

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : CLAREMONT 24-7 PTY LTD -v- INVOX PTY LTD  
[No 2] [2015] WASC 220

**CORAM** : LE MIERE J

**HEARD** : 10-13 MARCH 2015

**DELIVERED** : 17 JUNE 2015

**FILE NO/S** : CIV 1108 of 2015

**BETWEEN** : CLAREMONT 24-7 PTY LTD  
Plaintiff

AND

INVOX PTY LTD  
First Defendant

KW CORPORATION PTY LTD  
Second Defendant

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*Catchwords:*

Contract - Contract formation - Meeting of the minds - Electronic signature substitutes - Priorities of interests in land - Legal interests in land - Equitable interests in land - Equitable interest versus equity

*Legislation:*

*Electronic Transactions Act 2011 (WA)*  
*Law Reform (Statute of Frauds) Act 1962 (WA)*  
*Property Law Act 1969 (WA)*  
*Statute of Frauds 1967 (UK)*

*Result:*

There is an enforceable agreement between Claremont 24-7 Pty Ltd and Invox Pty Ltd that takes priority over the agreement between Invox Pty Ltd and KW Corporation Pty Ltd

*Category:* B

**Representation:**

*Counsel:*

Plaintiff	:	Mr M F Holler
First Defendant	:	Mr C L Hollett
Second Defendant	:	Mr D P H Engelter

*Solicitors:*

Plaintiff	:	Trinix Lawyers
First Defendant	:	Bowen Buchbinder Vilensky
Second Defendant	:	Williams & Hughes

**Case(s) referred to in judgment(s):**

AG(CQ) Pty Ltd v A&T Promotions Pty Ltd [2011] 1 Qd R 306  
Australian Broadcasting Commission v XIVth Commonwealth Games Ltd  
(1988) 18 NSWLR 540  
Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd (1986) 40  
NSWLR 622  
Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600  
Chan v Cresdon Pty Ltd [1989] 168 CLR 242  
Commissioner of State Revenue v Abbotts Exploration Pty Ltd [2014] WASCA  
211  
Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd (1996) 42 NSWLR  
409  
Foote v Acceler8 Technologies Pty Ltd [2012] NSWSC 635  
Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd (1995)  
7 BPR 14,551  
Hawksley v Outram [1892] 3 Ch 359  
Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq) (1965) 113 CLR 265

Masters v Cameron (1954) 91 CLR 353

Morrell v Studd & Millington [1913] 2 Ch 648

Pirie v Saunders (1961) 104 CLR 149

Pua Hor Ong v Wu You Yang Pty Ltd [2008] SASC 365

Smith v Jones [1954] 2 All ER 823

Toyota Motor Corp Australia Ltd v Ken Morgan Motors Pty Ltd [1994] 2 VR  
106

Uranium Equities Ltd v Fewster [2008] WASCA 33; (2008) 36 WAR 97

**LE MIERE J:****Overview**

1       The first defendant, Invox Pty Ltd, is the owner of premises in Claremont. The plaintiff, Claremont 24-7 Pty Ltd, says that on 5 December 2014 Invox agreed to lease the premises to it on the terms in the 'updated offer to lease' dated 5 December 2014. Invox says that it made no binding agreement to lease the premises to Claremont 24-7. On 31 December 2014 Invox made an agreement to lease the premises to the second defendant, KW Corporation Pty Ltd. Claremont 24-7 claims that it has an interest as equitable lessee in the premises and that its interest in the premises takes priority over any interest of KW Corporation.

2       Claremont 24-7 commenced this action on 27 January 2015. Claremont 24-7 applied for an interlocutory injunction restraining Invox from entering into a lease of progressing or engaging in any negotiation or discussion with any party other than Claremont 24-7 in relation to a lease of the premises. On 28 January I granted an injunction to that effect. KW Corporation was not then a party to the action but I directed that Claremont 24-7 give notice to KW Corporation of the proceedings. On 30 January KW Corporation was joined as a second defendant. KW Corporation counterclaims that it has an interest in the premises and its interest and claim to possession has priority to any claim by Claremont 24-7. The interlocutory injunction was varied to restrain Invox from entering into a lease or giving possession of the Premises to either Claremont 24-7 or KW Corporation.

3       On 17 February 2015 I ordered that the question as to whether Invox engaged in misleading or deceptive conduct or whether Claremont 24-7 and KW Corporation each have agreements for lease with Invox and if so whether KW Corporation's agreement for lease has priority over Claremont 24-7's agreement for lease and which is to be enforced, be tried as a preliminary issue before the question or issue of damages or other relief and, subject to the determination of those preliminary questions, the question or issue of damages or other relief be tried subsequently in such manner as the court may direct. These are my reasons for determining those separate questions.

**The first agreement**

4       Invox is the registered proprietor of a commercial property on Stirling Highway, Claremont, which consists of a building with shops

leased to retail businesses. A portion of the ground floor (the Premises) became vacant in August 2012.

5 Amar Patel is the owner or franchisee of a number of Snap Fitness clubs or gyms. In May 2012 he obtained from the franchisor, Snap Fitness (Australia) Pty Ltd, the right to operate a Snap Fitness club in Claremont and investigate a potential site for a gym in Claremont. Mr Patel saw an advertisement for lease of the Premises. The contact person in the advertisement was James Cheah. Mr Cheah is a director of Invox and has the conduct of its property business. It is common ground that Mr Cheah had authority to negotiate and enter into an agreement to lease the Premises on behalf of Invox.

6 Mr Patel made inquiries with the Town of Claremont about whether the Premises would be a suitable site on which to operate a gym. A Town of Claremont urban planner informed Mr Patel that a planning scheme amendment would be required before a gym could be permitted at the Premises. In February 2013 Mr Patel telephoned Mr Cheah to inquire about the Premises. Mr Cheah told Mr Patel to contact the managing agent, Irving Santa Maria of Alpha Property & Facilities Management Pty Ltd. For the next month Mr Patel talked with Mr Santa Maria about leasing the Premises. On 9 May 2013 an offer to lease the Premises, including acceptance of the offer by Invox, was executed. The lessee was described as Vinay Patel and/or Nominees trading as Snap 24-Hour Gym. Vinay Patel, who is Mr Patel's brother, signed the offer as 'director'. The lease was stated to be conditional, amongst other things, upon the lessee receiving council approval for the use of the Premises for its operations within six months. The condition was not satisfied and the agreement came to an end.

### **Patel pursues rezoning**

7 Mr Patel pursued the rezoning application with the Western Australian Planning Commission (WAPC). On 8 August 2014 the Minister for Planning approved an amendment to the Town of Claremont Town Planning Scheme which would permit the Premises to be used for a gym. On 3 September Mr Patel informed Mr Santa Maria that the Minister for Planning had approved the scheme amendment. Mr Santa Maria told Mr Patel that the Premises was still available for rent and he should provide a detailed update and submit a new offer to lease for Invox's consideration.

**Claremont 24-7 offers to lease Premises**

8           On 15 September Mr Patel, on behalf of Claremont 24-7, made a written offer to lease the Premises. The offer to lease is a document with the heading 'Snap Fitness' and is described by the parties as being in the Snap format. The offer included a rental incentive that in lieu of the building improvements to be carried out by the lessee, the lessor will grant the lessee 18 months half rent and an additional standard four weeks rent free be provided for lessee fit out. The offer also referred to building improvements to be carried out by the lessee (lessee works). The offer is stated to be subject to receiving approval to operate a 24 hour fitness centre and Invox consenting to all relevant applications from the Town within four months of the application being made and to Claremont 24-7 being completely satisfied with all conditions imposed by local authorities to operate a 24 hour fitness centre. Mr Patel sent the offer to Mr Santa Maria with an email which stated that if Claremont 24-7 could get approval of its offer it would like to immediately make a planning application because it typically takes two to three months and Claremont 24-7 would like to make the last council meeting in November or December.

**Negotiations for a lease**

9           In the following week there were discussions and emails between Mr Patel, Mr Santa Maria and Mr Cheah. Mr Santa Maria informed Mr Patel that the owner was dealing with two other gym operators and asked Mr Patel to present his best offer. Mr Patel met Mr Cheah at the Premises on 24 September. Mr Patel says that the following took place. Mr Cheah said that the reduced rent of 18 months half rent was a sticking point and suggested an alternative by which Invox would take on some of the site works. Mr Patel said to Mr Cheah that Claremont 24-7 did not want to spend time and money obtaining development approval only to find out that another offer had been accepted by Invox. Mr Cheah said that something would be worked out. Mr Cheah's evidence is different. Mr Cheah says he agreed that Invox was prepared to look at seeing if an agreement could be reached in light of the work undertaken by Claremont 24-7 to date but there was no agreement that there would definitely be an agreement to lease the Premises. Mr Cheah says that at best an understanding was reached that they would continue to negotiate and discuss the matter in order to see if there could be a meeting of the minds.

