

**Decision with Statement of Reasons of the First-tier Tribunal for Scotland  
(Housing and Property Chamber) under Regulations 9 and 10 of the Tenancy  
Deposit Schemes (Scotland) Regulations 2011**

**Chamber Ref: FTS/HPC/PR/21/2186**

**Re: Property at 31 Bridgend, Duns, Scottish Borders, TD11 3ES (“the Property”)**

**Parties:**

**Mrs Elizabeth Hurst, Mr James Hurst, Hill Cottage, Dominies Loan, Chirnside,  
Scottish Borders, TD11 3UA (“the Applicants”)**

**S. Lackenby General Builders Ltd, Trinity Walls, Bridgend, Duns, Scottish  
Borders, TD11 3ER (“the Respondent”)**

**Tribunal Members:**

**Sarah O'Neill (Legal Member) and David MacIver (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the respondent failed to comply with its duties under Regulation 3 (1) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 regulations”). The tribunal therefore makes an order requiring the respondent to pay to the applicants the sum of £550.**

**Background**

1. By application received on 9 September 2021, the applicants submitted an application form under rule 103 of Schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. In terms of their application, the applicants were seeking an order for payment in respect of the respondent’s alleged failure to lodge the deposit paid by the applicants with an approved tenancy deposit scheme, as required by regulation 3 of the 2011 regulations. The applicants sought an order for payment of three times the amount of the tenancy deposit.
2. Attached to the application form were:

- i. copy short-assured tenancy agreement between the parties which commenced on 1 May 2007
  - ii. letter from the respondent's solicitor to the applicants dated 23 April 2007 enclosing the tenancy agreement for signature
  - iii. copy Notices to Quit sent to the applicants by the respondent dated 6 May 2021
  - iv. various correspondence between the parties by text and email regarding the return of / proposed deductions from the applicants' tenancy deposit.
3. In their initial application, the applicants also sought the return of their tenancy deposit, but they were advised by the tribunal administration on 28 September 2021 that they would need to submit a separate application in respect of the return of the tenancy deposit. The applicants confirmed at the case management discussion (CMD) and at the hearing that they had done so.
  4. The application was accepted on 28 September 2021. A direction (incorrectly dated 6 July 2021) was issued to the applicants on the same day and a response was received prior to the CMD. A further direction was issued to the respondent on 17 October 2021. Written representations were received from the respondent on 21 October 2021.

### **The case management discussion**

5. A case management discussion (CMD) was held by teleconference call on 5 November 2021. The applicants were present on the teleconference call. The respondent was not present or represented on the call. The tribunal (consisting of Pamela Woodman, legal member) noted that details of the CMD, together with the application papers and guidance notes, had been served on the respondent by sheriff officer, and proceeded with the CMD in the respondent's absence.
6. At the CMD, the tribunal consented to the request by the applicants to amend the name of the respondent (originally named in the application form as S. Lackenby General Builders Ltd, Mr Steven Lackenby and Mrs Linda Lackenby) to "S. Lackenby General Builders Ltd". The tribunal noted that S. Lackenby General Builders Ltd was both the landlord named in the tenancy agreement and the registered owner of the property (Land Register title no: BER5025).
7. The tribunal referred to the transitional provisions in regulations 47 and 48 of the 2011 regulations. It noted that the respondent had not explicitly admitted that the tenancy deposit had not been lodged with an approved tenancy deposit scheme but had equally not asserted that it had been paid into an approved scheme. The tribunal was satisfied on the balance of probabilities that the respondent had not complied with the duty in terms of regulation 3(1) of the 2011 regulations. The tribunal referred the application to a hearing on

the amount of the order for payment to be granted in terms of regulation 10 (a) of the 2011 regulations.

8. The tribunal issued a further direction to the parties on 5 November 2021, requiring them to provide by 22 November 2021 any written submissions they wished to rely on and have the tribunal consider in connection with determining the amount of the order for payment. A response was received from the applicants on 8 November 2021. No response was received from the respondent.

### **The hearing**

9. A hearing was held by the present tribunal by remote teleconference call on 14 December 2021. Both applicants were present on the teleconference call and represented themselves. Mr Steven Lackenby, Director and Mrs Linda Lackenby, Secretary, of S. Lackenby General Builders Ltd, were present on the teleconference call and represented the respondent.
10. The tribunal chairperson explained to the parties at the start of the hearing that the application had been referred to a hearing to consider the amount of the order which the tribunal should grant in respect of the respondent's alleged failure to pay the tenancy deposit into an approved tenancy deposit scheme as required by regulation 3 (1) of the 2011 regulations. As the respondent had not been present or represented at the CMD, the tribunal chairperson asked the respondent's representatives whether they agreed that the deposit had not been paid into an approved tenancy deposit scheme.
11. Mr and Mrs Lackenby told the tribunal that they admitted there had been an oversight on their part and that they had not paid the deposit into an approved scheme. They explained that they had been under the impression that there was no requirement on the respondent to pay the tenancy deposit into an approved scheme because the tenancy had commenced in 2007, and the 2011 regulations had not come into force until 2012. Mrs Lackenby said that the respondent owned another property, and that the deposits paid by each of the three tenants who had lived in that property since 2012 had been lodged with Safe Deposits Scotland. Until they had received the applicants' tribunal application, she had been under the impression that the respondent had been complying with the legal requirements in relation to both properties.
12. Mr Lackenby said that when the application had been received, he had taken advice from his solicitor. He said that his solicitor had advised him that because the tenancy agreement had commenced prior to 2012, there was no need to pay the applicant's tenancy deposit into an approved scheme. His solicitor had provided him with a copy of a "Housing Rights Policy Briefing" on "The Tenancy Deposit Scheme" dated November 2015. This briefing, which

related to tenancy deposit schemes in Northern Ireland, had been included with the respondent's written representations which were received on 21 October 2021. Mr Lackenby pointed to the discussion on "deposit protection in other jurisdictions which discussed Scotland at section 3.2. The tribunal chairperson noted that this section stated: *"The 2011 Regulations are retrospective, which means that they apply to all tenancy deposits in Scotland, including those taken before the Regulations were introduced."*

13. Mr Lackenby again said that he had believed the respondent had complied with its obligations and had been surprised when they received the application papers. He said that the deposit had been paid to them through their solicitor, that it was sitting in a separate account waiting to be repaid to the applicants. He said that he had had every intention of paying the deposit back to the applicants, until the dispute between the parties over the cost of hiring a skip to remove belongings which they had left in the property.

