Equitable High-Density Housing: Fiduciary Duties in Developer-Negotiated Body Corporate Contracts

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Abstract

Strata title apartments constitute a significant and growing segment of the Australian housing market and have increasingly been the subject of consumer complaint. A particular source of concern are contracts between bodies corporate and service providers when housing developers have played a role in the contract's negotiation and formation. By analogy with company promoters, case law has held that developers owe bodies corporate a fiduciary duty. This article explores the consequence of that fiduciary duty for contracts between a body corporate and third-party service providers when the developer assisted in the formation of that contract. It situates discussion in the context of New South Wales strata title legislation, and draws on current developer practices, such as the creation of embedded networks for energy and water in apartment buildings.

I Introduction

Strata title is the fastest growing form of residential title in Australia. Urban consolidation policies have incentivised apartment and master-planned development in capital cities for decades, with over 4 million Australians now calling strata title

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home.[1] State governments have recently implemented planning reforms to further facilitate apartment construction on the assumption that this will increase housing supply, thus easing the housing affordability crisis.[2]

In tandem with increased construction, strata title has increasingly become the subject of consumer complaint,[3] and litigation, with allegations of exploitative practices on the part of developers and strata managers. Complaints from strata owners are typically consistent: opaque, inflated or unnecessary charges, that owners seem unable to escape. Although not obvious to many people, the source of these problems is the strata title legal form (or more accurately, a misuse of that form): strata title compels owners to make annual monetary payments called 'levies', and mandates membership of a body corporate, called an owners corporation ('OC') in New South Wales ('NSW'). The OC is a separate legal entity that can be bound by contracts that owners must pay for through their levies. When owners buy a new apartment, they frequently discover a range of OC contracts that they did not negotiate and have not read, but for which they have no choice but to pay.

Unhappy with the contractual and financial obligations they find themselves subject to because of OC contracts, owners have sued. In several cases, courts have held that strata developers owe fiduciary duties to the OC.[4] That conclusion stems from analogies made by courts between strata developers and company promoters, who have long been held to owe fiduciary duties to a company they promote.[5] In this article, we investigate the consequences of that view, with a particular focus on the relevance of the developer's fiduciary status to a longstanding and increasingly problematic strata title development practice: developers playing a role in the negotiation of contracts with third-party service providers that are ultimately entered between the OC and the third-party service provider. We explore the possibility that these practices can involve breach of the developer's fiduciary duties and concludes with consideration of remedies that might be available to OCs as a result.

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1 City Futures Research Centre, UNSW Sydney, *Australasian Strata Insights 2024* (Report, October 2025) 5 <https://www.unsw.edu.au/research/city-futures/our-research/projects/2024-australasian-strata-insights>.

2 See, eg, New South Wales ('NSW') Government, *Transport Oriented Development Program* (December 2023) <https://www.planning.nsw.gov.au/sites/default/files/2023-12/transport-oriented-development-program.pdf>.

3 See 'The Strata Trap', *Four Corners* (Australian Broadcasting Corporation, 9 September 2024) <https://www.abc.net.au/news/2024-09-09/the-strata-trap/104330248>.

4 See, eg, *Re Steel* (1968) 88 WN (Pt 1) (NSW) 467, 469, 470 (Else-Mitchell J) ('*Re Steel*'); *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* [2007] NSWSC 527 [218], [225], [231]–[234] (McDougall J) ('*Arrow Asset Management*'); *Radford v Owners of Miami Apartments, Kings Park Strata Plan 45236* [2007] WASC 250, [157] (Simmonds J) ('*Radford*'); *Meriton Apartments Pty Ltd v Owners Strata Plan No 72381* (2015) 105 ACSR 1, 71 [378], 72–3 [381]–[384] (Slattery J) ('*Meriton Apartments*'); *Owners of Strata Plan 74602 v Eastmark Holdings Pty Ltd* [2015] NSWSC 1981, [64] (Stevenson J) ('*Eastmark*').

5 See, eg, *Bagnall v Carlton* (1877) 6 Ch D 371, 386 (Bacon V-C), 404 (Baggallay LJ) (CA) ('*Bagnall*'); *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1236 (Lord Cairns LC), 1268–9 (Lord Blackburn) ('*Erlanger*'); *Emma Silver Mining Co v Grant* (1879) 11 Ch D 918, 934–6 (Jessel MR) ('*Emma v Grant*'); *Emma Silver Mining Co Ltd v Lewis & Son* (1879) 4 CPD 396, 408 (Lindley J for the Court) ('*Emma v Lewis*').

While most strata properties will be apartments,[6] the strata legal form is also used for low-rise developments ranging from peri-urban master-planned estates to eco-villages. These latter low-rise developments are often preferred by local councils as they privatise infrastructure and services, relieving councils of the need to provide those not just initially, but in perpetuity.[7] Strata title legislation varies among the states and territories, but its core concepts are consistent, and in this article we use the NSW legislation as the basis for discussion.

II Strata Development Practice

When someone buys an apartment from a strata developer, it is well-understood that the developer is making a profit on the sale of that apartment. That is an arms-length commercial transaction in which 'each [party] is engaged in conducting his own affairs',[8] which means that the transaction is generally not subject to fiduciary regulation:[9] no purchaser expects the strata developer to be acting altruistically when it sells an apartment. That is not so, however, where the apartment owners decide to enter a contract with a third party to provide services to the OC: it is far from clear that the developer has any interest in such third-party contracts. If the developer does have such an interest, the mere fact that there is no fiduciary duty owed to the apartment owners regarding the sale of apartments does not mean that the developer owes no fiduciary duty regarding the separate third-party service contracts.

Third-party service contracts are increasingly ubiquitous in modern strata developments. While owners can (and do) manage their own smaller schemes, the larger the scheme, the more likely it is that owners will need professional assistance. Legislation imposes a range of obligations on the OC, including obligations to manage the finances of the scheme, take out insurance, keep records and accounts, and crucially, to manage, repair and maintain the common property which the OC holds as 'agent' for all of the apartment owners as tenants in common.[10] If there are hundreds or even thousands of residents in a development, their common property will include complex plant and equipment, possibly recreational facilities, and even publicly-accessible open space. The OC will need to enter contracts with professional service providers to assist in managing these facilities.

OC contracts are binding on the apartment owners, not in the sense that those owners become parties to the third-party contracts, but in the sense that the OC 'must levy owners each year in accordance with their unit entitlements, to extract the necessary money for administrative and sinking funds to maintain and run the

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6 For simplicity, we refer to the person who buys a strata title from a developer as an 'apartment' owner, while recognising that developers build and sell many different sorts of properties.

7 Cathy Sherry, 'Land of the Free and Home of the Brave? The Implications of United States Homeowner Association Law for Australian Strata and Community Title' (2014) 23(2) *Australian Property Law Journal* 94.

8 BH McPherson, 'Fiduciaries: Who Are They?' (1998) 72(4) *Australian Law Journal* 288, 290.

9 See, eg, *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342, 351 (Dixon CJ, McTiernan and Fullagar J); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 70, 72 (Gibbs CJ), 100 (Mason J), 118–119 (Wilson J), 146, 149 (Dawson J) ('*Hospital Products*').

10 *Strata Schemes Development Act 2015* (NSW) s 28(1) ('*SSD Act*'). The OC has been described as a kind of trustee for the owners: *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, 195 [9]–[11] (French CJ) ('*Brookfield*').

scheme'.[11] Levying provisions are the key reason strata title legislation exists,[12] overcoming the longstanding property law rule that prevents positive obligations from binding freehold land and thus affecting successors in title.[13] This rule prevents current landowners from loading land up with obligations to pay money that all future owners of that land will need to discharge. However, the rule presents a problem if owners of fee simple apartment titles are going to be made to pay for the necessary upkeep of a collectively-owned building. To the extent that the levying provisions achieve this end, they are entirely legitimate. However, developers and the strata industry have recognised that the levying provisions are also an income stream that can be tapped by the developer or third-party companies via OC contracts.

While some contracts will provide owners with value for money, others appear not to be commercially competitive, at least from the owners' perspective. Contracts for 'embedded networks', which are invariably included in contemporary large-scale developments,[14] are a good example. Embedded networks allow for the bulk purchase of electricity or gas at a parent meter at a discount, or alternatively, the generation of energy onsite, and then the distribution of that energy to residents inside the strata scheme.[15] While owners could run their own embedded network, networks are typically run by third-party companies called 'embedded network operators' ('ENOs'). In theory, embedded networks provide residents with discounted energy, either because it is generated onsite (for example, solar panels) or because when it is purchased from retailers 'the network cost for large customers can be significantly lower than the combined costs of all the individual small customers'.[16] However, in practice, embedded networks have been the subject of multiple parliamentary and regulatory inquiries because residents are being charged above market rates for utilities, which they have no choice but to use.[17]

For example, some strata developments have solar panels on the roof, as part of an embedded network, installed and operated by a third-party provider. The contracts regarding those panels sometimes provide that the third-party retains

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11 Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (Routledge, 2017) 30 ('*Strata Title Property Rights*').

12 Ibid 14.

13 *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750 (CA); *Pirie v Registrar-General* (1962) 109 CLR 619.

14 Cathy Sherry, 'Collectively Owned Distributed Energy Resources and Private Property Law: Embedded Networks in High-Density and Master-Planned Housing' (2025) 43(3) *Journal of Energy and Natural Resources Law* 383.

15 Mike B Roberts, Arijit Sharma and Iain MacGill, 'Efficient, Effective and Fair Allocation of Costs and Benefits in Residential Energy Communities Deploying Shared Photovoltaics' (2022) 305 *Applied Energy* 117935:1–15.

16 Independent Pricing and Regulatory Tribunal (NSW), *Embedded Networks: Final Report* (April 2024) 29 ('*IPART Report*').

