FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AG/LBC/2019/0003**
Property	**:**	**Flat 52, Chester Close South, Regents Park, London NW1 4JG**
Applicant	**:**	**Chester Close South Residents Company Limited**
Representative	**:**	**Wilsons Solicitors LLP**
Respondent	**:**	**Ms Teresa Lee Ping-Li Hampson**
Representative	**:**	**Litigant in person**
Type of Application	**:**	**Determination of an alleged breach of covenant**
Tribunal Members	**:**	**Judge L Rahman** **Mrs Flynn MA MRICS**
Date and venue of Hearing	**:**	**29th April 2019 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**5/6/19**

DECISION

The application

1. The applicant seeks a determination under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that the respondent tenant is in breach of a covenant contained in the lease. In particular the applicant asserts that the respondent constructed an internal wall without consent.

The hearing

2. The applicant was represented by Mr Mills of counsel and the respondent appeared in person with her friend Ms Harnay (to provide moral support to the respondent). Also in attendance on behalf of the applicant was Mr Robert Myhill, a director of the applicant company and also a partner in the property management company engaged by the applicant, who gave oral evidence.

The background

3. The property which is the subject of this application is a two-bedroom flat on the second floor of a building comprised of 33 flats of a similar size and layout.

4. The tribunal inspected the property before the hearing in the presence of the respondent, Mr Mills, and Mr Myhill.

5. The respondent holds a long lease of the property. The specific provisions of the lease will be referred to below, where appropriate.

The issues

6. Whether there has been a breach of covenant.

7. The burden of proof rests with the applicant, on the balance of probabilities, to prove the lease includes the covenant(s) relied upon and that the alleged facts constitute a breach of those covenant(s).

The applicant's case

The material parts of the applicant's case, as set out by Mr Myhill in his witness statement dated 14/3/19, can be summarised as follows:

8. Historically, leaseholders have sought permission for minor structural alterations such as removing a wall between a small bathroom and separate WC to create a single room or creating an opening between the kitchen and sitting room. This is in keeping with more modern times and practices and does not alter the character of the flats in question.

Before Mr Myhill became a director of the applicant company, he had sought and obtained consent for such an alteration to his own flat in the same block.

9. On 22/6/18 Mr Myhill was informed by the non-resident day porter that he had noticed the construction of a wall within the respondent's property and that he had earlier seen large amounts of plasterboard and wood being delivered to the building. On the same date Mr Myhill sent an email to the respondent explaining that he had been informed that the respondent was in the process of building a stud partition wall in her sitting room. It was explained to the respondent that the erection of the wall was a breach of the terms of her lease and he requested that the respondent cease such works and remove any construction that had already taken place.

10. On 28/6/18 the respondent replied by email denying that she had constructed a wall. Further to the queries raised by the respondent, Mr Myhill explained that he, together with other leaseholders, had removed walls within their respective properties with the applicant's consent. However, the separation of the respondent's sitting room to create a third bedroom and a small reception room was a different alteration and for which consent must be obtained from the applicant.

11. After numerous exchanges between the applicant and the respondent, on 6/8/18 Mr Myhill was granted permission by the respondent to inspect the flat. Mr Myhill carried out a visual inspection of the wall. Using his experience and knowledge as a chartered surveyor, he noted the following:

    He saw what appeared to be a stud wall with an opening for a door although there was no door installed at the time of his inspection. The physical appearance of the structure was that of a wall. The wall appeared to be a typical stud wall made of wood and plasterboard which is regularly used in the construction industry. The wall had skirting and extends from the floor to the ceiling. The wall appeared to be capable of accommodating a door and the gap between the wall and the opposing wall (perpendicular to this) conveniently appeared to be the same size as a doorway entrance. The thickness of the wall (measured at 95 mm by the respondent) is in keeping with his observation that the wall is a stud wall. The sides of the wall were wallpapered with typical wallpaper. The wall creates two separate spaces of approximately 14.4 sq. m and 11.6 sq. m. He was firmly of the view that the wall was not a pre-constructed or movable partition and that it would have to be irreparably broken up to be removed.

