

LIFE LEASE RESIDENTIAL HOUSING

Is it Time for Legislation?

March 30, 2009

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The logo for Clark's Barristers & Solicitors. It features the word "Clark's" in a large, elegant, cursive script font. Below it, the words "Barristers & Solicitors" are written in a smaller, plain, sans-serif font.

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THE LIFE LEASE OPTION

Is it Time for Legislation?

INTRODUCTION

There is no doubt that life lease residential housing is considered a viable form of seniors housing in Ontario. In 2007 the Ministry of Municipal Affairs and Housing (“MMAH”) indicated that there were at least 135 life lease developments in the province, containing more than 8,600 units.¹

Three years earlier, the Ontario government budget backgrounder of May 18, 2004 described life lease “important as an alternative form of seniors housing”.

And, as far back as 2002, MMAH pointed out:

“Ontario’s demographic profile contains an increasing proportion of seniors. In 2001, an estimated 2.58 million residents, or 22% of Ontario population were 55 years of age and older. It is projected that this number will increase to 5.18 million in 2028, representing over 33% of the province’s total population. Municipal and community non-profit housing providers, as well as private senior sector developers, are exploring new ways to meet this anticipated demand. Life lease is one of the tenure options being employed.”²

Some commentators have attributed the success of the model to marketing of lifestyle, as opposed to bricks and mortar. Others have attributed its success to the fact that it is more often than not sponsored by not-for-profit or charitable organizations with less of a profit

¹ Ministry of Municipal Affairs and Housing, “*Life Lease Housing Consultation – Status Update*”, presented at Life Lease Housing Workshop, Luther Village on the Park, November 15, 2007, p.3.

² Ministry of Municipal Affairs and Housing, “*Life Lease Housing in Ontario*”, paper presented at Ontario Bar Association Program entitled “Life Lease, the New Wave in Retirement Housing” October 28, 2002, p.8.

motive than private developers who typically prefer condominiums. Life lease buildings typically contain more amenity space than condominiums. Lesser units mean lesser profit.

According to MMAH, “the lack of consistent legal, financial and governance structures for life lease projects can pose significant challenges for purchasers, and legal and real estate professionals involved in life lease transactions.”³ Many suggest that this is a direct consequence of the absence of comprehensive legislation. For the most part, life lease developments are governed by the common law of contract, real property, and corporations.

Life lease and “life lease interests” have been statutorily acknowledged in regulations under the Assessment Act and the Land Transfer Tax Act. Under the authority of section 19(1) of the Assessment Act, life lease interests as described in section 3.1.x. of Ontario Regulation 282/98 are market-valued as part of the Residential Property Tax Class.⁴

³ Ministry of Municipal Affairs and Housing, “*Best Practices Practices and Consumer Protection for Life Lease Housing in Ontario*”, March, 2007”, , p. 7

⁴ Ontario Regulation 282/98, Section 3(1) 1.x:

3. (1) The residential property class consists of the following:
 1. Land used for residential purposes that is,
....
 - x. land with self-contained units, organized as what is commonly known as a life lease project, in respect of which individuals (referred to in this subparagraph as “purchasers”) have each entered into an agreement to purchase a right (referred to in this subparagraph as the “life lease interest”) to occupy a unit for residential purposes within the project, if,
 - A. the term, not including renewals, of the life lease interest is equal to or greater than 20 years or is equal to the lifetime of the purchasers,
 - B. the purchasers have made one or more payments to the owner of the land on account of the purchase, and
 - C. the purchasers have a right to sell, transfer or otherwise dispose of the life lease interest in a manner determined under the terms of the agreement for the purchase

See also, Municipal Property Assessment Corporation, “Assessment Procedures for the Valuation of Life Lease Properties”, 2008.

Under Ontario Regulation 88/04, transfers of certain life lease interests are exempted from the imposition of land transfer tax.⁵

Except for those exceptions, and laws of general application relevant to virtually all forms of real property development, life lease has flown beneath the range of the legislative and regulatory radar.

And, the whys and wherefores of the proper application to life lease of common law principles, and the relevance of laws of general application are not without doubt. For that reason, another object of life lease legislation would be the clarification or codification of common law principles and confirmation of the relevance of laws of general application.

The question for our law makers is whether the inconsistent legal, financial and governance structures of life lease makes comprehensive legislation necessary in the interests of life lease sponsors, developers, purchasers, construction and unit lenders, real estate agents and, of course, lawyers. Complicating the matter is the concern of many life lease sponsors and purchasers alike that specific legislation might impose undue restrictions on innovative life lease sponsors and the current flexibility of life lease development.

