

Neutral Citation Number: [2016] EWHC 3017(Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Claim No HC 2015-002165

Rolls Building, 7 Rolls Building
Fetter Lane, London EC4A 1NL

Date: 1st December 2016

Before:

ANDREW SIMMONDS QC
(Sitting as a Deputy Judge of the High Court)

Between:

(1) JONATHAN BUCKLEY
(2) PATRICIA GORE
(3) JANE ALISON LINKLATER

Claimants

and

(1) CATHERINE JANE BARLOW
(2) ANGELA PATRICIA RUTH WEBBER
(3) VICTORIA JANE DYSON
(4) SARA RACHEL SMYTH-RIBERIO
(5) ANN BUCKLEY
(6) MARGARET CAMPBELL
(7) HER MAJESTY'S ATTORNEY-GENERAL

Defendants

Andrew Cosedge (instructed by Hill Dickinson LLP) for the Claimants
The Fifth Defendant in person

Hearing dates: 31 October and 1 November 2016

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para.6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Andrew Simmonds QC:

Introduction

1. This is an application for directions by the current trustees of a trust declared by an Indenture dated 30 December 1892 (“the 1892 Trust Deed”) relating to a plot of land in Stamford Hill, London N.16 on which was built a church for the use of the members of a religious sect which emerged in the 1840s and was known as the Church of the Holy Agapemony or, more simply, the Agapemonites.
2. In short, the problem is this. The Agapemonite sect became effectively defunct by the middle of the 20th century. The church was then leased to a different sect, the so-called Ancient Catholic Church, but was eventually sold to the Georgian Orthodox Church in 2011 for just over £1m. In consequence, the trustees are holding net proceeds of £982,000 (partly in a solicitors’ client account and partly on deposit with HMRC on account of any tax which may be due). They seek the Court’s directions as to how those proceeds should be disposed of.
3. As well as constituting an interesting footnote to the social history of Victorian England, this application raises some challenging issues under charity law.
4. The Claimant trustees were represented before me by Mr Cosedge, very experienced Chancery Counsel, instructed by Hill Dickinson LLP. The First to Sixth Defendants, who are all grandchildren of the Reverend John Hugh Smyth-Pigott, who was the leader of the Agapemonite sect from 1899 until his death in 1927, were not legally represented before me. I heard submissions from the Fifth Defendant, Mrs Ann Buckley, in person. She made her points very clearly and succinctly but, as she readily accepted, did not offer a legal analysis of the position. The Seventh Defendant, HM Attorney-General, was joined as a party to enable arguments to be advanced that the net proceeds should either be applied by way of a “*cy-pres*” scheme for general charitable purposes or be treated as *bona vacantia*. The Attorney-General declined the opportunity to make submissions. In those circumstances, Mr Cosedge did his best to explore all possible avenues impartially and I was greatly assisted by his written and oral submissions. However, given the lack of any other legal representation before me, I thought it right to conduct some legal research of my own.

5. The following possible means of dealing with the proceeds of sale are canvassed in the Claimants' Part 8 Claim Form:

- (a) a *cy-pres* scheme to be determined by the Charity Commission;
- (b) distribution to the estates of the individual members of the sect in 1892;
- (c) distribution to the estates of the original trustees of the 1892 Trust Deed;
- (d) distribution to the estates of the donors of the funds used to purchase the plot and build the church;
- (e) distribution to the estates of the vendors of the plot in 1892;
- (f) distribution to the Crown as *bona vacantia*.

6. Whilst such considerations cannot affect my decision as a matter of law, it will be apparent from my brief description of the circumstances so far that options (b) to (e) inclusive would present serious practical problems for the trustees in terms of tracing the correct recipients.

7. In my judgment, the first and most important question to resolve is whether the trusts declared by the 1892 Trust Deed were (or are to be treated as) exclusively charitable. If so, then subject to one further issue which I explore in paragraphs 51-62 below, the funds should be applied *cy-pres* for other charitable purposes and the other possibilities fall away. If not, I must then consider the other possible destinations.

8. That is the course which I propose to take, having first explained the terms of the trust and the relevant chronology and given a rather fuller description of the history, beliefs and activities of the Agapemonite sect.

The 1892 Trust Deed

9. There were 13 original trustees of the 1892 Trust Deed, including the Reverend Smyth-Pigott. The deed itself contains a direction that, if the number of trustees is reduced to fewer than 10,

new trustees are to be appointed to bring the number up to 13. I was told that the most likely explanation for the focus on the number 13 was a parallel with Christ and his 12 Apostles. As will be apparent when I come to describe the beliefs of the Reverend Smyth-Pigott, I am left in no doubt which of the original trustees considered himself to be the Christ figure.

