

**Housing and Property Chamber
First-tier Tribunal for Scotland**



**First-tier Tribunal for Scotland (Housing and Property Chamber)
STATEMENT OF DECISION: In terms of Section 24 (1) of the Housing (Scotland) Act 2006**

Chamber Reference: FTS/HPC/RP/16/0027 and FTS/HPC/RP/18/1020

Property at Rossie Priory, Inchtute, Perth, Perth & Kinross, PH14 9SG ("the Property")

The Parties:

Dr Peter Dymoke, residing at, Rossie Priory, Inchtute, PH14 9SH (being a joint Tenant along with his wife Beth Dymoke) ("the Tenant")

Mrs Caroline Best, having a place of business at Rossie Home Farm, Estate Office, Inchtute, PH14 9SH ("the Landlord")

Tribunal Members:

Andrew Cowan, Chairman/Legal Member

Robert Buchan, Surveyor Member

Background

1. The Tenant has made two Applications to the Tribunal in terms of Section 22 of the Housing (Scotland) Act 2006 ("the Act") in which he has made a variety of complaints that the Landlord has failed to ensure that the Property meets the Repairing Standard at all times during the Tenancy.
2. The Tenants first Application was received by the Tribunal on 25 January 2016. On 24 June 2016 a Notice of Referral was served upon the Tenant and the Landlord in relation to that Application. The Tribunal inspected the Property on 29 September 2016 and thereafter held a hearing in relation to the Tenant's first Application on that date. The Tribunal issued a Decision on 17 January 2017 in which they determined certain preliminary issues in connection with the limitation of the Landlord's duty to comply with the Repairing Standard.

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3. Further hearings in relation to the Tenant's first Application were adjourned as either the Landlord or the Tenant's witness, were not available.
4. The Tenant lodged a Second Application in relation to the Property. The second Application was received by the Tribunal on 8 May 2018. That Application included a further list of matters which the Tenant averred required to be repaired to ensure the Property met the Repairing Standard.
5. At a hearing on 24 August 2018 the Tribunal agreed to conjoin the Tenant's First and Second Application and to allow the parties to lead evidence in relation to the Application and any opposition thereto.
6. The Tribunal heard evidence from parties and their witnesses on 26 October 2018 and 4 February 2019.
7. After hearing evidence the Tribunal required the solicitors for both the Landlord and the Tenant to lodge written submissions in support of their respective arguments by Thursday 7 February 2019. Both the solicitor for the Landlord and the solicitor for the Tenant lodged written submissions as required.
8. The forgoing background briefly summarises some of the key points in the history of the Tenant's Applications. The Applications included lists of repairs which the Tenant considered required to be carried out to the Property to ensure it met the Repairing Standard. The list of alleged repairs ran to several pages including a wide range of issues which the Tenant considered required to be repaired.
9. Following a number of case management discussions and hearings (and the withdrawal of a number of complaints by the Tenant) the Tribunal were left with three matters of complaint.

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10. In terms of the Tenant's solicitors written submissions the three issues upon which the Tenant continues to maintain the property does not meet the Repairing Standard relate to:-

- a. A section of guttering attached to the eaves overlooking the courtyard lying to the north of the house
- b. A pathway or paved way that previously formed the floor of the demolished cloister of Rossie Priory House
- c. That area to the rear of the house comprising in particular what is described as the kitchen passage way and a number of rooms leading from that passage way.

11. The specifics of the complaint in relation to each of those matters are taken from the Tenant's Application.

The Repairing Standard

12. Section 13 (1) of the Act defines the Repairing Standard which the Landlord must maintain.

13. In terms of Section 14 (1) of the Act, the Landlord in a Tenancy must ensure the house meets the Repairing Standard (a) at the start of a Tenancy and (b) at all times during the Tenancy.

