

TRANSFER OF SHARES

REGISTRATION

- Until a transfer of shares is registered, the transferor of the shares continues to be the owner of the shares (s1072F) and purchaser is not recognised as a shareholder.

Corporations Act

Section 1070A	(1) A share, other interest of a member in a company: <ul style="list-style-type: none"> (a) is personal property; and (b) is transferable or transmissible as provided by: <ul style="list-style-type: none"> (i) the company's constitution; or (ii) the operating rules of a prescribed CS facility if they are applicable; and © is capable of devolution by will or by operation of law.
1071B(2)	Instrument of transfer (2) A company must only register a transfer of securities if a proper instrument of transfer has been delivered to the company. This is so despite: <ul style="list-style-type: none"> (a) anything in its constitution; or (b) anything in a deed relating to debentures.
1027F	Replaceable rule where a person transferring the shares remains the owner of those shares until the transfer is registered in the name of the recipient. Directors are not required to register a transfer unless the transfer was lodged at the registered office, any fee has been paid and they have all info about the right of the person to make the transfer. Directors can refuse to register s transfer of shares if the shares are not fully paid or the company has a lien on the shares Can also suspend registration so long as it is not for more than 30 days in a calendar year.

DOCTRINE OF CONVERSION (GENERAL LAW)

- Conversion: The doctrine gives the purchaser important remedies including specific performance and injunctions. **These remedies are only available if damages are inadequate.**
- If the contract is specifically enforceable (complies with formalities and not conditional), **the vendor becomes the trustee under a constructive trust for the purchaser, and the purchaser becomes the owner in equity** (*Lysaght*)
 - Purchaser is ready to perform therefore vendor should be- beneficial interest has passed to the purchaser and the vendor has a claim over the land (a vendor's lien) for the balance of the purchase price. This means the vendor has the power to retain possession until the purchase price is paid.
 - Equity considers as done what is ought to be done
 - Discretionary remedies- court determines whether equitable remedy should be granted
 - Whoever seeks equity should come with clean hands- purchaser should act bona fide

HOW DOES THE DOCTRINE WORK WITH SHARES?

- The doctrine may not readily apply for shares- share transfers are almost always conditional on factors including payment of the share price or approval of the company. If approval from the company or third party is conditional and not met, then there is no obligation to transfer the shares at general law (*Brown*)
- Worthington** criticises the general equitable rule as it applies to land- the right apparently arises when the specifically enforceable contract exists actually has no effective substance until at least some of the purchase price has been paid
 - Says that despite the theory that beneficial ownership passes from vendor to purchaser upon the existence of a specifically enforceable contract, until the purchase price has been paid it is the vendor that is entitled to dividends and voting rights, not the purchaser
 - If a transfer of shares is also subject to director approval, then it is a conditional transfer of shares in her view and not subject to the equitable maxim of equity doing what ought to be done
 - The vendor must be under a specifically enforceable or unconditional obligation to transfer identifiable property to the purchaser, before the purchaser can assert an equitable ownership interest arising by law- the conditions and hurdles to effecting the transfer of shares therefore is a bar to the finding of constructive trust
 - By comparison Roth J suggested in *Luxe* that a purchaser has a beneficial interest in shares even before the purchase price is paid**

Proprietary claim (most pertinent)

- It is well established that an agreement for the sale the shares in a private company, like an agreement for the sale of land, entitles the purchaser to specific performance.
- On that premise, Luxe acquired a beneficial interest in the shares as of the date of the SPA. Thus, When the shares were sold to Troika, Luxe had a proprietary claim to the surplus on the sale.

Account of profits

- Merely by way of obiter, the alternative claim that Luxe was entitled to an account of profits for breach of contract should be considered.
- There is no reason why, in principle, a court cannot award an account of profits for breach of contract: *Blake*.
- However, it should only do so when, exceptionally, a just response to the breach of contract so requires an account of profits: *Blake*.
- The SPA is an ordinary commercial contract and breach of such an agreement is not unfamiliar in a business context.
- There is no reason why, in principle, the ordinary compensatory measure of damages should not apply. Absent exceptional circumstances, an account of profits is not appropriate.

