fidelity'. In *Re Wrightson* Warrington J approved this approach, saying that it was ancillary to the court's principal duty to see that the trusts are properly performed.

10.6.3.3 The expense of removal

There are indications in *Re Wrightson* that the court is sometimes reluctant to remove trustees because of the administrative expense to the trust fund of doing so. This may mean that courts will be more reluctant to remove trustees from trusts with smaller funds.

10.6.4 REMOVAL UNDER S. 41, TRUSTEE ACT 1925

In *Re Lemann's Trust* (1883) 22 ChD 633, an aged trustee was removed because, 'through old age and consequent bodily and mental infirmity' she was incapable of executing any documents. In *Re Henderson* [1940] Ch 764 a trustee was removed because she initially stated her wish to retire from the trust but at a later date insisted that she would not retire unless certain conditions were met. In *Re Tempest* (1866) LR 1 Ch App 485 it was stated that, if an existing trustee unreasonably refuses to co-operate with a new trustee whom the court has appointed, this might be a ground for removing the *existing* trustee from office.

10.7 What If Nobody is Willing to Act as Trustee?

Simon Gardner in his *Introduction to the Law of Trusts*, Clarendon Press, 1990, observes (at p. 165) that 'human goodwill and the profit motive between them can be relied upon to produce a supply of people *prima facie* willing to be trustees'. This finds support in a survey carried out by C. Bell in 1988, 'Some reflections on choosing trustees', *Trust Law and Practice* (***Cases and Materials*** **(10.1)**). But what if no willing person can be found to carry out the trust? The maxim states that no trust will fail for want of a trustee. Thus, if nobody can be found who is willing to accept the appointment, the court will in certain circumstances appoint the Public Trustee or a judicial trustee to discharge the trust. As a last resort, the court can even act as trustee itself on an *ad hoc* basis. As Lord Eldon LC acknowledged long ago in *Morice* v *Bishop of Durham* (1805) 10 Ves 539: 'As it is a maxim, that the execution of a trust shall be under the control of the court . . . if the trustee dies, the court itself can execute the trust'.

Judicial trustees are appointed where the ordinary trustees of the trust have failed in their administration of the trust. Their appointment under the Judicial Trustees Act 1896 is designed to avoid the expense of the court itself discharging the administrative obligations of the trustee. They have all the powers of ordinary trustees, but, as officers of the court, they also have ready access to the court's directions as to administration of the trust.

The office of Public Trustee was established by s. 1 of the Public Trustee Act 1906. The role of the Public Trustee is to administer trusts (typically private, non-business trusts), no matter how small, for whom no other trustee can be found. Although the the court will take into account the wishes of the settlor when choosing new trustees, the settlor cannot exclude appointment of the Public Trustee in an appropriate case (*Re Duxbury's Settlement Trusts* [1995] 1 WLR 425).

It is in the office of the Public Trustee that the maxim *a trust will never fail for want of a trustee* finds its fullest expression.

(k) To concentrate managerial power (in relation to, for example, pension funds, trade unions and clubs).

(l) To achieve privacy in dealings with property (hiding true beneficial ownership behind legal ownership), e.g. secret trusts at **3.4.3**.

(m) To function as trading trusts and voting trusts (these topics are outside the scope of this book, but see, for example: The Hon. Mr Justice B.H. McPherson 'The Insolvent Trading Trust' in P D Finn 'Essays in Equity' The Law Book Company Limited, Sydney, 1985; and, M. A. Pickering, 'Shareholders' Voting Rights and Company Control' (1965) 81 *LQR* 248 at 257).

2.3 Trusts: To Define or Describe?

Given the very wide range of functions performed by trusts, and the great variety of contexts in which they are to be found, do you think it is possible to define the trust concept?

ACTIVITY 2

If you think you can do so at this stage, why not try to define the trust concept in your own words.

