

SHERIFFDOM OF NORTH STRATHCLYDE AT PAISLEY

[2026] SC PAI 78

PAI-A156-22

JUDGMENT OF SHERIFF BRIAN MOHAN

in the cause

DAVID WARD LILBURN

Pursuer

against

FORESTER LIFE LIMITED

First Defender

and

TUNBRIDGE WELLS EQUITABLE FRIENDLY SOCIETY LIMITED

Second Defender

Pursuer: Johnston KC, Advocate and Black, Advocate; Black & Markie, Dunfermline

First & Second Defender: Oliver, Advocate; Brodies LLP, Glasgow

PAISLEY, 2 June 2026

The Sheriff, having resumed consideration of the cause, SUSTAINS the defenders' sixth plea-in-law and Assoilzies the defenders from the craves of the initial writ; fixes **24 July 2026** at **11.00am** as a live hearing on expenses.

NOTE

Background

[1] In March 1986 and July 1988 the pursuer David Ward Lilburn entered into two income protection contracts with Tunbridge Wells Equitable Friendly Society Limited ("TWEFSL", the second named defender). These contracts provided that, in the event that the pursuer became unable to work, and subject to other conditions of the policy, he would receive income amounting to £200 per week.

[2] In 2002 the pursuer lost his job when he was diagnosed with [a long-term medical condition]. He claimed and received payment under the insurance contracts. Payments of £200 per week were made to him until March 2008. At that time he was required to provide updated medical evidence certifying his continuing incapacity to allow the payments to continue. He did not provide such certification. TWEFSL stopped the payments with effect from 4 March 2008.

[3] In July 2007 the pursuer's wife died. The pursuer was charged with causing her death by murder and then convicted of that crime in July 2008. He was sentenced to life imprisonment with a punishment part of 19 years. There are no live appeals against this conviction or sentence.

[4] On 22 July 2008, shortly after the pursuer's conviction for murder, TWEFSL terminated his membership of the Society. At the same time, they sent two cheques to the pursuer which represented the balance remaining in his accounts with them. These cheques were encashed on behalf of the pursuer by an individual acting under a power of attorney.

[5] In April 2013 the business of TWEFSL was transferred to Forester Life Limited, the first named defender, after which TWEFSL was dissolved and de-registered as a Friendly

Society. On 4 November 2015 the pursuer wrote to the first defender and sought reinstatement of his income protection claim. The first defender refused.

[6] The pursuer raised these proceedings by service of a claim under Simple Procedure on 16 April 2021. After sundry procedure the case was transferred to the Ordinary procedure, with amendment to the pleadings and the sums claimed. In this action the pursuer has sought the sum of £200,000. He claims this is the equivalent to payments of £200 per week which would have been due since such payments were stopped in March 2008.

[7] The defenders in this case have eight pleas-in-law, including substantive defences relating to the merits of the pursuer's claim. The debate before me covered the defenders' three preliminary pleas. Pleas-in-law 1 and 2 relate to relevancy and specification.

Plea-in-law 6 is to the effect that the pursuer's claim is time-barred.

[8] Clearly this case has a disturbing background with the pursuer having been convicted of the murder of his wife. But however unusual and shocking that is, in the background it must remain. The pursuer is seeking to claim continuous payments through the income protection insurance because of ill health during the period before and after his wife's death and over the 18 years since. This judgment is not about the pursuer's crime. It is not a decision on the merits of the parties' averments concerning whether the defenders were entitled to terminate their relationship with the pursuer following his conviction. This judgment is about whether the pursuer's claim was time-barred because the action was raised more than 5 years after the payments had stopped. The pursuer claims that, because of the nature of the relationship between the pursuer and the second defenders - a Friendly Society incorporated under statute – his claim is either imprescriptible or has a 20 year prescriptive period.

Defenders' submissions

[9] The defenders' position was that the relationship between the pursuer and TWEFSL was not a trustee/beneficiary relationship. It was purely contractual. Even the pursuer's own pleadings referred to "contract" throughout. As such, any claim which the pursuer purported to have on the income protection policies prescribed within 5 years. This action was served on 16 April 2021, over 13 years after the payments stopped in 2008. The action was therefore time-barred.