10. The deed records that the relevant plot had been acquired by an indenture of even date for £1200. The deed then provides that the land was purchased by the trustees

“...for and on behalf of the body of people hereinafter mentioned...upon trust that they and the trustees for the time being of these presents shall at all times hereafter permit the same and any church chapel or building which may be erected thereon to be used by and for all the purposes of the body of people which acknowledging the doctrine of the Trinity in unity as expressed in the creed commonly called the Apostles Creed worship the Lord Jesus Christ in his New Name as the Son of Man and believe in the Holy Ghost as having fulfilled the Gospel in “Brother Prince” and as being the covenant head of the Dispensation of Judgment introduced by Brother Prince whose teaching is contained in his writings “The Man Christ Jesus” and “The Counsel of God in Judgment”.

A power of sale was conferred on the trustees with the proceeds to be applied in re-investing in land held on the same trusts

“...or for promoting the objects of the said body in such manner as the trustees for the time being or a majority in number of such trustees shall think fit”.

The deed then provides for a gift over as follows:

“...subject and without prejudice to the foregoing trusts it is hereby declared that the said trust premises shall be held in trust for the trustees for the time being of these presents for their own use and benefit”.

11. I should add that small additional plots adjoining that acquired in 1892 were purchased by the trustees in 1895 and 1906. The church was built between 1893 and 1896. It came to be known as the Ark of the Covenant.

12. I make the following initial observations about the trusts declared by the 1892 Trust Deed:

- (1) Although there is no mention of the Church of the Holy Agapemony or the Agapemonites by name, it will be clear from what follows that “the body of people” referred to were indeed the Agapemonites.

- (2) On the face of it, the church is not held for the “body of people” as individuals but for the use of “all the purposes” or “the objects” of that body of persons.
- (3) The trusts declared are to apply “at all times hereafter” although the possibility of failure is recognised in the gift over to the trustees for the time being beneficially

“...subject and without prejudice to the foregoing trusts...”.

- (4) The description of the beliefs of the Agapemonites is a little rambling but two things are, I think, clear. First, their beliefs were rooted in orthodox Christianity: see in particular the references to the Apostles Creed and worshipping the Lord Jesus Christ. Secondly, they placed great faith in the teachings of “Brother Prince”. This is a reference to Henry James Prince, the founder and first leader of the sect.

Relevant background events

13. I should acknowledge at the outset that much of the material included in this, and the following, sections of my Judgment derive from the researches and writing of the First Defendant, Mrs Kate Barlow. As well as being a grandchild of the Reverend Smyth-Pigott and having been brought up in the Agapemonite community in Spaxton, Somerset (to which I refer below), Mrs Barlow is a retired journalist. Some of the articles and monographs she has written on the subject of the Agapemonites are formally in evidence in these proceedings. However, she also published in 2006 a personal memoir and history of the cult under the title “The Abode of Love” (a translation from Ancient Greek, *ἀγάπη* or *agape* being the Greek term for religious love). I have, with the agreement of the parties who appeared at the hearing before me, been provided with a copy of this book and have found it a useful additional source of information.
14. As I have mentioned, the Agapemonite sect was formed in the 1840s by H. J. Prince, a Church of England curate who had become dissatisfied with mainstream doctrine. Prince adopted a charismatic, evangelical style of preaching which attracted considerable support from the professional middle classes. Donations from his well-heeled followers enabled Prince to establish a retreat or community (the Agapemony) in the Somerset village of Spaxton which continued to operate until it was eventually sold off in the 1960s.