17 Legislative Assembly Committee on Law and Safety, Parliament of New South Wales, *Embedded Networks in New South Wales* (Report 3/57, November 2022); Department of Environment, Land, Water and Planning (Vic), *Embedded Networks Review: Final Recommendations Report* (January 2022); Australian Energy Market Commission, *Updating the Regulatory Frameworks for Embedded Networks* (Final Report, 20 June 2019) <https://www.aemc.gov.au/market-reviews-advice/updating-regulatory-frameworks-embedded-networks>; 'NSW Embedded Network Action Plan', *NSW Climate and Energy Action* (Web Page, 16 October 2025) <https://www.energy.nsw.gov.au/nsw-plans-and-progress/regulation-and-policy/nsw-embedded-network-action-plan>; *IPART Report* (n 16).

ownership of the panels, as well as all the electricity generated. The provider can sell the solar energy back to the grid for its own profit or sell it to the OC at its peak rate. The apartment owners will receive little or no benefit from the solar panels, not even rent for the use of the OC's common property on which the panels are sited.

Similarly, we have seen contracts under which a third-party provider agrees to provide electricity metering equipment to an OC, and to sell electricity to apartment owners at rates which are at least as favourable as the provider's best *generally available* peak rate. This means that the apartment owners do not receive any of the savings that flow from the bulk purchasing efficiencies of an embedded network; these are taken as ENO profit. Further, although apartment owners will pay no more than *peak* rates for electricity, no *off-peak* rates are available. Because the apartments will have been constructed by the developer and ENO with 'child' meters that do not have a National Metering Identifier, other retailers cannot supply individual apartments, effectively preventing owners and tenants from changing retailers and benefiting from market competition.[18]

These third-party contracts often run for many years, with a further renewal period. The OC is given relatively few rights to terminate, whereas the other party is often able to terminate readily. If the contract is terminated, the service provider may be given the ability to elect between:

(i) forcing the OC to purchase the plant from the provider at a set price;

(ii) removing the plant; or

(iii) leaving the plant in situ in exchange for a nominal payment (for example, $1 *if* the provider asks for that payment).

The provider's choice between these options will obviously be based on the current value of the plant and in its own interests, rather than in the interests of the apartment owners. The commercially one-sided nature of these options is further emphasised when it is recognised that the plant is almost certainly a fixture,[19] and thus part of the common property that already belongs to the OC and that owners paid for when they purchased their apartments. Although recent amendments to the *Strata Schemes Management Act 2015* (NSW) ('*SSM Act*') have now limited embedded network contracts to three years in line with other utility contracts,[20] there is a risk that developers will continue to include clauses requiring the OC to pay the capital costs of the network if the embedded network contract ends for *any* reason, effectively compelling OCs to renew contracts after an initial three-year term.

These contracts could simply be seen as poor commercial decision-making on the part of the OC, but that is because the discussion to this point has omitted the developer's role in the creation of these contracts and in the OC's decision to enter them. In the real world of strata practice, developers are routinely paid for these

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18 *IPART Report* (n 16) 96.

19 *Holland v Hodgson* (1872) LR 7 CP 328, 335 (Blackburn J for the Court); *TEC Desert Pty Ltd v Commissioner of State Revenue (Western Australia)* (2010) 241 CLR 576, 585–90 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ) ('*TEC Desert*'). See also below n 67.

20 *Strata Schemes Management Act 2015* (NSW) s132A(4) ('*SSM Act*') used to exempt embedded networks from the three-year limit on utility contracts, but that exemption was removed in early 2025: see *Strata Schemes Legislation Amendment Act 2025* (NSW) sch 1 [44].

contracts, either in cash or kind, by the third-party companies, creating additional profit for developers.[21] For example, ENOs typically pay developers for embedded network contracts by installing the embedded network infrastructure for the developer for free.[22] Other examples of OC contracts that are the result of in-kind payments to developers are:

- the 'almost universal practice' of strata managers providing free or discounted consultancy to developers on OC budgets in return for a strata management contract;[23]
- the provision of free landscaping in return for a landscaping contract; and
- increasingly, the provision of sustainability infrastructure like electric vehicle (EV) chargers, car share services, and grey and/or black water treatment plants in return for contracts with the OC for their maintenance and management.

Rather than paying in-kind, some third-party companies make cash payments to developers for contracts, such as the $190,000 payment made to the developer for a facilities management contract in *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* ('*Arrow Asset Management*').[24]

These OC contracts are negotiated by the developer and third-party service providers during the construction phase and prior to the registration of the strata plan and creation of the OC. Also during this phase, or even earlier, purchasers are signing off-the-plan contracts for unconstructed apartments. Off-the-plan contracts can only disclose the possibility of third-party–OC contracts, because the latter contracts have not yet been finalised. The third-party–OC contracts will not be seen by apartment owners until the first annual general meeting ('AGM'), well after settlement of sales, when the developer ensures that the contracts are presented to the OC with instructions from the strata manager (who has also likely provided benefits to the developer) for the OC to sign the contracts as a necessary part of the building's functioning. New apartment owners, acting as the OC, with no knowledge of building infrastructure or strata scheme management, invariably do so,[25] trusting that the developer and strata manager have acted, and are continuing to act, in their best interests.

The profits that developers are making from these OC contracts are rarely transparent. '[T]he entity that has the most legitimate right to exploit the business associated with maintaining the collectively owned property of the [apartment

[21] Nicole Johnston, 'An Examination of How Conflicts of Interest Detract from Developers Upholding Governance Responsibilities in the Transition Phase of Multi-Owned Developments: A Grounded Theory Approach' (PhD Thesis, Deakin University, 2017).

[22] Evidence to New South Wales Legislative Assembly Committee on Law and Safety, *Embedded Networks in New South Wales*, Parliament of New South Wales, Sydney, 12 August 2022, 12 (Stephen Brell, Strata Community Australia).

[23] See, eg, Michael Kleinschmidt, 'Falling Short of the Target: Some Implications for Fiduciary Duties for Developer Practice in Queensland and New South Wales' (2011) 19(3) *Australian Property Law Journal* 262, 264.

[24] *Arrow Asset Management* (n 4).

[25] Evidence to New South Wales Legislative Assembly Committee on Law and Safety, *Embedded Networks in New South Wales*, Parliament of New South Wales, Sydney, 12 August 2022, 12 (Stephen Brell, Strata Community Australia), 46 (Glen Streatfield, Energy Metrics Consulting).

owners'] community is the community itself',[26] but some developers appear to have been unable to resist the temptation to use their position as another, unrecognised, vehicle for profit.[27] That may involve breaches of the developer's fiduciary duties. Those breaches of fiduciary duty can, in turn, have consequences for the third-party contracts themselves, and may generate pecuniary liabilities for developers.

III The Developer's Fiduciary Status

In order to analyse this issue, it is useful to consider the reasons why developers have been held to owe fiduciary duties. Those reasons help to identify the ways in which there may be fiduciary problems in the developer's involvement in the creation of third-party service contracts with the OC.

A *The Reasons for Fiduciary Status*

The early treatment of strata developers as fiduciaries arose by analogy with promoters of companies:[28] just as a promoter of a company occupies a fiduciary position when it creates the company,[29] the developer occupies a fiduciary position when it brings the OC into existence by registering the strata plan. The early decision of Else-Mitchell J in *Re Steel* mentioned the possibility of developers being promoters, but his Honour's decision was more concerned with the fiduciary role of the members of the committee of the OC, who occupied positions akin to that of directors of a company.[30] However, in *Arrow Asset Management*, McDougall J accepted the analogy between the position of strata developers and that of company promoters,[31] and that approach has been followed in the subsequent case law.[32]

The analogy between developers and company promoters is obvious — indeed, it may simply be a direct application of principle, rather than an analogy — in situations where the development was a 'company title' scheme, the preferred form prior to strata titles legislation. In company title schemes, a company would purchase the land (and building), and then sell shares in the company to apartment owners, whose shareholding would entitle them to occupy an apartment in the building.[33] When someone bought land with a view to floating a company to buy the land and build apartments on it so that shares in the company could be sold to apartment owners, the developer was a promoter of a company in the conventional sense and so owed fiduciary duties. Indeed, one of the leading Australian cases about

[26] Cathy Sherry, 'Long-Term Management Contracts and Developer Abuse in New South Wales' in Sarah Blandy and Ann Dupuis (eds), *Multi-Owner Housing: Law, Power and Practice* (Routledge, 2010) 159, 172.
[27] Ibid 174.
[28] See, eg, *Re Steel* (n 4) 470 (Else-Mitchell J).
[29] See, eg, *Bagnall* (n 5) 386 (Bacon V-C), 404 (Baggallay LJ) (CA); *Erlanger* (n 5) 1236 (Lord Cairns LC), 1268–9 (Lord Blackburn); *Emma v Grant* (n 5) 934–6 (Jessel MR); *Emma v Lewis* (n 5) 408 (Lindley J for the Court).
[30] *Re Steel* (n 4) 469–71 (Else-Mitchell J).
[31] Ibid, discussed in *Arrow Asset Management* (n 4) [211], [225] (McDougall J).
[32] *Radford* (n 4) [157] (Simmonds J); *Meriton Apartments* (n 4) 72 [381] (Slattery J); *Eastmark* (n 4) [64] (Stevenson J).
[33] Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th ed, 2017) 954–5 [13.40].

company promoters was concerned with the activity of a property developer who undertook this sort of work.[34]

Given that history, one can understand why lawyers and judges would treat strata developers like company promoters, even after the introduction of strata title legislation. However, the analogy between the activities of strata developers and promoters is not quite so obvious, because a developer sells apartments directly to the apartment owners, rather than to the company (the OC) as a promoter normally would. Having said that, the common property will vest in the OC when the developer registers the strata plan. A further difference is that apartment owners do not get their property interests from the company (the OC) as shareholders in a newly-formed company would, but rather from the developer.

Notwithstanding those differences, there is still an analogy between the position and activity of strata developers and that of company promoters. The concept of a company 'promoter' 'has no very definite meaning',[35] but it is 'a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company'.[36] The basic idea is 'one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose'[37] is a fiduciary towards that company,[38] and that 'persons who get up and form a company have duties towards it before it comes into existence'.[39] In *Fawcett v Whitehouse*, a person who negotiated a deal as agent for an intended partnership (and who was therefore a promoter of that partnership) was held to owe fiduciary duties to the intended co-partners.[40] As use of the corporate form became more popular with the enactment of general incorporation statutes, that idea was extended to the promoters of companies. The promoter was therefore analogous to an agent for the company, although it could not strictly be an agent for the company given the company did not yet exist. While the concept of being 'an agent for a non-existent company'[41] was somewhat strained, the courts also conceived of the promoter as acting like a trustee for the intended company (just as '[t]here can be a trustee for unborn children'[42]).[43] Those analogies — with agency and trusteeship — convinced courts to treat promoters as fiduciaries

34 *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215 ('*Tracy*').

