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 Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/20/2468

Re: Property at 20 High Street, Alyth, PH11 8DW ("the Property")

Parties:

Mr Nicholas Bauer, 20 High Street, Alyth, PH11 8DW ("the Applicant")

Mr Neil Anderson, Kinballoch, Bankhead, Alyth, PH11 8HQ ("the Respondent")

Tribunal Members:

Petra Hennig-McFatridge (Legal Member) and Elizabeth Currie (Ordinary Member)

Decision :

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") determined to grant an order against the Respondent for payment to the Applicants of the sum of £900 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011 and refuses the motion for expenses by the Respondent.

A: BACKGROUND:

1. This is an application under Rule 103 of the Procedural Rules in terms of Regulations 9 and 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011. The procedural history of the case is narrated in the Case Management Discussion (CMD) Notice of 19 January 2021 and the note of the first hearing on 26 February 2021. Directions dated 20 January 2021 had been issued to the parties.
2. Since the first hearing date on 26 February 2021 the following further documents were submitted: on 9 April 2021 the Applicant forwarded a written statement from Ms Murdoch dated 30 March 2021. This was forwarded to the Respondent on 13 April 2021. Whilst the Respondent's solicitor initially lodged written opposition to the document being lodged late, this was later withdrawn

as the email from the Applicant had been received by the Tribunal on 9 April 2021 and thus within the time limit stated in Rule 22 of the Procedural Rules. No further evidential documents had been lodged by the Respondent

3. Both parties were notified of the hearing date of 16 April 2021 in terms of Rule 24 (2) of the Procedural Rules.

B: THE HEARING:

I THE EVIDENCE

1. The hearing proceeded by telephone conference at 10:00 hours on that day under participation of both parties and the Respondent's solicitor Mr Runciman. Oral evidence was provided by both parties and the witnesses Ms Murdoch for the Applicant and Mrs Anderson for the Respondent.

2. Mr Bauer's evidence:

   a) The Applicant's evidence was that the deposit had been paid and the negotiations about this had been dealt with by Ms Murdoch as set out in the documents he had lodged and in his application. The tenancy started on 4 April 2018 and clause 18th stipulates that the tenant shall pay the landlord at the date of entry a deposit of £900. The Respondent's bank statement shows that the rent of £450 was paid on 4 April 2018. He had received the bank details from the landlord on 3 April 2018. All rent payments were made under the same reference, Nick Bauer Rent. At the signing of the tenancy the support worker had discussed payment from Perth and Kinross Council (PKC) with the landlord. A lot of discussions were held by the support worker, which is why he is calling her as a witness. The deposit was dealt with on his behalf by Ms Murdoch. He did not inform the landlord himself on 13 April 2018 that the deposit had been paid. He only has the document from Safe Deposits Scotland (SDS) that the deposit was paid into SDS on 12 October 2020.

   b) When asked by Mr Runciman how the landlord would know that the deposit had been paid Mr Bauer stated that it was pointed out to the landlord when the lease was signed that he would get deposit from PKC. Mr Bauer stated he only questioned the deposit having been paid into a scheme on 10 October 2020 as he previously had no reason to question it. He had wondered about 6 months before that time why he had not received a certificate. He admitted it was highly unlikely that one would send large amounts of funds without checking they were received. Jill Murdoch had set up the scheme for him but her letter of 30 March 2021 gave no specific details of a reference for the payment to the landlord. He definitely recalled that it was pointed out to the landlord at the tenancy signing that he would get help with deposit from PKC. The helping referred to a payment in this case although the word "helping" could cover other things. The payment of £900 came in to the landlord's account from PKC. It was clear this was the deposit, which he thinks had been discussed. Mr Bauer queried why the landlord had not chased the deposit up if he did not think it had been paid in the first month. He had nothing to suggest Jill Murdoch would have specifically told the landlord that it had been paid. When asked by Mr Runciman about the

paperwork for the bond scheme Mr Bauer clarified that the only document he had was the invoice from PKC and that everything had been dealt with by Ms Murdoch. His understanding was that under the scheme PKC would pay the money and he would pay it back to them, which he had done. Because it was a higher amount than usual he had been given 2 years to pay it back. He believed the landlord had agreed as he had accepted the payment into the account. He only has a basic understanding of how the scheme worked, namely that the Council paid the deposit for private lets for people who don't have the money. It works by BACS payment and the landlord can then pay the deposit into a scheme. When Mr Runciman put it to Mr Bauer that the way this operated was not the regular way the scheme worked Mr Bauer stated he had nothing to do with that because his support worker set it up. PKC agreed to pay on his behalf because he had a good track record of paying the deposit back. This had happened on previous occasions. PKC were willing to pay to get him into the property. He doubted there were any credit checks carried out as he was already on the Housing Benefit system. He did not speak to the landlord about this and he was unaware if the landlord had received an invoice. At the signing of the lease the landlord Mr Anderson, his wife, Jill Murdoch and he, Mr Bauer, were present. Mr Bauer stated he was more interested in the lease being signed than in the discussion about the deposit. The payment of the previous 2 deposits was more like the scheme set out in the documents lodged by the Respondent as they were for 12 months but worked the same way, the Council paid and he paid it back to the Council .

c) The property had been found on Gum Tree and Jill Murdoch had sent him the link. He was assisted by the Housing Department and there were different people he spoke to. Jill Murdoch coordinated and knows more people in the Council. Nobody chased up the deposit with him for this lease and he thought after he had received the invoice from PKC that the matter had been dealt with. He had received the deposit information quickly for the previous tenancy and had then received the money back for the previous tenancy through the deposit scheme. He didn't chase it up for this tenancy as the lockdown happened until 10 October 2020. Mr Bauer clarified after Ms Murdoch's evidence that he knows the payment for a deposit as the Rent Bond Guarantee Scheme when the Council helps him with the deposit and there is a reference to bond guarantee in his invoice from the Council.

d) Mr Bauer stated at the end of the evidence that he had located an old telephone while the witness had given evidence and found 3 text messages with Ms Murdoch that showed he had visited the property to have a look first on 29 March 2018 and not on the day the tenancy was signed. He had not been aware before the evidence from the Respondent and his wife that they would claim it was all on the same day.