15. The sect, and Prince in particular, attracted considerable notoriety for reasons not directly related to the religious beliefs of its adherents. Prince arranged for some of his leading male cohorts to enter into “spiritual” marriages with three wealthy spinster sisters (the Nottidges), enabling Prince to acquire control over their assets. A fourth Nottidge sister, Louisa, became the subject of High Court litigation (**Nottidge v Prince** (1860) 2 Giff.246, to which I refer further below) when her brother kidnapped her from Spaxton and had her placed in a lunatic asylum with a view to protecting her from Prince’s influence. The Vice-Chancellor (Sir John Stuart) ordered Prince to retransfer the £5,700 worth of stock which Louisa had gifted to him on the grounds that it was procured by Prince’s undue influence over her as her spiritual leader. In fact, once released from the asylum, Louisa returned to the Agapemony, and lived there, apparently contentedly, until her death in 1858.
16. Rumours also circulated of sexual impropriety and exploitation. It was said that Prince publicly deflowered a virgin (“in expiation of the world’s sins”) in the chapel at Spaxton. As so often with rumours of a salacious nature, it is hard to know what is true and what is exaggeration.
17. By the late 1880s, Prince was growing old and senile and it was necessary to find a successor as leader of the sect. A chance meeting with one of Prince’s followers led to the Reverend Smyth-Pigott assuming that role. He was another disaffected Church of England clergyman who had abandoned a comfortable, middle-class curacy in North London to join the then-radical Salvation Army and had then left that organisation under a cloud. Smyth-Pigott was in his late thirties, was by all accounts a man of striking physical features and was married to one Katie Reynolds, a clergyman’s sister. Smyth-Pigott brought with him to the Agapemonites new members who had left the Salvation Army in protest at its treatment of Smyth-Pigott. They included some who were to be numbered among the original trustees of the 1892 Trust Deed, in particular Charles Stokes Read (a company director and stock-jobber, who is the paternal great-grandfather of the First Fifth and Sixth Defendants) and Joseph Morris, an architect who would be the designer of the Ark of the Covenant church.
18. Smyth-Pigott focused his preaching efforts on London and, continuing in Prince’s fiery, charismatic style, succeeded in attracting many new followers. The extent of his success can be measured by the plan which then emerged to establish a permanent place of worship for sect

followers in London. Hence the 1892 purchase of the plot of land in Stamford Hill. The purchase and the subsequent construction of the church was funded by donations from the faithful.

19. The Ark of the Covenant was constructed to Joseph Morris' design between 1893 and 1896. It appears to have been a most impressive and singular building. It consisted of a wide hall with a single-span, high-pitched roof, a tower and a spire at the western end with a shallow, semi-octagonal chancel. The exterior was of dark Bristol stone ornately dressed with white Portland stone. Around the base of the tower stood four winged creatures from the Book of Revelations (a man, a lion, an ox and an eagle) carved in white stone and trampling skeletons under foot. The pews inside the church seated 300. The church also boasted a glorious collection of stained glass windows designed by Walter Crane, a founder of the Arts & Crafts movement. There was no formal altar but a throne set on a dais in the chancel.
20. Prince died in 1899, and was duly succeeded as leader by Smyth-Pigott. To start with, he commuted between London and Somerset, attending to his flock in both locations. However, following an incident in 1902 (to which I will come shortly) he largely retreated to the Agapemony at Spaxton.
21. At some point Smyth-Pigott dispensed with his wife and also entered into a "spiritual" marriage with Ruth Annie Preece. They had three (illegitimate) children born between 1905 and 1910, named Glory, Power and Life – although, mercifully, they were also given, or later adopted, more conventional names (David, Patrick and Lavita). Patrick/Power was the father of the Second, Third and Fourth Defendants. Lavita/Life married the grandson of Charles Stokes Read and was the mother of the First, Fifth and Sixth Defendants. Within the sect, Smyth-Pigott became known as "Beloved" and he, Ruth and their children as the "Holy Family".
22. Smyth-Pigott died in 1927. There was no charismatic successor and it appears that the sect in London withered on the vine after his death. However, Ruth survived until 1956 and the community at Spaxton continued until the land and buildings were sold to a local developer in 1962. From 1956 until 1978 the then trustees of the 1892 Trust Deed leased the church to the

Ancient Catholic Church which continued to occupy it on an informal basis until about 2008 when that sect's leading light, the Reverend Pam Schroder, died.

23. Meanwhile, in 1965, the church was registered as a charity as being "Property held for the purposes of the Religious Body known as the Church of the Son of Man, also known as Agapemonite Church Primitives (the Ark of the Covenant)". It appears that this registration was effected on the initiative of Olive Morris (daughter of the architect Joseph), who was one of the trustees of the 1892 Trust Deed, but without the knowledge of Lavita, her co-trustee at the time. As I have mentioned, the land and buildings at Spaxton (which were not held by the trustees of the church) had recently been sold off. Olive Morris was apparently concerned that a similar fate might befall the church and she considered registration as a charity might prevent this. Unfortunately, no correspondence or other documentary evidence survives which explains the Charity Commissioners' reasons for acceding to the application.
24. In November 2004 the Charity Commission wrote to the solicitors acting for the then trustees in the following terms:

"We would say that the organisation was wrongly registered. We have examined the Trust Deed and we note from Picarda page 56 (see *Nottidge v Prince* (1860), that the Agapemonites was (sic) held not to be a religious body.

It does seem to us from the knowledge of this organisation that its purposes were never exclusively charitable. We are therefore proposing to remove the charity from the register forthwith".

