Partnership law in Ireland

Contents **Page**

Introduction

Partnerships are an important part of business life in Ireland. The law on partnership in Ireland is governed by the Partnership Act 1890. It was enacted as law in Ireland on 14 August 1890. The provisions of the act have not been subjected to any substantive revision or amendment since its enactment, and it remains the primary source of legislation when examining issues of partnership in Ireland. It has been suggested that the act does not reflect the modern realities of partnerships; the existing legislation has been amended on a piecemeal basis since then.

In the absence of a partnership agreement being entered into by partners, the provisions of the act will apply by default. Unless another legal form is established, partnership is therefore the default form of the legal relationship between two or more persons who carry on business together with a view to making a profit, the profit motive being an essential element of the definition of partnership.

The consequences of entering into a partnership are that each partner is jointly liable for the debts and obligations of the partnership, and for any loss or injury caused to any third party by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership. Unlike companies, partnerships do not have a separate legal personality.

This article will look at relevant sections of the act and explain their purpose and intent, and will look at how the courts interpret its provisions. We will also examine whether the provisions can be overruled by the terms of a partnership agreement.

The definition of what is a partnership under the act has caused some confusion from time to time, and we will look at a number of cases in both Ireland and England to outline its meaning.

What is a partnership?

> *"The difficulty whether a man is a partner or not has been of frequent occurrence and there are few questions of law on which there has been a greater diversity of judicial opinion".*
> Per Gibson J in Cullimore v Savage South Africa [1903] 2 IR 589.

As Judge Michael Twomey, in his book *Twomey on Partnership* (Bloomsbury, 2nd edition), puts it: "*despite these rather ominous words from Gibson J*", we will "*attempt to clarify the approach to determining whether partnership exists in particular case*".
In determining whether a partnership exists in Ireland, we need to look at section 1(1) and 2 of the 1890 act. Section 1(1) states that:

> "*Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."*

Twomey states that each of its six components must be satisfied for a partnership to exist: (1) the relationship (2) which subsists between persons (3) carrying on (4) a business (5) in common (6) with a view of profit.

Whenever two or more people carry on any form of business together with a view to profit but without incorporating as a limited company, they therefore, in law, form a partnership, even where this may not have been intended. This makes partnerships a very common form of business arrangement in Ireland, be they small, informal relationships where the parties may not actually realise they are partners in law, or more formal partnership agreements, eg between members of large, professional firms such as solicitors and accountants. It must consist of at least two persons and there is normally a maximum of 20.

Limits on the number of partners

Otherwise, no general partnership consisting of more than 20 persons may be legally formed for the purpose of carrying on any business that has for its object the acquisition of gain by the partnership or by the individual members thereof (Companies Act 2014, section 1435(1)). The foregoing restriction does not apply to partnerships of qualified accountants where each partner is a statutory auditor (Companies Act 2014, section 1435(1)(c)(i)), or to partnerships of solicitors where each partner is a solicitor (Companies Act 2014, section 1435(1)(c)(ii)). (The Legal Services Regulation Act 2015 provides for the future operation of multidisciplinary practices (MDP): a partnership formed under Irish law by written agreement by two or more individuals where at least one of them is a legal practitioner. The purpose of the MDP must be the provision of legal services and other services.)

The limitation on partnership numbers does not apply to partnerships set up for the purposes of carrying on or promoting the business of thoroughbred horse breeding (Companies Act 2014, section 1435 (1) (c) (iii)) and the number of partners in a banking partnership is restricted to 10 (Companies Act 2014, section 1436).

Determining if a partnership exists

Section 2 of the 1890 act sets out eight rules that determine whether a partnership exists in a particular case. This article will firstly deal with section 1(1) before turning to section 2 of the act.

Section 2 of the 1890 act sets out that in determining whether a partnership does or does not exist, regard is to be had to the following rules:

1. Joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof. In the case of Re Christie [1917] I IR 17, two brothers were co-owners in a farm. It was accepted by O'Connor MR that the two brothers who owned and worked the family farm in County Antrim and who supported themselves with the profits were partners in the farming stock and profits. This was accepted rather than decided by O'Connor MR as it does not appear to have been contested by the parties in that case.
2. The sharing of gross returns or profits does not of itself create a partnership, whether the people sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are obtained.
3. The receipt by a person of a share of the profits of a business is prima facie evidence that they are a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make them a partner in the business.

In the absence of a clear decision at the outset, it can sometimes be difficult to determine whether or not partnership came into being. This can be seen from the case of O'Kelly v Darragh [1986] IR 355. Both individuals shared the profits of an endocrine research business in a Dublin hospital providing testing and analysis services to drug companies. The plaintiff supervised the day-to-day running of the business while the defendant played no active part in the business. They divided the profits between them. When the plaintiff was dismissed by the defendant due to his continued absence from the business, he brought an action for a share of the profits on the basis that he had been a partner. Carroll J noted that the sharing of profits was prima facie evidence of partnership, but that this did not of itself make the relationship a partnership. While the plaintiff was a cosignatory in the bank account for the business, he was not involved in or responsible for getting funds for the continued operation of the business, nor in going out to get contract work for the business. In addition, there had never been a discussion of partnership between the plaintiff and the defendant, and there had never been a discussion of whether the plaintiff would have any personal liability if the contract work did not actually make a profit. On that basis, Carrol J held that although the plaintiff was entitled to a share of profits in the business, he was entitled to them as an employee, not as a partner.

Another case concerning the question of whether the relationship was a partnership or not was the case of DPP v McLoughlin [1986] IR 355. In this case, the defendant was prosecuted for failure to file employee returns with the Revenue Commissioners. The case concerned the legal relationship between the skipper/owner of a fishing trawler and his five crew members. They participated in regular fishing expeditions, though each weekly voyage was an entirely separate venture. No crewmember had a contract that entitled them to take part in any subsequent voyage. The crew members were not required to contribute to any loss that might result from any individual voyage. They were not paid any wages but were entitled to a share in the net profits of the individual fishing expedition. If there was no profit in the catch, the crew received no money but if circumstances necessitated it, the skipper would dispense "subs" to crew members who had particular cashflow difficulties. These were treated in the nature of advances against future share of profits. The skipper exercised the large measure of control over the manner in which each crewmember performed their individual work but this arose as much through the nature of the work as any contractual relationship. Costello J observed that the receiver's share of the profits was prima facie evidence of the existence of a partnership, and he held that the relationship between skipper and crew was not that of employer/employee but that of partnership. Of particular significance was the fact that the skipper did not determine the rate of remuneration.

The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make them a partner in the business or liable as such, as was illustrated in the case of Re Borthwick (1875) ILTR 155. Kirkpatrick advanced £800 to Borthwick. Borthwick spent this money on products for the business. In return, Kirkpatrick would receive interest on this loan as well as half the profits from the sale of the products. The court found, considering all the relevant facts, that Kirkpatrick, although the recipient of a debt out of the profits of Borthwick's business, was not his partner.

A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such. In Greenham v Gray (1855) 4LR 501 Ir C, the court held that the plaintiff was a partner on the basis that he managed the mill and in return he received a wage and a share of the profits. The agreement between the parties provided that the defendant was to fund the mill in which the business was to be run, while the plaintiff was to have internal control and management of the business and was not to engage in any other trade or business. The plaintiff claimed a share of the profits in the enterprise on the grounds that he was a partner or the defendant alleged that the relationship was one of employer/employee. Greene B held that certain following factors were inconsistent with the relationship of employer/employee, or, to use the language of the day, "*master and servant*". Instead, he held that the parties were partners as "all the clauses taken together prove that it was the intention of the parties to carry on trade together". The factors considered relevant were:

(i) The plaintiff is to have the entire control and management of the business
(ii) Accounts were to be tendered to both the plaintiff and the defendant; the plaintiff was to be paid a salary and one-fifth of profits
(iii) The plaintiff was in no way subordinate to the defendant and each was to have a say in the possible extension of the business.