35 *Emma v Lewis* (n 5) 407 (Lindley J for the Court). 'It is not a word of art': *Twycross v Grant* (1877) 2 CPD 469, 503 (CA). See also *Whaley Bridge Calico Printing Co v Green* (1879) 5 QBD 109, 111 (Bowen J); *Aequitas v AEFC* (2001) 19 ACLC 1006, 1071 [346] (Austin J) ('*Aequitas*'); Paul L Davies, Sarah Worthington and Christopher Hare, *Gower's Principles of Modern Company Law* (Thomson Reuters, 11th ed, 2021) 378 [10-136]; Joseph Gross, 'Who is a Company Promoter?' (1970) 86(4) *Law Quarterly Review* 493. Cotton LJ expressed dislike for the term in *Ladywell Mining Co v Brookes* (1887) 35 Ch D 400, 411 (Cotton LJ) (CA) ('*Ladywell Mining*').

36 *Erlanger* (n 5) 1268 (Lord Blackburn). Lord Blackburn's reference to 'the Act' was to the *Companies Act 1862*, 25 & 26 Vict, c 89, which 'provided the statutory framework for modern English company law': Susan Watson, *The Making of the Modern Company* (Bloomsbury, 2022) 130.

37 *Twycross v Grant* (n 35) 541 (Cockburn CJ).

38 Ibid 538; *Erlanger* (n 5) 1268 (Lord Blackburn).

39 *Emma v Lewis* (n 5) 407 (Lindley J for the Court).

40 *Fawcett v Whitehouse* (1829) 1 Russ & My 132; 39 ER 51, 56–7 (Lyndhurst LC) .

41 *Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch 809, 819 (Romer LJ) ('*Re Leeds*').

42 Ibid.

43 *Bagnall* (n 5) 407 (Cotton LJ); *Re Leeds* (n 41) 822 (Vaughan Williams LJ); Joseph Gold, 'The Liability of Promoters for Secret Profits in English Law' (1943) 5(1) *University of Toronto Law Journal* 21, 26.

for the company, and they can also be applied to the role that developers occupy when they negotiate contracts which the OC will later be asked to enter, after the developer creates the OC by registering the strata plan.

In effect, developers take control of decision-making about these service contracts, with owners having little real choice but to repose trust and confidence in the developer to have negotiated the contracts in the best interests of the future owners. That leaves owners, who have little capacity to exercise independent judgment about the choices they are offered, vulnerable to the possibility of developers taking advantage of the role they have undertaken,[44] which justifies the owners' expectation that the developer will act (or will have acted) in their interests.[45] An agent's undertaking to act on behalf of its principal, even if it is only inferred from the circumstance of agency, qualifies the agent as a fiduciary for their principal,[46] and developers (like company promoters) voluntarily take on a comparable role when they set about creating a strata development.

B *The Fiduciary Duties of Developers*

As Frankfurter J famously observed in *Securities and Exchange Commission v Chenery Corp*:

> [T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?[47]

Generally, promoters were considered to owe their fiduciary duties to the company.[48] In some cases, promoters were said to owe a duty to intending shareholders of the company,[49] but those observations are generally explicable on the basis that a promoter who wished to keep a profit made via promotion of the company would need to have that profit approved by an independent board of directors for the company,[50] and if there was none then the shareholders would need to be informed.[51] Another reason is that in some cases the promoter created a non-corporate investment syndicate, and so owed duties directly to the members of that

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44 *Hospital Products* (n 9) 96–7 (Mason J).

45 *Australian Securities and Investment Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35, 76 [272]–[275] (Jacobson J) ('*ASIC v Citigroup*').

46 *Hospital Products* (n 9) 96–7 (Mason J); *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 345 [177] (Finn, Stone and Perram JJ) ('*Grimaldi*').

47 *Securities and Exchange Commission v Chenery Corp*, 318 US 80, 85–6 (1943), quoted with approval in *Pilmer v Duke Group Ltd* (2001) 207 CLR 165, 198–9 [77] (McHugh, Gummow, Hayne and Callinan JJ) ('*Pilmer*'). See similarly, *Boardman v Phipps* [1967] 2 AC 46, 127 (Lord Upjohn).

48 *Bagnall* (n 5) 404 (Baggallay LJ); *Emma v Grant* (n 5) 936 (Jessel MR); *Gluckstein v Barnes* [1900] AC 240, 246 (Earl of Halsbury LC); *Jubilee Cotton Mills Ltd (in liq) v Lewis* [1924] AC 958, 968 (Lord Dunedin) ('*Jubilee Cotton*'); *Tracy* (n 34) 240 (Dixon CJ, Williams and Taylor JJ); *Australian Breeders Co-Operative Society Ltd v Jones* (1997) 150 ALR 488, 508 (Wilcox and Lindgren JJ) (FCAFC) ('*ABCOS*'). See also *Hichens v Congreve* (1831) 4 Sim 420; 58 ER 157, 160 (Shadwell V-C).

49 *Gluckstein v Barnes* (n 48) 249 (Lord Macnaghten); *Re Leeds* (n 41) 823 (Vaughan Williams LJ); *Jubilee Cotton* (n 48) 971 (Lord Sumner). See also *Directors of the Central Railway Co of Venezuela v Kisch* (1867) LR 2 HL 99, 113 (Lord Chelmsford LC) ('*Kisch*') (referring to 'the public'); *Twycross v Grant* (n 35) 527 (Cockburn CJ).

50 *Erlanger* (n 5) 1229 (Lord Penzance), 1236 (Lord Cairns LC), 1255 (Lord O'Hagan).

51 *Aequitas* (n 35) 1060 [292], 1060–1 [297] (Austin J).

syndicate.[52] Given the OC is a corporate body,[53] and acts in some sense as 'agent' for the apartment owners,[54] the developer's fiduciary duties can sensibly be taken as being owed to the OC, analogously with a promoter's fiduciary duties to the company that it creates.

Some of the older cases talk of the promoter's fiduciary duty as a duty to disclose his or her interest in the transaction that the company is being asked to enter.[55] That view does not sit well with the modern Australian view of fiduciary duties as 'proscriptive rather than prescriptive in nature',[56] given it seems to envisage a fiduciary duty that requires positive action (in the form of disclosure). More recent case law has therefore queried whether it is correct to talk of fiduciary duties of disclosure.[57] There can be no doubt, however, that a promoter or developer who occupies a fiduciary position will owe the twin 'fiduciary proscriptive obligations — not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict'.[58] It is these fiduciary duties which are most likely to cause problems for developers if they have been involved in creating the third-party service contracts which the OC later enters: 'as a promoter, as the man who has formed the company, he cannot take a secret profit',[59] and must 'avoid placing themselves in a position where there is a real sensible possibility of conflict between their duty and their personal interest'.[60]

However, the concept of disclosure remains relevant, in the sense that a failure to make sufficient disclosure will render ineffective any consent that the fiduciary's principal might otherwise be argued to have given to the conduct which amounted to a breach of fiduciary duty. As the High Court of Australia put it in *Maguire v Makaronis*, 'there was no duty as such on the appellants to obtain an informed consent from the respondents. Rather, the existence of an informed consent

52 *ABCOS* (n 48) 518 (Wilcox and Lindgren JJ). See also *Fawcett v Whitehouse* (n 40).

53 *SSM Act* (n 20) s 8(1).

54 *SSD Act* (n 10) s 28(1).

55 See, eg, *New Brunswick & Canada Railway & Land Co v Muggeridge* (1860) 1 Dr & Sm 363; 62 ER 418, 425 (Kindersley V-C) (VC); *Kisch* (n 49), 113 (Lord Chelmsford LC); *Dunne v English* (1874) LR 18 Eq 524, 533, 534 (Jessel MR); *Bagnall* (n 5) 386 (Bacon V-C); *Erlanger* (n 5) 1236 (Lord Cairns LC); *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652, 658 (Lord Herschell), 667 (Lord FitzGerald) ('*Cavendish Bentinck*'); *Gluckstein v Barnes* (n 48) 246 (Earl of Halsbury LC); *Re Leeds* (n 41) 823 (Vaughan Williams LJ), 831 (Stirling LJ); *Tracy* (n 34) 240 (Dixon CJ, Williams and Taylor JJ).

56 *Pilmer* (n 47) 198 [74] (McHugh, Gummow, Hayne and Callinan JJ), citing *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ), 137–8 (Gummow J); *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 501 [41] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Grimaldi* (n 46) 345 [178] (Finn, Stone and Perram JJ); *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83, 99 [31] (French CJ and Keane J), 106 [56] (Hayne and Crennan JJ); *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 30 [67] (Gageler J) ('*Ancient Order*').

57 *Arrow Asset Management* (n 4) [212] (McDougall J); *Meriton Apartments* (n 4) 72 [381] (Slattery J).

58 *Breen v Williams* (n 56) 113 (Gaudron and McHugh JJ). See also *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J).

59 *Emma v Grant* (n 5) 936 (Jessel MR).

60 *Aequitas* (n 35) 1070–1 [343] (Austin J).

would have gone to negate what otherwise was a breach of duty'.[61] A developer will likely have committed a breach of fiduciary duty if:

- they had a personal interest in the contract which the OC later entered and there was a 'real sensible possibility of conflict'[62] between that interest and the developer's duty to act in the interests of the OC in its dealings regarding the creation of contracts for the OC; or
- the developer otherwise profited or benefited by reason of the OC's entry into that contract.

The developer can then only defend itself if it obtained the fully informed consent of the OC,[63] which will only be the case if the developer has made 'full and frank disclosure of all material facts'[64] before obtaining that consent.[65]

IV Fiduciary Problems in Owners Corporation Contracts

It is now possible to consider the impact that the developer's fiduciary duties might have on contracts that the OC enters.

