Case Reference	**:**	**LON/00AM/HMF/2021/0063**
HMCTS code (paper, video, audio):	**:**	**V: CVPREMOTE**
Property	**:**	**19 Trehurst Street, London E5 0EB**
Applicants	**:**	**(1) Ms P Di Silvestro** **(2) Mr Ethan Jones**
Representative	**:**	**Ms C Sherratt (Justice for Tenants)**
Respondent	**:**	**Mr G Brown**
Representative	**:**	**Ms R Grewal Solicitor**
Type of Application	**:**	**Application by Tenants for a Rent Repayment Order**
Tribunal Members	**:**	**Judge S Brilliant** **Mr A Lewicki**
Date and Venue of Hearing	**:**	**13 October 2019** **10 Alfred Place, London WC1E 7LR**
Date of Written Reasons	**:**	**29 November 2021**

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was by video V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and no-one requested the same. The parties each provided bundles of documents albeit not electronically. References to the Applicants' bundle are A/[ ], and to the Respondent's bundle are R/[ ].

DECISION

Determination

1. The Tribunal is satisfied beyond all reasonable doubt that, during the year ending 15 March 2020 (for Ms Di Silvestro in Room 4) and the year ending 09 March 2020 (for Mr Jones in Room 1), 19 Trehurst Street, London E5 0BQ ("the House") was a House in Multiple Occupation ("HMO"). The Applicants are entitled to a rent repayment order as the House was unlicensed. The amount we order to be paid back to Ms Di Silvestro by the Respondent is **£3,965.50** and the amount to be paid back to Mr Jones by the Respondent is **£4,385.50**.

The proceedings

2. These proceedings concern applications for rent repayment orders pursuant to ss.40, 41, 43 and 44 Housing and Planning Act 2016.

3. Directions for the hearing were given on 19 April 2021. The hearing took place remotely on 13 October 2021. The Applicants were represented by Ms Sherratt and the Respondent by Ms Grewal. We are grateful to both of them for their considerable assistance.

4. At the hearing, Ms Di Silvestro and Mr Jones both gave evidence. The Applicant also relied upon witness statements of Mr Jones' father, Mr Dan Jones, and of Mr Waters, Ms Di Silvestro's boyfriend (the latter served out of time). The Respondent gave oral evidence and called his wife Ms Brissett. The Respondent also relied upon a witness statement of Ms Welch, who lives at 17 Trehurst Street. Mr Dan James, Mr Waters and Ms Welch were not available for cross examination and we place no reliance on their evidence.

The House

5. The House is in a Victorian terrace. It is on two floors and has five rooms, a kitchen, a bathroom and a separate toilet. Four of the rooms were at the material time let out to tenants. The fifth room, which is on the ground floor ("the Respondent's Room"), was not let out.

6. The registered proprietors of the House are the Respondent, Ms Brissett and the Respondent's parents (although in his evidence the Respondent said that his father had died). The House is charged to the Halifax. The date the charge registered was 01 November 2007. The Respondent gave evidence that this is not a buy to let

mortgage. Accordingly, the Respondent's letting out rooms in the House was not permitted by the mortgage. This theoretically might be prejudicial to any tenants.

7. There is a dispute between the parties as to whether the Respondent's Room was used by the Respondent as an occasional bedroom, as he maintains, or simply as a storage room, as the Applicants maintain.

8. In his witness statement, Mr Brown said:

I have always lived at [the House] with my parents and siblings and now as a "live-in" landlord having taken in lodgers to help me with the mortgage and my finances.... this is my only home... I occupy the front downstairs bedroom which is on the left as you enter the property ... I do not accept the accusation that I do not live at the property, this is untrue, I have always lived there, it is my main and only home and I have always occupied my room ... Admittedly, I do not always stay there every day and I come and go but I regard it as my principal and only home and have nowhere else I regard as my home...

9. In her witness statement, Ms Brissett, who is the tenant of 34 Pedro Street London E5 0BW (round the corner from the House), said:

Gareth and I have had a turbulent relationship over the years and it has been very on and off ... Because of our personal issues we found it better for ourselves and the sake of the children that Gareth lives at [the House] and we stay here at Pedro Street ... Admittedly, he does still come and go from Pedro Street and visits probably daily and stays over sometimes too, usually about 2 to 3 times a week, sometimes less and sometimes more. Gareth tends to have his meals here too to be around the kids and he doesn't want to interfere with his lodgers using the kitchen.

