JUDGMENT : The Hon. Mr. Justice Ramsey : TCC. 28th April 2006

1. This Judgment is concerned with the trial of certain preliminary issues relating to contractual arrangements between the parties

2. In 2000, the Defendant Somerfield Stores Limited ("Somerfield") decided to reorganise the way it carried out maintenance to its Somerfield and Kwiksave stores. The maintenance of these retail outlets caused a large administrative burden on Somerfield in dealing with each item of maintenance and the large number of contractors and, in addition, there were other concerns.

3. To reduce the burden and overcome these concerns, Somerfield decided to change the method of procurement by obtaining tenders for maintenance term contracts for the stores in various regions. It engaged E.C. Harris to produce the necessary tender documents and instructed Solicitors, Laytons, to draft the necessary agreements.

4. The maintenance work fell into three categories: Reactive Maintenance; Planned Preventative Maintenance and larger items of capital works referred to as Minor Works. The Reactive Maintenance ranged from replacing broken windows to unblocking drains to replacing light bulbs. The Planned Preventative Maintenance included portable appliance testing, water hygiene for Legionella, periodic replacement of all lamps and gutter cleaning. Minor works might involve replacement of a lift or a boiler.

5. On 20 June 2000, E.C. Harris sent the Claimant ("Skanska"), then known as Kvaerner Rashleigh Weatherfoil Ltd, an invitation to tender which was to be returned to Mrs. Ponsonby of Somerfield by 14 July 2000. In that letter it was stated:

" *c) Somerfield is under no obligation to award the Contract to you or any of the other tenderers, but should it choose (in its absolute discretion) to award the Contract to you:*

i) you will perform the Services in accordance with the terms of the Contract with effect from 28 August 2000 ("Commencement Date"); and

ii) you will submit full costs for the provision of the Services, and a full Asset register for all of the Premises, by no later than two months after the Commencement Date. Following submission of such costs, should the average cost per m^2 per Year for the Premises be deemed by Somerfield to be significantly different from the average cost per m^2 per Year shown in the Costs Schedules submitted with your Tender, then Somerfield shall have the right to re-tender the Contract. "

6. The tender documentation related to Regions 1, 5, 7 and 11 and included a draft Facilities Management Agreement ("FMA") in the form of Draft 3 dated 14 June 2000, which had been prepared by Laytons.

7. On 14 July 2000 Skanska sent their tender to Somerfield and included a list of "salient points" applicable to that tender invitation.

8. Following consideration of Skanska's tender, further tender documentation was sent to Skanska by E.C. Harris on 1 August 2000 relating to other regions.

9. There was a presentation from Skanska to Somerfield on 9 August 2000 and, following further exchanges of correspondence, Mrs. Ponsonby sent Skanska a letter dated 18 August 2000 in which she informed Skanska that they had been awarded regions 2, 6, and 8 and enclosed two copies of a letter which she asked Skanska to sign and date before returning one copy to her.

10. The letter dated 17 August 2000 was stated to be "Subject to Contract" and was in the following terms:

"*We refer to the invitation to tender ("Tender") sent to you on the 19th June 2000 for the provision to us of preventative and reactive maintenance services ("Services") in respect of the major plant and related equipment located in our stores and in regions two (2) six (6) and eight (8) as detailed in the Tender*

We now wish to appoint you to provide us with the Services, which are more particularly described in the contract (ref: JRB2240842 DRAFT3-14th June 2000) ("Contract") enclosed with the Tender.

This appointment is, however, strictly subject to contract, and to the approval of our board. As soon as this letter has been signed, we both undertake to commence good faith negotiations with a view to completing and signing a mutually acceptable contract detailing the terms of your appointment as soon as is reasonably practicable ("the Agreement"). No commitment from either of us relating to the provision of the Services shall (subject to the remaining provisions of this letter) arise until we have both signed the Agreement.

We agree to negotiate exclusively with you in respect of the Services until we give you notice indicating otherwise, save that we may negotiate the termination of our existing arrangements with our existing suppliers relating to the provision of any services similar to the Services.

In consideration of the above, and whilst we are negotiating the terms of the Agreement, you will provide the Services under the terms of the Contract from 28th August 2000 (or such other date as we may advise to you) until 27th October 2000 ("the Initial Period"), such Services to be provided at the prices detailed in the Tender return provided by you (as subsequently amended) as the same are more particularly itemised on the attached schedule.

In agreeing to the Services being provided on the above basis during the Initial Period, neither of us is in any way fettering our discretion to seek additional or different provisions or prices when negotiating the detailed terms of the Agreement.

We acknowledge that you will be expending time, resources and expense during the Initial Period, and in preparing to provide the Services after the Initial Period. Such expenses will include staff recruitment and the purchase of equipment. We, therefore, agree to reimburse your reasonable wasted costs and expenses should the Agreement not

be signed or should we unilaterally withdraw from, or otherwise terminate, negotiations prior to signature of the Agreement PROVIDED ALWAYS that our liability under this paragraph shall not in any event exceed £14,718 for region 2, £15,729 for region 6 and £18,912 for region 8. "

11. Under cover of a letter dated 21 August 2000 Skanska returned a copy of the letter of 17 August 2000 to Somerfield stating "we agree to the terms set out above"

12. The letter of 17 August referred to Skanska providing Services from 28 August 2000 (or such other date as Somerfield may advise Skanska) until 27 October 2000, but nothing of significance happened at the end of that period on 27 October 2000, Skanska continued performing maintenance and being paid by Somerfield.

13. On 21 November 2000 Mrs. Ponsonby wrote to Skanska following a meeting on 15 November 2000. In that letter she stated: "*Also as promised, I have reviewed your "Initial Period" and have extended this from 30th October 2000 to 26th November 2000 (4 weeks). I would appreciate it if you could meet these new deadlines. When you submit your invoice please ensure that Order GMTN011899 is quoted for Region 2 and GMTN011901 for Region 6 and GMTN011900 for Region 8*"

14. Again the end date of 26 November 2000 passed without anything of significance happening. Skanska continued performing services and being paid. On 22 December 2000 Mrs. Ponsonby wrote a letter to Skanska expressed, as being "Subject to Contract", in which she stated:

"*Further to our meeting last Thursday please find attached a schedule giving details of the extension of the Initial Period which we have agreed to extend from 27th November 20000 – 21st January 2001 (eight weeks).*

The above extension has been given by Somerfield to enable Skanska to complete the required asset registers, condition surveys, as well as to compile and supply Somerfield with a programme for the planned preventative maintenance (PPM) service. We would take this opportunity to remind you that one of the conditions imposed in the tender documentation and in your signed "Letter of Intent" was that this exercise would be completed in the eight week period by 29th October 2000 for all 3 regions

Somerfield are not prepared to give any further extension should Skanska not have completed the above by 21st January 2001. Somerfield have agreed this extension of time to allow Skanska not only the time to complete the contractual obligations but to improve their performance.

