SHERIFF APPEAL COURT

[2023] SAC (Civ) 11
SEL-A16-18

Sheriff Principal N A Ross
Sheriff Principal S Murphy KC
Appeal Sheriff G Wade KC

OPINION OF THE COURT

delivered by Sheriff Principal N A Ross

in the appeal in the cause

NATIONAL HOUSE BUILDING COUNCIL

Pursuer and Respondent

against

GAVIN HENDERSON JOINER AND BUILDING CONTRACTORS, GAVIN HENDERSON and ELLIOT HENDERSON

Defenders and Appellants

Defenders and Appellants: Garrity, advocate; Turcan Connell
Pursuer and Respondent: Welsh, advocate; BTO Solicitors LLP

21 February 2023

[1] This is an action for payment against a partnership formerly trading as house builders, together with the two partners of the firm. The partnership was formed under the law of Scotland. The respondent (the "NHBC") provides warranty and insurance products in relation to new homes across the United Kingdom, and maintains a register of builders who are covered by their insurance scheme. The action founds on contract, formed by the partnership registering as builders on the NHBC's register.

[2] Between 2006 and 2008 the appellants constructed various properties, including a number of domestic dwelling houses in a development at Priory Bank, Selkirk. Following

completion, each house was to be sold with the protection of the NHBC's warranty ("NHBC Buildmark Cover"), which would provide the domestic purchaser with, amongst other things, insurance against defective works. Following the sale of Plot 4, Priory Bank in about 2008, the purchaser complained of defective works within the house. The NHBC investigated, and found a number of defects, which it remedied at its own significant expense. The NHBC claims payment from the appellants of cost of the remedial works, in terms of the parties' contract.

[3] The appellants claim that neither the firm, nor partners of the firm, are liable to make payment, because the NHBC demand for payment post-dated the date of dissolution of the partnership. The only party to the contract with the NHBC was the partnership, not the partners. The partnership was dissolved, it is claimed, on about 31 March 2010. The action is also defended on the basis that the claim has prescribed. The sheriff appointed the cause to a preliminary proof before answer on two issues, namely the questions of prescription and the dissolution date of the partnership. Following the preliminary proof, he found that the firm had not been dissolved, and that the claim had not prescribed.

[4] Despite the limited scope of the preliminary proof, wider issues emerge which require resolution before the central questions can be answered. We will consider, first, the contractual basis of the NHBC claim and the evidence at preliminary proof; second, whether and when, on the evidence, the partnership was dissolved; third, the effect of dissolution on enforceability of the contract; fourth, whether there is continuing liability of the partners post-dissolution.

The contractual claim

[5] The NHBC claims payment under standard terms, being Rules 27(i) and 28(h) of the "Rules for builders and developers registered with NHBC", which are the standard terms said to regulate the contract. These provide:

> "27(i) If NHBC exercises its rights under Rule 27 [i.e. to carry out remedial works] you must immediately on demand (and without deduction or set off) indemnify (sic) NHBC in respect of all costs and expenses incurred by NHBC in connection with doing so…
> 28(h) In addition to NHBC's other rights under the Rules, if NHBC incurs any costs…NHBC may notify you in writing of the costs incurred…you must immediately pay to NHBC (without deduction or set off) an amount equal to the amount of the costs stated in the notice".

[6] The definition section provides that "You" refers to the builder or developer to whom the rules apply. References to persons include "firms" (but partners are not mentioned). The contract document is the "NHBC Application for Registration" which was completed by Gavin Henderson and is dated 12 June 2006. There is a subsequent document which bears to be an acceptance of registration, dated 8 December 2006, signed by Gavin Henderson "trading as Gavin Henderson Joiner & Building Contractor". Parties did not make submissions on this last document and nothing turns on it. It is not disputed that there was a contract between NHBC and the appellant partnership, but not the partners as individuals. The contract was for the provision of NHBC Buildmark Cover.

[7] While the pleadings convene the partners as partners and in a personal capacity, the contract documentation does not impose direct liability on the partners. The written contract is solely between NHBC and the partnership. It relates to the site at Priory, Selkirk. It is completed by Gavin Henderson, as partner of the firm. There is no term which imports personal liability.

[8] NHBC intimated claims on the appellants in 2015 and 2018, and raised the present action in 2018. The defenders refuse to make payment, on the grounds that the firm is dissolved, and also that any claim has prescribed.

The governing terms of contract

[9] A preliminary point is a dispute about which standard terms applied. The appellant partnership applied by application form dated 12 June 2006 to be placed on the NHBC's register. The NHBC accepted that application. The partnership thereby became bound by the NHBC Rules for Builders and Developers. Those rules provided that the NHBC may amend its rules from time to time upon giving notice, and the changes will take immediate effect. At the date of contract, the applicable version of those rules had been promulgated in 2006 (the "2006 Rules"). The rules were amended in 2009, and again in 2011 (the "2011 Rules").

[10] The appellants aver that the applicable version of the rules is the 2006 Rules. The NHBC claim relies on the 2011 Rules. The sheriff heard this argument, notwithstanding this went beyond the scope of the preliminary proof. He decided that nothing turned on this, the effect of the relevant rules being virtually identical. The difference in rules was the subject of submission on appeal.

