

Housing and Property Chamber First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) Property Factors (Scotland) Act 2011 (“the Act”) Section 19

The First-tier Tribunal for Scotland, Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 (“the regulations”)

Chamber Ref: FTS/HPC/PF/19/2070

Re.:1/2, 21 Newton Street, Greenock, PA16 8SA (the property)

The Parties:-

Mr Nicholas Paterson, TALPHA Investment Co. Ltd. 17 The Oval, Bicton, Shrewsbury, SY3 8ES (“the homeowner”)

Oak Tree Housing Association Ltd., 41 High Street, Greenock, PA15 1NR (“the property factor”) represented by Patten and Prentice solicitors, 3 Ardgowan Square, Greenock, PA16 8PP.

The Tribunal members: Simone Sweeney (legal chairing member) and Mary Lyden (ordinary housing member)

Decision of the Tribunal Chamber

The Tribunal unanimously determined that the property factor has failed to comply with the terms of the preamble to section 3 of the Code of Conduct for Property Factors (“the Code”) and has failed to meet the Property Factors’ duties in terms of section 17 of the Code.

Background

1. By application dated 1st July 2019, the homeowner applied to the Tribunal for a determination on whether the factor had failed to comply with section 3 of the Code imposed by section 14 of the Act and to carry out the property factor duties in terms of section 17 (1) (a) of the Act.
2. Specifically the homeowner alleged that the meter providing electricity to the common areas at the property was faulty, that the property factor was aware of this fault and issued charges to the homeowner based on estimated meter readings for several years. The homeowner alleged that the estimates were not an accurate reflection of the sums due. On his application, the homeowner provided,

“The Factor has failed-over a number of years- to address the issue of, apparently, the faulty electricity meter for common areas resulting in erroneous or unsubstantiated bi-annual charges included in the Factoring Charges.”

3. Moreover the homeowner specified that the property factor had failed to comply with the preamble to section 3 of the Code rather than a specific clause within that section. The homeowner alleged that, in issuing charges based on estimates, the property factor had failed to comply with the following terms of the preamble to section 3:

“While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.”

4. The homeowner intimated his complaint to the property factor, formally, in compliance with section 17(3) of the Act by email of 16th August 2019. A copy of that email together with copies of various other correspondence about the issue between the parties dating back to 2018 were produced by the homeowner as part of an appendix to his application.
5. By decision dated 7th October 2019, a Convenor referred the application to the Tribunal for a hearing. After sundry procedure, a telephone hearing was assigned to take place on Monday 19th October 2020 at 10am.

6. The telephone hearing proceeded on Monday 19th October 2020 at 10am. In attendance was the homeowner and, on behalf of the property factor, Mr Caldwell, solicitor and Ms Hopper, Technical maintenance manager.

Hearing of 19th October 2020

7. Prior to hearing evidence the Tribunal chair addressed two preliminary issues. The Tribunal chair enquired whether the homeowner was still insisting on a request for a direction which he had submitted, dated 9th October 2020. Within that request the homeowner sought information in connection with electricity charges. The property factor had provided much of this information to the homeowner prior to the hearing and had made the information available to the Tribunal. The homeowner confirmed that he was no longer insisting upon his request and it was formally withdrawn therefore.
8. Separately the Tribunal referred to a second Inventory of Productions which had been lodged by the property factor under cover of email dated 14th October 2020. The homeowner confirmed that he had received intimation copy of the Inventory on that date and was content for it to be received by the Tribunal. The Tribunal allowed the property factor's second Inventory of Productions to be received.

Submissions for the homeowner

9. Mr Paterson explained that he is the Executive Chairman of TALPHA Investment company limited which owns the property. He has held this position since 2003. He provided the Tribunal with the history of his career in housing management which included responsibility for managing utility supplies to the properties he had managed. Mr Paterson submitted that his experience entitled him to challenge the way in which the property factor had managed the common electricity supply at the property.
10. Mr Paterson explained that there had been an issue with the electricity meter for around 10 years. He had raised the matter with the property factor but they had failed to have the meter fixed. Mr Paterson had pursued his concern through the

property factor's complaints procedure, without success, hence the reason he had brought the application before the Tribunal.