Damages for breach of contract

- If an account of profits is not available, Luxe can clearly claim compensatory damages i.e. the difference in value between the shares and the contract price.
- Given the willingness of the buyer to breach the contract and their attempts to mislead Luxe as to the sale process, an injunction should be secured to freeze Midland's assets.

EXAMPLE: RESTRICTIONS ON SHARE TRANSFER IN CONSTITUTION

Board- Transfer of Shares	<ul style="list-style-type: none"> ▪ Unless the Board otherwise determines, an instrument of transfer of Shares must be: <ul style="list-style-type: none"> ○ in writing and in any usual or common form or in any other form approved by the Board; ○ executed by or on behalf of both the transferor and the transferee; ○ duly stamped (if required by law to be stamped); ○ delivered to the registered office for registration; and ○ accompanied by: <ul style="list-style-type: none"> ◆ a certificate for the Shares dealt with in the transfer (unless the Board waives production of the certificate on receiving satisfactory evidence of its loss or destruction); and ◆ any further information that the Board reasonably requires to establish the right of the person transferring the Shares to make the transfer ▪ If the Board's approval for a Share transfer is required under a provision of this Constitution, the Board may refuse to register the transfer without giving any reasons or specifying any grounds.
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REPRESENTATIONS, WARRANTIES AND INDEMNITIES

INTRODUCTION

- Representations, warranties and indemnities are contractual tools that are used by purchasers and vendors to manage the risk of a commercial transaction
 - Purchasers must use DD, warranties, indemnities to allocate risk in the event that an assumption about something turns out to be wrong
 - Vendors can **mitigate risk that purchaser does not pay**: Get a bank guarantee, letter of credit, require purchaser to pay full purchase price into an account (eskro?) so money only released in response to a direction to release the money from both parties and if there is a dispute about purchase it will be submitted to relevant DR mechanism
- **Warranty**: Contractual statement- has broader meaning in contract law

- **Guarantee:** A secondary obligation (to stand behind the promise that has been made by the party) e.g. in context of a debt, if I lent someone \$100 and someone acts as guarantor, it is a secondary obligation as it only kicks in if the person I am lending money to fails their obligations. Contingent upon primary therefore if there is failure of the primary obligation, the guarantee fails too.
- **Indemnities:** Unique invention of common law where you hold harmless a party in the event something happens. Can tie an indemnity to any event- no counter party in civil law jurisdictions. Belts and braces approach- can fall back on the indemnity if a primary guarantee etc failed.
 - An obligation under a guarantee is contingent on the debtor's obligation, whilst an indemnity is not. If the primary obligation was unenforceable, therefore, then the guarantee would fail but the indemnity would not
- *Instruments Act 1958* (Vic) s 126- guarantees must be in writing re. sale of land.

Freund, Anatomy of a Merger

The 'contractual four horsemen'

1. **Representations-** pre contractual statement to induce into entering into the contract, has the ability to rescind the contract where contract is treated as being of no effect and order to restore parties to position they were in before it was signed.
 - Representations assist extracting the maximum disclosure from the vendor and helps to set the stage for the prospective purchaser to walk away from the deal if the statements made are untrue before completion, or for indemnification after completion
2. **Covenants-** usually a negative promise (promise not to do something), but it's a special type of promise because it was traditionally under seal and appeared in a deed- the most formal obligation that can be given and not supported by consideration as it appears in a sealed doc
3. **Conditions** – elements that must be satisfied before the obligations of either party arise
 - Subsequent- purchaser has right to terminate the contract
 - Precedent- affects whether the contract comes into affect at all (in whole or in part)
4. **Indemnification or indemnities**