[11] We note that the rules are not identical as between the 2006 Rules and the 2011 Rules, but that they are similar in effect. Parties did not submit any detailed analysis of the wording, or effect. They accepted that the issues to be decided on appeal do not turn on any differences in the versions. In the absence of detailed analysis we have not identified that this point has either merit or relevance. Accordingly we do not depart from the conclusion reached by the sheriff, that nothing turns on variations between these two sets of rules. We

accept for present purposes that the 2011 Rules, as a permitted variation of the 2006 Rules, apply.

Prescription

[12] We can also deal with prescription at this stage. The appellants submitted that, on analysis of the pleadings, the NHBC claim appeared to be for breach of contract by defective performance, and not a claim for payment for expense incurred. It appeared to found on breach of contract by failure to build to applicable NHBC standards (Rule 10) and not a claim under Rules 27 and 28. If that were correct, then liability arose in 2008 upon the defective completion of the dwelling house at plot 4. The claim was not raised until 2015 at the earliest, and accordingly the claim has prescribed.

[13] On behalf of the NHBC it was submitted that the obligation founded upon is one of indemnity for the costs incurred in rectifying the construction defects in the house. The obligation is not to repair the property, but to indemnify the NHBC. This is unaffected by whether the claim is brought under the 2006 Rules or the 2011 Rules. It is a claim under Rules 27 and 28, not Rule 10. The claim is based on a conditional, on-demand obligation to make payment in terms of the 2006 Rules, as subsequently amended.

[14] We do not accept the appellants' submission. In our view, the pleadings, particularly in article 10 of condescendence, give fair notice that this is a claim for indemnity under Rules 27 and 28 of the NHBC Rules, irrespective of which of the 2006 Rules or 2011 Rules apply. It is a claim for payment on demand under Rules 27 and 28, not a claim directly founded on defective building works. Any obligation to make payment arose, at the earliest, in July 2015, and therefore prescription does not operate to defeat this claim. The claim has not prescribed.

[15] The appellants accept that if the claim is founded on a payment obligation under the contract, then demand was made within five years of raising the action, and that the claim has not prescribed. They submit that this does not avail the NHBC, because the contract terminated upon dissolution of the partnership on 31 March 2010. The subsequent questions, and the main focus of the action, relate to the continued existence of the partnership, and whether the appellants or any of them remain liable under the contract.

[16] Before proceeding, we consider the relevant parts of the sheriff's findings in fact and law, as follows:

The findings relating to the contract claim

[17] This being a preliminary proof, the factual matrix was only partly adjudicated upon by the sheriff, and otherwise the subject of averment only. We have referred to the latter where averments are not in dispute.

[18] The sheriff found in fact that the appellant partnership was engaged by a developer as a building contractor to construct ten new houses at Priory Bank, Selkirk. The partnership applied for registration with the NHBC on 12 June 2006, and was accepted shortly afterwards. He found that the partnership was thereby subject to the 2006 Rules, as amended from time to time.

[19] Both the 2006 Rules and the 2011 Rules impose an obligation to build in accordance with NHBC requirements, and to remedy defects. In the event of a claim by purchaser based on defective construction, a complex series of provisions applies. Broadly understood, the rules empower the NHBC to require the builder to carry out tests and investigations, or in the event the builder fails to do so, to carry these out themselves. Depending on circumstances, the NHBC may require repair works to be carried out, or carry

out those repairs directly, or choose to pay remedial costs to the owner. In defined circumstances (Rules 27 and 28), the NHBC may demand payment of those costs from the builder.

[20] On averment, the defective works were to a dwelling house which was completed in April 2008. The sheriff found that NHBC Buildmark Cover was issued for plot 4, on 4 April 2008. On about 6 April 2011 the owners of the house at plot 4 made a claim to the NHBC, identifying 15 faults with the property. These defects were identified by the NHBC as being in breach of Rule 10 standards.

[21] On averment, the NHBC exercised their step-in rights under Rule 27(d) in order to remedy the defects. Investigations and remedial works were carried out. The NHBC identifies the cost thereby incurred at £102,039.71.

[22] The sheriff found that four separate demands were made by the NHBC to the partnership, for payment of remedial costs. The demands were in terms of Rules 27 and 28. The demand letters were dated 14 July, 28 July and 29 September 2015 and 4 January 2018.

[23] We were not asked to disturb any of this evidence. It was not disputed that as a general principle the dissolution or death of one party to a contract will, at common law, cause a contract to lapse. The next dispute is whether, as the appellants claim, the partnership was dissolved prior to the present claim arising.

[24] Before considering the sheriff's conclusions on the evidence, we recognise that whether or not a partnership is dissolved is a mixed question of fact and law. We will therefore consider the law prior to considering the facts.

The legal effect of dissolution of partnership

[25] The appellants claim that the partnership was dissolved in 2010. This claim was first made in 2015. The dispute is whether a partnership continues in existence following dissolution, so that a claim may later be initiated against it.

[26] The status of a partnership following dissolution is settled by *The Commissioners of Inland Revenue* v *Graham's Trustees* 1971 SC (HL) 1. In that case a partnership was the tenant of a farm, and the partnership agreement provided that, following dissolution by death of a partner, the remaining partners were entitled to purchase the deceased partner's interest. Following the death of a partner, the pursuer claimed payment of estate duty on the basis that the farm no longer had a tenant and was subject to vacant possession. The issue was whether the death of a partner brought the partnership to an end, and thereby ended the tenancy.