You will quickly have discovered that the definition of trusts is fraught with difficulty. To define must always mean to describe the essence of the thing, and so any definition must necessarily be either incomplete and/or circular. (As to the problem of paraphrase in legal reasoning, see H. L. A. Hart, 'Definition and Theory in Jurisprudence' (1954) 70 *LQR* 37.) For what it is worth, and incomplete though it must be, this author would offer the following definition of a trust:

> *A trust is the relationship which exists in law wherever assets are subject to the holding or control of at least one person for a specified purpose or for the benefit of at least one other person in circumstances in which the former owes personal obligations of loyalty and good faith to the latter in relation to the use of the assets and the use of the former's position of trust, and in which the rights of the latter bind the assets in the hands of the former and in the hands of any third parties into whose holding or control the assets might come, but so as only to bind third parties to the extent that this would be equitable and so as never to bind an innocent purchaser for value of legal title to the assets who had no notice of the trust.*

Perhaps the nearest thing we have to a statutory definition of a trust is that which appears in the Recognition of Trusts Act 1987 (***Cases and Materials* (2.1)**), which incorporates into English law the Hague Convention on the Law Applicable to Trusts and on their Recognition. But even that 'definition' is concerned only to assist in the recognition of expressly created trusts. It does not refer to constructive, resulting or implied trusts.

The relevant part of the Hague Convention provides that:

> For the purposes of this Convention the term 'trust' refers to the legal relationship created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. A trust has the following characteristics – *a* the assets constitute a separate fund and are not part of the trustee's estate; *b*

title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; *c* the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law. The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

One useful way in which trusts can be described, and thereby more clearly understood, is to contrast and compare them with other legal concepts. This we will now attempt to do.

2.3.1 TRUSTS COMPARED WITH CONTRACTS

A contract is a private relationship between the parties under which their rights and obligations are generally enforceable only against each other (*Beswick* v *Beswick* [1968] AC 58), whereas it is of the essence of a trust that a settlor can give property to a trustee on trust for a third party, and thereby grant the third party (the beneficiary) rights against the trustee to see that the trust is properly discharged. However, third parties can now enforce their beneficial interest in a contract to which they were not a party, in certain limited circumstances. (Contracts (Rights of Third Parties) Act 1999. See **1.4.5.1**, **5.7** and ***Cases and Materials*** **(2.1.1.)**)

2.3.1.1 Are trusts merely a special type of contract?

Having noted the orthodox conceptual distinction between the contract and the trust, we should nevertheless be aware that many commentators have been impressed by the close relationship between the two concepts. Maitland thought it 'utterly impossible for us to frame any definition of a contract which shall not include the acts by which ninety-nine out of every hundred trusts are created' (F. W. Maitland, *Equity: a course of lectures*, 2nd edn, by J. Brunyate (Cambridge 1936) p. 111 – published after Maitland's death in 1906).

More recently, Professor Kevin Gray suggested that 'every gift, lease, trust and security has its origins in some arrangement of consent or assent.' ('Property in Thin Air' (1991) 50(2) *CLJ* 252 at 302). More recently still, a leading American academic went so far as to suggest that 'the deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract. Trusts are contracts' (J. H. Langbein in the 'Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625 at 627).

It may well be true that every *express* trust has 'its origins in' a transaction entered into by the settlor consensually, either voluntarily or for contractual consideration. The creation of any express trust is predicated upon a finding that the settlor (the original legal owner) intended its creation (see **4.4**), and therefore the consent of the settlor is always a feature of such trusts. However, many non-express trusts do not originate with the consent of the original legal owner, and some are even created against the legal owner's true intentions (see **Chapter 16**).

If, for the sake of argument, we were to accept that all trusts *originate* in real bilateral or multilateral consensus, this would only go a little way towards illuminating the essential nature of trusts. For even where trusts are *created* consensually, even contractually, they *operate* quite differently from contracts, not least because the trust creates *property* rights whereas the rights arising under a contract are merely personal. (See **2.4.4** for consideration of the different status of contractual (personal) and trust (proprietary) claims against the estates of insolvent persons.)

In *Re Duke of Norfolk's ST* [1981] 3 All ER 220. Fox LJ considered the contractual analysis of express trusts to be 'artificial':

CHAPTER THREE

CAPACITY AND FORMALITY REQUIREMENTS

3.1 Objectives

By the end of this chapter you should be able to:

- advise whether a would-be settlor is legally capable of setting up a trust;
- create a trust of any type of property in compliance with the proper formalities;
- deal with the equitable interest under a trust in compliance with the formalities;
- recognise the numerous trusts for which there are no formality requirements;
- identify valid 'mutual wills' and 'secret trusts'.