Still others argue that the absence of comprehensive legislation leads to undue risk for both life lease sponsors and unit purchasers. Consumer protection is cited as the primary concern for those who advocate legislation.

WHAT IS LIFE LEASE?

The question is best posed on two levels: one, what is life lease in concept; and two, what is life lease in law?

⁵ See Land Transfer Tax Bulletin LTT 1 – 2004, April, 2004

Conceptually, life lease has been defined as follows:

“...a legal agreement that permits its purchaser to occupy a dwelling unit for life in exchange for a lump sum prepayment and monthly fees. The lump sum may equal or be less than the market value of the unit. The monthly fees are paid to cover maintenance and other ongoing costs. ... Life leases are usually terminated by the death of the resident (or the last surviving spouse in the case of a couple). There is a general notion that the total cost to the resident is somewhat less (by varying proportions) than comparable housing in a straight ownership market.”⁶

There are several identified models or concepts of life lease. MMAH describes five models, all based on the amount returned to the life lease resident upon termination of the right to occupy:⁷

1. Zero Balance- No residual value is repaid to the occupant or their estate at the time of departure or death. Consequently, the purchase price for an interest of this type of life lease is least expensive relative to other forms.
2. Declining Balance – The residual value declines to zero at the end of a specific period of time. This type of life lease is slightly more expensive than the zero-balance form.
3. No Gain – The amount redeemed at the time of sale remains the same in nominal terms, although declining in real terms, as there is no provision for annual inflationary increases to be taken into account.

⁶ Christine Davis, Source Book on Life Leases: Findings of a survey of project sponsors, prepared for Canada Mortgage and Housing Corporation, October, 1993, p. 1

⁷ Ministry of Municipal Affairs and Housing, “*Life Lease Housing in Ontario*”, op.cit. p. 6.

4. Price-Indexed – Redemption value increases based on annual price index factors applied to the purchase price, for instance, the Consumer Price Index (CPI).
5. Market Value – the life lease interest is redeemed at whatever price the market will bear at the time of sale.

The purchase price and method of calculating the redemption value varies within each model. The most prevalent model in Ontario is the market value model, where the purchase price is based on the development cost of the unit, and the redemption price is negotiated by the resident selling in the open market. In contrast, under the zero balance model marketed by life insurance companies in England, the original cost to a resident was determined based partly on the development cost of the unit, but also in much the same manner as a one-time lump sum insurance premium, based on the life expectancy of the resident. As there is no redemption upon termination - nothing paid back to the resident's estate upon his or her death, if the resident beats the actuarial odds, he has won. On the other hand, if the resident were to die the day after taking up occupancy, the sponsor would win. Anecdotally, I am told, and not surprisingly, the concept did not appeal to Canadians when one insurance firm attempted to market it in the 1940's. The other models are distinguished by the means of determining the redemption price paid upon termination: the declining balance model, based on annual depreciation – or some other prescribed means; the no gain or fixed value, under which the resident receives no more, no less, than the original purchaser price; the price indexed model, where redemption price is based upon changes in the consumer price index or other index. The original purchase price in these other models can vary depending on the circumstances of a particular development.

So, simple enough in concept – even allowing for the various models - transmission from concept to legally binding document is another matter. Placing the square peg of concept into the round hole of common law principle and laws of general application has resulted in life lease occupancy agreements of various descriptions – one of the inconsistencies of which MMAH speaks.

What is a life lease in law?

In an attempt to outline for laypersons one manner by which life lease models may be distinguished in terms of commonly-known forms of land tenure, Gary Zock, President of Life Lease Associates of Canada (who, in fairness is not a lawyer - not that he is apologizing) - produced the following schematic at an Ontario Bar Association program in 2002⁸.

Life Lease Models

Zero Balance ↔ Declining Balance ↔ Fixed Price ↔ Price Index ↔ Market Value
RENTAL ←←←←← || →→→→→ FREEHOLD

For consistency, it would be better to either substitute “LEASEHOLD” for “RENTAL”, or “OWNERSHIP” for “FREEHOLD” in the diagram. Nonetheless, it graphically represents that the Zero Balance model is – in concept – more analogous to a lease than ownership. (Of course this model – as a lease - would undoubtedly violate the security deposit provisions of the Residential Tenancies Act, 2006.)⁹ At the other end of the schematic, the market value life lease is represented to be more analogous to ownership.

While this schematic outlines for laypersons one manner by which the life lease models may be distinguished in terms of commonly-known forms of land tenure, the better position would be that the actual mechanics of the relationship between the sponsor and the life lease resident in each particular development, as documented in the life lease agreement, determines where it might fit in law. And, even in the short history of life lease in Ontario, this has been borne out.