[10] The relationship between the pursuer and TWEFSL was not one of trust or one which otherwise gave rise to fiduciary duties. There was a difference in law between a *registered* Friendly Society which operates through trustees (under the Friendly Societies Act 1974) and an *incorporated* Friendly Society which operates under the Friendly Societies Act 1992.

Although the contracts in question were taken out when the TWEFSL was a registered (ie unincorporated) society, it later became an incorporated society. This was at the heart of the case: TWEFSL had become a body with a legal personality. This was clear in its internal Rules and Memorandum, adopted in 2006, both of which were lodged as productions.

[11] The pursuer submitted that his claim was imprescriptible, as provided in Schedule 3 paragraph (e)(iii) of the Prescription and Limitation (Scotland) Act 1973. For that proposition to succeed he would require to aver that there was a trust where the defenders (as the trustees) owed fiduciary duties to the pursuer (the beneficiary). Such a case was not relevantly pled by the pursuer. It was not the nature of the relationship. The pursuer here had entered into a contract of insurance with the defenders. That plainly was not a trust relationship. A company was not a trustee for its members. That principle had been made clear since *Salomon v Salomon* (1897) AC 22, and was reiterated by the Judicial Committee of

the Privy Council recently in *Jardine Strategic Limited v Oasis Investments LI Master Fund Limited and others* number 2 [2025] UK PC 34 at paragraph 31.

[12] When TWEFSL became incorporated, its assets became the absolute property of the company: section 6(2) of the Friendly Societies Act 1992. Furthermore, section 5(2) and Schedule 2 of the same Act expressly provided that the activities of an incorporated Society can include insurance activities for the benefit of its members. This was the same statute which enabled a former registered Society which held the status of a trust to transform into the business structure of an incorporated Society. The pursuer's reference to *Shore Porters' Society of Aberdeen v Brown and others* [2021] CSOH 37 was not relevant or helpful to his claim. That case dealt with an unincorporated association which had to be treated differently from an incorporated Society.

[13] Even leaving aside the argument concerning incorporation, it was important to note that the *obligation* which the pursuer sought to enforce was contractual in nature. This brought the claim within Schedule 1(g) of the 1973 Act, which in turn made the pursuer's claim subject to the 5 year prescription period of section 6. The case did not fall within the scope of Schedule 3(e) which covered imprescriptible rights and obligations of trustees.

[14] It was accepted that other fiduciary capacities could apply outside the existence of a trust. However, the pursuer had not made any relevant and specific averments which would support the existence of such a fiduciary relationship. The extension of fiduciary relationships was recognised in many legal authorities and most recently was considered by the Supreme Court in *Hopcraft and ors v Close Brothers and ors* [2025] UK SC 33. That decision (as could be seen at paragraphs 102-103 of the judgment), did not change the position so far as fiduciary relationships were concerned.

[15] The pursuer had an *esto* case. If the defenders' obligation was not imprescriptible then, according to the pursuer, it was an obligation which extinguished after 20 years, in accordance with the provisions of section 7 of the 1973 Act. That argument was misconceived. Under Schedule 1(g) of the Act, it was clear that the 5 year prescription applied. The prescription period was based on the nature of the relationship, not the status of the parties in this case. The nature of the obligation was contractual. The claim had therefore prescribed after 5 years. Accordingly, the defenders' position was that they should be assolizied. The matter could not be cured by amendment and there was no benefit in the action being dismissed. Decree of absolvitor should be issued.

Pursuer's submissions

[16] The pursuer's position was that his pleadings were relevant. The case was not time-barred because section 6 of the Prescription and Limitation (Scotland) Act 1973 did not apply to this claim.

[17] The pursuer had entered into an agreement with the second defender, TWEFSL. He was not claiming this was a trust. Although he accepted that the relationship was one of contract, it was not a straightforward commercial relationship. Certain fiduciary duties were owed by the defenders to the pursuer.

