Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended ("the Regulations") and The Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations")

Chamber Ref: FTS/HPC/PR/23/3046

Re: Property at 202 Shuna Street, Glasgow, G20 9ES ("the Property")

Parties:

Mr Jacques Van Schalkwyk, Mrs Jekaterina Van Schalkwyk, 9 Parva Street, Kavlak, Strazhitsa, Veliko Tarnovo Oblast, 5163, Bulgaria; TBC, TBC ("the Applicant")

Reid & Lovell Property Limited, 214 Terregles Avenue, Glasgow, G41 4RR ("the Respondent")

Tribunal Members:

Nicola Weir (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that a payment order should not be made against the Respondent in favour of the Applicant.

Background

1. The application submitted on 31 August 2023 sought a payment order against the Respondent in respect of the Respondent's alleged failure to carry out their duties in respect of a tenancy deposit, in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"). Supporting documentation was submitted with said application, including copies of a tenancy deposit certificate from Safe Deposits Scotland dated 28 November 2019 and an email from Safe Deposits Scotland dated 22 August 2023 stating that the deposit concerned had been transferred to another tenancy deposit scheme with My Deposit Scotland on 4 May 2022. The Applicant advised that

he was unable to produce a copy of the tenancy agreement in question as he had since moved to Bulgaria from Scotland and had put this documentation in storage prior to moving. The Applicant stated that the tenancy had commenced on 25 November 2019 and ended on 31 July 2023. The basis of the application was that the Applicant did not find out until after the tenancy ended that the deposit was no longer lodged with the original tenancy deposit scheme, and that this had caused them difficulties contacting the scheme about the deposit and trying to recover the deposit after the tenancy ended. The Applicant requested in their application that the Tribunal make an order in their favour for up to the maximum amount possible in terms of the 2011 Regulations, namely three times the deposit amount.

2. Following initial procedure and the submission of further information by the Applicant, on 10 October 2023, a Legal Member of the Tribunal with delegated powers from the Chamber President issued a Notice of Acceptance of Application in terms of Rule 9 of the Regulations. The application was thereafter notified to the Respondent by Sheriff Officer service on 1 November 2011 and details of the Case Management Decision ("CMD") were intimated to both parties. Both parties lodged written representations prior to the CMD.

3. The Case Management Discussion ("CMD") took place by telephone conference call on 11 December 2023 at 11.30am before the Legal Member and was attended by Mr Jacques Van Schalkwyk, for the Applicants (the joint former tenants) and Mr Harry Reid of the Respondent (limited company). Mr Reid confirmed that the application was opposed on the basis that there had been no breach of the 2011 Regulations by the Respondent. There was further discussion regarding the parties' respective positions in relation to the matter. Given the issues in dispute, the Legal Member explained that it was not possible for a decision to be made on this application at the CMD stage. An Evidential Hearing would require to be fixed in order that any further available documentation could be lodged. This would also provide an opportunity to both parties to submit legal submissions on the interpretation of the relevant parts of the 2011 Regulations and their applicability to the facts of this case and for the matter to be determined by a two-Member Tribunal. The Legal Member indicated that she intended to issue a Direction to parties with requirements in connection with the Evidential Hearing. It was also noted that the Applicant is now resident in Bulgaria and would require to join the Evidential Hearing by dialling in from Bulgaria. It was explained that, in circumstances where the Tribunal is taking evidence from parties or witnesses who are joining proceedings from certain countries, one of which is Bulgaria, a protocol of seeking permission from that country is now required to be undertaken by the Tribunal Administration which may slightly delay the fixing of the Evidential Hearing.

4. Following the CMD, the Legal Member issued a CMD Note of the discussions which had taken place and a Direction directing the parties as follows:-

   *"**A**. The **Applicant** and **Respondent** are required to provide:*

   1. *Copies of any emails or other communications issued to the Applicant advising*

of the transfer of the tenancy deposit in May 2022 from one tenancy deposit scheme into another;

2. *A list of any other documentation upon which the parties wish to rely; together with numbered copies of any such documents; and*

3. *A list of any witnesses that the parties wish to call to give evidence at the Evidential Hearing fixed in respect of this application, and to make arrangements for the attendance at the Hearing of any such witnesses.*