The church duly ceased to be a registered charity with effect from 1 December 2004. I shall have to return in due course to the reasons for deregistration set out in this letter.

The Agapemonites and their beliefs

25. A clear insight into the belief system of the Agapemonite community whilst under the leadership of Prince can be found in the report of **Nottidge v Prince** (*supra*). This contains extensive extracts from the written and oral evidence given by Prince in the course of the proceedings.
26. I refer to the following passages in particular:

- (1) In 1845 Prince declared that prayer was unnecessary because “the day of grace was closed and the day of judgment had commenced” (p.254);
 - (2) “Prince’s spirit was extinct, but his body was inhabited by the Holy Spirit” (p.254);
 - (3) Prince was “His [God’s] witness”. “This one man, myself, has Jesus Christ selected and appointed His witness to His counsel and purpose to conclude the day of grace and to introduce the day of judgment, and to close the dispensation of the Spirit and the Gospel and to enter into covenant with flesh” (p.257);
 - (4) “I have declared that the Holy Ghost by me did close the Day of Grace and introduce the Judgment. I have declared and mean that the Holy Ghost spake by me” (p.267).
27. Those extracts are of a piece with the trusts declared by the 1892 Trust Deed which refer to the body of people which “believe in the Holy Ghost as having fulfilled the Gospel in “Brother Prince” and as being the covenant head of the dispensation of judgment introduced by Brother Prince whose teaching is contained in his writings “The Man Christ Jesus” and “The Counsel of God in Judgment”.
28. Whilst the delusional and egotistical nature of Prince’s claims is self-evident, it seems to me that Prince claimed only to be God’s witness or instrument. He did not assert some personal messianic status. This was all in the context of Prince’s apocalyptic vision of the imminent Day of Judgment (reflected in concrete form in the statuary at the Ark of the Covenant) and the earthly paradise for believers provided at Spaxton.
29. Following Prince’s death, however, the sect’s new leader, the Reverend Smyth-Pigott, made even more ambitious claims. Whilst Prince was known to adherents as “Brother Prince”, Smyth-Pigott was (as I have mentioned) referred to as “Beloved” and he, Ruth and their children as the “Holy Family”. It appears, in a rule which certainly smacks of a personality cult, that at Spaxton only “Beloved” and his “Spiritual Bride” Ruth were permitted to have children. I have also mentioned the potential significance of the requirement in the 1892 Trust Deed for 13 trustees, of whom the first-named was Smyth-Pigott.

30. What might otherwise have been a matter of inference was asserted publicly in 1902 in an incident faithfully recorded by the Hackney and Kingsland Gazette. At Evensong on Sunday 7 September, Smyth-Pigott declared to his congregation at the Ark of the Covenant:

"I am come again for the second time as the Bridegroom of the Church and the Judge of all men, for the Father has committed all judgment unto me because I am the Son of Man. And you, each one of you, must be judged by me...

It is not up there – in heaven – where you will find your God, but in me who am united with the Father".

Perhaps predictably, this precipitated a riot. The next day, 5-6,000 people assembled on Clapton Common to denounce Smyth-Pigott's blasphemy. About 200 of them stormed the church. It was after this incident that Smyth-Pigott retreated to the Agapemony in Somerset.

31. Of course, Smyth-Pigott proved to be disappointingly mortal in 1927.

Did the 1892 Trust Deed declare charitable trusts?

32. There are two issues which arise here:

- (1) Were the trusts ones recognised by the law as charitable as being for the advancement of religion?
- (2) If so, were they for exclusively charitable purposes? It is well-established that if assets are held on trust to be applied for objects which embrace those which are charitable in law but also other objects which are not, that is insufficient. It is only if the relevant assets must be applied for objects which are charitable in law that the privileges attaching to charitable status apply.

However, it is important to bear in mind that these questions fall to be answered by reference to the precise terms of the 1892 Trust Deed and the background circumstances in 1892 when those trusts were declared. Subsequent events are not important except insofar as they shed light on the position in 1892.

33. It is a fundamental principle of this branch of charity law that the courts do not take it upon themselves to pass value judgments on different religions or on different sects within religions. This, no doubt, reflects the long tradition of religious tolerance in this country which has persisted for most of the last three centuries, at least. As the Master of the Rolls (Sir John Romilly) stated in **Thornton v Howe** (1862) 31 Beav.14, 19-20:

“In this respect, I am of opinion that the Court of Chancery makes no distinction between one sort of religion and another. They are equally bequests which are included in the general term of charitable bequests. Neither does the Court, in this respect, make any distinction between one sect and another”.