A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such.

The advance of money by way of loan to a person about to engage in business or carrying on a business, on the basis that the lender is to receive a rate of interest varying with the profits or is to receive a share of the profits arising from the carrying on of the business, does not make the lender a partner of the person carrying on the business.

Provided that the contract is in writing, and signed by or on behalf of all the parties thereto, a person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by them of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

Salaried v equity partners in professional practices

An issue that has exercised courts on an ongoing basis has been the existence and the determination of the status of what are referred to as salaried partners. A salaried partner is, in essence, an employee who is "held out" or marketed by a firm as a partner and is generally paid a salary as remuneration. There is obviously an important distinction between equity partnership, whereby the equity partner is a self-employed person and is taxed under Schedule D, and salaried partnership, where the salaried partner is an employee paid under the PAYE system who enjoys the benefit of employee rights (such as rights to redundancy, maternity leave etc) and in respect of whom the partnership must, for example, make employer pay related social insurance (PRSI) contributions.

The concept of a self-employed "junior partner" has also developed in professional firms, where the partner will receive a fixed amount each year that is grossed up so that the relevant partner appears to be self-employed but in reality is not entitled to a profit share – also known as a "fixed-share partner".

The basis of partnership in contract

It is clear that the partnership must be based on contract. A formal document is not necessary to create a partnership. There may be an implied partnership resulting from the acts of the parties: see Greenham v Gray [1855] 4 ICLR 501 above. The rights of partners, between themselves, are governed by the partnership agreement or contract or the deed of partnership or partnership articles, if any. Where members of a partnership set up business under the aegis of a company, the company has its own legal personality with its own rights and duties, together with the rights and duties of shareholders: Bayworld Investments v McMahon and Others [2003 HC] FL 8051. However, provision has been made to extend employment equality legislation to partnerships: Employment Equality Act 1998 s.13A inserted by Equality Act 2004 s.7.

In the case of DPP v McLoughlin [1986] IR 355 referenced above, Judge Costello stated in determining the existence of a partnership:

> *"Regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case."*

It is clear from Irish jurisprudence and case law that there is no requirement that a contract be in writing. In the case of Crowley v O'Sullivan (No 2), [1900] 2 IR 478, the parties had drawn up heads of agreement (which had not been signed) for the purchase of a shop in Bantry, Co Cork and its operation by them as partners. The High Court was happy to hold that an oral partnership agreement existed between the partners despite the defendant refusing to sign a heads of agreement, and damages were awarded against the defendant.

In AIB plc V Higgins and others [2010] IEHC 219, no written partnership agreement existed between four individuals who had formed a partnership to purchase lands. The court found a partnership existed.

Exceptions to the rule that a partnership may exist without a written agreement

There are certain exceptions to the rule that a partnership may exist without a written agreement. Judge Twomey, in his book, states:

> "*In the case of both registered farm partnerships and registered succession farm partnerships the partnership must be in writing. Investment limited partnerships are also*

required to have a written partnership agreement in place. Legal partnerships and multi-disciplinary practices will also be required to have written partnership agreements in place."

What relationships cannot be a partnership?

It is clear that, for a partnership to exist, the contractual relationship referred to in Section 1(1) of the 1890 act must subsist between the persons. Section 1(2) of the act goes on to state that there are certain relationships between persons that cannot be partnerships and these include:

1. *"A company registered as a company under the Companies Act 1862 or any other act of parliament for the time being in force and relating to the registration of joint stock companies or*
2. *Formed or incorporated by or in pursuance of any other act of parliament or letters patent or royal charter or*
3. *A company engaged in working mines within and subject to the jurisdiction of the Stannaries".*

The essential requirement to be carrying on business in common with others

To constitute a partnership, section 1(1) of the 1890 act requires the parties to be carrying on a business together, with the essential requirement that it be with a view to making a profit. Section 45 of the act defines business as including every trade, occupation or profession. Because of the requirement that the parties be varying on business, it follows that a partnership will not be deemed to exist if the parties have simply agreed to become partners but have done nothing more.

In Macken v Revenue Commissioners [1962] IR 302, an oral agreement to enter partnership was reached between a father and his two children in September 1953. This oral agreement dealt with such matters as the proportions in which profit, losses, assets and liabilities were to be shared and the trading name of the firm. The court held a partnership did not come into existence until April 1954, since the parties only commenced carrying on business at that time. Furthermore, a conditional agreement for partnership does not constitute the carrying on of business and the parties thereto will not be partners, as per Milliken v Milliken (1835) 8 Ir Eq R 16. In this particular case, an agreement between Mrs Milliken, Mr Grant and Mr Bolton provided that Mrs Milliken's son was to replace his mother as a partner in the firm, after a period of three years, if his conduct was to the "reasonable satisfaction" of Mr Grant and Mr Bolton. Before the end of the third year, Grant and Bolton decided to dissolve the firm and Mr Milliken took an action seeking to prevent the dissolution on the basis that he was entitled to become a partner. Blackburne MR held that the use of the words “reasonable satisfaction” indicated that it was completely within the discretion of Grant and Bolton as to whether or not to admit Mr Milliken to the firm:

> *“There is, perhaps, no subject on which a man might more reasonably reserve to himself the unlimited right of judging and acting for himself, than a contract for future partnership with a young and inexperienced man.”*

The essential requirement to have a view to profit

In order for a partnership to exist, the relationship between the parties must be one that is with a view to profit. There have been numerous cases to date in Ireland that have set out that a partnership cannot be established simply to make a loss. Furthermore, it is evident that a partnership must be able to show that the partners contemplated that a profit would be made arising out of the partnership. This was seen in the case of McCarthaigh v Daly [1985] IR 73, III ITR 253. A partnership was created in relation to the Metropole Hotel in Cork solely for the purposes of the creation of a loss for use by an individual against his income tax liability. The court held that this partnership was created merely to create a loss against income tax liability and not with a view to making a profit.

The case of Inspector of Taxes v Cafolla & Co [1949] IR 210 considered a partnership in which one partner had effective control over the business. Mr Cafolla, who had run the business as a sole trader in a chain of fast-food restaurants in O’Connell Street and Capel Street in Dublin, decided to form a partnership with his sons in order to benefit from the tax-free allowances of his children and in this way reduce the overall tax bill. (This was before the provisions of the Taxes Consolidation Act 1997, section 794, 795 and 798 came into existence.) The Revenue Commissioners claimed unsuccessfully that in these circumstances the income of the partnership should be deemed to be the income of Mr Cafolla. The question as to the existence of a partnership was determined by confirming that a valid partnership existed. Murnaghan J, in delivering the Supreme Court judgment, noted:

> “*It is now, I think, settled that it is not material whether Joseph Cafolla entered into the partnership deed with the intention of evading tax liability. So long as the agreement entered into by him was a genuine and real transaction, it must have its due legal effect in respect of liability for income tax.*”

(However, it is important to note that the mutual agency that should exist between partners was absent, as only Mr Cafolla was entitled to enter into contracts on behalf of the firm. For this reason, it has been suggested that this decision should not be followed insofar as it treats such a partnership as valid.)

