

Bond claims – Balcony, Deck & Garage Floors

Fair wear and tear

“Fair wear” is deterioration caused by the reasonable use of the premises. “Fair tear” is deterioration caused by the ordinary operation of the forces of nature. Importantly, intentional or negligent damage are not fair wear and tear.

The landlord must prove that damage is beyond fair wear and tear for compensation from the bond (*Barrera v Meyer* [2003] NSWCTTT 57; *Sunray Investments Pty Ltd v Cruwys & Ors* [1992] NSWRT 95). If the tenant wishes to argue that the damage is fair wear and tear, or to disprove any of the landlord’s claims or evidence, it is advisable that the tenant should produce evidence to support that argument (*Barrera v Meyer* [2003]).

NSW Tribunal must consider:

- the age, quality and condition of any item at the beginning of the tenancy;
- the average useful lifespan of the item;
- the reasonable expected use of such an item;
- any special terms of the tenancy agreement relating to that item; and
- the number and type of tenants, and the length of the tenant’s occupancy

(A. Anforth, P. Christensen, B. Taylor, *Residential Tenancies Law and Practice New South Wales*, 5th ed, Federation Press, Sydney, 2011, p. 120; *Tedja v Li (Tenancy)* [2012] NSWCTTT 298 [12]).

Is it fair wear and tear?

Perry v Long [2013] NSWCTTT 579: scratches and stains left by cat urine on skirting boards is not fair wear and tear.

Acevska v Foss [2010] NSWCTTT 541: pavers that were stained and dirty from umbrellas or pot plants were fair wear and tear.

Murphy v Woods (Tenancy) [2010] NSWCTTT 609: chips on tiles in kitchen, dining room and laundry caused by dropping cutlery and kids dropping things is beyond fair wear and tear.

Kent v Cheng & Shiu [2004] NSWCTTT 520: chipping of floor tiles is fair wear and tear in the absence of evidence of malicious or negligent conduct by tenants that could cause such chips.

Linke v Hazebroek [2004] NSWCTTT 608: nails, screws, staples into timber architraves, skirtings and other parts of the house without consent of the landlord is beyond fair wear and tear.

Lehane v Bryant [2005] NSWCTTT 636: staining on the deck from pot plants is beyond fair wear and tear and landlord is to be compensated for loss.

Barrera v Meyer [2003] NSWCTTT 57: minor stains from oil leaking from car is fair wear and tear. It is to be expected that there may be some marks from parking the car in the designated parking area.

NB. These cases provide a guide to how Tribunal members may decide your case and are not binding on the Tribunal’s decision.

Negligence: not fair wear and tear

Fair wear and tear does not include deterioration in the premises that could be prevented by reasonable conduct on the tenant’s part (*Alamdo Holdings Pty Limited v Australian Window Furnishings (NSW) P/L* [2006] NSWCA 224).

Landlord must limit losses

A landlord is not entitled to compensation for any loss that could have been avoided had the landlord taken reasonable action to limit the extent of the loss (called *mitigation*). Possible examples include: giving the

tenant the opportunity to do further cleaning; using council rubbish removal services instead of expensive private providers, or attending to repairs promptly (NSW Fair Trading, Standard form Residential tenancy agreement, cl. 36, http://www.fairtrading.nsw.gov.au/pdfs/Tenants_and_home_owners/Residential_tenancy_agreement.pdf). The onus of proof lies with the tenant if they are claiming at the Tribunal that a landlord is not entitled to compensation because they did not *mitigate* their loss (A. Anforth, P. Christensen, S. Bentwood, *Residential Tenancies Law and Practice New South Wales*, 6th ed, Federation Press, Sydney, 2014, p. 356).

If the landlord is claiming your bond money for repairs...

If you think the landlord may make such a claim against you, you need to be proactive. Consider the options below and what you would need to do to beat the landlord's claim BEFORE you leave the premises.

| Examples of evidence for use in the Tribunal | | |
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| Tenants' arguments | You need to show | Evidence that could be helpful |
| No Damage | That there is no damage to the balcony, deck or garage floor | <ul style="list-style-type: none"> Photographs from the start and end of the tenancy Incoming/outgoing condition reports |
| Normal wear and tear | <ul style="list-style-type: none"> That damage or deterioration is due to normal use of the premises by the tenant Damage was not caused by the tenant's negligence or deliberate actions, i.e. is due to normal natural changes, weather etc. | <ul style="list-style-type: none"> Evidence of the length of the tenancy Evidence of the condition of the balcony, deck or garage floor Evidence of the normal use of the area Evidence of the type of tenancy: are there children, is it a share house, are pets allowed etc. Photographs from the start and end of the tenancy An ingoing condition report showing that the condition of the balcony, deck, or garage floor Evidence that the condition is a result of the landlord's failure to perform necessary works in the in the areas affected Evidence of weather, drought, excessive rain, hail etc Signed and dated witness statements or statutory declarations verifying that the tenant maintained the areas through the tenancy |
| Damage caused by landlord's failure to repair | That the landlord is claiming the tenant's bond for damage caused by the landlord's own failure to maintain the premises | <ul style="list-style-type: none"> Evidence that the damage to the balcony, deck or garage floor has been caused by the landlord's inaction. Photos of the damage Evidence that you contacted the landlord to repair the damage Written reports by experts saying the damage to the balcony, deck or garage floor was caused by the landlord's failure to maintain the property Ingoing condition report |
| The landlord is claiming too much for the work that needs to be done | The landlord is claiming the cost of replacing the balcony, deck or garage floor, which could be repaired | <ul style="list-style-type: none"> A quotation from repairers showing a lower cost of rectification. Quotes for the provision of second hand or lower cost items |
| <p><u>Depreciation</u></p> <p>No set depreciation for floors, 10 years for renewable floor finish (such as varnished decks)</p> | <p>Decking and exterior floors are seen as part of the capital fittings in a home, and, as far as the Australian Taxation Office is concerned depreciate at the rate of 2.5 % per annum.</p> <p>It is commonsense however that normal life could often be less than 40 years – components wear out, depending on original materials, use, location (i.e. is the home near the coast), aspect and so on. Estimates of items' lifespan from manufacturers or maintenance contractors may be useful here.</p> | <ul style="list-style-type: none"> A copy of the Australian Taxation Office's Depreciation Tables for rental properties Evidence of the age of the items. You could ask the landlord to provide evidence of the age of the items. If they refuse, you could ask the Tribunal to order the landlord to do so. Photographs of the state of the items at the start of the tenancy Estimates of items' lifespan from manufacturers or maintenance contractors Evidence of external condition, e.g. exposure to weather, closeness to the coast, etc |