

Bond claims – Swimming Pools

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?

Lindholm v Matheson & Banbury [2000] NSWRT 110: Deterioration of the pool’s pH balance was not a matter of fair wear and tear. It is the tenant’s responsibility for cleanliness and correct pH balance of swimming pool. The landlord is responsible for maintenance of the structure and machinery of the pool.

Muscat v Vasquez & Thompson [2002] NSWCTTT 314: a green pool is damage beyond fair wear and tear. The Tribunal did not accept that a storm could cause a pool to go green in 3 days.

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

Swimming pool assets including chlorinators, filtration systems and heaters have a deemed useful life, and are outlined in the Depreciation Tables in the Australian Taxation Office’s *Rental Properties 2014: Guide for Rental Property Owners*.

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

To make these arguments at the Tribunal, you will need one or more of the following:

- Incoming and outgoing condition reports
- Quotes for costs of rectification
- Receipts for regular pool maintenance by the tenant
- Evidence that you rectified the breach wholly or partially, for example, you cleaned the pool
- Evidence that items necessary for the maintenance of the pool, such as filters etc were not maintained by the landlord and that the tenant asked that these items be fixed.

Depreciation of components

Chlorinators, filtration systems:	12 years
Pool cleaning assets:	7 years
Pool heaters – gas and electric:	15 years
Pool heaters – solar:	20 years