

**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Regulation 9 of the Tenancy Deposit
Schemes (Scotland) Regulations 2011**

Chamber Ref: FTS/HPC/PR/22/1181

**Re: Property at 43 Saltburn Road, Invergordon, Ross-Shire, IV18 0HH (“the
Property”)**

Parties:

**Sally Ann Waite, Mr Michael Waite, 2 Barevan Farm Cottage, Muir of Ord, IV6
7XB (“the Applicants”)**

**Mr John O'Hare, St Magnus, 40 Ballifeary Road, Inverness, IV3 5PF (“the
Respondent”)**

Tribunal Members:

Graham Harding (Legal Member)

Decision

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
Tribunal”) determined that the Applicants were entitled to an order for payment
by the Respondent to the Applicants in the sum of £2685.00.**

Background

1. By application dated 21 April 2022 the Applicants applied to the Tribunal for an order under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”). The Applicants submitted a copy of the tenancy agreement, correspondence from three tenancy deposit scheme administrators and email correspondence between the Applicants and the Respondent’s representative.
2. By Notice of Acceptance dated 9 May 2022 a legal member of the Tribunal accepted the application and a Case Management Discussion (“CMD”) was assigned.

3. Intimation of the CMD was served on the Respondent by Sheriff Officers on 24 May 2022.

The Case Management Discussion

4. A CMD was held by teleconference on 19 July 2022. The parties attended in person and the Respondent's representative Ms Susanne MacDonald attended also after a short delay.
5. It was agreed between the parties that:
 - (i) The parties entered into a short assured tenancy agreement that commenced on 19 September 2012 for a period of 6 months at a rent of £895.00 per month and continued from month to month thereafter.
 - (ii) The deposit of £895.00 paid by the Applicants to the Respondent's representative Ms MacDonald was never lodged in an approved Tenancy Deposit Scheme.
 - (iii) There was correspondence between Mr Waite and Ms MacDonald in August 2020 confirming that the deposit had not been lodged in a scheme but that it would be.
6. The Respondent explained that he had been working abroad throughout most of the period of the tenancy and had relied on his now ex-partner Ms Macdonald to deal with the administration of his portfolio of buy-to-let flats. He said that he had not been aware of the need to lodge deposits in an approved scheme. He went on to say that he had been unaware of the correspondence between Ms MacDonald and Mr Waite in August 2020 as he and Ms MacDonald had separated over two years ago.
7. The Respondent went on to say that he and Ms MacDonald had owned nine properties in all, six of which had been buy-to-let and four had now been sold. He said his brother was occupying one and had not paid a deposit.
8. For the Respondent Ms Macdonald said that she had found managing the letting business along with having so many children and with her partner working abroad quite overwhelming. She said she had tried to keep up with everything but it had been difficult. She explained that when the properties had first been purchased the Tenancy Deposit Scheme legislation had not been in force and she had never got round to dealing with it. She confirmed she had tried to register with My Deposits Scotland in August 2020 but had not then completed lodging the Applicant's deposit.
9. Ms Macdonald confirmed that most of the rented properties had been sold but one property still had a deposit that had not been lodged in a scheme.
10. The Respondent accepted that he was in breach of Regulation 3 but in mitigation suggested that the deposit had been returned in full. The rent paid by the Applicants although increased by £75.00 per month during the course of the tenancy was still less than the rent ought to have been. Furthermore, he

said he had wanted to sell the property several years ago but had decided not to as he had not wanted to put the Applicants out of their home. The Respondent submitted that the failure on the part of Ms MacDonald to lodge the deposit in a scheme was inadvertent due to her being overwhelmed with managing the properties. There were extenuating circumstances and an award of three times the deposit would be excessive.

11. For the Respondent Ms MacDonald concurred with the Respondent's submissions and said that the Applicants had always been treated fairly and their deposit repaid in full. She said that the remaining deposit held by the Respondent in respect of another property could be lodged in an approved scheme. They were not trying to deceive anyone.
12. For the Applicants, Mr Waite noted that the deposit paid into the Applicants' bank account had come out of the Respondent's personal account. The rent paid for the property was irrelevant but in fact was not low considering the windows needed replaced and the roof was leaking and there were problems with the electricity and gas safety inspection. He went on to say that the applicants had been misled in August 2020 that the Deposit was being placed in a Tenancy Deposit scheme when it was not. There had been no certainty and no protection. There had been a flagrant disregard for the rules.
13. For the Respondent Ms MacDonald disputed that the property was in a poor condition and said that quite a bit of maintenance had been carried out at the property but the Applicants had been made aware that the windows would not be replaced.