3. Evidence of Ms Murdoch:

a) She gave evidence that she is a support worker with Autism Initiative and the organisation had helped Mr Bauer a few times before. He did not have the £900 for the deposit. She communicated with the Private Let Team in PKC to get the

£900 paid and provided them with the landlord details and they paid it directly into the landlord's account. She did not know if there was any contact between the landlord and PKC. She was at the signing of the lease with Mr Bauer, Mr Anderson and Mrs Anderson. She stated she believed that she had a conversation with them that PKC would help Mr Bauer with the deposit. There was nothing in writing. a couple of days later the deposit was paid and Mr Bauer paid it back to the Council. She had spoken to Jennifer Kent, the Team leader of PCK Lets Team. There are a lot of Housing Officers but it needed to be authorised as it was a higher amount. Everything was done over the telephone and the Council had no additional information. It was about 2-3 days prior to the start of the tenancy as without their agreement they would not have been able to sign the tenancy.

b) Mr Bauer was already known to the service and she had asked if they would put up the money and they agreed. They had told her they would send Mr Bauer a payment schedule. He would not sign the lease without something in place. She recalled that she was standing in the kitchen of the property when she had the conversation about the deposit with the landlord. He gave them the bank details. She believes that this was also to pass them to the Council but she has no written permission for passing on the details from the landlord.. There was no paperwork, only the payment schedule to Mr Bauer and this is not normally required. Often the landlord is known to PKC Lets already. She did not think Mr Anderson was, but PKC Lets saw no need to contact him. It was agreed between PKC Lets and the tenant, they could have paid it to Mr Bauer for him to pay it on, but this did not seem necessary.

c) Ms Murdoch agreed with Mr Runciman that the landlord would have expected a reference on the payment. When asked by him whether she had documentation about the first time Mr Bauer used the service she replied she did not think this relevant as it was for another property. She deals with the scheme before and usually it is for one month's rent but they were happy to pay it on this occasion. There are a number of adults she deals with who use this and she was not aware of any requirement of a letter from the landlord with their agreement. She never had a case where that was needed. She said to the landlord PKC were helping out with the deposit. She could not remember what exact words were used. The money came in when due and there was no further request for the deposit from the landlord. As far as she was concerned all was fine.

d) When asked by Mr Runciman whether it was not odd that there was no reference on the payment in the account and whether she had the landlord's permission to give out the account details to the Council she stated that she has no paperwork and can only state again what she had already explained. She did not think as long as the landlord got the money the Council would have to contact him. When the money came in a couple of days after the tenancy signing she would guess the landlord would see it coming in and because it was expected she would think one would check if it had arrived. She stated she did not chase up the payment because she thought had it not arrived the landlord would have been in touch. She did not think this was her responsibility.

e) When she was asked by the ordinary member if she thought this was the rent bond scheme she stated she had supported other adults like this before and normally it is paid to the landlord and then a payment plan is set up. The Council knew Mr Bauer and were happy to pay the deposit. It was not a bond guarantee but a payment. She could not recall if the account details were given before, at or after the tenancy was signed. The meeting with the landlord was friendly and informal and the landlord was happy to help a vulnerable person. She could not recall if she specifically mentioned the words bond scheme but did not think she would have used the words Rent Bond Guarantee Scheme to the landlord. She confirmed she could not recall whether the account details had been provided by the landlord explicitly to be passed on to the Council or for the rent.

4. Evidence of Mr Anderson:

a) the Respondent, gave evidence. He stated he is a Gas service Engineer and landlord and has been renting out 2 properties for 14 years. This is managed by him and his wife. The lease for the property states that the lease starts on 4 April 2018 and a deposit of £900 was due on entry. The property had been advertised on Gum Tree and Ms Murdoch had telephoned on 3 April 2018 and they met on that day with Mr Bauer and her. The lease was signed on that day and witnessed by Ms Murdoch and he had provided her and Mr Bauer with the bank details as these were required by Mr Bauer for payment of the rent and the deposit. Both Mr Bauer and Jill Murdoch needed them. The Respondent stated that nothing else was discussed about the deposit other than that £900 had to be paid before the date of entry. Mr Bauer was aware of that and moved in on 4 April 2018. Mr Anderson stated that he was not aware that Ms Murdoch had asked for the account details for any other reason and he had not agreed for her to pass them on.

b) The account was used for property transactions for the tenancy e.g. when he needs to buy things. His wife has access to this, too. He stated he does not often check the account. On 4 April 2018 there was a payment from Mr Bauer with the reference NIC BAUER - RENT which was the reference used or all subsequent rent payments. On that day no other payments had gone into the account. The SDS certificate of Protection for the property shows that the deposit was paid into SDS on 12 October 2020 to the amount of £900 as per the tenancy agreement. The prescribed information regarding this was given to Mr Bauer around 12 October 2020 when it was posted through his letterbox. Mr Anderson stated it was registered on 12 October 2020 because he had been to the property for repairs and Mr Bauer had been very aggressive and mentioned the deposit. Mr Anderson stated he had gone on 9 October 2020 in the morning and the tenant had told him he would sue him for 3x the deposit. Mr Bauer had told him he was good at this sort of thing and that is why he would do that but he did not state when he had paid the deposit. Mr Anderson stated he had called SDS that day and registered the £900 deposit. He looked at accounts. He was looking for a payment from Mr Bauer about the deposit because he was the one supposed to pay it and did not find a payment in that name but registered it anyway. His wife Valerie spoke to the deposit team and asked for advice and they said lodging it would count in their favour. There was a payment

of £900 in the account on 13 April 2018 but he was never sure what it was. There was no reference. Neither Ms Murdoch nor Mr Bauer had contacted him about the deposit before 9 October 2020 and his reaction had been shock and disbelief.