[27] Three Inner House judges, sitting as the Lands Valuation Appeal Court, found that the partnership as regards all the partners ended on death in terms of section 33 of the Partnership Act 1890 (the "1890 Act"), the matter (per Lord Hunter) being not open to argument. While such a result may be avoided by agreement between the partners, the relevant contract yielded no such agreement. Following dissolution, while the dissolved firm might be said to continue in existence for certain limited purposes, "possibly a more accurate statement" is that the surviving partners of the dissolved firm have the rights and powers necessary to enable them to wind up the affairs of the dissolved firm and distribute its assets (per Lord Hunter). This analysis avoided the logical difficulty of asserting that the partnership continues in existence after it has been dissolved by the death of a partner. In relation to the effect on partnership contracts, the normal rule, which can be altered by contractual agreement, was that a lease to a partnership firm will be terminated by the

dissolution of the partnership on the death or bankruptcy of a partner (per Lord Fraser). When the partnership was dissolved, there was no person, natural or legal, who could be the tenant, so as to continue the tenancy.

[28] An appeal to the House of Lords was successful on other grounds, but not on partnership law. The intention of the contract was considered, but yielded no evidence of intent to displace the normal rule. Accordingly, the contract of co-partnership came to an end on the death of the partner. It followed that there was no tenant, because the farm had been let to the co-partnership and no one else (per Lord Reid). Following dissolution, the remaining powers were regulated by s. 38 of the 1890 Act, which provides:

> "After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of dissolution, but not otherwise."

[29] Lord Reid analysed the phrase "transactions begun but unfinished". It could not refer to "bargains", as otherwise it would override the prohibition on making new bargains or contracts. The phrase must mean that the surviving partners have the right and duty to complete all unfinished operations necessary to fulfil contracts of the firm which were still in force when the firm was dissolved. The position would otherwise be intolerable (at p 21). Section 38 did not make the partners parties to the firm's contracts so as to keep those contracts alive.

[30] Lord Upjohn observed that s 38 made plain that the ex-partners must complete all those contracts and other matters which are in medio when the partnership was a going concern. The ex-partners had power to complete transactions begun but unfinished at the time of dissolution, but not otherwise (at p 27).

[31] *IRC* v *Graham's Trustees* has more recently been applied in *Lujo Properties* v *Green* 1997 SLT 225 and, in particular, by Lord Reed in *Duncan* v *The MFV Marigold* 2006 SLT 975 at para [18] onwards, to which parties referred.

The effect of s.38 of the 1890 Act

[32] The NHBC place reliance on s.38 of the 1890 Act, set out above. Counsel noted that:

> "The dissolution of a partnership does not necessarily complete the process of winding up the affairs of the partnership. Usually it will be the start of the winding up process rather than the end." (Law Commission CP159 and Scottish Law Commission DP111, *Partnership Law* at paragraph 6.61)

[33] Counsel submitted that this continued to represent the current law as set out by the Inner House recently in *Sheveleu* v *Brown and Ducker* 2019 SC 149 at paragraphs 35 and 36. The matter did not turn on the continued existence of the partnership. The point is that there is a period of winding up. Self-evidently, if the partners have a statutory authority to continue to bind the firm after dissolution, the firm continues to exist as a legal entity. Dissolution prevented future obligations but did not avoid existing ones. That was the basis on which *IRC* v *Graham's Trs* had been decided. Liability attached because the present claim was a pre-existing liability. We do not accept that submission is correct.

[34] We note that s.38 of the 1890 Act was analysed with considerable erudition by Lord Reed (*Duncan* v *The MFV Marigold*, at [30] and following). While not expressly considering contingent liabilities, the discussion proceeded in relation to necessary continuation of rights in order to complete unfinished transactions (para [31]), not by reference to all possible liabilities. Lord Reed noted that the terms of s.38 were modelled on clause 55 of the original Bill, but more widely expressed. The original clause 55 employed the phrase "so far as may be necessary to settle and liquidate existing demands", which s.38

widened to "so far as may be necessary to wind up the affairs of the partnership". In the present case, had the original wording of clause 55 been adopted, it is readily seen that a contingent demand could not be considered an "existing demand". His Lordship's discussion did not require to consider contingent liabilities. The question is what the effect of the wider wording of s.38 may import. Lord Reed's analysis (para [33]) was that s.38 might be interpreted as stating two alternative purposes for which obligations survive dissolution. The first of these is to wind up the affairs of the partnership. The second is to complete transactions begun but unfinished at the time of dissolution. That analysis is not affected, on Lord Reed's view, by the dicta in *IRC* v *Graham's Trs* and *Lujo Properties*. He later observed that on any view s.38 cannot warrant the continuation of the business for more than a temporary period. The consequence of dissolution is (unless otherwise agreed) that the affairs of the firm must be wound up and the assets distributed in terms of s.44 of the 1890 Act (*Duncan*, para [19], [20]).