[18] The 1992 Act did change the nature of Friendly Societies and there was no dispute about that. The second defenders came into the category of a former registered Society which became incorporated. However, it had been well established in various authorities that fiduciary duties could be owed in different categories of circumstances. For example, Lord Reed made this clear in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] [UKSC] 58 [2015] AC 1503. That decision of the Supreme Court was followed in a Scottish

Outer House case: in *Kidd v Paull and Williamsons* [2017] CSOH 16; 2018 SC 193 Lord Tyre also confirmed that the types of relationship in which fiduciary duties were owed were not fixed.

[19] The decision in *Shore Porters' Society of Aberdeen v Brown and others* [2021] CSOH 37 was also relevant. The Lord Ordinary in that case held that office bearers in an unincorporated association owed fiduciary duties to its members.

[20] It was the position of the pursuer that the second defender could not terminate its relationship with him unilaterally, as it had purported to do. That action by TWEFL was a breach of the fiduciary duty which it owed to the pursuer. The premiums paid by the pursuer for the relevant insurance were "fiduciary property". Since the nature of the relationship involved fiduciary duties, the 5 year prescriptive period did not apply. The defenders were wrong in law to argue that. The pursuer's claim arose from a relationship which was imprescriptible.

[21] *Esto* the pursuer's claim was not imprescriptible then the nature of the relationship was not contractual but fiduciary. The 5 year prescription period under section 6 of the 1973 Act applied where the relationship was merely contractual. This relationship was contractual but also invoked fiduciary duties on the part of the defender. Accordingly the proper prescriptive period was 20 years.

[22] The pursuer's position was that this was supported even by the late authority lodged by the defenders, the *Hopcraft* case from 2025 (a car dealership finance case before the Supreme Court).

[23] The payments made to the pursuer ceased in 2008. On 4 April 2008, the second defender sought to terminate the relationship. The pursuer wrote to the first defender in 2015 when his mental health had recovered sufficiently to allow him to address this

matter. The court action had been raised in 2021. The prescriptive period of 20 years had not run and, accordingly, the action was not time-barred.

[24] The pursuer wanted the court to fix a proof.

Relevant law

Prescription and Limitation (Scotland) Act 1973

“Section 6 Extinction of obligations by prescriptive periods of five years

- (1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—
 - (a) without any relevant claim having been made in relation to the obligation, and
 - (b) without the subsistence of the obligation having been relevantly acknowledged,
 then as from the expiration of that period the obligation shall be extinguished:...
- (2) Schedule 1 to this Act shall have effect for defining the obligations to which this section applies.

Schedule 1 Obligations Affected by Prescriptive Periods of Five Years under Section 6

Subject to paragraph 2 below, section 6 of this Act applies.....

- (g) to any obligation arising from, or by reason of any breach of, a contract or promise, not being an obligation falling within any other provision of this paragraph.

Section 7 Extinction of obligations by prescriptive periods of twenty years

- (1) If, after the date when any obligation to which this section applies has become enforceable, the obligation has subsisted for a continuous period of twenty years—
 - (a) without any relevant claim having been made in relation to the obligation, and
 - (b) without the subsistence of the obligation having been relevantly acknowledged,
 then as from the expiration of that period the obligation shall be extinguished...
- (2) This section applies to an obligation of any kind ... not being an obligation specified in Schedule 3 to this Act as an imprescriptible obligation...

[Note: this is the wording of s.7(1) referred to by the parties and in force at the time the action was raised, though the terms of s.7(1) have since been altered with effect from 28 February 2025]

Schedule 3 *Rights and Obligations which are Imprescriptible for the Purposes of Sections 7 and 8 and Schedule 1*

The following are imprescriptible rights and obligations for the purposes of sections 7(2) and 8(2) of, and paragraph 2(h) of Schedule 1 to, this Act, namely....