Following on from these cases, it is important that the parties to a partnership are able to demonstrate some contemplation that a profit would be derived from the carrying on of the business of the partnership.

The requirement to be carrying on business in common

The final requirement of the definition of a partnership is that the parties be acting in common. Judge Twomey states that, in general terms, parties will be acting in common where they have a community of interest in the business in question or, in other words, are co-owners of the business. The courts have looked at a number of factors in determining whether there is sufficient community or interest for the parties to be held to be carrying on a business in common. An example of this can be seen in the case of Greenham v Gray (1855) 4 Ir CLR 501, referenced above, where it was held that the parties were carrying on business in common where:

1. The plaintiff was to have the entire control and management of the business
2. Accounts were to be tendered to both the plaintiff and the defendant
3. The plaintiff was to be paid a salary and one-fifth of the profits
4. The plaintiff was in no way subordinate to the defendant, and
5. Each was to have a say in the possible extension of the business.

Limited liability partnerships

Generally, partners have unlimited liability, meaning they are fully and jointly and severally liable for all the debts of the partnership.

The Limited Partnership Act 1907 (the 1907 act) facilitates the creation of a partnership in which some members have limited liability for the debts of the firm. The 1907 act came into effect on 1 January 1908. As with a general partnership, a limited partnership is not a separate legal entity. Limited partners must make a capital contribution to the partnership and their liability is limited by the 1907 act to the extent of the amount of capital contributed by them to the partnership. There must be at least one general partner with unlimited liability. The general partner may be an individual or a company. Limited partners may not be a part of the management of the firm and if they do so they are liable as if a general partner. A limited partnership does not have a separate legal personality. Limited partnerships are tax transparent; that is, the partnership is not taxable. Limited partnerships are generally not required to file accounts.

The partnership should consist of no more than 20 persons unless it is a banking partnership, in which case a maximum limit of 10 persons applies, unless it is an investment and loan finance partnership (Companies Act 2014 Section 1435(1)(c)(iv)), in which case an upper limit of 50 persons applies. The general partner(s) is/are liable for all the debts and obligations of the firm. The limited partners contribute a stated amount of capital to the firm and are not liable for the debts of the partnership beyond the amount contributed. A limited partnership must be registered with the Companies Registration Office (CRO) and in accordance with the 1907 act; otherwise, the partnership is a general partnership, which is governed by the 1890 act and by common law. If a limited partnership is not registered as required by the 1907 act, the limited partner(s) is/are deemed by law to be general partner(s), and so are liable for all the debts and obligations of the firm. The list of registered limited partnerships is publicly available on the CRO website. There are more than 2,500 limited partnerships listed on the register. There are additional requirements as part of the registration process where the general partner is a non-EEA national and where the general partner or limited partner is a company that is not registered on the Irish register of companies.

Changes in registration details should be notified to the Registrar within seven days, including changes in firm name, general nature of business, principal place of business and the name of any partner. Failure to do so is subject to a fine on summary conviction under the act. It is an offence under the act to make a false statement for the purposes of registration of a limited partnership. A limited partnership being deemed a general partnership is another consequence of failure to adhere to the rules on registration.

The 1907 act requires that, among other things, the register shows the principal place of business for the limited partnership. There is also a requirement for the limited partnership to inform the Registrar of Companies of changes to the details of the partnership, including the place of business on the register, within seven days. However, there is no requirement under the act to make an annual return to the Registrar, nor is a limited partnership required to have a registered office in the state.

In general, limited partnerships are not required to file accounts except where the general partner is a limited company. In this case, limited partnerships must file accounts for the partnership with the CRO (S.I. No. 396/1993 – European Communities (Accounts) Regulations, 1993). Depending on the size of the limited partnership, accounts are required to be audited.

Liability of a partner in a limited liability partnership of solicitors registered under the Legal Services Regulation Act 2015

Partnerships of solicitors registered with the Law Society of Ireland may apply to the Legal Services Regulatory Authority (LSRA) for authorisation to operate as limited liability partnerships (LLPs). All partners listed on the LSRA's Register of Limited Liability Partnerships are provided with limited liability and their personal assets are protected from the negligence of other partners. Unlike other forms of LLPs, in the case of a registered LLP in respect of solicitors under the 2015 act, there is no general partner with unlimited liability. Partners in an LLP may still be held liable for liabilities arising from their own acts of fraud, dishonesty, misconduct or criminality.

Section 123(1) of the 2015 act stipulates that a partner in a limited liability partnership shall not, by reason only of his or her being a partner or being held out as being a partner in that partnership, be personally liable directly or indirectly, by way of contribution or otherwise, for any debts, obligations or liabilities arising in contract, tort or otherwise of (a) the LLP, (b) himself or herself, (c) any other partner in that limited liability partnership, or (d) any employee, agent or representative of that LLP.

Section 123(1) does not apply to a partner in an LLP to the extent that (a) the debt, obligation or liability referred to in that subsection is incurred as a result of an act or omission of the partner involving fraud or dishonesty, and (b) that act or omission (i) was the subject of a finding of misconduct under Part 6 of the 2015 act, or (ii) constituted an offence of which the partner was convicted.

Furthermore, section 123(1) does not affect the liability of an LLP partner in respect of a debt, obligation or liability incurred by that partner for a purpose not connected with the carrying on of the business of the LLP.

Also, section 123(1) does not apply to an LLP partner to the extent that the debt or obligation referred to in that subsection relates to any tax (within the meaning of section 960A of the Taxes Consolidation Act 1997).

Finally, section 123(1) does not affect the personal liability of an LLP partner for any debt, obligation or liability referred to in that subsection where the debt, obligation or liability was incurred by reason of an act or omission of the partner that occurred prior to the date of authorisation from the LSRA to operate as an LLP, notified under section 125(6) .

The 1890 act applies to LLPs to the extent that it is not inconsistent with the provisions of the 2015 act.

The business name of the firm/partnership

The Registration of Business Names Act 1963 requires a partnership to register a business name where the firm carries on business under a business name that does not consist of the true surnames of all partners who are individuals and the corporate names of all partners that are bodies corporate without any addition other than the forenames of the individual partners or initials of such forenames. The use by two partners (A and B) of the business name “AB & Company” or “AB & Co” requires registration as there is an addition to the names of the partners. If a limited partnership registers under the 1907 act using a business name, the partnership is also required to register that business name under the 1963 act. The requirement is to furnish particulars to the Registrar of Business Names (Postal address: The Companies Registration Office, O’Brien Road, Carlow R93 E920) within one month after the adoption of that name. The Minister for Enterprise, Trade and Employment may refuse to permit the registration of any name that, in their opinion, is undesirable. There is an appeal to the High Court against such refusal.

Who can be members of a partnership?

A general partnership can consist of natural persons, bodies corporate or a combination of both. Unlike an incorporated company, a partnership does not have a separate legal entity to that of the partners. Therefore, general partners have unlimited liability, meaning that they are liable for the full debts of the partnership.

As partnerships do not have any legal personality, this also means that the partnership cannot own property, as it is instead owned by the individual partners as a group (or by some as trustee(s) for all).

A partnership may be sued in the firm name or in the name of the individual partners.

Issues can arise in relation to the question of capacity in law, to be a partner.