[35] While Lord Reed expressed doubts as to the extent of ex-partners' right to enter into new contractual commitments (at para [44]), he accepted that there may be advantages in enabling the business of a dissolved partnership to be carried on during the "twilight" period of winding up, for instance to allow the business to be sold as a going concern (para [43]). His view was that it is necessary to examine the facts in order to determine whether a given transaction arose from the conduct of the business of the dissolved partnership by the former partners for the purpose of winding up the affairs of the partnership, and was "necessary" for that purpose, or whether it was attributable to some other relationship.

Summary of legal effect of dissolution

[36] We consider that the following propositions should be derived from these cases:

[37] A partnership is a legal construct, the nature of which varies amongst different jurisdictions. For example, in Scots law a partnership has separate legal personality, while under the law of England and Wales it does not. There are therefore no natural assumptions to be made about the legal consequences of partnership. Equally, attempting to analyse partnership law by analogy with law as it applies to natural persons, or to limited companies, may be to assume an equivalence which does not exist. The Scottish law of partnership has a number of aspects which are not straightforward (*Duncan* v *The MFV Marigold* at para [13]). For example, an action may be raised against a dissolved partnership. That remedy is necessary before a partnership debt can be enforced against the former partners (*Highland Engineering Ltd* v *Anderson* 1979 SLT 122).

[38] The existence of a partnership does not require registration or any public act. The nature and administrative powers of a partnership can be regulated by the partners. Formation is an act of will. While dissolution of a partnership may be imposed by law in certain circumstances (ss 33 to 35 of the 1890 Act), it is primarily also an act of will. Except where dissolution is imposed by law, ascertaining whether a partnership has dissolved requires inquiry into the intention of the partners. When a dispute arises, the intention of the individual partners is the principal focus of inquiry, and findings in fact must be made. The exercise is an objective exercise in ascertaining subjective intent.

[39] Where the partnership agreement is in writing, the intention of the partners as to when dissolution should occur is discovered by the customary methods of contractual interpretation. If there is no written agreement, or no intention is discernible from any agreement, or from surrounding circumstances, then the 1890 Act, and if necessary the

common law (by s.46 of the 1890 Act), impose certain events of dissolution, including death or bankruptcy of a partner.

[40] The dissolution of the partnership is likely to affect the rights of third parties which have traded with the partnership. Certain protections are afforded against dissolution being abused to avoid liability to those third parties. One such protection is that the former partners have a right and duty to complete transactions begun but unfinished at the time of dissolution (s.38 of the 1890 Act). Otherwise the position would be intolerable (per Lord Reid in *IRC* v *Graham's Trs* at p 21; *Lujo Properties* at p236K).

[41] As a result, the mere fact that some business is transacted by the partners following dissolution does not necessarily prove that the firm was not, in fact, dissolved. The activity may be attributable to the ex-partners observing their post-dissolution duty under s.38. It may alternatively be attributable to the formation of a new partnership amongst the ex-partners (*Duncan* at [43]). These are both consistent with dissolution. Identifying whether, and when, dissolution has occurred is fact-specific in every case.

[42] At common law, if a partnership ceases to exist, the partnership contracts will lapse, in the absence of any effectual contractual provision to the contrary. S.38 does not make the partners party to the partnership contracts.

[43] The application of these principles, as Lord Reed makes clear, is heavily fact-dependent. The immediate questions are, firstly, whether the partnership was dissolved on about 31 March 2010 and if so, secondly, whether s.38 fixes the partnership, or the partners, with liability for the post-dissolution claim by the NHBC. We turn to consider the sheriff's findings on the evidence.

Dissolution of partnership: the evidence

[44] The appellants aver that the partnership was dissolved on 31 March 2010. The NHBC position is that there was no such dissolution. The sheriff found that the partnership was not dissolved, and continues in existence. The appellants submit that the sheriff was plainly wrong in this, and that this finding should be reversed.

[45] Analysing the facts is somewhat hampered by the sheriff's approach. He considered that nothing in the case turned on credibility and reliability. He engaged in limited discussion of the evidence. It was also only a preliminary proof. The following is our understanding of what the sheriff accepted, together with fair inference from the established evidence.

[46] The principal evidence about the status of the appellant partnership was given by the second and third appellants. They are Gavin Henderson and Elliot Henderson, the former partners. Their evidence was partly in affidavit form, partly oral. Transcripts of the oral evidence are lodged.

[47] Gavin Henderson's evidence was that the partnership was formed in late 2005. There were only two partners, himself and Elliot, his father. The partnership agreement was unwritten. Their intention was to run a building construction business. There were sundry projects, and one large development at Priory Bank, Selkirk. The latter was for construction of ten houses, but they built only four. They applied for the partnership to be registered with the NHBC on 12 June 2006. The purpose was to provide the new homeowners with NHBC Buildmark Cover. Plot 4 (the source of the present dispute) was inspected and the Buildmark Certificate issued on 4 April 2008. The partnership thereafter ceased trading due to the downturn in the housing market. Gavin Henderson left in 2008 to find employment in Australia. Although he returned a few months later, the partnership did not resume

operation and was dissolved, he thought, in about 2009 or 2010, before 31 March 2010. Dissolution was discussed on several occasions, and they asked their accountant to assist.

[48] He notified HMRC by letter dated 19 April 2010. VAT registration was cancelled on 16 May 2011. He advised the NHBC by letter of 19 April 2010. The bank account was closed in 2012.

