…in requiring "good tenantable repair" in paras (ii) and (iii) of s. 7(a) and "a condition fit for human habitation" in the first of these, the section is, in each case, imposing a standard of reasonableness having regard to the age, character and locality of the house and to the effect of the failure of the state or condition of the house as a whole."

[82] The lessor's obligations were recast in the 1994 Act in these terms –

"**Lessors obligations generally**

103.(2) At the start of the tenancy, the lessor must ensure –

(a) the premises and inclusions are reasonably clean; and

(b) the premises are fit for the tenant to live in; and

(c) the premises and inclusions are in a reasonable state of repair, having regard to the age of, rent payable for, and expected life of, the premises or inclusions.

(3) While the tenancy continues, the lessor must -

(a) maintain the premises and inclusions in a reasonable state of repair, having regard to the matters mentioned in subsection (2)(c);"

[83] In the earlier legislation the landlord's obligations were "to provide and, during the tenancy, maintain" the premises at the requisite standard; under the 1994 Act he or she had to "ensure" they were of the requisite standard at the start of the tenancy and to "maintain " them at that standard while the tenancy continued. The standards were the same, although the language had been updated; indeed the standard of repair was expressed in terms which picked up the Court of Appeal's decision in *Bond v Weeks*.

[84] The 1998 Amendment Act substituted the following obligations –

"103.(2) At the start of the tenancy, the lessor must ensure –

(a) the premises and inclusions are clean; and

(b) the premises are fit for the tenant to live in; and

(c) the premises and inclusions are in good repair; and

(d) the lessor is not in breach of a law dealing with issues about the health or safety or persons using or entering the premises.

(3) While the tenancy continues, the lessor -

(a) must maintain the premises in a way that the premises remain fit for the tenant to live in; and

(b) must maintain the premises and inclusions in good repair; and

(c) must ensure any law dealing with issues about the health or safety of persons using or entering the premises is complied with; and

(d) if the premises include a common area – must keep the area reasonably clean."

As in the 1994 Act the landlord's obligation at the commencement of the tenancy was expressed as one "to ensure" the premises were of a requisite standard; the standard of repair required was "good repair".

[85] There is no material difference between an obligation to "provide" premises of a certain standard, and an obligation to "ensure" they are of that standard. The latter means no more than to make sure they are of that standard, and doing so may necessitate some positive action to elevate them to that standard if they do not already meet it. The obligation is not a non-delegable one. It may be satisfied by engaging an apparently competent person to do the necessary work; if such a person is engaged and carries out the work negligently, the landlord will not be responsible for his or her default. See *Northern Sandblasting* per Brennan CJ, Dawson, Gaudron, Gummow and Kirby JJ (Toohey and McHugh JJ contra).

[86] Despite the change from "a reasonable state of repair" to "good repair", the standards demanded of a landlord are not absolute. The Legislature stopped short of imposing a standard of perfect repair.

[87] It is instructive to consider corresponding legislation in some of the Canadian provinces. In *McQuestion v Schneider* (1975) 57 DLR (3d) 149 Ontario legislation provided –

> "96. (1) A landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation…"

The plaintiffs in that case had owned and occupied the premises for several years before selling them to the defendants, and remaining in occupation as monthly tenants. Two weeks after the sale was completed, the female plaintiff was injured when she stood on a step, which gave way. The step was in a bad state of repair from dry rot. Neither the plaintiffs nor the defendants had any actual knowledge that the step was defective, and the presence of dry rot could not have been ascertained by any reasonable inspection. The Ontario Court of Appeal upheld the trial judge's finding that the defendants had not breached their obligations. MacKinnon JA said (at 238) –

> "In my view, s 96(1) does not impose an absolute liability upon a landlord for any injuries or damages that may be caused by a latent defect, of which the landlord has no knowledge, nor could reasonably be expected to have had such knowledge. To alter the law so drastically as to impose strict liability on a landlord, regardless of his knowledge or constructive knowledge, would require much more precise language."

He added (at 239) –

> "Putting the plaintiff's case at its highest, namely, that there is now a statutory duty of care imposed upon a landlord, the landlords did not know of the latent defect nor, under the circumstances, could they reasonably be expected to have had knowledge of it. It is also common ground that no notice of the defect was given to the landlord if that were required.
>
> In the circumstances we can find no failure on the part of the landlords to exercise a reasonable care in providing and maintaining the rented premises in a good state of repair and fit for habitation."