1. Minors: A minor is defined as someone under the age of 18 unless they are married. It is clear that a minor may be a partner. However, it must be noted that, where a minor becomes a partner, the firm is liable for the actions of the minor. The minor, however, will not be liable to any partners or third parties, nor will they be liable for the acts of the other partners while they are a minor. In the case of Shannon v Bradstreet (1803) 1 Sch & Lef 52, Redesdale LC said:

"*It is the peculiar privilege of infants for their protection, that though they are not bound, yet those who enter into contracts with them shall be bound, if it be prejudicial to the infant to rescind the contract.*"

Furthermore, any contract entered into by a minor will be voidable at the instance of the minor or within a reasonable time after they attain majority. In the UK House of Lords case of Lovell and Christmas V Beauchamp [1894] AC 607, Lord Herschell noted that:

"*I think that it is clear that there is nothing to prevent an infant trading, or becoming a partner with a trader, and until his contract partnership be dis-affirmed he is a member of the trading firm.*"

2. Companies: a company is a legal person for the purposes of section 1(1) of the 1890 act and therefore may be a member of a partnership. In determining whether a company can enter a partnership, regard must be had to the clauses in the constitution of that company.

3. Persons who require assistance in exercising their decision-making capacity, or who lack the capacity to make partnership-related decisions, may validly enter a partnership, provided their partners act bona fide and are unaware of their incapacity. It follows that where a person enters a partnership and subsequently becomes mentally incapacitated, this does not per se dissolve the partnership. In Re Ferrar, ex p Ulster Banking Xo (1859) 9 Ir Ch R 11, Ulster Bank sought to prove upon the joint estate between Simms and Ferrar. During the course of the partnership, Simms had become of unsound mind, yet the judge did not regard this fact as sufficient to dissolve the partnership. In effect, rather than dissolving the partnership, the mental incapacity of the partner rendered the partner a dormant partner. Judge Twomey states that the Assisted Decision-Making Capacity Act 2015 may change this. It is, of course, open to the other partners to apply to the court under section 35 (a) of the 1890 act for an order to dissolve the partnership on the grounds that a co-partner is mentally incapacitated.

4. Bankrupts, arranging debtors and insolvency debtors. The only reference to bankruptcy in the 1890 act is in section 33(1), which provides that a partnership is dissolved on the bankruptcy of a partner, unless the partners have agreed otherwise. There is no express prohibition in the 1890 act on a bankrupt becoming a partner in a firm and it is implicit in section 33(1) that a bankrupt may enter a partnership. However, the wide-ranging restrictions on a bankrupt and on an arranging debtor in section 129 of the Bankruptcy Act 1988 will, in most cases, be effective as a prohibition on their entering into partnership. Section 129 of the Bankruptcy Act 1988 stipulates that a bankrupt or an arranging debtor

who (a) either alone or jointly with any other person obtains credit to the extent of €650 or upwards from any person without informing that person that they are a bankrupt or an arranging debtor, or (b) engages in any trade or business under a name other than that under which they were adjudicated bankrupt or granted protection without disclosing to all persons with whom they enter into any business transactions the name under which they were so adjudicated or granted protection, shall be guilty of an offence.

5. Convicts: The Criminal Law Act 1997 allows for a convict to enter into a partnership agreement.

Types of partnerships

For the purposes of this article, we do not intend to go into details about the types of partnerships that can be created in Ireland. However, there are a number of types of partnerships that can be created. These include:

1. Partnership at will and formal partnerships
2. Partnership by deed, by agreement or orally
3. Sub-partnerships
4. Group partnerships
5. Parallel partnerships
6. Firms with partners in common
7. Corporate partnerships
8. Quasi partnerships
9. Registered farm partnerships and registered succession farm partnerships.

Liability of a partner for the acts of their partners

The liability of a firm for the acts of its partners is governed by various provisions of 1890 act. There are various sections under which liability may attach to a firm for the acts of a partner, which include:

- section 5 (which deals with the power of a partner to bind the firm)
- section 6 (which provides that partners are bound by any act done by a partner on behalf of the firm)
- section 7 (which deals with the situation where a partner uses the credit of the firm for private purposes)
- section 8 (which deals with the effect of a notice given to third parties that the firm is not to be bound by the acts of a partner)

- section 9 (which provides general principle in relation to the liability of partners for acts of other partners)
- section 10 (which deals with the firm’s liability for wrongful acts/omissions of a partner)
- section 11 (which deals with the firm’s liability for misapplication of property by a partner)
- section 13 (which deals with the firm’s liability for breach of trust by a partner)
- section 14 (which deals with the issue of persons held liable by virtue of “holding out”)
- section 15 (which deals with the firm’s liability for the admission or representation by a partner)
- section 16 (which deals with the effect of a notice to a partner being binding on the firm)
- Section 17 which deals with the liability of incoming and outgoing partners)
- section 38 (which deals with the continuing authority of partners for purposes of winding up).

The most important of these is section 5. This section confirms the general principle that a partner is an agent of the firm and of the other partners for the purposes of the business of the partnership. Consequently, since a partner is an agent of the firm and all partners for the partnership business, it follows that the firm should be liable for the acts of that agent that are done as part of the firm’s business. Each of these sections is an example of the wider principle that a partner is liable for the acts of their partner where done as part of the ordinary course of business of the firm, given the fact that each partner is their partner’s agent for the purposes of the partnership business.

The liability of a firm for the acts of a partner in any particular case may be considered under the most appropriate of the sections of the 1890 act referenced above, or alternatively under the general heading of the liability of a firm under agency principles for the acts of a partner. Regardless of whether one is attempting to establish liability of the firm under any of the sections referenced above or under the general principle of agency, there are three basic requirements that must be satisfied before liability will be established:

1. The act must be done by a partner
2. The act must be done qua partner, and
3. The act must be within the ordinary course of the business of the firm.

The various sections are examined below but where the meaning and effect of the section is clear, no further comment is made.

Nature and duration of a partner’s liability

A partner may be jointly liable for the obligations of the firm or they may be jointly and severally liable for those obligations. However, whether the liability is joint or joint and several, the extent of that liability is unlimited. A partner who creates a contractual responsibility subjects the firm to a single joint liability. This is set out in section 9 of the 1890 act.

Every partner in a firm is liable jointly with the other partners, for all debts and obligations of the firm incurred while they are a partner. After their death, their estate is also severally liable in due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in Ireland to the prior payment of the separate debts.

Section 12 of the 1890 act provides that a partner is jointly and severally liable for wrongful acts and omissions under section 10 and the misapplication of property in the custody of the firm as under section 11.

Although section 9 of the 1890 act is primarily concerned with establishing the joint liability of a partner for the firm’s contractual obligations, it also provides that the estate of a deceased partner is severally liable for debts and obligations of the firm incurred when they were a partner. A creditor of the firm may therefore go against the estate of a deceased partner without having recourse to the firm’s assets. In the event of the deceased partner’s estate being insufficient, the creditor may exercise their rights against the surviving partners for the balance of the debt. There is nothing to prevent the partners in a firm from expressly providing by contract that they will be jointly and severally liable for a particular contractual obligation.

Section 10 and 11 provide for the liability of partners for the wrongful acts and omissions of the firm (section 10) and for the misapplication of money or property (section 11). Section 12 then goes on to provide for the type of liability which attaches to both these sections.

Every partner is liable jointly with their co-partners and also severally for everything for which the firm, while they are a partner therein, becomes liable under either of the two last preceding sections. There is nothing to prevent the partners from expressly providing that the partners will only be liable jointly in relation to tortious liability and thereby override section 12.

Unlike liability for contracts under section 9 and torts under section 12, section 13, which deals with a breach of trust by a partner, does not specify the type of liability which attaches to that partner and their partners for a breach of trust.