10           Mr Patel spoke to Mr Cheah by telephone on 26 September. Mr Patel says that they talked about the breakdown of lessor and lessee

works and obtaining quotes for the works. Mr Patel travelled to Canada where his family lives.

11        On 9 October, after Mr Patel had returned to Perth, he met with Mr Cheah. They talked about the scope of lessor and lessee works. Mr Patel says that the following was said. Mr Cheah said he would obtain quotes to determine the lessor/lessee works split and resulting rental incentive. Mr Patel said he wanted to obtain development approval at the council meeting in December so that his fit out works could commence in early 2015. Mr Patel said that Mr Cheah was responsible for obtaining contract quotes for the lessor/lessee works and thus the offer to lease could not be finalised and Mr Patel would continue with the development approval application in the meantime. Mr Patel said that trying to obtain the development approval at the December council meeting brought a personal sacrifice because he was expecting the birth of his third child in Canada in December shortly after the council meeting scheduled for 9 December and so if they were proceeding with the lease he would need to delay his travel to Canada until after the meeting and hence he needed reassurance from Mr Cheah that the Premises was secured to be leased to Claremont 24-7 and that the only outstanding issue was finalising the scope of the lessor/lessee works. Mr Cheah said that Claremont 24-7 had secured the Premises and the scope of the lessor/lessee works was the only outstanding issue.

12        Mr Cheah's account is different. Mr Cheah says that they discussed the works to be done at the Premises but he did not make any promises or suggest that Claremont 24-7 had secured the Premises because he had no quotes for the work that the lessor was to undertake. Mr Cheah says that this was confirmed in an email to him from Mr Patel on 9 October at 3.42 pm.

13        Mr Patel says that as a result of the assurance from Mr Cheah at the meeting on 9 October that Claremont 24-7 had secured the premises, he commenced the development approval application and booked his travel to Canada for 10 December, the day after the scheduled council meeting. On 17 October 2014 Mr Patel made an application for planning approval to the Town of Claremont. The application sought approval for a change of use for the Premises to recreation - indoor (active). The application was signed by Mr Cheah.

14        In the following weeks Mr Patel spoke to Mr Cheah about the site works or fit out quotes. He says Mr Cheah said that the terms would be

finalised as soon as he received the quotes. Mr Patel says that he followed up Mr Cheah regularly asking about progress with the quotes.

15 In November Mr Lapellerie, the principal of KW Corporation, approached Alpha Property about leasing the Premises. After an initial inquiry about the size and layout of the Premises Mr Lapellerie made no further contact until 4 December when Mr Lapellerie forwarded to Mr Santa Maria a proposal to lease the Premises.

16 On 17 November Mr Cheah emailed to Mr Patel the proposed lessor works and calculation of incentives. On 27 November Mr Cheah emailed to Mr Patel checking to see that Mr Patel had received the information sent on 17 November and stated that he had just heard from the other agent that two additional offers were being tabled, one of them for a gym. Mr Patel emailed Mr Santa Maria stating that he would try and finalise things as soon as possible as he did not want to be going to the council meeting if there was a chance that Invox might lease the Premises to someone else after all the work Mr Patel had done. Mr Patel says that he telephoned Mr Cheah and the following occurred. Mr Patel asked about the other two offers and said that he had been waiting for Mr Cheah to provide the details for the lessor/lessee works. Mr Cheah reassured Mr Patel that no other offers would be considered and that if they could quickly agree on the lessor/lessee works split then there was nothing to worry about. Mr Patel reiterated to Mr Cheah that the offer to lease had to be confirmed and agreed prior to the council meeting on 9 December as Claremont 24-7 did not want to get approval only to have another tenant reap the benefit. Mr Cheah said that he agreed. In his evidence Mr Cheah said that he cannot recall the exact date but he had a conversation with Mr Patel between 27 November and 5 December. Mr Cheah says that in that conversation he did not agree or undertake not to consider any other offers to lease from prospective tenants. He only agreed to exclude the possibility of negotiating an offer to lease with another gym in view of the effort put in by Mr Patel.

### **Terms are agreed**

17 On 1 December Mr Cheah sent an email to Mr Patel in which he said that he appreciated both parties negotiating in good faith despite not having any obligation to do so at that time. Mr Cheah went on to express his disagreement with the calculation of the rent free provision. On 2 December Mr Patel sent Mr Cheah an email which contained updated calculations of fit out costs versus rental incentive.



18           The development approval application was due to be considered at a meeting of the Town of Claremont Council on 9 December 2014. On 3 December Mr Cheah sent an email to Mr Patel in which he put forward a proposal in relation to a rent free period and fit out costs and stated that the proposal was subject to acceptance in its entirety. On the same day Mr Patel replied by email stating that he was happy to proceed with that proposal and would update the offer to lease document and send it through so that they could get it executed by the end of the week as discussed. Later that day Mr Patel sent Mr Cheah an updated offer to lease.

19           On 4 December Mr Cheah received an email from Mr Santa Maria in relation to a potential offer to lease by KW Corporation. Mr Cheah responded by saying that an offer had been tabled by the original gym after many meetings and negotiations.

20           On 5 December Mr Cheah emailed to Mr Patel comments on Mr Patel's offer to lease. Mr Patel telephoned Mr Cheah. Mr Patel says that the conversation was to the following effect. They talked about the remaining required changes to finalise the offer to lease. Mr Patel said that as they had reached agreement he would make the final changes to the offer to lease and would send across the completed offer to lease for Invox to sign. Mr Cheah said that the offer to lease needed to be in the Alpha format. Mr Patel said that Claremont 24-7 needed confirmation that the Premises is 100% secured by the end of the day and prior to the council meeting the following week on 9 December. Mr Cheah said that the Premises was secured by Claremont 24-7. Mr Patel said that so that there was no uncertainty he needed Mr Cheah to confirm it in writing and to send the agreed offer to lease terms to Mr Santa Maria by email and a copy to Mr Patel confirming that they had reached agreement on the terms which were simply to be transferred into the Alpha format for execution.

21           Mr Cheah's evidence of the conversation is different. It is as follows. Mr Patel said he called to see if they could agree on an agreement in principle. Mr Cheah said that they could agree on key terms only and they had to be put into the Alpha format of an offer to lease and then forwarded to Mr Patel for execution. At no time during the conversation did he say to Mr Patel that Claremont 24-7 had secured the Premises as they did not have an executed offer to lease.

22           Mr Patel then updated the offer to lease document and emailed to Mr Cheah an updated offer to lease which is dated 5 December 2014 and which is in the Snap Fitness format and signed by Vinay Patel on behalf

of Claremont 24-7 (Updated Offer to Lease). Mr Cheah then sent an email to Mr Santa Maria and a copy to Mr Patel. The email attached a copy of the Updated Offer to Lease and stated 'enclosed terms in the Offer by Snap Fitness is acceptable to both parties. Could you kindly capture these terms inside Alpha Properties standard format offer that was used previously and expeditiously provide Offer and new Disclosure Statement to Amar Patel for his perusal and execution'.

- 23        At 11.42 am on 9 December Mr Santa Maria sent an email to Mr Patel which included an unsigned Offer to Lease prepared by Alpha Property, an unsigned lease prepared by Mallal & Co, solicitors, a disclosure statement and a tenant guide. The email stated that Mr Santa Maria would need the return of the disclosure statements signed and dated seven days from the date of the Offer which also needed to be returned for the owner's acceptance. At 1.25 pm on 9 December Mr Santa Maria sent an email to Mr Lapellerie in which he said that he had forwarded KW Corporation's offer to the owner for consideration however 'he advised that he is already dealing on an offer that he is committed to seeing it through for the tenancy'.