c) He had not checked the account regularly and had not chased up the tenant because his daughter had taken ill at the time with a brain tumour and the deposit had been the last thing on his mind. He had checked when Mr Bauer had mentioned it to him. He still is not sure that this payment was the deposit because he was not advised it would come from PKC and had never agreed to a bond scheme or given the account details for that. He had never heard of the deposit guarantee scheme and never been contacted about it. Nobody had ever chased him about the deposit lodging. The payment in the account was a cash payment and not what the guidance described. Mr Bauer had told him that he had had 30 properties before and was about to be homeless. He never mentioned a Bond Scheme or provided an application form. Mr Anderson stated he would not have agreed to a Bond Scheme because he would rather deal directly with the tenant and he could not have used it anyway because there was not EPC certificate for the property. He had not known about that scheme and was not participating in it.

d) Mr Anderson stated he knew about the duty to lodge a deposit with a scheme in 30 days and had lodged others in time as shown in the documents for the other property. If he had known that payment was a deposit he would have lodged it.

e) Mr Bauer asked Mr Anderson if he thought it reasonable to come and see a tenancy and sign the lease on the same day. Mr Anderson replied Mr Bauer was desperate and Jill Murdoch had given a referral. Mr Bauer stated he had looked at the property a week before but Mr Anderson stated this was not the case. Mr Bauer asked if it was on the 10 October 2020 he had talked about the deposit and Mr Anderson stated he was there on his own on 9 October but returned with his wife on 10 October2020. When asked by Mr Bauer why he had not made enquiries about the £900 payment Mr Anderson stated it was the least of his problems and it would have been for Mr Bauer to chase up the information about it. If the Bond Scheme had been used it would not have been a cash payment.

f) When asked about the agreement by the ordinary member Mr Anderson stated that it was agreed a bank transfer of the deposit would be made. He had not checked before releasing the keys as Jill Murdoch was the daughter of a friend and he took her word for it that Mr Bauer would pay rent and the deposit. He had not enquired about the affordability of the payments by Mr Bauer because of Ms Murdoch. He and his wife monitor the account. He had made no effort to trace the £900 payment. This had gone in the background and time had lapsed when it was brought to his attention in October 2020. When asked if this would not have been information relevant to his tax return he stated he just gives his statements to his accountant. He had been looking for a cash payment from Mr Bauer, not someone else. He did not recall a conversation on 3 April 2018 about the deposit with Jull Murdoch. He did not check if the rent

payment had arrived either. When asked by the legal member when he started to look at the account he said in October 2020.

g) When he was then asked how he could comply with the obligation to pay the deposit into a registered scheme if he did not check whether the deposit had been paid he answered it was one of those things. He presumed it had been paid in to a scheme at the time. When asked about this again he stated Valerie had gone online and checked for a £900 payment by Mr Bauer but none had been found. That payment should have been there on 4 April 2018 but was not. When asked whether he had not checked his account in years he stated he would check rent in April 2018 but it was a difficult time. His accountant had not mentioned the payment to him. Mr Anderson stated he would have asked what it was for but he had not checked in the 3 months after the tenancy start. He only had a quick look and if the payment had been from Mr Bauer it would have been flagged up. He had not looked in depth for £900 payment. He had no reason to check for a payment from the Council. In hindsight it had been better if he had checked. If there had been a payment of £900 by Mr Bauer it would have flagged up that they had to register the deposit. He had not chased up the deposit either. He had no reason not to lodge it and he would not have paid tax on it if he had, which he thinks he may have done. Nobody had chased this up and since every other transaction had Mr Bauer's reference he did not think the payment would come from someone else. He stated when asked by Mr Bauer when he would have chased up the deposit that he had no duty to chase it up.

h) He also stated his personal situation was still difficult and if there had been different circumstances it would be highly likely he would have chased up the deposit payment. Because the Tribunal had asked black and white whether it had been lodged he did not think it relevant to lodge any evidence about his daughter and his personal situation prior to the hearing.

5. Evidence of Mrs Anderson:

a) She stated she was the Respondent's wife and looked after the paperwork for the property including lodging the deposits. The start date of the tenancy was her birthday. She had put the property on Gum Tree and Jill had called to view the property and they came to see it. They had asked for a reduced rent and the rent had been lowered to £450 from the £500 as advertised. It was agreed a £900 deposit at the date of entry into the property account, gave details of account and entry on 4 April 2018The lease was signed on 3 April 2018 and they met Jill Murdoch and the tenant at the flat..The deposit had not been paid on the date of entry. She stated he can view the property account and all payments of rent are with the same reference as shown in the statements. She was not aware what the payment of £900 on 13 April 2018 was and it just said it was from PKC and she had not been told they would be involved.

b) On 10 October 2020 she went with her husband to the property about a gas valve repair and after she was confronted by Mr Bauer about the deposit she went home and looked at the SDS account. She called them and they said it would be good if she lodged it. She went to the bank accounts and saw the

£900 were paid. She thought oh my goodness. The payment did not quite add up. SDS said to lodge it even although it had not been paid with a reference in that name. She then lodged it on Mr Bauer's behalf. The payment was not associated with the deposit. She had never heard of the Bond Guarantee Scheme and nobody had said it would be paid by the Council. She now wishes they had used the Bond Scheme. The landlord has nothing to do with the Bond Scheme and the only reason she now has the remittance document addressed to her husband was that she contacted PKC and asked about a bond for Mr Bauer.