The start and end of a partner's liability for the firm's obligations may be summarised in the form of a three-part general rule. This general rule is as follows:

1. A partner is not liable for obligations incurred by their firm before they became a partner. This can be seen in section 17(1) of the 1890 act, which states that a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before they became a partner.
2. A partner is liable for obligations incurred by their firm while they are/were a partner. As set out in section 17(2) of the act, a partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before their retirement. In Cummins v Cummins (1835) 8 Ir Eq R 723, two brothers in a Co Cork partnership of four brothers were appointed by the father as trustees of the fund for the benefit of the two sisters. Contrary to the terms of the trust deed, the fund was not secured by the trustees, but was left in the firm to the knowledge of all four partners. Subsequently, one of the non-trustee partners applied the fund to pay off the firm's debts. All four partners were aware of the breach of trust, so Sugden LC held that they were all liable for that breach, including a retired partner.
3. A partner is not liable for obligations incurred by their firm after their departure, subject to important exceptions in respect of persons who dealt with the firm while they were a partner. The 1890 act provides for five situations in which the general rule, that a partner is not liable for obligations incurred after their departure from the firm, will apply without exception. They are:
    (a) A partner is not liable for obligations incurred after their death
    (b) A partner is not liable for obligations incurred after their bankruptcy
    (c) A former partner is not liable where they were not known to be a partne
    (d) a former partner is not liable to pre-existing customers on notice of their departure
    (e) A former partner is not liable to make new customers aware of their departure.

The exceptions would include:

1. Continued holding out as a partner as per section 14(1) of the act. In Tower Cabinet Co Ltd v Ingram [1949] 2 KB 397**,** the former partner, Mr Ingram, was alleged to be held out as still being a member of the firm by means of his name continuing to appear on the headed notepaper of the firm. He had retired from the firm and, due to carelessness on his part, he had omitted to destroy the headed notepaper that contained his name. After Mr Ingram's cessation of membership of the partnership, new notepaper was printed for use in the

future business of the firm. While Mr Ingram had been a partner, the notepaper had been headed "*Merry's*" and under that had borne the names "*AH Christmas and SG Ingram*", indicating that they were both partners. After the dissolution, the name "*Merry'*s" appeared on the new notepaper, and "*AH Christmas, Director*", apparently as being the person responsible for the running of the business. In January and February 1948, when goods were ordered from Tower Cabinet Co Ltd and delivered, Mr Ingram was not in fact a partner in this business. The question was whether the company was able to make him liable as a partner by reason of the provisions of the Partnership Act 1890, dealing either with holding out or with failure to give notice when a partnership has ceased and credit has been given to the partnership firm as if the outgoing partner were still a partner. On the facts, the court on appeal held that Mr Ingram was under no liability to Tower Cabinet Co Ltd in respect of the debts subsequently incurred by Mr Christmas at a time when Mr Ingram was not a partner.

2. Continuing authority of partners for the purposes of winding up. Section 38 states:

   > *"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 the dissolution, but not otherwise. Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt."*

3. Pre-existing customers who were unaware of his departure. Section 36(1) states:

   > "*Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change."*

The power of a partner to bind the firm

Section 5 of the 1890 act deals with the question of the power of a partner to bind the firm. Section 5 provides that:

> "*Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.*"

In Bank of Scotland v Henry Butcher and Co [2003] EWCA Civ 67, the UK Court of Appeal gave a decision in a case where the defendants entered into a partnership agreement which prohibited one partner from entering into a guarantee on behalf of the partnership unless the remaining parties provided their consent to this. In this case, Mr Hopkins entered into a consultancy agreement with the firm of Henry Butcher & Co. Under the agreement, the firm would receive a share of profits on mutual business deals with Mr Hopkins and would guarantee his indebtedness to the Bank of Scotland on foot of an overdraft up to a maximum of £200,000.

Four partners of the firm signed the bank guarantee. The guarantee was expressed to be given by the firm and by the four executing partners "*as partners and as individuals"*. After execution, two of the four executing partners initialled an amendment to the guarantee. In its unamended form, the guarantee appeared to have covered any indebtedness of Mr Hopkins to the bank. The effect of the amendment was to limit the guarantee to indebtedness arising under one particular account.

Mr Hopkins got into difficulties with his indebtedness to the bank, who called in his overdraft and then sought to enforce the guarantee. At first instance, the defendants to the action on the guarantee were the firm and the four partners of the firm who executed the guarantee. They argued unsuccessfully that the guarantee was not binding on them. On appeal, three main issues arose for determination, two of which warrant further consideration. These two issues are whether the guarantee was binding on the firm and, then, whether the amendments made to the guarantee after execution operated to invalidate it.

As to whether the guarantee was binding on the firm, the Court of Appeal upheld a finding of fact that there was "*actual authority founded upon consent*". However, the court's decision that the guarantee was binding on the firm as a consequence of the application of section 5 of the Partnership Act 1890 is more interesting and of wider significance. It was argued that a partner, at least in a professional partnership, does not have implied or ostensible authority to give a guarantee. This argument was supported by four 19^{th}-century cases, including Sandilands v Marsh (1819) 2 B & Ald 673. The court stated that old authorities, as set out, for example, in Halsbury's Laws of England and Halsbury's Statutes, "*are to be regarded with caution today when they lay down that it is not within the ordinary authority of a partner to give a guarantee*". However, the court did not have to determine whether a professional partner had implied or ostensible authority to execute a guarantee. Instead, the court was able to decide the issue of whether the guarantee was binding by relying on the ratio in the Sandilands case, which was held to be consistent with and explanatory of section 5 of the 1890 act.

The court held that the judgments in Sandilands make it clear that "*where a contract entered into by a partnership for the purpose of its business requires an act to be done, that act (when done) is itself to be regarded as done for the purpose of the partnership business, notwithstanding that (absent the contract) the act would have been outside the usual business of the partnership*".

On the facts of this case, the existence and acceptance of the consultancy agreement was partnership business and the guarantee, since it was given in respect of the consultancy agreement, was therefore given in the course of the partnership's business. From the bank's perspective, this part of the decision of the court was to be welcomed. If the guarantee were held not to be binding, a bank or anyone acting as a creditor in a contract of guarantee with a partnership would be required to obtain the consent of each and every partner, or risk enforcement of the guarantee against the executing partners only. From a commercial point of view, the decision enabled banks to continue to deal with partnerships and make capital available to them without having to introduce complex compliance procedures to protect their security interests.

The second issue for consideration in this case was whether the amendments to the guarantee after execution rendered it void. On this issue, the court followed Pigot's Case (1614) 11 Co Rep 26b and the UK Court of Appeal case of Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd [2000] 1 WLR 1135. A material alteration after execution without the approval of all the parties to the document renders it void. A material alteration amounted to an alteration that affects the nature and character of the instrument and where the alteration is "*potentially prejudicial*" to the obligor's legal rights and obligations. On the facts of this case, the amendment, far from being potentially prejudicial to the defendants' rights, was in fact beneficial since it narrowed down the sources of their potential liabilities. In so holding, the court reinforced the view that a guarantee will not lightly be avoided as a consequence of amendments made post-execution. It also appears that amendments made, which were beneficial to the guarantors and which do not affect the nature of the document as a guarantee, may not vitiate a guarantee even without the approval of all the executing guarantors.

Partners to be bound by acts of a partner on behalf of the firm

Section 6 provides:

> *"An act or instrument relating to the business of the firm done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.*

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments."

Section 6 confirms that the three requirements for a firm to be bound by the acts of a partner are equally applicable to a contract executed by a partner, whether oral or written, as they are to other acts of a partner. Thus section 6 requires the contract 1) to be executed by a partner, 2) to relate to the business of the firm and 3) to be executed in the firm name or in any other manner showing an intention to bind the firm.