### **Planning approval granted**

- 24        Mr Patel attended the council meeting on 9 December 2014 and made a submission to the council members in support of the development approval application. The council approved the application for planning approval for a change of use of the Premises to 'recreation-indoor (active)' for Snap Fitness. After the meeting Mr Patel informed Mr Santa Maria and Mr Cheah of the approval.
- 25        The following day Mr Patel took a number of steps to progress the fit out of the gym before leaving for Canada that day. On 11 December, whilst in transit in Hong Kong, Mr Patel telephoned Mr Cheah and told him that he accepted all the development approval conditions and started the process to obtain a building permit and commence the fit out of the gym. Mr Patel says that Mr Cheah said that he had no issue with the building permit application being lodged in the mid to end of January 2015 with the lease to commence on 1 May 2015 at the latest so there would be enough time for the fit out. On the following days there were various communications between Mr Patel, Mr Santa Maria and Mr Cheah concerning the council's conditions of development approval. Invoxx caused work to be done on the Premises. From 11 December Mr Patel was in Canada attending the birth of his third child.

**Invox agrees lease with KW Corporation**

26           On 22 December Mr Santa Maria sent an email to Mr Cheah referring to KW Corporation. Mr Santa Maria said that KW Corporation was really keen and he had not heard anything further from Snap Gym. Mr Santa Maria said that he had sent Mr Patel an email reminder and received an automated reply saying he will be away until February. Mr Santa Maria also said he sent a SMS on his last phone contact number but got no response. I accept Mr Santa Maria's evidence that he sent the SMS. I accept Mr Patel's evidence that he did not receive it. In the absence of any evidence about the operation of text messages generally, and in particular text messages between Australia and Canada, I am unable to resolve how the text message could have been sent by Mr Santa Maria and not received by Mr Patel.

27           On 25 December Mr Cheah received an email from Mr Santa Maria attaching an offer from KW Corporation and stating that it is a very clean offer with only three months net rent free and he had still not received the offer from Mr Patel.

28           Mr Patel reviewed the offer to lease prepared by Alpha Property. On 27 December Mr Patel sent an email to Mr Santa Maria which apologised for his delay in responding to the documents sent to him on 10 December and stated that there were quite a few inconsistencies and updates to the document required compared to the offer to lease in the Snap format that they had agreed on. Mr Patel proposed that they proceed with the offer to lease in his format and then make sure the lease documentation incorporates the additional terms. Mr Patel said that if Mr Santa Maria preferred the offer to lease in his format then he should make it entirely consistent with the agreed offer to lease and remove any additional clauses such as defaults. There followed an email exchange about whether there were any inconsistencies between the Updated Offer to Lease and the Offer to Lease drafted by Alpha Property.

29           On 27 December Mr Patel responded to the documents sent to him by Mr Santa Maria on 8 December. Mr Patel said there appeared to be quite a few inconsistencies between the Updated Offer to Lease and the Offer to Lease prepared by Alpha Property and marked up the Alpha Property Offer to Lease to show the inconsistencies. They related to cl 12 (right to sublease), cl 16 (reinstatement), cl 17 (signage), cl 18 (lease preparation documents), cl 19 (defaults), cl 20 (deposit), cl 24 (special conditions). Mr Patel said that terms like defaults could be reviewed and assessed by lawyers together with other terms in the lease but if Mr Santa

Maria would prefer the Offer to Lease in the Alpha format then they could simply make it entirely consistent with the Updated Offer to Lease and remove additional clauses such as the default clause. Mr Santa Maria responded later that day. He stated that the format is the same as the one that Mr Patel signed the first time. He further stated that the commercial terms of the Offer to Lease are, once all agreed, entered into the lease format to make it more specific and Mr Patel's lawyer could have a go then. Mr Santa Maria said that in accordance with the Retail Act they have to provide those documents which includes the format of the Lease. Further, Mr Santa Maria said that the Council approval still had a number of conditions and unless Mr Patel waived those and took on the Lease then the Offer remained subject to those conditions. Mr Santa Maria said that they had now received another offer which they had to deal with.

30        Mr Cheah sent an email to Mr Patel on 29 December at 10.12 pm in which he said that as far as he was aware all the agreed terms had been transferred across and the default provisions were the same as the ones on the original Offer to Lease. Mr Cheah said that there were other agents still marketing the property and he did not know if there was another offer being presented. He had asked Mr Patel to send back the executed copy at his soonest convenience so that he could push the board to consider the matter.

31        On 30 December at 5.26 am Mr Patel sent an email to Mr Santa Maria in which he said that he was not concerned which offer to lease format was used as long as it was exactly consistent with the terms that had been agreed, that is the terms in the Updated Offer to Lease. Mr Patel said that based on Mr Cheah's previous confirmation that terms had been agreed followed by the development approval being received they were progressing the matter and he was not sure why there was still talk of another offer being considered.

32        On 30 December at 12.11 pm Mr Patel sent an email in which he said that he thought they had agreed on terms as in the Updated Offer to Lease which were to be the terms of the Offer to Lease in the Alpha Property format but there were inconsistencies and other clauses in accordance with his comments. In relation to other offers, Mr Patel said he thought they had a clear conversation about other offers and that he needed to know that they had agreed on terms and thus secured the site prior to the Council meeting which Mr Cheah confirmed was the case.

33        On 31 December 2014 Invox and KW Corporation executed an offer to lease the Premises (the KW Corporation Offer to Lease). On the same

day Mr Santa Maria sent a letter to Mr Patel which stated that the owners had accepted another offer for the lease of the Premises. Mr Santa Maria said:

As you may be aware and it has always been made clear that until your proposed use of the premises had received all the necessary approvals and the offer presented to the Owner and approved, there would be no agreement over the lease of the premises with SNAP Gym.

The Owner appreciates that you have taken considerable steps to obtain a change of use for the premises including costs incurred, however the Owners gave no commitment and that all investigation and any costs incurred by you, would be, at your own risk.

A commercial decision was taken in this regard and we are unable to pursue your proposal further.

34 Mr Cheah sent an email to Mr Patel on 31 December stating that the owners had decided to accept another offer for lease of the Premises. Mr Patel responded on 2 January 2015 stating:

Given we had agreed on all terms and thus secured the site something I confirmed with you was a prerequisite prior to the council meeting, I am gobsmacked having received your email below and the attached letter from Alpha Property about 'another offer being accepted'.

### **Witnesses**

35 Mr Patel, Mr Cheah, Mr Santa Maria and Mr Lapellerie all gave evidence by way of witness statement and were cross-examined.

36 I found Mr Patel to be generally a truthful and reliable witness. Mr Patel's evidence was generally plausible and consistent with contemporaneous events and circumstances. Mr Patel was consistent in his evidence that he was determined to resolve the issue of whether the Premises were secured for Claremont 24-7 before the council meeting of 9 December 2014 and had told Mr Cheah of his determination. Mr Patel's position is plausible and consistent with his actions and communications.

37 I find that Mr Cheah was not honest and frank in his dealings with Mr Patel. After the 9 May 2013 offer to lease the Premises came to an end Mr Patel put another proposal to Mr Santa Maria. In an email sent to Mr Cheah on 9 April 2014 Mr Santa Maria said that what Mr Patel was asking was no risk to the owner and if they did get a tenant they would be able to accept it and simply give Mr Patel notice. Mr Santa Maria said that if Invox did get another tenant Mr Cheah 'can also lever this one'. In an email reply to Mr Santa Maria Mr Cheah instructed Mr Santa Maria to

let Mr Patel know that his application had cost them and they would only proceed with certain specified changes and instructed Mr Santa Maria to 'paint a picture of frustration and bitterness'. In cross-examination Mr Cheah agreed that that was intended to put pressure on Mr Patel. In an email to Mr Patel sent on 6 September 2014 Mr Cheah said, 'I have been provided with the approval to explore a common ground solution along the lines of what we discussed'. Mr Cheah had not obtained approval from anyone. He had the authority to make decisions about leasing the Premises and did so.

38 In an email of 29 December 2014 Mr Cheah urged Mr Patel to send back the executed copy of the offer to lease as soon as possible so that he could push the board to consider it. In emails on 30 December 2014 Mr Cheah told Mr Patel that he had related to the board that no other gym was to be considered. Those statements were not true. In cross-examination Mr Cheah admitted that the decisions were made by him and not referred to any board. In cross-examination Mr Cheah was not initially frank about his incorrect references to the board. He initially said that he used the term 'board' loosely in his emails with Mr Patel. On further cross-examination he admitted that he was the one who made the call and the board did not come into it.