12. The respondent had persistently maintained that the wall is a "Chinese Legacy Art Project" and that the wall is removable. On 15/10/18, the respondent emailed photographs of the wall together with an explanation as to the images on the sides of the wall. In Mr Myhill's

view, the way that the respondent had decorated the wall was not relevant to its purpose as a wall. In his view, creating artwork on the wall does not stop it being a wall. The respondent is free to decorate the flat as she wishes and to install artworks that are genuine artworks. However, the respondent had built a wall to act as a divide to create two separate spaces in the sitting room. In his view, the respondent's claim that the wall is an art project seeks to disguise its true function, namely, that of enabling the creation of an additional room in the flat. It was important that the rooms in the flats of the building were not further separated into smaller rooms as the applicant had its own obligations not to make alterations under its head-lease, the building is in an area of high housing density and the applicant is concerned that the flat is being altered with a view to subletting with the benefit of an extra bedroom, and no permission had been granted for any similar alterations to the building and it was unlikely that the applicant would ever grant such consent in the future.

13. If the tribunal did not consider that the structure is a wall, it is nevertheless an additional "thing" that had been erected or set up on the demised premises given its clear function as that akin to a wall.

The material parts of Mr Myhill's oral evidence can be summarised as follows:

14. If the applicant were satisfied that the newly created space would not be used for a third bedroom and the wall would be removed once the respondent and her family decided to sell the flat or move out, the applicant may have given its consent. However, the applicant did not believe that the space was not intended for use as a third bedroom. He could not see any other reason to build such a structure. He would advise the applicant to not grant consent as he thought the structure is a wall. The lease precludes the construction of a wall without consent and he considers the structure to be a wall and not a chattel.

15. The applicant did not have any prejudice towards the respondent. It is difficult to define art and if consent were granted by the applicant, this may set a precedent as others may also want the same and claim that the divider is not a wall but is artwork.

16. If the respondent were to put her art project on an existing wall, there would not have been any difficulties with the terms of the lease. However, the respondent had built a wall on which to put the artwork.

17. When he inspected the wall, he did not see any gaps between the new wall and the ceiling and the existing wall as a filler had been used to fill the gaps.

The respondent's case

The material parts of the respondent's case, as set out in her witness statements dated 11/2/19 and 9/4/19, can be summarised as follows:

18. The respondent's hobbies include art and doing DIY jobs. To commemorate what the respondent and her daughters had managed to achieve since moving to London 35 years ago, before moving out of the property and making use of wallpaper remnants, the respondent came up with the idea of creating a "Legacy Chinese Gardens Art Project" ("the art project"). The art project is very meaningful to them because it is linked to very special 3-D pictures (with migrating bird scenes made of real feathers) which were brought with them when they left Hong Kong in 1984. In her view, this art project, consisting of two large panels of different Chinese garden scenes and not taking up any furniture space along any of the walls of the sitting room, is quite impressive and beautiful and interesting to look at from both the dining area as well as the sitting area. The respondent enjoyed creating it for cultural, sentimental, and aesthetic reasons. Unfortunately, Mr Myhill misunderstood her intentions. She was disappointed that the applicant requested that the wall be removed.

19. The respondent categorically confirms that not a single screw or nail had been used to fix the art project onto the walls, ceilings, or floors of the property. The lightweight frame was made of soft wood studwork timber and the covering panels on either side were made of thin plasterboard measuring a total thickness of only 9.5 cm. Therefore, technically and strictly speaking, the art project is free standing just like any other pictures or furniture leaseholders can put within their room/lounge. The integrity, structure, fabric, character, and value of the property had not been jeopardised or damaged at all. The art project had not divided the lounge into two rooms. The lounge is exactly the same as before with two functional areas (one dining area and one sitting area). No extra third bedroom had been created.

20. As the art project is situated within the lounge, it forms part of the contents of the lounge just like any other pictures or furniture that leaseholders can put within their lounge. As the art project does not form part of the building or a room, the art project should not be regarded as a wall.

