Trinity Term
[2014] UKSC 33
On appeal from: [2012] EWCA Civ 983

JUDGMENT

Shergill and others (Appellants) *v* Khaira and others (Respondents)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Hodge

JUDGMENT GIVEN ON

11 June 2014

Heard on 19 and 20 February 2014

Appellants	*Respondents*
Mark Herbert QC David Halpern QC Prof Satvinder Singh Juss (Instructed by Addlestone Keane Solicitors)	Mark Hill QC James Quirke (Instructed by Seymours Solicitors LLP; D C Kaye Solicitors; Bindmans LLP)

LORD NEUBERGER, LORD SUMPTION AND LORD HODGE (with whom Lord Mance and Lord Clarke agree)

1. This appeal arises out of divisions which have arisen within a Sikh sect associated with three Gurdwaras (Sikh temples) in Bradford, Birmingham and High Wycombe. It raises two questions arising out of the trusts on which the Gurdwaras are held. The questions are (i) the extent to which it is open to trustees to alter, or restrict, the terms of the trusts upon which they hold property, and (ii) the extent to which the court can and should refuse to determine issues of religion or religious belief in legal proceedings. The Court of Appeal confined itself to issue (ii). They decided that the whole dispute was non-justiciable and ordered a permanent stay of the entire proceedings, thus making it unnecessary to deal with issue (i).

The factual background

2. On 22 April 1987, fourteen men, all Sikhs living in or near Birmingham, attended a meeting at which certain "decisions were passed unanimously" according to a memorandum ("the April 1987 memorandum"). An unchallenged translation of the April 1987 memorandum records that it was decided that:

> "under the guardianship of His Holiness Brahamgiani, revered 108 Sant Maharaj Baba Gian Singh Ji of Nirmal Kutia Johal, and on his orders, wishes and instructions, another Gurdwara … be established in the Midlands area of England for the benefit and forever success of the Sikh faith, brotherhood and the devotee congregations …".

His Holiness there referred to was the then holder of the office of Holy Saint, and known for the purpose of these proceedings as "the First Holy Saint". The First Holy Saint had succeeded the original Holy Saint (who had died in 1971), as the religious head of the abode of saints at Nirmal Kutia in the Indian village of Johal. The memorandum also recorded that it was decided that "another large gathering be called" on 17 May 1987.

3. A meeting duly took place on 17 May 1987, which was attended by twenty-eight men, and which resulted in decisions which were recorded in another memorandum ("the May 1987 memorandum"). This memorandum, again in an unchallenged translation, records a number of decisions. First, that,

"under the Supreme Authority of" the First Holy Saint (referred to in the memorandum as "His Holiness"), a Gurdwara "be established in the Midlands area", which was to be "similar to" a Gurdwara which had been acquired in Bradford in 1982. Secondly, that "this Gurdwara … be established in Birmingham under the discipline and headship of His Holiness". Thirdly, that the Gurdwara "and all services shall always be conducted according to the orders and wishes of His Holiness". The fourth decision was that only adherents "of Sikh faith" could be a trustee or on the management committee. Fifthly, it was decided to "look for a building for the … Gurdwara… and to purchase it according to orders from His Holiness". Finally, a committee of nineteen men was recorded as "formed to serve".

4. Meanwhile, donations were being collected from devotees, and a property at Oldbury, Birmingham ("the Birmingham Gurdwara") was found and, on 17 September 1987, it was inspected by the First Holy Saint. According to a memorandum ("the September 1987 memorandum") of that date, he "gave his approval with delight" to its purchase. The memorandum records that he "gave the responsibility of managing [the Birmingham] Gurdwara" to five men, of whom four, the first, second and third respondents and Tarlochan Singh ("the original trustees") were described as "trustees". The September 1987 memorandum also stated that "only Maharaj Sri 108 Sant Maharaj Baba Gian Singh Ji - Nirmal Kutia, Johlan - will have the authority to change any trustee, management member and the whole management system of the Gurdwara Sahib in any form at any time".

5. The Birmingham Gurdwara was then purchased with a combination of the donations collected from devotees and loans, which were subsequently discharged from further donations. The Birmingham Gurdwara was transferred to the original trustees by a transfer dated 19 November 1987 ("the transfer"). The transfer referred to the original trustees as "Trustees of the Gurdwara Amrit Parchar Dharmik Diwan (UK) Birmingham" (to whom we will refer generically as "the Birmingham trustees"), and to the property transferred as "know[n] for identification only as an Office Block but which is to be known as a Sikh Temple". The transfer contained a covenant by the original trustees with the transferor that for ten years the property would not be used other than "as a Temple, Synagogue or Church".

6. On 15 January 1991, the original trustees executed a Deed of Trust ("the 1991 Deed"), under which they declared in clause 1 that they were the duly appointed trustees of the Gurdwara Amrit Parchar Dharmik Diwan (UK) Birmingham, which they defined as "the Society" (Amrit Parchar refers to a form of baptism). The Society was described in clause 1 as "a religious organisation preaching and practising the Sikh faith, following the teachings of [the First Holy Saint] resident at Nirmal Kutia … ('the Saint") or his successor". Clause 2

referred to the Birmingham Gurdwara (defined as "the property"), and in clause 3 the original trustees declared that they held it "as Trustees for the Society to be dealt with as may be directed in writing by the Saint or his successor". In Clause 4, the original trustees declared that the trust for sale on which the property was held would not be exercised "without the consent in writing and the direction of the Saint or his successor". Clause 5 empowered "the Saint or his successor" "at any time … [to] remove the Birmingham trustees or any of them and appoint new trustees". Clause 7 provided that, in the event of the Society being "wound up or ceasing to exist", the property and all other assets in the hands of the Birmingham trustees "shall be held in trust for the Saint or his successor".

7. At around this time, on 24 February 1991, the Constitution of the Society ("the 1991 constitution") was drawn up and signed by a number of men including the first, second, third and fourth respondents. The 1991 constitution applied to the communities which worshipped at both the Bradford and the Birmingham Gurdwaras. It described the Society's aims and objects as including "[t]o preach Sikhism, doctrine of Holy Shri Guru Granth Sahib and teachings of Ten Gurus from Guru Nanak Dev Ji to Guru Gobind Singh Ji", as well as others, including encouraging "ceremonial baptism", discouraging "the use of alcohol and smoking", encouraging Panjabi education, and establishing a Sikh information centre and libraries. Clause 10 of the 1991 constitution stated that changes in the Society's management committee could only be made by "[the first Holy Saint] or his successor", and, at the end of the constitution there was added "PS Word 'successor' in the above text means Sant Harbhajan Singh Ji (Brakat)", who was at that time the assistant to the first Holy Saint (hereinafter "Sant Harbhajan Ji").

