Strata Managers as Fiduciaries

by **Gary Bugden**[1]

Preliminaries

1. Coverage

In this paper I will consider:

(a) what we mean by a "fiduciary";

(b) how to determine if a fiduciary relationship exists between 2 entities;

(c) what the 'fiduciary relationship' seeks to achieve;

(d) whether strata managing agents are in a fiduciary relationship with the owners corporations they manage;

(e) what fiduciary duties flow from the relationship;

(f) how those fiduciary duties are discharged;

(g) the exclusion or modification of fiduciary duties by contract;

(h) the relationship between fiduciary duties and statutory duties;

(i) 'risky dealings' to be avoided or carefully managed by strata managing agents; and

(j) the over-riding call to "*act professionally*" at all times.

2. Terminology

2.1 Terminology varies from State to State and Territory to Territory. However for consistency, I propose to use terminology appropriate for New South Wales (unless dealing with a specific jurisdiction) and you can use your own knowledge to substitute the terminology relevant for your jurisdiction.

Who are fiduciaries?

3. Fiduciaries defined

3.1 There is no simple definition of a "fiduciary". The dictionary definition refers to "*a person bound to act for another's benefit, as a trustee in relation to his or her beneficiary*".[2] In *Hospital Products Ltd v United States Surgical Corporation*[3] Mason J defined commonly accepted fiduciary relationships as being "*relationships of trust and confidence*" or confidential relationships. He identified trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company and partners as being examples of fiduciary relationships. However, he made it clear that the list was not exhaustive.

3.2 To express it in another way, "*a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest*."[4]

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[1] **Gary Bugden** is a Fellow of the Australian College of Strata Lawyers, a partner of Bugden Allen Lawyers, author of numerous strata related papers and publications and Sessional Professor of Strata and Community Titles at Bond University.

[2] Collins English Dictionary.

[3] (1984) 156 CLR 41 at 96-7.

[4] *Grimaldi v Chameleon Mining NL* 287 ALR 22 at 177.

3.3 The "*critical feature is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person*".[5]

4. When a fiduciary relationship exists

4.1 Whether a fiduciary relationship exists in a particular case, and if so, the scope of that fiduciary relationship, are matters which depend critically upon the circumstances of the case.[6] Any contract or agreement between the parties is a relevant factor in determining the existence of a fiduciary relationship, the two being able to exist at the same time. When considering contractual terms, implied terms can be as important as express terms.[7] Examples where terms of trust and reliance might be implied include bargains struck otherwise than at arms' length or where a party is particularly vulnerable.

4.2 The general principle that fiduciary relationships may be created by co-existing contractual arrangements was confirmed by Mason J in the *Hospital Products case*[8] where His Honour said:

> "*That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction*."

4.3 According to one learned author "*The characteristics which define a fiduciary relationship cannot be exhaustively defined. It is inappropriate to treat the existence of a fiduciary obligation as being dependent upon whether the principal and beneficiary fall into a particular status relationship*."[9]

4.4 Furthermore, the mere fact that there is a legislative provision which imposes similar obligations on a party to those of a fiduciary does not relieve or affect those fiduciary obligations. They co-exist unless the legislation clearly suggests otherwise. Therefore, where there is a rule requiring a strata manager to avoid a conflict of interest, that rule does not extinguish the fiduciary obligations unless this is its clear intention. An example of such a rule is clause 9 of the *Queensland Code of conduct for body corporate managers and caretaking service contractors*,[10] which provides:

> "*A body corporate manager or caretaking service contractor for a community titles scheme (the **first scheme**) must not accept an engagement for another community titles scheme if doing so will place the person's duty or interests for the first scheme in conflict with the person's duty or interests for the other scheme.*"

4.5 Equity requires that the principal must act in the "*interests of*" or "*for the benefit of*" the beneficiary rather than in the principal's own interests.[11]

5. The objectives of a fiduciary relationship

5.1 The 2 important objectives of a fiduciary relationship are:

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[5] *Hospital Products case* (Supra at 96-7).
[6] In *Re Coomber* [1911] 1 Ch 723 at 728-9, approved in *Hospital Products* (supra) ALR at 458.
[7] See *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982)149 CLR 337 at 353-355.
[8] Supra.
[9] James Edelman, '*The Role of Status in the Law of Obligations: Common Callings, Implied Terms and Lessons for Fiduciary Duties*' (Paper presented at the University of Alberta, 18 July 2013, and DePaul University conference, Chicago, 19–20 July 2013).
[10] Schedule 2 of the BCCM Act.
[11] *Breen v Williams* (1996) 186 CLR 71 at 113.

