FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/24UL/HMG/2019/0005
Property	:	3, The Pavilion, Farnborough, Hampshire GU14 6JT
Applicant	:	Mr Richard Capp
Respondent	:	Ms Sula Bransden
Representative	:	
Type of Application	:	Application for a rent repayment order by tenant Sections 40, 41, 42, 43 & 45 of the Housing and Planning Act 2016
Tribunal Member(s)	:	Judge J Dobson Mr R Brown FRICS Mr M Jenkinson
Date of hearing	:	20th August 2020
Date of Decision	:	12th November 2020

DECISION

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Summary of the Decision of the Tribunal

1. **The Tribunal is satisfied beyond reasonable doubt that the Respondent landlord has committed two offences under section 1(3)(A) of the Protection from Eviction Act 1977.**

2. **The Tribunal has determined that it is appropriate to make a rent repayment order.**

3. **The Tribunal makes a rent repayment order in favour of the Applicant in the sum of £147.87.**

4. **The Tribunal orders that the Respondent pay to the Applicant an additional £150 as partial reimbursement of the Tribunal fees paid.**

Application

5. The Applicant, Mr Richard Capp, applied by application dated 19th December 2019, to the Tribunal for a rent repayment order against the Respondent, Ms Sula Bransden, in relation to his occupation of 3 The Pavilion, 2 Sherborne Road, Farnborough, GU14 6JT ("the Property"), described as a "small single bedroom terrace flat" pursuant to section 41 of the Housing and Planning Act 2016 ("the HPA 2016"). The Applicant claimed repayment of £4000, the sum of £500 per month as part of the sum paid (£800) each month for the period January 2019 to August 2019 inclusive. For the avoidance of doubt, whilst the Applicant referred to the Property as a flat, in practice it is a two-storey house, consisting of a lounge and kitchen area to the ground floor and a bedroom and bathroom to the first floor.

6. The grounds for seeking a rent repayment, as set out in the application and Statement of Case, are that the Respondent committed offences under section 1 of the Protection from Eviction Act 1977 ("PEA 1977"). No specific sub-section or sub-sections were referred to and identification of section 1(3) and/ or section 1(3)(A) would have been preferable. Section 1(2) cannot apply in this instance.

7. The Applicant provided with the application evidence of the payments made by him to the Respondent, which were not in dispute. He additionally provided copies of the agreement entered into by the parties on 18th February 2017 and a subsequent variation dated 14th August 2018 (individually "the Agreement" and "the Variation" respectively and collectively "the Agreements") and copies of various emails sent by the parties from 3rd January 2019 onward.

8. The task for the Tribunal in rent repayment case was summarised in *London Borough of Newham v John Francis Harris* [2017] UKUT 0264 (LC). Whilst that case related to HA 2004 prior to the amendment by HA

2016 and an application by a local authority and not an occupier, the task remains the same. The Upper Tribunal stated that as follows:

> "The task for the Tribunal therefore is as follows: firstly to decide whether the conditions in sections.....have been fulfilled; secondly to decide in the circumstances whether or not to make an order and finally if an order is made, then to determine the amount of the order having regard to the requirements ……"

Directions made/ history of the case

9. Directions were given on 9 January 2020, followed by further Directions on 12th March 2020, the Respondent having sought an extension of time for her response to the application. An email from her to the Tribunal dated 10th March 2020, with attachments, was accepted as the Respondent's statement of case. The application was listed for hearing on 13th April. The Applicant correctly advised that to be Easter Monday. The Tribunal subsequently invited agreement of the parties to a determination of the application on the papers. The parties agreed.

10. Regrettably, matter rested there for several weeks, as a consequence of the Covid-19 pandemic and the closure of the Tribunal office, only coming before a Judge to consider the approach to be taken to determination of the application in mid- July 2020. At that stage, the Judge did not, having considered the bundle, find the matter suitable for determination on paper and decided that a hearing was required, noting in particular that the relevant allegations appeared to be ones of harassment or similar, that there appeared likely to be a direct conflict of evidence in respect of certain matters and that the criminal standard of proof applied.

11. The Applicant provided a bundle of his documents for the hearing, including the Respondent's statement and the three pages of attachments, which was the total of the Respondent's case at that point. Several additional documents by way of evidence were provided by the Respondent by emails dated 10th and 11th August 2020, including photographs of the condition of the Property after the Applicant had vacated and, most notably, a document described by her as "Background notes 3 The Pavilion" apparently effectively a (very late) witness statement. The Respondent appears to have misunderstood that 10th August was the date for filing any further evidence, rather than in fact being the date for the Applicant to provide the hearing bundle.

The law

12. The relevant statute law is annexed to this Decision. The relevant test under s1(3)(A) of the PEA 1977 is a subjective in respect of knowledge, although an objective one in respect of reasonable cause to believe and, if relevant, reasonable grounds for doing an act.