8. On 20 September 1993, a property was acquired at High Wycombe ("the Wycombe Gurdwara") with the assistance of donations and loans from devotees. The transfer was made to the sixth and eighth appellants and the fifth and sixth respondents ("the Wycombe trustees"), who were described as holding the property "upon the trusts declared by a Deed of even date herewith". By that Deed, the Wycombe trustees declared that they held the Wycombe Gurdwara "in accordance with [the Society's] constitution". At that time, or shortly afterwards, the 1991 constitution was replaced by a new constitution ("the 1993 constitution") which applied to the communities which worshipped at the Bradford, Birmingham and Wycombe Gurdwaras ("the three Gurdwaras"). The 1993 constitution was in very similar terms to the 1991 constitution and, in particular, it included the same clause 10 and "PS" as the 1991 constitution.

9. On 31 August 2001, the First Holy Saint appointed the third appellant as one of the Birmingham trustees in place of Tarlochan Singh. Three months later, the First Holy Saint died and was succeeded by Sant Harbhajan Ji, who died a few months later in March 2002. It is the appellants' pleaded case that, on 20 March 2002, the ninth appellant, Saint Sant Jeet Singh Ji Maharaj ("Sant Jeet

Singh"), was then recognised as the head of Nirmal Kutia Johal in India, and thereby became the Third Holy Saint, as confirmed by a formal written resolution signed by 24 saints and eleven dignitaries. On 13 July 2003, at a joint meeting of the management committees of the three Gurdwaras, Sant Jeet Singh was recognised as the Third Holy Saint, in a resolution signed by a number of men, including the first, second, third, fourth, fifth and sixth respondents.

10. On 31 December 2003, a revised Constitution ("the 2003 constitution") for the three Gurdwaras was agreed in Nirmal Kutia, and it was signed by various men, including the six respondents. This 2003 constitution was quite similar to the 1991 and 1993 constitutions, but it had somewhat more aims and a few further provisions. It referred to the consent of Sant Jeet Singh "and his successor" being required for certain changes in personnel, and contained a "NOTE" at the end stating that "[t]he word 'successor' … means His Holiness Sant Baba Jaspal Singh …".

11. New trust deeds were prepared in respect of each of the Birmingham and Bradford Gurdwaras. That in respect of the Bradford Gurdwara was executed on 13 February 2004. However, the first, second and third respondents (as three of the four Birmingham trustees) refused to execute the new trust deed in respect of the Birmingham Gurdwara. By deeds executed on 8 June 2004 and 20 June 2006, Sant Jeet Singh purported to remove the first, second, third and fourth respondents as Birmingham trustees, and to replace them with the second, third, fourth and fifth appellants. By another deed dated 12 June 2008, Sant Jeet Singh purported to remove the fifth and sixth respondents as Wycombe trustees, and to replace them with the sixth, seventh and eighth appellants and two other men. On 8 October 2008, the first, second and third respondents (as the other three Birmingham trustees) purported to remove the third appellant as a trustee and to replace him with the fourth respondent.

The procedural history

12. On 25 June 2008, the appellants issued proceedings in the High Court seeking various heads of relief, including removal of the first, second, third and fourth respondents as Birmingham trustees, and as members of its management committee, and for connected relief (as well as for relief in connection with the Wycombe Gurdwara). Paras 3-6 of the particulars of claim explained that Birmingham Gurdwara was a place of Sikh worship, that Sikhism involves worshipping ten successive Gurus, that the Nirmalas are a sect of the Sikh religion founded by the tenth Guru, Gobind Singh Ji, that the original Holy Saint started preaching in about 1920, and that Nirmal Kutia is the abode of the saints of Nirmal, a sect which is distinguished by its adherence to baptism and strict adherence to Rehet Maryada, the Sikh code of conduct. In para 28, it was stated

that the three Gurdwaras were "religious endowments having the purpose of the advancement of tenets of the Holy Saints of Nirmal sect".

13. Although the particulars of claim were rather long, the essence of the claim in relation to the trusteeship of the Birmingham Gurdwara was that Sant Jeet Singh, as the successor of the First Saint, had the right to remove and appoint trustees under the 1991 Deed, and that he had validly removed the first, second, third and fourth respondents as Birmingham trustees and as management committee members in June 2004. They sought similar relief in respect of the trusteeship and management committee of the Wycombe Gurdwara.

14. The Defences of the respondents did not admit paras 3-5 and denied para 28, of the particulars of claim. More specifically, it was alleged in the Defences that the Second Holy Saint died in March 2002 without appointing a successor, and, in any event, the expression "successor" in the 1991 Deed only applied to the Second Holy Saint. The respondents contended that the 1991 Deed could not validly extend the power to remove or appoint trustees to anyone other than the First Holy Saint. The respondents also raised counterclaims, which included a claim for declarations that the first, second, third and fourth respondents were the Birmingham trustees, and that Sant Jeet Singh had no power of removal or appointment of Birmingham trustees or any other power in relation to the Birmingham Gurdwara or its management.

15. The appellants wished to amend their particulars of claim, and the respondents not only opposed this on the ground that the claim had no realistic prospect of success, but sought to strike out the claim as it raised issues which were said to be unjusticiable. Those two issues came before His Honour Judge David Cooke, sitting as a judge of the High Court in the Birmingham District Registry. On 12 September 2011, he gave the appellants permission to amend their particulars of claim, and dismissed the respondents' application to strike out the claim – [2011] EWHC 2442 (Ch). He gave the respondents permission to appeal on the latter point. The amended particulars of claim were served a week later.