c) She stated there was no duty on the landlord to chase up a deposit but for the tenant to let them know when it was paid. She confirmed the landlord knows about the need to pay the deposit into a registered scheme and others were paid in and no doubt it would have been lodged in 30 days. When asked by Mr Bauer she confirmed that she still considered he had not paid the deposit as the payment of £900 was not in his name and she only registered it in a panic. Mr Bauer asked her why she had said to him on 10 October 2020 that it is safe although she now said she had no recollection of the deposit being paid. Mrs Anderson answered that she had not said it was safe but "flew" home to find an account entry of £900 paid from someone else and registered that on Mr Bauer's behalf although he had not paid it. She stated she had not queried the payment of the deposit with Mr Bauer because of her daughter's illness.

d) When asked by the ordinary member why keys were issued without payment of the deposit Mrs Anderson stated this was the first tenancy where they had used SDS. There was a personal event. They just did not do it properly and correctly for this tenancy. Because of the reference from Jill, whose father was a family friend they thought Mr Bauer would be a super tenant and it was urgent. They knew about the Asperger's because Mr Bauer had wished to tell them about it. She did not check if the deposit had been paid although she knew it needed to be lodged within 30 days because of her personal circumstances. For the tenancies for the other properties the deposits were lodged within days. This was no excuse. They had not had to lodge a deposit previously because the tenant was a personal friend and that was why they did not have a SDS account before and she would not have opened it until a tenant was found through Gum Tree for this property. Mrs Anderson stated that at the signing of the tenancy Jill Murdoch had not mentioned Mr Bauer would get help with the deposit. He got keys on 3 April 2018. Mrs Anderson stated she checked the rent had been paid on 4 April 2018 and the news about their daughter had been given to them that weekend. She had seen the rent payment and never thought twice about anything else.

6. e) Her recollection was that now and again her husband had a glance at the account for rent payments. She did not check in 2 1/2 years although she knew about the Regulations. They did not chase Mr Bauer for the deposit. They would have become aware of the deposit if Mr Bauer had told them it had been paid. She had genuinely overlooked the payment of £900 and not queried it She possibly should have checked with Jill. The payment from PKC had no reference. She had telephoned them on 12 February 2021 to ask if they were involved in the bund scheme and they had told her they had signed up. She

had then looked at the Bund Scheme Leaflets and she wishes this had been used because the Council would have collected the payments under the Scheme and then lodged it on the tenant's behalf. The Council confirmed they had paid the £900 and did not ask for it back and gave her the remittance advice. The wording of the remittance mentions the bond scheme. When asked if she had paid back the £900 to the Council she said she feels she is in a quandary because she may get a bill from the Council at some point for repayment. She had not offered to return the funds to the Council and in reply to her enquiries she had received the remittance advice lodged in evidence. She had opened an SDS account for another tenant. When asked by the legal member about the tenancy agreement style lodged in evidence for the other property she confirmed that was a style she had used before and the style Short Assured Tenancy it may have been the wrong tenancy type at that time. When asked how she and her husband keep up with the information regarding tenancies she stated she would sure do so now.

7. The documents lodged in this case are listed in the previous CMD note and Hearing note. The only additional document lodged in evidence was the letter of 30 March 2021 from Ms Murdoch, the content of which was spoken to by her in oral evidence.

II THE SUBMISSIONS:

8. Mr Bauer moved for his application to be granted. He made no legal submissions. He had repeatedly reminded the Tribunal that he was not legally trained. As per his application he considered the Respondent had not complied with the Regulations and the Tribunal should award a penalty.

9. Mr Runciman made a further motion for expenses in this case and explained that the Applicant had not corrected the reference to the Rent Bond Guarantee Scheme at any point although it had become clear during the evidence that the Rent Bond Guarantee Scheme had clearly not been used in this case. There was a cash payment in this case, not a bond and the procedure for the bond was not followed as set out in the guidance. The Tribunal also notes that there had been a previous motion for expenses regarding the adjourned first hearing date.

10. Mr Runciman made the following submissions:

    The first question in terms of Regulation 3 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) for the Tribunal was whether or not the landlord received the deposit and if so when. The Respondent and his wife were both competent and credible. They had corroborated each other's evidence that they had not been aware the deposit had been lodged. It was paid by PKC and not received from the tenant. The Bond Guarantee Scheme would not have been suitable for the tenancy. After the deposit had been paid they took action on 10 October 2020. The mention of the deposit by Mr Bauer would be the first day the Respondent could have complied with the duty to lodge the deposit. There was no reason not to lodge the deposit. Mr Anderson

was aware of the regulations. All their productions had been lodged in good time and the Tribunal should prefer the evidence of the Respondent.

There had been contradictions in the Applicant's evidence. The Respondent was not told about the PKC bond payment. Ms Murdoch stated she did not use the word Bond Scheme. Mr Bauer had used that description The Respondent's case had been prepared on the basis that the argument was that the scheme had been used. There was a failure of recollection in the Applicant's evidence and Ms Murdoch's with a lot of "would have" being mentioned.

If the Bond Scheme had not been intimated to the Respondent then payment was never intimated. If was up for the Applicant to confirm payment of the deposit, not to the Respondent to chase it up. The terms of payment as a personal payment from the tenant by 4 April 2018 had been discussed with the Applicant. Before the start of the tenancy the account details were provided to the Applicant and his witness, not to PKC. On the date of entry the rent was paid but nothing else. The tenant took possession and made no further announcements.