(a) to require the fiduciary to avoid any personal benefit or gain obtained in circumstances where there is a conflict of interest; and

(b) to impose an obligation to account to the principal for any benefit or gain obtained in those circumstances.

5.2 Deane J in *Chan v Zacharia*[12] expressed these objectives in another way:

> "*The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage*."

Are strata managers fiduciaries?

5.3 The answer to this question will depend on the role undertaken by the strata manager, bearing in mind that roles do differ under their various administration agreements. Sometimes the title of a person will be indicative of whether they are a fiduciary, although this is by no means reliable. For example, in NSW the title "strata managing agent" suggests a principal and agency relationship, which has been held to be a fiduciary relationship.[13] On the other hand, in Queensland the title "body corporate manager" suggests a mere clerical role based on a contractual relationship.

5.4 Whether either of those implications are correct will still depend on the terms of the administration agreements. Because administration agreements vary from management company to management company and from jurisdiction to jurisdiction it is simply not possible to arrive at a generic answer to the question. All that can be said is that in most cases the roles undertaken by both strata managing agents and body corporate managers would result in them being fiduciaries.

5.5 To illustrate those points - where a strata manager's role is to act as delegate of an owners corporation, or its committee, then clearly that puts the agent in a position of trust and confidence. Where the strata manager takes on the role and responsibility of the secretary and/or treasurer of the owners corporation, then they accept a similar position. Even the mere operation of the owners corporations bank account, or a trust account containing the owners corporation's funds, will be sufficient to create a fiduciary relationship.

5.6 At the other end of the spectrum, if a strata manager was engaged merely to be the custodian of the owners corporation's records and keep its Strata Roll, then it is unlikely that they would be in a fiduciary relationship with the owners corporation. The level of "*trust and confidence*" involved with that role may not meet the threshold for a fiduciary relationship.

5.7 In Queensland, body corporate managers specifically appointed to *exclusively* perform the functions of the committee and its office bearers are clearly fiduciaries.[14] Most other bodies corporate authorize their manager to exercise the powers of one or more executive committee members (i.e. chairperson, secretary and/or treasurer) but retain the governance functions within their committee. Because those *non-exclusive* appointments automatically result in the

[12] (1984) 154 CLR 178 at 198–9.

[13] *Hospital Products Ltd v United States Surgical Corporation* (supra).

[14] See for example, Chapter 3 Part 5, section 77, of the *Body Corporate and Community Management (Standard Module) Regulation 2020*.

body corporate manager being a non-voting member of the committee,[15] that input into the governance of the body corporate is likely to be sufficient to constitute the body corporate manager as a fiduciary. Add to that the custodianship of the body corporate funds (which is also normal) and there is no doubt that a fiduciary relationship exists.

5.8 In Victoria, an owners corporation has extensive powers to delegate its powers and functions to a manager[16] and the mere fact that the manager, in exercising those powers or functions, is acting in the role of the owners corporation would (subject to any special terms of their contract) make the manager a fiduciary of the owners corporation. Therefore, it is likely to be common for a Victorian manager to be in a fiduciary relationship with their owners corporation.

5.9 The same tests and contractual considerations need to be applied in the other Australian jurisdictions to determine the precise relationship between an owners corporation and a strata manager.

5.10 So far as New Zealand is concerned:

(a) the services provided by a body corporate manager are:[17]

(i) record keeping and other administrative services;

(ii) financial services, including the handling of money belonging to the body corporate or members of the body corporate; and

(iii) regulatory compliance services, including the making or preparing of statutory disclosures;

(b) body corporate managers are under strict conduct obligations, including:[18]

(i) acting in the best interests of the body corporate;

(ii) acting in good faith; and

(iii) to disclose conflicts of interest.

The net effect of those roles and obligations (particularly the financial services role) is that a New Zealand body corporate manager would be in a fiduciary relationship with the body corporate, subject only to consideration of the precise terms of their contract.

What does this mean?

6. Fiduciary duties.

If a person is a fiduciary, then they owe duties to their principal. These fiduciary duties are centered around two rules:

(a) the conflicts rule; and

(b) the profits rule.

Each rule will be briefly considered.