If at the end of the period Skanska have not met the requirements of Somerfield as fully discussed with you and W.S. Atkins at our meeting on 14th December 2000, then Somerfield reserve the right not to place all or parts of this Facilities Management Contract with Skanska."

15. On 3 January 2001 Mr Paul Rogers of Skanska responded to that letter in the following terms:

"*We acknowledge and thank you for your letter dated the 22nd December 2000, confirming that you are extending the Initial Period of our Services Maintenance Contract to the 21st January 2001.*

We acknowledge that this extension period is granted to enable us to complete the compilation of: Asset Registers, Condition Surveys and PPM Programmes, in compliance with the requirements of the conditions imposed in the tender documentation and your Letter of Intent."

16. On 18 January 2001 Mr Atkinson, Somerfield's Property Director contacted Mr Rogers of Skanska questioning Skanska's performance in a number of areas and in response on 19 January 2001 a meeting was proposed. It is not clear what, if anything happened in terms of discussions at that time. However, so far as the date of 21 January 2001 is concerned nothing further of any significance occurred. Mrs Ponsonby was no longer involved in late January 2001 and no one, either from Skanska or Somerfield, raised any matter with the other party. Instead Skanska continued performing maintenance services and being paid for them, as before.

17. It was evident, though, that Somerfield were considering reducing the number of stores which were being dealt with by Skanska and, following discussions between Somerfield and their Solicitors, Laytons, a letter of advice was written to Somerfield by Laytons on 12 February 2001 in which they explained their views on the contractual position, as they saw it. Mr Jervis of Laytons stated:

"*As you are aware, we are still in the process of finalising the Facilities Management Agreements with each of the six contractors engaged by Somerfield around the UK. The relationship with Skanska is therefore governed by an entirely separate set of terms to those comprised in the latest draft. This set of terms is laid out in correspondence running over several months. I have no evidence of written acceptance or acknowledgements of the terms which must therefore be incorporated by performance. …*

It would be arguable that the terms set out in correspondence relate specifically to the Initial Period which has now expired and the business relationship is now an adhoc arrangement with no ongoing commitment on either side."

18. Skanska continued to perform the maintenance services as before at the Somerfield and Kwiksave stores and when an incident occurred at the Wisbech store, involving injury to a child, correspondence was exchanged in which Somerfield referred to clauses in *"The Agreement"* to which Skanska responded that *"we are not in possession of any contractual documentation at the present time, therefore we cannot comment on [Clauses] 4.1, 4.2, 20.2, 14.3.1", being references to clauses of the Facilities Management Agreement relied on by Somerfield. Skanska did however refer to "contract requirements".*

19. A meeting took place on 11 May 2001 between Skanska and Somerfield and on 4 June 2001 Mr Atkinson of Somerfield wrote stating that at the meeting they had discussed problems which Somerfield had been experiencing with the service provided by Skanska and that it was agreed there would be a change in the

number of stores for which Skanska would remain responsible. In that letter Mr Atkinson said: "*Accordingly I attach the schedule of stores at which Skanska will provide reactive and preventative maintenance services with effect from 1 July 2001*".

20. In response, on or about 8 June 2001, Mr Rogers of Skanska stated: "*We agree that Somerfield are within their rights under the letter of intent to reduce the number of stores allocated to Skanska…*".

21. On 30 August 2001 Laytons prepared an amended draft Facilities Management Agreement and sent it to Mr Jackaman at Skanska. That version of the Agreement made various changes, in particular relating to Key Performance Indicators in Appendix 11 and in Clauses 4.21 to 4.23.

22. These amendments were considered internally within Skanska and then, on 18 September 2001, Mr Jackaman wrote to Mr Smale, who worked for Nickleby & Co, consultants engaged by Somerfield, setting out proposed amendments to the contract document for consideration at a contract review meeting. That meeting was held on 19 September 2001 and was attended by Mr Smale and Mr Laidlaw on behalf of Somerfield, Mr Jervis of Laytons and Mr Russell and Mr Jackaman on behalf of Skanska. Skanska's letter of 18 September 2001 was used as the structure for the meeting and various matters were accepted or agreed. In particular in the minutes it stated: *"The Commencement Date was agreed by all parties to be 14 September 2000. MJ asked what the term was to be. NS confirmed that the minimum Term was for three years, subject to termination."*

23. Mr Jackaman sent a letter on 21 September 2001 confirming the actions agreed upon. He confirmed the position on commencement date and term and added: "*Laytons will issue by the middle of next week the revised contract document for final acceptance. The target date for final contract signatures is the 15th October 2001*."

24. Mr. Jervis of Laytons then sent an amended Draft Facilities Management Agreement to Mr Jackaman on 26 September 2001. He stated: "*Provided that the above is acceptable, I will be in a position to draw up engrossment copies of the Agreement for execution once I have received an agreed schedule of Refund Rates.*"

25. The Schedule of Refund Rates took some time to produce. On 11 February 2002 Mr Smale wrote to Mr Russell of Skanska, asking for Skanska to complete an attached spreadsheet with the information on refund rates for missed planned preventative maintenance visits. On 13 March 2002 Mr Smale wrote to Mr Russell asking for the refund rates by 25 March 2002.

26. On 3 April 2002 Ms Lesley Archer of Somerfield wrote to Mrs Brenda Paddison of Skanska in respect of "open orders", that is orders which had not been invoiced. She said that the items should be invoiced by the end of the month or closed down or good reason should be shown for leaving them open. Failure to do that, she said, would result in Somerfield closing the orders forthwith and then Somerfield would accept no liability for further costs.

27. On 17 September 2002 Ms Archer wrote to Mr Laidlaw at Skanska to say as follows: "*I am instructed to advise you that Somerfield/Kwik Save will be enforcing Clause 4 of Appendix 11 (works must be submitted to Somerfield on CIA within specified period of time) of the FM Agreement rigorously from 23rd September. Somerfield/Kwik Save will not accept charges for works that fall outside the specified parameters.*"

28. In response to that letter Mr Laidlaw sent an e-mail on 3rd October 2002 in these terms:

"*Thank you for your letter of 17th September regarding Clause 4 of Appendix 11 and your intention to rigorously enforce this item of the above from September 23rd. I would point out however that issues relating to the agreement remain unresolved and at this moment in time we are working within the spirit of the contract rather than an agreed document.*

Under the circumstances I would like to propose a meeting with yourself to discuss the agreement, as I do not believe the enforcement of Clause 4 at this time will enhance the spirit of the contract. "

29. .. In the meantime on 19 September 2002 Ms Archer wrote to Mrs Paddison in respect of outstanding capital jobs which were overdue for invoicing. She said: "*Please either invoice these jobs or advise why they should remain outstanding. If I have not heard from you by 3rd October 2002, I will close the jobs in question and no charges will be accepted thereafter.*"

30. On 14 October 2002 Somerfield then sent Skanska a list of "records" or invoices that had been deleted from a particular batch of invoices submitted by Skanska. The reason given for the deletion of the majority of these items was "*payment timed out"*, that is that the invoice had not been submitted within the period required by Clause 4 of Appendix 11 of the August 2001 draft Facilities Management Agreement.