A partner using the credit of the firm for private purposes

Section 7 provides:

> *"Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner."*

The effect of a notice that the firm will not be bound by acts of a partner

Section 8 provides:

> *"If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement."*

Consequently, third parties who have notice of the restriction on the powers of a partner cannot bind the partnership, but those who do not have such notice are entitled to rely upon the general principle that a partner is authorised to bind the firm.

Liability of partners generally

Section 9 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; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts."*

The liability of the firm for wrongs

Section 10 provides:

> "*Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.*"

Misapplication of money or property received for or in the custody of the firm

Section 11 clarifies the requirements to be satisfied for a firm to be bound by the misappropriation of a third party's money or property by a partner or a firm. Section 11 provides:

> *"In the following cases; namely –*
>
> *(a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and*
>
> *(b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;*
>
> *the firm is liable to make good the loss."*

Liability for joint and several wrongs

Section 12 provides:

> *"Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections."*

Improper employment of trust property for partnership purposes

Section 13 provides:

> *"If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein:*
>
> *Provided as follows: –*
>
> *(1) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and*
>
> *(2) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control."*

Persons liable by "holding out"

Section 14 deals with the question of someone who allows themselves to be held out or represented as being a partner. Section 14 provides:

> *"(1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.*
>
> *(2) Provided that where after a partner's death the partnership business is continued in the old firm's name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death."*

The question of admissions made by and representations made by partnerships

Section 15 provides:

> *"An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm."*

Notice to an acting partner to be notice to the firm

Section 16 provides:

> *"Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner."*

Liabilities of incoming and outgoing partners

Section 17 deals with the question of the liabilities of incoming and outgoing partners and it provides:

> *"(1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.*
>
> *(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.*
>
> *(3) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted."*

Duty of a partner not to compete with the firm and to account for any profits made as a result of competition

Section 30 provides:

> *"If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business."*

Rights of persons dealing with the firm following changes to the constitution of the firm

Section 36 of the 1890 act deals with the question of people continuing to deal with the firm after a change in the constitution of the firm and provides:

> *"(1) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.*
>
> *(2) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.*
>
> *(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively."*

Right of partners to give public notice of dissolution

Section 37 deals with the right of a party to give public notice of the solution. It provides:

> *"On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence."*

Continuing authority of partners for the purposes of winding up

Section 38 deals with the question of authority of partners continuing for the purposes of winding up and 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 the dissolution, but not otherwise.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt."

Management rights of partners

This area is governed by no fewer than five separate provisions of the 1890 act. Firstly, the right to participate in management of the firm is provided by section 24(5) of the 1890 act, which expressly provides that:

"*Every partner may take part in the management of the partnership business.*"

Then the exercise and extent of this right is clarified by section 24(8), which deals with majority voting on ordinary matters, and while section 24(7) specifically provides that the consent of all partners is required for the admission of a new partner, section 24(8) provides that no change may be made in the nature of the partnership business without the consent of all existing partners. It must be noted that each of these can be modified by express or implicit agreement among the partners in any particular case.

It is clear there is a right of every partner to participate in the management of the firm. A basic principle of partnership law is that unless otherwise agreed, all partners are equal. In Shaw v O'Higgins (1829) 3 Ir Law Rec 104, the management rights of one partner in a firm were infringed by his partner who removed partnership money from the common fund to his own separate fund for safe keeping. The judge, MacMahon MR, granted an injunction to prevent either partner from excluding the other from the management of the firm.

In Re Murph's Restaurant Limited [1979] ILRM 141, there was a quasi partnership between the petitioner and the two brothers for the running of a number of restaurants in Dublin and Cork. However, the two brothers began to undermine the petitioner's right to participate in the management – the partnership was breached by the two brothers. The company was run on a very informal basis in that the company did not hold annual meetings, have annual accounts prepared, hold regular or formal board meetings of directors, maintain minutes of meetings or other formal company records. Instead, the three shareholders/directors met every Monday night for management meetings, had their meals in the company premises and met regularly over lunch.

The affairs of the company were conducted and the decisions taken at the Monday night meetings and the informal meetings. Unfortunately, the two brother shareholders/directors fell out with the third and attempted to remove him from the company's board of directors. The third shareholder then sought to have the company wound up on the basis that he had been treated oppressively and unfairly, as they had also sought to purchase his shareholding in the company on unfavourable terms. The court held that the removal of the shareholder/director repudiated a relationship that was based on mutual trust and confidence and was more akin to a partnership than a company. As a result, the court felt that it was fair and equitable to lift the corporate veil and wind up the company.

Gannon J held that, where there exists between the participants such "*a relationship of equality, mutuality, trust and confidence between them which constitutes the very essence of the company*" on the basis of which the participants constitute a joint venture, they may regard themselves by reason of this relationship "*as equal partners".* Gannon J summarised the position as follows:

> *"[i]t is quite clear from the evidence taken as a whole and from practically every aspect of evidence relating to the different events and the conduct of the affairs of this company that [the three shareholders] were equal partners in a joint venture, and that the company was no more than a vehicle to secure a limited liability for possible losses and to provide a means of earning and distributing profits to their best advantage with minimum disclosure. The company was never conducted in accordance with statutory requirements nor in accordance with normal regular business methods. The directors received no fees, the shareholders received no dividends, and all three directors/shareholders received by mutual agreement exactly the same income from the earnings of the company adjusted according to profitability in the form of drawings recorded as salary, drawings from cash unrecorded, credit deposits of cash in building societies' accounts, perquisites of meals and cars, and various expenses for purely personal purposes in respect of all of which strict equality was always maintained. This was achieved, and could be achieved, only by a relationship of mutual confidence and trust and active open participation in the management and conduct of the affairs of the company particularly in the irregularity or informality of its corporate quality of existence … [the action of removing the applicant from his position as company director] was a deliberate and calculated repudiation … of that relationship of equality, mutuality, trust and confidence … which constituted the very essence of the existence of the company."*

Although an important right, it is clear from the terms of section 24(5) of the 1890 act that the right of a partner to management participation is a default right rather than a mandatory obligation.

Under section 24(5), a partner has a right, rather than an obligation, to participate in the management of the firm. Accordingly, there is no requirement that a partner devote their full time or indeed any time to the management or business of the firm, in the absence of any agreement between the partners to that effect. Rather, in the absence of agreement, the amount of time that a partner devotes to the management of the firm is at their discretion. For this reason, it is common to have a term in a written partnership agreement requiring the partners to devote their full attention to the firm's affairs, whether to its management or the general business of the firm. However, it must be remembered that a partner who opts out of management participation may not rely on this fact to escape liability for the acts of the active partner(s). This misconduct of his or her partner(s) is the misconduct of the partnership and for which he or she is jointly liable.

In the absence of any agreement or custom to that effect, under section 24(6) there is no right for a partner, whether managing partner or not, to receive remuneration for their management in the firm.

Section 24(8) of the 1890 act provides that subject to express or implied agreement between the partners to the contrary, any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

Financial rights of partners

1. Sharing of profits and losses:

   Section 24(10) of the 1890 act states the interest of partners in the partnership property and their rights and duties in relation to the partnership shall be determined subject to any agreement express or implied between the partners, by the following rules, ie that all the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses whether of capital or otherwise sustained by the firm. This is not a mandatory rule and can be varied by the partners.