The parties' written cases

13. The Applicant's written case was essentially that the Applicant sought accommodation in Farnborough where he had obtained employment. The parties entered into the Agreement for exclusive possession at rent of £720 per month and that was varied in August 2018 to allow for occupation by the Applicant's wife and their dog following the Applicant's wife obtaining work in London, at increased rent of £800. The Applicant stated that the Respondent started to engage in harassment in that she sent an email 3rd January 2019 seeking to evict the Applicant's wife, that the Respondent demanded regular deep cleans of the Property, that she entered the Property on multiple occasions without notice and that the Respondent sent multiple harassing emails about trivial matters within the Property and containing thinly veiled threats that the tenancy would be unlawfully terminated. The Applicant stated that in consequence the Applicant's wife made arrangements to be able to work from the couple's home in Nottingham and the Applicant terminated the tenancy with effect from 31st August 2019, thereafter staying in hotels when working in Farnborough. The Applicant referred to only seeing the Respondent on one occasion after entering into the Agreement. The Applicant also referred to subsequent conduct by the Respondent, including failure to return the deposit paid, which he also says was only protected in July 2019.

14. The Respondent's written case was principally contained in two documents, the first of which was her email of 10th March 2020 and the second was the "Background" document. Her case was essentially that the Applicant contacted her through a website called Spareroom.com, looking to rent a room. The Respondent had five applicants for the accommodation but the Applicant viewed the Property first. She stated that she explained the terms of occupation to each of the applicants, including the fact that she would have access to the accommodation, and that the Applicant was happy to accept those terms. The Respondent cited comment from the Citizen's Advice Bureau about lodgers. The Respondent explained that she is a flight attendant, that she rents a room in Farnborough and that she needed to use the Property to rent out for weekdays. The Respondent provided details of referees and a short chronology of events prior to the Applicant taking up occupation. The Respondent stated that she was concerned about cleaning of the Property from an early stage.

15. The Respondent asserted that the request for the Variation came out of the blue and the Applicant said it would be for a "short time", in response to which the Respondent imposed a number of strict stipulations to which the Applicant agreed. She stated that she agreed to the adjustment of the Agreement to allow for the Applicant's wife and dog occupying the Property for a short time, 3-4 months maximum, and that after the end of that period she wished to revert back to sole occupancy by the Applicant. She said that the Applicant left for the Christmas 2018 holiday without saying when the Property would be empty and that when she attended there was no heating on, a velux window was open and the Property was

not clean and tidy. The Respondent accepted sending the email dated 3rd January 2020 wishing to revert to the Applicant's sole occupancy and suggested thereafter the Applicant tried to manipulate the Agreements to stretch how long his wife and dog could stay, never providing an end date for their staying. She accepted sending other emails in January and April 2019. The Respondent submitted that the Applicant accepted 31st July 2019 that he was aware of his obligations and only after that asserted that she had been illegally entering the house and harassed the Applicant and his wife. She essentially contended that the Applicant decided to leave of his own volition. Additional comments were made about an inventory check and the Respondent expressed dissatisfaction with the standard of cleaning following the Applicant's vacation of the Property. The Respondent made comments about the deposit paid, including that the Tenancy Deposit Scheme returned the deposit to her as there was no tenancy and that the Applicant has not provided details to enable the deposit to be returned. The Respondent concluded both documents by denying that there was a tenancy agreement on which to claim a rent repayment order.

The hearing

16. The hearing was conducted remotely by way of video proceedings. The parties both represented themselves and both gave oral evidence. There were no other witnesses called by either party. The parties expanded on their written cases in oral evidence.

17. The Applicant provided in advance of the hearing a Skeleton Argument dated 17th August 2020. That addressed the question of whether the Applicant was a tenant or a lodger, citing two case authorities, which the Applicant provided, namely *Street v Mountford* [1985] UKHL 4 and *Antoniades v Villiers* [1988] 3WLR 139. He particularly asserted that he had exclusive occupation for rent and the Respondent did not provide "attendance or services". He referred to the similarity between the situation in this case and in *Antoniades*. The Applicant picked out elements of certain emails sent. Finally, the Applicant made submissions as to the amount for which a rent repayment order should be made.

18. The Respondent submitted a short further document by email 18th August 2020 which the Tribunal understands was in response to the Applicant's Skeleton Argument. That indicated a failure to understand the Direction with regard to Skeleton Arguments, suggesting that of the Applicant to be late, which it was not. The document otherwise repeated the Respondent's contention that there was no tenancy, rather occupation as a lodger, said there was little interaction between the parties and mentioned the Variation and so summarised elements of her written case.

19. After hearing from the parties, including the Applicant's agreement, the Tribunal decided to admit the additional evidential documents submitted 10th and 11th August 2020 by the Respondent albeit that the documents were late and potentially contained matters of significance.

20. As the parties were both unrepresented, the Tribunal put a number of questions to the parties to test the allegations made by the Applicant, with both parties also having the opportunity to ask questions of the other. The Tribunal's approach included instances of putting the same question to both parties, to be answered by each in turn, including each instance of harassment set out by the Applicant in his case.

21. Oral closing comments were made by both parties. The Respondent commented at some length on the reason for not having returned the Applicant's deposit and said there had been no issues from previous occupiers. She denied harassing the Applicant. The Respondent said that she was not making money out of the Property, only covering expenses, having paid the rent on where she lived from her flight attendant earnings. However, she said that she was not earning in that job, and currently only received a minimal income from a part-time job. She contended that 8 months' worth of rent being ordered was excessive. The Respondent commented that the Applicant's wife and dog were at the Property until late April, despite her having wished them to leave at the end of January. She suggested that there had been no issues before August 2018.