The landlord and Respondent was not in a place to chase the Applicant over the deposit due to personal problems. That was not his obligation. On 10 October 2020 the Applicant first mentions the deposit to the Respondent and immediate action was taken. The payment identified was paid 9 days after it had been due and was never intimated to the Respondent. At the CMD the Bond Scheme was mentioned. Contrary to what the Applicant had said, maybe this had not been used. The Scheme would require a Guarantee Bond, not a cash payment and there should be documentation. Whatever was done was done without the Respondent's knowledge. No reason was evidenced that 2 years had been agreed for repayment and 2 x rent as deposit under the Bond. The landlord and Respondent was not approved for the Scheme and there was no evidence provided the Applicant had been. It was up to the Applicant to confirm payment through a third source and to state it had been paid, the landlord and Respondent should not be accountable if this was not done. It was an unspecified payment from a third party.

The Tribunal should find that the payment was made on 10 October 2020 when it was intimated to the Respondent and then lodged within 2 days. The Respondent had complied with his landlord duties under the Regulations as best he could and should not be punished for a failure of the Applicant. The claim should be dismissed in full and an order for expenses should be made.

If the Tribunal found that the Respondent had not complied it should consider that the funds had remained in the account untouched for over 2 years. In all other instances the Regulations had been complied with and the deposit lodged very quickly. The use of the Bond Guarantee Scheme had been irregular in this case and this should be reflected in the decision.

The Respondent had not persistently and continuously failed to comply with the Regulations In terms of case law Jenson v Fappiani the Respondent had accepted his fault and the penalty was at the lower end of the scale. This was

similar to this case. Mr Runciman quoted some passages of the decision and stated a penalty of 1/3 rather than 3 times the deposit would be more appropriate. However, his principal position was the case should be dismissed with expenses.

C THE LEGAL TEST:

1. In terms of Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) an application under that Regulation must be made within 3 months of the end of the tenancy.

2. In terms of Regulation 10 “if satisfied that the landlord did not comply with any duty in Regulation 3 the First tier Tribunal
   (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 First tier Tribunal 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.”

3. In terms of Regulation 3 (1) "A landlord who had received a tenancy deposit in connection with a relevant tenancy must, within 30 days of the beginning of the tenancy (a) pay the deposit to the scheme administrator of an approved scheme;

4. In terms of Rule Expenses: "40.—(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.
   (2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made."

D: FINDINGS IN FACT

Based on the documents lodged and the oral evidence the Tribunal makes the following findings in facts:

1. The parties are the tenant and landlord for a Private Residential Tenancy over the property which commenced on 4 April 2018.
2. The tenancy agreement was in form of a Minute of Lease and not in the format of the Model Tenancy in terms of The Private Residential Tenancies (Statutory Terms) (Scotland) Regulations 2017

3. In terms of Clause 18 of the tenancy agreement a deposit of £900 was payable by the tenant to the landlord at the date of entry.
4. No information about lodging the deposit into a registered scheme was provided in the tenancy agreement.
5. A sum of £900 with no reference was paid into the Respondent's bank account by Perth and Kinross Council on 13 April 2018
6. On 10 October 2020 the Applicant had enquired with the Respondent about the deposit.
7. A sum of £900 as deposit for the tenancy was lodged with the tenancy deposit scheme SafeDeposits Scotland on 12 October 2020 by the Respondent.
8. The tenancy is ongoing
9. For the tenancy period from 13 April 2018 to 12 October 2020 the deposit had not been lodged with a registered scheme.
10. The deposit should have been lodged within 30 working days of 13 April 2018 and thus by 25 May 2018.
11. The funds had been held in the account of the Respondent which was an account solely used for property related transactions.
12. At some point in March 2018 the property was advertised for a rental of £500 on Gum Tree,
13. The Applicant attended to look at the property on or around 29 March 2018.
14. Prior to 3 April 2018 Ms Jill Murdoch, who is the Applicant's support worker from Autism Initiative, arranged by telephone for PKC to cover the deposit funds of £900 by a loan to the Applicant, to be repaid by the Applicant over a period of 2 years.
15. This arrangement is not the type of arrangement set out in the guidance and application documentation for the Perth and Kinross Council Rent Bond Scheme, which is usually in form of a guarantee provided to the landlord by the Council for the deposit sum and not a funds transfer.
16. The Respondent had not used a Rent Bund Guarantee Scheme previously and had no knowledge of the Rent Bond Scheme and its workings at the time the tenancy was entered into.
17. On 3 April 2018 the Applicant and his attended the property and the parties signed the tenancy agreement.
18. At that time Ms Murdoch advised the Respondent that the Applicant was to have help from the Council with the deposit. No precise details about what form this would take was provided to the Respondent.
19. The deposit payment of £900 was made by PKC on 13 April 2018
20. PKC issued an invoice to the Applicant on 18 April 2018 under the description "Routine payment of bond guarantee for payment of deposit for your tenancy at 20 High Street, Alyth" for the net amount of £900.
21. The Applicant has since repaid the amount in full to PKC.
22. The Respondent has been acting as landlord for 14 years and has been letting out two properties, of which the property to which this case relates is one.
23. He manages the letting business together with his wife Mrs Anderson, who also has access to the property account.
24. The Respondent opened an account with Safe Deposits Scotland at some point after the tenancy for the Applicant commenced.
25. This was used for his other rental property when a deposit was paid by the tenant for the other property in February 2020