31. In response to Mr Laidlaw's email of 3 October 2002, a meeting was arranged with Mr Smale for 23 October 2002 to discuss the position.

32. Mr Smale's notebook records the meeting with Mr Laidlaw but merely states: "Agreed Refund Rates". On 24 October 2002 Mr Smale sent Mr Jervis at Laytons a six page document containing Refund Rates and stated:

"*NB under App 11 KPIs Para 4*

Their timeout days should be sixty and one hundred, not thirty and sixty."

33. Ms Archer contacted Mr Smale on 1 November 2002 saying that Skanska had returned about 40 jobs that were "timed out". She later, on 4 November 2002 wrote to Skanska to say: "*I have been advised by Nick Smale that jobs are not to be timed out until 90 days. Please, therefore, return any jobs that were less than 90days from date of*

completion at the time they were first submitted. DO NOT return any jobs more than 90 days from date of completion."

34. A subsequent meeting was arranged for 5 December 2002, attended by Mr Laidlaw, Mr Hendry and others on behalf of Skanska and Mr Smale and Mr Shardlow on behalf of Skanska. One matter discussed related to "timed-out" jobs and Mr Smale noted in his diary:

" *NE - 50 out of which 10 is capital*

NW - 33k timed out

SE - 85K"

35. This note related to the value of the jobs in each region which had been "timed-out" by 5 December 2002 and consequently had not been paid by Somerfield. Mr Smale's note records that it was agreed that Mr Shardlow and Mr Smale would go the Skanska's West Byfleet office "*to go through timed out jobs*".

36. As a result, a further meeting took place at West Byfleet on 12 December 2002. Mr Smale's diary entry reads: "*Went through timed out jobs and PM costs submitted to STEPS. TL to submit timed out through CIA or has done. Went + verified lists of acceptable jobs. Jobs not on the list + pre-dating 23/9 are all timed out. OK to all.*"

37. I shall return to the substance of the meetings of 5 and 12 December 2002 when I consider the disputes between the parties as to the purpose and outcome of those meetings.

38. Whatever happened in December 2002, there was a subsequent meeting on 18 February 2003 between Mr Smale on behalf of Somerfield and Mr Russell and Mr Laidlaw on behalf of Skanska. At that meeting Skanska raised, for the first time, the question of a large number of "calls", or jobs, which had not been invoiced. In the notes of that meeting prepared by Mr Russell it is stated:

"*It was then brought to the attention of [Mr Smale] by [Mr Russell] , of a major issue with regards to Reactive and Quoted Works on the Skanska contract between the dates September 2000 and February 2002 namely:-*

8090 calls still to be processed on to the CIA system from the contract broken down by region into approximate figures detailed below

2,000 West Byfleet

1,700 Manchester

4,300 Darlington

Combination of Quoted Works and Reactive calls, both chargeable and non-chargeable. "

39. Mr Smale received these minutes and subsequently responded stating that two points had been omitted from the minutes:

"*Somerfield's position is that the 8090 invoices are "timed out"*

When Skanska's directors meet Somerfield, full explanation required as to how this problem arose."

40. On 21 February 2003 Mr Smale responded to amended minutes which now included the two points and referred to a conversation with Mr David Raw, Associate Director of Facilities Management at Somerfield and said: *"I have had a prelim chat with David Raw. He insists he wants a meeting with your directors prior to any audit. I know that goes against what we said at the meeting but I think we have to go along with what he wants. I will send copy of minutes to him."*

41. Mr. Smale then sent an email on 24 February 2003 to Mr Raw of Somerfield in which he set out the position as follows:

"*I hoped to append this note to the advice prepared by Laytons on Skanska's invoice timeout predicament. Unfortunately I have not received the advice at this end yet and if I don't send this now I shall forget to do it altogether!*

Brian Shardlow and I met Skanska on 5th December 2002 at Tipton to review contract issues. I made notes in my book at the time, one of which shows that Skanska said they had a total of £168k which had been caught by the timeout KPI which we enforced, as you know, from 23 September 2002. Skanska broke down the sum owing by region thus:

North East £50k out of which £10k was capital

Northwest £33k

SouthEast £85k

It was arranged that Brian and I would attend Skanska's West Byfleet offices on 12th December to go through a list of their timed out jobs and determine which, exceptionally, would be paid. This we did. My notes at the time say "Jobs not on the list and predating 23/9 are all timed out".

Although the contract has not been signed by Skanska my notes show that they were fully aware of the time out KPI and accepted it. It would be our intention to use these notes (plus a statement from [Mr Shardlow] and myself) to support our position that it was the intention (very important point legally) of both parties, Skanska and Somerfield, to work to the contract on this point and therefore it should be considered binding upon both."

42. The value of the 8090 calls was assessed by Skanska and sent to Mr Smale. On 10 April 2003 Mr Rogers of Skanska wrote to Mr Raw of Somerfield concerning a future meeting to discuss resolution of the sum outstanding. He said:

"*As you are aware, there is an agreed backlog of reactive/quoted work calls outstanding across our Somerfield Regions, amounting to 8,090 calls between the dates September 2000 to February 2002*

During discussions and e-mail correspondence between Nick Smale (Nickleby) and our Mike Russell and Tom Laidlaw there has been valuation of these tasks based upon an agreed formula as follows:

Chargeable/Quoted works value = £1,227,670

Non Chargeable (comprehensive) value= £ 425,244 …

I am also aware that there has been some discussion over your revised contract key performance indicators which do not allow payment for call outs over 100 days old.

For the avoidance of doubt, the original tender contract had no such provision and indeed, stated that key performance indicators were to be negotiated not imposed, and we have already rejected this modification to the contract."