3.2 Introduction

In this chapter we will see that most trusts, even express trusts, can be created without any formality whatsoever. However, statute does lay down a number of requirements relating to capacity and formality in trust creation. These requirements tend to arise from special policy considerations, rather than from anything inherent in the trust *per se*.

3.3 Capacity

According to the Oxford English Dictionary, capacity means in this context, 'legal competency or qualification'. The two most common reasons for lack of capacity are poor mental health and minority (infancy). These are considered below. However, even so-called 'artificial' persons, such as corporations, might also lack capacity if the legal documentation according to which they are constituted restricts or excludes their powers. So, for example, the 'objects clause' in the memorandum of a limited liability company might expressly or impliedly exclude the company's power to act as a trustee.

3.3.1 MENTAL INCAPACITY

Medical evidence as to the mental state of property owners may raise a presumption that they lack the mental capacity necessary to make valid dispositions of their property. Unless this presumption is rebutted by other evidence, any purported dispositions will be ineffective to transfer the beneficial interests in the property (see *Simpson* v *Simpson* [1992] 1 FLR 601 in

fidelity'. In *Re Wrightson* Warrington J approved this approach, saying that it was ancillary to the court's principal duty to see that the trusts are properly performed.

10.6.3.3 The expense of removal

There are indications in *Re Wrightson* that the court is sometimes reluctant to remove trustees because of the administrative expense to the trust fund of doing so. This may mean that courts will be more reluctant to remove trustees from trusts with smaller funds.

10.6.4 REMOVAL UNDER S. 41, TRUSTEE ACT 1925

In *Re Lemann's Trust* (1883) 22 ChD 633, an aged trustee was removed because, 'through old age and consequent bodily and mental infirmity' she was incapable of executing any documents. In *Re Henderson* [1940] Ch 764 a trustee was removed because she initially stated her wish to retire from the trust but at a later date insisted that she would not retire unless certain conditions were met. In *Re Tempest* (1866) LR 1 Ch App 485 it was stated that, if an existing trustee unreasonably refuses to co-operate with a new trustee whom the court has appointed, this might be a ground for removing the *existing* trustee from office.

10.7 What If Nobody is Willing to Act as Trustee?

Simon Gardner in his *Introduction to the Law of Trusts*, Clarendon Press, 1990, observes (at p. 165) that 'human goodwill and the profit motive between them can be relied upon to produce a supply of people *prima facie* willing to be trustees'. This finds support in a survey carried out by C. Bell in 1988, 'Some reflections on choosing trustees', *Trust Law and Practice* (***Cases and Materials*** **(10.1)**). But what if no willing person can be found to carry out the trust? The maxim states that no trust will fail for want of a trustee. Thus, if nobody can be found who is willing to accept the appointment, the court will in certain circumstances appoint the Public Trustee or a judicial trustee to discharge the trust. As a last resort, the court can even act as trustee itself on an *ad hoc* basis. As Lord Eldon LC acknowledged long ago in *Morice* v *Bishop of Durham* (1805) 10 Ves 539: 'As it is a maxim, that the execution of a trust shall be under the control of the court . . . if the trustee dies, the court itself can execute the trust'.

Judicial trustees are appointed where the ordinary trustees of the trust have failed in their administration of the trust. Their appointment under the Judicial Trustees Act 1896 is designed to avoid the expense of the court itself discharging the administrative obligations of the trustee. They have all the powers of ordinary trustees, but, as officers of the court, they also have ready access to the court's directions as to administration of the trust.

The office of Public Trustee was established by s. 1 of the Public Trustee Act 1906. The role of the Public Trustee is to administer trusts (typically private, non-business trusts), no matter how small, for whom no other trustee can be found. Although the the court will take into account the wishes of the settlor when choosing new trustees, the settlor cannot exclude appointment of the Public Trustee in an appropriate case (*Re Duxbury's Settlement Trusts* [1995] 1 WLR 425).

It is in the office of the Public Trustee that the maxim *a trust will never fail for want of a trustee* finds its fullest expression.