

Bond claims – Walls and paint

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?

Haddad v Catillo [1996] NSWRT 16: Some marks on the walls are fair wear and tear, particularly if there were children living in the house.

Garzo Holdings P/L v Landwi & Kalouche [2003] NSWCTTT 413; *Acevska v Foss* [2010] NSWCTTT 541: minor marks, dents and pricks on the walls are fair wear and tear.

Murphy v Woods (Tenancy) [2010] NSWCTTT 609: Scuffs, scratches, dints, gouges, marks and two patches on the walls was fair wear and tear. The landlord’s claim for compensation for repainting was depreciated to give allowance for 5 years’ wear and tear.

Weber v Franks [2002] NSWCTTT 414: tenant covering dirt and marks on wall by painting with colour landlord didn’t like; walls not in worse condition than condition report.

Fan & Philip, Xue Tuan & Sen v Rickets [2013] NSWCTTT 647: food splashing and marks on kitchen painted wall is fair wear and tear. Tribunal held that walls in this location should be tiled, not painted.

Buckland v Goodwin [2009] NSWCTTT 685: stains on the wall caused by tenant’s dog, which the landlord allowed the tenant to keep on the premises, is fair wear and tear.

Howarth v McConchie [2006] NSWCTTT 541: Marks on wall from emissions from the barbeque is not fair wear and tear.

Bell and Bell v Boccola, Campbell and Lawrence [2009] ACAT 26: plaster cracks as building settles is fair wear and tear.

Pettit v Ardern [2013] NSWCTTT 532: holes and dents in walls are beyond fair, wear and tear. However in this case, the landlord’s compensation claim was dismissed due to lack of invoice from licensed tradesperson.

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 deemed lifespan of paint is 7-10 years. If walls have not been repainted during this time, even if any damage is beyond fair wear and tear, the landlord has not suffered any loss and cannot claim repainting costs (*Acevska v Foss* [2010] NSWCTTT 541).

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 repainting walls...

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 paintwork	Photographs from the start and end of the tenancy An ongoing condition report showing that the walls were already marked
Normal wear and tear	That marks on the walls are due to normal use of the premises by the tenant (This may work with scuff marks, but not with crayon marks or gouges in the plaster). Damage was not caused by the tenant's negligence or deliberate actions	Evidence of the length of the tenancy Evidence of the length of time since the premises were last painted 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 ongoing condition report showing that the walls were already marked Photographs showing that the marks on the walls are not excessive Evidence that the condition of the paintwork is a result of the landlord's failure to repair, for example if there is mould due to a water leak, but not the tenant's failure to ventilate the property
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	Evidence that damage to the paint (bubbling, peeling, mould etc) was caused by landlord's inaction. Photos of the damage. Evidence that you notified the landlord of required repairs or damage. Written expert reports that damage to the walls was caused by landlord's failure to maintain the property. Ongoing condition report. NOTE: Landlords often claim that mould and damp is caused by tenants not ventilating premises. If you are claiming that mould is the landlord's responsibility, you need to show it is a result of a structural issue – such as a water leak – and/or that you properly ventilated the premises during your tenancy.
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 wall / room / section needs fixing	A quotation from a painter who has seen the walls and outlining the work required. This could include simply washing the walls with an appropriate and good quality cleaner.
<u>Depreciation</u> Normal life of paintwork: 10 years	The original paintwork was old and the landlord shouldn't claim the new value because they have benefited from its use for a period. For example, if the walls were last painted 6 years ago, the landlord could only claim 40% of repainting.	A copy of the Australian Taxation Office's Depreciation Tables for rental properties Evidence of how long it is since the walls were painted. You could also ask the landlord to provide evidence of when the walls were last repainted. If they refuse, you could ask the Tribunal to order the landlord to do so. Photographs of the state of the paintwork at the start of the tenancy.