43. Mr Raw wrote to Mr Rogers on 22 April 2003 on the question of payment and stated: "*…all I am empowered to say is that your claims for monies due will, as with all other contractors, be dealt with according to the terms and conditions of the FM contract signed by Somerfield's Group Property Director....*"

44. In response on 23 April 2003 Mr Rogers of Skanska said: "*With regard to your final comment and for the avoidance of doubt, we have yet to sign a contract with Somerfield as a number of the conditions are still being negotiated, as they were changed by Somerfield post tender and after the contract had commenced.*"

45. A meeting then took place on 29 April 2003 between Mr. Raw [DR] and Mr. Smale [NS] of Somerfield and Mr.Rogers [PR] and Mr. Russell [MR] of Skanska. At that meeting Mr. Smale's note records the following

"*DR said Somerfield regarded the backlog as 'timed out' and therefore not liable for payment. PR replied Somerfield could not unilaterally impose the timed out clause. DR pointed out that [Skanska] was aware of the timeout clause was operating under it because it had conducted previous negotiations with Somerfield for payment of jobs timed out and rejection of jobs timed out. PR said [Skanska] would not agree to such a clause. NS replied [Skanska] did agree to it*

NS said Somerfield had given notice that it would enforce the timeout clause from 23rd September 2002. Following that notice, Tom Laidlaw ([Skanska's] Account Manager for Somerfield) met Somerfield to discuss the value of the works (approximately £100,000) caught by the timeout clause. NS said he and Brian Shardlow (Somerfield's Facilities Management Co-ordinator) had attended [Skanska's] West Byfleet office on 12th December 2002 and had agreed which of the works were acceptable (by designating them with a 'tick) and which were not acceptable (by designating them with a 'cross') on the list Tom Laidlaw and colleagues had presented. Tom Laidlaw had said if Somerfield paid the 'ticked' works no other works that would be timed out as of 23/9/02 would be liable for payment. NS said Somerfield's position was that an agreement had been made then. …

PR said the timeout clause fell within the KPI section of the Contract and [Skanska] had written to Somerfield during post- tender negotiations saying KPIs should be agreed and not imposed. NS replied Mike Jackaman (Facilities Services Manager at [Skanska] with responsibility for South East) had accepted the revised contract (including the timeout clause) bar a few incidental issues in an email dated 5th October 2001. The email confirmed the minutes of the meeting (held on 19/9/01) to agree the revised contract, PR and MR said they had no knowledge of the detail or of previous negotiations which might lead to an acceptance of the contract and would look into it."

46. Skanska's entitlement to be paid for the 8090 calls was not resolved and disputes arose as to the terms of the agreement under which Skanska was operating. Although Somerfield had sent Skanska a signed version of the Facilities Management Agreement earlier in 2003, it was not signed by Skanska.

47. Skanska informed Somerfield on 2 June 2003 that the "agreement" terminated on 13 September 2003 and Somerfield agreed this in their letter of 9 June 2003. Skanska therefore ceased performance of the services on or about 13 September 2003.

48. The parties were unable to resolve their differences and these proceedings were commenced by Claim Form dated 25 July 2005 with an accompanying Particulars of Claim. A Defence and Counterclaim was served on 10 October 2005. A trial of preliminary issues concerning the contractual status of the arrangements between the parties and the existence of any settlement agreement was ordered by Mr Justice Jackson in August 2005 and Revised Preliminary Issues were subsequently agreed.

49. Directions were given and at the hearing of those preliminary issues, I heard evidence from ten witnesses and the issues were dealt with in written and oral opening and closing submissions. I now turn to consider the seven agreed preliminary issues in the light of that evidence and those submissions.

Issue 1: "*Under the contract made on or about 21 August 2000 between the parties ("the August 2000 Contract"), was it agreed that the services required of the Claimant thereunder should be provided under (1) all, or (2) some, and if so which, of the terms of the contract document entitled "Facilities Management Agreement" and referenced "JRB/2240842 Draft 3 – 14th June 2000" ("the June 2000 FMA")*".

50. The parties are agreed that "the August 2000 Contract" was formed by Skanska's signature on the copy of the letter of 17 August 2000 which was returned to Somerfield under cover of Skanska's letter of 21 August 2000.

51. The relevant passage of the letter of 17 August 2000 stated that: "*In consideration of the above, and whilst we are negotiating the terms of the Agreement, you will provide the Services under the terms of the Contract from 28th August 2000 (or such other date as we may advise to you) until 27th October 2000 ("the Initial Period"), such*

Services to be provided at the prices detailed in the Tender return provided by you (as subsequently amended) as the same are more particularly itemised on the attached schedule."

52. The question raised by the phrase "*provide the Services under the terms of the Contract*" is that of the extent to which the terms of the "Contract", that is the June 2000 draft FMA, were incorporated into the agreement formed by the letter of 17 August 2000 and its subsequent signature by Skanska. In summary, Skanska submits that there was limited incorporation of only such terms as were necessary to elaborate on the Services to be provided under that Contract. Somerfield, on the other hand, contends for the incorporation of all the terms except those terms which would not be appropriate to such a short term contract.

53. Mr Stephen Dennison QC and Miss Serena Cheng who appeared for Skanska submit that the words "*…provide the Services under the terms of the Contract"* required Skanska to provide the Services described under the terms of the June 2000 FMA and that the June 2000 FMA was incorporated into the August 2000 Contract only insofar as it defined the "*Services*". They submit that the words "*under the terms of the Contract*" are commonly applied to describe an entitlement arising pursuant to an agreement. They point out that the letter expressly defines the Contract as one to "*provide us with the Services, which are more particularly described in [the June FMA]*" and that those Services are described in the June draft FMA. They submit that it is not necessary or desirable to extend the natural meaning of the words used.

54. They rely on the fact that the first part of the 17 August 2000 letter of intent went to considerable lengths to ensure that Somerfield did not commit to an agreement incorporating the terms of the draft June 2000 FMA. They point out that Somerfield used the expression "Subject to Contract" and made the distinction in the letter between "*the Contract*" and "*the Agreement*". They submit that it would be odd if, having gone to such lengths to qualify the basis upon which Somerfield was to contract, it then incorporated the full terms of the FMA.

55. They submit that the terms of the August 2000 Contract were designed as a term contract and were only intended to stand as an interim agreement pending completion of the asset survey and the completion of good faith negotiations.

56. Mr Jeremy Nicholson QC and Mr Adrian Hughes, who appeared for Somerfield, submit that the crucial words are those in the fifth paragraph of the 17 August 2000 letter: *"…you will provide the Services under the terms of the Contract…"* and that the second paragraph is only a preamble reciting Somerfield's wish to appoint Skanska in due course; giving further definition of the Services by reference to the June 2000 terms and abbreviating the June 2000 terms to the word *"Contract"*.

57. They submit that the ordinary and natural meaning of the words *"…you will provide the Services under the terms of the Contract…"*, defined as the June 2000 terms, is that the Services were to be provided under all of the June 2000 terms.

58. This, they contend, is supported by the commercial purpose of the August 2000 Contract which, they state, was to provide satisfactory working arrangements to govern the provision of the Services, and payment for them, and other aspects of the relationship between the parties, pending negotiation, completion and signature of a formal Agreement.