7. The conflicts rule

7.1 A fiduciary owes a duty of loyalty to their principal and they must not put themselves in a position where duty and interest are in conflict.[19] That duty was subsequently expanded by the

[15] See for example, section 12 of the *Body Corporate and Community Management (standard Module) Regulation 2020*.
[16] See section 11 of the *Owners Corporation Act 2006* (Vic).
[17] Section 114G of the *Unit Titles Act 2010* (NZ).
[18] See section 114I of the *Unit Titles Act 2010* (NZ).
[19] *Aberdeen Railway Co v Blaikie Brothers* [1843-1860] All Eng Rep 29

High Court by including circumstances where there is a significant possibility of conflict.[20] The rule is strictly applied.

7.2 The objective of the conflicts rule is concerned about the possibility of fraud and has been said to be:

(a) to preclude the fiduciary from being swayed by considerations of personal interest;[21] and

(b) to protect directors, trustees and others from the fallibility of human nature so that, "*if they choose to enter into contracts in cases in which they have or may have a conflicting interest, the law will denude them of all profits they may make thereby*".[22]

8. The profits rule

8.1 Like the conflicts rule, the profits rule is also concerned about the possibility of fraud and is strictly applied where the profit was gained by reason of the fiduciary position.[23] In the words of Knight Bruce V-C on the question of fraud:[24]

> "*It is mainly this danger, the commission of fraud in a manner and under circumstances which, in the great majority of instances, must preclude direction, that in the case of trustees and all parties whose character and responsibilities are similar … induces the Court …. for the protection of the public generally …. to adhere strictly to the rule, that no profit of any description shall be made by a person so circumstanced.*"

8.2 However, the profits rule does not depend on fraud or the absence of good faith, or even the entitlement of the principal. The liability rests entirely on the fact that the fiduciary, no matter how honest or well intentioned, made a profit in the required circumstances.[25] The outcome is the obligation of the fiduciary to account to the principal for the profit.

9. Discharging the fiduciary duty

9.1 If a fiduciary is to receive a benefit in circumstances where there is a conflict of interest, then two things are necessary before the fiduciary will be permitted to retain the benefit, namely:

(a) full and frank disclosure; and

(b) fully informed consent.

9.2 Full and frank disclosure *of all material facts* is necessary before there can be an effective consent.[26] The disclosure must be such that the principal has all the relevant information to make a proper judgment as to whether to give consent.[27]

9.3 What is required for fully informed consent is a question of fact in the circumstances of each case.[28] In some cases, for example, where the principal is suffering from a disability or limited understanding (as may be the case with some owners corporations), independent legal advice may need to be taken by the principal in order for them to give a fully informed consent.

10. Exclusion or modification by contract

10.1 Mention was made earlier of the relevance of the terms of the contract between the fiduciary and the principal in determining whether the fiduciary can profit in circumstances where there

[20] *Chan v Zacharia* (1984) 154 CLR 178.
[21] *Chan's case* (supra).
[22] Vaughan Williams LJ in *Costa Rica Railway Co v Forwood* [1901] 1 Ch 746 at 761.
[23] *Chan's case* (supra).
[24] *Benson v Heathorn* 62 ER 909.
[25] *Boardman v Phipps* [1967] 2 AC 46 and *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.
[26] *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 All ER 1222.
[27] *Boardman v Phipps* [1967] 2 AC 46.
[28] *Maguire v Makaronis* (1996) 188 CLR 449.

would otherwise be a conflict of duty and personal interest.

10.2 The importance of the contract was made very clear by Meagher JA in the NSW Court of Appeal decision in *Real Estate Services Council v Alliance Strata Management Limited & Ors*.[29] When dealing with a complaint that a strata managing agent, as a fiduciary, had taken insurance commissions His Honour said:[30]

> "*The law on these matters is, I think, hardly in doubt. It may be summarized as follows: first, that for a fiduciary such as an agent to receive a commission for which he does not account is, if that is the totality of the relevant facts, a grave breach of his duty; secondly, if full disclosure is made, and an informed consent given by the person to whom the fiduciary duty is owed, the commission may be retained without impropriety by the fiduciary; and thirdly, if the fiduciary, before embarking on his fiduciary occupation, stipulates for the retention of commissions as the price of his occupation, the rules governing fiduciaries have got nothing to do with the receipt of commissions. In this third category, informed consent is irrelevant, as is disclosure. It is simply a matter of determining in what area of the fiduciary's occupation the usual fiduciary duties arise, and this is determined by the contract between the parties – a contract entered into before any fiduciary relationship existed.*"