14. Section 16 of the Act sets out certain exceptions to the Landlord's repairing duties. In particular Section 16 sets out as follows

(1) The duty imposed by Section 14 (1) does not require-

- a. Any work to be carried out which the Tenant is required by the terms of the Tenancy to carry out
- b. Any work to be carried out for which the Tenant-
 - i. Is liable by virtue of the Tenant's duty to use the house in a proper manner, or
 - ii. Would be so liable but for any express undertaking on the Landlord's part,
- c. The house to be rebuilt or reinstated in the event of destruction or damage by fire or by storm, flood or other inevitable accident, or A Cowan

d. The repair or maintenance of anything that the Tenant is entitled to remove from the house.

(2) The exception made by subsection (1)(a) applies only if the Tenancy concerned is-

a. For a period of not less than 3 years, and

b. Not determinable at the option of either party within 3 years of the start of the Tenancy

(3) Where the terms of a Tenancy are not agreed until after the Tenancy starts, the Tenancy is, for the purpose of subsection (2), to be treated as starting on the date of the agreement.

(4) A Landlord is not to be treated as having failed to comply with the duty imposed by Section 14 (1) where the purported failure occurred only because the Landlord lacked necessary rights (of access or otherwise) despite having taken reasonable steps for the purpose of acquiring those rights.

15. The Tenancy agreement between the parties is comprised of an offer to let issued in April 2015 and two subsequent missives. Clause 4 of the offer to let refers to the condition of the property. In particular the offer of let provides as follows:-

***4.1 Condition of the Subjects**

(a) The Tenants accept the subjects as complying with the Repairing Standard at the Date of Entry as evidenced by a Record of Condition to be prepared by the Landlord and assigned by both parties, a copy being retained by each of the parties.

(b) The Tenant accepts the subjects as being in good tenantable condition and repair and in good decorative order as at the Date of Entry. The Tenant will maintain the interior of the subjects throughout the period of this lease and leave it at the termination of this Lease, for any reason, in good tenantable condition and repair and in good decorative order.

(c) Throughout the duration of the Lease the Tenant is responsible for ensuring the Subjects meet the Repairing Standard except that the Landlord shall be responsible for ensuring that the Subjects meet the Repairing Standard in respect of the following only-

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(i) The subjects are wind and watertight except that broken window panes will be replaced at the Tenant's expense,

(ii) The structure and exterior of the subjects (including drains, gutters and external pipes) are in a reasonable state of repair and in proper working order (having regard to the age, character and prospective life of the Subjects and the locality in which the Subjects are situated)...

16. In terms of the Decision issued by the Tribunal dated 17 January 2017 and in particular under the heading "Preliminary Issue 4" the Tribunal accepted that the Landlord had "contracted out" of certain parts of the Repairing Standard. The Tribunal determined the lease between the parties was for a period not less than a period of three years and was not determinable at the option of either party within three years of the start of the Tenancy. The Tribunal therefore determined that the Landlord was entitled to insist upon a restriction of the Repairing Standard imposed by the terms of the Tenancy agreed by the parties (hereinafter referred to as the "restricted Repairing Standard").

17. The extent of the Landlord's duty to ensure the Property meets the Repairing Standard (as required by Section 14 (1)) of the Act is therefore restricted. In particular the Landlord's duty is defined by clause 4 of the offer of let to the Tenant.

18. The Tenant's solicitors submit that the restricted Repairing Standard agreed between the parties continues to require the Landlord to meet the statutory Repairing Standard as required by Section 13(1)(a) and (b) of the Act. That is not the case.

19. In terms of Section 13(1)(a) of the Act, the house meets the Repairing Standard if "the house is wind and water tight and in all other respects reasonably fit for human habitation." The reference to fit for human habitation is not included in the restricted Repairing Standard agreed

20. between the parties in terms of the lease.

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The Hearing & Evidence

21. The Tribunal heard evidence from parties and their witnesses on 26 October 2018 and 4 February 2019.

The Tribunal heard evidence from:

Mr Peter Dymoke (the Tenant)

Mrs Beth Dymoke (the Tenant's wife)

Mr Innes Altken, Chartered Building Surveyor

Mrs Caroline Best (the Landlord) and

Mr Aaron Love. Alliance Preservation Limited

22. The Landlord was represented throughout proceedings by her solicitor, Mr David Oglivy of Messrs Turcan Connell. The Tenant was represented by his solicitor, Mr Alasdair Taylor of Messrs Lindsays.