59. They accept that a few of the June 2000 terms are inconsistent either with the express provisions in the letter of 17 August 2000 or the nature of the short term contract, in particular that the definitions of Commencement Date (1 August 2000) and Term in clause 1.1 and the provisions in clause 2 on Commencement and Term, are inconsistent with the start date of 28 August 2000 and the 'Initial Period' until 27 October 2000, as stated in the letter of 17 August 2000. Also they accept that Clause 24 on Variation, Clause 26 on Costs of the Agreement, and Clause 31 on Entire Agreement were inapplicable to and inconsistent with an interim contract contained primarily in the letter of 17 August 2000.

60. In relation to Skanska's contention that the June 2000 terms were incorporated into or relevant to the August 2000 Contract only in so far as they defined the Services, they submit that there is an internal contradiction: if the terms defining the Services were incorporated in the August 2000 contract then the Services were to be provided under those terms. It is also contrary to the ordinary and natural meaning of wording referring to the provision of services or goods "under particular terms", as understood by reasonable businessmen, for example, "under the JCT Terms". They submit that Skanska's submission depends on supplying the word *"described"*.

61. In approaching the questions arising from the construction of the August 2000 Contract, both parties cite the familiar authorities of ***Mannai Investments v. Eagle Star*** [1997] AC 749, HL, per Lord Hoffman at 775; and ***Investors Compensation Scheme v. West Bromwich Building Society (No. 1)*** [1998] 1 WLR 896, per Lord Hoffman, at 912H and following, to which can be added ***BCCI v. Ali*** [2002] 1 A.C. 251 and ***Sirius International Insurance Co v. FAI Insurance Co*** [2004] 1 WLR 3251 at 3257-8

62. The task is therefore to construe the 17 August 2000 letter accepted on 21 August 2000, together with the documents to which it referred, against the factual background known to the parties, adopting the approach summarized in those authorities.

63. One of the important background matters is the fact that the letter of 17 August 2000 was intended to give rise only to an interim arrangement pending the negotiation of an acceptable Facilities Management Agreement. The use of the phrase "subject to contract" and the words of caution within that letter show that the parties, particularly Somerfield, were anxious not to be bound by the full terms of such an agreement until all the

necessary matters had been finally negotiated. The purpose of those further negotiations was to arrive at "*a mutually acceptable contract detailing the terms of your appointment*."

64. Against that desire for a period of negotiation was Somerfield's immediate requirement for maintenance to be carried out at its stores and this requirement could not await the outcome of those negotiations.

65. The emphasis in the letter of 17 August 2000 is upon the provision of Services at the prices in the schedule attached to the letter. Those Services are defined in the first paragraph of that letter as "*preventative and reactive maintenance services*" and in the second paragraph are said to be "*more particularly described in the contract*" defined as the June 2000 FMA. The prices were to be those in the attached schedule and, in addition, if there were no final Agreement, Skanska would be paid wasted costs and expenses which were capped and were stated not to include certain types of loss.

66. In my judgment, the obligation for Skanska to provide the Services "*under the terms of the Contract*" cannot, as Somerfield accepts, be read as including all the terms of the June 2000 FMA and equally, as Skanska now accepts, cannot be read as including none of the terms of that document. Given the way in which Services were defined in the second paragraph of the 17 August 2000 letter and given that those Services were to be provided whilst the parties negotiated the terms of a mutually acceptable contract, I accept Skanska's submission that the intention of the parties could not have been to incorporate most of the terms of the current draft FMA. It was those very terms which the parties were negotiating and which, therefore, were not mutually acceptable.

67. Rather, the emphasis being on an interim arrangement to provide Services, I consider that the parties intended to incorporate the terms of the June 2000 FMA only to the extent that they were necessary to define the Services which Skanska was to provide.

68. On that basis, the main provision of the June 2000 FMA which would be incorporated would be Clause 4 "Services" relating to the particular Services (excluding Clauses 4.21 and 4.22 which are in square brackets and Clause 4.23 which is a provision relating to Clauses 4.21 and 4.22). Also incorporated would be such other provisions of the June 2000 FMA as are referred to in Clause 4, to the extent necessary to define the Services to be provided. The relevant definitions in Clause 1.1 would apply to the defined terms used in Clause 4. In addition the definition of "Specification" would apply as it was defined as the specification for the Services set out in Appendix 9. However, it would apply only to the extent that is consistent with the limited obligation to provide the Services under the August 2000 Contract.

69. At this stage, the parties have both approached this issue in terms of broad principle. Originally, the position of the parties appeared to be that either all or none of the terms of the June FMA were incorporated. This position was modified during the course of submissions and, as I have said, Somerfield has now identified the limited terms which it contends are not incorporated. Skanska has not set out its case on the precise terms which it contends are incorporated although, in argument, certain terms were identified which are accepted to be incorporated.

70. As a result, I answer this issue in terms of the broad principle that the terms incorporated are those terms of the June 2000 FMA limited to the terms necessary to define the Services which Skanska was to provide but also, as I have set out above, I have identified certain terms taking account of the limited submissions made as to the practical effect of that broad principle.

Issue 2 : "*Did the August 2000 Contract continue in force after 21 January 2001*".

71. The parties are now agreed that the August 2000 Contract which was expressed to run from 28 August 2000 to 27 October 2000 was extended first to 26 November 2000 and then to 21 January 2001. They also agree that there was no further express extension of that contract. Skanska contends that the August 2000 Contract ended at 21 January 2001 but Somerfield contends that it continued after that date.

72. Skanska submits that the August 2000 Contract expired or lapsed according to its terms on 21 January 2001 and that after that date, the parties did not expressly agree to reactivate the August 2000 Contract. Skanska contends that the only issue is whether the parties' conduct was such as to necessitate the inference that they shared a common intention to resurrect the August 2000 Contract, and thereby to be bound by the terms of the June 2000 FMA.

73. On the facts, Skanska states that the parties agreed that Skanska would carry out reactive maintenance and minor works services in accordance with Somerfield's faxed requests for such work containing standard terms and Somerfield pressed Skanska to fulfil the requirements of whichever draft of the Facilities Management Agreement best suited Somerfield's commercial interest at any given time. The parties were not therefore at any point *ad idem* on the terms that governed their relationship after 21 January 2001.

74. Skanska relies on the fact that the August 2000 Contract was implemented for a specific and limited duration to provide an opportunity for the parties to negotiate mutually acceptable terms whilst they had flexibility by not being committed to a long term contract and that this also allowed Skanska to compile the asset register, in the meantime.