[49] By April 2010 the partnership registration with NHBC had lapsed. However there were two plots (1 and 2) which had been sold by the developer. The plots required a final inspection by the NHBC. The NHBC advised that in order for the final inspection to be carried out the partnership would require to be reinstated to the register, despite having ceased trading. The appellants' office manager (employed by a separate limited company, but performing some duties for the dissolved partnership) sent to the NHBC an email and cheque to allow re-registration. She also sent to the NHBC a letter dated 11 April 2011 advising that the partnership had ceased to trade, and requesting refund of a deposit for undeveloped plots. The deposit was duly refunded. In light of further correspondence, the office manager sent a further email dated 17 February 2012 advising that the partnership had ceased to trade in 2010.

[50] Elliot Henderson's affidavit was consistent with the foregoing. He could not remember the date of dissolution, but trading ceased following the 2008 market crash and did not resume. After Gavin returned from Australia, it was their intention to trade in the family forestry business, and not to return to housebuilding.

[51] Richard Waterfield, the NHBC's recoveries manager, also provided an affidavit. He had no direct involvement, but was aware of certain activities of the appellants. The NHBC's business is to provide warranties and insurance for new build homes. It allows members of the public to purchase with an increased degree of comfort that any problems or

defects which arise after purchase will be resolved. This is particularly advantageous for small housebuilders, as it alleviates the nervousness of the potential buyer. An NHBC-registered builder is required to build to certain standards, and to put right defects when notified. If that is not done, the NHBC is obliged to remedy any defects, and the builder must pay these costs.

[52] The firm was registered, under the 2006 NHBC rules. These rules provide for amendment from time to time. The appellants' registration was due to expire on 1 April 2010. They emailed the appellants on 19 April 2010 to advise of expiry. The appellant firm then renewed thereafter, and paid the fee. Inspection of plots 1 and 2 was carried out in March 2011. The buyers of plot 4 intimated a claim under the Buildmark Policy in April 2011. The NHBC notified the appellants of this claim on 6 May 2011. The appellant firm intimated that they had ceased to trade in 2010.

[53] The firm's accountant, Andrew Wayness, gave evidence that the firm was dissolved on 31 March 2010. The partners gave intimation of intent on 20 April 2009, and instructed accounts to be made up to the year end on 31 March 2010.

[54] The sheriff accepted that many of the post-March 2010 activities by or on behalf of the partners were largely consistent with winding up the business of the firm, and did not prove the partnership had not been dissolved. That is not challenged, and they therefore need not be discussed here in detail. However, the sheriff decided that, nonetheless, the partnership had not been dissolved, and continued in existence. The single episode upon which the sheriff relied for this was the re-registration of the firm for the purposes of the continued protection of the NHBC Buildmark Policy in respect of plots 1 and 2.

[55] That finding is challenged on appeal. We consider that the sheriff erred in the application of the law to the facts, and that his conclusion that the partnership was not dissolved, whether in 2010 or at any other time, cannot be supported.

The sheriff's findings on dissolution

[56] The sheriff treated the question of dissolution primarily as one of analysis of events, rather than giving primacy to the partners' intentions. Having heard evidence from partners and the partnership accountant, he opined that nothing in the case turned on the credibility or reliability of any of the evidence, and that the key facts were not in dispute. Although those witnesses who were involved directly or indirectly with the partnership were unanimous in stating that the partnership had dissolved on some date prior to 31 March 2010 (albeit no specific date was identified), he decided that that this could not be the case, by reference to analysis of subsequent events. The sheriff regarded as particularly significant the fact that, in April 2010, the partners' re-registered the partnership with the NHBC. He viewed this act as going beyond winding up the partnership. This fact alone, in the sheriff's view (para [13]), was entirely inconsistent with the partnership having ceased to exist in March 2010.

[57] In our view, applying *IRC* v *Graham's Trs*, the sheriff erred in two respects. First, his approach gave undue weight to surrounding circumstances, and did not give sufficient, or any, weight to the evidence of the partners and their advisers. Second, his conclusion, that re-registration of the partnership was inconsistent with dissolution, is flawed. We discuss this further below.

[58] The sheriff stated that nothing turned on credibility and reliability of the witness evidence, and accordingly made no finding. There was no dissenting or competing evidence

as to the partners' subjective intentions. There was no suggestion that the evidence was insufficient to prove the appellants' case. The sheriff did not state any reason not to accept the evidence of the partners that, following the housing crash of 2008, they stopped building houses and dissolved the housebuilding firm. The nature of a partnership is that it "subsists between persons carrying on a business in common with a view of profit" (s.1 of the 1890 Act). There was, on our reading, no evidence of any such continuing business or intention to profit after 2008. The sheriff did not doubt or reject the partners' evidence. Their evidence is supported by the firm's accountant. The underlying facts are consistent with the firm ceasing business, and the partners commencing work in an unrelated forestry business. In our view there is strong evidence that the partnership, being a partnership at will, was dissolved at some date in 2008 or 2009, and at the latest by 31 March 2010.

[59] In reaching the opposite conclusion, the sheriff relied on surrounding facts, narrowed down to the re-registration of the partnership with the NHBC, to show that the partnership continued to exist. On the authorities, such an exercise remains nonetheless a specific and objective assessment of the partners' subjective intentions, not merely a general objective assessment.