39 In an email to Mr Santa Maria on 17 September 2014, in response to a proposal from Mr Patel, Mr Cheah said, 'At this stage we will be considering his offer together with the other offers for a gym or alternate use. For his information, we have an additional two parties looking at the premises for a gym and I suspect his best foot forward to secure the tenancy will be necessary'. In accordance with his instructions, Mr Santa Maria informed Mr Patel that he had presented Mr Patel's offer to the owner and that the owner was dealing with two other gym operators and had asked Mr Patel to present his best offer. In cross-examination Mr Cheah said that one of the two parties looking at the premises for a gym was a Mr Zee Wey Gong. That was not true. Mr Cheah said he had received an enquiry from Mr Gong on 18 August 2014, asking 'what type of business did you have in mind for the property' and had received no further response. In an email to Mr Patel on 27 November 2014 Mr Cheah said that he had just heard from the other agent that two additional offers were being tabled, one of them for a gym. Mr Cheah was cross-examined about the two offers. One was an expression of interest from a gym operator called Essence Lifestyle Fitness which Mr Cheah believed got to the point where an offer was presented but he 'didn't actually take that too seriously' and had thrown it in the bin at the time he told Mr Patel that he had an offer from a gym. There was no

second offer. At around that time Mr Cheah said he had had a conversation with Jack Bennett from Burgess Rawson, another agent. Mr Bennett said there was a possibility of introducing a discount chemist at the site but nothing came of that. In cross-examination Mr Cheah said that he had used the word offer 'loosely'. In my view, Mr Cheah's statements were misleading if not deceptive. They were intended to put pressure on Mr Patel to 'put his best foot forward'.

40        These matters reflect adversely on the character of Mr Cheah and his willingness to bend the truth when it suits his purpose. Those matters in turn cast doubt on the reliability of his evidence.

41        I found some parts of Mr Cheah's evidence to be unreliable. His evidence concerning the crucial telephone conversation with Mr Patel on 5 December 2014 was not convincing. He has no actual recollection of whether the telephone conversation preceded or followed the email he received from Mr Patel at 3.11 pm that day. The clear inference from the order in which he narrates the events in his witness statement is that the email came first. In cross-examination Mr Cheah conceded that it was possible that the phone call happened before Mr Patel's email, then he conceded that it was more likely than not. However, the effect of Mr Cheah's oral evidence is that he does not recall whether the email or phone call came first. In his witness statement Mr Cheah says that Mr Patel called him to see if they could agree on an 'agreement in principle' and he responded by saying that they could agree on key terms only that had to be put into the Alpha Property format offer to lease and then forwarded to Mr Patel for execution. His claim that he told Mr Patel that they could agree on key terms only is inconsistent with his email that he sent to Mr Patel on 3 December in which he said that the proposal he put forward 'was subject to acceptance in its entirety'.

42        I find that Mr Cheah's evidence was a reconstruction based on his position that no legally binding agreement was reached in the telephone conversation rather than being an actual recollection. Mr Cheah significantly departed from that evidence in cross-examination when he said he recalled that what Mr Patel said was 'Do you think we could agree the terms before the council meeting on the 9th' and he responded 'I believe we can agree the terms'. That oral evidence contained no reference to 'agreement in principle' or agreeing 'key terms only'. Mr Cheah qualified his oral evidence by adding, 'However any SNAP format won't be acceptable to us to execute; we need to capture those terms in Alpha Property standard OTL, because that OTL encompasses items that were agreed to previously that need to be on there now'. It is

unlikely, having regard to Mr Cheah's considered account of the telephone conversation in his witness statement and his initial oral recollection of what was said in the telephone conversation that he has an actual recollection of speaking those words. In my opinion, Mr Cheah's statement was a reconstruction motivated by his position that there was no final agreement until an offer to lease was executed in the Alpha Property format.

43 I found Mr Lapellerie and Mr Santa Maria to be generally truthful witnesses and their evidence for the most part was not controversial.

### **Defendants' contention no binding agreement made**

44 The defendants raised three principal contentions disputing that any binding agreement for lease was made. The first was that negotiations had been conducted on the basis that the parties would not be bound until such time as they executed an offer to lease in the Alpha Property format, which did not happen. The second was that the parties had not intended to be bound until the agreed terms were captured in an offer to lease in the Alpha Property format and executed by the parties. The third contention was that the agreement was uncertain because essential terms of the agreement to lease had not been agreed as at 5 December 2014.

### **Contract formation - legal principles**

45 The primary issue is whether Claremont 24-7 and Invox made a binding agreement for a lease of the Premises.

46 In *Masters v Cameron* (1954) 91 CLR 353 the High Court catalogued key situations that commonly arise where one party alleges that a binding contract has come into existence in advance of execution of a formal document:

- (1) Where the parties intend to be immediately bound to the performance of the terms on which they have agreed, while at the same time proposing to have the terms re-stated in a form which is fuller or more precise but no different in effect from those agreed on.
- (2) Where the parties have completely agreed on all of the terms of their bargain and intend no departure from those terms and intend not to add any terms beyond those which are expressed or implied in their agreement, but have made performance of one or more of the terms conditional on the execution of a formal document.



- (3) Where the parties do not intend to make a concluded bargain at all unless and until they execute a formal contract.

47 In categories (1) and (2), there is a binding contract; in category (3) there is not. A fourth category has been recognised since the judgment of McLelland J in *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 622: where the parties intend to be bound immediately by the terms which they have agreed upon, whilst expecting to make a further contract in substitution for the first contract containing, by consent, additional terms.

48 Whether the parties have reached final agreement or intend to postpone contractual relations is a question of intention, objectively ascertained from the language the parties have used or inferred from their conduct. In *Australian Broadcasting Commission v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 Gleeson CJ, with Hope and Mahoney JJA agreeing said:

The problem which arises is that [the parties] have exchanged communications which, on the one hand, use the language of agreement but, on the other hand, disclose an expectation that at some future time a document embodying the terms of their contractual arrangement will be brought into existence. Where ... the communications which the parties have exchanged are in writing, the question of their 'intention' is, prima facie, to be resolved objectively, and as a matter of construction of the relevant documents. Thus, in ... *Masters v Cameron* ... the majority [sic] in the High Court said ((1954) 91 CLR 353 at 362):

'The question depends upon the intention disclosed by the language the parties have employed, and no special form of words is essential to be used in order that there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape.' (1988) 18 NSWLR 540 at 548G-549D.

49 In construing a written document which the parties have signed, whether the parties subjectively considered they were bound is not the central point. The central point is whether a reasonable person would regard them as bound by what they said and did, in the light of the admissible surrounding circumstances. A binding contract may be found even where some wording is used that would, but for context and circumstances, have indicated no binding contract was intended.

50 I find that Mr Patel and Mr Cheah reached agreement on the terms which they had negotiated for a lease of the Premises. That is not the same thing as having agreed to make a legally binding lease. In

***Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd*** (548), Gleeson CJ said:

It is to be noted that the question in a case such as the present is expressed in terms of the intention of the parties to make a concluded bargain: see eg *Masters v Cameron* (at 360). That is not the same as, although in a given case it may be closely related to, the question whether the parties have reached agreement upon such terms as are, in the circumstances, legally necessary to constitute a contract. To say that parties to negotiations have agreed upon sufficient matters to produce the consequence that, perhaps by reference to implied terms or by resort to considerations of reasonableness, a court will treat their consensus as sufficiently comprehensive to be legally binding, is not the same thing as to say that a court will decide that they intended to make a concluded bargain. Nevertheless, in the ordinary case, as a matter of fact and common sense, other things being equal, the more numerous and significant the areas in respect of which the parties have failed to reach agreement, the slower the court will be to conclude that they have the requisite contractual intention.

51      In *Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd* (1995) 7 BPR 14,551, 14,569 Kirby P said:

Even where the parties have agreed on the 'major matters', their subsequent conduct may indicate that they did not intend to be bound until the other issues between them were resolved in a formal document ...

and

Where a binding agreement is said to have been formed as a result of correspondence, it is necessary to look at that correspondence as a whole. It is wrong to isolate any part of the correspondence from the rest in order to prove or disprove the existence of a binding agreement. The same approach should be taken to the analysis of words and phrases within the correspondence. Reference to an 'agreement' having been reached does not necessarily prove the existence of a presently binding contract. Conversely, references to a 'proposed' agreement and similar expressions will not necessarily mean that no agreement presently exists. It is a question of how the words are to be interpreted in their context and in the light of the correspondence, viewed as a whole.