23. Following the conclusion of evidence, and having considered the written submissions lodged on behalf of both parties by their respective solicitors, the Tribunal now decides as follows:-

Complaint that a Section of Guttering Attached to the Eaves Overlooking the Courtyard Lying to the North of the House

24. In the extensive list of repairs submitted by the Tenant in support of his Application the Tenant makes reference to "gutters and downpipes". He states that the gutters are leaking and corroded and requiring repair. No further specification is given in the Application as to the nature, location and extent of this part of his complaint.

25. In terms of the written submissions lodged by the Tenant's solicitors at the end of proceedings the Tenant seeks to argue that the evidence supports a finding by the Tribunal that the

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guttering and drainpipes at the property were not in a reasonable state of repair and in proper working order and that, as a consequence, the property was not watertight.

26. The Tenant lodged with the Tribunal, in advance of the hearing, a report prepared by Mr Innes Aitken, chartered building surveyor. The report was based on the inspection of the property which took place on 22 October 2018. The report is dated 23 October 2018.

27. The report from Mr Aitken includes observations (at paragraph 7.02) that "From my heavily restricted ground level inspection, the roof coverings, flashings, watergates, parapet gutters, rhones etc appear to be old and I recommend that a thorough roof inspection is carried out by a competent contractor." He continues at paragraph 7.03 "parapet gutters, valley gutters and rhones should be cleared out at least once if not twice per year". No further specification of the specific areas of the property to which these comments related was given in the written report, although the report did have a number of photographs annexed thereto.

28. Specific evidence was heard from witnesses at the Tribunal hearing in relation to the condition of guttering and rain water goods at the Property. That evidence was restricted to the gutters and rain water goods shown in the photographs numbered 9 and 10 in the annex to Mr Aitken's report. Both photographs were labelled in that report as showing "Moss growth to monopitched lean-to roofs to rear"

29. In the course of the evidence heard at the Tribunal Mrs Dymoke gave evidence to the Tribunal that the guttering shown on the photographs referred to above were blocked and, in heavy rain, water came over the top of the gutters and down the walls of the Property. Mrs Dymoke accepted that, since the date of the Application to the Tribunal, work had been carried out to gutters and rain water goods at the area shown in the photographs. As at the date that she gave evidence, Mrs Dymoke accepted that the issue was "probably addressed", although she highlighted that the gutters and other rain water goods had not been properly tested as there had not been significant rainfall since the date they had been repaired.

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30. Mr Aitken gave evidence to the Tribunal on this matter. In his evidence he identified that from his observations at ground level he was of the view that sections of the guttering and/or the rain water goods were in a poor condition. He did identify in his evidence that the downpipe identified in photograph number 9 had now been repaired. Although he did state in evidence that he felt the guttering was of such poor quality that it fell below the Repairing Standard, the extent of the Repairing Standard (as modified by the lease between the parties) was not put to the witness in evidence and accordingly no evidence was presented to the Tribunal as to Mr Aitken's views on whether the state of the guttering at the area in question fell short of the "restricted" Repairing Standard.

31. Having considered all of the available evidence the Tribunal are not satisfied that there is a sufficiency of evidence to demonstrate that the guttering at the Property (and in particular at the location complained of) did not meet the restricted Repairing Standard. In considering whether the gutters at the Property meet the Repairing Standard the Tribunal must consider whether the Property remains wind and water tight. No evidence was presented to the Tribunal which supported a finding by the Tribunal that the Property was not wind and water tight (as at the date of the hearing) in relation to these matters. The Tribunal accept that there was evidence that, in the past, the guttering and rainwater goods at this specific location at the Property had not been in good condition. The Tribunal further noted, however, that since the date that the Application was first raised at the Tribunal, the Landlord had carried out work at the property to address the complaints made by the Tenant in relation to this specific part of the property.