[60] While the sheriff did accept that other post-March 2010 acts, such as cancellation of a bond, or carrying out remedial work, were consistent with winding up of the partnership affairs post-dissolution, he considered that the act of re-registration was not. The sheriff held that was only attributable to the continued existence of the partnership.

[61] We consider that the sheriff erred in his approach to the evidence, and accordingly that his findings in fact are flawed. He gave insufficient consideration to the will of the partners, or to the continued existence of the house construction business. These are central to whether the partnership has dissolved (ss.32 and 33 of the 1890 Act).

[62] We consider the sheriff erred also as to the legal consequences of dissolution. The sheriff reached the view that a partnership does not cease to exist as a legal entity as at the date of dissolution, albeit that the scope of its activities is curtailed. On the basis of the foregoing cases, that is not a correct statement of the law. *IRC* v *Graham's Trs* is, in our view, clear. A partnership ceases to exist on the date of dissolution.

[63] The errors in law require us to reconsider the factual evidence, to assess whether this court has sufficient evidence available to make alternative findings in fact. We reconsider the evidence in the light of the principles discussed above.

Reassessment of the evidence relating to dissolution

[64] It was submitted on behalf of NHBC that this court could reassess the weight to be given to the evidence if the judge's conclusion was rationally insupportable (*Henderson* v *Foxworth Investments* 2014 SLT 775). In our view, however, reliance on that case is unnecessary, because the sheriff erred not in the assessment of the evidence but on the legal test he applied. He did not focus on the intentions of the partners in relation to dissolution. We require to assess whether there is sufficient material to allow this court to consider the facts. Even in the event that this were correctly regarded as an issue of evidential assessment, we would have found the sheriff to have reached a conclusion which the totality of the evidence did not support, and so was plainly wrong.

[65] In our assessment we have sufficient evidence to make findings. Parties have lodged transcripts of the evidence of the witnesses Wayness (partnership accountant), Gavin Henderson, Elliot Henderson, and an employee of NHBC, together with a joint minute, affidavits and productions. The sheriff's view was that the basic factual evidence

was not in dispute. The sheriff accordingly had no material advantage in assessing the import of the evidence.

[66] The question is whether the appellants discharged the evidential burden of proving that the partnership was dissolved on 31 March 2010, and the consequences.

[67] We refer to the principles already discussed, and note that there is considerable latitude in what activities are capable of amounting to post-dissolution activities authorised by section 38 of the 1890 Act. As noted in *Duncan* v *The MFV Marigold* (above), the scope of s.38 was widened to include activities "so far as may be necessary to wind up the affairs of the partnership". This incorporates two alternative purposes, namely for the ex-partners to wind up the affairs of the partnership, and secondly, to complete transactions begun but unfinished at the time of the dissolution. Lord Reed quoted *IRC* v *Graham's Trs*:

> "But I see no difficulty in holding that [s.38] does require unfinished operations to be completed under the conditions which would have applied if the contract had still existed" (per Lord Reid at p21)

[68] Against that background, we have reviewed the evidence. We consider there is no reason not to accept the unchallenged evidence of the partners as to their own intentions. They intended the partnership to dissolve. We do not consider that one central event on which the sheriff relied, namely the subsequent re-registration of the partnership with the NHBC, disproves that the partnership dissolved on or before 31 March 2010. The reasoning is as follows. As the content and effect of the transcripts and affidavits are not in dispute, we will not set these out at length.

[69] We agree with the sheriff's assessment that the post-2010 activities, other than re-registration, are consistent with post-dissolution winding up of the firm's activities. While there is some evidence of lawyers' letters in 2015 referring to the partnership, this is

unaccompanied by any evidence of actual partnership activity. It is explicable by mis-statement by the lawyers, who were not witnesses, and is of limited evidential value.

[70] Although there was some reference to subsequent remedial building work carried out by the partners, the sheriff was unable to make any finding in fact about this (para [15]) and we have not placed significant weight on this. In our view it is neutral, and consistent with completion of unfinished operations.

[71] We have set out above the nature of the partners' evidence, and that of the firm accountant. There is no competing evidence, and no identifiable difficulty with credibility and reliability. It is internally consistent, and also with the surrounding evidence of a firm which no longer had any reason or desire to trade.

[72] We do not attribute any legal significance to the event of re-registration which was central to the sheriff's analysis. There are, in our view, several factors which tend to demonstrate that re-registration was a permitted action under s.38. The first factor is that this was not a new registration, but a continuation of the status quo which had been allowed to lapse.

[73] The second factor is that no witness claimed, and there was no other evidence, that this act was attributable to continued housebuilding activity, or intent to do so, on the part of the partnership. The sale of plots 1 and 2 was being carried out by the developer, not by the appellants. It is not evidence either of intention to continue the partnership, or of a continued adventure or undertaking. The construction undertaking was unarguably at an end.