34. The facts of **Thornton v Howe** are instructive. The testatrix left a fund “for the printing, publishing and propagation of the sacred writings of the late Joanna Southcote”. The validity of the bequest was challenged on the basis that (p.15):

“...the writings of Joanna Southcote, which are referred to in the will of the testatrix purport to declare, maintain or reveal that she was with child by the Holy Ghost, and that a second Shiloh or Messiah was about to be born of her body, and in other parts thereof purport to be or contain revelations made to her by the Holy Ghost or by divine inspiration, and to maintain or declare that she was moved or inspired by the Holy Spirit to write the same...”.

The Master of the Rolls said (at pp.18-19):

“She [*Joanna Southcote*] was, in my opinion, a foolish, ignorant woman, of an enthusiastic turn of mind, who had long wished to become an instrument in the hands of God to promote some great good on earth. By constantly thinking of this, it became in her mind an engrossing and immovable idea, until at last she came to believe that her wish was accomplished, and that she had been selected by the Almighty for this purpose. Of course she had, during her life, many followers, and probably has some now, as every person will have who has attained to such a pitch of self-confidence as sincerely to believe himself to be the organ of communication with mankind specially selected for that purpose by the Divine Author of his being”

and at pp.20-21:

“The testatrix, it is clear, was a disciple or believer in Joanna Southcote, who, from her writings, it is clear, was a very sincere Christian but she laboured under the delusion that she was to be made the medium of the miraculous birth of a child at an advanced period of her life, and that thereby the advancement of the Christian religion on earth would be occasioned. But her works, as far as I have looked at them, contain but little upon this subject, and nothing which could shake the faith of any sincere Christian. In truth, although her works are in a great measure incoherent and confused, they are written obviously with a view to extend the influence of Christianity”.

He held that the testatrix’s will created a charitable trust.

35. The parallels with the present case are, in my judgment, obvious. Prince considered himself to be God's witness or instrument – or, as the Master of the Rolls put it, an “organ of communication with mankind specially selected for that purpose by the Divine Author of his being”. The fact that these claims were foolish and delusional does not disqualify the trust from charitable status if it was established (in the present context) “with a view to extend the influence of Christianity”. In my judgment, it was. I have already referred (in paragraph 12 above) to the respects in which the 1892 Trust Deed incorporates references to mainstream Christian doctrine.

36. In **Re South Place Ethical Society** [1980] 1 WLR 1565, 1571, Dillon J said:

“It seems to me that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god”.

This formulation may now be unduly narrow but the Agapemonite faith undoubtedly had those attributes.

37. It could be argued, I suppose, that under Smyth-Pigott's leadership, the sect crossed a line between eccentricity and downright blasphemy and that this should influence my decision. But I am not persuaded that that is so. First, the only qualification added by the Master of the Rolls to his statement of principle in **Thornton v Howe** was (p.20):

“It may be that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality”.

That is a very high threshold which I am not satisfied is crossed. Secondly, the Master of the Rolls was not unduly troubled by the fact that Joanna Southcote claimed to be the mother of a second Messiah (in other words, of equivalent status to the Virgin Mary). It is difficult to see why Smyth-Pigott's claim to be the second Messiah himself should make the difference between charitable and non-charitable status. Thirdly, and in any event, the trust was established in 1892 when Prince was still leader and ten years before Smyth-Pigott's declaration of divinity. My decision must be based on what I can glean of the Agapemonites' belief system in 1892, not later on.

38. In my judgment, the Court should not allow either the delusions of Prince (or Smyth-Pigott) or indeed the dubious activities of the two leaders which I have described to obscure the fact that the objects of the 1892 Trust Deed were to promote the religious activities of a body of people who constituted a recognisable Christian sect. I find that the religious purposes of the Agapemonite sect were charitable in law.

39. What, then, of the reasons given by the Charity Commission for deregistering the sect in 2004? The Charity Commission's letter gave two reasons:

(1) It appears from p.56 of *Picarda: The Law and Practice Relating to Charities* that the Agapemonites had been held in **Nottidge v Prince** not to be a religious body;

(2) The purposes of the organisation were never exclusively charitable.

40. I do not accept the second of those two reasons, as I shall explain in paragraphs 45-49 below. As for the first reason, the reference to *Picarda* is to the first edition of that work published in 1977. It was not the edition in force when the letter was written in 2004. Page 56 of the first edition stated:

“In this country certain sects have been held not to be religious institutions. Thus the “Church” of the Agapemonites was held not to be a religious institution...”.