75. Skanska also relies on the fact, which it contends was expressly recognised by the parties, that for the August 2000 Contract to continue in force they had to agree to extend its duration, as they did on two occasions. Skanska submits that the proposition that the August 2000 Contract continued is inconsistent with the express agreement that the parties made.

76. Rather, Skanska submits, the parties continued to negotiate the terms of the Contract through to 2003 and performance was rendered and accepted in anticipation of the conclusion of a contract, not pursuant to a subsisting agreement.

77. Skanska contends that some assistance is to be gained from the decision of the Court of Appeal in ***Baird Textiles Holdings Ltd. v. Marks & Spencer plc*** [2002] All ER (Comm) 737. In *Baird* the court approved the test required for the implication of a contract from conduct in the following terms: - "*A court will only imply a contract by reason of the conduct of the parties if it is necessary to do so. It will be fatal to the implication of a contract that the parties would or might have done as they did without any such contract. In other words, it must be possible to infer a common intention to be bound by a contract which has legal effect. If there was no such intent the claim would fail.*" per Sir Andrew Morritt V-C at 743 and 746.

78. Skanska contends that Somerfield cannot satisfy the test of necessity and that the proposition that there was a common intention to contract on terms as to which the parties were *ad idem*, is inconsistent with the contemporaneous documents.

79. As to Somerfield's case that after 21 January 2001, the parties operationally "*carried on as before*", Skanska disputes that but states that, in any event, the parties would have conducted themselves in exactly this way, even absent a contract between them. Their actions were equally referable to an understanding that whilst "*nothing much really*" happened contractually after 21 January 2001, Skanska would operationally continue with the project in general terms, pending negotiations for a full and final Facilities Management Agreement.

80. Skanska submits that at no material time, did the parties reach a consensus on the terms (if any) that governed their relationship after 21 January 2001. At no time did Somerfield express a clear intention to be bound by the terms of the August 2000 Contract and/or the June 2000 FMA and no contract to resurrect that Contract, or further to be bound by that FMA, falls to be implied from the parties' conduct.

81. Somerfield submits that based on the approach indicated in ***Brogden v. Metropolitan Railway*** (1877) 2 A.C. 666; ***Pagnan v. Feed Products*** [1987] 2 Ll.Rep. 601, 610-611, 619; and ***Percy Trentham v. Archital Luxfer*** [1993] 1 Ll.Rep. 25, 27, the contract continued, particularly bearing in mind that the parties intended to and did contract to 21 January 2001, and the only question is whether that intention is to be taken as continuing after that.

82. Somerfield points out that before 21 January 2001 the 'Initial Period' had already expired on two occasions but performance had continued on both sides: after 26 October 2000, before being extended retrospectively on 21 November 2000 from 30 October 2000 to 26 November 2000 and after 26 November 2000, before being extended retrospectively on 22 December 2000 to 21 January 2001.

83. Somerfield states that the fact that a difference of view surfaced about which version of the FMA the parties were working to is not relevant as the parties had been working to the June 2000 terms for at least 9 months between January 2001 and October 2001 and either an agreement was reached in October 2001 to the revised version of those terms, or the June 2000 terms continued (subject to any specific variations which may have been agreed).

84. In my judgment, the starting point for the consideration of this issue must be the fact that, as is common ground, there was an existing binding agreement in force prior to 21 January 2001. That agreement consisted of a simple agreement for Skanska to provide Services and be paid the price set out in the August 2000 Contract.

85. As Somerfield states, the initial period to 27 October 2000 expired and the subsequent period to 26 November 2000 expired without there being any effect on the performance of the Services by Skanska or the price being paid by Somerfield. During the period from 27 October 2000 until 21 November 2000 and during the period from 26 November 2000 to 22 December 2000 the continued performance by both parties was not referable to any change in position by either party, but rather to the continuation of the August 2000 Contract.

86. Whilst it is correct, as Skanska points out, that in both cases Somerfield expressly extended the period, retrospectively, I consider that express extension did no more than continue the arrangement that had been continuing in any event.

87. In relation to the extension of the periods in the letters of 21 November 2000 and 22 December 2000, it is to be noted that:

(1) The letter of 21 November 2000 extended the Initial Period to 26 November 2000 and Mrs Ponsonby stated that she "*would appreciate it if you could meet these new deadlines*". That is not language which presumes that after that deadline all obligations end but is more by way of exhortation to meet the deadlines for the performance of certain obligations.

(2) The letter of 22 December 2000 states that the Initial Period is extended to 21 January 2001 but then deals with the position as follows:

"*The above extension has been given by Somerfield to enable Skanska to complete the required asset registers, condition surveys, as well as to compile and supply Somerfield with a programme for the planned preventative maintenance (PPM) service. We would take this opportunity to remind you that one of the conditions imposed in the tender documentation and in your signed "Letter of Intent" was that this exercise would be completed in the eight week period by 29th October 2000 for all 3 regions*

Somerfield are not prepared to give any further extension should Skanska not have completed the above by 21st January 2001. Somerfield have agreed this extension of time to allow Skanska not only the time to complete the contractual obligations but to improve their performance.

If at the end of the period Skanska have not met the requirements of Somerfield as fully discussed with you and W.S. Atkins at our meeting on 14th December 2000, then Somerfield reserve the right not to place all or parts of this Facilities Management Contract with Skanska."

88. It is evident from those documents and the 17 August 2000 letter that the Initial Period was envisaged as having two purposes. First, it provided a period during which Skanska was to complete required asset registers and condition surveys and compile and supply Somerfield with a programme for the planned preventative maintenance. Secondly, it was a period during which the interim arrangements would apply, pending the negotiation of a "*mutually acceptable contract*". Whilst by 22 December 2000 it was clear that Somerfield were reluctant to extend the period on the basis of the time being taken for Skanska to produce the necessary documents, the wording of the letter of 22 December 2000 does not contemplate that the terms of the August 2000 Contract would not continue beyond 21 January 2001. Somerfield merely reserved the right not to place all or parts of the Facilities Management Contract with Skanska.

89. It is therefore necessary to consider what happened on 21 January 2001. The evidence is that there was no express extension of the Initial Period and that Skanska continued to provide the Services in the same manner as before and was paid by Somerfield on the same basis as before.

90. Skanska submits that there is no inference from the parties' conduct that they shared a common intention to reactivate or resurrect the August 2000 Contract. Skanska submits that the parties would have conducted themselves in exactly this way, even absent a contract between themselves and their actions were equally referable to an understanding that whilst "*nothing much really*" happened contractually after 21 January 2001, Skanska would continue with the work in general terms, pending negotiations for a final Facilities Management Agreement.