[74] The third factor is that there is a clear rationale for re-registering which is independent of any continued existence of the partnership, namely the need to effect the sale of the two remaining house plots 1 and 2. As Mr Waterfield's evidence stated, NHBC

Buildmark Cover is particularly advantageous for small housebuilders, as it alleviates the nervousness of potential buyers. On that evidence, such re-registration by the appellant firm is consistent with ensuring the domestic purchasers were sufficiently reassured to proceed with the purchase of plots 1 and 2. That is not an act of trading as a partnership, but of completing the partnership's pre-dissolution business of building houses at Priory Bank, Selkirk for sale. It falls within the acts "necessary…to complete transactions begun but unfinished at the time of the dissolution", not in relation to plot 4 which had already been sold in 2008, but in relation to plots 1 and 2 which remained unsold.

[75] Accordingly, in our view the act of re-registration does not bear the single implication attributed to it. Not only does re-registration not demonstrate a continuing partnership, it is in fact more consistent with post-dissolution duties than with continued existence of the partnership. It is equivalent to the example of the half built bridge referred to in *IRC* v *Graham's Trs*.

[76] The remainder of the evidence we regard, as did the sheriff, as neutral, and certainly insufficient to disprove the uncontradicted evidence of the partners. We find in fact and law that the partnership was dissolved on or before 31 March 2010. We are unable to identify a specific date, the witnesses being uncertain, but 31 March 2010 is the latest possible date.

Substitute findings in fact about dissolution

[77] For these reasons, we will alter the findings in fact in the following terms:

[78] First, by adding at the end of existing finding in fact 18: "Any such suggestion, were it made, was in error of fact".

[79] Second, by adding further findings in fact as follows:

> "20. In 2008 the market for newbuild dwelling houses crashed. The partnership did not perform any building activities after 2008. There was no continued partnership venture or undertaking after 2008. Gavin Henderson went to Australia to find work. On his return, he and Elliott Henderson formed the intention to work in forestry.
>
> 21. On an unidentified date in late 2009 the partners resolved, following discussion, to dissolve the partnership. They instructed Andrew Wayness, the firm accountant, to dissolve the partnership formally. Mr Wayness drew up accounts to the end of the financial year on 31 March 2010. He informed HMRC that the partnership was dissolved on that date.
>
> 22. Following dissolution the partners corresponded with their bank and HMRC and arranged for the partnership to be re-registered with the pursuer. All these post-dissolution activities were necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of dissolution."

[80] Third, by deleting the existing findings in law and substituting: "1. The partnership was dissolved by agreement of the partners on or before 31 March 2010."

[81] The subject of this action, and of this appeal, is what effect such dissolution had on any obligations the partnership may have had under the NHBC Rules.

The effect of dissolution on the NHBC contract: the basis of liability

[82] The sheriff considered that the partnership was still in existence and did not consider the contract further. As we have found the partnership to have been dissolved, it is then necessary to consider the question of liability of the partnership, and of the partners, under the present contract.

[83] The NHBC set out the route to liability in article 1 of condescendence. They regard the partnership as extant, not dissolved, but if the latter then liability still attaches to the partners. Such liability is based on section 38 of the 1890 Act, for obligations of the partnership until winding up was completed.

[84] The NHBC avers that the appellants were, at the date of claimed dissolution, aware of claims by the purchasers, that if left unresolved the claims would be pursued against the

NHBC, and accordingly that "there existed potential liability" under the 2011 Rules. The appellants were obliged to perform the repair obligations, and in the absence of performance could not be formally wound up. They were not entitled to wind up the partnership for improper purposes, and such dissolution would be of no effect.

[85] We note that this last argument, that dissolution was of no effect if there were outstanding obligations, was not made before the sheriff or discussed by him, possibly because this did not form part of the preliminary proof. It was not made on appeal.

[86] The NHBC refers to the obligation to meet construction standards (Rule 10) and the obligation to repay NHBC on demand various costs (Rules 27(i) and 28). The construction standards were breached and the appellants did not carry out remedial works. The appellants, in May 2011, intimated to the purchasers that they had ceased trading and would not carry out any remedial works. The appellants were advised of what works were required by Investigation Report dated 27 June 2011. The NHBC exercised their step-in rights under Rule 27(d), and carried out the necessary remedial work. The claim is made under Rule 27(i) and Rule 28(h) of the 2011 Rules, which require payment on demand. Such demands were made on 30 June 2015 and 4 January 2018. Such demands did not constitute new obligations assumed by the partnership after the purported dissolution. The appellants are jointly and severally liable to make payment. The appellants refute this case.

Liability of the partnership

[87] The partnership is party to the contract, but the partners are not. The partnership was dissolved on or before 31 March 2010. The NHBC case is founded on demands for payment made in 2015 and 2018. There is no party to the contract against which a claim can be raised.

[88] For liability to arise, the NHBC would require to show either that the partnership had continuing existence beyond 2010, notwithstanding dissolution, or alternatively that the obligation had some type of existence prior to the date of dissolution. The pleadings hint at both cases.

[89] In relation to the partnership continuing to exist beyond dissolution, we have already rejected this case. The NHBC relies on s.38 of the 1890 Act. The inference is that dissolution creates a period of winding up of the firm's affairs, during which a claim can be raised. The NHBC submission accepted that the effect of dissolution does not alter existing obligations but did prevent the binding of the firm to future obligations. That is fatal to this argument - there was no partnership against which to make the payment demands of 2015 and 2018. New claims cannot be raised against the partnership after dissolution.