- (e) any obligation of a trustee...
 - (iii) to make furthcoming to any person entitled thereto any trust property, or the proceeds of any such property, in the possession of the trustee, or to make good the value of any such property previously received by the trustee and appropriated to his own use;

Section 15 *Interpretation of Part I*

- (1) In this Part of this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them....

‘trustee’ includes any person holding property in a fiduciary capacity for another and, without prejudice to that generality, includes a trustee within the meaning of the Trusts (Scotland) Act 1921; and ‘trust’ shall be construed accordingly;”

Analysis

[25] This was a debate on the defenders’ preliminary pleas. The defenders deny that any payment was due to the pursuer. Their preliminary pleas numbers one and two are standard challenges to relevancy and specification. The real focus of this debate however was the defenders’ sixth preliminary plea concerning prescription. That plea-in-law is in the following terms:

“6. *Esto* the defenders have breached its contracts with the pursuer (which is denied), any obligation on the defenders to make payment to the pursuer (*esto*, any obligation on the defenders to make payment to the pursuer of any sums due to the pursuer prior to 16 April 2016) has prescribed in terms of s6(1) of the Prescription and Limitation (Scotland) Act 1973 and the defenders should be assoilzied.”

The preliminary pleas regarding relevancy and specification only come into focus if the pursuer’s case survives the challenge regarding prescription.

[26] Although counsel for the pursuer indicated at one point that he was not insisting that there was a recognised “trust”, he maintained that the relationship between the parties was in the nature of a trust. If he is correct in that, the obligations owed by the defenders are imprescriptible ie not subject to any time bar. The pursuer’s secondary, or *esto*, position was that, if the relationship between the parties was not one of a trust, it was nevertheless one where fiduciary duties were owed. If he is correct in that latter submission, a 20 year time bar applies under section 7 of the 1973 Act. Under that scenario, the pursuer’s claim in this action (raised in 2021) would not be time-barred. The defenders’ position was that the relationship between the parties was contractual only and that, as such, any claim the pursuer may have had prescribed after 5 years.

Was there a Trust?

In *Moultrie’s Executor v Moultrie* (OH) 2024 SLT 245 Lord Braid noted the following in para [11]:

“... it is difficult to discover a wholly satisfactory definition of a ‘trust’ in Scots Law. However, certain essential ingredients of a trust and consequently of a trustee, emerged from the authorities. These are that a trust property vests in a trustee, who then holds that property on behalf of the other beneficiary. *Gloag and Henderson*, explains at para 41.03, citing *Stair* that the trustee ‘is the owner of the property subject to trust ... however, the property is owned by the trustee under fiduciary obligation to use it for the benefit of the beneficiary. Such property can be regarded as being in a patrimony separate from the trustee’s private patrimony’”.

[27] It is not until condensation 7 of the pleadings that the pursuer raises the question of a trust. He avers the following:

“The funds accrued via donations, premiums and/or subscriptions are the property of the second defender managed by the Board. This fund is dedicated to certain purposes for the benefit of a class of beneficiaries, namely its members. The trust fund was vested in and administered by the Board who acted as Trustees within the meaning of the 1973 Act. The second defender therefore owed fiduciary obligations

to the pursuer as a member. The second defender owed a fiduciary duty to make fiduciary property or its proceeds forthcoming to any person entitled to it.”

This part of the pursuer’s pleadings sits in contrast with the rest of the Record. The same article of condescendence avers that the second defender is an incorporated Friendly Society under the Friendly Societies Act 1992. Reference is made to its 2006 Memorandum and the 2006 Rules (adopted into the pleadings). The section of the Memorandum and Rules so adopted, however, do not make any reference to a trust.

[28] Indeed, throughout the Record, the pursuer’s pleadings refer to a “contract” (or “contracts”) between the parties: the term is used over twenty times in the various articles of condescendence. The section of the Memorandum and Rules which the pursuer incorporates into his pleadings uses the word “contract” five times. Furthermore, the pursuer’s first plea-in-law twice refers to the “contracts” between the parties.