10.3 In the same case, Powell JA expressed the importance of the contract in these terms:[31]

> "*As has often enough been pointed out, to describe a person as "a fiduciary", or to describe a relationship as a "fiduciary relationship" is, in this day and age, to tell one little as to the nature and extent of the duties, arising from the particular relationship, to which the "fiduciary" is subject – that question can be determined only after a consideration of all the circumstances – including such of the terms of any contract between the relevant parties which modify, or exclude, what might otherwise be duties to which a party to such a relationship would normally be regarded as subject – out of which the relevant relationship has arisen."*

10.4 In the *Alliance case*, the Court was considering a number of administration agreements Alliance had entered into over a range of past years. The Court made it clear that the disclosure clauses in some of the earlier agreements may not have been adequate to displace the fiduciary duties Alliance owed to the bodies corporate (as they were then called) they managed. Thus, there is a cautionary message in the decision; namely, to make sure the provision in the administration agreement authorizing the taking of commissions is sufficiently detailed and clear as to exclude the fiduciary duty.

10.5 The following wording ***did not*** receive the Court's tick of approval:

> "*The Agent may, from time to time, as Agent for Banks, Building Societies and Insurance Companies receive commission which helps offset process of such bodies' documentation."*

10.6 In contrast, Meagher JA believed the following wording (which was in a seventh version of their contract) was such as to allow Alliance to keep its insurance commissions without committing any breach of its fiduciary duties:[32]

> "*(i) It is acknowledged by the Body Corporate that the Agent has an arrangement with the Insurance Companies specified in Schedule 1 (and such additional or other Insurance Companies as may be notified in writing from time to time by the Agent to the Body Corporate) such that the Agent will receive a commission in the event that the Body Corporate places insurance business with any of such Insurance Companies*

[29] [¶80-029] NSW Strata and Community Law Cases 1990-2000 (CCH).
[30] At page 60,248.
[31] At page 60-251.
[32] At page 60-248.

and it is agreed that the Agent is entitled to retain such commission by way of further remuneration for the performance of the duties specified in Clause 3(a)."

The First Schedule contained the following statement:

"Insurance Companies with whom the Agent has a commission arrangement:

Colonial Mutual General Ins Brokers, Sun Allliance, Adept Ins. Brokers, G.R.E. Insurance Ltd., Aetna Life Progressive Property Insurance Agents Pty. Ltd."

10.7 There was another cautionary message from the following passage of Meagher JA in the Alliance decision (which followed his consideration of the above 2 clauses):[33]

"*However, I should make it plain that the view which I have just expressed must be subject to some fairly obvious exceptions: if, for example, the contract itself was vitiated by fraud, undue influence or the like it would be too fragile a plank on which to stand. Again, it would not absolve Alliance from its duty to select an insurer which did not pay it commissions rather than one which did, if it were in the interests of the body corporate to do so. And, if it is necessary to repeat, what is true of the seventh version of the contract is not true of its predecessors*."

11. Remedies for breach of duty

The obvious remedy for breach of fiduciary duty is to require the fiduciary to account for the profit or benefit received. However, there are many useful remedies where there is a conflict of duty and interest. They include prohibitory or mandatory injunctions, rescission and equitable compensation.[34]

Impact of statutory duties of disclosure

12. Statutory duties of disclosure

12.1 In some jurisdictions managers are required by statute to make disclosure where commissions or other benefits are being received in circumstances where there is the potential for a conflict of interests. Insurance commissions are the main targets. Two examples are:

(a) in New South Wales, a strata managing agent must disclose at each annual general meeting of an owners corporation whether any commissions or training services have been provided to or paid for the agent (other than by the owners corporation) in connection with the exercise by the agent of functions for the scheme during the preceding 12 months, including particulars of any such commissions or training services; and

(b) in Queensland –

(i) before a body corporate decides to enter into a contract where the body corporate manager has a relationship to the 'provider' under the contract, notice must be given disclosing the relationship;[35] and

(ii) if a body corporate manager is to receive a commission, payment or other benefit as a result of a contract being entered into by a body corporate they manage, a

[33] At page 60-249.

[34] See *McKenzie v McDonald* [1927] VLR 134, *Maguire v Makaronis* 91996) 188 CLR 449 and *Daly v Sydney Stock Exchange* (1986) 160 CLR 371.

