

Bond claims – Bathrooms

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 Federation Press, Sydney, 2011, p. 120; *Tedja v Li (Tenancy)* [2012] NSWCTTT 298 [12]), *Residential Tenancies Law and Practice New South Wales*, 5th ed,

Is it fair wear and tear?

In *Murphy v Woods (Tenancy)* [2010] NSWCTTT 609, the Tribunal held that heat damage on the vanity exceeds fair wear and tear, but is not bad enough that it needed to be replaced.

In *Crowe v Best* [2009] NSWCTTT 83, the Tribunal held that the crack in the basin is usually beyond fair wear and tear. However, the basin was likely 18 years old and so had no depreciable value, meaning the landlord had no loss. So the tenant was not liable.

Buckland v Goodwin [2009] NSWCTTT 685: shower screen not functioning correctly is damage beyond fair wear and tear.

Toru and Raveora v Cheow (2005) NSWCTTT 410: a drain blocked by hair is fair wear and tear.

Archer v Pacific Link Community Housing Association [2008] NSWCTTT 1345: there was no evidence that the shower hinges were damaged because of any intentional or negligent act of the tenant, so the Tribunal held that the damage was more likely to be fair wear and tear.

Weber v Franks [2002] NSWCTTT 414: crack in shower screen is fair wear and tear, because landlord did not prove that tenants negligently or intentionally damaged.

Howarth v McConchie [2006] NSWCTTT 541: a broken towel rail is fair wear and tear. This was because the action of removing or replacing a towel would cause downward pressure.

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 other bathroom fixtures. 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 bathroom fittings 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 bathroom.
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 Evidence that you contacted the landlord to repair 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 bathroom repair issue <p>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 leaks – and/or that you properly ventilated the premises during your tenancy.</p>
The landlord is claiming too much for the work that needs to be done	The landlord is claiming the cost of renovating the entire bathroom when only patching work is required	<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> Normal life of assets: <ul style="list-style-type: none"> Shower curtains: 50% pa Accessories: 20% pa Exhaust fans: 10% pa 	The original bathroom was old 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.	<ul style="list-style-type: none"> A copy of the Australian Taxation Office's Depreciation Tables for rental properties Other information on the usual lifespan of various fittings may be more useful for many bathroom fittings, which are viewed by the Tax Office as capital items. See if you can get this information from manufacturers or suppliers Evidence of how old the fittings claimed are You could also ask the landlord to provide evidence of the age of the fittings. If they refuse, you could ask the Tribunal to order the landlord to do so. Photographs of the state of the bathroom at the start of the tenancy
<u>Depreciation</u> Fixed items— Showers, baths, basins, mirrors etc depreciate at 2.5% per annum	Baths, vanities, basins, toilets 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