[88] In *Gaul v King* (1979) 103 DLR (3d) 233 the plaintiff had occupied residential premises for 18 years when she was injured when a rotten floorboard on a landing gave way when she stepped on it. The landlord had no actual notice of the defect,

and the plaintiff failed to prove that reasonable inspection of the premises would have disclosed it. The Nova Scotia Supreme Court Appeal Division held that legislation imposing on the landlord a statutory condition to "keep the premises in a good state of repair" gave rise to a right of action in tort in favour of a tenant who suffered physical injuries as a result of the disrepair of the premises. In the context of the landlord's statutory right of entry on 24 hours' notice to the tenant, the court rejected notice of the defect as a condition of liability (at 241 -242). It construed the obligation to keep the premises in a good state of repair in this way (at 242)-

> "While it can be argued that the mandatory language of the Act does impose strict liability, I think the appropriate test to apply under our *Residential Tenancies Act* is the common duty of care. I do not think that the Legislature intended to impose liability without proving lack of care or diligence on the part of the person on whom the duty is imposed. In my opinion the landlord has a duty to see that the premises are as safe as reasonable care and skill can make them. This is not an absolute liability and does not cover defects, such as latent defects, which could not be discovered by the exercise of reasonable care and skill. As the landlord is responsible under the Act to keep the premises in good repair he will be liable for defects which are discoverable by the exercise of reasonable care and skill."

[89] The 1998 Amendment Act should be similarly construed as not imposing an obligation on the landlord to remedy defects beyond those of which he or she has actual or constructive notice. Here the appellant had no actual notice of the wood rot; whether it had constructive notice was a question of fact which the trial judge must be taken to have determined against it. Unless that finding should be reversed, the appeal cannot succeed.

[90] Soon after the respondent's accident, the staircase was removed. Photographs were taken of the dismantled staircase, and both sides engaged experienced engineers who were asked to view the photographs and to express opinions on why the steps gave way.

[91] Mr Hanson of SMEC Australia Pty Ltd, who was retained by the respondent, said -

> "Photograph 2 shows that the ends of the two damaged treads have suffered damage over the years probably from moisture allowing wood rot to progress slightly each time the tread/stringer joint gets wet from rain or cleaning the staircase. The nature of the slotted joint means that moisture cannot evaporate as readily from the joint as it can from the external surfaces of the staircase. Rot will progress causing the timber to weaken with time with the outer surfaces of the mating timber losing strength and allowing movement to occur, this process taking years, not days."
>
> "SMEC can only conclude that a progressive deterioration of the timber in the treads, and to a lesser extent in the stringers, has caused the treads to fall suddenly when the amount of residual, competent timber has reduced to the extent that the end of the treads can no longer support a person using the staircase in normal, every day circumstances."

> "SMEC believes that regular visual inspection by a person with some experience in house maintenance would have revealed the potential for failure of the rotted treads several years before the failure occurred."

[92] Dr Jenkins, the appellant's expert, was understandably cautious about expressing opinions on the basis of photographs. He nevertheless made a number of pertinent comments -

- Wood rot is progressive in nature.
- If wood rot was present in the steps, it may not have been visible to the naked eye immediately before the accident.
- Rocking and tendency of the tread to move when a person steps on to it is a common indicator of the presence of rot. That those using the staircase before the accident did not note any such rocking or movement of the treads suggests either that rot was not present or if it was that it was not detectable through looseness or rocking of the treads.
- Rot could be concealed from view by paint.
- A common means of searching for rot in timber is to probe with a slender (but not necessarily pointed) tool or instrument, such as a screwdriver. Such probing would reveal the presence of rot or decayed timber (or white ant attack) close below the surface.

[93] In light of this evidence, the question of constructive notice comes down to whether the appellant's obligation to ensure the premises were in good repair at the start of the tenancy obliged it to have the stairs inspected by someone with experience in house maintenance.

[94] This case is readily distinguishable from *Watson v George* [1953] SASR 219. There a paying guest in a boarding house died from the effects of inhaling carbon monoxide emitted by a faulty bath heater. When the appliance was installed, it was new, safe and efficient, but it had been in use for more that 20 years and, unbeknown to the boarding house keeper, had developed faults when the tragedy occurred. Ligertwood J posed the question -

> "..whether the defendant in a reasonable course of conduct towards her boarders should from time to time have had the bath-heater examined by an expert to see whether it was functioning properly."

His Honour answered the question in the negative, saying (at 155) that -

> "..to condemn the defendant on this ground is, I think, to be wise after the event and not to judge the affairs of mankind by the standard of ordinary reasonable human conduct."

[95] This was an old house in tropical north Queensland. The wooden steps were exposed to the weather. Progressive deterioration from wood rot resulting from exposure to moisture was reasonably foreseeable by someone in the position of the appellant. That foreseeability was heightened by the fact that at least one tread had been replaced. The presence of rot could have been detected by relatively simple probing with a screwdriver by someone with experience in home maintenance; it was not something requiring the skill of a professional engineer. To expect the appellant to have the stairs inspected by someone with experience in home maintenance would require no more of it than the exercise of reasonable care to

make sure the premises were in good repair and fit for the respondent and her husband to live in. In my opinion the trial judge's conclusion effectively fixing the appellant with constructive notice of the defect was clearly correct.

[96] I would dismiss the appeal with costs.