91. In my judgment the question is not whether the parties "reactivated" or "resurrected" the August 2000 Contract but whether they continued to operate on the basis of that contract after 21 January 2001. The Court of Appeal in *Baird Textiles Holdings Ltd. v Marks & Spencer plc* [2002] All ER (Comm) 737 emphasised that it must be possible to infer a common intention to be bound by a contract which has legal effect in order to establish an agreement based on conduct. In this case the inference is, in my judgment, much easier to draw because up until 21 January 2001 the parties were conducting their relations on the basis of the August 2000 Contract and did not change their position after that date.

92. The important factor in this case is that the parties continued to conduct themselves as before in circumstances where they had a pre-existing agreement. Indeed as Skanska points out, nothing much really happened contractually after 21 January 2001, but Skanska continued with the Services, pending negotiations for a final Facilities Management Agreement. Continuing the Services in those circumstances is, in my judgment, precisely what was envisaged under the August 2000 Contract.

93. Once that position is reached, then I consider that the August 2000 Contract will continue unless and until the parties agree on another contractual basis. I do not consider that the position is affected by the fact that one party seeks legal advice as to its position or incorrectly asserts that some other contractual position applies. Once the August 2000 Contract continues after 21 January 2001, as derived from an objective analysis of the conduct of the parties, such subjective matters do not give rise to a different contractual basis.

94. As a result, I find that the August 2000 Contract continued in force after 21 January 2001. In those circumstances, Issues 3 and 4 no longer arise.

Issue 5 : "*Was a binding agreement reached between the parties about "timing out"? If so, when, on what terms and with what meaning and effect?*".

95. This issue relates to the effect of two meetings which were held in September 2001 and October 2002 between representatives of Skanska and Somerfield and whether the parties agreed at those meetings that certain provisions of the August 2001 draft FMA would apply to the arrangements between the parties.

96. The background to this issue is that at the end of August 2001, Somerfield provided Skanska with a further draft FMA dated Draft 3- 31August 2001. This draft made a number of additions and included:

(1) A new Clause 4.22 which stated:

"*with regard to a failure to fulfil the KPI numbered 4 in Appendix 11, save where expressly agreed otherwise any works chargeable to Somerfield under the terms of this Agreement which are not reported in accordance with the provisions of clause 8.18 within sixty (60) days of completion of such works shall cease to be chargeable, and, for the avoidance of doubt, any invoices submitted by the Contractor in respect of such unreported works shall not be payable by Somerfield*"

(2) A new Appendix 11 which provided at paragraph 4:

"*Save where expressly agreed otherwise, at least 90% of all works carried out under the terms of this Agreement shall be reported to Somerfield in a Works Report within thirty (30) days of completion of the works and 100% of works carried out under the terms of this Agreement shall be so reported to Somerfield within sixty (60) days of such completion.*"

97. The provisions in Clause 4.22 and paragraph 4 of Appendix 11 have been referred to in this case, together, as the "timing-out" provision.

98. Somerfield contends that the parties agreed on the "timing-out" provision in the following circumstances. On 19 September 2001, there was a discussion of the August 2001 draft FMA at a meeting between Somerfield and Skanska which was followed by Skanska's email of 5 October 2001 in which Skanska raised no objection to the "timing-out" provision.

99. On 3 April 2002, Somerfield chased Skanska about old work orders for which no works reports had been submitted. Somerfield indicated that these works were "timed-out", but invited Skanska to submit them anyway by the end of April 2002, so that Somerfield could pay and account for them.

100. On 17 September 2002, Somerfield gave Skanska notice that from 23 September 2002 "timing-out" would be strictly enforced and by a further email of 19 September 2002, extended the deadline to 3 October 2002. Skanska then requested a meeting to discuss the matter.

101. On 23 October 2002, that meeting took place, between Mr Smale on behalf of Somerfield and Mr Laidlaw on behalf of Skanska.

102. Somerfield submits that, on the basis that Skanska did not raise any objection to "timing-out" from August 2001 until 3 October 2002 it is reasonable to infer that Skanska accepted "timing-out" and only baulked at it when Somerfield started enforcing it as from 23 September 2002, because it found that the 60 day-period caused difficulty.

103. Somerfield contends that at the meeting on 23 October 2002, a supplementary agreement about "timing-out" was concluded to the effect that Skanska were to submit reports for payment of all reactive maintenance and minor works within 100 days after completion, and would not be entitled to any payment for such works reported after that time. Somerfield contends that this agreement was then implemented by Somerfield and Skanska.

104. Somerfield relies on the evidence of Mr Smale and submits that his evidence is that there was a clear agreement at the meeting on 23 October 2002 as to the 100 day period and the application of the "timing-out" clause. This, it contends, is supported by the fax he sent on the next day, instructing Laytons, Somerfield's solicitors, that the timing out days in Appendix 11, should be "*sixty & one hundred not thirty & sixty*", increasing the "timing-out" deadline from 60 days to 100 days. Somerfield also points out that Laytons acted on this in due course by revising the deadline to 100 days in the final version of the FMA.

105. Somerfield submits that Mr Laidlaw's evidence that the meeting and discussion on 23 October 2002 were *"informal"*; that the discussion about timing out was *"casual"*and his denial that anything was agreed (even for inclusion in a revised FMA), cannot be correct.

106. Somerfield also relies on the fact that Skanska, and in particular Mr Laidlaw, evidently knew of the 100 day period and it refers to Skanska's internal memo of 6 February 2003, copied to Mr Laidlaw and Skanska's email of 7 February 2003 from Heather Pearson to Lesley Archer.

107. Although there is Mr Smale's fax of the following day which supports consensus about 100 day timing out, Somerfield accepts that there is no note of the agreement, nor any letter confirming it but submits that Mr Smale had no reason to think there would be any controversy about the agreement. It states that in the previous autumn, Skanska had accepted the revised FMA containing the timing out provisions and the only question raised by Mr Laidlaw was the length of the timing out period, which Mr Smale believed was resolved at the meeting.

108. In response Skanska observes that, in the light of Somerfield's acceptance that any agreement does not preclude Skanska from payment for work completed prior to October 2002, this issue has little practical relevance.

109. Skanska submits that, as a matter of fact, no supplementary binding agreements were made but that the meetings between the parties were for the purposes of negotiating and finalising the contract, which negotiations were at all times "subject to contract".

110. In relation to Somerfield's contention that the "timing-out" provision was agreed as part of the meetings in September 2001, Skanska relies on the fact that the negotiations in September 2001 continued to be under the reservation of the "Subject to Contract" label applied by Somerfield at the outset. That label was specifically repeated when in August 2001 Skanska was sent, by Laytons, the August 2001 draft of the FMA. Skanska submits that, in any event, the "timing-out" clause was not discussed at the 19 September 2001 meeting, as is clear from the minutes and silence is not agreement and cannot be equated with such acceptance.