A *Contracts between an Owners Corporation and a Developer*

We start with the easier, although less common, case of a contract which the developer enters directly with the OC, as it provides a straightforward example of the application of fiduciary principles.

1 *The Developer Itself*

To take one example, the developer may have installed infrastructure, such as a pool heater,[66] to which the developer retains title after the common property vests in the OC. The developer may then contract with the OC to provide services to the OC, and the apartment owners, by using (and maintaining) that infrastructure, and it may stipulate for a right to remove the infrastructure if the OC wishes to have the service provided by someone else.

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61 *Maguire v Makaronis* (1997) 188 CLR 449, 467 (Brennan CJ, Gaudron, McHugh and Gummow JJ) ('*Maguire v Makaronis*'). See also *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1, 22–3 [105]–[108] (Besanko J) (FCAFC); *Mualim v Dzelme* (2021) 157 ACSR 367, 388 [111] (Gleeson JA); *Wright v Lemon* [2024] WASCA 19, 161 [437] (Buss P). Cf *ABCOS* (n 48) 516 (Wilcox and Lindgren JJ), in which the Full Court of the Federal Court of Australia talked of a duty to disclose, notwithstanding that the case was argued and decided after the High Court of Australia had delivered judgment in both *Breen v Williams* (n 56) and *Maguire v Makaronis* (n 61).

62 *Boardman v Phipps* (n 47) 124 (Lord Upjohn); *Hospital Products* (n 9) 103 (Mason J); *Pilmer* (n 47) 199 [78] (McHugh, Gummow, Hayne and Callinan JJ).

63 *Boardman v Phipps* (n 47) 109 (Lord Hodson); *ASIC v Citigroup* (n 45) 79 [293] (Jacobson J).

64 *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1132 (Lord Wilberforce for the Court) (PC).

65 For further discussion of what full disclosure requires, see below Part V(B).

66 See, eg, Kleinschmidt (n 23) 264.

It is not clear that infrastructure will necessarily continue to belong to the developer, as it may well become a fixture.[67] This is an objective conclusion of property law that cannot be avoided by contract.[68] However, while that is significant when land is transferred between natural persons (a contract between A and B that an item will remain a chattel is not enforceable against a new owner of the land, C), common property never changes hands, always being owned by the OC as agent for the owners.[69] Thus, the OC will always be bound by a contract that it entered into with the developer, even if the infrastructure is objectively a fixture.

However, the developer's fiduciary position when this contract is entered generates the possibility that the contract involves a breach of the developer's fiduciary duties. The analogy with company promoters selling assets to the company once it has been formed is clearest in this context. Even if the promoter bought those assets at a time when it was not in a fiduciary position vis-à-vis the company,[70] a sale of the assets to the company can be rescinded if the company was not provided with an independent board of directors to approve the contract, and if the promoter did not fully disclose all material facts to that board so it could make an informed decision whether the contract was in the best interests of the company.[71] As Lord Wynford put it in *Rothschild v Brookman*:

> no man ought to be trusted in a situation that gives him the opportunity of taking advantage of the person who has reposed confidence in him … [a fiduciary] is bound to show, by clear evidence, that [his principal] knew at the time the real nature of these transactions, and with full knowledge of their nature assented to them.[72]

Or, as Cockburn CJ put it in *Twycross v Grant*:

> Fully admitting that a person who sells to a company is no more bound to disclose how, or upon what terms, he acquired the subject-matter of the sale, than an ordinary vendor to an ordinary purchaser, it seems to me that when the vendor adopts the character of a promoter, the matter assumes a very different aspect. A fiduciary or, at all events, a quasi-fiduciary, relation arises between him and the company. He is bound to protect its interests, and those of the shareholders. All his dealings with them, and for them, should be *uberrimae fidei*. He should conceal nothing from them which it is essential to them to know. If he proposes to appropriate to himself any part of their funds as a reward for his services, or to derive advantage by selling to them at a

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67 Whether something has become a fixture will depend on the familiar inquiry into the degree and objective purpose of annexation of the thing to the land: *Holland v Hodgson* (n 19) 335 (Blackburn J for the Court); *TEC Desert* (n 19) 586 [24] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ), quoting *National Australia Bank Ltd v Blacker* (2000) 104 FCR 288, 293 [10] (Conti J).

68 *SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2021) 113 ATR 24; *Hobson v Gorringe* [1897] 1 Ch 182 (CA); *Melluish v BMI (No 3) Ltd* [1996] AC 454.

69 *SSD Act* (n 10) s 28(1).

70 The promoter's position is even worse, at least as regards remedies, if it acquired the assets as a trustee for the company: the asset is then treated as belonging to the company in equity from the outset, with the result that the promoter cannot take any benefit from the sale to the company and so has to disgorge the difference between the initial purchase price and the price at which he sold to the company. Where the property was not bought while the defendant occupied a fiduciary position, this remedy is not so clearly available: *Re Cape Breton Co* (1885) 29 Ch D 795, 804–5 (Cotton LJ) (CA) ('*Cape Breton*'); *Erlanger* (n 5) 1235 (Lord Cairns LC).

71 *Erlanger* (n 5) 1229 (Lord Penzance), 1239 (Lord Cairns LC), 1255–6 (Lord O'Hagan).

72 *Rothschild v Brookman* (1831) 2 Dow & Cl 188; 6 ER 699, 702 (HL).

> profit, any contracts by which effect has been given to such purposes come, I cannot but think, within this protective enactment.[73]

2 *Other Companies Related to the Developer*

It is less clear how this analysis applies where the infrastructure is installed, and the contract with the OC is entered into, by a subsidiary of the developer; or, as is perhaps even more likely, by a subsidiary of a parent company which also owns the developer. The use of separate corporate entities is a normal practice of corporate groups, and the connected ownership does not automatically translate the developer's fiduciary status and duties onto the other members of the corporate group.

If a member of a corporate group were created with the very purpose of taking up an opportunity that the developer could not itself exploit, because of the developer's fiduciary duties, then the developer could potentially be held liable for the profit made by the other company on the basis that the company was operating as an agent for the developer,[74] and the other company might be held liable as a knowing participant in that breach of duty by the developer.[75] However, the mere fact of creating separate companies within a corporate group to take on different activities of the group, on the basis that it can insulate potential liabilities, does not normally justify that sort of analysis.

The use of related companies can, nonetheless, create problems when one of those companies owes fiduciary duties to an outsider. In the present context, the developer might itself still be in breach of its fiduciary duties if it recommends to the OC that the OC should enter into the contract with another member in the developer's corporate group: that could constitute a conflict between the developer's duty to the OC as its promoter, and the developer's personal interests. 'The interests of the fiduciary that are involved in a conflict … may be the fiduciary's interest in acquiring a benefit for itself, *or it might be the fiduciary's interest in having a benefit arise for a third party that it favours*.'[76]

Further, if the developer has breached its fiduciary duty by convincing the OC to enter a service contract with a company related to the developer, the related company could be exposed to an 'ancillary liability'[77] if it *assisted* in the developer's breach of fiduciary duty.[78] However, this sort of constructive trustee liability will only arise in Australia if the developer's breach of fiduciary duty amounted to a

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73 *Twycross v Grant* (n 35) 538.

74 Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (Sweet and Maxwell, 20th ed, 2020) [45-085].

75 *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 564–5 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) ('*Warman*'), discussing *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 397 (Gibbs J).

76 *Perpetual Trustee Co Ltd v Shambrook* [2024] QSC 105, [62] (Applegarth J) (emphasis added). See also *Haywood v Roadknight* [1927] VLR 512, 517, 519 (Dixon AJ); *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143, [71] (McLure JA) ('*SASB*').

77 *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, 626 [72] (Leeming JA) (CA) ('*Hasler*').

78 The related company is unlikely to be liable as a knowing *recipient*, as there has not been a transfer of property to it made in breach of trust or fiduciary duty: *Evans v European Bank Ltd* (2004) 61 NSWLR 75. (Although see *Westpac Banking Corp v Bell Group Ltd (in liq) (No 3* (2012) 44 WAR 1, 391–3 [2159]–[2169] (Drummond AJA); but cf Jamie Glister, 'Security Interests and Knowing Receipt' (2023) 43(4) *Legal Studies* 624, 634.)

'dishonest and fraudulent design'.[79] While dishonesty is a high threshold, it simply means 'a transgression of ordinary standards of honest behaviour'.[80] '[A] person may have acted dishonestly, judged by the standards of ordinary, decent people, without appreciating that the act in question was dishonest by those standards.'[81] If the developer has committed a breach of fiduciary duty, and ordinary decent people would consider the developer to have transgressed ordinary standards of honesty, the related company may be liable as a constructive trustee if it assisted the developer to commit the breach and was aware of the breach.

Alternatively, if the related company *induced* or *procured* the developer's breach of fiduciary duty by intentional conduct, then the related company could be liable even if the developer's breach was not itself dishonest,[82] provided the related company knew facts that would indicate to a reasonable person that the developer was acting in breach of its fiduciary duty.[83]

B *Contracts between an Owners Corporation and Third Parties*

We now turn to consider what implications a developer's fiduciary status has for contracts entered by the OC with *third-party* service providers. The lack of connection to the developer makes it less obvious that the developer's fiduciary status holds any ramifications for such contracts, but our analysis in this section suggests that view might be deceptive.

The industry practice described above, of service providers paying developers for contracts in cash or kind, suggests that developers enter a *separate agreement* with the third-party service provider, in advance of the OC entering into its service contract with the third-party.[84] Where a fiduciary agent enters a contract on behalf of their principal in return for a payment, the payment is generally referred to as a 'bribe', and the agent has acted in breach of fiduciary duty. The payment places the agent in a position where their personal interest conflicts with the duty

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79 *Barnes v Addy* (1874) LR 9 Ch App 244, 252 (Lord Selborne LC). See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 164 [179] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah*').

80 *Hasler* (n 77) 636 [124] (Leeming JA).

81 *Farah* (n 79) 162 [173] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

82 *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62 ('*Pittmore*'). See also *Farah* (n 79) 159 [161] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Hasler* (n 77) 627 [77]–[78] (Leeming JA).

83 *Pittmore* (n 82) 102 [194] (Leeming JA).

