

Bond claims – Kitchen Benches

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?

Green v Miller [2005] NSWCTTT: scratches from failure to use a cutting board is a lack of care and is not fair wear and tear.

Ehmsen v Lamba [2012] NSWCTTT 191: swelling of kitchen bench is fair wear and tear

Soun v Woods [2013] NSWCTTT 65: some scratches on the benchtop is fair wear and tear.

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).

Maintenance of kitchen benches

In *Howarth v McConchie* [2006] NSWCTTT, the Tribunal held that granite kitchen benches require particular care with cleaning. Not cleaning the granite bench properly leads to the bench absorbing cooking oils. In this case, the tenant was liable for the repair of stained and marked granite benchtop.

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 is no damage to the kitchen bench	<ul style="list-style-type: none"> Photographs from the start and end of the tenancy Incoming/outgoing condition reports showing the cleanliness of the premises
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 	<ul style="list-style-type: none"> Evidence of the length of the tenancy Evidence of the age of the benchtops Evidence of the type of tenancy: are there children, is it a share house, etc. Photographs from the start and end of the tenancy An ingoing condition report showing that the condition of the benchtops Evidence that the condition of the benchtops is a result of the landlord's failure to repair ... for example if there is swelling or staining due to a water leak Any special instructions or equipment provided by the landlord to the tenant for the maintenance of the benchtops.
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	<p>Evidence that the damage to the fixtures has been caused by the landlord's inaction.</p> <ul style="list-style-type: none"> Photos of the damage items Copies of letters from the tenant to the landlord asking the landlord to repair the damage Written reports by experts saying the damage to the fixtures 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 whole benchtop when only one part needs fixing or replacing	<ul style="list-style-type: none"> A quotation from repairers showing a lower cost of rectification. Quotes for the provision of second hand benches A quote or report showing that the damaged part of the benchtop can be cleaned / repaired / patched with no extensive work required Evidence that the landlord has re-let the premises for the same or reduced rent.
<u>Depreciation</u> No set depreciation for fitted benchtops	<p>Kitchen benches 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 benchtops often do not last for 40 years – components wear out, depending on original materials, use and so on. Estimates of the kitchen bench's useful lifespan from manufacturers or maintenance contractors may be useful here.</p> <ul style="list-style-type: none"> A copy of the Australian Taxation Offices Depreciation Tables for rental properties Evidence of the age of the cupboards, construction materials, condition of the kitchen benchtop at the start of the tenancy. You could ask the landlord to provide evidence of the age of the kitchen benchtop. If they refuse, you could ask the Tribunal to order the landlord to do so. Photographs of the state of the kitchen benchtop at the start of the tenancy 	