4. *Written legal submissions in support of their respective positions as to whether or not there has been a breach of the duties to provide information (and updated information) to the Applicant by the Respondent and therefore a breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011 by the Respondent and, if so, submissions as to the appropriate level of sanction to be imposed by the Tribunal in terms of section 10(a) of the 2011 Regulations. Said submissions should make reference to the 2011 Regulations as well as to any statutory or other guidance or caselaw or other authorities on interpretation and application of the 2011 Regulations which support that parties' position.*

***B**. In addition, the **Respondent** is required to provide a copy of the tenancy agreement between the parties.*

*The said documentation should be lodged with the Chamber no later than close of business **14 days** prior to the Evidential Hearing.*

Reason for Direction

The Respondent disputes liability in that they dispute that they are in breach of any duties in respect of the information requirements of the Tenancy Deposit Schemes (Scotland) Regulations 2011."

5. An Evidential Hearing was initially fixed to take place on 26 March 2024. However, due to an oversight on the part of the Tribunal Administration, the consent of the Bulgarian authorities (referred to above) was not obtained and the Evidential Hearing required to be postponed to take place on 4 June 2024. The consent of the Bulgarian Authorities was subsequently obtained and parties notified accordingly.

6. Following the CMD, the Respondent contacted the Tribunal several times requesting further information/clarification and in respect of procedural matters. Queries regarding procedural matters, such as the consent of the Bulgarian authorities, were responded to by the Tribunal Administration. Queries and issues raised by the Respondent concerning the contents of the CMD Note and the amended Regulations were responded to as instructed by the Legal Member.

7. Both parties responded to the Tribunal Direction. On 12 March 2023, the Applicant emailed their submissions and a copy of the Certificate of Incorporation and balance sheet of the Respondent company. On 20 April 2024, the Respondent emailed their original submissions dated 27 November 2023 and 30 November 2023, together with supporting documentation, namely

a letter containing a timeline from Safe Deposits Scotland; an email from My Deposit Scotland to the Applicant dated 6 May 2022; bank transaction details from Safe Deposits Scotland; a Check-out Report in respect of the Property dated 25 August 2023; and an email from Slater Hogg to the Respondent dated 6 December 2023 regarding rent arrears action/deductions from the tenancy deposit. The Respondent also reiterated some procedural concerns regarding the process which he had raised earlier, namely that the Applicant had not provided their address in the application form originally submitted [although had subsequently] and he still considered he should have sight of the consent from the Bulgarian authorities [which he was not entitled to].

Evidential Hearing

8. The Evidential Hearing took place by telephone conference call on 4 June 2024, commencing at 10am. It was attended for the Applicant by Mr Jacques Van Schalkwyk who was also acting on behalf of his wife, the joint former tenant and by Mr Harry Reid, Director, of the Respondent limited company. Mr Reid indicated that he was accompanied by a friend who was with him in a supportive capacity but would be taking no part in the proceedings. Mr Reid refused to provide the friend's name, although it had been explained by both the Tribunal Clerk and the Legal Member that this was a necessary formality in relation to an Evidential Hearing. Mr Reid indicated he would require to seek legal advice on this issue as he had not been aware of this but, on being offered a brief adjournment in order to do so, he declined and subsequently decided to proceed, indicating that his friend had left the room. Mr Reid was asked to confirm that he was now alone, which he did. It was explained that this would be noted in the formal Decision to be issued following the Tribunal Decision.

9. No other preliminary issues were raised by either party.

10. The Legal Member made introductory comments; referred to the previous CMD and the Notes of that; the Direction issued following the CMD and the parties responses to that; summarised the facts that the parties appeared to be agreed upon, which both parties confirmed; and explained the purpose of the Evidential Hearing and the issues to be decided by the Tribunal, essentially whether or not there had been a breach of the 2011 Regulations by the Respondent and, if so, whether the breach should result in a sanction being imposed on the Respondent by way of a payment order and, if so, how much that sanction should be.

11. Both parties confirmed that they did not intend to call any witnesses but would each give evidence themselves with reference to the documentation they had each lodged and submissions as to their respective positions. The Legal Member explained the procedure and the Tribunal then proceeded to hear evidence from the parties and asked the parties a number of questions.