84 By way of example, we have seen at least one OC embedded network contract to provide 'retail services' (ie, selling electricity) via the network to apartment owners, which required the parties to the contract to secure assignment of the contract to the OC after the OC's first AGM. That obligation makes sense if it is owed by the developer, rather than the OC, but the contract is drafted as a contract between the third-party energy provider and the OC. The developer is not named as a party, but the contractual term only makes sense if the developer is also subject to obligations regarding the contract. Similarly with obligations in the contract requiring the OC to instal the infrastructure necessary for the network to operate; that is an obligation that cannot sensibly be owed by an OC.
There must be some form of agreement between the developer and the service provider, although it remains unclear whether that agreement is a formal contract or merely an informal arrangement to the effect that benefits will be provided by the service provider (at a reduced rate, or for free) in return for the developer providing encouragement and assistance in arranging a contract for the service provider with the OC.

they owe to their principal,[85] and it constitutes a profit received by the agent by reason of their fiduciary position.[86] Thus, while bribery is a clear case, the receipt by an agent of *any* benefit which is obtained by reason of the fiduciary position, or which creates a conflict between the agent's duty and their personal interest, will mean the agent has acted in breach of fiduciary duty. It does not matter whether the benefit is by way of monetary payment or some other valuable benefit: '[t]he benefit of a business connection is such a benefit'.[87] Thus, for example, a sub-contract given by one party to the agent of the other party has been regarded as a bribe of the agent.[88] 'In its ordinary meaning, the word bribe includes *any reward* given with a view to perverting the judgment or conduct of the recipient.'[89] As Finn noted, '[i]n a profit-making activity a calculable saving in cost can readily be equated with a profit: the one produces the other'.[90]

Irrespective of the form of the benefit, as the developer is in a fiduciary position vis-à-vis the OC, any benefit that the developer receives from a third party in return for third-party–OC contracts can be seen as creating a conflict between the developer's duty to the OC and the developer's personal interest, or as constituting a profit made from the developer's fiduciary position. On either view, the developer breaches its fiduciary duty unless it obtains the fully informed consent of the OC to that conflict or profit.

There are two ways in which this activity raises fiduciary concerns. First, when the developer negotiates (or agrees to) the terms of a third-party–OC contract, the developer does so on behalf of the OC, the intended contracting party. The developer is not acting formally as agent for the OC, in part because the OC does not yet exist, but that is what makes the developer's position analogous to that of a company promoter. If those contracts are then presented to the OC by the developer without the developer getting authorisation for any conflict or profit, then the developer is acting in breach of its fiduciary duty.

Second, when the developer presents the draft contract to the OC, there is an implicit (if not explicit) recommendation of the contract as commercially competitive and appropriate. That can potentially be considered as advice to the OC to enter the contract, and providing advice may have fiduciary consequences if the developer is not free of conflicting interests. Advisers do not always owe fiduciary duties to their advisees,[91] but the developer is already recognised as a fiduciary, and

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85 *Shipway v Broadwood* [1899] 1 QB 369, 373 (Collins LJ) (CA). It is *irrelevant* whether the bribe had any effect on the mind of the person to whom it was paid: *Shipway* at 373; *Re a Debtor* [1927] 2 Ch 367, 373 (Lord Hanworth MR) (CA); Steven Elliott (ed), *Snell's Equity* (Sweet and Maxwell, 35th ed, 2025) [7-053].

86 *Parker v McKenna* (1874) LR 10 Ch App 96, 118 (Lord Cairns LC); *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339 (CA); *Hopcraft v Close Bros Ltd* [2025] 3 WLR 423, 447 [71] (Lord Reed PSC, Lord Hodge DPSC, Lord Lloyd-Jones, Lord Briggs and Lord Hamblen JJSC).

87 *Ancient Order* (n 56) 12 [7] (Kiefel CJ, Keane and Edelman JJ); see also 32–3 [75] (Gageler J). See also *Chan v Zacharia* (n 58) 198–9 (Deane J); *Hospital Products* (n 9) 110 (Mason J); *Warman* (n 75) 558 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

88 *Panama & South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) LR 10 Ch App 515, 527 (James LJ) ('*Panama*'). See also *Fawcett v Whitehouse* (n 40) 57 (Lyndhurst LC): '[i]f it was a conditional gift, still it was a benefit to this party'.

89 *Petrotrade Inc v Smith* [2000] 1 Lloyd's Rep 486, 489 (Steel J) (emphasis added).

90 Paul Finn, *Fiduciary Obligations* (Law Book Company, 1977) 129 [288].

91 See, eg, *Pilmer* (n 47) 195–8 [69]–[75] (McHugh, Gummow, Hayne and Callinan JJ).

can fairly be said to be 'guiding or influencing'[92] the OC to enter the contract, particularly if the developer represents to the OC that there is no alternative.[93] Where a fiduciary adviser represents, even if only implicitly, that the terms presented are competitive and appropriate, in circumstances where the advisee is vulnerable to abuse of its position by the adviser, there is a reasonable basis for expecting the advice to be provided without conflicting interests.[94]

Even a canvassing or introducing agent, whose role is merely to bring parties together, can owe fiduciary duties if they assume a responsibility to promote the interests of one principal (or both principals).[95] As with company promoters, where the company cannot choose its representative when it does not exist, so with the OC that cannot choose who will occupy the fiduciary advisory position that the developer takes on when it creates a strata scheme.[96] Having somewhere to live is a necessity for everyone — it is not an optional consumer item,[97] and homeowners must choose something from the limited offerings on the market. The non-optional nature of housing makes strata title owners, and the OC which they comprise, particularly vulnerable to rent-seeking activity on the part of developers.

V Authorisation of Owners Corporation Contracts

It is also important to consider how the OC contract is entered, as that can have an impact on whether any breach of fiduciary duty might be avoided.

A *Timing Of Entry into the Owners Corporation Contracts*

During the 'initial period', between registration of the strata plan (at which point the OC comes into being) and the time when one-third of the apartment titles have been transferred to owners,[98] the OC is prohibited from engaging in particular activities. These include:

[92] Ibid 198 [75] (McHugh, Gummow, Hayne and Callinan JJ).

[93] This seems to be common industry practice: see Evidence to New South Wales Legislative Assembly Committee on Law and Safety, *Embedded Networks in New South Wales*, Parliament of New South Wales, Sydney, 12 August 2022, 9, 13 (Stephen Brell, Strata Community Australia), 10 (Karen Stiles, Owners Corporation Network).

[94] See, eg, *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] 1 WLR 4481, 4490 [32] (Longmore LJ) (CA). See also Finn (n 90) 175–6 [406]–[408].

[95] Peter G Watts and Francis MB Reynolds, *Bowstead and Reynolds on Agency* (Thomson Reuters, 23rd ed, 2024) 238 [6-037]. See also *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384, 397–8 [23]–[24] (Elias CJ), 409 [68] (Blanchard, McGrath and Gault JJ) (SC); *Regier v Campbell-Stuart* [1939] 1 Ch 766, 768–70.

[96] A fiduciary relationship can arise where a person assumes the authority of an agent, even if that authority has not been given voluntarily by the principal: see, eg, Michael Bryan, '*Boardman v Phipps* (1967)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Bloomsbury, 2012) 581, 588. That must always be so with company promoters, and similarly strata developers.

[97] Of course, some apartments are purchased by investors, but generally so they can be rented out to other people who need somewhere to live and perhaps cannot afford to purchase an apartment. Either way, the developer's breach of fiduciary duty has an impact on those who live in the building.

[98] *SSM Act* (n 20) s 4(1).

- incurring a debt (which entry into a contract generally does[99]) for an amount that exceeds the sum then available in the OC's administrative fund or capital works fund;[100] and
- appointing a strata or building manager or any other person to assist with the management, maintenance and repair of common property, for a term that would extend beyond the first AGM.[101]

These provisions, designed to protect owners, generally mean that developers avoid using their control of the OC to form contracts in the initial period.

After the initial period ends, the first AGM of the OC will be held,[102] at which point the OC must decide which contracts to enter for the services the strata scheme will need.

1 *If the Developer Controls a Majority of Votes at the Annual General Meeting*

At that stage, the developer will normally own only a small proportion (if any) of the apartments, but if the development process has not gone well, or the developer intentionally retains apartments for letting, it is possible that the developer might still own a large number of the apartment lots. At the first AGM, therefore, it is possible for the developer to own up to 65% of the apartments and thus be able to exercise majority voting power. Notwithstanding that the developer may be a fiduciary, the developer is permitted to vote in its own interests, similar to shareholders in a company even if the shareholder is also a director of the company and has a personal interest in the transaction that a general meeting is authorising.[103] That is not so, however, if the shareholder's vote amounts to a fraud on the minority.[104] The mere fact that the person controls the vote and is interested is insufficient, on its own at least, provided the contract price is fair,[105] but they 'must not exercise their vote so as to appropriate to themselves or some of themselves property, advantages or rights which belong to the company',[106] or in a way that is beyond the purpose for which the voting power has been conferred or is otherwise oppressive.[107] Although the principle of fraud on the minority is difficult to define,

99 See *Bondlake Pty Ltd v Owners – Strata Plan No 60285* (2005) 62 NSWLR 158.

100 *SSM Act* (n 20) s 26(1)(b).

101 Ibid s 26(1)(c).

102 Ibid s 14(1).

103 See, eg, *North-West Transportation Co Ltd v Beatty* (1887) 12 App Cas 589, 593, 601 (Baggallay LJ for the Court) (PC) ('*Beatty*'); *Burland v Earle* [1902] AC 83, 94 (PC).

104 *Beatty* (n 103) 593–4, 600 (Baggallay LJ for the Court); *Ngurli Ltd v McCann* (1953) 90 CLR 425, 439 (Williams ACJ, Fullagar and Kitto JJ) ('*Ngurli*').

105 Note the observation that the price in *Beatty* 'was not excessive or unreasonable': *Beatty* (n 103) 596 (Baggallay LJ for the Court).

106 *Ngurli* (n 104) 439 (Williams ACJ, Fullagar and Kitto JJ).