16. The respondents appealed to the Court of Appeal on the issue of justiciability and also on the permission to amend (for which they obtained permission to appeal from the Court of Appeal). The Court of Appeal allowed their appeal for reasons contained in a judgment given by Mummery LJ (with whom Hooper and Pitchford LJJ agreed) [2012] PTSR 1697. He held that there were no "judicial or manageable standards" by which the issues could be judged, because they turned on the question "who is 'the successor' of the original founder of the temple trusts", which was an issue which "depends on the religious beliefs and practices of Sikhs generally and the Nirmal Kutia Sikh

institution in particular", and which "is not justiciable by the English courts" – see para 77.

17. The appellants now appeal to this Court. When considering the arguments, it is only necessary to deal with those which relate to the Birmingham Gurdwara and the Birmingham trustees, as there are no different arguments which relate to the Wycombe Gurdwara and the Wycombe trustees.

The issues

18. During the course of the argument before us, four issues emerged as likely to be in dispute, if this case were to go to trial on the basis that all issues were justiciable. It may be that there would be other issues, but, as far as this appeal is concerned, we should concentrate on the four issues.

19. The first issue is whether the respondents are right in suggesting that the 1991 Deed was invalid if and in so far as it purported, by clause 5, to confer the power to appoint and dismiss trustees on anyone other than the First Holy Saint. The second issue, which only arises if the appellants are right on the first issue, is whether the reference to the "successor" of the First Holy Saint in the 1991 Deed is to be read as limited to Sant Harbhajan Ji, ie the anticipated, and actual, immediate successor to the First Holy Saint, as the respondents contend, or whether it extended to each subsequent successor, as the appellants argue. The third issue, which only arises if the appellants are right on the first and second issues, is whether Sant Jeet Singh is indeed a successor to the First Holy Saint – ie whether he is indeed the Third Holy Saint – as the appellants contend and the respondents deny. During argument, it appeared that the respondents wished to raise a fourth issue, albeit that it may be an aspect of the third issue, namely that Sant Jeet Singh has departed from the tenets of mainstream Sikhism and is on character grounds unfit to be the successor. It is regrettable that this issue, even if it is only relied on as an aspect of the third issue, should only have become apparent during the hearing of an appeal in the Supreme Court against a pre-trial decision of the Court of Appeal based on the parties' respective pleaded cases. We required the respondents to give written particulars of their case in connection with the fourth issue, to which the appellants responded, but that all had to take place after the hearing had concluded.

20. Before considering these issues, it is right to say that it is very hard to see how the decision of the Court of Appeal to stay the proceedings generally could possibly have been justified in the light of the first two issues, especially as they should logically be considered first. The question whether the original trustees, who were apparently resident in England and held property in England, had the

power to execute a document such as the 1991 Deed, turns solely on the English law of trusts, and cannot conceivably involve an unjusticiable issue. As to the second issue, it turns on a question of interpretation of the 1991 Deed, and it would be more than strange if a pure question of interpretation of a trust deed executed in England relating to property in England and clearly intended to be governed by English law, could not be resolved by an English court. If the respondents succeed on either of these two issues, the claim would fail.

21. On the other hand, it is at least understandable why it might be said that the third and fourth issues are not justiciable. In those circumstances, the sensible approach to adopt is to deal with the first two issues in turn, then to deal with the principles of non-justiciability, and decide whether the Court of Appeal was right at least in relation to those issues, and finally to mention two procedural points.

The first issue: was clause 5 of the 1991 Deed invalid?

22. The respondents' case on the first issue relies on the points that the terms of the trust on which the Birmingham Gurdwara was acquired, and the basis upon which donations were sought and paid for the purpose of acquiring the Birmingham Gurdwara (and, no doubt, the basis upon which any further donations were paid to the original trustees until the 1991 Deed was executed) were those set out in the April 1987 memorandum, the May 1987 memorandum and the September 1987 memorandum (together "the 1987 memoranda"). In these circumstances, runs their argument, it was not open to the original trustees to vary the terms of the trust as they purported to do in clause 5 of the 1991 Deed by extending the right to appoint and dismiss trustees from the First Holy Saint to "his successor" .

23. The appellants' answer to this has two prongs. First, it is said that there is a general principle that, where money or other property is made over to trustees for "somewhat indefinite" charitable purposes, it is open to the trustees (indeed it may be incumbent on them) to ensure the preparation of a more formal and more specific document setting out the terms of the trust. Secondly, the appellants contend that the relevant respondents (ie those concerned with the Birmingham Gurdwara rather than the Wycombe Gurdwara), as trustees and/or as active management committee members, cannot challenge the validity of the 1991 Deed, especially as they have for many years acted as if they held office under its terms.

24. In support of both arguments, Mr Mark Herbert QC relied on the reasoning of Sir Herbert Cozens-Hardy MR in *Attorney-General v Mathieson* [1907] 2 Ch 383. In that case, the Rev John Wilkinson, who appears to have run

various charities in the Stoke Newington area of London, including "the Mildmay Mission to the Jews", received £1350 from "a lady", who lived in the area and suggested to him that the money might be used for a convalescent home. When he pointed out that the provision of a home and school for children was more pressing, she said "Use it for that or any other way you like", and he then used it to purchase a property, Cromwell Lodge, in his own name, and without any declaration of trust. He then used the remainder of the money to fit out and equip Cromwell Lodge, which he then used as a school and home for Jewish children. A year later, in September 1885, a trust deed was executed conveying Cromwell Lodge, together with other property, to trustees (including Mr Wilkinson) on trust for the purposes of the Mission, namely "to preach the Gospel … to Jews in Great Britain and Ireland (and also in foreign parts if it is deemed desirable), employing in the prosecution of the work" activities including "homes for destitute children, agencies for procuring employment and assisting emigration, night schools …, sewing classes, … and for promoting the salvation of … souls". The 1885 Deed contained various other provisions, relating to matters such as the trustees' powers of sale, investment and appointment of a director (inevitably, Mr Wilkinson).

25. The question before the Court of Appeal in *Mathieson* was whether the Attorney-General's consent to the proposed sale of Cromwell Lodge was required under the Charitable Trusts Act 1853, which turned on the question whether the 1885 Deed was binding on the trustees, or whether, as Kekewich J had held, the 1885 Deed "made no difference to Mr Wilkinson's powers" – see at p 387. If the former view was correct then the trustees could not apply the proceeds of sale of Cromwell Lodge as income; if the latter view was right, they could do so only with the consent of the Attorney General. The Court of Appeal disagreed with Kekewich J, and held that the latter view was right. Sir Herbert Cozens-Hardy MR said at p 394 that the trustees appointed under the 1885 Deed:

> "do not, and cannot, challenge the validity of the trust deed under which they are acting, and it is plain that it would be a breach of trust to apply the proceeds of the sale of the house as income. Even if Mr Wilkinson could originally have done this, they are now bound to treat the proceeds of sale as capital, and invest it accordingly."