⁸ Ibid.: p. 3.

⁹ S.O. 2006, Chapter 17, Section 106.

What a particular life lease is in law depends on the terms of the agreement entered into between the sponsor and the resident. To borrow the advice of my former Professor at Windsor, later Dean of Law at McGill, Rod McDonald, when lecturing on Judicial Review of Administrative Actions: “The first three rules are: read the statute, read the statute, read the statute.” In the life lease context, it is “read the agreement, read the agreement, read the agreement.”

What a particular life lease agreement is in law should not be determined by its name. The name “life lease” is not universally utilized. In an attempt to avoid the characterization of the life lease concept as one form of housing or land tenure or another, the model has been variously described as “life occupancy estate”, “right to occupy agreement”, “life estate”, “life tenure”, “equity lease”. Life lease agreements have been crafted by sponsors’ counsel so that they do not offend the legal regime as it presently exists – the common law and laws of general application.

One example is instructive. It demonstrates the interplay of concept, life lease agreements crafted by legal counsel in purported compliance with applicable common law and legislation, the interpretation of each by regulatory officials, and the reaction of sponsors and their legal counsel to such regulatory interpretation.

Section 1(6) of the Land Transfer Act¹⁰ provides that there is no land transfer tax payable on a lease:

“if the lease, at the time the lease or transfer or notice of either of them is tendered or submitted for registration, is for an unexpired term that cannot exceed 50 years, including any renewals or extensions of the term provided for in the lease or in a separate option to lease or other document entered into as part of the arrangement relating to the lease.”

¹⁰ R.S.O.1990, C. L-6.

Initially, the Ministry of Revenue expressed the opinion that land transfer tax was payable by residents upon the entering into of certain life lease agreements where the term was expressed to be for the life of the resident, as, notwithstanding that the age of most of the residents involved made it highly unlikely that the actual term would approach fifty years, the terms of the agreement – as so expressed to be for the life of the resident - made it possible.

In response, some life lease sponsors limited the term of their life lease agreements to fifty years less a day.

By return volley, the Ministry of Finance issued letters to several life lease sponsors – *including those whose agreements were limited to the truncated term of fifty years less a day* - warning that it would be assessing their residents for land transfer tax, interest and penalty from the date that they took occupancy on the basis that a life lease agreement was not a lease, but rather was an instrument conveying a beneficial interest in land.¹¹ Land transfer tax was assessed regardless of the term of the life lease agreement. For good measure, the Ministry issued an advisory to the same effect to the legal profession, published in the Ontario Reports.

After intensive lobbying by the Ontario Association of Non Profit Homes and Services for Seniors (“OANHSS”) and others, the transfer of a “life lease interest” was exempted from tax if it was acquired for personal use of the purchaser or his or her family, presumably as opposed to an acquisition for investment purposes only.¹² The Ministry of Finance interpretation, and later, the regulatory exemption, rendered the adjustment to the term of life lease agreements academic.

¹¹ R.S.O. 1990, C. 1-6, s. 3 (1).

¹² Ontario Regulation 88/04.

Noteworthy was the adoption of the term “life lease interest”. This constituted the second formal legislative acknowledgment that the market value life lease model of life lease is probably not a lease. It begged the question: if it’s not a lease, what is it?

I considered the issue in the paper I delivered at the Ontario Bar Association program on Life Lease Housing in October 2002.¹³ And, in section 14 of the template life lease occupancy agreement I produced for a life lease development consultant,¹⁴ a copy of which is attached to this paper, I described the interest that a life lease corporation grants to a purchaser as follows:

“Purchaser's Life Lease Interest: the Corporation grants to the Purchaser an estate, right or interest in and to the Lands (the "Life Lease Interest") which consists of the Purchaser's right to actually occupy the Unit for his or her own use and enjoyment if the Purchaser also signs this Agreement as Resident, or to agree with the Corporation and the Resident, or a future occupant of the Unit, as to the actual occupancy, use and enjoyment of the Unit by the Resident or future occupant. Subject to the terms of this Agreement, the Life Lease Interest may be held by the Purchaser for as long as the Purchaser lives, may be transferred by the Purchaser to a third party in the open market prior to his or her death, or by his or her estate trustees after his or her death, or may be transferred by the Purchaser to members of his or her family prior to his or her death, or by his or her estate trustees after his or her death in accordance with the terms of any will the Purchaser may make prior to his or her death, or in accordance with the laws of the Province of Ontario governing the distribution of the estates of persons who die without wills.”

