

Bond claims – Floor finishes, timber and polished 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?

Acevaska v Foss [2010] NSWCTTT 541: marks from high heels are fair wear and tear.

Alexander and Persi v Rogan [2005] NSWCTTT 377: several large gauges and heavy indentations from high heel shoes were considered to go beyond fair wear and tear.

Gordalski v Ward [2010] NSWCTTT 384: deep grooves on the floor are beyond normal wear and tear. Since it was a relatively small portion of the whole floor, the Tribunal decided that the tenant should be responsible for 25% of costs for sealing and glossing the floor.

Morgan v Kihara [2010] NSWCTTT 490: marks and damage from a child’s toy is beyond fair wear and tear. The Tribunal decided that the tenant was only liable for 1/6 of the resanding costs due to the extent to which the damage exceeded wear and tear.

Green v Miller [2005] NSWCTTT 703: floor boards over a period of time are likely to show marks, scratches or even some indentations. Deep indentations are not fair wear and tear.

Raper v Sanderson [2009] NSWCTTT 385: Scratching on floor caused by coffee table was held to be beyond fair wear and tear because several large scratches which appeared to go beyond the surface of the boards, and some gouging was apparent from photographs.

Pettit v Ardern [2013] NSWCTTT 532: long surface scratches are beyond fair wear and tear.

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).

Lifespan

The lifespan of a floor finish is 12-15 years (*Pettit v Ardern* [2013] NSWCTTT 532). In *Pettit v Ardern*, since there was no evidence on when the floor was last sanded and polished, the Tribunal held that resanding and repolishing would likely occur in the near future, and apportioned about 1/6 of the costs for resanding and repolishing. Floating timber floors are expected to last 15 years, linoleum floor coverings 10 years.

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		
Tenants' arguments	You need to show	Evidence that could be helpful
No Damage	That there has been no deterioration of the floor	<ul style="list-style-type: none"> Photographs from the start and end of the tenancy An ingoing condition report showing that the floors were already marked
Normal wear and tear	That marks on the floors are due to normal use of the premises by the tenant Damage was not caused by the tenant's negligence or deliberate actions	<ul style="list-style-type: none"> Evidence of the length of the tenancy Evidence of the length of time since the floors were last polished or sealed Evidence of the type of tenancy: children, pets allowed, share house, etc. Photographs from the start and end of the tenancy An ingoing condition report showing that the floors were already marked Photographs showing that the marks on the floors are not excessive Evidence that the tenant took care of the floors, by putting rugs down etc. Evidence that the condition of the floor is a result of the landlord's failure to repair or seal (see below).
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 was caused by the landlord's failure to maintain, for example if there is deterioration due to damp caused by a leak Photos of the damage Evidence that you notified the landlord of any required repairs or damage Written reports by experts saying the damage to the floors was caused by the landlord's failure to maintain the property Ingoing condition report An expert's written opinion that the floor is made of a soft wood not suitable for sanding and sealing, as it damages very easily
The landlord is claiming too much for the work that needs to be done	The landlord is claiming the cost of repainting the whole unit when only one room / section needs resanding or resealing	<ul style="list-style-type: none"> A quotation from a floor contractor who has seen the floors and outlining the work required. If the landlord is claiming compensation for work that is not necessary, such as for punching and filling nails on a floating timber floor, the tenant should, to be safe, obtain a quotation or statement from a contractor that says the work is not necessary
<u>Depreciation</u> Normal life of polished timber floor finishes, 12 – 15 years, floating timber floors 15 years, Linoleum 10 years	The floor has not been resurfaced for a period of time, and the landlord should not claim the new value of the item because they have already benefited from its use for a period of time. For example, if an floor finish's useful life is 12 years, and it is six years old, the landlord could only claim 50% of the cost of the repair.	<ul style="list-style-type: none"> A copy of the Australian Tax Offices Depreciation Tables for rental properties Evidence of the age of the floor You could also ask the landlord to provide evidence of the item's age. If they refuse, you could ask the Tribunal to order the landlord to do so. Photographs of the state of floor at the start of the tenancy Estimates of items' lifespan from manufacturers or maintenance contractors
<u>Depreciation</u> No set depreciation for floor tiles, cork, parquetry etc.	Tile, cork and parquetry 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. It is commonsense however that normal life could often be less than 40 years –depending on original materials, use, location in the home, and so on. Estimates of items' lifespan from manufacturers or maintenance contractors may be useful here. See evidence points in the item above.	