Mr Jacques Van Schalkwyk – first-named Applicant

12. Mr Van Schalkwyk stated that this application has arisen because the Respondent had moved the tenancy deposit of £650 to another scheme and the Applicant was never informed of this. When the deposit had originally been placed in the scheme with Safe Deposits Scotland ("SDS") in 2019, everything had been done properly and they were issued with a Tenancy Deposit Certificate, etc by Mrs Lovell of the Respondent company, as confirmed in the letter the Respondent had produced from SDS dated 17 November 2023. However, when the deposit was moved to a different deposit scheme in 2022 with My Deposits Scotland ("MDS"), the Applicant was never informed of this so thought the deposit was still with SDS. He only found this out when he contacted SDS at the end of the tenancy and they told him the deposit had been transferred to MDS. He was not, however, able to log into his account with MDS as he had never received the log-in details and they also had initial difficulty finding any trace of the deposit on their system too. He referred again to the letter from SDS of 17 November 2023 and said that it confirmed the position that it was Mrs Lovell who had asked for the tenancy to be transferred to another scheme and does not understand why the Respondent did not inform him directly of this as they had in 2019. SDS say that Slater Hogg should have informed him on behalf of the Respondent. SDS also state that they themselves had made an error in not notifying him as they would normally do and apologised for this. Mr Van Schalkwyk stated that no-one therefore notified him as they should have done and he considers it is the Respondent, as landlord, who has this duty and should be held responsible for the breach of the Tenancy Deposit Regulations.

13. Mr Van Schalkwyk was referred to the email lodged by the Respondent from the new tenancy scheme MDS dated 6 May 2022 which appeared to have been sent to Mr Van Schalkwyk's correct email address. As this appeared to contain all the information concerning the new scheme in which the deposit was held, including the log-in details to enable the Applicant to log-in to their system, Mr Van Schalkwyk was asked to explain why he did not consider this to be notification to him in terms of the Tenancy Deposit Regulations. In explanation, Mr Van Schalkwyk stated that, although this is his correct email address, he never received that email. His email account had been hacked in 2019 and the email from MDS would have ended up in his junk mail as he would not have had MDS as one of his existing contacts. Even if he had received it, he would not have read it as he would not have known who MDS were.

14. Mr Van Schalkwyk explained that he suffers from ADHD and that he had to spend two to three days contacting the deposit schemes and trying to find out what had happened, which was stressful and resulted in him having time off work. He stated that the Respondent had been quick enough to email him about other matters concerning the tenancy, such as rent arrears, and was aggrieved that he had not been informed by the Respondent about the tenancy deposit being moved as this was a breach of the Respondent's duties in terms of the Tenancy Deposit Regulations. He felt this had deliberately been done in secrecy. He also said that he had been confused by communications from

Slater Hogg who had taken over the management of the tenancy as account details he was given were in the name of another organisation, Countrywide. Slater Hogg had not advised him about the tenancy being transferred into another scheme, although they had informed him about other issues they were dealing with in connection with his tenancy. In response to a question from a Tribunal Member, Mr Van Schalkwyk stated that he had not been intending to try and claim back the deposit because he knew there was outstanding rent. He was just frustrated to find out that his deposit had been moved to another scheme without his knowledge and that this caused him inconvenience and stress at the end of the tenancy.

15. Mr Van Schalkwyk was then referred to the specific provisions of the 2011 Tenancy Deposit Regulations and asked to explain which specific provision or provisions he considered to have been breached by the Respondent and if it was only Regulation 43, how that tied in with Regulations 9 and 10 which deal with the imposition of a sanction. Mr Van Schalkwyk stated that Regulations 9 and 10 state that a sanction must be imposed on a landlord who breaches any duty in Regulation 3 and that Regulation 3(1)(b) refers to the duty to provide the tenant with the information concerning the scheme in which the deposit is held required by Regulation 42. He conceded that Regulation 3 does not mention Regulation 43 which is about the duty of the landlord to provide updated information regarding the scheme. However, he thinks Sections 42 and 43 are connected to one another and that it would not make sense that a landlord is under a duty to provide this information to their tenant within 30 days of the start of the tenancy if the landlord could then quickly move the deposit and not inform their tenant of the new scheme details, without being sanctioned. Mr Van Schalkwyk considered that when a deposit is transferred into a new scheme, the information duties could fall under Regulation 42(3)(b).