Two authorities were footnoted as supporting this statement. The first was **Nottidge v Prince**. However, that case had nothing to do with the charitable status of the Agapemonite sect and the Vice-Chancellor said nothing on that subject. The case was entirely concerned with the validity of Louisa Nottidge's gift to Prince which was set aside on conventional equitable principles. The second footnoted case was “*Re Fysh* (1957), *The Times*, 1 July”.

41. My researches in the Inns of Court libraries have failed to unearth any case report of, or even an article about, *Re Fysh* in *The Times*. However, there are two references to such a case in “*The Abode of Love*” (pp.142-3 and 204). It appears that Jessie Fysh, one of the sect's adherents who had lived for a while at Spaxton, died in 1953 leaving a will under which £10,000 was to be held in trust to be used for the religious purposes of the Church of the Ark of the Covenant. The gift was challenged by Jessie's family and the case was tried in the Chancery Division in June 1955

(not 1957) and was the subject of an article (apparently not a law report) in The Telegraph (not The Times). The account in Mrs Barlow's book suggests that the challenge was successful and that the Judge was influenced by Smyth-Pigott's claim to be the second messiah.

42. It is hard to know what to make of this in the absence of any report of the (unnamed) Judge's decision and reasoning. In any event, the Judge would have been deciding a different question to the one which I have to decide. He had to decide whether a gift to the Church of the Ark of the Covenant was a valid charitable gift in 1953 when Jessie Fysh died. By that time, Prince was long gone and the sect could be considered to reflect Smyth-Pigott's more extreme claims (if that is relevant: as I have said, I do not think it tips the balance). Moreover, the sect was by then defunct so there was no extant charitable purpose for the gift to bite on. I do not think that *Re Fysh* should affect my view of the position in 1892.
43. My conclusion is that the statement in the first edition of *Picarda* is too broadly expressed. It is right to point out that it has not appeared in either of the two most recent editions of that work.
44. Before the enactment of the Charities Act 2006 (which has no retrospective effect), the necessary element of public benefit was presumed in relation to religious charities. I see no grounds for concluding that this presumption is displaced in the case of the 1892 Trust Deed. The sect was outward-looking and welcomed new members. The Ark of the Covenant appears to have been open, at least most of the time, to the public.
45. I turn now to the issue foreshadowed above, namely whether the trusts declared by the 1892 Trust Deed were exclusively charitable. I agree with the Charity Commission that, on the evidence, the purposes or objects of the Agapemonite sect were not exclusively charitable. For example, the running of the Spaxton community could not be an exclusively charitable enterprise. Nor can the 1892 Trust Deed properly be construed as limiting the trusts to those objects of the sect which were charitable in law. The Trust Deed refers to "all the purposes" of the sect and "the objects of the said body in such manner as the trustees for the time being or a majority in number of such trustees shall think fit". The present case is therefore analogous with cases such as **MacLaughlin v Campbell** [1906] IR 588 ("such Roman Catholic purposes...as the trustees might think fit and proper") and not with cases such as **Re Barnes** [1930] 2 Ch 80n

("to the Church of England absolutely") and Re Schoales [1930] 2 Ch 75 ("to the Roman Catholic Church for the use thereof") where gifts to the "Church" enabled the Court to construe the permissible objects as limited to religious ones. If the 1892 Trust Deed had referred to "the Church of the Holy Agapemony", the matter might have stood differently.

46. However, the Charity Commission's reasoning under his head seems to me to ignore the effect of the Charitable Trusts (Validation) Act 1954. The operative provisions of this statute are as follows:

"1. Validation and modification of imperfect trust instruments.

(1) In this Act, "imperfect trust provision" means any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable.

(2) Subject to the following provisions of this Act, any imperfect trust provision contained in an instrument taking effect before the sixteenth day of December, nineteen hundred and fifty two, shall have, and be deemed to have had, effect in relation to any disposition or covenant to which this Act applies –

(a) as respects the period before the commencement of this Act, as if the whole of the declared objects were charitable; and

(b) as respects the period after that commencement as if the provision had required the property to be held or applied for the declared objects insofar only as they authorise use for charitable purposes...

2. Dispositions and covenants to which the Act applies.

(1) Subject to the next following subsection, this Act applies to any disposition of property to be held or applied for objects declared by an imperfect trust provision, and to any covenant to make such a disposition, where apart from this Act the disposition or covenant is invalid under the law of England and Wales, but would be valid if the objects were exclusively charitable...

(3) A disposition in settlement or other disposition creating more than one interest in the same property shall be treated for the purposes of this Act as a separate disposition in relation to each of the interests created".

47. The effect of these provisions is that where a disposition made in an instrument taking effect before 16 December 1952 (as the 1892 Trust Deed was) is not exclusively charitable, it is to be

treated as exclusively charitable if it would otherwise be invalid. The statute operates retrospectively: "...shall have, and be deemed to have had, effect...".