¹³ John T. Clark, “*Life Lease Housing: What is a Life Lease?*”, presented at Ontario Bar Association Program entitled “Life Lease, the New Wave in Retirement Housing” October 28, 2002.

¹⁴ Reproduced with the approval of Life Lease Associates of Canada.

Instead of attempting to characterize the life lease agreement in traditional land tenure terms, I thought it best to describe what it is the purchaser/resident actually acquires; to describe the concept so that the reader would consider exactly what the purchaser/resident acquires without being locked into pre-conceived notions of what they are acquiring based on traditional common law principles of real property law and laws of general application.

That said, as I indicated later in the same paper, relying on Anger and Honsberger, I came around to the view that that the “life lease interest” – what the purchaser/resident gets under the template agreement I prepared – is probably a life estate subject to condition subsequent.

Fee simple estates of land can be terminated upon the occurrence of certain sufficiently-defined events. Anger and Honsberger:

“The estate upon condition subsequent is one that may be determined by re-entry by the grantor upon the happening of a specified event. Thus in a grant to A in fee simple provided that he does not marry B, the grantor may re-enter to terminate the estate if A does in fact marry B. If the grantor does not re-enter, or if A does not marry B, the estate will continue until its natural determination.”¹⁵

Anger and Honsberger cited the example of an *inheritable fee simple estate* that is subject to condition subsequent. A “life lease interest” may be an example of a *possessory life estate* that is subject to condition subsequent. The most common life estate subject to condition subsequent encountered by practitioners today is a possessory life estate granted under a will to, say, a surviving spouse who is granted a life estate in the

¹⁵ Anger and Honsberger, *Law of Real Property*, 2nd ed. by A.H. Oosterhoft and W.B. Rayner, Vol. 1 (Aurora, Canada Law Book Inc., 1985), p. 225.

matrimonial home that was owned by the deceased spouse, much as in *Re McColgan*¹⁶ “to hold as a home until her death, or until she is not residing there personally”.

The conditions subsequent that can terminate the “life lease interest”, or, the purchaser’s of resident’s right to occupy the life lease unit before the express alternative times of termination (i.e. death ([section 35.11], or sale before death [section 35.1]) are set out in the template. They are: one, default of purchaser’s obligations under the agreement [section 32, 33 and 34]; two: in certain prescribed circumstances, the incapacity of the purchaser/resident to live independently [section 35.11]; and three, destruction of the unit [section 36.1].

It is important to note that in the absence of specific legislation, the position of one particular Ministry of the Crown - even though it has “sponsored” the promulgation of regulations defining the concept, does not necessarily define the concept for all purposes. That fact is important to counsel who hold the view that a life lease must be a lease in order to bring life leases under the particular exemption from the part lot control provisions of the Planning Act relied on by life lease sponsors.¹⁷ This concern, however, is mitigated by the fact that if that is the concern of a particular sponsor group and its counsel, the life lease agreement can easily be structured as a lease.

MMAH AND LEGISLATION

In 2002, MMAH identified the fifteen consumer protection issues, expressing the concern that individuals were investing in life lease units without adequate consumer protection being provided:¹⁸:

1. Definition of a life lease unit;
2. Duration of the “lease” term;

¹⁶ (1969), 4 D.L.R. (3d) 572 (Ont. H.C.).

¹⁷ R.S.O. 1990, c. P-13, section 50(9).

¹⁸ Ministry of Municipal Affairs and Housing, “*Life Lease Housing in Ontario*”, op.cit. p. 9.

3. Disclosure to prospective purchasers;
4. Governance;
5. Reserve funds;
6. Dispute resolution;
7. Retention and resale value;
8. Security of tenure;
9. Registration on title;
10. Assignment and subletting of right to occupy;
11. Pre and post construction insurance;
12. Expropriation and foreclosure;
13. Entry by sponsor or agent;
14. Power of Attorney/proxies;
15. Cancellation of agreement/failure to deliver possession.

Indicating that it would continue to examine these issues and pursue a consumer protection framework for consideration by stakeholders, MMAH concluded that the definition of a life lease would ultimately influence the breadth of consumer protection coverage required. Having regard to the fact that there are five models of life lease, MMAH indicated that a broad definition of life lease is essential.¹⁹

More recently, MMAH sought input from stakeholders in connection with a discussion paper it issued in March, 2007²⁰. Its expressed object was to “identify best practices and develop appropriate measures for protecting the interests of all those involved in Ontario’s life lease housing sector.”²¹ Of the fifteen issues identified in 2002, MMAH sought input on all but the first two: definition of a life lease unit and the duration of the life lease “term”. It might be reasonably inferred that just as MMAH speculated in 2002, the fact that there are several models of life lease, and variations of each model, and that some life leases might be characterized as “leases” while other not, MMAH had

¹⁹ Ibid., p. 9.