52      In *Uranium Equities Ltd v Fewster* [2008] WASCA 33; (2008) 36 WAR 97 Steytler P, McLure and Buss JJA explained that there is some overlap between the requirements of intention to create legal relations and certainty:

If a contract is legally uncertain, this might indicate that the parties did not intend to create legal relations. A contract can be uncertain in various ways, one of these being incompleteness, in the sense that essential terms are lacking ... The overlap between intention and uncertainty is at its

greatest in cases in which agreement of some matters is deliberately postponed. If what is postponed is essential to the agreement (itself a question that largely depends upon the intention of the parties), the agreement, to the extent that it has been reached, will be void. Also, the fact that essential terms have been left over for later agreement will militate against a finding that the parties intended to create contractual relations [127].

- 53           An agreement is void for uncertainty only if its essential terms are uncertain or lacking. Inessential terms that are vague or incomplete can be filled out by the court, ignored or severed.

**There was a binding agreement**

- 54           I find that on 5 December 2014 Claremont 24-7 and Invox made a legally binding agreement for a lease of the Premises. They intended to be immediately bound by the terms which they had agreed upon whilst expecting to make a further agreement in substitution for the first agreement containing, by consent, additional terms. I am of that opinion for the following reasons.

- 55           Invox and Claremont 24-7 negotiated over a long time and in detail for an agreement to lease the Premises. Mr Patel pursued a rezoning application with the WAPC which resulted on 8 August 2014 in an amendment to the Town Planning Scheme which would permit the premises to be used for a gym. On 15 September Claremont 24-7 made a written offer to lease the Premises. The parties negotiated terms of a lease. Mr Patel met Mr Cheah on 24 September. I accept Mr Patel's evidence that Mr Cheah said that the reduced rent of 18 months half-rent proposed by Claremont 24-7 was a sticking point and Mr Cheah suggested an alternative by which Invox would take on some of the site works. That is consistent with Mr Patel's email sent to Mr Cheah at 3.05 pm that day. In that email Mr Patel discussed a rent-free period and for the owner to compensate Claremont 24-7 for carrying out fit-out works. Mr Patel urged the owner to make a decision as soon as possible and said that he wanted to get to the December council meeting and not have to wait until February 2015. It is apparent from that email that the parties were discussing, but had not reached agreement, on the terms of rental incentive and fit-out works.

- 56           Mr Cheah and Mr Patel met again on 9 October. I accept that Mr Patel talked about the development approval application. He had raised that in his email to Mr Cheah on 8 October. I accept that Mr Patel said that he was trying to obtain the development approval at the December council meeting. That is consistent with Mr Patel's statements

over a period of time. I accept that the only terms of the lease which the parties had not agreed and which they were continuing to negotiate were the lessor/lessee split in relation to fit-out works and the rental incentive. That is consistent with the emails between the parties at that time. I accept that Mr Cheah gave Mr Patel reason to believe that they would reach agreement on the lessor/lessee works and hence on an agreement for the lease of the Premises. However, it is apparent that whilst the parties had reached an advanced stage of their negotiations Mr Cheah made no binding commitment.

57           On 17 October Mr Cheah signed an application for a planning approval prepared by Mr Patel. The application sought approval for a change of use for the Premises to recreation-indoor (active). In the following weeks Mr Patel spoke to Mr Cheah about the site works or fit out quotes. I accept that Mr Cheah said words to the effect that the terms of an agreement to lease would be finalised when Mr Cheah had received the quotes.

58           On 17 November Mr Cheah emailed to Mr Patel the proposed lessor works and calculation of incentives. On 27 November Mr Cheah emailed to Mr Patel, checking to see that Mr Patel had received the information sent on 17 November and stated that he had just heard from the other agent that two additional offers were being tabled, one of them for a gym. As I have said, that was a deceptive, or at least misleading, statement. Mr Cheah was putting pressure on Mr Patel to reach an agreement about the lessor/lessee works. It is apparent from Mr Patel's email to Mr Santa Maria on 27 November that Mr Patel was concerned to reach an agreement for a lease of the Premises before the council meeting on 9 December. I accept that Mr Patel telephoned Mr Cheah and asked about the other two offers referred to by Mr Cheah. I accept that Mr Patel again told Mr Cheah that he needed the offer to lease to be confirmed and agreed prior to the council meeting on 9 December because he did not want to get the approval only to have another tenant reap the benefit. That is consistent with Mr Patel's position over a period of time. No binding agreement had been made. Mr Cheah said so in an email to Mr Patel on 1 December. Mr Cheah sought to negotiate a more favourable rent-free provision than Mr Patel had proposed.

59           On 3 December Mr Cheah sent an email to Mr Patel in which he put forward a proposal in relation to a rent-free period and fit out costs and stated that the proposal was 'subject to acceptance in its entirety'.

60           The situation immediately before the emails and telephone conversations on 5 December was that Mr Cheah and Mr Patel had been negotiating directly for some time. For some time the only outstanding issues to be resolved were fit out costs and a rent-free period. On 3 December Mr Cheah put forward a proposal in relation to a rent-free period and fit out costs and stated that the proposal was subject to acceptance in its entirety. In the same vein, Mr Patel responded, saying that he was happy to proceed with that proposal and would update the offer to lease document and send it through so that they could get it executed by the end of the week, as they had discussed. In effect, the terms had been agreed but had not been reduced to writing in a single document.

61           On 4 December Mr Santa Maria emailed Mr Cheah about a potential offer to lease the Premises by KW Corporation and asked if Mr Cheah was interested in firming up an offer. Mr Cheah responded on the same day, in which he said he would consider it only if there was space in another tenancy and said that after many meetings and negotiations an offer had been tabled by the 'original gym you were in discussions with'. Mr Santa Maria sent a further email asking Mr Cheah if he wanted any further assistance with the gym, especially with the disclosure statements. At 4.50 pm that day Mr Cheah emailed Mr Santa Maria, saying that he will forward 'final agreed terms to you shortly' and that a fresh disclosure statement should be made available to him then. That is the situation immediately before Mr Cheah's email to Mr Patel on 5 December 2014.

62           On 5 December 2014 Mr Cheah emailed to Mr Patel comments on Mr Patel's updated offer to lease document. Later that day Mr Patel telephoned Mr Cheah. Claremont 24-7's case rests on what was said in that telephone conversation and the email subsequently sent by Mr Cheah to Mr Santa Maria. Mr Patel and Mr Cheah do not agree what was said in that conversation. For the reasons I have stated I prefer and accept the evidence of Mr Patel. Mr Patel and Mr Cheah discussed and agreed upon the remaining changes to finalise the offer to lease. Mr Patel said that as they had reached agreement he would make the final changes to the offer to lease and would send Mr Cheah the completed offer to lease for Invox to sign. Mr Cheah said the offer to lease needed to be in the Alpha format. Mr Patel said that Claremont 24-7 needed confirmation that the premises was 100% secured by the end of the day and prior to the council meeting on 9 December 2014. Mr Cheah said that the premises was secured by Claremont 24-7 and Mr Patel said that so that there was no uncertainty he needed Mr Cheah to confirm it in writing and to send the agreed offer to lease terms to Mr Santa Maria by email and a copy to

Mr Patel confirming that they had reached agreement on the terms which were simply to be transferred into the Alpha format for execution.

63 Mr Cheah's email of 5 December 2014, to Mr Santa Maria, copied to Mr Patel, evidences the oral agreement reached by Mr Cheah and Mr Patel on behalf of Invox and Claremont 24-7 respectively. The email states that the terms in the enclosed Updated Offer to Lease are acceptable to both parties and asks Invox's agent, Alpha Property, to put the terms into Alpha's standard format for Mr Patel's perusal and execution. I accept Mr Patel's evidence that he had told Mr Cheah that he wanted to resolve the agreement to lease before the Council meeting on 9 December 2014. All the essential terms for an agreement to lease were agreed. I accept Mr Patel's evidence that in their conversation on 5 December Mr Cheah said that their agreement needed to be put into the Alpha format. Mr Cheah knew that Mr Patel was insistent that the agreement to lease be resolved before the 9 December Council meeting. Mr Cheah did not say anything to the effect that their agreement was subject to the execution of an offer to lease in the Alpha format.