Complaint in Relation to the Pathway or Paved Way

32. In his application the Tenant complained, in one of his schedule of lists of complaints, that a "path" at the property was badly damaged and a serious trip hazard.

33. At the inspection of the property, the Tenant identified an area of ground outside the front of the property on which there was an area of flagstones. These can be further identified in photographs 21 to 34 of the Aitken report.

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34. The Landlord gave evidence that the area in question was not intended to form a path. She explained in her evidence that the stonework was what remained of a corridor (or similar) which had formed part of a larger building (which had previously formed part of the Priory) and which had been demolished sometime in the 1950's. The area in dispute was never intended to be an external path and had not been used as such.
35. The Tenant argued that the stone area at the front of the property was a pathway and, as such, fell to be regarded as part of the structure and exterior of the house and required to meet the restricted repairing standard.
36. The Tenant made reference to the Collins dictionary definition of pathway as "a path which you can walk along or a route which you can take".
37. In his evidence Mr Innes Aitken made reference to his report at paragraph 7.10 that "The large walkway on the front lawn, which is surfaced in flagstones, is in very poor condition and presents a health and safety risk and is in need of complete uplifting and relaying." He gave evidence that he did not consider the area to meet the repairing standard. He did so, however, on the basis that the area concerned was a path or walkway.
38. On this matter, the Tribunal preferred the submissions of the Landlord and did not accept that the area concerned was intended to be leased to the Tenant as a pathway which the Tenant could use for access along the front of the building. No evidence was led by the Tenant that the area in question was ever used as a pathway either before or during the period of the lease.
39. The Tribunal noted at their inspection that there was an alternative access along the front of the property, along a formal pathway which had been created and which led through the sunken garden at the front of the property. Access along the front of the building could therefore be taken using that formal pathway.

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40. The Tribunal accept that the stone area located in the front garden of the property is included within the definition of "house" as defined in Section 194 of the 2006 Act. That said however, the repairing standard requires the Tribunal to take account of the age, character and prospective life of the property. Given the history of this property, the Tribunal were satisfied that the stone area existed in its current state as a consequence of the age of the property and the previous works which had been carried out when part of the original property was demolished.

41. The Tribunal were satisfied that the stone area had never been put in place with the intention that they would form part of an external pathway at the property. The Tribunal regarded the stones as a part of the features of the former buildings which were erected on that part of the site. They are not, and were never intended to be an external path, and do not require to be maintained as a path.

42. Accordingly, the Tribunal determined that, having regard to the age and character of this feature of the property, there had been no failure by the Landlord to comply with the restricted repairing standard in relation to this matter.

Complaint That Certain Parts of the Property Suffer from Dampness and/or Water Ingress

43. In the extensive list of repairs submitted by the Tenant in support of his application the Tenant complains that in relation to the passageway nearest to the kitchen and rear entrance hall within the Property there is plaster and paint coming away from the walls which is an indication of damp. He further complains that the floors are very wet throughout the passages and in the side room of the kitchen passageway. In relation to the rear cloakroom of the Property the Tenant complains that the room is very damp and there is mould in the walls. In relation to the larder, kitchen store and pantry at the Property the Tenant complains that there is evidence of dampness.

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44. The Tribunal has inspected the Property on three separate occasions. At the first inspection on 15 September 2017 the Tribunal noted that in certain parts of the main house (at the rear of the building) there appear to be evidence of dampness. In particular the Tribunal had noted that there is apparent evidence of rising dampness within the kitchen pantry at the rear of the building. There was evidence of significant dampness in these parts of the Property at the date of that inspection. The Tenant had also complained of dampness within the kitchen passageway nearest the kitchen and the rear entrance hall where plaster and paint were coming away from the wall. The Tenant also complained that the concrete flooring in these areas could become wet. The Tribunal had noted the flooring had been wet and at the most recent inspection on 26th October 2018 the Tribunal again had noted small droplets of water on the main passageway adjacent to the kitchen of the Property.