22. The Applicant first addressed his status at the Property, re-iterating his assertion of a tenancy. He argued that it was beyond reasonable doubt that the contents of emails met the test in the PEA 1977. He suggested that conduct after the end of the tenancy, contacting his employers and with regard to the deposit, was relevant conduct. The Applicant accepted that the Respondent may be suffering financial hardship and noted the difficulties in the aviation industry. He said that the Property was a buy-to-let investment and so the letting was essentially on a commercial basis, that the Respondent had equity and so the Property was making the Respondent a profit. The Applicant said that people must stand up for what they write, by which the Tribunal understand he was referring to taking responsibility. The Applicant also suggested that the relevant period should now be 9 months of rent, to which the Respondent objected. The Applicant said that he would leave that to the Tribunal.

23. The Tribunal found the Applicant to give cogent and honest evidence, although the Tribunal was not impressed by some of his comments about matters provided for in the Agreements, suggesting provisions to be small prints he did not think enforceable- and hence he apparently felt himself not bound by them, irrespective of having agreed to them. The Tribunal also found that the Applicant had been difficult and not entirely helped the overall situation.

24. The Tribunal was not without any sympathy for the Respondent. However, the Tribunal was less than convinced about some of the evidence of the Respondent and for the reasons explained below approached her evidence about matters in dispute between the parties with some caution. In the event, there was very little factual dispute and even less that turned on the outcome of that.

Discussion of issues raised in the hearing and Consideration

25. There were two principle elements of dispute between the parties. The first of those was the status of the Applicant in respect of his occupation of the Property. The second was the allegations of harassment and similar made by the Applicant. The Tribunal takes those in turn and then addresses such incidental matters as are relevant.

26. The Tribunal notes that it must be satisfied to the criminal standard, i.e. beyond reasonable doubt, so that the Tribunal is sure. The Tribunal applies that standard to the matters in dispute. Where the Tribunal refers below to having made a finding or to being satisfied in respect of an offence, the Tribunal does so having applied that standard.

Tenancy or licence to occupy?

27. Given the extent to which the parties referred to the issue in their written cases and in oral evidence, it is sensible to address first the tenure of the Applicant in relation to the Property at the relevant time. That can be done in relatively short order and without detailing the evidence given at length. The point does not have the significance that the parties perceived. The Respondent clearly believed that a rent repayment order could only be made if the Applicant could demonstrate a tenancy agreement had been entered into and that rent was paid pursuant to that.

28. For reasons briefly set out below, the Tribunal finds the Applicant to have held a tenancy of the Property. However, the much more important point is that the Respondent was wrong to believe that the Applicant needed to prove holding a tenancy and that she could successfully oppose the application by demonstrating a lack of such tenancy.

29. The HPA 2016 provides in section 56, headed "**General Interpretation of Part**", as follows:

    "In this part
    "letting"-
    (a) Includes the grant of a licence, but
    (b) except in Chapter 4, does not include the grant of a tenancy or licence for a term of more than 21 years,
    And "let" is to be read accordingly;
    "tenancy"-
    (a) Includes a licence, but
    (b) except in Chapter 4, does not include the grant of a tenancy or licence for a term of more than 21 years.

30. It is very clear to the Tribunal from that definition of tenancy in HPA 2016 that there is no practical difference for the purpose of consideration of a rent repayment order as to whether the Applicant is correct that he held a tenancy as understood under the general law or the Respondent is correct that the Applicant held a licence. Both of those tenures amount to a tenancy as defined in HPA 2016.

31. However, just in case the Tribunal may have erred in relation to the above, the Tribunal finds that the Applicant in any event had a tenancy under the general law and irrespective of the definition in the HPA 2016.

32. Whilst the matters below do not constitute the entirety of the factors tending one way or the other, the most significant ones are explained. The Agreement referred to the Applicant having "the personal right" to live in "the Accommodation" and to "The Shared Rooms". The Tribunal accepted the evidence of the Applicant that the advert for the accommodation had referred to sole occupancy, that the Agreement was in what he regarded as unusual terms but contained what he regarded the most important matters- the rent payable, confirmation of the Respondent paying for utilities and notice periods. The Respondent gave evidence that she had obtained template wording for the Agreement from the internet, subject to amendments she then made. The Tribunal found that the reality was that only the Applicant- and then later his wife and their dog- occupied the Property, which the Agreement provided for seven days each week rather than for any shorter period, not that the Tribunal found that provision of particular significance. Save for very limited storage space, there was no part of the Property not within the occupation of the Applicant and the rent paid was paid for occupation of the Property as a whole and not for any limited part of it. The Respondent had her own accommodation elsewhere and it was implausible that the married Applicant and the Respondent contemplated an arrangement which involved sharing a small one- bedroomed property at the outset and sharing was even more implausible following the Variation providing by occupation by the Applicant's wife. Although the Respondent was permitted by the Agreement to store items in under the stairs and certain bedroom storage and so to enter the Property in order to access those, notably, the Respondent was required under the terms of the Agreement to give the Applicant notice to access the Property unless there was an emergency. The Tribunal found that the Respondent's retention of items in the Property and the reservation of her ability to enter the Property to access those was something of a sham and designed to suggest lack of a tenancy or otherwise occupation of the Property as her home rather than for genuine reasons.