26. The Respondent had issued the same style of tenancy agreement as for the tenancy between the parties for the other property to a tenant on 9 February 2020.
27. The deposit for that tenancy was lodged with a registered scheme by 13 February 2020.
28. The Respondent used the Model Tenancy for a further tenancy entered into for the other property on 2 July 2020. The deposit for this tenancy was lodged with a registered scheme on the date of entry of 2 July 2020.
29. On or around the weekend of 3 and 4 April 2018 the daughter of the Respondent received a diagnosis of a brain tumour.
30. The Respondent did not check the property account for a rent or deposit payment on or after 4 April 2018.
31. The Respondent did not check or arrange for someone else to check the deposit payment had been made.
32. The deposit of £900 was paid by PKC by bank transfer directly into the property account on 1 April 2018 but no reference was included in the payment other than the identifier "Perth and Kinross CO BACSTEL.
33. All rent payments were made by the Applicant under the reference NIC BAUER-RENT.
34. On or about 12 February 2021 the Respondent's wife made enquiries with PKC regarding the payment received from PKC in the property bank account. In reply PKC issued a BACS REMITTANCE ADVICE dated 10 April 2018 to the Respondent with the Invoice number entry: "BOND CLAIM.NBAUER" for the amount of £900.
35. At no point prior to 10 October 2020 had the Applicant or his support worker explicitly advised the Respondent of the deposit payment through PKC.
36. At no point had the Respondent or his wife made any enquiries with either the Applicant or his support worker regarding the payment of the deposit being late.
37. At no point prior to 10 October 2020 had the Respondent or his wife contacted PKC to enquire about the nature of the payment of £900 on 13 April 2018 made by PKC into the property account of the Respondent.

E: REASONS FOR DECISION:

1. Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the regulations. The non-compliance with the Regulations is not disputed by the landlord.

2. Ultimately the Regulations were put in place to ensure compliance with the Scheme and the benefits of dispute resolution in cases of disputed deposit cases, which the Schemes provide.

3. The Tribunal considered that the deposit had been paid in this case on 13 April 2018. The Tribunal found the evidence of the Applicant and Ms Murdoch credible and mutually corroborating regarding the involvement of Ms Murdoch in the arrangement for the payment of the deposit by PKC on behalf of the Applicant and accepted that this had taken place without documentation being issued other than the invoice to Mr Bauer. The Tribunal found the evidence of Ms Murdoch in particular entirely credible as she was able to describe her involvement in detail

and was able to explain the reasons of PKC Lets to assist the Applicant and their willingness to do so informally.

4. The evidence of the parties only factually differed in one material aspect, namely whether the Respondent had been advised of the arrangements made regarding the deposit payment and the authorisation of Ms Murdoch to pass the account information to PKC.

5. Ms Murdoch was unable to give the exact wording used when she gave evidence that the matter of the deposit had been discussed at the time when the tenancy was signed. Although she was unable to provide the wording, the Tribunal does not agree with Mr Runciman that the use of the words by her and Mr Bauer that she "would have" done so diminish the credibility of the witness with regard to the fact that she did advise the Respondent that the Applicant would have help from the Council to pay the deposit. The witness had made all the arrangement for this herself. She knew that this would be a matter that would be of interest to the Respondent. She did have a clear recollection of the conversation having taken place, of where it had taken place, namely in the kitchen of the property and when it had taken place, namely at the signing of the tenancy agreement. This was further corroborated by the evidence of the Applicant, who stated that this was mentioned on the occasion of attending the property to sign the tenancy but that he had not paid much attention to the content of the discussion as he was more preoccupied with the signing of the tenancy agreement. The Tribunal considered that the evidence of the witness Murdoch, who is the only truly independent witness in this case and would neither benefit or be affected by the outcome, showed her intention to give a true account of the matter, clearly identifying the matters she was sure of, the making of the statement to the Respondent that PKC would help the Applicant with the deposit, and the matters she could not specifically recollect, such as the precise full wording of her statement to the Respondent at the time.

6. The Respondent and his wife both deny such a discussion had taken place but both stated that the support worker, who was known to them, had vouched for the Applicant as tenant. Both stated the amount and account and date of payment of the deposit were discussed. On balance the Tribunal found the evidence of Ms Murdoch on that matter more convincing and likely in all the circumstances.

7. The Tribunal did not consider that the different references of the Applicant and Ms Murdoch to the Rent Bond Scheme disclosed a material difference in their evidence. The Applicant lodged the invoice he received from PKC, which refers to "Routine payment of bond guarantee for payment of deposit for your tenancy". The Council's description of the payment prompted the Applicant to use the term Bond Guarantee in his representations. The Tribunal noted that Ms Murdoch stated in her evidence she had not used that term, however, this does not contradict the fact that the Council used it in the invoice.

8. The evidence from the Applicant was clear throughout the case, namely that the Council had made the payment on his behalf and it had not been lodged correctly by the Respondent. The Tribunal considers that the fact that the payment made by the Council did not follow the requirements, process and documentation of the usual Rent Bund Guarantee Scheme as described on the Council's website and

style documentation lodged by the Respondent is not relevant for the matter it had to decide.

9. Both the Respondent and his wife stated they had not been familiar with the Rent Guarantee Bond Scheme. This invites the conclusion of the Tribunal that since the normal process of said scheme was not used by the Council in any event would not have made a difference to the conduct and understanding of the Respondents. They could not have been confused by the fact that a cash bank transfer was used for the deposit rather than a guarantee because they state they did not know the Rent Bond Guarantee Scheme existed in the first place. Thus they would not have been expecting the matter to be settled by a guarantee. Both stated they did expect a payment into the property account for the deposit sum of £900 to be made.