[90] The alternative route to liability is that the claims in 2015 and 2018 were not new claims, but related to obligations which pre-exist the dissolution in 2010. The NHBC submission was that the partnership agreed contractual obligations, in the context of the NHBC Buildmark Cover, which involved exposure to remediation claims for a period of 10 years. One such obligation was the contingent obligation to make payment (Rule 27(i)) which was conditional on a demand for payment.

[91] We do not accept this analysis either. In our view, the obligation to make payment did not exist prior to demand being made. The NHBC averments referring to underlying obligations to carry out remedial work, and the knowledge by the partners of a potential claim, have served to obscure the basis of the claim. The appellants' case placed considerable reliance on the unclear nature of the claim. We consider that prior to the demand notices, there was no claim, monetary or otherwise, by NHBC against the appellants. The existence of potential liability, or contingent liability, or even knowledge of

a likely claim, are not equivalent to a demand for payment, and do not trigger any obligation. It could not be otherwise. Prior to March 2010 the partnership could not know that a sum was payable, what the quantum might be, or why it was payable. For example, the NHBC Investigation Report was the first detailed intimation of remediation works, but was served almost 15 months following the date of dissolution. Even then it was not a claim for payment under Rule 27(i). Even had the former partners wished to settle claims during the winding up, they would have had no means of identifying the nature or quantum of the NHBC claim. The fact that the partnership was subject to contingent contract terms does not by itself create a liability. At the date of dissolution, they had no means of knowing if the contingency would ever arise.

[92] In relation to on-demand obligations, the NHBC submissions placed reliance on *Royal Bank of Scotland* v *Brown* 1982 SC 89. Where an obligation is conditional on a demand being made, the demand is a condition suspensive of the obligation becoming enforceable. That case addressed the situation where an enforceable obligation arose prior to the date of liquidation of a company, and whether demand upon the guarantors was necessary before the obligation to pay arose. It was held that the cautionary obligation arose prior to liquidation, and that it was not payable until demand was made. The NHBC sought by analogy to show that the contractual obligation of the appellants to make payment was an obligation which subsisted prior to any dissolution.

[93] We do not consider that *Royal Bank of Scotland* assists the NHBC case. In that case, there was an existing, constituted, pre-liquidation right to claim against the guarantors. It just had not been enforced prior to liquidation. In the present case, there was no existing, constituted right to enforce payment prior to dissolution, as no demand had been made at that point. The NHBC could not claim under Rule 27(i) until it had stepped in and carried

out works. Those events were not complete until long after dissolution of the partnership. Prior to dissolution the NHBC rights under the contract were hypothetical only. There was no uncompleted transaction.

[94] Accordingly, no direct claim is available against the partnership. It was not in existence when payment was demanded, and there was no established liability which pre-dated the dissolution. The NHBC case is not assisted by s.38 of the 1890 Act, because payment of the demands was not necessary to wind up of the affairs of the partnership, and nor did it form part of any uncompleted transaction (in the sense of "unfinished operations" per Lord Reid in *IRC* v *Graham's Trs*) begun but unfinished with NHBC. At the date of dissolution, the partnership did not know that a claim by the purchaser against the NHBC, or by the NHBC against the partnership, would be made. There was no operation or transaction to complete.

[95] In our view, the critical question is whether the present claim is based on a liability which was constituted and enforceable against the partnership by the NHBC immediately prior to dissolution. In our view, it was not. s.38 of the 1890 Act does not operate to make it so.

Liability of the partners

[96] For completeness, it is necessary to consider whether the partners can be convened independently from the partnership.

[97] As individual liability is largely dependent on liability being established against the partnership (see *Highland Engineering Ltd* v *Anderson* 1979 SLT 122 at 123-124 per Lord Grieve) the foregoing points are equally available in defence of the partners.

[98] Both parties refer to section 9 of the 1890 Act, which provides: "Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner …"

[99] The NHBC position is that the obligation to make payment on demand is an obligation of the partnership which was incurred whilst the second and third defenders were partners of the firm for the purposes of section 9 of the 1890 Act. The firm has not been wound up because it has obligations that are extant. The appellants are required, therefore, to constitute the debt against the firm before seeking to recover the payment from the partners personally. They are the only partners of the firm, so this action has been constituted against the firm and the whole of the partners of the firm. The second and third defenders are personally liable for the obligation and are required to make payment to the pursuer as sought on record.

[100] In our view, this argument proceeds on the same errors as to dissolution and the constitution of the obligations. The obligation was to make payment on demand, and no such obligation was triggered while the appellant partners were partners in the firm. No demand for payment was made, so no obligation to pay existed. Their partnership ended when they decided to end it, namely upon dissolution. The obligation to pay on demand, in its uncrystallised form, was neither a debt nor an obligation. The obligation was incapable of being identified or obtempered at any time prior to dissolution.

[101] In relation to dissolution, section 9 creates liability for firm debts "while a partner". But if there is no firm, there can be no partners, only former partners. The firm does not exist after dissolution. A subsequent liability, created after dissolution, is not part of the affairs which need winding up, nor is it an incomplete transaction.

Disposal

[102] The appeal will therefore be allowed. No further grounds of action remain, so we will grant the appellants' motion, recall the interlocutors of the sheriff, sustain the appellants' fourth plea-in-law and dismiss the action. Parties should please attempt to agree matters of expenses, failing which they should contact the clerk for further procedure.