33. The Tribunal agrees with the Applicant that the judgments in both *Street v Mountford*, a long-established and well-known authority, and *AG Securities v Vaughan/ Antoniades v Villiers* offer strong support for the Applicant having been a tenant in law. The Tribunal has considered the various factors for and against a tenancy in light of those authorities. The Tribunal did not make a finding as to the type of tenancy held.

34. The amount paid by the Applicant to the Respondent is accordingly rent both on the basis of that being the proper description for payment under a tenancy agreement and also, even if there had not been found to be a tenancy agreement, because a payment for occupation, whether under a tenancy or a licence, is to be treated as rent pursuant to the HPA 2016.

35. The Respondent stated in response to questioning by the Applicant as from the Variation, she considered the Applicant's wife to be jointly the lodger, which occupancy she was entitled to end by notice. However, the Applicant had not asserted that his wife became a tenant or anything other than an occupier permitted under his tenancy. The Tribunal is not satisfied that the Applicant's wife became a tenant following the Variation. In any event, no claim was brought by her.

Was an offence committed under the PEA 1977?

36. The evidence comprised copies of communications sent between the parties and the oral evidence given, expanding on the written statements made. No dispute arose as to the communications being sent or to their contents.

Offences found to be committed and relevant evidence

37. The Applicant gave evidence that he used the Property during the week prior to August 2018 but also some weekends, for example when going to shows in London with his wife, although he agreed with the Respondent that was not every weekend.

38. The Applicant explained that his wife worked in Nottingham but was then head-hunted for a role in London with a probationary period of six months. He said that she was unable to commute from Nottingham but that as her new boss worked from home, they hoped that she would be able to do so following that probationary period. Her ability to accept the role was said to be almost conditional on being able to stay at the Property and for them to be able to have their dog, which was described as getting quite old, there. The Applicant stated that he explained the situation to the Respondent, that she agreed and further that he was happy to accept the changes within the Variation.

39. The Respondent did not entirely accept that, disputing two matters. Firstly, she stated that the Applicant had specifically said that his wife would occupy the Property for a short time, with no mention of the time being as long as six months or any given time. She said in that regard that she knew nothing of a probation period for the Applicant's wife's job nor was it said to her that taking the job was dependent on being able to stay at the Property. Secondly, she said that the dog occupying the Property gave her cause for hesitation because she considered the Property did not suit a large breed of dog, including because of having no garden.

40. The Tribunal notes that the Variation states "Requested for wife to stay maximum 3 nights per weekday nights" and also "The Lodger has requested permission to house a dog for several days a week, not permitted on furnishings upstairs, there will be a child gate on the stairs to ensure this is maintained". The parties apparently both agreed to that and indeed the Applicant's oral evidence was that his wife was never there for more than 3 nights, which the Respondent did not challenge. The Tribunal finds that the agreement only supports limited occupation

of the Property week by week by the Applicant's wife- although the wording is less than perfectly clear and the clauses about the Applicant's wife and their dog provide for quite different periods for no reason given by the parties- but says nothing about any occupation by the Applicant's wife being time- limited. The rent is varied upwards from £720 to £800 as from 1st December 2018- the Respondent said to reflect anticipated higher utility bills- and with no suggestion that it would then reduce at any later time. The Tribunal finds that no time limited agreement for the occupation of the Property by the Applicant's wife was made.

41. The Respondent said that she gave notice that she required the Applicant's wife to leave in a text message in December 2018, although the Applicant had not relied on any such text in respect of his application and his response to the Respondent's evidence was that he had not received it, which the Tribunal accepted.

42. The Applicant stated that the Respondent's email of 3rd January 2019 caused him harassment, by stating that ".... I am cancelling all requests, it will be sole occupancy in the week and no pets in the house with immediate effect 3 January 2019". The Applicant stated that amounted to evicting his wife and that evicting his wife was in effect evicting him.

43. The Respondent denied that her actions or emails amounted to harassment of the Applicant or would to another occupier and she pointed to her experience of living in properties where landlord had clear requirements. She was adamant that she was not by her email of 3rd January evicting the Applicant but rather asking that his wife and dog not come back, by which the Tribunal perceives she meant that they not remain. The Respondent repeated in response to later questions that if the Applicant reverted to occupying the Property alone, the Agreement could continue. In response to further questioning by the Applicant, the Respondent changed her position and said that she was not evicting the Applicant's wife but was asking her to leave. She agreed that was with immediate effect from 3rd January 219, the date of her email.