48. In **Ulrich v Treasury Solicitor** [2006] 1 WLR 33 at [29], Hart J formulated the question to be asked as follows:

"Another way of putting that question is to ask whether anyone would have a legitimate complaint if the whole were applied for charity....If, upon an examination of the objects of the trust, as expressed by its wording construed against the appropriate factual matrix, the answer to that question is that no-one could object to an exclusively charitable application, the provision satisfies the condition".

In the case of the 1892 Trust Deed, no-one could, in my judgment, properly object to the church and its proceeds of sale being applied exclusively for the religious purposes of the Agapemonite sect.

49. But for the operation of the 1954 Act, the disposition in favour of the Agapemonites would be void as being a non-charitable purpose trust. Accordingly, the Act operates to save it and it must be treated as a retrospectively valid charitable trust in 1892.

Can the proceeds of sale of the church be applied *cy-pres*?

50. In my judgment, it is clear that what the textbooks refer to as a "*cy-pres* occasion" has occurred. The Agapemonite sect lost its driving force with the death of Smyth-Pigott and its numbers gradually dwindled. By 1956 the Ark had ceased to be used for Agapemonite worship: hence the lease to the Ancient Catholic Church. Even the Agapemony at Spaxton disbanded in the early 1960s. As Mrs Buckley pointed out in her address to me, the First to Sixth Defendants inclusive are the last of the Agapemonites (no doubt, at least in part, because of the rule that only "Beloved" and Ruth could have children). But they do not claim to adhere to the sect's religious principles. It is therefore no longer possible for the funds held by the trustees to be used for the religious purposes of the Agapemonite sect.
51. There is, however, one further condition of which I must be satisfied before I can order that a *cy-pres* scheme be drawn up. In cases of supervening impossibility, a *cy-pres* application is only permitted if the original gift to charity was "outright" or "perpetual". In the present case, that raises the question of what is the significance of the gift over to the trustees for the time being

beneficially “subject and without prejudice to the foregoing trust”. There can be no doubt that, because it did not take effect immediately on the execution of the 1892 Trust Deed (as it would have done if the primary trust had not been charitable), the gift over is void for perpetuity. Does its mere presence in the 1892 Trust Deed nevertheless prevent application of the *cy-pres* doctrine?

52. There are a number of reported cases in this area which are not entirely easy to reconcile. The guiding principle does, however, seem to be clear. The question is one of construction of the relevant trust deed. As Stirling J put it in **Re Bowen** [1893] 2 Ch 491, 495-6:

“The question which I have to decide, therefore, appears to me to reduce itself to one of the construction of the testator’s will – i.e. whether the testator has given the property to charity, in perpetuity, subject to an executory gift in favour of the residuary legatee, or whether he has given it for a limited period, leaving the undisposed of interest to fall into residue”.

If the former is the correct construction, a *cy-pres* application may be ordered. If the latter is the correct construction, it may not.

53. In **Re Bowen**, the testator left funds to establish certain schools and to continue them “for ever thereafter”. But he also declared that “if at any time hereafter the Government of this kingdom shall establish a general system of education”, the trusts should cease and the relevant funds should be disposed of elsewhere. Stirling J held that

“He [*the testator*] contemplates a perpetual succession of trustees in whom the execution of the trust is to be vested. I think that on the true construction of the will there is an immediate disposition in favour of charity in perpetuity, and not for any shorter period. That is followed by a gift over if at any time the Government should establish a general system of education; and under that gift over the residuary legatees take a future interest conditional on an event which need not necessarily occur within perpetuity limits. It follows that the gift over is bad...”.

54. In **Re Peel’s Release** [1921] 2 Ch 218, land was granted “for ever thereafter” for use as a place of instruction in the principles of the Church of England for 70 poor children of the parish. The deed went on to provide that, if this charitable purpose should “either not take effect or, having taken effect, shall afterwards cease or determine or be defeated or the precise objects of these presents being for the education of poor children in the principles of the Church of England

become prevented” then a gift over should operate. Sargant J held that the charitable gift was perpetual and not for a limited period only.

55. On the other side of the line is **Re Randell** (1888) 38 Ch D 213, where a testatrix left money on trust to pay the income to the incumbent of a particular church and his successors “so long as” they permitted parishioners to attend free of charge (i.e. without paying pew-rents) with a gift over to residue if that condition was not fulfilled. North J held that

“...there is a charity created for a definite limited time and no longer, and there is no general purpose of charity with respect to which a scheme could be made altering entirely the destination of the income of these investments”.