[29] Accordingly, notwithstanding the single reference to a “trust fund” and “Trustees” in Condescendence 7 which I have noted above, the pursuer does not plead the existence of a trust with any obvious enthusiasm. His pleadings overwhelmingly aver that the relationship between the parties was based on contract. I therefore reject the argument that any obligation owed by the defenders to the pursuer was in the nature of a trust and therefore imprescriptible.

What is the relevance of the Friendly Societies Act 1992?

[30] The authorities before me include a lengthy consultation paper from the Law Commission of England and Wales, “Review of the Friendly Societies Acts 1974 and 1992”. The paper encapsulates the distinction between a “registered” and an “incorporated” Friendly Society, noting in paragraph 1.38:

“Depending on whether they are registered under the 1974 Act or the 1992 Act, slightly different terminology may be used in respect of Friendly Societies.

Friendly Societies registered under the 1974 Act are referred to as ‘registered Friendly Societies’. These are Friendly Societies that are registered by the FCA, but registration under the 1974 Act does not confer body-corporate status. Registered Friendly Societies therefore do not have a separate legal personality that can hold property; any property is held by the Friendly Society’s trustees rather than the registered Friendly Society itself.

Friendly Societies registered and incorporated under the 1992 Act are referred to as ‘incorporated Friendly Societies’. By virtue of their incorporation under the 1992 Act, incorporated Friendly Societies have their own legal personalities and can therefore hold properties in their own right.”

[31] Accordingly the Friendly Societies Act 1992 allowed Friendly Societies to become “registered” or “incorporated”. There is a distinction in the legal status of each of these, depending on governance decisions made by a particular Society. Under section 6(2) of the 1992 Act, where a Society becomes incorporated then “all property held immediately before incorporation by any person in trust for the Society shall become by virtue of this subsection the property of the Society after incorporation”. Furthermore, under Schedule 4 of the 1992 Act “on incorporation of the registered Society ... (b) any appointment as trustee or treasurer of the Society shall determine” [ie terminate]. The pursuer avers that the second defender is an incorporated Friendly Society. Consequently, the effect of the 1992 Act’s provisions are that the relationship between the parties cannot be regarded as one of trustee and beneficiary.

Was there still a fiduciary duty owed by the defenders?

[32] But the absence of a trust is not the end of the matter. It is clear from the authorities that fiduciary duties may still be owed by the defenders to the pursuer if the appropriate

relationship is averred. Section 15 of the 1973 Act (the interpretation section) makes clear that the term “trustee” includes any person holding property in a fiduciary capacity.

[33] The case law cited and produced by the parties was extensive, running to over 1,000 pages. It is apparent from these authorities (and was common ground) that the categories of relationship in which fiduciary duties are owed are not closed. A number of the passages cited assisted me in determining whether the relationship between the parties in this case imposed such fiduciary duties.

[34] Lord Tyre in *Kidd v Paull and Williamsons* [2017] CSOH 16; 2018 SC 193 noted at paragraph 44:

“...it seems to me that the approach adopted by the UK Supreme Court in *AIB* is, and is intended to be, equally applicable to breaches of fiduciary duty where there is (and has been) no trust fund in existence.”

In *Shore Porters’ Society of Aberdeen & Others v Kevin Brown & Others* [2021] CSOH 37

Lady Wolff noted at paragraph 30:

“The question of whether a fiduciary obligation arises is determined by the nature of the role assumed and any associated duties imposed”.

In *Moultrie’s Executor v Moultrie* (*supra*) Lord Braid observed at para [20]:

“That leads to the next question which is in what circumstances might a person be said to hold property for another in a fiduciary capacity? There is no doubt that a person can do so without necessarily being a trustee in a common law sense, for example an agent. Were it otherwise, the definition in s.15 [of the 1973 Act] would have been unnecessary. Professor Johnston, for one, is clear that the broad definition in the 1973 Act has the consequence that ‘the question of an obligation being imprescriptible can arise well outside the context of trusts proper and may extend to some or all cases in which there is no trust but the debtor in the obligation owes a fiduciary duty to the creditor’; Johnston, *Prescription and Limitation* (2nd Edition) 3.24. However, as Professor Johnston also acknowledges in that paragraph, precise scope of the category of cases where that does arise is uncertain. He lists solicitors as one example of persons falling within it; so, too, company directors under reference to *Ross v Davy* 1996 SCLR 369 at 374, where it was accepted that, at least in the

circumstances of that case, a company director fell within schedule 3, although not a trustee in all cases”.