[35] See for example, section 154 of the *Body Corporate and Community Management (Standard Module) Regulation 2020*.

disclosure notice must be given by the manager, including any monetary amount involved.[36]

12.2 Other jurisdictions have or are considering similar requirements.[37]

12.3 In the absence of a clear intent that the statutory disclosure requirements are intended to displace the manager's fiduciary obligation, those fiduciary obligations remain.

Secret commissions

13. State legislation

13.1 All Australian State jurisdictions have laws which criminalise the taking of secret commissions in certain circumstances.[38] For example, in Queensland it is an offence:

(a) under section 442B of the *Criminal Code* to corruptly receive or solicit any valuable consideration as an inducement or reward where the receipt or expectation is to influence a particular outcome; and

(b) under section 442BA of the Code to corruptly give or offer valuable consideration as an inducement or reward where the receipt or expectation is to influence a particular outcome.

13.2 Those provisions are very complex, as are a number of other related provisions, but it is not beyond possibility that a gift or other consideration, received or offered, could qualify as a secret commission. The maximum penalty for breach of those sections is 7 years imprisonment.

14. Federal legislation

There is also a 'secret commissions offence' under Federal law, but it is highly unlikely to apply to an owners corporation situation.

Risky Dealings

15. What are risky dealings?

15.1 "Risky dealings" involve arrangements which do not ***directly*** amount to a manager accepting or paying a consideration for a personal benefit which is or may be detrimental to their principal, but which rather ***indirectly*** amounts to such an outcome.

15.2 The arrangements are couched in a way that they might appear to be normal and legitimate commercial dealings, whereas they have the potential of working against the interests of the principal.

16. Some examples

16.1 There are a number of industry practices which can be described as "*risky*" from a conflict-of-interest perspective. They include:

(a) free or discounted goods and services;

(b) complimentary training and CPD services;

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[36] See for example, section 156 of the *Body Corporate and Community Management (Standard Module) Regulation 2020*.

[37] Sections 146 and 147 of the *Strata Titles Act 1985* (WA) sets out comprehensive obligations regarding acting in good faith, informing of pecuniary and other interests and informing of remuneration and other benefits. Similar, although not as extensive, obligations are imposed on managers under section 122 of the *Owners Corporation Act 2006* (VIC).

[38] For example; section 179, *Crimes Act 1958* (VIC), Part 4A, *Crimes Act 1900* (NSW).

(c) free developer consulting;

(d) sponsorships; and

(e) advertising arrangements.

Each one will be explained briefly.

Free or discounted goods and services

16.2 This involves a supplier (usually a tradesperson), used by a manager to provide services to their owners corporations, undertaking work on the manager's own property free of charge. This is effectively a "pay back" or "incentive" for the manager to continue to provide work to the supplier.

Complimentary training and CPD services

16.3 This involves a supplier (commonly a law or accounting firm) used by a manager to provide services to their owners corporations, providing training or education services to the manager's business in the expectation of attracting future work from the manager. There is a clear intent or expectation that the arrangement will open the possibility of future work for the supplier.

Free developer consulting

16.4 This involves a strata manager providing free of charge consulting services to developers (including assistance with management structuring for the project, framing by-laws, preparing the initial budget and other materials required for contract disclosure) in exchange for a 3 year administration agreement with the owners corporation. The agreement is put in place by the developer at the initial general meeting of the owners corporation.

16.5 This arrangement usually results in the developer being in breach of their fiduciary duty to the owners corporation, because the arrangement is rarely, if ever, disclosed and consented to. The strata manager is effectively an 'accessory' to this breach of duty.

Sponsorships

16.6 This involves a supplier taking up an offer to sponsor the manager, or an event being run by the manager, by payment of a sponsorship fee. The intent of the sponsorship being to involve the supplier in the event (e.g. a speaking slot) and/or future work. Again, there is a clear intent or expectation that the arrangement will open the possibility of future work for the supplier.

Advertising arrangements

16.7 This involves a supplier taking up an advertising opportunity promoted by the manager (such as a "Trades and Services Directory") on the understanding, or with the expectation that, the arrangement will provide future owners corporation work for the supplier. Sometimes, the arrangement is quite specific – *if you are not on our supplier list you will not be given work*!

17. How to deal with these arrangements

17.1 These "risky dealings" are not necessarily bad or prohibited. For example:

(a) providing training and education services to managers can be a positive contribution to improving the quality of strata management services; and

(b) having a Trades Directory where participants are vetted for licensing, insurances and safe work practices is a positive consideration for an owners corporation engaging their services.