²⁰ Ministry of Municipal Affairs and Housing, “*Best Practices...*” op. cit., p. 2.

²¹ Ibid., p. 8.

concluded that it would be difficult to create anything other than a very broad legislative definition of life lease; one that would acknowledge that the form of tenure would vary from model to model and project to project.

And, perhaps it is instructive that, after receiving 80 written submissions and receiving submissions from 200 stakeholders at five consultation sessions, MMAH gave no indication of imminent, or even contemplated, legislation²².

The Ontario Association of Non Profit Homes and Services for Seniors (“OANHSS”) expressed the two key principles on which its recommendations to MMAH were founded:²³

”OANHSS members believe that consumer access to appropriate and timely information about the housing that they intend to occupy is of critical importance. Education about the concept and key features of issues of life lease housing should be made available for consumers and for the professionals in the community that they may turn to for advice, including lawyers, accountants and real estate agents.

Any legislation to regulate life lease housing needs to support and encourage the flexibility, innovation and creativity that have contributed to the success of existing projects. Standards for life lease housing should focus on the outcomes to be achieved and should avoid prescribing the process to be followed to achieve the outcomes.”

²² Ministry of Municipal Affairs and Housing, *“Life Lease Housing Consultation – Status Update”*, op. cit., p. 5.

²³ Ontario Association of Non-Profit Homes and Services for Seniors, *“Submission to Ministry of Municipal Affairs and Housing on Life Lease Housing”*, June, 2007, p. 2.

Legislation is of secondary importance to OANHSS – just a means to achieve specific outcomes that they appear to imply is possible without legislation. Consumer access to information and education for stakeholders is paramount according to OANHSS. Inferentially, it appears that OANHSS would not favour prescriptive legislation that follows the Condominium Act model as the means by which “best practices” are achieved if it comes at the expense of sponsorship “flexibility, innovation and creativity”.

The “stakeholder views” reported by MMAH were the following:

Common Stakeholder Views

“Greater disclosure of rights and responsibilities of life lease residents and sponsors is required in both marketing materials and life lease agreements.

- Would help clarify resident involvement in financial and operational management, security of tenure, reserve funds, subletting, and resale value retention.

Residents’ Views

- Need to better educate representatives of legal community, insurers and lenders about life leases.
- Seeking stronger consumer protection measures:
 - Disclosure (financial and management);
 - Deposit security;
 - Pre and post-construction insurance; and
 - Registration of agreements on title.
- Access to project financial / operational information and input into decision-making are very important.

Sponsors’ Views

- Many believe that their life lease agreements already adequately disclose and address key consumer protection issues.
- Public education and adoption of best practices is the most appropriate solution to address consumer protection issues.

- Some argue that financial confidentiality is necessary for certain projects (e.g. sponsors that are involved in multiple projects on single site).²⁴

MMAH indicated that it would continue to analyze stakeholder input and present it to the government for action.²⁵ As of the date of this paper, nothing further has been forthcoming.

IS LEGISLATION THE ANSWER?

Life Lease sponsors would invite one to conclude that the reason life lease legislation has not been forthcoming is that the life lease industry in Ontario governs itself well. There has not been a flood of litigation in connection with life lease development, and, of the cases of which I am aware, they more often than not involve general development or contractual issues that are independent of the life lease concept.

In the conclusion of its response to MMAH, OANHSS appears to conclude that the reason for this is the local accountability of local sponsors.²⁶

“Life lease housing has been a highly successful housing option, providing an excellent option for seniors who have the resources to purchase a modest home and an opportunity for non-profit organizations to develop housing to serve a broad spectrum of the population.

The community-based non-profit organizations that provide this type of housing are recognized and respected in the cities and towns in which they are located. They are often run by cultural, religious or community groups, and are accountable to the boards

²⁴ Ibid. p.6.

²⁵ Ibid. p.8.

²⁶ Ibid., p. 15.

that govern them and to the local communities they serve. To ensure that this accountability extends to the seniors who purchase an interest in a life lease unit, OANHSS recommends comprehensive disclosure and public education.”

Be that as it may, it is cold comfort for lawyers, as the standard of care for lawyers in advising prospective life lease purchasers, or sponsor groups, or construction financiers, or contractors, is quite a bit higher than, “I know the sponsors. You can trust them to do the right thing”.