21. The case of **Riverside Park Ltd –v- NHS Property Services Ltd [2016] EWHC 1313 (Ch)** is relevant and important when considering the main issue of her case, namely, whether the art project is a chattel or fixture? This case highlighted the importance of making a distinction between fixtures and chattels so that strange and unreasonable and irreconcilable situations [mentioned in the following paragraph] would not occur.

22. The respondent has not breached clause 3.13.1 because the purpose of this clause is clarified in clause 3.5. The applicant's interpretation of

clause 3.13.1 is so broad and literal that, with no links to clause 3.5 and no distinctions made between fixtures and chattels, it would result in a strange and unreasonable and irreconcilable situation. For example, the installation of a floor-to-ceiling wardrobe (either fixture or chattel) in the bedroom or a floor-to-ceiling bookcase would be prohibited. The installation of a small wardrobe in the bedroom or a small bookcase in the sitting room would also be prohibited. There would be no distinctions between the installation of a shower cubicle in the bathroom and the setting up of a water tray for children to play in the lounge because both would be prohibited. However, according to the applicant's case, a shower cubicle (definitely a fixture containing indisputable walls and a door) will somehow not be prohibited. A shower cubicle, with walls and a door and looking like an extra room, should be prohibited. To erect or set up a table, a bed, or a wardrobe from IKEA, would be prohibited because only pre-constructed furniture would not be prohibited. A long sofa or a long bookcase positioned across a long rectangular sitting room would become a "divide", a "partition", and "a non-bearing internal wall" because it "physically splits into two the room in which it is located". With no nails or screws there is nothing to "connect" the respondent's art project to the ceilings or walls. Technically speaking, the art project is just resting on the respondent's own carpets. A reasonable person with common sense would not interpret clause 3.13.1 in a way that would create strange and unreasonable and irreconcilable situations like the examples mentioned.

23. A key issue that needs to be decided by the tribunal is whether her art project is "genuine artwork" or a "disguise to create an additional room in the flat". The fact is, there is no third bedroom created within the flat.

24. Her art project is "genuine artworks" and she should be free to decorate the flat as she wishes. The respondent happens to be an old Chinese woman who genuinely has art as one of her hobbies. It is worrying that the applicant has difficulty in accepting that the respondent created the art project for art's sake as well as for sentimental reasons. The respondent has attended painting classes (Chinese and watercolour) and likes going to the National Gallery. She also enjoys watching arts programmes on TV. By way of an example, the respondent has created two pieces of art works (a watercolour painting which she did for her daughter's birthday in 1995 and a self-portrait made of chocolate when she attended an art class on a cruise ship in 2013).

25. According to her understanding, "genuine artworks" can provoke controversy, express feelings, evoke emotions, convey messages, and require creative thinking. The respondent's art project should be considered as "genuine artworks". Artists use different materials and different surfaces for creating their artworks. The respondent can categorically confirm that she has no intention or purpose to build a wall to create an extra third bedroom. At her age, with her hobbies,

which include travelling, the respondent does not want or need the extra work, headaches, and problems associated with HMO lettings.

26. Since all artworks are subject to personal interpretations, she can accept the applicants or anybody else's personal subjective interpretation that her art project to them looks like a "wall" or "divider" or "thing". However, it is not fair or reasonable for anybody to try to impose their own personal subjective and prejudicial and incorrect interpretation of her intentions for her art project.

27. To avoid any damage to the ceilings, walls, or floors, the art project needed to be full height and 3-D so that it could stay in position without using any nails or screws for fixing it to the ceilings, walls, or floors. The builder has provided a handwritten statement dated 8/2/19 confirming the materials used for the art project. To create "landscape" pictures and not "portrait" pictures, the width needed to be greater than the height. Despite the use of picture frames all around the borders, as the ceilings and the walls are not 100% level or straight, some gaps are visible between the art project and the ceiling and the wall. This is concrete proof that no nails or screws have been used for connecting the art project to the ceilings or the floors or the walls. The respondent had never used the art project "to act as a divider".