11. The electricity is provided to the building by SSE. SSE send invoices for the common electricity supply to the property factor by whom it is paid and the charges passed onto the homeowners at the building. The problem for the homeowner is that because the meter is not in proper working order, the bill which SSE issues to the property factor is based on an estimated reading. The homeowners have been charged on the basis of estimated costs for many years.
12. Mr Paterson submitted that the property factor was aware that the electricity meter was faulty and knowingly issued bills to homeowners which it knew to be inaccurate. The property factor had consistently ignored the fact that the bills were inaccurate and paid the sums due to SSE safe in the knowledge that the property factor would incur its loss from the homeowners. Essentially the property factor was never out of pocket because the homeowners were paying the sums due. Mr Paterson suggested that the property factor ought to have challenged SSE to do something about the matter but because there was no loss to the property factor, they had failed to do so.
13. The homeowner made reference to various invoices which had been lodged before the Tribunal. Specifically he referred to an invoice from SSE dated 27th September 2019. It showed an estimated reading of 59671 units despite there being zero consumption. Another invoice dated 18th December 2019 provided an estimated reading of 60666 with a consumption of 995 units. Mr Paterson submitted that the property factor had failed to scrutinise these charges from SSE. Rather the charges had simply been passed onto the homeowners by the property factor and were met with the monies recovered from the homeowners.
14. Mr Paterson referred the Tribunal to his second inventory of productions lodged in November 2019. Within the inventory were various copy invoices issued by SSE to the property factor between 10th September 2016 and 24th June 2019. Also included within the inventory were copy factoring invoices issued by the property factor to

the homeowner. These covered the period from 1st July 2008 to 30th June 2019. The factoring invoices showed the share of the common electricity supply which the homeowner was due to pay for each period. The homeowner alleged that there was a disparity in the charges for the common electricity supply which the homeowner was due to meet. In his letter of 26th November 2019 covering the inventory, the homeowner stated,

“It can be seen from the Analysis that several of +-the Respondent’s charges (sic) for common supply electricity bear little resemblance to those raised by SSE, the latter’s being in any case somewhat fictitious given the faulty meter.”

15. Mr Paterson raised a further issue of “backbilling” which he alleged to be in operation. In his letter of 26th November 2019 the homeowner quoted from OFGEM to explain what was meant by “backbilling.” It was said that ,

“Put simply, a supplier can’t seek additional payment for unbilled energy used more than 12 months prior to the error being detected and a corrected bill being issued...Your supplier can’t ask to be paid for unbilled energy used more than 12 months ago, if you haven’t been accurately charged for this usage before.”

It was alleged by the homeowner that the property factor has over provided for the suppliers’ charges for common electricity for the period from 12 November 2004 to 18 December 2019. He alleged that there had been an overcharge of, £390 (or £371.46 + VAT). Notwithstanding the issue of backbilling, the homeowner alleged that his analysis of the charges from SSE and those issued by the property factor revealed to him that there were excess charges ranging between £87 to more than £4,000.

16. The homeowner explained that he had raised a formal complaint with the property factor around 2012. The homeowner had followed the complaints procedure. It was understood by the homeowner that for accurate readings to be available the meter required to be replaced. The homeowner alleged that there had been delay on the part of the property factor to resolve his complaint and to do more to replace the meter. The homeowner accepted that only SSE could replace the meter, not the

property factor. He accepted that the property factor had brought the matter to the attention of SSE but delays had occurred in SSE replacing the meter. Recognising the obstacle which existed for the property factor, the homeowner had recommended to the property factor that they lodge a formal complaint with SSE for any delay or failure to replace the meter. Should the complaints procedure be exhausted, without success, then it was open to the property factor to raise the matter with the relevant ombudsman. The homeowner was convinced that involvement of the ombudsman would heavily influence SSE to bringing about a replacement of the meter. Mr Paterson insisted that he had suggested this to the property factor and to its solicitor but they had not followed his advice. The homeowner explained that because the name on the electricity bill is that of the property factor, he is unable to pursue the complaints process to this end, himself. Mr Paterson submitted that had the property factor followed his suggestion, when he had made it some years earlier, a fully working meter would be in place which could generate accurate charges for all homeowners concerned. In failing to pursue this route, timeously, Mr Paterson alleged that the property factor had failed in meeting the Property Factors' duties as required by the Act.