2. Outlays and advances by partners:

   Section 24(2) of the 1890 act states that subject to express or implied contrary agreement between the partners, the firm must indemnify every partner in respect of payments made and personal liabilities incurred by them:

   (A) in the ordinary and proper conduct of the business of the firm, or

   (B) in or about anything necessarily done for the preservation of the business or property of the firm.

3. Payment by the firm for services from a partner:

Section 24(6) states that subject to express or implied contrary agreement between the partners, no partner shall be entitled to renumeration for acting in the partnership business.

4. Payment of interest:

Section 24(4) of the 1890 act states a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by them.

5. Partnership books and accounts:

Section 24(9) provides that the partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when they think fit, have access to and inspect and copy any of them.

Expulsion of a partner

Section 25 sets out that no majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

Fiduciary duties of partners

Partners owe each other a fiduciary duty. It is noteworthy, however, that the 1890 act fails to expressly deal with or expressly recognise that partners owe each other a fiduciary duty. However, as Judge Twomey points out in his book, the 1890 act does recognise a number of instances of this fiduciary duty, such as the duty of a partner to render true accounts of and information on the partnership to their partner(s) and the obligation of a partner to account to the firm for any benefit derived by them for any transaction concerning the partnership or using the partnership property, name address or connections. A partner's general fiduciary duty has been recognised by the courts in a number of cases, as can be seen below.

The fiduciary duty, which was first recognised in the case of Meagher v Meagher [1961] IR 96, has since been expanded. In Meagher v Meagher, three brothers were involved in the development of houses, one of whom died. The value of the assets of the partnership substantially increased after the death of the brother, and the Supreme Court, in overruling a High Court decision, determined that the estate of the deceased brother should receive its proportionate share of the increased value of the assets.

In Williams v Harris [1980] ILRM 237, the court confirmed the existence of fiduciary duty between partners. A partner must act in the firm's interest, with McWilliam J stating:

"The mere existence of a partnership creates a fiduciary relationship between the partners."

This was also seen in the case of Irish Press plc v Ingersoll [1995] IESC 10, which involved a 50:50 shareholding in two separate joint ventures companies by Irish Press plc and the Ingersoll group of companies. This relationship was held by Barron J to be, in effect, a partnership, and he noted the decision by Irish Press plc to pursue the venture was based on representations by the Ingersoll group that it was a considerable organisation from which personnel would be available to assist the quasi partnership. Personnel were not made available from Ingersoll to assist the quasi partnership. This fact, combined with the placing by Ingersoll of its nominees on the board of the two joint venture companies for the purposes of Ingersoll's interest and not the interests of the companies, was held to be evidence of mala fides and the breakdown of trust between the parties. The judge, Barron J, held that this constituted a breach of trust between the parties, which justified the sale of Ingersoll's shares to Irish Press plc.

It is clear that a partner must act in good faith and not abuse their powers. In Heslin v Fay (1) (1884) 15 LR Ir 431, the partners entered into a partnership agreement whereby the defendant had the power to increase the capital of the firm if it was necessary for carrying on the business of the firm. There was a further provision in the agreement, which provided that each partner withdraw the amount of any surplus capital paid by him to the partnership. When the defendant called on his partners to repay the surplus capital which he had paid to the firm, Fay responded by raising the capital of the firm so as to reduce the amount of surplus owed to Heslin. The judge held that Fay had no right to use his power of increasing the capital for the purpose of resisting the plaintiff's demand for a return of his surplus capital and, for this reason, Heslin was granted dissolution of the partnership.

Another aspect of the fiduciary duties owed by one partner to another is the requirement that partners treat each other as equals. However, as is obvious from the terms of the 1890 act itself, this is an aspect of a partner's fiduciary duty that may be excluded by agreement between the partners, since the partners may, for example, share profits unequally or have differing voting rights. In Bolton v Carmichael (1856) 1 Ir Jur (ns) 298, there was a law partnership between Carmichael and his nephew, Bolton. The defendant did not treat the plaintiff as his partner, trading in effect as a law clerk. He did not allow him to review the books of the partnership, nor did he allow him to meet with clients. In relation to Carmichael, Brady LC held that he had:

"throughout the existence of the partnership an assumption of superiority which may have been natural enough considering the relationship rather connection between them, but which was very inconsistent with that equality which should exist between partners. When he is desirous of dissolving it he does not communicate directly with his partner, but he writes to the young man's father, treating the petitioner more like an apprentice than a partner, and as if his voice in the matter was quite a secondary consideration."

On that basis, the court held that partnership had been dissolved as a result of the defendant's conduct.

Equality does not mean identical treatment, as Inspector for Taxes v Cafolla and Co., [1949] IR 210**,** referred to above, illustrates.

It is clear partners owe each other a duty of honesty. This duty was evident in the case of Hutcheson v Smith (1842) 5 Ir Eq R 117; in this case, the defendant had been appointed to collect the firm's assets as part of its winding up. It became apparent the defendant did not fully disclose the true amount of partnership funds to the court or his partner. The judge found that the defendant owed his partner a duty of honesty. As a result of his actions, the judge made an order that the defendant pay interest to his partner on his share of that money from the date the defendant had it in his possession.

Statutory instances of fiduciary duty

There are four statutory instances of a partner's fiduciary duty, all of which are contained in the 1890 act:

1. to render true accounts and full information (section 28)
2. to account for private profits (section 29(1))
3. to account for profits of a competing business (section 30)
4. to share post- dissolution profits (section 42(1)).

Partnership property

In order to determine whether property is partnership property or not, regard should be had to the 1890 act and to court decisions. Sections 20(1), 20(3) and 21, which we will deal with below, deal with the issue as to whether property is partnership property or not.

Section 20 defines partnership property as:

> *"(1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.*
> *(2) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.*
> *(3) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase."*

Therefore, it is clear that property that is brought into the partnership stock is partnership property. Stock in 1890 would have meant all assets as distinct from the modern sense of stock: of a stock-take or inventory.

Section 21, which provides that

> "*Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm*",

adds to the description of partnership property in section 20 (1) by providing a presumption that the firm's funds are used to purchase property, that property is deemed to be partnership property. An important factor in determining whether property is partnership property or not is the presumption that property is partnership property if it is acquired for the purposes and in the course of the partnership business.

In Re Ryan (1868) 3 Ir Eq Rep 222, two partners purchased a premises in Dublin. The premises were purchased in order to expand the business. The court concluded that, as the premises were acquired for the partnership business, they were partnership property.

The express terms of section 21 indicate that the presumption that property purchased with firm money is partnership property may be rebutted by evidence of a contrary intention of the parties.

In Re Littles (1843) 6 Ir Eq R 197 (affirmed (1837) 10 Ir Eq R 275, shares in the Fife banking company were in the name of one partner but were paid for out of partnership money, thus giving rise to the presumption that the shares were partnership property. However, this presumption was rebutted by the fact that there was no mention of the shares in the accounts of the firm or in the agreement dealing with the retirement of one partner from the firm, which listed all the partnership property. For this reason, the shares were held not to be partnership property but rather to be co-owned by the partners.

This article does not intend to go into further detail in relation to the conflicts between section 21 and section 20(3), nor the distinction between partnership property v joint property of partners.

Remuneration of partners

The Partnership Act 1890 section 24(6) states that no partner is entitled to remuneration for acting in the partnership business. This section can be bypassed by the signing of a partnership agreement setting out the rights of the partners to remuneration and drawings.

Dissolution of partnerships

There are two types of dissolution of partnership:

1. a general dissolution
2. a technical dissolution.