10. In their evidence the Applicants said that they had never seen the Respondent living at the House, he only visited occasionally.

11. We prefer the evidence of the Applicants on this issue. We reject the suggestion that the Respondent uses the House as his principal home or any home. Both the Respondent and his wife admit that the Respondent only eats at the House rarely, which is hardly consistent with Respondent using the House as a home. Perhaps the best independent evidence of where the Respondent lives is to be found in his medical records [R/20-30], where 34 Pedro Street is given as his address on five occasions. The Respondent and his wife also have a joint Barclays current account giving 34 Pedro Street as their address [R/47].

12. In the end it is not of any great relevance whether or not the Respondent spends nights at the House, save to say that because it cannot truly be described as his home neither Applicant could properly be classified as a lodger. However, the Respondent accepts that the Applicant are tenants and not lodgers

13. It is common ground that the Respondent required an HMO licence from 01

October 2018. The Respondent said that he was naïve in not knowing about this requirement, and has now made an application with professional assistance which is being processed. We do not find that the Respondent deliberately flouted the law, but it is his obligation as a landlord to keep up to date with the legal requirements governing lettings and he was at fault in not doing so.

The leases

14. On 24th June 2018, the Respondent entered into a written agreement with Ms Di Silvestro. Bizarrely, it is headed "Licence Agreement for Lodger Scotland" and by clause 13 of its terms and conditions it is said to be governed and construed in accordance with the Law of Scotland. No one suggested that it was in fact to be governed by Scottish Law and, in the absence of any expert evidence, an English Court or Tribunal will assume it to be the same as English Law. It was also common ground that the document was a lease rather than a licence, and we shall refer to it as "Ms Di Silvestro's Lease".

15. Ms Di Silvestro's Lease provided that she would pay £550 rent per month payable in advance. The printed document allowed an amount to be filled in for "The DEPOSIT". The figure inserted was £550 but the words "The DEPOSIT" were crossed out and the words "RENT IN ADVANCE" written in.

16. On 09 March 2019, the Respondent entered into an identical document with Mr Jones ("Mr Jones' Lease").

17. Mr Jones' Lease provided that he would pay £600 rent per month payable in advance. Again, the printed document allowed an amount to be filled in for "The DEPOSIT". The figure inserted was £600. Unlike in Ms Di Silvestro's Lease the words "The DEPOSIT" were not crossed out, but the words "IN ADVANCE" were written in at the end of the line.

18. Ms Sharrett took the point that these sums were in truth deposits which had not been transferred into a deposit protection scheme, and amounted to bad conduct by the Respondent. The Applicants denied that the written alterations had been made at the time of the signing of the respective leases, but asserted that the alterations must have been made later.

19. This is serious allegation to make and, on balance, we are not persuaded by this evidence. If the Respondent had decided to tamper with the documents it is unlikely that he would have altered each one differently, even though the Respondent explained this on the basis of his illness. Accordingly, we do not find the Respondent has failed to comply with the law regarding the protection of deposits.

20. The Respondent's evidence as to why he used these bizarre licence agreements was that they were the ones provided by the estate agent he consulted in 2012/2013 when he first wished to let out rooms in the House. After that agent closed the Respondent tried to find others but they all seemed to "muck him about". So he just carried on using the original agreements.

21. Whilst we accept that the Respondent is not a professional landlord, it is still his duty to take all reasonable steps to ensure that the proper paperwork is used. The Respondent was extremely cavalier in not noticing that it was a Scottish document. Moreover, at least by 2018, he was not "living" at the House. We find that the Respondent was at fault in not providing proper tenancy agreements.

The rent

22. Ms Di Silvestro lived at the House from 15 July 2018 until 25 March 2020. She paid £550 per month rent. Her claim to recover 12 months' rent amounts to £6,600.

23. Mr Jones lived at the house from 09 March 2019 until 25 March 2020 he paid £600 per month rent. His claim to recover 12 months' rent amounts to £7,200.