17. In conclusion, the homeowner argued that the practice of issuing charges based on estimated readings from a faulty meter went directly against the obligations upon the property factor as set out within the preamble to section 3 of the Code. The homeowners did not know what they were paying for; it could not be explained how those charges were calculated; and, in Mr Paterson's submission, the payment requests involved were improper due to their inaccuracy. The homeowner asked the Tribunal to find that adopting this practice and failing to bring about a successful resolution to the problem even when he had offered a possible solution revealed a negligence in the property factor's responsibilities and a breach of their duties in terms of the Act.
18. The Tribunal clerk enquired from the homeowner what he felt could be done to resolve the dispute between him and the property factor. The homeowner submitted that he wished the Tribunal to direct the property factor to do the following:

Immediately make a formal complaint to SSE; Thereafter to make a referral to the ombudsman about the failure of SSE to resolve the issue; to issue no further charges to the homeowner in respect of the common electricity supply until the meter was replaced and in proper working order or, alternatively, to refute any invoices from SSE which show a consumption and to recharge the homeowner for SSE's quarterly charges for zero consumption only; to provide the Tribunal and the homeowner with monthly updates on progress and to write to all homeowners,

“detailing the referral to the Tribunal and today's outcome, and to provide written updates as to what progress is being achieved to resolve the erroneous billing.”

Submissions for the property factor

19. In response, Mr Caldwell denied that there had been any breach by the property factor of the property factor's duties as set out at section 17 of the Act or of section 3 of the Code.
20. Mr Caldwell accepted that the dispute between the parties related to factoring services and specifically the charges included for the supply of electricity to the common parts of the property. Moreover the property factor admitted that the sums included in the invoices to homeowners had been based on estimated meter readings. Ms Hopper explained further that the property factor's standard practice was for all common charges for electricity to be issued on the basis of estimated readings. The property factor applied this practice across all of its factored properties (of which there are more than 1,000). It was admitted by the property factor that the electricity meter at the property was faulty; that the property factor had had knowledge of this fault for some time; and that the homeowner had taken issue with the accuracy of the electricity meter some years previously.
21. However, Mr Caldwell denied the allegations of the homeowner that there had been any breach of section 3 of the Code by the property factor. Specifically he denied that the property factors had made any *“improper payment request”* as set out at the preamble to section 3 of the Code. Mr Paterson did not consider charges based on

estimated readings to be improper. He explained that the meter at the property has been static for at least 3 years. He submitted that the property factor had elected, "*responsibly,*" to include estimated readings in its factoring charges. The property factor itself receives charges from the utility supplier based on estimated readings. The property factor must meet these charges. Mr Paterson submitted that the property factor had given an undertaking to the homeowner to account for any excess charges or to seek payment for any undercharging in the event that accurate meter readings become available.

22. The property factor's solicitor highlighted to the Tribunal the schedule of factoring charges, produced by the homeowner in November 2019 (in particular the charges between 2017 and 2019). Mr Caldwell submitted that these documents revealed that there was no charge to the homeowner for common electricity between January and June 2017. He explained that this was due to the property factor having received no bills from SSE for this period. The documents reveal a charge to the homeowner of, £1.90 for the period July to December 2018; £3.80 for the period January to June 2019; Prior to that the homeowner was charged £21.07 between July and December 2017 and £37.25 for the period January to June 2018. Whilst Mr Caldwell could understand that the homeowner was frustrated by the situation, he did not consider these to be payment requests which could be described as, "*improper.*" Mr Caldwell considered the more modest sums to be of some significance in this regard.
23. Mr Caldwell disputed any suggestion that there had been any inaction or delay on the part of the property factor to resolve the homeowner's complaint. Rather the property factor had made efforts to have the meter replaced. The property factor fully accepted that the meter required to be replaced but to do so was largely out of the property factor's control. Indeed, in April 2019 SSE had accepted responsibility for the defective meter. Mr Caldwell had provided a timeline of the property factor's efforts under cover of letter dated 14th October 2020. Insofar as is relevant it provided,