44. The Tribunal is entirely satisfied that the Respondent was not entitled to seek to end the occupation of the Property by the applicant's wife and that both the Applicant would be caused harassment by such an email. The Tribunal is further satisfied that sending such an email was likely to interfere with the peace and comfort of the residential occupier i.e. the Applicant. The Tribunal is satisfied that the Respondent objectively had reasonable cause to believe that such an email was likely to cause the residential occupier to give up possession. The provision is as to whether the conduct is likely to produce that outcome, not whether it is bound to. More than one outcome may be likely and the Applicant leaving was plainly one of those. A husband occupying a property with his wife where it is said that his wife cannot continue to occupy the property, would be likely to be caused to give up occupation of that property. The Tribunal was not satisfied of any reasonable grounds for doing the act. The Tribunal finds that an offence was committed under s 1(3)(A) of the PEA 1977

45. The Tribunal was not satisfied that the Respondent intended the Applicant would be caused to give up occupation and so the Tribunal does not find that an offence was committed under s 1(3) of the PEA 1977.

46. The Applicant asserted the same about the Respondent's email dated 9th January 2019. The Respondent had plainly attended at the Property as revealed by her reference to the vacuum cleaner- "I can see that you haven't emptied the full canister (sic)". The Applicant referred to the Respondent's comment about cleaning- "will not tolerate any deviation", which the Applicant said amounted to 'do what I say or get out'. He said that he had sent a gentle email and that the whole tone of the email back from the Respondent was harassing. The Applicant stated that it threw his wife and himself into a panic. The email 9th January also stated: "If you think you can have this flexibility anywhere else feel free to move that will allow a dog and partner for staying with you".

47. The next matter which the Applicant stated caused him harassment was another email sent by the Respondent also dated 9th January 2019 which required a specific cleaning routine.

48. The Respondent said that she stood by the contents of the earlier 9th January 2020 email and that if the Applicant was not comfortable he was welcome to give notice. She referred to having allowed previous occupiers to have family come and stay, by which the Tribunal understood for short periods.

49. In relation to the later email, the Respondent accepted what she had said about a cleaning routine and was content with it. She said that on occasions she had attended the Property at the weekend, she had cleaned. The Respondent denied that email added anything to the wider situation, asserting that it simply re-iterated matters and suggested that keeping the Property clean and tidy was "not that difficult" and asked of vacuum cleaning before the Applicant left each time "Is it that big a deal?".

50. The Tribunal is satisfied that both the Applicant and the reasonable occupier would also be caused harassment by those emails. The Tribunal is further satisfied that sending such an email as that earlier on 9th January 2019 was likely to interfere with the peace and comfort of a residential occupier. Further, that the Respondent objectively had reasonable cause to believe that such an email would be likely to cause the residential occupier to give up possession. Indeed, the Respondent's evidence that if the Applicant was not comfortable then he could give notice amply demonstrates that the Respondent appreciated that his giving up occupation was a likelihood. The latter email compounded matters.

51. The Tribunal is not satisfied that the Respondent specifically intended the Applicant to give up possession on this occasion. However, the Tribunal finds that she subjectively knew a likely outcome of her email was him doing so. The Tribunal was not satisfied of reasonable grounds for doing

the act. The Tribunal finds that a further offence was committed under s 1(3)(A) of the PEA 1977.

Matters in respect of which offences were not found to be committed

52. The Applicant gave evidence that thereafter he received what he described as "niggling emails" from the Respondent, which he considered to be low level harassment, although he did more colourfully describe the Respondent as "like a mosquito", but notably he accepted that behaviour did not make him want to leave the Property. The Respondent denied doing anything more than outlining that the Property had to be kept tidy.

53. The Tribunal is not satisfied that an offence under the PEA 1977was committed. Whilst such emails could interfere with the peace or comfort of a residential occupier, the Tribunal finds that the necessary other elements under section 1(3) and/or 1(3)(A) are not made out.

54. The same applies in relation to the various attendances at the Property by the Respondent to collect mail. The Respondent accepted attending on a number of occasions (particularly before the relevant period back in May 2018 when she said she was waiting for something particular in the post). The Respondent suggested that she was made to feel uncomfortable when collecting any post and she indicated that she did not do so from late 2018 onward.

55. The Applicant drew her attention to an email from her dated 15th April 2019 which demonstrated that the Respondent had attended the Property, to which the Respondent replied that she had missed that. The Applicant then put to the Respondent that her email 24th January 2019 referred to a further attendance, to which the Respondent accepted that she must have also attended then. The Tribunal did not accept the Respondent's evidence about attendances and finds that the Respondent was evasive and attempted to play down her level of attendance at the Property, only accepting the above attendances when compelled to do so. That impacted on her credibility.

56. However, the Tribunal finds that the Applicant was aware that the Respondent would attend to collect post, having agreed to that, and finds that the Respondent was entitled to do so. The Tribunal is not satisfied that the requirements of section 1(3) or 1(3)(A) are made out in the circumstances of this case.

57. The Applicant did not assert any offence arising from the Respondent cleaning the Property, if indeed she did and so no finding is required, or made. That was in any event prior to August 2018 and so prior to the period relevant in this application.

58. The Applicant cited a further email dated 24th January 2019 as another incident of harassment. He referred to that stating that the Respondent would attend on Saturday and instructed him to leave before the weekend. The Tribunal notes that the email continued by noting that the

Applicant had not answered the Respondent's question as to for how long his wife and their dog would be at the Property and stated- "I would ask that after Easter that is the limit of this arrangement". The Respondent made a number of comments including saying again that she wanted the Applicant's wife to leave but the Applicant still had sole occupancy. The Respondent also said that nothing changed after that, including after April and that she did not follow up on the Applicant's wife leaving beyond seeking the Applicant to come back to her on how long his wife would be there.