10. Mr Runciman had submitted that the Respondent would not have known the deposit had been paid on 13 April 2018 and thus would not have been under an obligation to lodge it. From the evidence provided the Tribunal found it established that a payment of the amount of the tenancy deposit stated in the tenancy agreement was paid into the property account of the Respondent 9 days after the start of the tenancy and thus in close proximity to the date when the deposit should have been received from the Applicant. The Tribunal was satisfied that the Respondent had been advised by Ms Murdoch that PKC would be providing help to the Applicant with the deposit. As the payment of the correct amount was made into the relevant account by PKC shortly after the tenancy commenced the Respondent was in a position to conclude that this was the deposit payment, although it did not have a specific reference. If he had been in any doubt and thought the payment was wrongly made, he could have queried the payment with PKC at the time. This was clearly possible as he did so in 2020. The Tribunal concludes thus that the deposit was paid on 13 April 2018, the Respondent should have identified this as the deposit payment or, if he had any doubts at least he should have queried the matter with the Council which would have put the matter beyond doubt. The deposit should have been transferred into a registered scheme 30 working days after that day. The Respondent failed to do so and thus did not comply with the duties of the landlord under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

11. Having found that a breach of the Regulations took place, the Tribunal then has to consider what the appropriate penalty in terms of Regulation 10 (a) of the Regulations should be. In the case Tenzin v Russell, of 20 December 2013, Sheriffdom of Lothian and Borders, Sheriff Principal Stephen stated at para 19 "*There are no rules as to the approach that the court should take in assessing the amount of the order. The court must make an order and it is therefore reasonable to read into the regulations that Parliament intended to leave it entirely to the court to determine the level of penalty to impose. The regulations do not enumerate any matters or criteria which the court must have regard to. Accordingly, the sheriff has complete discretion as to the level of the order and is constrained only by the amount of the deposit and a triple multiplier. The sheriff, of course, will have regard to any evidence offered by way of mitigation. In dealing with non-compliance no distinction has been drawn by the legislators between the careless or devious; the experienced or inexperienced, the culpable or inadvertent. Likewise the strict liability consequences of non-compliance allow the court to promote rigorous*

application of the regulations pour encourager les autres. In other words deterrence."

12. The Tribunal considers that the discretion of the Tribunal is correctly exercised in the manner set out in the case Jenson v Fappiano (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015 by ensuring that it is "fair and just, proportionate" and informed by taking into account the particular circumstances of the case. This case was specifically referred to by the Respondent's solicitor in his submissions.

13. The Tribunal has a discretion in the matter and must consider the facts of each case appropriately. In that case the Sheriff set out some of the relevant considerations and stated that the case was not one of "*repeated and flagrant non participation in, or non-compliance with the regulations, by a large professional commercial letting undertaking, which would warrant severe sanction at the top end of the scale*". It was held that "*Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgement. The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in maximum sanction. There must be a judicial assay of the nature of the noncompliance in the circumstances*..."

14. The Tribunal in applying its discretion took the following matters into account. Both the Respondent and his wife stated they were familiar with the landlord's obligations to pay a deposit into a registered deposit scheme when they entered into the tenancy with the Applicant. However, the Respondent and his wife made various different statements about their subsequent efforts to check the rent and deposit had been paid and the Tribunal found their evidence in regard to their oversight of the property account unreliable and not credible.

15. Both stated that the Respondent was aware of his duties as landlord but the evidence from Mrs Anderson was that no arrangements had been made to open an account with a registered scheme when the property was being advertised. The documents support that the first time the Respondent used the registered Scheme SDS was in February 2020. The Respondent has been renting out property for 14 years but has elected not to involve any professional help in this process. He thus has to rely on his own management of the rental properties and ensure that the manner in which he carries out the letting activity complies with all relevant legislation and he is able to keep himself informed of any relevant duties for private landlords. As a landlord he has to ensure his accounting process is sufficiently robust to identify when he needs to take action e.g. in lodging a deposit with a registered scheme.

16. The Respondent stated in evidence first that he did not check the property account at all because of his daughter's diagnosis. He then changed his evidence and stated that he checked the first rent payment but then not other payments. His wife stated that the Respondent would check the property account on occasion. The Tribunal on balance concluded that the Respondent simply did not check the account at all for some considerable time after the start of the tenancy.

17. Both the Respondent and his wife were unable to provide an explanation how they would have envisaged to comply with the regulations if they did not check whether the deposit payment had been made. The Tribunal noted as an aggravating factor in this case the lack of checks carried out on the account because the duty to pay the deposit into the registered scheme would apply to a deposit paid late as it would to a deposit paid at the date of entry. If the landlord does not check the payments he receives he can then also not react when a payment requires further action on his part.

18. The deposit was only paid into the registered scheme when this was explicitly queried by the Applicant and the payment of £900 had not been identified as a relevant payment by either the Respondent or his wife in the course of their business of letting property for money until then. The Tribunal found that this indicates that the Respondent had no mechanism in place to check rent and deposit payments and to follow up on such payments to ensure deposits were then lodged into a registered scheme. Even although the Respondent is what could be described as an amateur landlord who has another profession as his main source of income, he should have had mechanisms in place to ensure he adhered to all landlord obligations.

19. The Tribunal accepts that the Respondent at some point after the tenancy of the Applicant commenced did open an account with a relevant scheme. At that point it should have occurred to the Respondent that since the account was only opened after the tenancy commenced, any deposit paid by the Applicant clearly had not been lodged with a registered scheme as would be required. At that point the Respondent should at least have taken steps to ascertain whether any action was required on his part with regard to the Appellant's tenancy but the Respondent did not do so.

20. The Tribunal also noted that the tenancy agreement for the tenancy issued by the Respondent to the Applicant and to another tenant for his other rental property in February 2020 was drawn up as a Short Assured Tenancy and not as a Private Residential Tenancy, which would have been the correct documentation for any tenancy entered into after the Private Housing (Tenancies) (Scotland) Act 2016 came into force on 1 December 2017. The Tribunal concluded from this that the Respondent was clearly not fully up to date with the legislation applicable to private rental properties as a diligent landlord should.

21. The deposit was not paid into a registered scheme until 12 October 2020 and thus almost 2 1/2 years after the deposit was paid to the Respondent. This constitutes a prolonged breach of the Regulations.

22. On the other hand, the Tribunal considered in the Respondent's favour that the deposit had been paid into a registered scheme as soon as this was explicitly identified as an issue on 10 October 2020. This meant that at the end of the tenancy, which is the time when decisions about the return of the funds are made, the deposit will now be protected and the Applicant will have access to the dispute resolution scheme of scheme. Ultimately the main goal of the Regulations, that both parties have access to the dispute resolution mechanism when the tenancy ends, is thus achieved in this case prior to the end of the tenancy.