Sir Herbert then continued:

> "There is, moreover, a further difficulty in the way of the trustees. When money is given by charitable persons for somewhat indefinite purposes, a time comes when it is desirable, and indeed necessary, to prescribe accurately the terms of the charitable trust,

> and to prepare a scheme for that purpose. In the absence of evidence to the contrary, the individual or the committee entrusted with the money must be deemed to have implied authority for and on behalf of the donors to declare the trusts to which the sums contributed are to be subject. If the individual or the committee depart from the general objects of the original donors, any deed of trust thus transgressing reasonable limits might be set aside by proper proceedings instituted by the Attorney-General, or possibly by one of the donors. But unless and until set aside or rectified, such a deed must be treated as in all respects decisive of the trusts which, by the authority of the donors, are to regulate the charity. And it is irrelevant to urge that the donors did not originally give any express directions on the subject…"

26. Thus, there were two strands to the decision in *Mathieson*. The first is that trustees who have been appointed under the terms of a trust deed cannot challenge the validity of the deed. That would presumably be justified on the ground that the only basis upon which they have any title to involve themselves in the affairs of the trust is as trustees, and they cannot therefore impugn the very document under which they achieved that status. They would be almost tantamount to denying their own title. The second strand in the decision is that, where a charitable trust is initially created by donors in general or vague terms, it is open to the trustee to execute a more specific deed which limits the terms of the trust, provided it does not conflict with the terms on which the donors made their donations – and that a challenge to any terms of the specific deed must be made by the Attorney-General (or possibly by the donors).

27. There does not appear to have been much discussion or development of the principles laid down in *Mathieson*, either in the textbooks or in the cases. Counsel have drawn our attention to two subsequent first instance decisions where the second strand of the decision was considered. In *In re Orphan Working School and Alexandra Orphanage's Contract* [1912] 2 Ch 167, Parker J followed the second strand of the decision, although, as he said, the subsequent trust deed in his case widened rather than narrowed the trusts on which the property in question was held – see at p 180. However, he upheld the validity of the deed on the ground that the committee of the charity concerned were "the agents for declaring the trusts, and what they declare is *prima facie* to be considered as carrying out the intention of the donors". The second strand of the decision in *Mathieson* was also considered by Walton J in the unreported decision of *Jeeves v Imperial Foods Ltd, Pension Scheme* (unreported, 27 January 1986). As he explained, there may be many "occasions in law in which a fund is held on trust, but at the particular point there is no final definitive trust deed". He went on to say that "it may very well be that … a person who had contributed to the fund in

question would be in a position to object to some provision which was never contemplated, but which was put or attempted to be put into the final trust deed".

28. On behalf of the respondents, Mr Mark Hill QC suggested that we could decide this first issue in the respondents' favour, on two grounds namely (i) the 1991 Deed plainly went further than the donors would have envisaged, or the terms of the 1987 memoranda permitted, and (ii) the original trustees did not, as a matter of general trust law, have the ability to allocate the right to appoint or dismiss trustees in any event.

29. We would reject the contention that we should accept ground (i), at any rate at this interlocutory stage. It is questionable whether the respondents, or at least those who were appointed as Birmingham trustees, can get round the first strand of the decision in *Mathieson*. It is true that they did not become trustees as a result of the 1991 Deed, as they became trustees when they purchased the Birmingham Gurdwara. But if that prevents the first strand in *Mathieson* applying, it would appear to mean that, in *Mathieson* itself, Mr Wilkinson could have impugned the 1885 Deed which he prepared and executed, as he had become a trustee when the money was handed over to him in 1884. It seems to us questionable whether the Master of the Rolls would have envisaged that Mr Wilkinson was in a different position in this connection from the other trustees. Like Mr Wilkinson, the first, second and third respondents declared that they were trustees of the relevant trust, and set out the terms of that trust, in the relevant Deed and signed it.

30. As to the second strand in *Mathieson*, the precise status of the 1987 memoranda is not entirely clear, but, even assuming in the respondents' favour that the 1987 memoranda do govern the terms of the trust as far as they go and that clause 5 goes further than those memoranda, it is not inconsistent with what is contained in them. On the respondents' case, the 1987 memoranda limit the power of appointment and dismissal of trustees to the First Holy Saint and are silent as to that power after his death; if that is right, then according that power to his successors was merely an administrative extension of, and not inconsistent with, what was in the memoranda. Certainly, there is nothing in clause 5 which is, at least on the face of it, inconsistent with any provision of the 1987 memoranda, or which appears, in the words of the Master of the Rolls, to "depart from the general objects of the original donors".

31. Subject at any rate to Mr Hill's ground (ii), clause 5 of 1991 Deed may well be the sort of provision which could have been perfectly properly included in a definitive deed of the type which Sir Herbert Cozens-Hardy MR and Parker J respectively sanctioned in *Mathieson* and *Orphan Working School* respectively, namely to "prescribe accurately the terms of the charitable trust".

Quite apart from this, again subject to ground (ii), in view of what was said towards the end of the second passage quoted from *Mathieson*, we have considerable doubts whether anyone other than the Attorney-General (or, conceivably, any of the original donors) would be entitled to raise the point. In any event, we note that the 1991 Deed has been expressly treated as valid at least on one occasion in August 2001 when a new trustee was appointed, and was not challenged for twelve years, and that may provide another difficulty for the respondents.

32. Mr Hill's ground (ii) is based on the proposition that the trust in this case was formed before 1991, namely (at the latest) when the Birmingham Gurdwara was transferred to the original trustees. On that basis, he contends that at that point the power to appoint (and dismiss) trustees was crystallised in accordance with section 36(1) of the Trustee Act 1925, which limits the power to:

> "(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
>
> (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee".

In these circumstances, runs the respondents' argument, section 36(1)(a) applied so long as the First Holy Saint lived, and, when he had died, section 36(1)(b) came into effect, and it was not open to the trustees to delegate their power of appointment thereunder for the future to anybody else.