17.2 The important thing is managing them appropriately. This involves:

(a) full disclosure of the arrangement to the owners corporation (including monetary values) and the obtaining of an informed consent from the owners corporation to the arrangement; or

(b) very clear reservation in the administration agreement of the right to put the arrangement in place (i.e. a contractual term which pre-dates the implementation of the arrangement).

17.3 In the case of some of those arrangements (e.g. complimentary training and free developer consulting), the benefit will have been obtained before the administration agreement is entered into. In that case, the disclosure in the administration agreement will need special wording to ensure the arrangement and past financial benefits are clearly spelt out.

17.4 In addition, safeguards need to be put in place to ensure that the arrangements do not influence the choice of a supplier in the case of goods and services. For example, in the case of insurance placement the strata manager needs to undertake (or have undertaken by an ***independent consultant***) a very thorough analysis of the benefits of going with that particular supplier. That process needs to be documented and, preferably, made available to the owners corporation, or at least its committee. It is most important that the strata manager does not rely entirely upon the party paying the commission (e.g. the broker or insurer) for that analysis.

17.5 The analysis referred to above is not undertaken for the purpose of advising the owners corporation on which insurance cover it should take out (because that is beyond the role and licensing of the strata manager), but rather to justify for the strata manager themselves the reasons why the choice is best for the owners corporation. It could take the form of a simple check-list which analyses the strengths and weaknesses of the contending suppliers and their respective products. It would then serve to justify any choice or recommendation made by the strata manager should the need arise.

17.6 The final matter to be avoided is the temptation to characterize the commission or other gain as covering the cost of services provided, thus reducing the annual administration fees. The classic example is the claim that insurance commissions are intended to cover the costs associated with placement of insurances and attending to claims and dealings with the insurer. Sometimes those claims even extend to a statement that without the commissions the costs to the owners corporation of attending to those matters would be even higher. Given the quantum of the average insurance commissions and the infrequency of insurance related work, those types of claims can be deceptive and misleading.

Professional considerations

18. Importance

18.1 In many ways professional considerations are equally as important as compliance with statutory or common law obligations of disclosure. This is particularly the case for new professionals such as strata managing agents. Strata Community Australia ("**SCA**") has worked hard to build professionalism within the strata management sector and some good results have been achieved.

18.2 It is very important that these results are not eroded by the type of 'risky dealings' previously dealt with in this paper. Strata managers must support SCA's efforts by working hard to ensure they display all the signs of true professionalism.

19. Scope of professional considerations

19.1 Professionalism is displayed in 2 core streams:

(a) professional standards mandated for the particular profession; and

(b) general professional standards.

19.2 In the case of strata managing agents, mandated standards will arise from codes of conduct or practice rules arising from one or more of the following:

(a) a licensing authority (such as New South Wales Fair Trading);

(b) strata titles legislation (such as the *Code of conduct for body corporate managers and caretaking service contractors* in Queensland); and

(c) an industry body, in this case SCA.

19.3 General professional standards are set by the practitioners themselves. The more attention paid to education (including continuing professional development), ethical conduct, trustworthiness, client service standards and dedication to the interests of the client, the more professional recognition that will follow. To be regarded as professional, one must act in a professional way. To be regarded as a 'learned profession' its practitioners need to be highly educated and skilled in their area of expertise which is practiced in a professional way.

Take-away points

Key "take-away" points for today are:

1. Each appointment of a strata managing agent needs to be looked at to determine whether a fiduciary relationship exists with the owners corporation.
2. Delegations of powers, operation of bank accounts and performance of governance functions are good indicators that a fiduciary relationship exists.
3. Personal gains by the fiduciary (such as the receipt of insurance commissions) can be authorized by the terms of the 'contract' under which they are appointed.
4. If so authorized, no issue of full and frank disclosure and informed consent arises.
5. The wording of the authorization needs to be carefully drafted, particularly where at the time of the contract the consideration or other benefit has already been obtained.
6. If there is no authorization, then disclosure and consent will be necessary.
7. Where possible, "*risky practices*" should be avoided and where that is not possible, they should be carefully managed.
8. Statutory disclosure obligations and fiduciary duties can co-exist, in which case it may sometimes be necessary to discharge them both.
9. Rather than pushing the indirect income boundaries to the limits, consider being more professional in your approach by being more transparent.

Gary Bugden
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