24. The Respondent paid for a number of utilities. These outgoings are listed at A/[85]. They total £1,003.61 per month. However, this figure includes mortgage interest of £614.21 per month. In accordance with the case law set out below, we deduct from the rent paid by the Applicants the Respondent's outgoings (other than the mortgage payments which are not allowed to be deducted). This reduces the deductible outgoings to £389.40 per month.

25. As there are five flats in the House, the outgoings relating to each flat are £77.88 per month. This equates to £934.56 per annum. Accordingly, for the purpose of these proceedings, Ms Di Silvestro's rent rounded down is £5,665 per annum and Mr Jones' rent rounded down is £6,265 per annum.

The state of the House

26. The Applicants make complaints about the state of the House. In their signed statements of case and witness statements they refer to 3 matters (1) old and damaged flooring which required replacement, (2) mould on the walls in Ms Di Silvestro's room and (3) mice infestation. In his oral evidence Mr Jones stated that he had not reported the flooring problem to the Respondent.

27. As far as the mould is concerned, the Respondent placed a dehumidifier in Ms Di Silvestro's room to dry out the excess moisture, he applied anti-mould paint in two stages and when the problem did not go away he commissioned a report in November 2019 which showed that the gutter needed to be cleared. This work was then undertaken, but it should have been done earlier than the following February.

28. As far as the mice infestation is concerned he put down traps and poison in response to the complaints. Mr Jones' witness statement did not refer to this problem at all.

29. The WhatsApp exchanges [A/32-39] show that the Respondent was a polite and caring landlord who responded to complaints and did not evade his

responsibilities. He had, for example, a contract with British Gas for central heating cover, plumbing and drains cover and home electrical cover [R/45].

30. It should also be mentioned that in their oral evidence at the hearing the Applicants also complained about the smoke alarms and the provision of mattresses. These matters were never raised in the Applicants' statements of case or witness statements and we do not propose to deal with them.

31. It is instructive that new tenants at the House appear to have been introduced by existing tenants, rather than through adverts by the Respondent. Mr Jones was advised of a room vacancy via a recommendation on Facebook. Ms Di Silvestro was advised of a room vacancy by a friend. She also found a new flatmate for one of the rooms.

32. Is also telling that when Mr Jones left he sent a WhatsApp message to the Respondent:

Thank you for having me, if my circumstances change again in the future and I make a return to London I'll be sure to let you know and see if you have a room again.

33. His attempt to explain this away in his oral evidence was not convincing.

34. There is also an issue as to whether or not the Applicants broke into the Respondent's Room when the Wi-Fi needed repairing. There was conflicting evidence on this. It is a serious matter and, on balance, we prefer the evidence of the Applicants that they did not do this.

The Respondent's financial and medical circumstances

35. We are satisfied on the evidence that the Respondent has very limited financial means. Ms Sherratt took the point that contrary to the directions the Respondent had not disclosed documentary evidence regarding his financial circumstances. Nevertheless, the directions were not framed in terms of an "unless" order and in our view the Respondent did give adequate evidence of his means and was not cross examined on it.

36. In paragraph 9(n) of his statement of case, the Respondent said:

The Respondent has no income, he is not employed. He has one lodger at the property and is reliant on financial assistance from his wife at times. He has a small pension from when he was employed as a bus driver.

37. In paragraph 6) of his witness statement, the Respondent said:

I do not currently work and have no income and I relied on the income from my lodgers if anything was left after paying all the bills etc and Tracey also helps

me financially too although I try not to ask.

38. We are also satisfied from the medical evidence that the Respondent suffers from serious ill health. He has been hospitalised with diverticular disease, a digestive condition that affect the large intestine (bowel). He has also been hospitalised with viral encephalitis, an acute, usually diffuse, inflammatory process affecting the brain. This has given the Respondent problems with his eyesight, some memory loss, confusion, disorientation and dizzy spells. It has also affected his mood. He is being investigated for diabetes.

The statutory framework

39. s.72(1) Housing Act 2004 ("the 2004 Act") provides:

> *A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1) and is not so licensed.*

40. It is conceded by the Respondent in these proceedings that the House is an HMO. In paragraph 37 of her skeleton argument Ms Grewal said the Respondent would rely upon the defence of reasonable excuse. This was rightly not pressed and there is no reasonable excuse in this case.

