

Bond claims – Gardens and Lawns

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 (*Barraera 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?

Kenny v Beevers [2011] NSWCTT 133: natural changes in the life of a garden over a period of time, in this case, growth of weeds, is fair wear and tear.

Moffatt v Gorham [2003] NSWCTTT 564: loss of plants during drought is fair wear and tear.

Cancio v Ware [2004] NSWCTTT 498: damage to lawn during a drought and water restrictions is fair wear and tear.

Ward & Becker v Campbell [2005] NSWCTTT 23: before and after photos were provided of the lawn, where before the beginning of the tenancy there was fairly good grass cover, and virtually none at the end of the tenancy. The Tribunal could not accept that it was all due to natural elements and was not fair wear and tear.

Bell and Bell v Boccola, Campbell and Lawrence [2009] ACAT 26: garden mulch that breaks down and garden furniture that rusts over time is 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).

Beware when negotiating with the landlord

In *Jablonski v Mantle & Keith* [2011] NSWCTTT, the Tribunal held that by obtaining a quote to repair the lawn and forwarding the quote to the landlord, the tenant’s action amounted to an admission that the damage was their responsibility and that the work had to be done and that this cost was acceptable to them. Thus fair wear and tear could not be argued. It might be prudent to note in any communication with the landlord that quotes are for the purposes of settling the claim and are not an admission of responsibility.

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 gardens or lawns	<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 items Evidence of the normal use of the garden 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 gardens and lawns Evidence that the condition is a result of the landlord's failure to perform necessary works in the garden, e.g. watering systems, fertilizing etc. Evidence of weather, drought Receipts for lawn mowing and gardening paid for by the tenant Receipts for gardening paid for by the tenant Signed and dated witness statements or statutory declarations verifying that the tenant maintained the gardens and lawns through regular watering etc.
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 gardens and lawns has been caused by the landlord's inaction. Photos of the damage Evidence that the landlord was notified of the gardening issues, e.g. cut down tree with overgrown roots 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 items which could be repaired or using high priced contractors to perform work, especially in relation to green waste removal.	<ul style="list-style-type: none"> A quotation from gardening experts showing a lower cost of rectification. Quotes for the provision of second hand or lower cost items Evidence that plants were diseased or in poor condition during the tenancy. This should include photos and may need to include written reports from gardening contractors or experts.
<u>Garden rectification can be expensive</u>	<ul style="list-style-type: none"> Tenants should be careful with the state of lawns and gardens. Landlords have in the past claimed extensive rectification costs for repairing lawns, or replacement costs for mature plants. Claims like this can cost tenants thousands. Tenants should take careful note of deterioration in gardens or plans and advise the landlord of issues that arise. Tenants should make sure they have evidence in the form of photographs, reports etc if they notice deterioration in gardens or lawns. 	