Mr Harry Reid – Respondent (Director)

16. Mr Reid stated that, in his view, Regulation 42 only applies to the situation where the deposit is initially lodged in a scheme and has no bearing on the situation where the deposit is subsequently transferred. The Regulation 3 duties only relate to the beginning of the tenancy and the initial lodging of the deposit. His position is that, on transfer of a deposit, it falls on the scheme administrators to notify the tenant. The new scheme here, MDS, did that and notified the Applicant by email on 6 May 2022 immediately after the deposit was transferred to MDS. The previous scheme, SDS, had failed to notify the Applicant for which they have apologised but this is not the Respondent's responsibility. Mr Reid made reference to Regulation 23(3) of the 2011 Regulations which apply to the situation where a landlord requests the transfer of a tenancy deposit from one scheme to another which states:- "The scheme administrator must notify the tenant in writing of the date on which the deposit was paid to the other approved scheme or repaid to the landlord." Mr Reid confirmed that the Respondent had been entitled to assume the scheme administrators would pass the information on to the Applicant and did not consider that the Respondent was under a duty to do so. Mr Reid confirmed that it was Ms Lovell, his business partner, who had dealt with the initial tenancy deposit scheme but she is unwell and this is why he was now dealing with this. He does not think that they were at fault as

they had arranged for Slater Hogg to manage the tenancy for them and were relying on them to handle things. He does not think Slater Hogg did contact the Applicant regarding the transfer of the deposit, again, probably because they were relying on the tenancy deposit schemes to do what they were obliged to.

17. Mr Reid was asked to comment on Regulation 43 and the duty to provide updated information to the tenant where information previously provided under Regulation 42 becomes inaccurate. Mr Reid stated that he does not consider that the Respondent was in breach of Regulation 43, arguing that the duty on the landlord in terms of Regulation 43 is only in relation to updating the information provided at the beginning of the tenancy under Regulation 42 and that it is only the scheme administrators who are required to notify a tenant where the deposit is subsequently transferred under Regulation 23(3). Mr Reid did not agree that Regulation 43 could be interpreted such that both the scheme administrators and the landlord are under duties to inform the tenant when there is a change to the scheme in which the tenancy deposit is held.

18. Mr Reid stated that Mr Van Schalkwyk could have contacted the Respondent or Slater Hogg direct and asked about the whereabouts of the deposit but he did not do so. Mr Reid explained that there was a problem with rent not being paid and that the Applicant had moved out of the Property without giving notice. The Respondent did not even know initially that the Applicant had gone and he had not provided any forwarding address. It was only when they received the Tribunal papers that the respondent found out that the Applicant had moved to Bulgaria.

Mr Jacques Van Schalkwyk – first-named Applicant

19. Mr Van Schalkwyk interjected at this point and stated that he had not contacted Slater Hogg because when they had contacted him to say that they had taken over management of the Property from the Respondent, they mentioned rent, repairs, etc but nothing about the tenancy deposit. As far as he was concerned, only the Respondent dealt with the tenancy deposit. He stated that there were some long-standing issues with the Respondent which he would not go into and maintained that the Respondent had known that they had moved out.

Summing-up

20. Mr Van Schalkwyk stated that the landlord's duties to provide the tenant with information about the scheme in which their deposit is held are clear from Regulations 42 and 43. When information becomes inaccurate, the landlord is under a duty to provide updated information to the tenant. The Respondent here did not send anything to the Applicant. In contrast Ms Lovell of the Respondent had done this at the start of the tenancy and sent them a copy of the tenancy deposit certificate. The Respondent forgot about their duties when the deposit was transferred and Mr Reid only mentions everyone else's duties. Mr Van Schalkwyk referred to documentation he had lodged regarding the Respondent company. The company has a massive property portfolio and this means they should know their duties, both management of tenancy duties and

legal duties. The Respondent did not comply with these duties in relation to the transfer of the deposit. Mr Reid is still denying today that the respondent was under any duties here. For this reason, Mr Van Schalkwyk maintains that the Tribunal should find the Respondent in breach of their duties and impose the maximum sanction. He considers that the sanction should be representative of the means of the Respondent. Mr Van Schalkwyk was asked if he did not consider that the sanction should also reflect the severity of any breach that the Tribunal is considering and that any breach here is perhaps at the lower end of the scale in terms of severity. Mr Van Schalkwyk did not agree. He mentioned that the Respondent's other tenants could find themselves in the same position if the Respondent is not heavily sanctioned. He also considers it important that it has never been explained why the tenancy deposit was transferred from one scheme to another in the first place and he thinks that the information was deliberately kept from him when the tenancy was ending.