General dissolution occurs where the partnership is ended, the business is wound up and the partnership assets are sold. Section 39 of the act allows a partner to force the general dissolution of the firm. A technical dissolution will occur where there is a change in partners, either by a partner leaving or a new partner joining the firm. The death or bankruptcy of a partner will also lead to a technical dissolution. It will become a general dissolution if the remaining partners decide to sell the assets of the partnership and wind up the business.

Means by which a partnership is dissolved

A partnership may be dissolved in two ways, either by court order or in circumstances that do not require a court order.

1. Dissolution of a partnership at will by notice: unless the partners in a firm have agreed otherwise, any one partner in a partnership, at will, may dissolve the partnership by giving notice of dissolution to his partners as per sections 26(1) and 32(c) of the act.
2. Dissolution by the death of a partner: section 33(1) provides that subject to any agreement between the partners, every partnership is dissolved as regards all the partners by death of

any partner. It is routine in partnership agreements to provide that, in such circumstances, the partnership will continue as between the surviving partners.

In Cuffe v Murtagh (1881) 7 LR Ir 411, there was a partnership for a fixed term of seven years between six flour millers in Dublin and Athlone, and, during that term, two of the partners died. The death of the partners was not contemplated by the terms of the partnership agreement and the partnership business continued as before the deaths, thus leading to a technical, rather than general, dissolution of the partnership. After these deaths, the other partners continued to operate the business as before. Since the partnership agreement had not contemplated the continuation of the fixed-term partnership after the death of any of the partners, the presumption was that the new partnership was a partnership at will applied and, accordingly, it was held by Chatterton VC that a partnership at will had come into existence on the death of the partners.

3. Dissolution by bankruptcy of a partner: Section 33(1) and Provincial Bank of Ireland v Tallon [1938] IR 361, where the judge ruled that upon one of the partners becoming bankrupt, the partnership had dissolved.
4. Dissolution by expiration of a fixed-term partnership.
5. Dissolution by termination of an adventure or undertaking.
6. Dissolution by agreement.
7. Dissolution by illegality of the partnership.
8. Dissolution by repudiation.
9. Dissolution by recission.
10. Dissolution as a result of a charging order.

Dissolution by the court

Section 35 of the 1890 act sets out the main instances in which a partnership may be dissolved by court order. It provides that, on application by a partner, the court may decree a dissolution of the partnership in any of the following cases:

(a) When a partner is found lunatic by inquisition, or is shown to the satisfaction of the court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by their committee or next friend or person having title to intervene as by any other partner.

(b) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing their part of the partnership contract.

(c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the court, regard being had to the nature of the business, is calculated to prejudicially affect the varying on of the business.

(d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts themself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with them. (As to conduct rendering continuance impractical, see Re Murph's Restaurant [1979] ILRM 141 and Bolton v Carmichael (1856) 1 Ir Jur (ns) 298 referenced above.)

(e) When the business of the partnership can only be carried on at a loss.

(f) Whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.

The two seminal Irish Quasi Partnership cases which relied on the just and equitable grounds of section 35(f) are Murph's Restaurant [1979] ILRM 141, referenced above, and Re Vehicle Buildings [1986] ILRM 239, which involved a loss of confidence among the partners that could have been dealt with under section 35(d). The company operated a successful repair and sales business in relation to motor cars. However, the relationship between the two promoters broke down, leading to a high degree of animosity and allegations of fraud, which resulted in a complete deadlock in the management of the company. Referring to the judgments of Lord Justice Cozen-Hardy MR and Lord Lindley in Re Yenidje Tobacco Co Ltd [1916] 2 Ch 426, Murphy J held that since the partnership would be dissolved on the grounds of deadlock, the quality partnership should be wound up where its management was deadlocked. Academic commentary on the judgments goes into some detail about whether courts actually relied on the provisions of section 35(d) or section 35(f) but we need not concern ourselves about that.

Post-dissolution and the winding up of a partnership

A partner must notify the public on the dissolution of a firm. On a firm's technical dissolution, this is important in circumstances where it will help terminate a partner's liability for the acts of the firm after their departure. Such notification is also important in the general dissolution of a partnership because a third party who had dealings with the firm is entitled to treat the firm as still existing until they are notified of the dissolution.

A question arises in relation to giving notice to third parties who had no dealings with the firm. A partner must place an advertisement in *Iris Oifigiuil* of the dissolution of the firm. This gives notice to third parties of the departure of a partner or of the firm's dissolution. Therefore, it is clear a partner will not be liable for the acts of their former partners subject (in the case of winding up) to the continuing authority of the winding up of partners under section 38, if the third party is notified or deemed to be notified of the dissolution as a result of the publication of the notice.

The importance of notifying third parties of the dissolution of a partnership is evident from the terms of section 37 of the 1890 act, which not only grants a partner the right to publicly announce the firm's dissolution but also to require the other partners to concur for that purpose. Section 37 states:

> *"On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.*"

When a partnership is subject to a general dissolution, the business of the firm must be wound up. This winding up must be done by somebody and, for this reason, section 38 of the act provides that, after dissolution, each partner's authority to bind the firm continues but only for the purposes of completing the firm's transactions and winding up the firm:

> **"***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 the dissolution, but not otherwise."*

The rule that a partner winding up a firm has authority to bind that firm is subject to the exception that the firm is not bound by the acts of a bankrupt partner. Therefore, a third party who is dealing with a bankrupt partner acting on behalf of a firm being wound up will not be able to claim that the firm is bound by the acts of the bankrupt partner. This proviso will not, however, prevent a person (whether a former partner or not) from being liable as a partner by holding out under section 14(1) where they allow themself to be held out as in partnership with a bankrupt partner.

Section 38 has two limits on the authority of the winding-up partner to bind the firm: the action must be either necessary to wind up the firm or it must be necessary to complete unfinished transactions of the firm.

Effect of dissolution on contracts with employees

It would appear that, under a general resolution of the firm, employments of contract are only terminated on the completion of the winding up of the firm. It is only at this stage that a potential claim for redundancy may arise. The position is different under a technical dissolution of a firm.

Where the firm suffers from a technical dissolution, the contracts with the employees are not terminated but instead transfer to the new partnership.

Monies due to a departing or deceased partner

A common consequence of the departure of a partner is that the firm continues, the outgoing partner will have their share in the partnership purchased by the continuing partners and they may be owed monies by the firm in respect of this share. The 1890 act specifically refers to such debts in section 43, which states:

> *"Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death."*

Third parties dealing with a dissolved firm

The position of third parties dealing with a dissolved firm is the same in the general dissolution and a technical dissolution of a partnership. The position is that a third party who dealt with the firm prior to the general dissolution is entitled to treat the firm as continuing until receipt by them of actual notice of the dissolution.

Forced sale of partnership assets

Section 39 provides:

> *"On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm."*

It is evident that the partners of a dissolved firm are best positioned to oversee its winding up in light of their knowledge of the firm's business. However, where partners cannot come to an agreement in relation to the winding up of the firm, section 39 clearly envisages a winding-up order being granted by the court. Only a partner or their representatives can bring an application under section 39. Creditors cannot petition the court.

Post-dissolution profits

This issue is addressed by section 42(1) of the 1890 act, which states:

> *"Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent per annum on the amount of his share of the partnership assets."*

Distribution of assets

Section 44 sets out the rules that apply in settling accounts between the partners after a dissolution of partnership. These include:

(a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital and, lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.

(b) The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:

1. in paying the debts and liabilities of the firm to persons who are not partners therein
2. in paying to each partner rateably what is due from the firm to them for advances as distinguished from capital
3. in paying to each partner rateably what is due from the firm to them in respect of capital
4. the ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

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