Toronto lawyer Alex Henderson, speaking at the 2002 Ontario Bar Association program on Life Lease, delivered this frank assessment:

“I have been asked to speak on the subject of acting for a purchaser of a Life Lease.

First of all, I don’t know what one should do, I can only tell you what I do.

Also, I would like to say, based on the Life Leases upon which I have acted to date, I dislike them intensely. As a lawyer, they scare me because my clients have the potential to lose everything if something goes awry with the funding plans of the Organization. At the other end, nothing has ever happened to date and my clients are happy, or no longer care one way or the other.²⁷”

Mr. Henderson expressed the feelings of some lawyers upon first coming across life lease. If it is new to them, it will take time for even the obvious issues to register. There is

²⁷ Alexander Henderson, “*Life Leases: Why they Work and Why they Worry Me*”, paper presented at Ontario Bar Association Program entitled “Life Lease, the New Wave in Retirement Housing” October 28, 2002, p.1.

no Life Lease Act. Is it a poor man's condominium? What about the Planning Act? Is it Taron insured? If not, what about that 25% deposit? Who are the developers? As it is typically a non-profit, perhaps a Church or cultural group, do they know the first thing about development?

If those questions aren't scary enough, the lawyer has to deal with client expectations. Some clients come in with the expectation that the answer to all legal issues is sitting close by - on the lawyer's shelf; that a lawyer should be able to quickly address any legal challenges that life lease development create.

There is precious little written on life lease to date, and even fewer decided cases, so the lawyer must attempt to find out who acts for the sponsor group and obtain every possible bit of assistance from its solicitor. The lawyer may justifiably inform the client that the lawyer is not in a position to give advice on the proposed purchase, while expressing concern that it is a new concept that may likely have unresolved legal issues.

Would legislation calm the lawyer's nerves? In my view, the answer is no, at least standing alone. However, legislation would give a measure of comfort that it has at least passed muster with the Legislature of Ontario. The lawyer's lack of knowledge would still be of concern. The unspoken question that can be inferred from life lease sponsors and OANHSS is whether there are better means than legislation to give lawyers and other involved professionals the education they need in order to properly advise clients on life lease.

THE CONDOMINIUM EXPERIENCE

In the Preface to *Condominiums in Ontario: A Practical Analysis of the New Legislation*²⁸, Harry Herskowitz and Mark Freedman acknowledge that "prior to 1967, the condominium concept was unknown and untested in the province of Ontario." In the

²⁸ Harry Herskowitz and Mark F. Freedman, *Condominiums in Ontario: A Practical Analysis of the New Legislation*, (Ontario Bar Association and Law Society of Upper Canada, Toronto, Ontario, 2001, p.xiii.

years leading up to 1967, I expect that there were several nervous lawyers asked to review condominiums. Legislation was required to statutorily do what the common law would not – to enable condominium boards of directors to enforce the positive covenants that make a condominium work. The Condominium Act was born.

But, is legislation the only answer? Consider positive covenants.

Life lease deals with enforceability of positive covenants differently than condominium does. The life lease industry has dealt with the positive (as opposed to restrictive) covenants contractually. In so doing it has demonstrated that in certain circumstances there are workable remedies other than specific legislation that reconcile apparently relevant common law precepts and laws of general application that were developed long prior to, and without any knowledge of, condominium or life lease. The “life lease interest” market value life lease model appears to provide non-statutory assurance of the enforceability of age restrictions in life lease agreements.

The Court of Appeal confirmed the non-enforceability of positive covenants on successor title holders in *Amberwood Investments Ltd. v Durham Condominium Corporation No. 123*²⁹. The decision re-affirmed the requirement to maintain a chain of privity of contract between the party in whose favour the covenant runs and successor covenantors. Speaking in the context of condominium versus freehold townhouses, Ottawa condominium counsel Deborah Bellinger outlined the legal principles involved:

“The use of common property can be restricted whether or not the person subject to the restriction was a party to the original agreement that created it. This is so provided the Purchaser had notice of the restriction when he chose to acquire an interest in the property.

²⁹ (2002) Carswell Ont. 850 (C.A.)

Conversely, it is established that a person cannot be made liable to fulfil a positive obligation on a contract unless he was a party to it. A person cannot be forced to contribute to costs to maintain and repair common property, unless he was a party to the agreement that says he shall so contribute. The courts have, however, allowed for exception to this general rule, but as can be seen from the Amberwood case the exceptions are not clear.