41. s.40 of the Housing and Planning Act 2016 ("the 2016 Act") states:

> (*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 … under the tenancy.*

42. Among the relevant offences is having control of or managing an HMO which is required to be licensed and which is not licenced.

43. s. 43 of the 2016 Act provides that the Tribunal may make a rent repayment order if it is satisfied beyond reasonable doubt that the offence has been committed, and that where the application is made by a tenant the amount is to be determined in accordance with s.44.

44. s.44 provides:

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

(2) The amount must relate to [our emphasis] rent paid during the period mentioned in the table: [The table provides for the offence in these proceedings to be *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 … .

(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.

The case law

45. There is no requirement that a payment in favour of the tenant should be reasonable: Vadamalayan v Stewart [2020] UKUT 183 (LC) [11].

46. It is not possible to find in the 2016 Act any support for limiting the rent repayment order to the landlord's profits. That principle should no longer be applied. That means that it is not appropriate to calculate a rent repayment order by deducting from the rent everything spent on the property during the relevant period. There is no reason why the landlord's costs in meeting his obligations under the lease (such as repairs) should be set off against the cost of meeting his obligations to comply with the rent repayment order: Vadamalayan [14-15].

47. In cases where the landlord pays for utilities, there is a case for deduction, because electricity for example is provided to the tenant by third parties and consumed at a rate the tenant chooses; in paying for utilities the landlord is not maintaining or enhancing his own property: Vadamalayan [16].

48. What a landlord pays by way of mortgage repayments - whether capital or interest - is an investment in the landlord's property and it is difficult to see why the tenant should fund that investment by way of a deduction from the rent repayment order: Vadamalayan [54].

49. The context of a "starting point" is familiar in criminal sentencing practice, but since the rent paid is also the maximum which may be ordered the difficulty with treating it as a starting point is that it may leave little room for the matters which s.44(4) obliges the Tribunal to take into account, and which Parliament clearly intended should play an important role (Ficcara v James [2021] UKUT 38 (LC) [50] .

50. The most recent authoritative decision is the decision of Fancourt J in Williams v Parmar [2021] UKUT 0244 (LC). This deserves to be quoted at length:

> *23. The offence of having control of or managing an unlicensed HMO is not an offence described in s. 46(3)(a) and accordingly there was no requirement in this case for the FTT to make a maximum repayment order. That section did not apply. The amount of the order to be made was governed solely by s.44 of the 2016 Act. Nevertheless, the terms of s.46 show that, in cases to which that section does not apply, there can be no presumption that the amount of the order is to be the maximum amount that the tribunal could order under s.44 or s.45. The terms of s.44(3) and (4) similarly suggest that, in some cases, the amount of the order will be less than the rent paid in respect of the period mentioned in the table in s.44(2), though the amount must "relate to" the total rent paid in respect of that period.*
>
> *24. It therefore cannot be the case that the words "relate to rent paid during the period …" in s. 44(2) mean "equate to rent paid during the period …". It is clear from s. 44 itself and from s. 46 that in some cases the amount of the RRO will be less than the total amount of rent paid during the relevant period. S. 44(3) specifies that the total amount of rent paid is the maximum amount of an RRO and s. 44(4) requires the FTT, in determining the amount, to have regard in particular to the three factors there specified. The words of that subsection leave open the possibility of there being other factors that, in a particular case, may be taken into account and affect the amount of the order.*
>
> *25. However, the amount of the RRO must always "relate to" the amount of the rent paid during the period in question. It cannot be based on extraneous considerations or tariffs, or on what seems reasonable in any given case. The amount of the rent paid during the relevant period is therefore, in one sense, a necessary "starting point" for determining the amount of the RRO, because the calculation of the amount of the order must relate to that maximum amount in some way. Thus, the amount of the RRO may be a proportion of the rent paid, or 8 the rent paid less certain sums, or a combination of both. But the amount of the rent paid during the period is not a starting point in the sense that there is a presumption that that amount is the amount of the order in any given case, or even the amount of the order subject only to the factors specified in s.44(4).*
>
> *26. In this regard, I agree with the observations of the Deputy President of the Lands Tribunal, Judge Martin Rodger QC, in Ficcara v James. [2021] UKUT 0038 (LC), in which he explained the effect of the Tribunal's earlier decision in Vadamalayan v Stewart [2020] UKUT 0183 (LC). Vadamalayan is authority for the proposition that an RRO is not to be limited to the amount of the landlord's profit obtained by the unlawful activity during the period in question. It is not authority for the proposition that the maximum amount of rent is to be ordered under an RRO subject only to limited adjustment for the factors specified in s. 44(4).*