59. Whilst not accepting the Respondent's wider position, the Tribunal does not agree with the Applicant's assertion that the email was an instruction for him to leave. The tone of the email is somewhat different to those earlier in the month and, whilst it must be seen through the prism of those, it asks for, rather than demands, an end to the occupation of the Property by the Applicant's wife and their dog at a point some weeks off. The necessary elements of an offence under section 1(3) and 1(3)(A) are not, the Tribunal finds, made out.

60. The Applicant next referred to the Respondent's email dated 15th April 2019. He said that related to trivia but that because of reference to such trivial matters, he decided that he needed to leave the Property. He stated that his wife started to make arrangments to be able to work from home and that the next communication was his notice to quit.

61. The Applicant accepted in response to questioning that much of his complaint was about emails rather than actual actions to evict but he referred to the attendance at the Property "without permission", the attempt to evict his wife and other matters following from there. He asserted that the emails contained thinly veiled threats that the tenancy would be unlawfully terminated.

62. The Respondent referred to the email 15th April being three months later than the others, said that she was again only re-iterating about cleaning and that she thought that her approach was appropriate and that the Property was her house. She said that she had asked that the Property be kept clean and tidy but every time she went back that had slipped further.

63. The Tribunal finds the Respondent's concern was in relation to cleaning. The Tribunal accepts the possibility that the peace and comfort of a residential occupier might be interfered with, taking the email in context, although not in isolation. However, the Tribunal finds that the Applicant has failed to prove intention, knowledge or reasonable belief to the required standard. Further, he has failed to prove that a residential occupier would be likely to give up possession. The Tribunal is not satisfied that an offence was committed. The Tribunal further found that none of the emails demonstrated any threat of termination of the Applicant's tenancy.

64. It follows that the Tribunal does not find that the Applicant's case effectively asserted a continuing course of harassment, was correct.

Other matters

65. The parties both agreed that the Respondent paid for utilities, including broadband but did not pay for a telephone. The Applicant stated that was a "great draw" to him because it meant that he did not have to be involved with the utility companies. The Tribunal accepts and adopts that.

66. The Respondent gave evidence that she stayed at the Property one night during the tenancy when she had a very early start at Farnborough Airport and the weather was especially bad, using the sofa-bed downstairs apparently before the Variation. Irrespective of whether that could constitute an offence, it pre-dates the period relevant to this application and so no finding need be made. The fact that the Respondent had clearly indicated by email that she had stayed more than once, whereas her oral evidence was firm that she had stayed on only that one occasion produced inconsistency and cast some further doubt on the Respondent's evidence.

67. The Respondent contended that in 2019 the Applicant had started harassing and bullying her, which the Tribunal did not, on the limited evidence presented, accept.

68. The Respondent also stated in answer to specific questions from the Tribunal that her answers would have been the same if the Applicant was a tenant, although she did not accept him to be.

69. The Tribunal found that the perspective of the parties changed following the Variation. The Tribunal noted that the Applicant continued to occupy the Property for approximately twelve months following the Variation and approximately eight months after the last offence found by the Tribunal to have been committed.

70. The Tribunal records its findings about matters after the Applicant ceased to occupy, as relevant to conduct insofar as appropriate- see below.

The decision in respect of whether to make a rent repayment order

71. The Tribunal is satisfied beyond reasonable doubt that the Respondent has committed an offence under section 1(3) of the PEA 1977 within the 12 months preceding the application. A ground for the making of a rent repayment order has been made out.

72. Pursuant to the HPA 2016, a rent repayment order "may" be made if the Tribunal finds a relevant offence was committed. It is apparent that the Tribunal could determine that a ground for a rent repayment order is made out but not go on to make such an order. The next question is therefore whether an order should be made.

73. A similar provision in the Housing Act 2004 was considered by the Upper Tribunal in The London Brough of Newham v John Francis Harris [2017] UKUT 264 (LC) in which Judge McGrath said the following:

> "I should add that it will be a rare case where a Tribunal does exercise its discretion not to make an order. If a person has committed a criminal offence and the consequences of doing so are prescribed by legislation to include an obligation to repay rent or housing benefit then the Tribunal should be reluctant to refuse an application for rent repayment order."

74. Whilst that statement was made in the context of a House in Multiple Occupation licensing offence, there is no reason to consider the principle is any less applicable in this instance.

75. The Tribunal exercises its discretion to make s rent repayment order in favour of the Applicant.

76. The Tribunal found offences committed under the PEA 1977 with the intention of the Applicant leaving the Property. The Tribunal considers that is more than ample basis for the exercise of discretion to make a rent repayment order rather than not doing so. The Tribunal does not consider that there is any other circumstances identifiable in this case sufficient to weigh against that.

The amount of rent to be repaid

77. Having exercised its discretion to make a rent repayment order, the next decision is how much should the Tribunal order.