45. The Landlord had instructed Alliance Preservation Scotland Limited ("Alliance") as specialist contractors to survey the Property in October 2016, February 2017 and September 2017. Reports by Alliance which were prepared following each of these surveys (copies of which were available to the Tribunal) highlighted that there were higher than average moisture readings at the Property at the rear of the building. The reports identified evidence of black spot mould in areas and salting on walls caused by moisture. Within the larder at the Property the Alliance reports specifically noted that the larders were cold but no evidence of damp or moulding.

46. The Alliance reports recommended various works to the Property including the installation of a damp proof course and the wrapping of walls with dampness membranes. These works were carried out by Alliance at the Property and these works were then further inspected and reported upon by Alliance in September 2018. Mr Aaron Love gave evidence to the Tribunal as to the nature and extent of the works which had been completed by Alliance in this respect.

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47. Accordingly, by the date of the Tribunal hearing on 26th October 2018 the Landlord had instructed and completed certain works to address concerns of dampness etc. at the locations complained of by the Tenant.

48. The evidence heard at the hearing on 26th October 2018 primarily related to the Tenant's concerns that:-

- a) There continued to be the presence of water droplets on the floor of the main kitchen passageway within the Property and
- b) that there continued to be evidence of dampness on the lower wall of the pantry and the adjoining room.

49. The passageway floor had recently been painted with an oil based paint as instructed by the Landlord, but the Tenant was concerned that there continued to be water droplets on the floor which they were concerned were a risk to health and safety.

50. The Tenant produced a report by Mr Innes Aitken (chartered building surveyor) dated 23 October 2018. Mr Aitken gave evidence to the Tribunal in relation to his report. In his report Mr Aitken observed that there were extensive areas of water droplets across the floors in the areas complained of by the Tenant and he found that some droplets were concealed in blisters under the fresh paint that had been applied by the Landlord. He could find no evidence that the water had dripped onto the floor and the ceilings were in a relatively good condition and unaffected by dampness. He was unable to clarify the source of the water but he did recognise that the water could provide a significant health and safety risk to users of the Property. He surmised that further investigations were necessary, but he considered that it appeared that the floor may be sweating due to heavy condensation. He noted that certain solid floors at this part of the Property had extensive moisture readings and there were some areas of dampness on the bottom of the walls immediately above the skirting level in the pantry and adjoining corridor and cloakroom at the Property.

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51. Mr Altken recommended that further works were carried out to the Property to prevent ongoing issues in relation to the identified dampness and/or condensation.

52. Although in his written report Mr Altken had come to the conclusion that the droplets on the floor were the result of condensation, in his evidence to the Tribunal he accepted that there could be alternative causes for the droplets on the floor and accepted that it was possible the droplets could be coming from beneath the floor.

53. The Tribunal established from the evidence that:-

- a) there was evidence of some form of dampness and/or condensation affecting certain parts of the property, although this had now been mitigated to a large extent by the works carried out by Alliance.
- b) the extent and cause of any continuing dampness and/or condensation within the Property is uncertain. The Tribunal could not be satisfied, on a balance of probabilities, as to the cause of dampness either within the larder of the Property or the main passageway nor in relation to the cause of water droplets which formed from time to time on the floor of the main passageway.

54. In his written submission the Tenant's solicitor specifically submits that, as a consequence of ongoing issues in relation to dampness and the presence of the water droplets, the Property does not meet the Repairing Standard as required by Section 13 (1)(a) of the Act.

55. Section 13 (1)(a) of the Act requires that the house meets the Repairing Standard if the house is wind and water tight and in all other respects reasonably fit for human habitation.

56. The Landlord submits in their written submissions that the "second leg" of Section 13 (1)(a) is engaged where a house requires to be "reasonably fit for human habitation".

