

Bond claims – Fences and Driveways

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?

Wilson v Bowman [2011] NSWCTTT 225: cracks in the driveway caused by ground movement is fair wear and tear.

Murphy v Woods (Tenancy) [2010] NSWCTTT 609: where colourbond panels were dented, each panel was determined separately as to whether they were fair wear and tear. Compensation awarded to replace two panels.

Richardson v Morrison [2011] NSWCTTT 610: dents in colourbond are fair wear and tear with a family with 8 children.

Garzo Holdings P/L v Landwi & Kalouche [2003] NSWCTTT 413: dents likely caused by son hitting fence with a ball is fair wear and tear. The minor damage was to a corner of the fence and there was no diminution in its functionality.

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

Refer to the Australian Taxation Office’s *Rental Properties 2014 Guide* for the useful life of fences and driveways. Arguments could focus on the landlord not having suffered any real loss, for example, if a new tenant has been found at the same market rent.

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).

Evidence in the NSW Civil and Administrative Tribunal

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	<ul style="list-style-type: none"> Photographs from the start and end of the tenancy An ingoing condition report showing that the fences or driveway were already damaged
Normal wear and tear	<ul style="list-style-type: none"> That damage 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 type of tenancy: are there children, is it a share house, etc. Photographs from the start and end of the tenancy Evidence, such as signed and dated witness statements or statutory declarations, photographs, expert reports that the damage occurred during the normal use of the fences or driveway.
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 has been caused by the landlord's inaction. Photos of the damage Written reports by experts saying the damage was caused by the landlord's failure to maintain the property Ingoing condition report Evidence that you notified the landlord of the fence or driveway repair issue
The landlord is claiming too much for the work that needs to be done	The landlord is claiming the cost of repairs or replacement of the whole fence or driveway when only a part requires repairing or replacement	<ul style="list-style-type: none"> A quotation from a tradesperson who has seen the property, outlining the work required, and what could be reasonably accounted for by fair wear and tear
<u>Depreciation</u> Fixed items— Fences and driveways depreciate at 2.5% per annum	Fences and driveways 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 – components wear out, depending on original materials, use, location and so on. Estimates of items' lifespan from manufacturers or maintenance contractors may be useful here.	<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. Photographs of the state of the items at the start of the tenancy Estimates of items' lifespan from manufacturers or maintenance contractors