Findings in Fact and Law

14. The parties entered into a Short Assured Tenancy that commenced on 19 September 2012 and continued until 25 April 2022.
15. The Applicants paid a deposit of £895.00 at the commencement of the tenancy.
16. The deposit was never lodged in an approved Tenancy Deposit Scheme.
17. The Respondent owned 6 rented properties managed by his then partner Ms Susanne MacDonald
18. The Respondent spent significant time working abroad.
19. Ms MacDonald was aware of the requirement to lodge tenants' deposits in an approved scheme but failed to do so.
20. The Respondent was in breach of Regulation 3 of the 2011 regulations.

Reasons for Decision

21. Regulation 3 of the 2011 Regulations States:

Duties in relation to tenancy deposits

3.—(1) A landlord who has received a tenancy deposit in connection with a relevant tenancy must, within 30 working days of the beginning of the tenancy—

(a) pay the deposit to the scheme administrator of an approved scheme; and

(b) provide the tenant with the information required under regulation 42.

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

(3) A “relevant tenancy” for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—

(a) in respect of which the landlord is a relevant person; and

(b) by virtue of which a house is occupied by an unconnected person,

unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

(4) In this regulation, the expressions “relevant person” and “unconnected person” have the meanings conferred by section 83(8) of the 2004 Act.

The Respondent failed to lodge the Applicants’ deposit in an approved scheme for the entire duration of the tenancy, a period of more than nine and a half years. During this time the Applicants deposit remained unprotected. In the event of the insolvency of the Respondent the Applicants would have ranked as ordinary creditors with no guarantee that their deposit would be returned to them at the end of the tenancy.

22. Although the Respondent spent a considerable amount of time working abroad, as a registered landlord and the Applicants landlord the onus was on him to familiarise himself with the legal obligations on him as a landlord and to ensure that whoever he delegated the day-to-day management of his business to was complying with all relevant legislation. In this he completely failed to do both before he and Ms Macdonald separated and subsequently.

23. Although the Respondent has sold several of the properties in his portfolio there is still at least one where a deposit has not been lodged in an approved scheme despite both he and Ms Macdonald being aware of the issues in these proceedings.

24. Ms Macdonald may have found managing her partner's portfolio of properties overwhelming but that does not excuse failing to lodge not only the Applicants' deposit but apparently all the other tenants' deposits in approved schemes over an extremely long period of time. It would have been open to her and the Respondent to have obtained professional assistance from a letting agent if that was the case.
25. The level of rent paid during the tenancy has no bearing in mitigation and in any event, it is disputed that the rent paid was less than it should have been. Similarly, it is not relevant that the Respondent chose not to take steps to terminate the tenancy at an earlier stage.
26. In the case of *Jenson against Fappiano* 2015 G.W.D. 4-89 the court found that where there was non-compliance with Regulation 3 a sanction should be fair, proportionate and just taking account of the circumstances of the case. The Tribunal has to exercise its discretion after careful consideration of the circumstances (*Tenzin v Russell* 2015 Hous. L.R. 11). In reaching its decision the Tribunal has taken account of the extremely long period that the Applicants' deposit remained unprotected. The Tribunal considers the fact that the Respondent owned a significant number of rented properties and no deposits were lodged in approved schemes is also material as is the fact that despite becoming aware of the issues in these proceedings in May this year one tenanted property still has not had its deposit lodged in an approved scheme. Whilst the Tribunal acknowledges that the Applicant apparently relied on his former partner Ms MacDonald to manage his rented properties the Tribunal does not accept to any material extent that absolves him of his legal responsibilities to comply with the regulations or to mitigate his failures. There was an onus on him as a landlord to be familiar with the relevant legislation and to ensure that anyone who he delegated authority to, complied with such legislation.
27. Taking everything into account the Tribunal was satisfied that this was a very serious breach of the 2011 Regulations that merited a sanction at the highest end of the scale and awards the Applicants the maximum amount of £2685.00.

Decision

28. The Tribunal having carefully considered the information before it and being satisfied that it has sufficient information to allow it to make a decision without the need for a hearing finds the applicants entitled to an order for payment by the Respondents in the sum of £2685.00.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.



**Graham Harding
Legal Member/Chair**

**19 July 2022
Date**