21. Mr Reid stated that the Respondent had complied with all of the Regulations at all times regarding the deposit. The deposit was always in a scheme for the duration of the tenancy. The Applicant was told of the new details by the new scheme administrators and Mr Reid stated who better than them to provide these details to the tenant. He considers that the scheme administrators are acting as representatives of the landlord in these circumstances. Mr Van Schalkwyk left the Property giving no notice and made no contact with the Respondent or Slater Hogg. He has admitted that he knew the deposit was needed to cover outstanding rent, so Mr Reid does not understand why the Applicant even wanted to know where the tenancy deposit was. Mr Reid was asked to comment on Mr Van Schalkwyk's suggestion that there was a deliberate attempt to hide the information regarding the tenancy deposit from him. Mr Reid stated that there was no attempt to do this at all. The deposit was moved to the new scheme due to them taking over management of this Property for the Respondent and the reason that was done was because the Respondent was finding the Applicant so difficult to deal with.

22. The Legal Member confirmed that the Evidential Hearing was now concluded and the Tribunal Members would thereafter consider the evidence heard and reach a decision as to whether there has been a breach of the 2011 Regulations by the Respondent and, if so, what level of sanction is to be imposed. Parties were advised that the Tribunal Decision would be issued in writing in due course and parties were thanked for their attendance.

Findings in Fact

1. The Respondent company was the owner and landlord of the Property.

2. The Applicant was the tenant of the Property by virtue of a Private Residential Tenancy commencing on 25 November 2019 which ended on or around 31 July 2023 when the Applicant had vacated the Property.

3. The tenancy deposit payable in terms of this tenancy was £650 which was paid by the Applicant to the Respondent at the outset.

4. The tenancy deposit was lodged timeously with SDS by the Respondent and the Applicant was issued with a Tenancy Deposit Certificate dated 28 November 2019.

5. The Respondent previously managed this Property themselves but subsequently used Slater Hogg (Countrywide) as their letting agent to manage the Property.

6. The Respondent contacted SDS on 2 May 2022, requesting that the deposit be transferred to MDS.

7. The deposit of £650 was transferred by SDS to MDS on 5 May 2022 and received by MDS on 6 May 2022.

8. Due to an administrative error for which they have apologised, SDS did not notify the Applicant that the tenancy deposit had been transferred, as would have been their usual procedure.

9. Neither the Respondent nor their letting agent notified the Applicant regarding the transfer of the tenancy deposit.

10. The Respondent informed MDS that Slater Hogg (Countrywide) was their letting agent and authorised MDS to deal with Slater Hogg (Countrywide) in respect of the tenancy deposit.

11. On 6 May 2022, MDS emailed the Applicant at their correct email address, notifying the Applicant that they were now holding the tenancy deposit and providing all the requisite information, including log-in details to allow the Applicant access to their system.

12. The Applicant either did not receive the email from MDS or did not read it.

13. Relations between the parties had deteriorated during the tenancy and when the Applicant vacated, there were outstanding issues concerning rent arrears and the condition of the Property.

14. The Respondent's letting agent contacted MDS requesting return of the whole deposit, in view of outstanding rent arrears, etc.

15. The whole deposit of £650 was subsequently returned to the letting agent on behalf of the Respondent and this was put towards the outstanding rent arrears.

16. There was no balance left of the deposit for payment to the Applicant, which the Applicant accepts.

17. The Applicant had contacted SDS in or around August 2023 regarding the tenancy deposit and found out on or around 23 August 2023 that it had been transferred to MDS in May 2022.

18. SDS stated to the Applicant that the Respondent should have advised the Applicant of the transfer of the deposit at the relevant time.

19. The Applicant did not directly contact the Respondent or their letting agent at the end of the tenancy or thereafter regarding the tenancy deposit.