28. She disagrees that permanently removing complete solid brick walls and changing the layout or character of the flat are "minor structural alterations". The other works approved by the applicant with respect to other flats actually involved major structural, drainage, and plumbing alterations not just inside the demised premises but outside in the communal areas as well. The removal of one WC from a flat alters "the character of the flats in question" because most, if not all estate agents and buyers, would consider a two-bedroom flat with two WC to be more desirable and valuable than a two-bedroom flat with only one WC. Mr Myhill's claim that this is in keeping with more modern times and practices is incorrect. On the contrary, the art project with Chinese garden scenes is in harmony with Regent's Park and depending on personal tastes can even enhance the character of the flat. The respondent accepts that her art project cannot remain intact when removed. However, her art project has not caused any damage to the flat during its construction and it would not cause any damage to the flat when vacant possession is required. The art project does not "form part of the building or a room". Her art project is not a "wall" and its function as "genuine artworks" cannot be that "akin to a wall".

29. The tribunal notes the handwritten letter dated 8/2/19 from the respondent's builder confirming that softwood stud work timber and plasterboard were used for building the wooden frame in June 2018 and that no nails or screws had been used for fixing the frame to the ceiling or the wall or the floor.

The material parts of the respondent's oral evidence can be summarised as follows:

30. The art project is vertical and you cannot see through it or walk through it and it is 9.5 cm in thickness. Although the lounge always had two different areas, and continued to do so, there was now a physical barrier between the two different areas [dining and sitting].

31. There are skirting boards along the bottom of the art project on both sides. There are two strips of wallpaper on one side of the art project.

32. The art project has been "wedged into place" so that it cannot be moved. The art project would have to be broken to be removed. When asked whether the art project was semi-permanent, the respondent stated that she did not know and that it would depend on how long she or her family intended to reside there. If they stayed there for the next 10 years, the art project would remain there for the next 10 years. If the art project were pushed, it would not fall over but a hole would be made in it. This was because of the width of the art project and the way in which it was wedged between the ceiling and the floor. Physically, the art project was stuck in place without the use of glue or screws by being wedged in.

33. The respondent accepts that others may consider the art project to look like a "wall" or "divider" or "a thing". However, she knows that it is artwork. She accepts that all the directors of the applicant company consider the structure to be a wall. When asked whether the structure was very similar to a wall, even if it were art, the respondent stated "*call it whatever you want. I respect people's subjective interpretation*".

34. When asked why the art project needed to be at a depth of 9.5 cm, the respondent stated that her builder had told her that "*its standard size stud works*".

35. Although it was not necessary that her art project was of that particular size, if it were smaller it would not have had as big an impact.

Closing submissions

36. The material parts of the applicant's closing submissions can be summarised as follows:

37. Even if the structure was an art project, it was a fixture and would be a breach of covenant. The court held in the case of **Riverside Park Ltd** that *"Whether or not items become tenants fixtures depends first, on the mode of annexation to the soil or fabric of the building and whether they can be easily removed without damage to the item of building; and second, on the object and purpose of the annexation,*

whether it was for the permanent and substantial improvement of the premises or merely for a temporary purpose, or the more complete enjoyment and use of his as a chattel…" The court referred, at paragraph 26 of its judgement, to **Hellawell v Eastwood**, in which it was said *"…whether the machines when fixed were parcel of the freehold…is a question of fact depending on the circumstances of each case and principally on two considerations: first, the mode of annexation to the soil or fabric of the house and the extent to which it is united to them, whether it can be easily removed, integre, salve et commode or not without injury to itself or the fabric of the building; secondly on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling…or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel"*. The court further stated at paragraph 39 of its judgement that "*The authors of "Dowding and Reynolds on Dilapidations: The Modern Law and Practice 2013-14" specifically considered the status of partitions. At para .25-13 they say: "Partitions of whatever construction are virtually always fixed to the building in some way or other. It is thought that any substantial connection between the partition and the structure of the building is likely to lead to the conclusion that the partition has lost its chattel nature. For example, a stud wall which is constructed of plasterboard on wooden studs, the studs being fixed to the walls of the building and to the floor, will generally be either a fixture or an integral part of the demised property. However, it may be that freestanding demountable partitions, fixed only by brackets and screws, would, in an appropriate case, be held to remain chattels. In practice, something may turn on the extent to which a partition is realistically capable of being removed and used elsewhere. If it is, then, depending on the precise facts, it may be easier to conclude that it has not ceased to be a chattel. If, on the other hand, it is of such a nature that either it cannot be removed without destroying it, or if removed it would be effectively useless elsewhere, then it is very likely to be held to have lost its chattel nature. In the New Zealand case of Short v Kirkpatrick [1982] 2 NZLR 358 partitions which had been solidly affixed to the concrete floor by means of ramset pins and nailed at the top to the ceilings were held to be tenant's fixtures.*" The tribunal therefore has to consider a two-stage test. Firstly, how, and secondly, why it is put in place.