33. It is true that the power of trustees of a fully constituted charitable trust do not include the right to delegate the power to dismiss or appoint trustees to a third party, unless of course the trust deed gives them that power - see the discussion in Underhill and Hayton, *Law of Trusts and Trustees* (18th edition, 2010) paras 51(1)(b) and 51(11). However, where the principle in *Mathieson* applies, it seems to us that trustees must have the power to include new provisions in the trust deed which they would not normally have the power to impose in the case of a fully constituted trust. Accordingly, it is at least arguable that, where the terms of a trust are so sparse that the trustees have "implied authority for and on behalf of the donors to declare the trusts to which the sums contributed are to be subject", that authority extends to including a provision such as clause 5 of the 1991 Deed. It is worth noting that the 1885 deed of trust in *Mathieson* provided that the trustees could delegate their management powers

to “a director”, and that the first director, Mr Wilkinson, should have “power to appoint his successor” – see at p 386.

34. We have expressed our views on the various points raised by the first issue in an intentionally tentative basis, as we consider that, if the respondents wish to pursue this first issue at trial, they should be free to do so. It would not be right for us to decide any of the various points at this interlocutory stage, given that (i) the law in this area is surprisingly undeveloped, (ii) the issue, and the points to which it gives rise, have not been fully pleaded even now, (iii) the resolution of those issues is very likely indeed to be fact-sensitive, (iv) the facts of this case are both unusual and unclear, (v) the arguments of the parties have changed as the proceedings have progressed, and (vi) the various points have not been considered by Judge Cooke or by the Court of Appeal. Mr Herbert did not press us to rule in the appellants’ favour on the issues: indeed, it was his case that we ought not to determine them. We think that that was a wise decision.

The second issue: the meaning of “successor”

35. The question is whether the reference in the 1991 Deed to “his successor” is to the Second Holy Saint, or whether it includes all subsequent Holy Saints. On the face of the 1991 Deed, it appears to us that, as a matter of language, “his successor” could be limited to the immediate next Holy Saint, or it could extend to each successive Holy Saint. It is true that it is expressed in the singular, but the effect of section 61(c) of the Law of Property Act 1925 provides that “[i]n all deeds, … unless the context otherwise requires, … [t]he singular includes the plural and vice versa”. Given that there is no indication that the trusts declared by the 1991 Deed were intended to be limited in time, and indeed the natural implication is very much the other way, we can see great difficulties for the respondents’ argument on this second issue.

36. However, we do not think it right to resolve the second issue either. The factual matrix is always important when construing a document, and, while it by no means always justifies live evidence when an issue of interpretation of a document is contested, it does so in this case for reasons (iii) to (vi) set out in para 34 above. In addition, although the force of the point is blunted by the fact that even the earliest Constitution, the 1991 Constitution, was signed after the 1991 Deed, it is conceivable that the respondents may be able to derive some assistance from the “PS” at the end of the 1991 and 1993 Constitutions and the Note at the end of the 2003 Constitution. Those words may have been included not to limit the meaning of “successor” in the Constitutions, but merely to identify the current successor, or for some other reason, but their natural meaning could be to limit the meaning of “successor” in the 1991 and 1993 Constitutions to the Second Holy Saint, and in the 2003 Constitution to Sant Baba Jaspal Singh

as successor to Sant Jeet Singh. However, the absence of any such "PS" or Note from the 1991 Deed could well prove a problem for the respondents as could the fact that a time-limited constitution would seem to be a less implausible concept than a time-limited charitable trust deed.

The third and fourth issues: non-justiciability generally

37. The third and fourth issues raise the questions whether Sant Jeet Singh is indeed the third Holy Saint, and whether the doctrines to which he and the appellants subscribe and/or his personal qualities comply with the religious aims and purposes underlying the 1991 Deed. It was such issues which the Court of Appeal held were unjusticiable, and it is to the question of non-justiciability to which we now turn.

38. Mummery LJ took as his starting point the decision of the House of Lords in *Buttes Gas and Oil Co. v Hammer (No 3)* [1982] AC 888, which he described at para 26 as "the clearest and most authoritative guidance that can be found in the authorities about the basis on which a line is drawn between justiciable and non-justiciable issues." *Buttes Gas* arose out of an action for slander whose real object was to obtain a decision of the English court about the boundary between the territory of three Gulf states, a question upon which the validity of the parties' off-shore drilling rights depended. The House held that issue to be non-justiciable, and struck out the proceedings. The single reasoned speech was delivered by Lord Wilberforce. The case is so well-known that we may perhaps be forgiven for summarising his reasons quite shortly. Lord Wilberforce, with the support of the rest of the House, considered that there was a general principle in English law of "judicial restraint or abstention" that "the courts will not adjudicate upon the transactions of foreign sovereign states". This was not, in his view, a principle of discretion but a principle of law "inherent in the very nature of the judicial process" (pp 931-932). Having summarised the allegations in the case before the House, Lord Wilberforce said this at p 938:

> "Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are—to follow the Fifth Circuit Court of Appeals - no judicial or manageable standards by which to judge these issues, or to adopt another phrase (from a passage not quoted), the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law."

39. Mummery LJ regarded this statement as authority for the proposition that in the absence of objective juridical standards ("judicial or manageable standards") by which to decide an issue, a court must regard it as non-justiciable. He put the present case in the same category because he considered that the same principle applied when the acts complained of were guided by religious beliefs whose justification was incapable of objective assessment.