107 *Gambotto v WCP Ltd* (1995) 182 CLR 432, 444 (Mason CJ, Brennan, Deane and Dawson JJ), 452 (McHugh J). In *Estmanco (Kilner House) Ltd v Greater London Council*, the Council was effectively the promoter of a company title scheme for the sale of what were previously council flats: [1982] 1 WLR 2. Megarry V-C held that when control of the Council changed following local council elections, it could constitute a fraud on the minority for the newly-elected council to exercise its exclusive voting power in the company to stultify a substantial part of the purpose for which the

it has been applied to strata voting,[108] and might potentially be applied to a decision like this if the developer uses its majority vote to cause the OC to approve conduct that would otherwise amount to a breach of fiduciary duty by the developer. That would be analogous to the company law context, where:

> The majority can choose to excuse breaches of duty by directors, provided that the majority have not used their voting powers to confer benefits upon themselves in breach of duty and are not using the self-same powers to prevent the company from recovering the loss caused to it, in effect expropriating the minority in the process. … the 'fraud on the minority' exception prevents directors from improperly benefitting themselves at the expense of the company.[109]

2 *If the Developer Does Not Control a Majority of Votes at the Annual General Meeting*

It will be more common that the developer will not control a majority or any votes at the first AGM. That will mean the OC's decision to enter a contract with the third-party service provider appears to be separate from the developer, and free from any fiduciary problem. However, as described above, because of the assistance given to developers by third-party service providers, in cash or kind, it is common for the developer to have a role in convincing the OC to enter the contract with a third-party service provider: the developer will arrange for the OC to be given the hitherto unseen contracts at the first AGM, explaining that they are necessary for the functioning of the development. Any benefit that the developer has received from the service provider, albeit earlier in time (as with most bribes), can mean that the developer is acting in breach of fiduciary duty. As James LJ said:

> any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this Court. That I take to be a clear proposition, and I take it … to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him.[110]

The work of convincing the OC to enter the service contract may be done by the strata manager, rather than the developer itself. That may make it less obvious that the developer is getting a benefit from the service provider, but questions will still remain as to why the strata manager is recommending the OC enter the contract. The role of strata managing agent involves a fiduciary responsibility to the OC, and ultimately therefore to the owners for whom the OC holds the common property as agent.[111] That is why the strata manager must disclose before its appointment any

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company title scheme was created by the previous council administration, as that would bring disadvantage to the shareholders in the company who had already bought flats under the scheme: at 16.

108 *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46, 53–4 (Handley JA) (CA); *Thoo v Owners Strata Plan No 50276* (2011) 15 BPR 29,309, 29,350 [178], 29,351 [180], 29,351 [182] (Slattery J). See also *Owners Strata Plan 50276 v Thoo* (2013) 17 BPR 33,789, 33,829 [186] (Tobias AJA), overturning the 2011 decision, but affirming the accuracy of the principles there described.

109 *Harris v Microfusion 2003-2 LLP* [2017] 1 BCLC 305, 317 [33] (McCombe LJ) (CA).

110 *Panama* (n 88) 526. See also *Alexander v Webber* [1922] 1 KB 642, 644 (Bray J).

111 *SSD Act* (n 10) s 28(1).

connections that it has with the original owner of the development,[112] as well as 'any direct or indirect pecuniary interest in the strata scheme (other than an interest arising only from the prospective appointment)'.[113] But fiduciary principles will continue to apply to strata managers after appointment, with the consequence that they may be in breach of fiduciary duty if they act with a conflict between duty and interest, or otherwise make a profit by reason of their fiduciary position.

> A conflict of interest and duty can arise where the personal interest of the fiduciary is pecuniary or non-pecuniary, direct or indirect. A non-pecuniary interest includes an interest by way of association, whether by way of kinship or business connection. Whether the interest is within the conflict rule will depend on (inter alia) the nature, intensity and duration of the association.[114]

If the strata manager recommends a contract to the OC because it considers that will be to the benefit of the developer, the strata manager may itself be acting in breach of its fiduciary duty to the OC, bearing in mind the interaction and connection between the developer and the service provider. This breach of fiduciary duty by the strata manager is in addition to any breach committed by the developer.

B *Authorisation for Breach of Fiduciary Duty*

If there is a breach of fiduciary duty in the way that an OC contract with a third-party service provider was formed, the developer (or strata manager) can protect itself and others by making full disclosure to the OC of all material facts regarding the conflict or profit, and getting informed consent from the OC to the conflict or profit. The OC must actually consent: a breach of fiduciary duty is cured by consent, not merely by disclosing facts which constitute the breach.[115] And the burden of convincing the court that fully informed consent was given lies with the fiduciary.[116]

'What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given.'[117] The materiality of information is determined not by whether it would have altered the principal's decision to enter the transaction,[118] but rather by whether it might have affected his decision.[119] This will generally require disclosure, not merely of the fact of benefit or conflict, but also disclosure of the *nature* of that benefit or interest: 'a man declares his interest,

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112 *SSM Act* (n 20) s 71(2)(a).

113 Ibid s 71(2)(b).

114 *SASB* (n 76) [71] (McLure JA). See also the text and cases above at n 76.

115 Cf *Eastmark* (n 4) [159]–[160] (Stevenson J).

116 *Maguire v Makaronis* (n 61) 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

117 Ibid. See also *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1, 14 (Privy Council) ('*Gray*').

118 Although, if it would have been done so, then it clearly was material: eg, *Imperial Mercantile Credit Association (in liq) v Coleman* (1873) LR 6 HL 189, 205 (Lord Cairns) ('*IMC*').

119 *Gray* (n 117) 14–15; *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 394 (Davies, Sheppard and Gummow JJ); *Gemstone Corp of Australia Ltd v Grasso* (1994) 62 SASR 239, 243 (Matheson J), 252–3 (Olsson J); *Johnson v EBS Pensioner Trustees Ltd* [2002] Lloyd's Rep PN 309, 320 [70] (Dyson LJ). This is consistent with the High Court's decision in *Maguire v Makaronis* (n 61), although, as the High Court noted, the causal effect of the fiduciary's failure to disclose a material fact may affect the remedies that are available: see *Maguire v Makaronis* (n 61) 467–8 (Brennan CJ, Gaudron, McHugh and Gummow JJ). Cf *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 815.

not when he states that he has an interest, but when he states what his interest is'.[120] Importantly, this will require full disclosure of whatever benefit the developer (or strata manager) has received in connection with its encouragement to the OC to enter into the contract. Contrary to assumptions in the strata industry,[121] it will not suffice to disclose the terms of the contract which the developer is recommending that the OC enter with the service provider, as that wholly fails to reveal the nature of the conflicting interest or profit that the developer has obtained in connection with the contract.

The requirement that the principal's consent be fully informed ensures that the principal can fully understand the risk that the transaction carries and determine for themselves 'that [they] would rather run the risk'.[122] Fiduciary duties

> are prophylactic in the sense that they tend to prevent the disease of temptation in the fiduciary — they preserve or protect the fiduciary from that disease … The prevention of or protection from the relevant disease is assisted by the strictness of the standard imposed and the absence of defences justifying departures from it.[123]

However, the 'reason why the law permits the rule to be relaxed is obvious … If the person entitled to the benefit of the rule is content with that position *and understands what are his rights in the matter*, there is no reason why he should not relax the rule'.[124] In allowing the fiduciary principle to be relaxed, equity is balancing respect for autonomous decisions with the protective function that fiduciary doctrine serves.

A couple of points merit attention in this context. First, in *Meriton Apartments Pty Ltd v Owners Strata Plan No 72381* ('*Meriton Apartments*') Slattery J said that 'if the profit "being realised by [the fiduciary is] within reasonable limits and [is] not such as to cast doubt on the viability of the venture, there would have been no undisclosed material fact"'.[125] This could be taken to suggest that a profit or benefit for the developer need not be disclosed to the OC if it is reasonable in amount. It is important, however, to recognise that Slattery J was discussing a contract for *the developer* to provide caretaking services to the strata development. As Slattery J said, 'any purchaser should have assumed that [the

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120 *IMC* (n 118) 205 (Lord Cairns). See also *Gray* (n 117) 14.

121 For example, at the New South Wales Parliamentary inquiry into embedded networks, when asked about disclosure of 'inducements or sweeteners' (at 45) paid to developers by ENOs, the General Manager of Centralised Energy Services and New Property at Origin Energy said:

> Yes, I think that's an easy question to answer. Yes, there should be transparency. The agreements that are put in place between the developer and the retail embedded network operator that then, at the first annual general meeting, get discussed and get novated — they should have all the information there. Should that be disclosed earlier, when a new apartment owner is buying their apartment? We think it should. There should be nothing to hide, absolutely.
>
> Evidence to New South Wales Legislative Assembly Committee on Law and Safety, *Embedded Networks in New South Wales*, Parliament of New South Wales, Sydney, 12 August 2022, 45–6 (Andrew Cameron).

This answer fundamentally confuses disclosure of the contract that provided a benefit to the developer with the disclosure of the OC–ENO contract.

122 *Christophers v White* (1847) 10 Beav 523; 50 ER 683, 684 (Lord Langdale MR).

123 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 409 [413]–[414] (Heydon JA).

124 *Boulting v Association of Cinematograph Television & Allied Technicians* [1963] 2 QB 606, 637 (Upjohn LJ) (emphasis added) (CA).

125 *Meriton Apartments* (n 4) 88 [450] (Slattery J), quoting *ABCOS* (n 48) 512 (Wilcox and Lindgren JJ).

developer] as caretaker was going to make a profit'[126] and so might be taken to consent (even if only implicitly) to that profit provided it is reasonable in size. Even that approach, however, runs up against the traditional fiduciary doctrine which requires disclosure, not merely of the fact that the fiduciary has a conflicting interest, but also of the nature of that interest. As Austin J said in *Aequitas v AEFC*, in a case involving sophisticated commercial parties, in order to get informed consent to a promoter's conflict of interest, disclosure required revelation at the very least of the price differential involved in the transaction 'and also the nature and amounts of the benefits which the joint venturers would receive from the transaction'.[127] Furthermore, particularly where the developer's interest arises by reason of benefits that are wholly separate from the contract that the OC is entering into with the service provider, even the fact (let alone the nature) of the benefit that the developer has obtained in connection with the contract may well not be apparent and what Slattery J said in *Meriton Apartments* cannot save the developer.

