

Chapter 5

Equity and its Role for Superannuation Pension Schemes in the 1990s

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When it was found that Mr Maxwell had stolen the money, there was much speculation in the newspapers about how such a thing could have happened. The true answer, which was that Mr Maxwell had simply opened the safe, seemed unsatisfying. It might have done if he had taken a few hundred thousand pounds, but for hundreds of millions a more sophisticated explanation was required. It did not take the journalists long to find one. The trouble was, they said, that pension funds were held on trusts and the law of trusts was a medieval institution. It was typical of everything that was wrong with English society that we had not only allowed this outdated body of law to survive but thought that it could protect those modern serfs, the Maxwell pensioners, against his depredations. The sooner it was abolished the better.

It is of course true that equity has medieval origins. But then so has a lot of the law, including the law of theft, which seems to have had equally little effect in deterring Mr Maxwell. Equity began when some Norman bishop, chancellor to a Norman king, decided that he ought to rescue a litigant's immortal soul from the danger of perdition which seemed likely to follow if he enforced his rights under the English common law. The bishop did not claim to set aside the law under which he was entitled to judgment; who was he, a Norman, to question the common law of England? But enforcement of the judgment in that particular case would lie so heavily upon the litigant's conscience that the chancellor bishop, in the name of the king, thought it right to intervene.

This historical origin explains two features of equity which are still extremely relevant to its role in pension law today. The first is the moral content of the doctrines of equity. The notions of fiduciary duty, unconscionability and good faith are the expression of moral values. This is what gives them their flexibility and makes them so attractive to judges. The second is the delicate relationship between equity and the law. Equity always claimed to be not a rival but a supplementary system of rules. One of the maxims of equity was 'equity follows the law' by which was meant that if the law completely covered the ground, equity did not interfere. Of course this was to some extent a pretence; equity made its own decision as to whether the law did fully cover the ground – or not. In many cases the practical effect was that equity did not so much supplement as supplant the law. This was exposed in the *Judicature Act 1873*, which for

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