40. Even assuming that that is an accurate classification of the issues in this action, it seems to us that Mummery LJ misunderstood the reasoning of *Buttes Gas*. Lord Wilberforce's reference to judicial and manageable standards was a quotation from the decision of the Fifth Circuit Court of Appeals in the United States litigation between the same parties upon substantially the same issues. That was in turn based on the celebrated decision of the United States Supreme Court in *Underhill v Hernandez* (1897) 168 US 250 about the act of state doctrine. The reason why the Fifth Circuit Court of Appeals regarded the issue as non-justiciable was not that judges were incapable of deciding questions of international law. Nor was that why Lord Wilberforce agreed with them. Quite apart from the fact that he was himself an international lawyer of some distinction, he points out at p 926F that English courts had on a number of occasions decided issues about the international boundaries of sovereign states "without difficulty". The issue was non-justiciable because it was political. It was political for two reasons. One was that it trespassed on the proper province of the executive, as the organ of the state charged with the conduct of foreign relations. The lack of judicial or manageable standards was the other reason why it was political. Both points are made in the short passage from the Fifth Circuit Court of Appeals decision cited at p 936 of Lord Wilberforce's speech. As can be seen from Lord Wilberforce's summary of the facts at pp 922-925 and 937, this was because the dispute arose out of the way in which the four states concerned had settled the issue of international law by a mixture of diplomacy, political pressure and force in a manner adverse to the interests of Occidental Petroleum. Occidental wished to obtain a judicial decision that that settlement had been the result of an unlawful conspiracy. This involved assessing decisions and acts of sovereign states which had not been governed by law but by power politics. It is difficult to imagine that such a conclusion could have been reached in any other context than the political acts of sovereign states, for the acts of private parties, however political, are subject to law. The actors are answerable to municipal courts of law having jurisdiction over them and applying objective, external legal standards.

41. There is a number of rules of English law which may result in an English court being unable to decide a disputed issue on its merits. Some of them, such as state immunity, confer immunity from jurisdiction. Some, such as the act of state doctrine, confer immunity from liability on certain persons in respect of certain acts. Some, such as the rule against the enforcement of foreign penal,

revenue or public laws, or the much-criticised rule against the determination by an English court of title to foreign land (now circumscribed by statute and by the Brussels Regulation and the Lugano Convention) are probably best regarded as depending on the territorial limits of the competence of the English courts or of the competence which they will recognise in foreign states. Properly speaking, the term non-justiciability refers to something different. It refers to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject-matter. Such cases generally fall into one of two categories.

42. The first category comprises cases where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers. Cases in this category are rare, and rightly so, for they may result in a denial of justice which could only exceptionally be justified either at common law or under article 6 of the Human Rights Convention. The paradigm cases are the non-justiciability of certain transactions of foreign states and of proceedings in Parliament. The first is based in part on the constitutional limits of the court's competence as against that of the executive in matters directly affecting the United Kingdom's relations with foreign states. So far as it was based on the separation of powers, *Buttes Gas and Oil Co. v Hammer (No 3)* [1982] AC 888, 935-937 is the leading case in this category, although the boundaries of the category of "transactions" of states which will engage the doctrine now are a good deal less clear today than they seemed to be forty years ago. The second is based on the constitutional limits of the court's competence as against that of Parliament: *Prebble v Television New Zealand Ltd* [1995] 1 AC 321. The distinctive feature of all these cases is that once the forbidden area is identified, the court may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable. Where the non-justiciable issue inhibits the defence of a claim, this may make it necessary to strike out an otherwise justiciable claim on the ground that it cannot fairly be tried: *Hamilton v Al-Fayed* [2001] 1 AC 395.

43. The basis of the second category of non-justiciable cases is quite different. It comprises claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law. Examples include domestic disputes; transactions not intended by the participants to affect their legal relations; and issues of international law which engage no private right of the claimant or reviewable question of public law. Some issues might well be non-justiciable in this sense if the court were asked to decide them in the abstract. But they must nevertheless be resolved if their resolution is necessary in order to decide some other issue which is in itself justiciable. The best-known examples are in the domain of public law. Thus, when the court declines to adjudicate on the international acts of foreign sovereign states or to review the exercise of the Crown's prerogative in the conduct of foreign affairs, it normally refuses on the

ground that no legal right of the citizen is engaged whether in public or private law: *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin); *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910. As Cranston J put it in the latter case at para 60, there is no "domestic foothold". But the court does adjudicate on these matters if a justiciable legitimate expectation or a Convention right depends on it: *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76. The same would apply if a private law liability was asserted which depended on such a matter. As Lord Bingham of Cornhill observed in *R (Gentle) v Prime Minister* [2008] 1 AC 1356, para 8, there are

> "issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them. This is not to say that if the claimants have a legal right the courts cannot decide it. The defendants accept that if the claimants have a legal right it is justiciable in the courts, and they do not seek to demarcate areas into which the courts may not intrude."

44. In *Bruker v Marcovitz* [2007] 3 SCR 607, the Supreme Court of Canada had to deal with very similar questions in the context of religious beliefs. A wife whose marriage had been dissolved by the courts of Quebec sued her ex-husband for damages for refusing to give her a *get*. This would have enabled her to contract a second marriage which would be lawful as a matter of Jewish religious law. The parties had agreed at the time of their separation to appear before the rabbinical court to obtain a *get* when their civil divorce became final. The Court of Appeal had declined to decide the claim on the ground that the substance of this obligation was religious and moral in nature, and not justiciable. The Supreme Court disagreed. Citing *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47 at para 50, they accepted that the courts "should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, 'obligation', precept, 'commandment', custom or ritual". But this did not prevent them from giving effect to the civil consequences of religious acts. So, while a court could not enforce the husband's religious obligations as such, their religious nature was consistent with their being enforced as a civil contract. The court was divided, the minority (Deschamps and Charron JJ) taking the view that the wife's inability to obtain a purely religious benefit, namely the right to a religious remarriage, was incapable of giving rise to a claim for civil damages. But they accepted the essential position adopted by the majority, that "a court is thus not barred from considering a question of a religious nature, provided that the claim is based on the violation of a rule recognized in positive law" (para 122).

The third and fourth issues: religious doctrine

45. This distinction between a religious belief or practice and its civil consequences underlies the way that the English and Scottish courts have always, until recently, approached issues arising out of disputes within a religious community or with a religious basis. In both jurisdictions the courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust. We consider each circumstance in turn.

46. The law treats unincorporated religious communities as voluntary associations. It views the constitution of a voluntary religious association as a civil contract as it does the contract of association of a secular body: the contract by which members agree to be bound on joining an association sets out the rights and duties of both the members and its governing organs. The courts will not adjudicate on the decisions of an association's governing bodies unless there is a question of infringement of a civil right or interest. An obvious example of such a civil interest is the loss of a remunerated office. But disputes about doctrine or liturgy are non-justiciable if they do not as a consequence engage civil rights or interests or reviewable questions of public law.