“ On 5th June 2019 engineers appointed by SSE attended the subjects to replace the meter. They were unable to do so. It was stated that access was required to each household due to a shared fuse on the main fuse box. They identified a potential fire risk if properties were unoccupied during the meter replacement and insisted that OTHA accept responsibility in the event of damage. SSE subsequently advised that access to each property was no longer required...On 12th December 2019, an engineer appointed by SSE attended the property. Due to his late arrival he was unable to replace the meter due to issues including failing light...On 28th January 2020, an engineer arrived at 12:50pm. Contrary to previous advice he stated his need for access to each property...A date of 24th February 2020 was proposed by SSE for replacement of the meter, however, this was unsuitable to the homeowner’s tenant...The appointment for 23rd April 2020 was cancelled due to the Coronavirus Pandemic...An appointment made for 10th June 2020 was cancelled by engineers appointed by SSE at short notice. Another appointment was to be scheduled however the meter operators/engineers previously appointed by SSE subsequently advised that they were no longer instructed...and the Respondents were advised to deal with SSE direct.”

24. In his letter to the Tribunal dated 4th November 2019, Mr Caldwell had submitted that the property factor had,

“taken all responsible efforts to resolve the dispute. They will continue to do so. In the meantime, they continue to pay SSE for the supply of electricity to the subjects based on estimated readings.”

25. Mr Caldwell did not dispute that the homeowner had brought to the attention of the property factor the possibility of pursuing SSE’s complaints procedure to bring about a replacement meter, failing which to escalate the issue to the relevant ombudsman. The homeowner had lodged emails between himself and Mr Caldwell from 21st November 2019. In the interests of reaching a settlement, Mr Caldwell had written,

“The only concession I can offer is a willingness to make a complaint to the ombudsman, however we have no realistic prospect of a successful outcome and our offer is made as a gesture to show my client’s commitment to resolving matters.”

However Mr Caldwell conceded that the property factor had never pursued any complaint against SSE. He submitted that he was not convinced that a complaint to SSE would take matters forward even if escalated to the ombudsman. Mr Caldwell added that a complaint would not get the meter replaced.

26. It was explained further that the property factor has also been faced with a change in personnel. The officer previously handling matters had been absent from duty due to illness and the matter had transferred to Ms Hopper in summer 2020. The Tribunal questioned Ms Hopper directly about recent attempts to move matters forward with SSE. She advised that she had sent an email to SSE on 1st October 2020 which was contained within the second inventory of productions for the property factor. Within the email, Ms Hopper had enquired, *“please advise when an engineer is planned to visit to allow us to notify residents in writing.”* Ms Hopper explained that she had only returned from a week’s annual leave. Having checked her emails prior to the hearing she had identified only an acknowledgement email from SSE and had sent a chaser email to SSE that morning.

27. The housing member of the Tribunal referred to Ms Hopper’s submission that this is not an isolated situation and that the property factor has around 47 defective electricity meters across its property portfolio. The housing member expressed to Ms Hopper that she was struck by the scale of the problem. The response was that this is an *“accidental”* property factor with responsibility for 1,000 homeowners and more than 400 owners in communal tenements. Factoring responsibilities had flowed from an amalgamation of three separate housing associations around 2004. Ms Hopper explained that there is no specific team which manages only factoring. Rather the factoring function is shared amongst various teams. The maintenance team deal with issues in connection with repairs and the finance team will issue bills to homeowners. Notwithstanding the scale of the problem of defective electricity

meters across its property portfolio, Ms Hopper submitted that the property factor had never received any similar complaint or experienced pressure to replace a faulty meter from any other customer beyond the homeowner. Ms Hopper provided an undertaking to familiarise herself with the homeowner's complaint and to continue to contact SSE with a view to having the meter replaced.