38. With respect to the respondents art project, based on the respondents own evidence, it is stuck in place and can only be taken out by breaking it, therefore it is permanent. There is no need for the use of glue or nails. The question is whether something is connected. The respondent accepts that it is stuck in place. With respect to the second question, the respondent stated that if she lived at the flat for 10 years the art project would stay there for 10 years. Therefore, the intention is for it to stay there as long as possible. In the respondent's mind, she wanted it to be permanent. If the art project cannot be removed without destroying it, it is unlikely to be a chattel. The respondent accepts that the art project

would have to be broken to be removed. Therefore it cannot be a chattel.

39. The material parts of the respondent's closing submissions can be summarised as follows:

40. The art project is not connected to anything. It was created as a piece of artwork and heritage. Although something can be destroyed, it does not mean that it cannot still be art. For example, when Banksy had one of his artwork destroyed, this increased its value at auction. Nobody knows the future therefore you cannot say if something is permanent or not. The art project is a chattel, not a fixture or a fitting. It is genuine art and does not breach any terms of the lease.

The tribunal's findings and conclusion

41. At the start of the hearing, both parties agreed with the tribunal that it was very difficult to define what true art is and that it is open to different subjective interpretations. In the circumstances, both parties agreed that it was irrelevant whether the wall/art project was genuine art or not. Both parties further agreed that it was speculative as to whether the respondent intended to create a third bedroom. Both parties agreed with the tribunal that the tribunal should simply determine whether the wall/art project resulted in a breach of the terms of the lease.

42. Both parties agreed that the relevant term in the lease is clause 3.13.1, the material parts of which states: "*That no additional building or any additional walls or other things whether temporary or otherwise shall be erected or set up upon the demised premises… and that no alteration whatsoever shall be made in the plan or elevation of the demised premises…*"

43. Contrary to the argument advanced by the respondent, the tribunal did not find clause 3.5 to be of relevance. That clause specifically deals with what should happen, as stated clearly and specifically within the relevant clause, "*At the expiration or sooner determination*" of the lease. Clause 3.5 does not seek to or need to or in fact clarify clause 3.13.1, which deals with the lessees obligations during the term of the lease.

44. Much has been made by the respondent concerning internal structural works carried out by other lessees to their respective flats, including works to Mr Myhill's own flat. However, the tribunal did not find this to be of relevance as the tribunal is not required to determine whether those works also breached clause 3.13.1. In any event, those works were carried out with the applicants consent.

45. Having carried out an inspection, and upon consideration of the overall evidence, the tribunal found the wall / art project to have been constructed of wood and plasterboard, which is regularly used in the construction industry. It extends from the floor to the ceiling and has skirting along the bottom on each side. Its thickness of 9.5 cm is the standard size used in stud works / walls. The respondent states, and there is no evidence to the contrary, that the wall/art project has not been glued or screwed into the ceiling or the floor or the existing wall. On the face of it, this would appear to be a typical stud wall made of wood and plasterboard except that it has not been glued or screwed into the ceiling and the floor and the existing wall as is the case ordinarily.