14. Mrs Hurst told the tribunal that she had also been unaware of the duty on the respondent to pay the tenancy deposit into an approved scheme and had only become aware of it when asking for the tenancy deposit to be repaid. When asked by the tribunal whether they wished to raise any other issues in relation to the amount of any payment order, the applicants indicated that they did not.

### **Findings in fact**

15. The tribunal made the following findings in fact:

- The parties entered into a short-assured tenancy agreement in relation to the property on 1 May 2007.
- The respondent was the owner and registered landlord of the property
- The tenancy agreement provided that a tenancy deposit of £550 was to be paid by the applicants to the respondent.
- The applicants paid the sum of £1100 to the respondent's solicitor in respect of the tenancy deposit and the first month's rent on 27 April 2007.
- The tenancy was a 'relevant tenancy' in terms of the 2011 regulations.
- The respondent did not pay the tenancy deposit into an approved tenancy deposit scheme.
- The tenancy came to an end on or around 2 July 2021, when the applicants vacated the property.

### **Reasons for decision**

16. The tribunal noted that the 2011 regulations came into force on 7 March 2011, and that the approved tenancy deposit schemes became operational on 2 July 2012. The regulations were retrospective in nature, and the relevant transitional provisions were set out at regulations 47 and 48, which state:

*47. Where the tenancy deposit was paid to the landlord before the day on which these Regulations come into force, regulation 3 applies with the modification that the tenancy deposit must be paid, and the information provided, within 30 working days of the date determined under paragraph (a) or (b)—*

*(a) where the tenancy is renewed, by express agreement or by the operation of tacit relocation, on a day that falls three months or more, but less than nine months, after the first day on which an approved scheme becomes operational, the date of that renewal;*

*(b) in any other case, the date which falls nine months after the first day on which an approved scheme becomes operational.*

*48. Where the tenancy deposit was paid to the landlord on or after the day on which these Regulations come into force and before the first day on which an approved scheme becomes operational, regulation 3 applies with the modification that the tenancy deposit must be paid and the information provided within 30 working days of the date which falls three months after the first day on which such a scheme becomes operational.*

18. As the tenancy deposit in this case was paid prior to 7 March 2011, and the tenancy was not renewed between 2 October 2012 and 2 April 2013, the date by which the tenancy deposit should have been paid into an approved scheme was governed by regulation 47 (b). The deposit should have been paid into an approved scheme within 30 working days of 2 April 2013 (nine months after 2 July 2012) i.e. by 15 May 2013.
17. The respondent's representatives admitted that the respondent had failed to do so. The tribunal chairperson explained to the parties that the tribunal was therefore obliged to make an order requiring the respondent to make payment to the applicant, in terms of rule 10 of the 2011 regulations. The question before the tribunal was the amount which the respondent should be ordered to pay to the applicant, which could be up to three times the amount of the tenancy deposit.
18. The tribunal adjourned the hearing briefly to consider what an appropriate level of payment order would be in the circumstances. The tribunal considered the need to proceed in a manner which is fair, proportionate and just, having regard to the seriousness of the breach (Sheriff Welsh *in Jenson v Fappiano* 2015 GWD 4-89).
19. The applicants' tenancy deposit had been left unprotected for more than 8 years. The applicants had therefore been denied the opportunity to dispute any issues relating to repayment of the deposit through an approved tenancy deposit scheme. This was unfortunate as, although the tribunal accepted Mr Lackenby's evidence that the deposit had been kept in a separate account, there was clearly a dispute between the parties over the return of the deposit.

20. The tribunal noted the view expressed by Sheriff Ross in *Rollet v Mackie* ([2019] UT 45) that the level of penalty should reflect the level of culpability involved. It noted in particular his view, as set out at para 13 of the decision that: *“The admission of failure tends to lessen fault: a denial would increase culpability.”*
21. The tribunal found Mr and Mrs Lackenby to be credible in their evidence and accepted that they had been unaware that they had a duty to lodge the tenancy deposit into a scheme, given the commencement date of the tenancy. It also accepted their evidence that they had paid tenancy deposits in relation to other post 2012 tenancies at another property owned by the respondent into an approved scheme
22. While none of the aggravating factors noted by Sheriff Ross in *Rollet v Mackie* appeared to be present in this case, however, the respondent did nevertheless have a duty under the 2011 Regulations to pay the deposit into an approved scheme. The respondent had a responsibility as a landlord to ensure that it required with the relevant law.
23. Taking all of the above considerations into account, the tribunal determined that an order for £550, the amount of the tenancy deposit paid, would be appropriate in this case.

## **Decision**

24. The tribunal determines that the respondent has failed to comply with the duty in terms of Regulation 3 (1) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 to pay a tenancy deposit to the scheme administrator of an approved scheme within the prescribed timescale. The tribunal therefore makes an order requiring the respondent to pay to the applicants the sum of £550.

## **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.**

Sarah O'Neill

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**Legal Member/Chair**

\_\_\_\_\_  
14 December 2021  
**Date**