There is therefore a distinction between restrictions and positive obligations, the former will bind successors, the latter may not.”³⁰

Arguing that the condominium offers greater certainty because the Condominium Act requires the purchaser to comply with the Act and the condominium declaration to contribute to common expenses, Ms. Bellinger indicated that in the case of freehold townhouses, there being no legislation to assist, “the parties must seek the assistance of the courts in common law, and much enforcement may depend upon the specific wording of each agreement.”³¹

Ms. Bellinger was referring to freehold townhouses, not life lease developments, and yet her point is valid. There is more certainty because of the Condominium Act. The counter point, however, is whether the law makers, after legislating life lease to provide such certainty, would be able to resist the temptation to impose a prescriptive regime similar to condominium.

And, let’s not forget that there *are* non-statutory answers to the issue of positive covenants. Ms. Bellinger and Professor McDonald would say: “Read the agreement.” Upon reading, a lawyer would discover that in most life lease agreements, when a resident wishes to sell his life lease interest, he surrenders it to the sponsor, and a new

³⁰ Deborah Bellinger, “*Freehold vs. Condo: Understanding the Distinction*”, CondoBusiness October, 2002, p.16.

³¹ Ibid. p.17.

agreement is entered into between the sponsor group and the person who acquires the life lease interest. Under the terms of the template life lease agreement attached, in section 35.7, the sponsor is obligated to enter into a *new* life lease agreement with the purchaser with whom the vendor resident has contracted, while the old agreement (and life lease interest) is surrendered. The new agreement is entered into, the terms of which the new resident, as a party, is obligated to abide, including its positive covenants. Privity of contract is maintained between the sponsor (and through the sponsor, the incumbent residents in whose favour the covenant runs) and the new resident covenantor.

In addition, there is a plausible argument that if the members of the life lease corporation are residents in the building, each would be bound by a by-law provision respecting positive covenants, and even more specific matters such as age restrictions for residency. Donald Bourgeois, on the relationship between non-profit corporations and their members:

“The relationship between an organization and its members is contractual in nature. This contractual relationship exists where the organization is an unincorporated association or a corporate entity incorporated as a corporation without share capital or a co-operative corporation without share capital.”³²

If as a precondition of ownership, a new resident must become a member of the life lease corporation and agree to abide by all by-laws, including positive covenants, the issue is resolved without having to resort to legislation that sponsors fear would, over time, come to feature the prescriptive nature of the Condominium Act, potentially affecting adversely the flexibility of the life lease concept.

All of this is not to express the opinion that the life lease community should consider the Condominium Act to be an unjustified governmental incursion into private contractual

³² Donald J. Bourgeois, *The Law of Charitable and Not-For-Profit Organizations*, 3rd ed., Butterworths Canada Ltd. 2002, p 290.

and property rights. On the contrary, the first Condominium Act was, and its improved 1998 version, is essential consumer legislation that governed and governs the relationship between developers and unit purchasers, property managers and professional advisors. And, the objects of the 1998 legislation identified by Herskowitz and Freedman - instituting flexibility in connection with various forms of condominium “while maintaining the fundamental concept of consumer protection”³³ correspond – not surprisingly - to some of the same issues that the MMAH study identified in connection with life lease.

OBJECTS OF LIFE LEASE LEGISLATION

Legislation is considered to be remedial; it is said to remedy conflicts or problems that arise among individuals and organizations in society. It will often attempt to equalize perceived power relationships between haves and have-nots. It will attempt to clarify ambiguous, confusing and sometimes irrelevant or what may be inappropriate (in today’s context) common law principles, or (in terms of the issue-specific legislation) laws of general application.

Unfortunately, in seeking to achieve these objectives, laws are created which are often too far-reaching in their application. That appears to be the concern of OANHSS, which, while acknowledging the mutual advantage to sponsors and purchasers alike of addressing consumer protection initiatives that have not yet been consistently addressed by the industry, warns that “the flexibility, innovation and creativity that have contributed to the success of existing projects” might be lost by legislation that prescribes the method by which specific objectives of legislation are to be achieved.

Life lease purchasers and their advisors would like to see consumer protection as the central theme in legislation, specifically in connection with purchaser deposit security, financial and management disclosure, pre- and post-construction insurance before and

³³ Herskowitz and Freedman, *op. cit.* p.xiv

after construction, the freedom to register a life lease interest and the freedom to “sublet” a unit.

Of importance to all – purchasers, developers, contractors, lenders, lawyers, accountants, property insurers, title insurers – is education; to learn more about life lease generally.

In connection with particular projects, all acknowledge the benefit of more consistent disclosure in connection with financial and management matters and a better delineation of the respective rights and responsibilities of residents and sponsors. Both marketing materials and life lease agreements can be improved in this respect in how they deal with security of tenure, reserve funds and resale value retention, to name just three.