Second, as the High Court of Australia noted in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, 'the sufficiency of disclosure can depend on the sophistication and intelligence of the persons to whom disclosure must be made'.[128] If the fiduciary's principals are not sophisticated business people, then a term tucked away in a sub-clause of standard terms and conditions that the principal is unlikely to read may not suffice.[129] Without meaning any disrespect, apartment owners are generally a disparate and often inexperienced group, particularly when compared with the 'professionals' that have strong vested interests in securing these lucrative contracts. OC contracts can relate to complex plant and equipment and the lay apartment owners are heavily reliant on the advice of the developer and strata manager as to which contracts the OC needs. Apartment owners would not expect the developer to receive a commission or other form of benefit from the service provider for introducing the service provider to the OC, unless the developer tells them.

The statutorily mandated strata development structure, which provides for the creation of the OC to act as a kind of trustee holding the common property for the benefit of the apartment owners,[130] is designed to ensure that the common property will be held and managed for the benefit of the apartment owners. The OC is not created as a profit-centre for the developer. Any steps that the developer takes in connection with the OC are reasonably expected to be undertaken in the best interests of the apartment owners for whose benefit the OC exists. For that reason, the developer occupies a fiduciary position vis-à-vis the OC and, for that reason, the developer cannot benefit from transactions that it causes the OC to enter — unless that benefit has been clearly revealed to the apartment owners when the OC meets, and then agreed to by them.

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126 *Meriton Apartments Pty Ltd v Owners of Strata Plan No 72381 (No 2)* [2016] NSWSC 819, [68].
127 *Aequitas* (n 35) 1066 [325] (Austin J).
128 *Farah* (n 79) 139 [107] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).
129 See, eg, *Maguire v Makaronis* (n 61).
130 *Brookfield* (n 10) 195 [10] (French CJ).

VI Remedies

The potential remedial consequences of the foregoing analysis are not completely straightforward. Where a benefit arises from a contract that the developer *itself* entered with the OC, if the benefit was not disclosed and consented to by the OC then, by analogy with company promoters, the OC will be able to rescind that contract.[131] Company promoter cases suggest that if the contract is not rescinded, courts refuse to rewrite the bargain,[132] even if the contract is not rescinded for reasons outside the company's control.[133] This suggests that the OC may not be entitled to an account of any profits that the developer makes from the contract if it is not rescinded.[134]

The main focus of our analysis in this article, however, is on profits or benefits which the developer has obtained from a third party. It is clear from *Arrow Asset Management*, that where that profit is a payment to the developer from someone who is not a party to the fiduciary relationship between the developer and the OC, the developer can be required to disgorge that profit through an account of profits.[135] An account may be difficult where the benefit is in-kind, as it may be hard to quantify its value,[136] but that does not relieve the court of its obligation to make a reasonable approximation of the profit or benefit.[137]

Even where the benefit is a direct bribe or secret commission, stripping that benefit from the developer through an account of profits does not avoid the contract between the OC and *the service provider*, which the OC may wish to do. The developer's role as an intermediary between the OC and the service provider means

131 *Tracy* (n 34) 245 (Dixon CJ, Williams and Taylor JJ).

132 *Cape Breton* (n 70) 803–5 (Cotton LJ); *Re Lady Forrest (Murchison) Gold Mine Ltd* [1901] 1 Ch 582, 589–90 (Wright J) ('*Lady Forrest*'); *Burland v Earle* (n 103) 99 (Lord Davey for the Court).

133 *Ladywell Mining* (n 35) 408 (Cotton LJ), 416 (Lopes LJ). The refusal to rewrite the contract applies most clearly where the promoter sold an asset to the company which the promoter had acquired for itself before promotion of the company began, and thus which the promoter held for its own benefit rather than in a fiduciary capacity for the company: *Lady Forrest* (n 132132) 588–9 (Wright J); *Burland v Earle* (n 103) 98 (Lord Davey for the Court). The promoter's profit can be stripped, even if the contract is not rescinded, if the promoter has sold property to the company which it acquired in a fiduciary capacity for the company: *Gluckstein v Barnes* (n 48); *Peninsular & Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189, 246–7 (Dixon J) ('*Peninsular*').

134 *Tracy* (n 34) 239–241 (Dixon CJ, Williams and Taylor JJ); *Meriton Apartments* (n 4) 77–8 [401], 79–80 [408]–[414], 86–7 [444] (Slattery J). A line of case law suggests that equitable compensation for the company's loss might be available in such cases, given the promoter has acted in breach of its duty, but that remains unclear: see *Re Ambrose Lake Tin & Copper Mine Co; Ex parte Taylor; Ex parte Moss* (1880) 14 Ch D 390, 394 (James LJ), 398–9 (Cotton LJ) (CA); *Lydney and Wigpool Iron Ore Co v Bird* (1886) 33 Ch D 85 (CA) ('*Lydney*'); *Cavendish Bentinck* (n 55) 661–2 (Lord Herschell), 665–6 (Lord Watson); *Re Leeds* (n 41) 825 (Vaughan Williams LJ); *Peninsular* (n 133) 213 (Latham CJ), 246 (Dixon J), 250; *Meriton Apartments* (n 4) 87 [446] (Slattery J); Matthew DJ Conaglen, 'Equitable Compensation for Breach of the Fiduciary Dealing Rules' (2003) 119 (April) *Law Quarterly Review* 246.

135 *Arrow Asset Management* (n 4).

136 This does not mean quantification is necessarily impossible — in many of these cases, services and infrastructure that have been provided to the developer will have a commercial value which could be used to quantify the value of the developer's unauthorised benefit (eg, the price that the service provider has foregone recovering from the developer for the services or infrastructure in return for the developer's assistance in ensuring the OC later enters into a valuable contract with the service provider).

137 *Warman* (n 75) 558 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

that the developer's breach of fiduciary duty will only permit the OC to rescind the resultant contract if the service provider was aware of the facts that constitute the developer's breach. The service provider need not have acted dishonestly, nor with the intention of corrupting the developer,[138] but it must be aware of (or wilfully blind to[139]) the fact that the OC has been 'deprived of the disinterested advice of their agent by or at least to the knowledge of the'[140] service provider. Given the service provider will generally be an experienced strata player, and often the party that provided the benefit to the developer, there may well be sufficient knowledge on the service provider's part for rescission of the contract.

Furthermore, a third party in this situation:

> if he takes the hazardous course of paying a sum to the buyer's agent in order to secure his help, and does not himself communicate it, he must at least accept the risk of the agent's not doing so. He has taken a course which can be validated only by actual disclosure to the opposite principal.[141]

If the service provider does not itself disclose to the OC the benefits that it has provided to the developer, the service provider 'cannot afterwards defend the transaction by claiming that [it] believed the agent [developer] to be an honest man who would disclose it himself'.[142] For this reason, the use of 'anti-bribery' clauses in the contract between the OC and the service provider — clauses requiring each party to ensure and confirm that its representatives have not given or received any bribe or secret commission — will be ineffective to protect the service provider against rescission: if the OC was not made aware of the developer's secret benefit, it cannot confirm the lack of that benefit, and it cannot have given informed consent to the benefit, of which the service provider is itself aware notwithstanding its assertion to the contrary in the contract.

Rescission of the service provider contract would remove the OC's right to receive that particular service, but this remedy would leave the OC free to renegotiate a new contract for that service on terms which have not been influenced by the secret benefits that the developer received. However, the remedy of rescission requires that there be *restitutio in integrum*,[143] which means that the 'parties are released from the obligations created by the contract, have returned to them any advantages transferred under the contract, and are indemnified for any detriments incurred pursuant to the contract'.[144] This could be difficult, in practical terms, in respect of many service contracts. For example, where the service provider installed infrastructure in the development, it may not be possible to remove it. The courts

[138] It is also 'immaterial whether the initiative for the agent's taking an interest of his own came from the agent himself or from the other party to the transaction': *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256, 1261 (Millett J) (Ch D) ('*Logicrose*'). That question might, however, be relevant if the service provider is sued for inducing the developer's breach of fiduciary duty.

[139] Ibid.

[140] Ibid.

[141] *Grant v Gold Exploration & Development Syndicate Ltd* [1900] 1 QB 233, 249 (Collins LJ) (CA).

[142] *Logicrose* (n 138) 1262 (Millett J).

[143] *Maguire v Makaronis* (n 61) 467, 474–5 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Erlanger* (n 5) 1278 (Lord Blackburn).

[144] Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (Oxford University Press, 3rd ed, 2023) 295 [13.02].

have sometimes dealt with this sort of difficulty, where an asset cannot be returned (for example, because it was sold before rescission was sought), by ordering payment of the value of the asset: where rescission is provided as an equitable remedy, as it is following a breach of fiduciary duty, 'it is not necessary to restore the parties precisely to their former position if, by the exercise of the powers of the Court, a substantial restitution can be achieved'.[145] Another challenge might be the provision of services that are not assets: it will not be possible, for example, to return electricity that has already been used in apartments or common property. Again, this could be resolved by payment of a sum reflecting the value of the services : '[u]pon rescission the party providing the services will become entitled to an account for the expenses incurred in providing the services, or perhaps their value including a profit element, with an allowance for any sums received'.[146]

Another remedial option might be for the court to rescind the contract for the future only, leaving untouched anything that has already been done. This is not how equitable rescission normally works — one of the key distinctions between equitable rescission and termination of a contract for breach is that the former sets aside the transaction *ab initio*, whereas the latter only operates *de futuro*[147] — but there are (admittedly limited) instances of equitable remedies being awarded prospectively only.[148] However, this approach would not necessarily resolve issues regarding ownership of, and payment for, plant and machinery that the service provider installed, which may still require payments of the sort discussed in the paragraph above.