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57. That however is not the standard which has been agreed between the parties in terms of clause 4 of the lease.
58. Clause 4(2) of the lease requires the Tenant to maintain the interior of the subjects throughout the period of his lease and the termination of this lease, for any reason in good tenable condition and repair and in good decorative order.
59. Clause 4(3) of the lease confirms that the Tenant is responsible for ensuring those subjects meets the Repairing Standard except in two specific areas where the Landlord is responsible for ensuring that:-
- a. The Property is wind and water tight and;
 - b. That the structure and exterior of the subjects are in a reasonable state or repair and in proper working order.
60. There is no obligation for the Landlord to ensure that the Property remains in all respects "reasonably fit for human habitation".
61. The Landlord's obligation is to ensure that the Property is wind and water tight. The Tenant has a responsibility to keep the Property in tenable condition. In the Landlord's written submission to the Tribunal reference is made to specific authorities on the definition of "wind and water tight".
62. In the case of *Wolfson v Forrester* 1910 SC675 the Lord President commented that "wind and water tight means only wind and water tight against what may be called the ordinary attacks of the elements, not against exceptional encroachments of water due to other causes"
63. The matter was further examined in the case of *McGonagal v Pickard* 1954 SLT 62. In that case Lord McIntosh approved the passage referred to in *Wolfson v Forrester*. The Pursuer in that case had argued that the obligation to keep wind and water tight had been breached by

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dampness entering the house. Lord McIntosh referred to that other argument as "an unwarrantable extension of meaning to the obligation to keep premises wind and water tight. It includes in it something which would not in my opinion, properly fall under what Lord Dunedin says may be called the ordinary attacks of the elements. Some dampness arises almost invariably from the foundations of a house as may be seen from the modern practice of always putting in a damp proof course when laying the foundations of a house. In my opinion the spread of damp from that source or that type of damp, would not be a breach for the Landlord of his obligation to keep the house in a wind and water tight condition. In my opinion, what the obligation means is that the roof and outer walls of the structure or house or premises or whatever it be, must be kept in such condition that they are proof against the ordinary attacks of the elements, i.e. of the wind, of the rain and snow and so on that may fall upon it or beat against it in the ordinary course of our climate".

64. Accordingly the Tribunal are satisfied that the Landlord has a duty to keep the Property wind and water tight. Having regard to the authorities referred to by the Landlord, the Tribunal are not satisfied that there is a sufficiency of evidence to demonstrate that the Landlord has failed to keep the Property wind and water tight in relation to the areas complained of in the Tenant's application. The Tribunal accept the evidence that there is ongoing evidence of occasional water droplets on the flooring of the main passageway at the kitchen area of the Property and that a wall in the larder and adjoining rooms continue to be damp in certain areas. The Tribunal do not however accept that that evidence in itself is sufficient to establish that the house is not wind and water tight.

65. The Tribunal are not required to consider whether the Property is fit for human habitation as that is not part of the Landlord's obligations in terms of the Repairing Standard as restricted by the tenancy agreement between the parties.

66. For completeness the Tribunal noted that the Tenant did not submit within their written submissions that they considered the issues of dampness and water droplets within the Property to be a failure of the Landlord's duty to maintain the structure and exterior of the

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subjects in a reasonable state of repair. In any case, the Tribunal were not satisfied that there was evidence of failure of the Landlord to maintain the structure and exterior of the house in a reasonable state of repair. This was particularly so when the age, character and location of the property are taken into account. The area of dampness concerned a pantry which was designed to be kept cool. No evidence was produced of the determinate cause of any continuing dampness and/or water droplets within the Property and the Tribunal could not be satisfied on the evidence provided that the Landlord had failed to meet the Repairing Standard in that respect.

67. Having regard to the whole evidence, the terms of the lease agreement between the parties and authorities the Tribunal has determined that there has been no failure by the Landlord to meet the Repairing Standard in relation to this matter.

Decision

68. The Tribunal determined that there was no evidence of any continuing failure by the Landlord to maintain the Property at the Repairing Standard, as restricted by the terms of the Lease between the parties.

69. The decision of the Tribunal was unanimous.

Right of Appeal

70. In terms of section 46 of the Tribunals (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.

71. Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is

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abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

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Signed.....

ANDREW COWAN

Legal Member

Date:

8/5/19.