Reasons for Decision

1. The Tribunal was satisfied that the application was in order and had been submitted timeously to the Tribunal in terms of Regulation 9(2) of the Tenancy Deposit Regulations [as amended to bring these matters within the jurisdiction of the Tribunal], the relevant sections of which are as follows:-

*"**9.**—(1) A tenant who has paid a tenancy deposit may apply to the sheriff for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.*

(2) An application under paragraph (1) must be made by summary application and must be made no later than 3 months after the tenancy has ended.

***10.** If satisfied that the landlord did not comply with any duty in regulation 3 the sheriff—*

(a)must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit; and

(b)may, as the sheriff considers appropriate in the circumstances of the application, order the landlord to—

(i)pay the tenancy deposit to an approved scheme; or

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

Regulation 3 [duties] referred to above, is as follows:-

*"**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."

Regulation 42 [landlord's duty to provide information to tenant] referred to above, is as follows:-

***"42.**—(1) The landlord must provide the tenant with the information in paragraph (2) within the timescales specified in paragraph (3).*

(2) The information is—

(a)confirmation of the amount of the tenancy deposit paid by the tenant and the date on which it was received by the landlord;

(b)the date on which the tenancy deposit was paid to the scheme administrator;

(c)the address of the property to which the tenancy deposit relates;

(d)a statement that the landlord is, or has applied to be, entered on the register maintained by the local authority under section 82 (registers) of the 2004 Act;

(e)the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid; and

(f)the circumstances in which all or part of the tenancy deposit may be retained at the end of the tenancy, with reference to the terms of the tenancy agreement.

(3) The information in paragraph (2) must be provided—

(a)where the tenancy deposit is paid in compliance with regulation 3(1), within the timescale set out in that regulation; or

(b)in any other case, within 30 working days of payment of the deposit to the tenancy deposit scheme."

Regulation 43 [duty to provide updated information] is as follows:-

*"**43**. Where information required to be provided by the scheme administrator under regulation 22 or by the landlord under regulation 42 becomes inaccurate the person required to provide that information must ensure that revised information is provided."*

Reference was also made during the Evidential Hearing to Regulations 22 and 23 which are as follows:-

*"**22.**—(1) On receipt of a tenancy deposit and the required accompanying information, the scheme administrator must—*

(a)pay the tenancy deposit into a designated account; and

(b)issue written confirmation to the landlord and tenant that the tenancy deposit has been received and paid into a designated account.

(2) The scheme administrator must also advise the landlord and tenant of—

(a)the amount of the deposit;

(b)the date on which the deposit was received by the scheme administrator;

(c)the address of the property to which the tenancy deposit relates;

(d)the name and contact details of the landlord; and

(e)details of how to contact the scheme administrator to notify any inaccuracies in the information in sub-paragraphs (a) to (d).

***23.**—(1) A landlord may apply for repayment of a tenancy deposit from an approved scheme for the purpose of transferring it to another approved scheme.*

(2) On receipt of such an application, the scheme administrator must—

(a)if so requested, pay the tenancy deposit to the other approved scheme on the landlord's behalf; or

(b)in any other case, repay the tenancy deposit to the landlord.

(3) The scheme administrator must notify the tenant in writing of the date on which the deposit was paid to the other approved scheme or repaid to the landlord."

2. The Tribunal was also satisfied that there had been a breach of Regulation 43 of the 2011 Regulations by the Respondent. The parties had opposing views on this. The Applicant submitted that in terms of Regulation 43 (the "Duty to provide updated information"), both the landlord and the scheme administrators were under a duty to provide updated information to the tenant where the information they had previously provided (the scheme administrators under Regulation 22 and the landlord under Regulation 42) had become "inaccurate". The information which had become inaccurate was the details of the scheme in which the deposit was held. The Respondent, on the other hand, denied any breach of Regulation 43, arguing that where a deposit is transferred into another scheme at a landlord's request in terms of Regulation 23, it is only the scheme administrators who are under any duty to provide the tenant with the updated information and that a landlord is entitled to rely on the scheme administrators doing this, which MDS, the new scheme administrators, had. In

support of this proposition, Mr Reid made particular reference to Regulation 23(3) which states that "The scheme administrator must notify the tenant in writing of the date on which the deposit was paid to the other approved scheme or repaid to the landlord".