23. The Tribunal also accepts that the Respondent had been able to evidence that he had lodged the deposit with a registered scheme within the required period for the two tenancies for his other rental property in 2020. Clearly by then he was fully aware of the duty to do so and did follow this up with the required actions.

24. Furthermore the Tribunal took into account that the Respondent did not have any reason not to lodge the deposit of the Applicant and, as is shown in the bank statements lodged, simply left the funds to accumulate with other rental payments in the property account. This was not his day to day personal account, it was a separate account and the funds in said account exceeded the deposit amount for the whole period. The deposit had thus not been used by the Respondent for any other purpose and had remained untouched.

25. The Tribunal concludes that the non compliance with the Regulations in this case was not a deliberate and nefarious action by the Respondent but essentially an oversight and a lack of organisation on the part of the Respondent. A contributing factor to this may have been that the Respondent and his wife at the time the tenancy started did have personal problems and were somewhat distracted from dealing with the rental property. The Tribunal notes that the Respondent and his wife gave evidence on that point only at the hearing and that this had not been mentioned by the Respondent or his solicitor at any point during the CMD or the first hearing date. It had not been referred to in any representations. However, the Applicant did not object to the Respondent providing this explanation and the Tribunal considered that the evidence on this matter did assist the Tribunal in establishing the actual likely reason for the failure to lodge the deposit at the relevant time and was thus a matter that should be considered applying the overriding objective to deal with matters justly.

26. In terms of Regulation 10 (a) if satisfied that the landlord did not comply with any duty in regulation 3 the Tribunal must make a payment order between £0.01 and three times the deposit. The maximum amount in this case with a deposit amount of £900 would thus be £2,700. Applying the considerations in the approach to exercising discretion as set out above, the Tribunal does not consider that the failure to comply with the Regulations in this case warrants a penalty at the high end of the scale. However, the Tribunal considered that the amount of £300 suggested in the submissions of the Respondent's solicitor was not sufficient to reflect the prolonged nature of the failure of the Respondent to lodge the deposit and his failure to rectify the matter once he opened an account with a registered scheme. In all the circumstances the tribunal considered it fair, proportionate and just to make a payment order for the sum of £900, which reflects the seriousness and duration of the breach and constitutes a meaningful sanction for non-compliance of the Regulations.

27. The Tribunal refuses the application for an order for expenses made by the Respondent in terms of Rule 40 of the Rules of Procedure. Rule 40 states: "*Expenses 40.—(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.*

(2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made."

28. The Rule clearly sets out that expenses may only be awarded against a party behaving unreasonably in the conduct of the case and thus putting the other party to unnecessary or unreasonable expenses. The first submission of the Respondent's solicitor regarding expenses was that the need for an adjournment on the first hearing date set for 26 February 2021 constituted such an unreasonable conduct. However, the Tribunal considers that the necessity for an adjournment on that occasion arose from the inability of the clearly material witness, Ms Murdoch, to participate in the hearing due to medical reasons. Her acting as a witness had been arranged by the Applicant through another support worker at the CMD on 19 January 2021 and thus the Applicant had taken reasonable steps to ensure the witness would attend. Whilst in an ideal world the witness and the Applicant would have intimated that to the Tribunal and the Respondent some time prior to the hearing, the Tribunal accepts that the Applicant had only been told by Ms Murdoch one or two days prior to the hearing date that she could not attend and he had asked the witness to contact the Tribunal and she had only done so the day prior to the hearing. The Applicant is not legally trained and due to his condition of Aspergers Syndrom received considerable support in his participation in the case from Autism Initiative. The Tribunal accepts that he considered asking his support worker to contact the Tribunal a safe and reliable way to advise the Tribunal of the situation. The Tribunal does not consider that the conduct of the Applicant on that occasion was unreasonable. The hearing on 16 April 2021 clearly showed that the witness was essential to the matters on which the Tribunal had to make findings and that her non attendance on 26 February 2021 was not a matter of avoiding giving evidence. She clearly was willing and able to be a witness for the Applicant in the case. That she was ultimately not able to do so on 26 February 2021 was not due to the conduct of the Applicant. That this was only intimated to him a day or two before the hearing and the Tribunal on the day prior to the hearing was again not due to unreasonable conduct by the Applicant

29. The Respondent's solicitor further submitted that the Respondent had prepared the case of his defence around the issue of whether or not the deposit had been dealt with by the Council under the Rent Bond Guarantee Scheme. This had been put forward by the Applicant in his representations and he now had changed his evidence to say that the Bond Scheme had not been used. This had caused unreasonable and unnecessary expenses to the Respondent in the preparation of the case without specifying this argument further. The Tribunal does not consider that the Applicant had behaved unreasonably in the conduct of his case. He had mentioned the Rent Bond Guarantee Scheme because this is the term he thought applied. The invoice he received from the Council stated as the reference "bond guarantee for payment of the deposit". He had made it clear that he had no input into the setting up of the payment and that this was all done by his support worker, who at the hearing confirmed this. At no point had the Applicant put forward that the assistance from the Council was anything else but a payment from the Council made directly to the Respondent by bank transfer, which he, the Applicant, then had to pay back to the Council. He did not change the basis of his application at

any point in the Tribunal process. There was no unreasonable conduct and thus an award of expenses would be inappropriate.

Decision:

1. **The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicants of the sum of £900 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011**
2. **The First-tier Tribunal for Scotland (Housing and Property Chamber) refuses the application of the Respondent for expenses.**

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.

Petra Hennig-McFatridge

Petra Hennig McFatridge	**30 April 2021**
Legal Member/Chair	**Date**