64 The conduct of the parties is not consistent with no binding agreement being made until an offer to lease in the Alpha format was executed. Both parties knew that Mr Patel was insistent upon the matter being resolved before the 9 December meeting. Neither Mr Cheah nor Mr Patel did anything to ensure that an offer to lease in the Alpha Property format was drawn and executed by the parties before the council meeting on 9 December 2014. Mr Santa Maria did not send the documents to Mr Patel until 11.42 am on the day of the Council meeting. Mr Santa Maria's email makes no provision for the documents to be executed before the Council meeting. Mr Patel did nothing to see that the documents were executed before the Council meeting. In view of Mr Patel's insistence that the matter be resolved before the Council meeting, such conduct is wholly inconsistent with Mr Cheah having said anything in their 5 December 2014 telephone conversation to the effect that there was no agreement until an offer to lease in the Alpha Property format was executed. After sending the email to Mr Patel on 9 December 2014 Mr Santa Maria informed KW Corporation that the owner was already dealing on an offer that he was committed to seeing through.

65 The conduct of the parties after 5 December 2014 is consistent with them having made an agreement for the lease of the Premises. On 8 December 2014 Mr Patel approached a finance company about finance that he would require for a new gym that was opening soon. Importantly, Mr Patel attended the council meeting on 9 December 2014 and made

submissions to council members to approve the development approval application. Mr Patel had consistently stated to Mr Cheah before the meeting that he would not go to the council meeting to get approval for the development approval application unless the premises were secured to Claremont 24-7. The Council granted planning approval for the use of the Premises as Recreation - Indoor (Active) subject to a number of conditions relating to car bays, signage, vacant space and bins. Mr Patel contacted a number of people to start to make arrangements to open the gym in early 2015. He contacted a finance company, Snap Fitness head office and DB Building Design and arranged for his brother to contact their builder to check his availability to commence the fit out works in January and February. On 10 December 2014 Mr Patel called Mr Todd Howard from Fitness Management Company who manages other Snap Fitness gyms for Mr Patel and told him to contact the equipment suppliers to inform them Mr Patel would be looking to put in an order for gym equipment in January with a likely installation date in March. Mr Patel told Mr Howard that he could start thinking about planning and staffing for the gym for presales and the opening process in March.

66           On 10 December 2014 Mr Patel telephoned Mr Cheah to talk about the development approval conditions. Mr Cheah said that the lessor works would be completed prior to Christmas which would enable the lessee works to commence in early 2015. Mr Patel sent Mr Cheah a copy of the Council conditions. Mr Cheah responded stating he did not understand the rationale for item 7 and asked whether there was a new bin enclosure being proposed. Later that day Mr Patel responded that he was still waiting to hear from the manager at the Council to discuss the conditions. On 11 December Mr Patel telephoned Mr Cheah and said that he had accepted all the development approval conditions and had started the process to get the building permit, commence the fit out and open the gym. Mr Cheah said that he had no issue with the building permit application being lodged in January with the lease to commence on 1 May 2015 at the latest.

67           The Updated Offer to Lease provided for the lessor to carry out work on the premises including removing flooring, removing internal partitioning and walls and preparing the walls ready to paint. The Updated Offer to Lease also provided for the lessor to carry out lighting and electrical work. As I have said, on 10 December Mr Cheah told Mr Patel that the lessor works would be completed prior to Christmas.

68           The evidence is that Invox carried out the lessor works. Mr Patel looked through the window of the premises on 10 February 2015. It

appeared to him that Invox had completed all the landlord's works which it was required to complete under the Updated Offer to Lease. That evidence was not challenged by Mr Cheah or Invox. It is supported by the documentary evidence and the evidence of Mr Lapellerie. When Mr Lapellerie put forward a proposal to lease the Premises on 4 December 2014 he referred to the substantial amount of work required to ready the premises. On 22 December 2014 Mr Santa Maria sent an email to Mr Lapellerie in which he said that the premises had been reinstated by the owner so there would not be any work required apart from KW Corporation's own fit out requirements. In his oral evidence Mr Lapellerie said that when he subsequently inspected the Premises more work had been done than he had expected, including partitioning, carpet removal and the patching of walls. In an email from Gerard De Souza of Alpha Property to Mr Lapellerie on 21 January 2015, Mr De Souza said that the owner had plastered the walls and done an undercoat for the lessee to finish off with the colour of its choice and that all the other lighting and electrical work had been completed. In his oral evidence Mr Lapellerie said that he had not asked for any lighting or electrical work to be done.

#### **Invox contention that agreement uncertain**

69 Invox submitted that the Updated Offer to Lease included reference to four terms that were ambiguous or yet to be agreed. The first is the lease commencement date. That is an essential term. The date on which the lease commences must be certain or capable of being rendered certain before the lease takes effect. This is satisfied, for example, in a lease expressed to commence 'from the completion of the building': *Pirie v Saunders* (1961) 104 CLR 149, 154.

70 In this case the Updated Offer to Lease stated that the lease was to commence:

On completion of lessor works or within 30 days of the lessee receiving all relevant approvals (specifically DA and building permit) on terms and conditions which are to the complete satisfaction of the lessee, whichever is the latter. The lessee will promptly inform the lessor if the conditions of the approval are satisfactory upon receipt of relevant approvals.

71 Whether or not the commencement date in the Updated Offer to Lease is certain or capable of being rendered certain involves a question of construction of the Updated Offer to Lease. The commencement date in the Updated Offer to Lease is the later of the two dates or events identified in the commencement clause. The first date or event, that is 'on completion of lessor works', is capable of ascertainment - *Pirie v*



*Saunders*. In my opinion the later date or event is also capable of ascertainment.

72        There is a recognised exception to the requirement for agreement on all essential terms. That is where the agreement provides a mechanism for the determination of the omitted matter and the operation of that mechanism does not require the further agreement of the parties: *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600; *Toyota Motor Corp Australia Ltd v Ken Morgan Motors Pty Ltd* [1994] 2 VR 106, 202. In *Foote v Acceler8 Technologies Pty Ltd* [2012] NSWSC 635 Pembroke J held that the agreement for lease in that case should be construed as obliging the lessor to determine the date for commencement of the lease following regulatory approval. The agreement for lease stated that the commencement date was four weeks after handover date. Handover date was stated as 'TBA', which the parties agreed meant 'to be announced' or 'to be advised'. Clause 23 provided that occupation of the premises will not be granted by the owner until the lease documentation has been executed to the satisfaction of the owner's solicitors. Pembroke J reached the view that, properly construed, and having regard to cl 23, the determination of the handover date was given to the owner. The owner was bound to act reasonably.

73        In this case the proper construction of the agreement to lease is that the commencement date is the later of the date of completion of lessor works or the date 30 days after the lessee receives the relevant approvals or such earlier date within that 30 day period as the parties may agree, if any. That is not an agreement to agree because if the lessor works have been completed and the parties have not agreed a date within 30 days of the lessee receiving all relevant approvals then the lease will commence on the last of the 30 days after the lessee receives all relevant approvals. In effect, if the completion of lessor works occurs earlier than 30 days after the lessee receives all relevant approvals the lease commencement date is 30 days after the lessee receives the relevant approvals or such earlier date within the 30 day period as the parties may agree. That is sufficiently certain.

74        Invox alleges that three other terms of the Updated Offer to Lease are uncertain. The first is the special condition that the lessor and lessee will discuss and agree a suitable option to optimise the existing AC system with additional units (installed by lessee) to optimise for temperature and energy use with a temperature sensor to determine which unit(s) will kick in. Insofar as the condition requires the parties to agree a suitable option to optimise the existing AC system, the condition is ineffective. In my

opinion that condition may be severed. Whether or not an uncertain provision can be severed depends upon the intention of the parties as to whether the operation of the contract, apart from the impugned part, was to be conditional on the efficacy of that part, or whether it was to take effect notwithstanding the failure of that part. In *Pua Hor Ong v Wu You Yang Pty Ltd* [2008] SASC 365 Kourakis J explained:

Finally I shall consider whether it is arguable that the agreement to convert the equity to a loan is binding even if the interest clause itself is uncertain.

If a court is satisfied that the real intention of the parties was to enter into an immediate and binding agreement then the Court will do its best to give effect to that intention. However, if the parties never intended to enter into a binding agreement without first agreeing the particular terms of their bargain, then no contract can come into existence unless and until those terms are agreed.