46. However, the respondent accepts that it has been constructed in such a way that it has effectively been wedged into place such that it cannot be moved or pushed over. (The tribunal noted that it sunk into the carpet to the extent that it would be very difficult to move it along). The respondent went to the extent of stating that if a person pushed hard enough, that person would break through the plasterboard but it would not move.

47. On the basis that the construction is not glued or screwed into the ceiling or the floor or the existing wall, the respondent argued that the construction is not a wall. However, using the tribunal's expert knowledge, the tribunal did not find it necessary for the construction to be glued or screwed into place in order to be defined as a wall. The use of glue or screws would give the construction strength, stability, immovability, and a degree of permanence. However, according to the respondents own evidence, all of this had been achieved by the way in which the construction had been designed and wedged into place.

48. It has been constructed as a typical stud wall, acts like a wall (walls do not have to be load bearing and can be used to divide an area), and looks like a wall. For the reasons given, on balance, the tribunal found the construction to be a wall. This is not inconsistent with the tribunal's acceptance that the respondent considers this to be a "Legacy Chinese Gardens Art Project", the tribunal simply finding that the art project happens to be on a wall and / or incorporates a wall.

49. The tribunal agrees with the applicant that it is immaterial whether the wall is a chattel or fixture as clause 3.13.1 is sufficiently clear and adequately broad to cover both. It prohibits the erection of a wall whether temporary or otherwise. In any event, for the reasons set out in the applicant's closing submissions, on the facts of this case, the tribunal does not find the construction to be a chattel. In particular, the tribunal noted that although no glue or screws had been used to fix the construction in place, it was nevertheless wedged into place / fixed to the building in such way or another such that it cannot be moved and used elsewhere, it cannot be removed without destroying it, and it was

clearly intended to last for as long as the respondent or her family resided at the flat and was not there for a temporary purpose.

50. The tribunal found clause 3.13.1 to be clear and unambiguous, namely, that the respondent shall not erect "*any additional walls…whether temporary or otherwise…"*

51. For the reasons given, the tribunal is satisfied that there has been a breach of covenant.

52. If the tribunal is wrong in concluding that the construction is a wall, the tribunal agrees with the submissions made on behalf of the applicant that, applying the "*ejusdem generis principle*" (meaning that where several words preceding a general word point to a confined meaning the general word shall not extend in its effect beyond subjects ejusdem generis (of the same class)), the art project amounts to "*other things*" as it is akin to a wall. The tribunal notes the theoretical argument put forward by the respondent that such an interpretation would result in the installation of a floor-to-ceiling wardrobe in the bedroom or a floor-to-ceiling bookcase being prohibited. However, the tribunal agrees with the submission made on behalf of the applicant that clause 3.13.1 specifically deals with "a*dditional building or any additional walls or other things"* which would not, applying the ejusdem generis principle, ordinarily relate to a hypothetical bookcase, as a bookcase is a bookcase and is not of the same class as a building or a wall. Nevertheless, on the facts of a particular case, it may be arguable that a floor to ceiling bookcase with a solid back through which it is not possible to see through, and if the bookcase were either fixed to the floor or ceiling with glue or screws or was wedged in such a way that it was not moveable, may be considered to be akin to a wall. This would of course be dependent on many other considerations also. However, on the facts of this case, the tribunal is satisfied that the art project is similar to a wall and therefore amounts to "*other things*" and is consequently precluded by clause 3.13.1.

53. The applicant acted reasonably in connection with the proceedings and was successful on the single disputed issue. Therefore, it would not be just or equitable in the circumstances to make an order under section 20C of the of the Landlord and Tenant Act 1985 and section 5A to Schedule 11 of the Commonhold and Leasehold Reform Act 2002 to prevent the applicant passing any of its costs incurred in connection with the proceedings before the tribunal through the service charge or as an administration charge. For the same reasons, the tribunal determines that the respondent shall reimburse any application fee(s) paid by the applicant to the tribunal in connection with these proceedings within 28 days of this decision.

Name: Luthfur Rahman **Date:** 5/6/19

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).