Findings in fact

28. That the property factor has had responsibility for providing property management services at the property since 2004.
29. That the homeowner's complaint concerns charges for the supply of electricity to the common areas at the property.
30. That the electricity meter at the property is not in proper working order and requires replacement.
31. That the electricity supplier at the property is SSE which has responsibility for replacing the meter.
32. That the electricity meter has been defective since at least 2012.
33. That the homeowner highlighted the defective electricity meter to the property factor in 2005, 2012, 2018 and 2019.
34. That in or around 2012 the homeowner raised a complaint with the property factor that charges for his share of the common electricity supply should not be based on estimated readings.
35. That the property factor receives charges for the electricity supply to the common parts from SSE and passes these charges onto the various homeowners at the property.
36. That the charges received from SSE by the property factor and those passed onto the homeowners by the property factor are based on estimated charges only.

37. That the practice of the property factor is to issue charges for the common electricity supply based on estimated costs, only.
38. That the property factor has issued charges to the homeowner for the common electricity supply based on estimated costs since 2004.
39. That in receiving charges based on estimated costs, the homeowner does not know what he is paying for and how the charges have been calculated.
40. That the property factor has provided an undertaking to the homeowner to review all charges for the supply of electricity once the faulty meter has been replaced and to refund any overpayment received during the time the meter was defective.
41. That the property factor brought the matter to the attention of SSE which accepted responsibility for the disputed meter in April 2019.
42. That engineers from SSE attended the property on 5th June 2019, 12th December 2019, 28th January 2020 and 10th June 2020 but were unable to repair the meter.
43. That the meter readings have been static for a period of at least 3 years.
44. That the homeowner brought to the attention of the property factor a possible solution to the issue some years previously.
45. That this possible solution was for a complaint to be raised with SSE that the meter was faulty and should that complaint not bring about replacement of the meter, then for the property factor to escalate the matter to the relevant ombudsman.
46. That the homeowner is unable to pursue a complaint with SSE in relation to the matter.
47. That only the property factor can pursue a complaint against SSE as it is the property factor's name which appears on the invoices generated by SSE.
48. That pursuit of SSE's complaints procedure and escalation to the ombudsman, if necessary, may bring about a solution to the homeowner's complaint.

49. That, by email of 21st November 2019 to the homeowner, the property factor's solicitor offered by way of a concession, a "*willingness to make a complaint to the ombudsman.*"

50. That, as at the date of the hearing before the Tribunal, the property factor had failed to pursue a complaint against SSE or to the ombudsman.

Reasons for decision

51. The relationship between the parties has existed since around 2004. Throughout that period the homeowner has received charges for his share of the common electricity supply at the property from the property factor. These charges have all been based on estimated charges. The supply of electricity to the common areas of the property is provided by SSE. SSE issue bills for the common electricity supply to the property factor. The bills issued by SSE are based on estimated charges. The reason for only estimated costs being available is that the meter at the property is not working. This fact is agreed by the parties and by SSE. Accurate charges cannot be made until the meter is replaced. The property factor feels that it is in a difficult position.

Responsibility for the meter rests with SSE. This, too, is a matter of agreement. The property factor's position is that it has liaised with SSE and offered assistance in what limited ways it can to facilitate access to the property in order that the meter is replaced.

52. By letter of 4th November 2019 the property factor claims to, "*have taken all responsible efforts to resolve the dispute.*" However the property factor admits that the homeowner raised, some years ago, the possibility of exhausting SSE's complaints process to bring about a solution to matters. The homeowner had investigated the process and seemed confident that should the complaints process with SSE not succeed, then escalating matters to the ombudsman would bring about a replacement meter. The property factor has chosen not to pursue this process despite having offered it to the homeowner by way of a concession in an email dated 21st November 2019. The property factor's solicitor submitted to the Tribunal that such a complaint would not

bring about a replacement meter. No evidence or explanation was offered in support of this submission.