Where a term of an agreement is found to be uncertain it is said that a question of 'severance' arises and that a court may 'save' the contract by severing the offending part or parts from the agreement. The use of the word 'severance' may distract from the real question. It suggests that a court for one reason or another excludes a term from the agreement of the parties or in some way reduces the content of their agreement to something less than that which the parties had agreed. To my mind the better approach where a term is found to be uncertain is to ask whether 'the parties did not intend to contract unless effect could be given' to the uncertain clause.

It seems to me that to apply that test to the facts of this case it is necessary to ask whether, if the parties were told that they had failed to agree on the charging of interest because of the way in which the interest clause was expressed, they would have responded 'well the deal is off then unless and until we agree on a rate' [57] - [60].

75 In my opinion if the parties had been told that they had failed to agree on an option for optimising the existing AC system because of the way in which the condition was expressed they would have responded that they had agreed on a lease of the Premises and they would have to negotiate a suitable option to optimise the existing AC system as best they could. The lessor works specified in the Updated Offer to Lease includes that the existing AC system (60 kw minimum requirement) be in good working order. With that backstop both parties were content to provide simply that they would negotiate a suitable option to optimise the existing AC system. The condition may be severed.

76 The next alleged uncertain term is the special condition that the lessor will not unreasonably withhold any further works required by Snap

Fitness. In my opinion that clause is not uncertain. Alternatively, if it is then it may be severed.

- 77        The final term alleged to be uncertain is the special condition that the lessee will not agree to any refurbishment clauses other than those stipulated by Snap Fitness Franchise Agreement or at the request of the Franchisor. In my opinion that clause is not uncertain. The Snap Fitness Franchise Agreement can be identified. The Franchisor must be a reference to the franchisor of Snap Fitness clubs. If the refurbishment clause is not within the Snap Fitness Franchise Agreement or requested by the Franchisor then Claremont 24-7 is not required to agree to its inclusion in the formal lease when it is prepared. If I am wrong in that then the clause may be severed.

### **Terms not performed**

- 78        Invox refers to other terms of the Updated Offer to Lease and appears to argue that their nonfulfillment means that no legally binding agreement for lease was made. The first term is that the plaintiff pay a deposit upon acceptance of the offer to lease. The second is that a personal guarantee be provided by a director. In my opinion the failure of Claremont 24-7 to pay the deposit or for a director to provide a personal guarantee does not have the effect that no binding agreement for lease was made. Invox does not argue that by failing to pay the deposit or provide the personal guarantee Claremont 24-7 repudiated the agreement, Invox accepted the repudiation and thereby terminated the agreement for a lease. Invox's case is limited to arguing that no agreement for lease was made.

- 79        Invox refers to three special conditions that the offer is subject to:
- receiving approval to operate a 24 hour fitness centre and the lessor to consent to all relevant applications from local authorities (Town of Claremont) within four months of the application being made;
  - the lessee being completely satisfied with all conditions imposed by Town of Claremont to operate a 24 hour fitness centre; and
  - the lessee will promptly inform the lessor if the conditions imposed by the Town of Claremont are acceptable to the lessee.

Claremont 24-7 did receive approval to operate a 24 hour fitness centre. Claremont 24-7, by Mr Patel, informed Invox, by Mr Cheah, on 11 December 2014 that it was satisfied with the conditions imposed by the

Town of Claremont. In any event, those conditions are conditions for the benefit of Claremont 24-7 and may be waived by Claremont 24-7.

### **Formal requirements**

80       Invox pleads that any agreement to lease is unenforceable by reason of the fact that Invox did not sign the offer to lease and there has otherwise been noncompliance with either or both s 4 of the *Statute of Frauds 1967* (UK) as amended by the *Law Reform (Statute of Frauds) Act 1962* (WA) and s 34 of the *Property Law Act 1969* (WA). In response Claremont 24-7 pleads that the email of 5 December 2014 from Mr Cheah to Mr Santa Maria and Mr Patel attaching the Updated Offer to Lease and confirming that the terms in the offer to lease were acceptable to Claremont 24-7 and Invox was sufficiently signed by Mr Cheah at law, alternatively under s 10 of the *Electronic Transactions Act 2011* (WA). Claremont 24-7 says that Claremont 24-7, by adopting email as a method of communication, consented to Mr Cheah identifying himself by that email and to Mr Cheah indicating his intention in that way regarding confirming that the terms in the Updated Offer to Lease were acceptable to Claremont 24-7 and Invox. Claremont 24-7 pleads in the alternative that the agreement to lease is enforceable by reason of acts of part performance.

81       *Electronic Transactions Act* s 10 provides:

- (1) If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if -
  - (a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated; and
  - (b) the method used was either -
    - (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
    - (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence;

and

(c) the person to whom the signature is required to be given consents to that requirement being met by the use of the method mentioned in paragraph (a).

(3) The reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature.

82 *Statute of Frauds Act* s 4 and *Property Law Act* s 34 are laws that provide consequences for the absence of a signature and hence laws that require a signature for the purposes of s 10(1) and are laws to which s 10(1) applies. I am satisfied that the printed signature on Mr Cheah's email of 5 December under the word 'sincerely' identifies him and indicates his adoption of the information communicated. Furthermore, I am satisfied that the method used was as reliable as was appropriate for the purpose for which the email was communicated in light of all the circumstances. If s 10(1)(c) is required to be satisfied then I am satisfied that that requirement is also satisfied, that is, Mr Patel, on behalf of Claremont 24-7, consented to the requirement of the note or memorandum of the agreement being signed by Invox by the use of the email. I am satisfied that the Updated Offer to Lease and Mr Cheah's email of 5 December 2014 is a memorandum or note of the agreement, is in writing and signed by Invox.

83 Counsel for Invox submitted that the intention of Mr Cheah in sending the email was not to accept the offer to lease but rather was an instruction to his agent to capture the terms of the Updated Offer to Lease in an Offer to Lease in the Alpha format. I do not accept that argument. The method of subscribing to his email 'sincerely James Cheah' was to communicate to Mr Santa Maria and Mr Patel that he was adopting and communicating the information in the email to them. The proper interpretation and effect of the information in the email is a matter of argument. However, that does not detract from the fact that Mr Cheah used the method to indicate to Mr Patel and Mr Santa Maria the information in the email. The information in the email was that Invox agreed to lease the Premises to Claremont 24-7 on the terms of the Updated Offer to Lease. It is not necessary to consider whether there was part performance of the agreement for lease.

### **Priority**

84 A lease which complies with the requirement for a legal lease creates a legal interest in the land, whereas an agreement for lease creates only an equitable interest. Claremont 24-7 submits that the agreement between

Claremont 24-7 and Invox is an agreement for a lease, not a lease, and hence is an equitable interest. The question of priorities arises between the equitable right of Claremont 24-7 and the right of KW Corporation arising from the offer to lease executed by KW Corporation and Invox on 31 December 2014. The result depends on a number of factors. The first factor is whether the right, title or interest of KW Corporation is equitable or legal. In the former case the result is usually governed by the maxim the person who is first in time takes precedence. In the latter, it is usually governed by the maxim where the equities are equal the law prevails.

### **Nature of KW Corporation interest**

85           The KW Corporation Offer to Lease is an agreement to lease not a present demise of the Premises. The instrument states that the lessee 'offers to lease from the Lessor, the premises ...'. The lease is to commence at a future date - 1 February 2015. Clause 17 of the KW Corporation Offer to Lease provides that the lessee shall execute the lessor's standard lease format with each party to bear its own legal costs. The Offer to Lease does not purport to be a lease itself. It is an agreement for lease.

86           KW Corporation submits that it acquired a legal interest for valuable consideration in good faith and without notice of Claremont 24-7's equitable interest. KW Corporation submits that it took possession of the Premises on 27 January 2015 and by taking possession it became a tenant at will.

87           Mr Lapellerie telephoned Mr D'Souza of Alpha Property on 27 January 2015 and asked if he could have the keys to the Premises so that he could take tradesmen to the Premises so he could start measuring up and getting quotes. Mr D'Souza said he would check with Mr Santa Maria if he was able to give Mr Lapellerie the key. Mr D'Souza called Mr Lapellerie back. Mr D'Souza said that Mr Lapellerie could have the key. They arranged to meet and Mr D'Souza subsequently gave Mr Lapellerie the key. Mr Lapellerie went to the Premises, unlocked the door and admitted Albert, a plasterer. Mr Lapellerie and Albert spent about an hour at the Premises talking about partitioning of the floor space and making measurements.