Real property concepts that impact on life lease, and what exactly life lease is in law, such as “leasehold”, “freehold”, “life estate”, have been in other contexts, the subject of legal opinion and judicial review for centuries. This continues, even with clarifying, remedial legislation in place. That said, for the lawyer concerned with discharging his or her duty to the client, and in so doing demonstrating the appropriate standard of care in connection with these concepts, as now applied to life lease, legislation would appear to be an absolute essential. I would caution however that, based on the condominium experience, legislation wouldn’t end the debates; it wouldn’t result in any lesser litigation than if legislation were not in place. The litigation would be based on differing interpretations of the legislation, perhaps instead of differing interpretations of an agreement. Pick your poison.

From the lawyers’ perspective? What legislation would do is provide a level of consistency and definition that we, as lawyers – who are called upon to “bless” the arrangements that life lease residents and sponsors so clearly desire – require in order to properly assess and deliver consistent and competent advice.

I am not aware if the Ontario Bar Association made a submission in the MMAH consultation. If not, I would suggest that the reason is that life lease has as of this point in

time flown under the range of lawyers' radar as well as legislators'. I believe that this must change.

CONSUMER PROTECTION AND DISCLOSURE

It is fair to ask life lease sponsors if their reservations about the nature of legislation are actually based on the fact that they like flying under the radar – perhaps for cost purposes or perhaps to avoid red tape. Or, more charitably, whether their concern is that they have a concept that is working without a lot of government involvement, and that prescriptive legislation would increase lawyers' involvement and only lead to the invention of legal issues that will stifle innovation and flexibility – ultimately to the detriment of the life lease residents. Whatever it is, life lease sponsors have to understand that the imperative driving law makers will not, in most cases, be the reduction of red tape. Rather, as it often does in enacting remedial legislation government will look to the relative bargaining strength of the parties involved.

For that reason, that any life lease legislation would include consumer protection provisions is clear. To quell the fears of life lease sponsors who acknowledge the importance of better disclosure yet fear over-regulation, a statutory prospectus regime would be more welcome than a condominium-type regime – and, in practical terms, probably more appropriate. Reconciling five models of life lease in one piece of comprehensive “how-to” legislation would be a daunting task – and one that may not be necessary to achieve the objects of legislation.

Who is to say that condominium – with the benefit of hindsight - might not have been better off under a Condominium Act legislation that used disclosure more and prescription less? It might have been preferable that the onus of compliance be placed on the developers – those who have the most to gain – by means of significantly more severe penalties for failure to make proper disclosure in connection with particular developments, rather than a system where architects, engineers, planners and lawyers have to navigate regulation and bureaucracy, and invent means such as phantom

mortgages to reconcile commercial reality with the delays that the condominium approval process entailed.

PRIVATE VS. NON-PROFIT LIFE LEASE

By far the majority of life lease developments have been undertaken by non-profit organizations such as Churches, cultural groups, local municipalities and retirement homes. Condominium developers have tested the waters, but, for the most part shied away. There is often less profit in developing life lease than condominium; one reason being the provision of more amenity space for residents, and the legal landscape (compared to condominium with its own Act) is uncertain. Why venture into something they don't know? And, there is a (mostly) unspoken element of scepticism. Many condominium developers consider life lease as condominium on the cheap – developed by those attempting to skirt the expense of the condominium regime, or by well-intentioned, but marginally competent amateurs.

Perhaps it is best that two solitudes exist; that life lease be left to non-profits who have demonstrated an affinity for developing communities within the walls of their buildings, rather than an assemblage of individual owners. Of considerable significance is that a market value life lease development is a means by which non-profits can realize on some of the equity tied up in redundant land. Life lease consultants will tell you in marketing they look firstly to those with a relationship with the non-profit sponsor – the best example being parishioners of a Church sponsor.

It might be appropriate for the Ontario government to consider legislation specifically restricting life lease development to the non-profit sector. The government might be interested if it was satisfied that with the assistance of loan guarantees and incentives for developers and residents (that would be less expensive to the government than other affordable housing programs) the supply of affordable housing might be considerably increased as non-profit organizations make the use of dormant lands to respond to a social need.

If an infrastructure-seeking government was looking for a new supply of affordable housing, non-profit life lease could be the answer. With the proper due diligence, the province or municipalities might be willing to guarantee purchaser deposits or even partially subsidize the construction cost of life lease units – passing the benefit to residents in the form of resident equity that would enable them to qualify for mortgage financing of a defined portion of the balance of the purchase price of a unit.

Food for thought?