56. Similarly, in **Gibson v South American Stores (Gath & Chaves) Ltd** [1950] Ch 177, the Court of Appeal held that a fund created by a company to provide pensions and gratuities to “necessitous and deserving” employees did not disclose a permanent charitable intent *inter alia* because the relevant deed contained a general discretionary power enabling the company’s board to revoke or modify the trusts declared at any time.

57. In **Re Cooper’s Conveyance Trusts** [1956] 1 WLR 1096, land was granted to establish the Orphan Girls’ Home in Kendal in accordance with certain rules set out in a schedule “and on failure of the said trust evidenced by a resolution of the Committee of Management”, the land should “subject to the said foregoing trust” and “on the failure of the aforesaid charitable objects” be held upon other trusts. The Home was forced to close in 1954 after 90 years of useful life. Upjohn J held that a *cy-pres* scheme could not be directed on the footing that

“...the donor intended a gift to charity only for a limited time and for a limited purpose; that is to say, the time limited by the time for which the orphanage could be carried on”.

58. This decision has been criticised in *Picarda* (4th Ed, p.465) and by other academic writers. With respect to the Judge, I too find his reasoning hard to follow. He starts (at 1101-2) with a recognition that the issue is one of construction of the relevant deed and a statement of principle which is broadly consistent with **Re Bowen** (which he cites with approval):

“Where in terms an absolute and perpetual gift to charity is made with a gift over on cesser which fails for remoteness or some other reason, the original perpetual gift to charity remains; but, on the other hand, where there is a gift to charity for a limited period then the undisposed of interest reverts to the grantor”.

He then refers to another case and observes:

“As in the case before me, there was in that case a gift neither expressed to be in perpetuity nor, on the other hand, limited in duration.

At 1103, he continues:

“Thus, in the present case, if there had been no gift over on the failure of the orphanage, it would hardly have been suggested that upon subsequent failure of it there would have been a resulting trust. Where, however, the donor uses language showing an intention that in some circumstances he contemplates a failure of the purpose or indicates that his gift is only to be for a limited time or purpose, then it becomes a question of construction, whether he has made an out-and-out or perpetual gift to charity or not, and that is not inaptly expressed by asking whether he has evinced a general charitable intention”.

Then at 1104:

“What, however, seems to me clear is that the donor desired the charity to continue only while it could be carried on as an orphan girls’ home by the committee of management and subject to the general supervision and general meetings of subscribers as detailed in the schedule. When that particular charity came to an end, in my judgment, she evinced the clearest possible intention that the property was to go over to the non-charitable purpose mentioned in her will. She has said quite clearly that, on failure of the trusts...it is to be held upon the new trust...”.

He then reached his conclusion, as I have set out above.

59. This is puzzling because the Judge appears to have based his conclusion entirely on the fact that the donor contemplated, and expressly provided for, the failure of the declared charitable purpose. But that, surely, cannot be enough. If it were, the contrast which he makes (based on **Re Bowen**) between “an absolute and perpetual gift to charity...with a gift over on cesser” and “a gift to charity for a limited period” would never arise. The latter would always include the former.
60. It is fair to say that the test is, as it seems to me, inherently problematic. Any disposition containing a gift over conditional on failure of a charitable purpose could be interpreted as a charitable gift for a limited period, *viz.* until the failure of the purpose. There is no clear principled distinction between the two.

61. Nevertheless, on the current state of the authorities, that is the distinction which I must try to draw. Since it is a question of construction of the relevant trust deed, other reported cases on different wording are not decisive. I must focus entirely on the 1892 Trust Deed.
62. In my judgment, the 1892 Trust Deed contains an outright or perpetual trust for charitable purposes. The following aspects of the deed's provisions support this conclusion:
- (1) The primary trusts are declared to apply "at all times hereafter".
 - (2) There is no express limit on the duration of the charitable trust.
 - (3) The gift over takes effect only "subject and without prejudice to the foregoing trusts". In other words, unless the primary charitable trust becomes impossible to perform, it prevails.
 - (4) The declaration does not attempt to identify the circumstances in which the charitable trust might fail. The gift over is simply a fallback in case the unexpected happens.
63. It follows that there is no obstacle to my directing that the net proceeds of sale of the Ark of the Covenant be applied *cy-pres* pursuant to a scheme determined by the Charity Commission and I so order.
64. In her oral address to me, Mrs Buckley invited me to order that the proceeds be distributed to the First to Sixth Defendants to be shared between them on the footing that they are the only people left who have anything to do with the Agapemonites. However, that is a course which is not legally open to me.