88           On 29 January Mr Lapellerie received a letter from Claremont 24-7's lawyers attaching court documents, including the injunction restraining Invox from leasing the premises to anyone other than Claremont 24-7. On 30 January Mr Lapellerie met an electrician, Karl, at the premises as he had previously arranged. They checked light switches, power points, the

switchboard and an alarm pad. Mr Lapelerie remained after Karl had left and then himself left the premises.

89 On 2 February 2015 Mr D'Souza telephoned Mr Lapelerie. Mr D'Souza said that he needed the key back. They arranged to meet. Mr Lapelerie returned the key to Mr D'Souza. In the course of his oral evidence Mr Santa Maria said that he could not remember how many keys there were to the Premises but normally with a vacant tenancy they would have two or three keys. He agreed that it would be very unusual to have only one key.

90 I am not satisfied that KW Corporation obtained possession of the Premises. Mr Lapelerie did not ask Alpha Property for the key to the Premises so that KW Corporation could take possession of the premises before the agreed lease commencement date. Mr Lapelerie asked if he could have a key to the premises so that he could take tradesmen to the Premises and start measuring up and getting quotes. Mr Lapelerie accessed the Premises using the key on two occasions. He did not purport to exclude everyone else from the Premises. I infer from Mr Santa Maria's evidence that Alpha Property had more than one key to the Premises. Alpha Property sought the return of the key because of the injunction granted by this court on 28 January 2015. Mr Lapelerie returned the key to Alpha Property when Alpha Property requested the return of the key.

91 Both possession and payment of rent are required for a common law tenancy: *Chan v Cresdon Pty Ltd* [1989] 168 CLR 242 at [11]. KW Corporation paid a deposit to Invox. The Offer to Lease provided for a three month rent free period and that the deposit shall form a credit to the lessee's rental account and be held in trust and subsequently applied to the first month's rental. The payment of the deposit was not the payment of rent. KW Corporation did not take possession or pay rent. It did not acquire a legal interest in the Premises. It acquired an equitable interest.

### **Priority - principles**

92 Where the competition is one between two equitable claimants, the usual rule is that the claims rank in order of temporal priority: *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 276 (Kitto J). The authors of the 5th edition of *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* at [8-015] say that the onus rests on the holder of the later equitable interest to demonstrate why the ordinary rule should be displaced and why that interest prevails over the earlier one.

93 Counsel for KW Corporation, Mr Engelter, submitted that the fact that one interest was created before the other 'is a factor of last resort only' and the correct approach is to determine where the better equity lies. In *AG(CQ) Pty Ltd v A&T Promotions Pty Ltd* [2011] 1 Qd R 306, Holmes JA, with whom McMurdo P and McMeekin J agreed, said at [26] that there is a divergence as to whether the rule of priority for the interest first created was one of first or last resort and that both approaches may be found in the authorities. Holmes JA reached the following conclusion:

One can accept as correct these propositions advanced by AG(CQ) on the strength of the more recent authorities: the question is as to which is the better equity, and in determining that question the conduct of both parties will be relevant. But one can also say that it is proper to look for both meritorious and unmeritorious (or disentiing) conduct as, in my respectful view, the learned judge did in this case; and it is legitimate to determine the worse of the equities in order to establish the better [36].

#### **Claremont 24-7 has equitable interest not mere equity**

94 KW Corporation says that it has the better equity. KW Corporation submits that if the conflict is one between a prior mere equity and a subsequent equitable interest, the holder of the prior equity loses priority to a bona fide purchaser of the subsequent equitable interest who takes without notice of the equity: *Smith v Jones* [1954] 2 All ER 823; *Latec Investments v Hotel Terrigal Pty Ltd (in liq)* (277), (278) (290 - 291); *Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd* (1996) 42 NSWLR 409, 425.

95 KW Corporation says that Claremont 24-7 has a mere equity because its agreement to lease was subject to a number of conditions. In particular, the agreement to lease was subject to conditions relating to parking and bins. Therefore, KW Corporation says no lease of the premises by the owner to Claremont 24-7 may ever have arisen. Claremont 24-7's interest in the land was contingent on those conditions being met. Until the conditions were met it could not have any direct interest in the land and thus KW Corporation has the better equity. KW Corporation referred to *Commissioner of State Revenue v Abbotts Exploration Pty Ltd* [2014] WASC 211, 131 - 138 [200], [216] - [225]. If a contract has been made, but the relevant obligation is subject to a condition precedent not within the control of the claimant, then specific performance will not be decreed unless the condition has been fulfilled or, if it is solely for the benefit of the claimant, waived by the claimant: *Hawksley v Outram* [1892] 3 Ch 359; *Morrell v Studd & Millington* [1913] 2 Ch 648.



96 The planning approval granted by the Council was subject to conditions which included conditions relating to car bays and bin areas. However, the agreement for lease on the terms of the Updated Offer to Lease is not conditional upon the conditions of the Council's planning approval being met. The Updated Offer to Lease contains a special condition that the lessor will not unreasonably withhold approval and will promptly sign all necessary documents required by the lessee to obtain all authority approvals. That is not a condition precedent to the agreement for the lease. In any event, the Council granted the relevant approvals, albeit subject to conditions.

97 The Updated Offer to Lease is expressly subject to 'receiving approval to operate a 24 hour fitness centre, and the lessor to consent to all relevant applications from Local Authorities within four months of the application being made'. That condition was satisfied insofar as it required approval to operate a 24 hour fitness centre.

98 The Updated Offer to Lease is further subject to 'the lessee being completely satisfied with all conditions imposed by the Town of Claremont to operate a 24 hour fitness centre'. That is not a condition precedent to the agreement for a lease. Even if it was it is a condition capable of being waived by Claremont 24-7. In fact, Claremont 24-7 informed Invox on 11 December 2014 that it was satisfied with the conditions and hence the condition relating to the condition imposed by the Town of Claremont was satisfied. The agreement to lease is not conditional in the relevant sense. It gives rise to an equitable interest not a mere equity.

### **KW Corporation did not have notice of Claremont 24-7's interest**

99 Claremont 24-7 says that KW Corporation had notice of Claremont 24-7's prior interest. KW Corporation did not have actual or imputed knowledge that Invox had agreed to lease the Premises to Claremont 24-7 or that Claremont 24-7 had any prior interest in the Premises. Mr Lapellerie attended the Premises on 16 and 21 January 2015. They were vacant. Claremont 24-7 relies on a telephone call from Mr Patel to Mr Lapellerie on 19 January 2015. That conversation took place after KW Corporation and Invox had executed the KW Corporation offer to lease. I find that KW Corporation did not have actual knowledge of the fact that the owner and Mr Patel's company had made an agreement for lease of the Premises and therefore did not have actual knowledge of Claremont 24-7's interest in the Premises.

100           A person is deemed to have constructive notice of all matters of which the person would have received notice if the person had made the investigations usually made in similar transactions; and of which the person would have received notice had the person investigated a relevant fact which had come to that person's notice and into which a reasonable person ought to have inquired: *Meagher, Gummow and Lehane's Equity Doctrines & Remedies* (5th ed) [8-270]. In my opinion there were no investigations or inquiries which KW Corporation ought to have made which would have brought Claremont 24-7's interest in the Premises to its notice. The premises were vacant. No inspection of the premises would have disclosed that Invox had granted a lease of the Premises to Claremont 24-7. No inquiry by KW Corporation of Invox would have disclosed the agreement for lease to Claremont 24-7 because Mr Cheah and Mr Santa Maria maintained that there was no binding agreement. In summary, KW Corporation did not have actual or constructive notice of the agreement for lease between Invox and Claremont 24-7.

101           I find that the equities are equal and the first in time prevails. That is, the interest of Claremont 24-7 prevails over that of KW Corporation.

**Answers to preliminary questions**

102           I find:

1.       There is a binding agreement between Claremont 24-7 and Invox for a lease of the Premises on the terms of the Updated Offer to Lease.
2.       There is a binding agreement between KW Corporation and Invox for a lease of the Premises on the terms of the Offer to Lease executed by them on 31 December 2014.
3.       Claremont 24-7's interest in the Premises as equitable lessee has priority over the interest of KW Corporation in the Premises.
4.       Invox should be ordered to specifically perform its agreement for a lease with Claremont 24-7.

103           I will hear from the parties what orders should be made to give effect to these reasons and for the determination of the remaining issues in this action.