78. The period of rent to be considered is identified in section 44 of the HPA 2016, as the period of 12 months ending with the date of the offence. The offences were found to have been committed were committed on two dates, 3rd and 9th January 2019. The relevant period of time is therefore potentially early January 2018 onwards but the Applicant has not claimed an order for repayment of rent for that period. Rather, the Applicant has done so from January 2019. Accordingly, only 9 days' worth of rent is relevant.

79. The amount of rent ordered to be repaid must not, as stated in section 43, exceed the rent paid during that period.

80. 100% of the rent paid is the mandatory amount if there had been an actual conviction unless there are exceptional circumstances. In a case such as this one, where there has been no conviction, there is no reference in the HPA 2016 that a 100% refund should be ordered. However, the Tribunal has had particular regard to the decision of the Upper Tribunal in *Vadamalayan v Stewart* and others (2020) UKUT 0183 (LC). The Upper Tribunal held that a 100% rent repayment order should be the starting point nevertheless, stating as follows:

> "That means that there is nothing to detract from the obvious starting point, which is the rent itself for the relevant period of up to twelve months. Indeed, there is no other available starting point, which is unsurprising; this is a rent repayment order so we start with the rent."

81. That is subject to appropriate adjustment in the event that the landlord paid for the utilities used by the tenant, which is relevant in this application.

82. The Upper Tribunal has, since the hearing of this application and in a decision issued on 19th October 2020, *Chan v Bilkhu* [2020] UKUT 3290(LC), reiterated the approach to be taken. The Tribunal must adopt the same starting point as provided for in Vadamalayan and so 100% of the rent paid, subject to adjustment for the cost of the utilities.

83. Whilst the total sum of rent paid during the period claimed for is £6400, the application made is for repayment of a lower sum of £4000. The Applicant stated in his Skeleton Argument that he had selected the figure of £500 per month, rather than £800 per month, to allow for the cost of utilities. The Applicant did go on to invite the Tribunal to instead use any actual figures for the cost of utilities obtained from the Respondent. However, no evidence was given by the Respondent as to such costs. There is certainly no evidence on which to find that such cost would have been greater than the allowance made by the Applicant when formulating his claim. Accordingly, the only realistic approach to take is to adopt the figure chosen by the Applicant.

84. The relevant monthly rent to consider is therefore £500. In the event that the Tribunal considers having balanced the relevant factors that any reduction from 100% less the cost of the utilities is appropriate, such reduction should therefore be made from that £500 per month.

85. That equates to £16.43 per day. 9 days at that rate amounts to £147.87. That is the maximum award that the Tribunal may make.

86. This Tribunal approaches the question of the amount of the rent repayment order on that basis. The starting point and the end point are not always the same and section 44 identifies factors to be considered in respect of an application such as this one which is made by a tenant.

87. The Tribunal notes, that the benefit obtained by the tenant in having had the accommodation is not a material consideration in relation to the amount of the repayment to order. The Tribunal further notes that Sections 44 and 45 of the HPA 2016 do not include the word "reasonable" and that *Vadamalayan* and *Chan* stated there is no longer a requirement of reasonableness. Those judgments also held in clear terms that the Tribunal must consider the actual rent paid and not simply any profit element which the landlord derives from the property, to which no reference is made in the HPA 2016.
88. Section 44(3) of the HPA 2016 requires the Tribunal to, in particular, take into account the conduct of the landlord and the tenant, the financial

circumstances of the landlord and whether the landlord has at any time been convicted of an offence to which Chapter 4 of the HPA 2016 applies. Whilst the listed factors must therefore be taken into account, and the Tribunal should have particular regard to them, they are not the entirety of the matters to be considered. Any other relevant circumstances should also be considered, requiring the Tribunal to identify whether, or not, there are such circumstances and, if so, to give any appropriate weight to them.

89. In terms of the financial circumstances of the landlord, The Tribunal accepts that the aviation industry has been heavily affected by the Covid - 19 pandemic and that a flight attendant such as the Respondent is very likely to have suffered reduced income. The Respondent has the Property itself but the Tribunal accepts receives a limited income. The Tribunal does not have full details of the Respondent's income and outgoings but, for the reasons explained below, nothing turns on that.

90. There is no evidence that the Respondent has received any previous convictions in respect of any relevant offence.

91. The Tribunal considers that the key element of those specifically listed in the HPA 2016 is therefore conduct. That includes the conduct of both parties, which the Tribunal understands to mean the conduct of the parties in relation to the tenancy and the obligations as landlord and tenant and not to mean the conduct of these proceedings.

92. The most significant element of conduct is that the offences committed were the result of emails and not of physical acts and no acts to obtain possession of the Property followed. In the context of offences committed under the PEA 1977, the Respondent's offences were a long way down the scale. Those comments in no way condone harassment of tenants in any manner. As noted above, the Applicant was harassed by those emails but it is very relevant that he was able to remain at the Property for several more months.

93. In relation to conduct after the Applicant left, the Tribunal is concerned as to the Respondent's contact with the Applicant's employer, which it considers caused the Applicant an unnecessary difficulty where his employer was concerned that he was leaving, although a difficulty that was fleeting and easily resolved. The Tribunal finds the situation about the deposit unsatisfactory and does not accept that the Respondent was unable to have ensured that the money was sent to the Applicant in one or other suitable manner.