3. The Tribunal considered that the Applicant's interpretation of Regulation 43 was the correct one; that Regulation 43 clearly envisages circumstances where the landlord is under a duty to provide updated information to the tenant and, in the Tribunal's view, there was no information that could be of more significance than advising a tenant that the deposit was now held in an entirely different scheme to the one that had originally been intimated to the tenant by the landlord in terms of Regulation 42; and that just because the scheme administrators were also under a specific duty in terms of Regulation 23(3) to advise the tenant in writing of the date on which the deposit was paid into a new scheme, this did not absolve the landlord of their separate duty, in terms of Regulation 43, to provide updated information to the tenant. It was also noted by the Tribunal that the Regulation 23(3) obligation on the scheme administrator was only to notify the tenant of the "date" of lodging in the new scheme, whereas, clearly, if the 2011 Regulations are to serve their purpose, the tenant should be informed of other information too, namely the accurate details of the deposit scheme in which the deposit is held. The Tribunal was not persuaded by the Respondent's argument that the scheme administrators were 'representing' the landlord when they notified the Applicant of the deposit transfer and details of the new scheme in which it was held. Likewise, nor was the Respondent entitled to claim that they were not in breach of the 2011 Regulations, given that they had employed a letting agent to deal with the management of the tenancy, including the deposit on their behalf from when it was transferred and for whatever reason, the letting agent had not notified the Applicant of the transfer either. The duties in terms of the 2011 Regulations are placed on landlords, not their agents.

4. The Tribunal determined that, although it had found the Respondent to be in breach of Regulation 43, this did not entitle the Tribunal to apply a financial sanction against the Respondent in terms of Regulations 9 and 10. This is because the wording of Regulation 10 clearly states that it is only where the Tribunal is "satisfied that the landlord did not comply with any duty in regulation 3". Regulation 3 specifically refers only to the period "within 30 working days of the beginning of the tenancy" and to the landlord's duty to "provide the tenant with the information required under Regulation 42". The Tribunal noted the Applicant's argument that Regulation 43, being specifically linked in its wording to the information provided under Regulation 42 should be considered to be an extension of Regulation 42, and thereby fall under the Regulation 3 duty, or that the transfer into the new scheme falls under Regulation 42(3)(b), namely "in any other case, within 30 working days of payment of the deposit to the tenancy deposit scheme." The Tribunal also understood the logic behind the Applicant's argument that a tenant should know where the deposit was lodged, not just at the outset of the tenancy, but throughout the tenancy, as the consequences for the tenant, from not knowing, are the same, and that the landlord should accordingly be subject to the same sanction where the tenancy has been transferred later in the tenancy. The Tribunal, however, preferred the Respondent's argument that Regulation 42(3)(b) referred to by the Applicant

was still referencing the duties to provide information at the beginning of the tenancy, albeit in situations where the payment of the deposit into the scheme had not been done within the initial 30-day period.

5. In determining this issue, the Tribunal had regard to the fact that these Regulations had been in place since 2011 and had been reviewed by the Scottish Ministers once they had been in operation for five years. The Tribunal considered that, had it been identified that there was a gap in the Regulations in terms of the sanctioning of landlords in this particular situation, the Regulations would surely have been amended to rectify this matter and they had not been. Nor was the Tribunal aware of any previous court or Upper Tribunal decisions on this particular point. In terms of their Direction issued following the CMD, the Tribunal had invited the parties to lodge any relevant authorities in support of their respective arguments but no caselaw or Decisions had been referred to in the parties' submissions which were based only on the wording of the 2011 Regulations. Accordingly, having regard to the above, the Tribunal did not consider that the breach of Regulation 43 to be covered by the sanction provisions in the 2011 Regulations.
6. Given that no sanction is payable, the Tribunal did not require to determine the amount of any sanction. However, the Tribunal does wish to state that, had this been a situation in which the Tribunal was able to impose a sanction, the sanction here would have been nominal only. By Mr Van Schalkwyk's own admission, the Applicant had not considered that they were due to receive any part of the deposit back. There was no financial loss. His argument for the maximum sanction to be imposed was only on the basis of the stress and inconvenience caused to the Applicant at the end of the tenancy in locating the tenancy deposit and the fact that the Respondent was a professional landlord, with a large property portfolio who should have been aware of their duties in terms of the 2011 Regulations. None of these factors, in the Tribunal's view, would have outweighed the fact that this was a minor breach of the Regulations.

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.

N Weir

_____ **Date: 4 June 2024**

Legal Member/Chair