A further potential difficulty with rescission is the potential for an estoppel by convention, between the OC and the service provider, to counteract rescission. This issue is highlighted in the *Arrow Asset Management* case, where a management agreement was terminated at the end of the initial period unless it was disclosed and ratified at the first AGM. McDougall J held that the disclosure had been inadequate,[149] with the consequence that the agreement had not been ratified, but he held that both parties had assumed the agreement was in force, so an estoppel by convention bound them.[150] If the OC is entitled to rescind a contract, it obviously denudes the right to rescind of any value if the OC will nonetheless be bound by an estoppel by convention. We suggest, however, that this ought not to be the result where a right to rescind has arisen because of a breach of fiduciary duty. While estoppel by convention can generate a legal relationship between parties where none existed,[151] where the OC seeks to rescind a contract it entered because the developer acted in breach of fiduciary duty to the knowledge of the service provider, the

145 *McKenzie v McDonald* [1927] VLR 134, 146 (Dixon AJ). See also *Alati v Kruger* (1955) 94 CLR 216, 223–4 (Dixon CJ, Webb, Kitto and Taylor JJ).

146 O'Sullivan, Elliott and Zakrzewski (n 144) 339 [15.39], see also 418 [18.99].

147 See, eg, *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 469–70 (Starke J), 476–7 (Dixon J); *Johnson v Agnew* [1980] AC 367, 396 (Lord Wilberforce); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 844 (Lord Wilberforce).

148 See, eg, the constructive trust recognised in *Muschinski v Dodds* (1985) 160 CLR 583, 623 (Deane J) (and see 598 (Gibbs CJ), 599 (Mason J), 615 (Deane J)).

149 The *effect* of the agreement must be disclosed: *Hudson Property Group Pty Ltd v Community Association DP 270238* [2005] NSWCA 374.

150 *Arrow Asset Management* (n 4) [170]–[187] (McDougall J).

151 Patrick Keane, *Estoppel by Conduct and Election* (Thomson Reuters, 3rd ed, 2023) 123–4 [8-001], 128–9 [8-006].

position is different from *Arrow Asset Management*. In the present context, there *is* a contract between the OC and the service provider, *but* the service provider's participation in the developer's breach of fiduciary duty justifies that contract being set aside. The conscience of the service provider is affected by its participation in the developer's breach of fiduciary duty: if that is not the case, then the OC will not be entitled to rescission; if it is the case, then rescission is justified in equity — in neither case should equity recognise an estoppel by convention.

These potential difficulties could provide courts a reason to refuse rescission because substantial *restitutio in integrum* is impossible. That then raises the question whether the OC could recover equitable compensation for any loss caused by the developer's breach of fiduciary duty. A line of case law, most famously associated with the English Court of Appeal's decision in *Re Cape Breton Co* ('*Cape Breton*'),[152] suggests that equitable compensation is not available as a remedy where a fiduciary has entered into a transaction with its principal in breach of fiduciary duty: the breach entitles the principal to rescind the transaction, but the principal cannot affirm the transaction and at the same time seek compensation for its loss. Courts do not want to rewrite the contract between the fiduciary and principal,[153] which is understandable where the principal, with full knowledge of the facts constituting the breach, chooses to affirm the transaction.[154] But the English courts applied the doctrine in *all* circumstances where rescission was impossible, including where it had become impossible through no fault of the principal.[155] Thus, the fiduciary has breached its duty by entering into a transaction with its principal without adequate disclosure, but the principal's inability to rescind the transaction leaves it with no remedy. For that reason, there are suggestions in the House of Lords' speeches on appeal from *Cape Breton* that a compensatory remedy might be available and is not precluded simply because rescission is not possible.[156] As Austin J observed in *Aequitas v AEFC*, although the *Cape Breton* line of cases

> has an established pedigree … the reasoning underlying these cases is unsatisfactory, especially where rescission has become impossible. … In such a case an order for an account of profits or equitable compensation is not directed to re-writing the contract, but to addressing the consequences of conduct of the defendant that was collateral to the contract.[157]

We suggest that this view applies *a fortiori* where an OC is unable to rescind a contract with a *third-party* service provider, but the contract was formed through the disloyal intermediation of a developer. Here, the situation differs from that in the *Cape Breton* cases, as the problem lies in the contract with a third-party service

152 *Cape Breton* (n 70). For other relevant authorities, see above nn 132–3.

153 See above n 132.

154 See, eg, *Cape Breton* (n 70) 801, 805 (Cotton LJ), 811–13 (Fry LJ); *Lydney* (n 134) 94 (Lindley LJ for the Court).

155 *Ladywell Mining* (n 35) 408 (Cotton LJ), 416 (Lopes LJ).

156 *Cavendish Bentinck* (n 55) 661–2 (Lord Herschell), 666 (Lord Watson), 669 (Lord Macnaghten). Part of the difficulty with the older cases in this line is that they concerned mines: the speculative nature of mines led some judges, such as Cotton LJ, to think the asset had no market price (see, eg, *Cape Breton* (n 70) 805); but even judges who did not take that extreme view recognised the difficulty in placing an accurate market value on such assets: see, eg, Bowen LJ's dissent in *Cape Breton* (n 70) 809–10; *Cavendish Bentinck* (n 55) 667 (Lord FitzGerald).

157 *Aequitas* (n 35) 1086 [428] (Austin J). See also *Murdoch v Mudgee Dolomite & Lime Pty Ltd (in liq)* (2022) 398 ALR 658, 695–6 [178] (Leeming JA) ('*Murdoch*').

provider being unable to be rescinded, which in turn causes a loss to the principal (the OC), and so the objection that the court does not like to rewrite contracts that fiduciaries have made with their principals does not apply.[158] If the OC suffers loss as a result of that contract, it ought to be able to recover that loss by an award of equitable compensation against the disloyal developer. For example, if the contract with the service provider cannot be rescinded, and the OC is required to pay above market rate for services, or for plant and machinery, the difference between the contract price and the market rate could be recovered from the developer as equitable compensation. Indeed, even if rescission of the contract *is* possible, if the OC suffers loss as a result of the contract, it is arguable that the OC ought to be able to recover that loss from the developer in addition to any rights that the OC has to rescind the contract. If, for example, rescission of the service contract required payments to be made by the OC, the OC might seek compensation from the developer for the amount of those payments.

VII Conclusion

The Australian housing market is in the midst of an affordability crisis for both owners and tenants.[159] Economists,[160] and in turn governments,[161] have become convinced that the solution to the crisis is increased supply and that the best way to deliver supply is through medium- to high-density development.[162] As a result of these policies, millions more Australians will call strata title dwellings home in the coming century, and it matters that the property titles they acquire are functional, affordable and fair. Consistent consumer complaint about strata title suggests that this is not currently so.

When assessing whether land titles are functional and fair, it is essential to remember that residential land is not an optional consumer item. If people do not like what the market offers, they cannot choose nothing: they must buy or rent something because a secure and stable home is a prerequisite for any kind of decent life.[163] Further, land is finite. If we do not like the terms on which it is offered, such as developer-negotiated contracts that bind the land and future owners for long periods of time on commercially uncompetitive terms, we do not have unlimited other choices. We are restricted to what the market offers, and in the context of strata title, that can be markedly uniform.

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158 Indeed, the New South Wales Court of Appeal has held that the objection does not apply to a contract between the fiduciary and principal for the supply of *services* that is incapable of rescission: *Murdoch* (n 157) 696 [181]–[182] (Leeming JA).

159 Alan Kohler, 'The Great Divide: Australia's Housing Mess and How to Fix It' (2023) 92 *Quarterly Essay* 1.

160 Ross Kendall and Peter Tulip, 'The Effect of Zoning on Housing Prices' (Research Discussion Paper 2018-03, Economic Research Department, Reserve Bank of Australia, March 2018).

161 Productivity Commission (NSW), *Building More Homes Where People Want to Live* (May 2023); Productivity Commission (NSW), *Building More Homes Where Infrastructure Costs Less: Comparing the Marginal Costs of Servicing Growth in Different Areas of Sydney* (August 2023); Productivity Commission (NSW), *What We Gain by Building More Homes in the Right Places* (February 2024).

162 NSW Government (n 2).

163 Laura Underkuffler-Freund, 'Property: A Special Right' (1996) 71(5) *Notre Dame Law Review* 1033, 1039; Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1991) 39(2) *UCLA Law Review* 295.

Property law has always recognised that because land is both essential and finite, current owners cannot be given unlimited power to regulate and burden land in ways that harm non-owners and future generations. Under all its torturous technicality, much property doctrine (for example, the rule against perpetuities, the prohibition on positive obligations binding freehold land, even the *Statute of Quia Emptores 1290*) is designed to prevent that sort of burdening of land for future owners.[164] It limits current owners' freedom to deal with their land in order to protect future owners' freedom and use. However, strata title legislation creates a significant exception to that general rule through the statutory obligation to pay levies and the creation of an OC, a separate legal entity that can make contracts which both current and future apartment owners will need to discharge. Using the strata form, original landowners (that is, developers) can effectively burden strata titles with obligations that would be prohibited for other types of land titles. This makes owners of apartments vulnerable to the kind of exploitative OC contracts that we have described in this article.

Governments are alive to the potential for exploitation and have attempted to legislate to protect owners: for example, by imposing restrictions on what developers can cause an OC to do in the initial period. However, statutory provisions are static; developers' lawyers can draft around them, and industry practice can find other avenues, for example by presenting new and inexperienced owners with contracts at the first AGM, which owners are advised are essential for the strata scheme. As a result, equitable doctrines become important, particularly those that have protected parties (including parties in commercial relationships) against the 'danger … of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect'.[165]

For the same reasons that company promoters owe fiduciary duties to the companies they create, strata developers owe fiduciary duties to the OCs they create when they register strata plans. Those duties are designed to protect against the risk that the developer will exploit the relationship that it has with the OC, sacrificing the OC on the altar of profit. The developer's fiduciary position means it cannot take an unauthorised benefit for itself and cannot allow itself to occupy a position where its self-interest and duty conflict. Industry practices regarding the developer's role in the formation of contracts between the OC and third-party service providers involve activities that may breach the developer's fiduciary duties, attracting remedies that can potentially deprive the service provider of the benefit of those contracts or subject the developer to significant pecuniary remedies.

164 Sherry, *Strata Title Property Rights* (n 11) 47–72; AWB Simpson, *A History of the Land Law* (Clarendon Press, 2nd ed, 1986).
165 *Bray v Ford* [1896] AC 44, 51 (Lord Herschell).