47. The governing bodies of a religious voluntary association obtain their powers over its members by contract. They must act within the powers conferred by the association's contractual constitution. If a governing body of a religious community were to act *ultra vires*, for example by seeking a union with another religious body which its constitution did not allow, a member of the community could invoke the jurisdiction of the courts to restrain an unlawful union. See *Barker v O'Gorman* [1971] Ch 215, which concerned a challenge to a proposed union between the Methodist Church and the Church of England on the ground that the Methodist Conference had no power to vary the doctrinal standards of the former church. It is a case involving a private Act of Parliament (the Methodist Church Union Act 1929) rather than a contract. But the principles of *ultra vires* are the same. See also *Long v Bishop of Cape Town* (1863) 4 Searle 162 PC, 176 per Lord Kingsdown.

48. Similarly, members of a religious association who are dismissed or otherwise subjected to disciplinary procedure may invoke the jurisdiction of the civil courts if the association acts *ultra vires* or breaches in a fundamental way the rules of fair procedure. The jurisdiction of the courts is not excluded because the cause of the disciplinary procedure is a dispute about theology or ecclesiology. The civil court does not resolve the religious dispute. Nor does it

decide the merits of disciplinary action if that action is within the contractual powers of the relevant organ of the association: *Dawkins v Antrobus* [1879] 17 Ch D 615. Its role is more modest: it keeps the parties to their contract. In *McDonald v Burns* 1940 SC 376, Lord Justice-Clerk Aitchison stated (at pp 383-384):

> "In what circumstances, then, will the Courts entertain actions arising out of judgments of ecclesiastical bodies: Speaking generally, in either of two situations – (first) where the religious association through its agencies has acted clearly and demonstrably beyond its own constitution, and in a manner calculated to affect the civil rights and patrimonial interests of any of its members, and (secondly) where, although acting within its constitution, the procedure of its judicial or quasi-judicial tribunals has been marked by gross irregularity, such fundamental irregularity as would, in the case of an ordinary civil tribunal, be sufficient to vitiate the proceedings. But a mere irregularity in procedure is not enough. … In short, the irregularity alleged must not be simply a point of form, or a departure from prescribed regulation, but must go to the honesty and integrity of the proceedings complained of."

49. We turn to the court's enforcement of trusts. The courts have jurisdiction to determine disputes over the ownership, possession and control of property held on trusts for religious purposes. Where people set up a trust to govern the purposes for which property is to be acquired and held, they are performing a juridical act which creates interests that the civil law will protect. The courts have repeatedly exercised jurisdiction in disputes over the ownership of property which were caused by religious disagreements. Many of the cases date from the 19th century and are Scottish, because of the propensity towards schism of the Scottish Presbyterian churches at that time. But the same principles applied in English law and, subject to the statutory jurisdiction of the court to approve *cy-près* schemes, which we discuss below, they remain valid in both jurisdictions.

50. In a series of cases in which, as a result of a schism, parties disputed who had the beneficial interest in property which was held in trust for a religious community, the rule was established that the civil courts would ascertain the foundational and essential tenets of a faith in order to identify who was entitled to the property. This rule replaced the former rule, which applied at least in Scotland, that the courts would not investigate the religious grounds of a schism but would give effect to the majority view within the religious community.

51. In *Craigdallie v Aikman* (1813) 1 Dow 1, 14-16 Lord Eldon established the principle of both English law and Scots law that in the event of a division within a voluntary religious body, the property held for the purposes of the association will go to the part of the body that adheres to its fundamental religious principles, as identified in its contract of association. In the English case of *Attorney General v Pearson* (1817) 3 Mer 353, 400-401, 36 ER 136, 150) he stated

> "[W]here a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the Court, and that to refer to any other criterion, as to the sense of the existing majority, would be to make a new institution, which is altogether beyond the reach, and inconsistent with the duties and character, of this Court."

52. The House of Lords considered the matter again in *General Assembly of the Free Church of Scotland v Overtoun* [1904] AC 515 (1904 7 F (HL) 1). In that case a Bench of seven Law Lords confirmed the rule in *Craigdallie v Aikman*. That rule has been applied since then. Most recently, the Inner House of the Court of Session has applied the rule in *Smith v Morrison* 2011 SLT 1213. In that case, Lord Drummond Young's opinion contains a careful historical analysis of development of the principle. We agree with his opinion (at para 101) that "in every case … it is the trust deed or other agreement that determines what are the fundamental principles on which the congregation associated." We also agree with his view (at paras 113-116) that the law looks to the fundamental principles and essential standards of the body rather than minor matters of administration and minor changes in doctrine in ascertaining the scope of the trust. Lord Drummond Young cited (at para 118) the opinion of Lord President Cooper in the unreported case of *Mackay v Macleod* (10 January 1952) in the context of "a competition between two parties, each claiming to be the beneficiaries entitled to certain trust property." The Lord President stated:

> "In such a case it is the duty of the Court to take cognisance of relevant matters of belief, doctrine and church government for the purpose, but only for the purpose, of informing themselves as to the <u>essential and distinguishing tenets</u> of the Church in question, and of discovering the differences, if any, which can be detected in the principles to which the competing claimants respectively profess adherence."
>
> (Our emphasis).

53. This clear line of authority contradicts the idea that a court can treat a religious dispute as non-justiciable where the determination of the dispute is necessary in order to decide a matter of disputed legal right. Again, as Lord Davey said in *Free Church of Scotland v Overtoun* (at pp 644-645) the civil courts do not have the right "to discuss the truth or reasonableness of any of the doctrines of [a] religious association". He stated

> "The more humble, but not useless, function of the civil Court is to determine whether the trusts imposed upon property by the founders of the trust are being duly observed."

54. The principles established in the church cases apply equally to other religions. In *Hasanali v Mansoorali* (Privy Council Appeal No 79 of 1945) (unreported, 1 December 1947), the Board in an appeal from the High Court of Judicature at Nagpur was concerned with the right to the use of property belonging to members of a Muslim community of the Ismailia Shia sect in the Central Provinces in India. The dispute within the religious community was whether an earlier leader of the sect, who was the 46th "Dai" or missionary, had validly appointed his successor before he died in 1840 CE. The authority of the current Dai, who was the 51st Dai, depended upon the validity of the nomination of the 47th Dai and his successors. The method by which a Dai nominated his successor as leader of the sect was by "Nas-e-Jali", a form of declaration by the Dai. The declaration gave his successor civil powers as head of the sect and as trustee of its property as well as ecclesiastical powers as religious leader. The Board examined the tenets of the sect and the surviving evidence of what had occurred on the day on which the former leader died, before concluding that the Dai had made a valid declaration marking out his successor. It also ruled on the question whether the current Dai's excommunication of members of his community complied with the procedures in the constitution of the religious community.