94. Neither party identified any other relevant considerations in relation to the amount of the rent repayment order.

95. As noted above, the amount of any rent repayment order is a penal sum and not compensation. The Tribunal is very much mindful of that and of that purpose of the HPA 2016. The Upper Tribunal stated in *Vadamalayan* the Judge's understanding that:

"Parliament intended a harsh and fiercely deterrent regime".

96. That statement was made in the context of a HMO licensing offence. However, the regime cannot have been intended to be less harsh, and more obviously would if anything be harsher, in the context of offences under the PEA 1977.

97. The Tribunal having noted the starting point identified in *Vadamalayan* and balanced the various relevant factors into account, the Tribunal has determined that it is appropriate in this instance to order repayment of all of the rent for which an order could be made.

98. The Tribunal records that if that sum were not so modest in the first instance, the Tribunal would almost certainly have reduced the amount of the order to reflect lack of intent on the part of the Respondent and the lack of knowledge sufficiently proved in respect of the first offence. However, the Tribunal does not consider that the above weighs sufficiently heavily set against the modest sum which may be ordered. Equally, if the sum ordered would otherwise have been such that the Respondent's financial situation were more relevant, the Tribunal would have been likely to reduce the amount of the order to an appropriate extent for that reason. Given the modest sum ordered, the Tribunal does not consider the Respondent's financial situation should reduce the award. In a similar vein, the conduct after the end of the tenancy cannot increase the award and as the Tribunal does not consider that the other factors should reduce the award in any event, there is no impact for that conduct to have.

99. The Tribunal makes a rent repayment order in the sum of £147.87.

Application for refund of fees

100. The Applicant asked the Tribunal to award the fees paid in respect of the application should he be successful, namely reimbursement of the £100 issue fee and the £200 hearing fee.

101. The fees needed to be paid in order to bring the claim and the Applicants has been successful in the proceedings. However, that to a significantly reduced extent and where the Tribunal has found two instances of offences but has not accepted the broader picture presented by the Applicant. Whilst the Applicant has proved offences and that must be give due weight, it is very doubtful that the time and expense involved was proportionate to the outcome achieved.

102. In those circumstances, the Tribunal has considered with some care whether any of the fees should be ordered to be repaid and, if so, how much. Taking matters in the round, it is appropriate to order and the Tribunal does order the Respondent to refund half of the fees and so the sum of £150 to the Applicant, in addition to the amount of the rent repayment order itself.

Rights of appeal

1. 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.

2. 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.

3. 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.

4. 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.

Appendix of relevant legislation

Protection from Eviction Act 1977

Section 1 Unlawful eviction and harassment of occupier

(1) In this section "residential occupier", in relation to any premises, means a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises.

(3) If any person with intent to cause the residential occupier of any premises-

(a) To give up the occupation of any premises or any part thereof; or
(b) To refrain from exercising any right or pursuing any remedy in respect of the premises or part thereof;

does acts [likely] to interfere with the peace or comfort of the residential occupier or members of his household……. he shall be guilty of an offence.

(3A) Subject to subsection (3B) below, the landlord of a residential occupier or an agent of the landlord shall be guilty of an offence if-

(a) he does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or
(b) …..

and in either case he knows or has reasonable cause to believe that that conduct is likely to cause the residential occupier to give up occupation of the whole or part of the premises

(3B) A person shall not be guilty of an offence under subsection (3A) above if he proves that he had reasonable grounds for doing the acts…….

Housing and Planning Act 2016

Chapter 4 RENT REPAYMENT ORDERS

Section 40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—

(a) repay an amount of rent paid by a tenant, or

(b) ……

(3) A reference to "an offence to which this Chapter applies" is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord.

Act	section	general description of offence
Criminal Law Act 1977	section 6(1)	violence for securing entry
Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
Housing Act 2004	section 30(1)	failure to comply with improvement notice
	section 32(1)	failure to comply with prohibition order etc
	section 72(1)	control or management of unlicensed HMO
	section 95(1)	control or management of unlicensed house
This Act	section 21	breach of banning order

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

Section 41 Application for rent repayment order

(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if —

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and
(b) the offence was committed in the period of 12 months ending with the day on which the application is made.

Section 43 Making of rent repayment order

(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).

(2) A rent repayment order under this section may be made only on an application under section 41.

(3) The amount of a rent repayment order under this section is to be determined in accordance with—

(a) section 44 (where the application is made by a tenant);
(b) .....
(c) section 46 (in certain cases where the landlord has been convicted etc).

Section 44 Amount of order: tenants

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.

(2) The amount must relate to rent paid during the period mentioned in the table.

If the order is made on the ground that the landlord has committed	the amount must relate to rent paid by the tenant in respect of
an offence mentioned in row 1 or 2 of table in section 40(3)	the period of 12 months ending the with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

(3) The amount that the landlord may be required to repay in respect of a period must not exceed—

(a) the rent paid in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount the tribunal must, in particular, take into account—

(a) the conduct of the landlord and the tenant,

(b) the financial circumstances of the landlord, and

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.