[35] *Gloag and Henderson* itself also notes at paragraph 3.04, in a passage highlighted in the several of the cases:

“The classic relationships in which fiduciary obligations arise in Scots law are those of trustee and beneficiary, agent and principal, partners in a partnership and director and company. In each of these cases the first-named party will be subject to two fiduciary obligations. But the categories of fiduciary relationships are not closed and may arise wherever one party is entrusted with powers for the benefit of another in circumstances giving rise to the principal’s reasonable expectation that its interests will be given priority by the other party.”

[36] All of these authorities confirm that the categories of relationship where fiduciary duties apply are not fixed. In each of the cases cited above the court concluded a fiduciary duty was owed where a party was responsible for funds belonging to another. These included duties owed by solicitors (*AIB v Redler; Kidd v Paull and Williamsons*), office bearers of an unincorporated society with no owner (*Shore Porters’ Society of Aberdeen*) or an executor (*Moultries’ Executors v Moultrie*).

[37] However, while it is not possible to provide an exhaustive definition of the categories in which fiduciary duties are owed, the limitations of the concept have also been noted recently. In the UK Supreme Court (sitting as the JCPC) in *Jardine Strategic Limited v Oasis Investments* [2025] UKPC 34 Lord Briggs and Lady Rose noted at paragraph 31:

“It has for long been established that directors owe their fiduciary duties to the company alone, although they must take into account the interests of the shareholders and, when insolvency intervenes, the company’s creditors”.

[38] Most recently in *Hopcraft and ors v Close Brothers and ors* [2025] UK SC 33 the Supreme Court noted at paragraph 110:

“As a general rule, outside well-established fiduciary relationships, such as company director, partner or agent, in a commercial context ‘it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another

commercial party' ... The sales assistant on advising the customer on the attractiveness of a garment or the wine waiter in advising the diner on the suitability of a wine with a meal, addresses the interests of the customer or diner without taking on a duty to act exclusively in the other's interests. He or she provides a commercial service in the interests of his or her employer, who may thereby come under contractual obligations and may incur by vicarious liability for its employee's tortious acts. No obligation of loyalty ... arises".

The examples cited by the pursuer where fiduciary duties are found to be owed do not in themselves take his case over the line or make his pleadings relevant. The pursuer's averments concerning fiduciary duty (as noted above at para [27]) are somewhat bolted on to the pleadings in Condescence 7. They do not sit easily with his extensive averments which aver the contractual nature of the relationship between the parties.

[39] Based on the pleadings and the productions my conclusion is that the relationship between the parties was purely commercial and founded on the two insurance contracts covering income protection. The second defender's status as a Friendly Society did not alter that because it was an incorporated Friendly Society, not a registered one. I have concluded from the authorities that the relationship was not one where the defenders owed fiduciary duties to the pursuer. The nature of the obligation owed by the defenders did not place the parties' relationship between the parties into one of the categories – and did not have any of the features – where fiduciary duties arose.

[40] Consequently, I do not accept the pursuer's submission that the obligations owed by the defender were either imprescriptible (under Schedule 3 of the 1973 Act) or subject to the 20-year prescriptive period (section 7). Accordingly, it is the 5 year prescriptive period in section 6 of the 1973 Act which applies to the pursuer's claim.

[41] The action was raised in April 2021. This was outside the relevant prescriptive period. In light of my findings I uphold the defenders' sixth plea-in-law and I therefore grant decree of absolvitor to the defenders.

Expenses

[42] There were a number of motions concerning expenses earlier in the procedure which remain outstanding, the outcome of which will be affected by this judgment. I have therefore assigned a hearing on expenses.