



[PROFESSIONAL PRACTICES SERIES]

Share purchase for exclusive use of a dwelling

December 2005 / Reviewed in September 2008 • There is a method of acquiring real estate that all real estate brokers and agents should acquaint themselves with. It is a process, sometimes called “securitization”, by which a buyer acquires, on the one hand, full ownership of a number of shares in a company (legal person) whose main asset is an immovable and, on the other hand, under a leasing agreement inseparable from the share acquisition agreement, the exclusive use of a given apartment in the immovable. The buyer then holds all rights of use to this apartment and may, in principle, occupy it or lease it. In this type of transaction, the acquisition of shares is therefore indivisible from the right to occupy an apartment specifically tied to the shares acquired.

One of the reasons for developing this method of acquiring real estate, prevalent in large cities, was to get around the restrictions associated with the conversion of rental properties into divided co-ownership properties (condominiums). Owning shares with a right of use on an apartment can, in practice, present similarities with divided co-ownership (right of ownership, exclusive use of an apartment, agreement and by-laws governing the rights and obligations of the owners and tenants). However, acquiring these shares should not be confused with purchasing a condominium, and it is important for

a buyer to understand exactly what he is buying.

The Court of Appeal has recently clarified the nature of the ties that bind the buyer of shares in the company that owns the immovable, first to this company, and second to the tenant leasing the apartment in question (1). The facts in this case were as follows: In 2001, a buyer purchased the seller’s shares in Les Appartements Port-Royal inc., a company that owned the immovable by the same name. Ownership of these shares gave him the right to occupy one of the apartments in the building. Concomitantly, the buyer signed a contract with Port Royal called an “ownership lease”. At that time, the apartment was being rented out to a third party under a lease agreement with the seller. Informed of the situation, the buyer agreed to maintain the lease until it came due. A few months after his acquisition, assuming he was the owner of the apartment, the buyer notified the third party that he wished to repossess the dwelling at the end of the lease in order to occupy it himself. The third party refused to leave, citing his status as lessee and his right to maintain occupancy under the Civil Code of Québec.

In order to rule in this matter, the Court had to answer two questions: **1) Had the buyer become the owner of the apartment? 2) Was the third party a lessee with a right to maintain occupancy within the**

meaning of the Civil Code of Québec? According to the Court, owning the shares in Port Royal did not mean owning the apartment. Port Royal retained ownership of the immovable. The “ownership lease”, granting the exclusive use of a dwelling that the buyer did not own made him a lessee within the meaning of the Civil Code of Quebec. Therefore, the buyer could not exercise the right of repossession by invoking his quality of owner of the immovable, which he was not. However, the Court concluded that the third party could not benefit from the right to maintain occupancy. Because the owner of the Port Royal shares was the lessee of the apartment, the lease signed with the third party was in fact a sub-lease. The Civil Code does not grant the sub-lessee the right to maintain occupancy.

A real estate broker or agent involved in this type of real estate acquisition must inform the buyer about what exactly he is and isn't acquiring. He is buying shares in a company that owns an immovable, which shares are tied to a lease allowing the exclusive use of a dwelling in this immovable. The buyer does not become the owner of the apartment that he may occupy, but rather a shareholding lessee. (E)

Source: ACAIQ

¹ Carrigan v. Court of Quebec, REJB 2005-91247.