51. At [36] the learned judge confirmed that the instalments of an interest only mortgage are not to be deducted from the landlord's profit. Neither side raised an argument that payments for utilities should not be used to reach an "adjusted starting point", and the learned judge said nothing about those deductions. We are therefore free to make such deductions if we think it is right to do so, and in this case we do feel it is right so to do.

52. At [40] the learned judge repeated that there was no presumption in favour of the maximum amount of rent paid during the period, and the factors that may be taken into account are not limited to those mentioned in s.44(4), although the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases.

53. At [41] the learned judge said that the circumstances and seriousness of the offending conduct of the landlord are comprised in the "conduct of the landlord" [in s.44(4)(a)], so the Tribunal may, in an appropriate case, order a lower than maximum amount of rent repayment, if what a landlord did or failed to do in committing the offence is relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise.

54. The learned judge continued:

> *50. I reject the argument of Mr Colbey that the right approach is for a tribunal simply to consider what amount is reasonable in any given case. A tribunal should address specifically what proportion of the maximum amount of rent paid in the relevant period, or reduction from that amount, or a combination of both, is appropriate in all the circumstances, bearing in mind the purpose of the legislative provisions. A tribunal must have particular regard to the conduct of both parties (which includes the seriousness of the offence committed), the financial circumstances of the landlord and whether the landlord has at any time been convicted of a relevant offence. The tribunal should also take into account any other factors that appear to be relevant.*
>
> *51. It seems to me to be implicit in the structure of Chapter 4 of Part 2 of the 2016 Act, and in sections 44 and 46 in particular, that if a landlord has not previously been convicted of a relevant offence, and if their conduct, though serious, is less serious than many other offences of that type, or if the conduct of the tenant is reprehensible in some way, the amount of the RRO may appropriately be less than the maximum amount for an order. Whether that 13 is so and the amount of any reduction will depend on the particular facts of each case. On the other hand, the factors identified in para 3.2 of the guidance for local housing authorities are the reasons why the broader regime of RROs was introduced in the 2016 Act and will generally justify an order for repayment of at least a substantial part of the rent. This is what Judge Cooke meant when she said in Vadamalayan that the provisions of the 2016 Act are rather more hard-edged than those of the 2004 Act, which included expressly a criterion of reasonableness. If Parliament had intended reasonableness to be the criterion under Chapter 4 of Part 2 of the 2016 Act it*

would have said so.

Applying the case law to the facts

55. The Respondent has no convictions for failing to obtain a licence. Contrary to Ms Sharrett's submission this is not a neutral matter, but it is to be put on the scales in favour of the Respondent.

56. The Applicants were both good tenants, which goes in their favour.

57. As far as the Respondent is concerned the points which weigh against him are (a) the pretence that the House was his principal home; (b) funding the House with a mortgage which did not permit tenants to live there; (c) using Scottish lodgers' agreements rather than ASTs and (d) the failure to have an HMO licence.

58. The points in his favour are (a) by and large he responded appropriately to the mould and mice problems and had a BG contract for central heating cover, plumbing and drains cover and home electrical cover; (b) tenants were recommended by other tenants and Mr Jones sent a fulsome testimonial; (c) he genuinely did not believe he needed an HMO licence; (d) he was not a professional landlord; (e) he only owned one house; (f) he is a first-time offender; (g) his health is poor; (h) he is not well off and (i) he has now engaged a professional company to obtain an HMO licence.

59. We take into account the case law referred above. Standing back, looking at the matter in the round and doing the best we can to apply the case law, we are of the view that the Respondent should make rent repayment orders of 70% of the rent claimed (less permissible deductions).

60. In the case of Ms Di Silvestro we award 70% of £5,665 which is £3,965.50. In the case of Mr Jones we award 70% of £6,265 which is £4,385.50.

61. The Applicants are also entitled to recover the application fee and the hearing fee.

Name: Simon Brilliant **Date:** 29 November 2021

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.