55. The immigrations of the 20th century have diversified the religious landscape of the United Kingdom and the principles of the church cases have been applied equally to other religious communities in this country. In *Varsani v Jesani* [1999] Ch 219, the Court of Appeal dealt with a dispute over the use of a temple in London which was held in trust for a Hindu sect. The original purpose of the charity was the promotion of the faith of Swaminarayan according to the teachings and tenets of Muktajivandasji. A schism occurred in the community when in 1984 allegations of misconduct were raised against the successor, whom Muktajivandasji had nominated before his death in 1979. The majority of the community accepted his authority. But a minority thought that he had disqualified himself by his behaviour from the office of successor. The Court of Appeal held that, but for the extension of the court's jurisdiction to make a scheme *cy-près* in section 13 of the Charities Act 1960, it would have

had to apply the law laid down by the *Craigdallie*, *AG v Pearson* and *Free Church* cases.

56. In both jurisdictions the court has power to make a scheme *cy-près*. Among the grounds on which the trust purposes of a charity may be reorganised is "where the original purposes, in whole or in part, have since they were laid down, … ceased … to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift." (section 13(1)(e)(iii) of the Charities Act 1993). In Scotland, similar provision is made for the reorganisation of both non-charity public trusts and also charitable trusts in section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and sections 39-42 of the Charities and Trustee Investment (Scotland) Act 2005 respectively. This power may provide a means of avoiding the judicial determination of a religious dispute. But if it is not available, the court cannot shirk its duty to determine a matter of civil right.

57. The respondents referred to the judgments of Gray J in *Blake v Associated Newspapers Ltd* [2003] EWHC 1960 and Simon Brown J in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex p Wachmann* [1992] 1 WLR 1036 in support of their contention that the dispute in this case was non-justiciable. But neither case supports that contention. In the former case the court stayed an action for defamation by Mr Blake against the publisher of the "Daily Mail" for describing him as a "self-styled" or "imitation" bishop. The claimant had relinquished his status as a priest within the Church of England and had established with a Mr Palmer an organisation called "The Province for Open Episcopal Ministry and Jurisdiction". Mr Palmer had purported to consecrate him a bishop. The case raised questions of doctrine and ecclesiology: the question was whether he was a bishop or merely a self-styled bishop. We do not think that the court was correct to refuse to adjudicate on that issue on the ground that it was non-justiciable. The claim was a civil claim in tort and the court will enter into questions of disputed doctrine if it is necessary to do so in reference to civil interests. See also *Forbes v Eden* (1867) LR 1 Sc & Div 568 HL, Lord Cranworth (at pp 581-582), Lord Colonsay (at p 588). The problem that such defamation claims face, which will usually doom them to failure, is that they raise issues of religious opinion on which people may hold opposing views in good faith. The expression of such views without malice is likely to be protected by the defence of honest comment – what used, until *Joseph v Spiller* [2011] 1 AC 852, to be called fair comment.

58. The ratio of the judgment in *Wachmann* was that the Chief Rabbi's decision that the applicant was not religiously and morally fit to hold office as a rabbi did not raise an issue of public law which was amenable to judicial review. The case is not an authority for a proposition that the legality of such disciplinary proceedings is not justiciable. If the claim had been presented as a challenge to

the contractual jurisdiction of a voluntary association, the court would have had jurisdiction to consider questions of *ultra vires* and allegations of breaches of natural justice: see *Long v Bishop of Cape Town* (above); *R v Imam of Bury Park Mosque, Luton, Ex parte Sulaiman Ali* CA 12 May 1993 QB COF 91/1247/D (The Times, 20 May 1993) in which Roch LJ cited Denning LJ's judgment in *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329, 342; *Brentnall v Free Presbyterian Church of Scotland* 1986 SLT 471. In Scotland, the wider scope of the supervisory jurisdiction of the Court of Session, which extends to those who exercise a jurisdiction conferred by private contract, would have allowed the challenge to be in the form of an application for judicial review as an alternative to a claim based on contract: *West v Secretary of State for Scotland* 1992 SC 385, Lord President Hope at pp 399-400.

59. Accordingly, unless the parties are able to resolve their differences, for example by a reorganisation of the trust purposes *cy-près*, the court may have to adjudicate upon matters of religious doctrine and practice in order to determine who are the trustees entitled to administer the trusts. Subject to further amendment of the parties' cases, the question whether Sant Jeet Singh has power to appoint and dismiss trustees may depend on issues such as (i) what are the fundamental tenets of the First Holy Saint and the Nirmal sect, (ii) what is the nature of the institution at Nirmal Kutia in India, (iii) what steps or formalities were needed for a person to become the successor of the First Holy Saint, and (iv) in relation to the fourth issue whether the teachings and personal qualities of Sant Jeet Singh comply with the fundamental religious aims and purposes of the trust.

Conclusion and ancillary matters

60. For these reasons, we would allow this appeal and restore the order of Judge Cooke. In so doing, we are reinstating the permission he accorded to the appellants to amend their particulars of claim, subject to certain reservations stipulated in his order. Although the Court of Appeal entertained an appeal against that order, they did not rule on it. We can see no good reason why an appellate court should interfere with a case management decision of this sort. It is not as if the hearing is imminent, and, as we have indicated, the respondents appear to wish to expand their case.

61. There is one other matter we should mention. In his judgment, Judge Cooke made it clear that he did not consider that expert evidence would be appropriate. Whether that was right before the respondents made it clear that they wished to raise what we have called the fourth issue need not be decided. What is clear is that, in the light of the fourth issue, there is a strong case for saying that expert evidence should be permitted. In the light of that, as well as in the

light of our decision on the points raised by the appeal, we propose to order that these proceedings be remitted to the High Court for appropriate further directions, without prejudice to the parties consenting to all further directions which they agree are needed.