53. It is not possible for the homeowner to pursue a complaint to bring about an improvement to this situation. Only the property factor can do that but has delayed or refused to do so over a period of some years.
54. In failing to pursue this route at an earlier stage, the Tribunal is not satisfied that the property factor has shown that it has, "*taken all responsible efforts to resolve the dispute.*" In the course of the hearing, the property factor's technical manager indicated that she would now consider this option. A reasonable effort would have been to make a complaint to SSE. This was not done. It is regrettable that the homeowner was put to the time and inconvenience of bringing this application, preparing for and attending a hearing before a Tribunal before the property factor was prepared to seriously entertain his suggestion to solve to the problem. Taking into account the length of time which has passed since the homeowner offered this solution and the delay or refusal to act upon it despite having been offered a complaint to the ombudsman as a "*concession*" in November 2019, the Tribunal is not satisfied that the property factor has carried out the property factor's duties in terms of section 17 of the Act.
55. The property factor admits that the homeowner is charged for electricity based on estimated costs. The property factor's position is that charging on the basis of estimates is acceptable; its standard practice across its entire property portfolio; that SSE charge them estimated costs and that it is powerless to replace the meter. The property factor says that against this background they are not making "*improper payment requests*" in terms of the preamble to section 3 of the Code.
56. The length of time over which the property factor has been charging by way of estimates is significant. There may, of course, be circumstances with electric charges where billing based on estimates would be appropriate and reasonable. This would be the situation where the meter is accurately functioning and periodic readings are taken from that meter which would allow adjustments to be made to any estimated billing. That is not the situation in the present case. The property factor does not

dispute that the homeowner has been charged on the basis of estimates since 2004 without any adjustment from an accurate meter reading. The property factor does not provide any time period or date by which this practice will change. The property factor's position is that it is unable to do so because it is at the mercy of SSE to move matters forward.

57. Section 3 of the Code requires transparency in the full range of services which are provided by a property factor. Section 3 provides that transparency, *"especially important for building trust in financial matters."* Moreover section 3 places a duty on a property factor that its homeowners,

"know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved."

58. The property factor insists that charging by estimated costs is not an, *"improper payment request."* The property factor is simply passing on the estimated charge which it has received. It is in the same position as the homeowner. However neither the property factor nor the homeowner knows what it is paying for with estimated bills from SSE, nor how the charges were calculated. It is not appropriate for a responsible property factor to pass onto a homeowner a cost which the property factor itself cannot explain for a period of 16 years. It is not appropriate for a responsible property factor to do this as a matter of practice for a period of 16 years. The property factor's solicitor insisted that the fact that the sums charged were only modest amounts was of significance. This is rejected by the Tribunal. The sums may be modest but they have been charged to the homeowner for a period of 16 years. . The property factor offers no indication of when or indeed, if, that may ever change. It is not reasonable for the property factor to continue with this practice indefinitely and to hide behind the failures of the utility supplier. Particularly in the context of the property factor's failure to take all the steps open to them to attempt to resolve the issue. Whilst the property factor may argue that it, too, is forced to pay estimated costs as a result of a faulty meter, the property factor recovers the sums due from its customers. Provided that they pay in full, there is no loss to the property factor. By

following this practice, the Tribunal is not satisfied that the property factor can show homeowners what they are paying for and how the electricity charges are calculated. To that end, the Tribunal finds a failure on the part of the property factor to comply with section 3 of the Code.

59. In recognition of the length of time which has passed without the homeowner's complaint being resolved, the inconvenience which he has experienced and the efforts which he has made to bring about a solution, without the co-operation of the property factor, the Tribunal awards the homeowner financial compensation. The Tribunal directs the property factor to compensate the homeowner in the sum of £250, a token amount to be paid in the time period set out in the proposed order.

Decision

60. In all of the circumstances narrated, the Tribunal finds that the property factor has failed in its duty to carry out the property factor's duties under section 17 (1) (b) of the Act and that the property factor has failed to comply with the preamble to section 3 of the Code.
61. The Tribunal determine to issue a Property Factor Enforcement order ("PFEO").
62. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the property factor and to allow parties to make representations to the Tribunal.
63. The Tribunal proposes to make the order in the following terms:

Within 14 days from the date of issue of this order, for the property factor to:-

- *provide to the homeowner confirmation that they have lodged a complaint with SSE for its failure to replace the defective electricity meter at the property;*
- *provide to the homeowner an undertaking that the property factor will escalate the matter to the ombudsman should the complaint with SSE fail to bring about replacement of the electricity meter by SSE.*

- *to provide to the homeowner payment of £250 by way of compensation for the time, preparation and inconvenience he has experienced in having to bring this application*

64. 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 within 30 days of the date the decision was sent to them.

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Legal Chair, At Glasgow on 13th November 2020