111. Skanska submits that there was no supplemental agreement made as part of the meeting between Mr Smale and Mr Laidlaw on 23 October 2002. It states that Mr Laidlaw's evidence was that it was agreed that the 100 days would be put into the draft FMA document and he expressly rejected the suggestion that there was any "supplemental agreement". Skanska also states that there is no evidential basis for a finding that the parties made a supplementary contract and notes that its contention is consistent with the fact that the proposed revisions to the draft FMA documentation were sent by Mr Smale to Laytons, on 24 October 2001.

112. It is evident that Somerfield's primary contentions on the "timing-out" provision depend on a two stage agreement, first an agreement to the provisions of the August 2001 draft FMA and then a further agreement to vary those terms to change the periods. It is therefore necessary to consider what happened both in September 2001 and October 2002.

113. On 30 August 2001 Mr Jervis of Laytons sent to Mr Jackaman of Skanska by email an amended draft of the FMA which incorporated a "timing out" provision in Clause 4.22 and Appendix 11. That email was headed "Subject to Contract". That email referred to the fact that any issues arising out of that draft document would be discussed at a meeting to be arranged. That meeting was arranged and one of the purposes of the meeting, as stated by Ms Archer in her email of 4 September 2001, was "*Putting the Maintenance Management Contract to bed*" which then contemplated that the Contract would be signed.

114. After an internal discussion, Mr Jackaman wrote to Mr Smale on 18 September 2001 proposing certain amendments to the draft FMA. That letter then formed the agenda for the meeting which took place on 19 September 2001 between Mr Smale and Mr Shardlow on behalf of Somerfield, Mr Jervis of Laytons and Mr Russell and Mr Jackaman on behalf of Skanska. There was no discussion of the amended Clause 4.22 and Appendix 11 at that meeting but at the end of the meeting Laytons were to issue a revised contract for final acceptance with a target date for signature of 15 October 2001.

115. That amended draft was subsequently circulated by Mr Jervis on 2 October 2001 but the date of 15 October 2001 passed and there was no signature.

116. On that basis, whilst no objection was raised at the meeting or in correspondence by Skanska to the terms of Clause 4.22 and Appendix 11, the only effect of that lack of objection, in my judgment, is that if no later objection were raised and the FMA Contract had been signed Skanska would have been bound by it. However, that did not occur. The status of that document was that it was "subject to contract" and imposed no obligations unless and until it was signed by the authorised representatives of the parties. This would mean that right up until signature Skanska could object to any provision and renegotiate the contract, even if they had not specifically raised it before.

117. Whilst, in principle, the parties could have amended the existing August 2000 Contract by adding Clause 4.22 and Appendix 11 to it, they did not do so and there is no evidence that the parties intended to make Clause 4.22 and Appendix 11 binding in advance of the signature of the FMA Contract.

118. There is, I find, no basis for there being a binding agreement in 2001 that the terms of Clause 4.22 and Appendix 11 would bind the parties prior to a signed agreement. I now consider the position in October 2002.

119. It is evident that in 2002 Somerfield had become concerned at the backlog of "open orders", that is, orders for work which had been carried out but which had not been closed and invoiced to Somerfield. Ms Archer raised her concerns on 3 April 2002 and informed Skanska that, if appropriate action was not taken, Somerfield would close the order and accept no liability for cost.

120. On 17 September 2002 Ms Archer wrote to Mr Laidlaw and informed him that Somerfield would be enforcing Clause 4 of Appendix 11 of the FMA rigorously from 23 September 2002 and would not accept charges which fell outside the specified period. In relation to outstanding "capital orders" Ms Archer wrote a similar email on 19 September 2002 stating that if she had not heard from Skanska by 3 October 2002 she would close the jobs in question and no charges would be accepted thereafter.

121. Mr Laidlaw wrote to Ms Archer on 3 October 2002 in response to her letter of 17 September 2002 and in relation to Clause 4 of Appendix 11 informed her that Skanska were working within the spirit of the contract rather than an agreed document. He proposed a meeting to discuss the agreement.

122. That discussion, I find, took place at the meeting between Mr Laidlaw and Mr Smale on 23 October 2002. From the correspondence leading up to that meeting, Mr Smale's note in his diary and the fax sent by Mr Smale to Mr Jervis at Laytons on 24 October 2002, it is evident that an important matter discussed at that meeting was "refund rates", that is, rates to represent sums which would be refunded by Skanska under the FMA if they did not carry out particular aspects of planned preventative maintenance. That was stated in the correspondence to be the final matter that was needed to conclude the draft FMA and by then was long overdue.

123. It is also evident from Mr Smale's note to Mr Jervis that, at the meeting on 23 October 2002, he discussed with Mr Laidlaw the provisions of paragraph 4 of Appendix 11 and this led to Mr Smale stating to Mr Jervis that the "*timeout days should be sixty and one hundred not thirty and sixty*". On this aspect, I have considered the evidence of Mr Laidlaw and Mr Smale and find that the number of days allowed in Appendix 11 was raised at the meeting on 23 October 2002 and that Mr Laidlaw proposed 100 days. I accept Mr Laidlaw's evidence that this period was agreed on the basis that it would be put on the amended draft FMA which would be presented to Skanska for approval and that he did not reach an agreement on 23 October 2002 that the period was to apply in advance of a formal signed agreement. Mr Laidlaw's recollection of events was much clearer than Mr Smale's. In addition Mr Smale was more tentative in his evidence than would appear from his witness statements. When it was put to Mr Smale that he was going to put in the 100 day period in the evolving contract and that is what he did, there was no suggestion that there was some other significance to that agreement, in terms of giving rise to an immediate binding obligation.

124. As a result, I have come to the conclusion that no binding agreement was reached between the parties about "timing out" either in September 2001 or subsequently at the meeting between Mr Laidlaw and Mr Smale on 23 October 2002. As a result, Issue 6 does not arise.

Issue 7 : "*Was a settlement agreement made between the parties in December 2002? If so, what was settled thereby*".

125. This is probably the most important issue in this case because it potentially affects Somerfield's liability to pay for the 8090 calls outstanding in 2003. Somerfield contends that at a meeting between Skanska and Somerfield on 12 December 2002 it was agreed that Somerfield would pay agreed sums in settlement of all liability for reactive maintenance and minor works completed 100 days or more before 12 December 2002 and Skanska would not claim payment for any other works completed 100 days or more before that date.

126. Somerfield states that the background to the meeting on 12 December 2002 was, that, after the meeting between Mr Smale and Mr Laidlaw on 23 October 2002, there remained uncertainty and dispute about what was to happen about old works carried out before that date.

127. On 5 December 2002, Somerfield states that there was a discussion on what should happen to works which had been carried out before 23 September 2002 and Mr Laidlaw produced a list of old works which it was agreed would be discussed at a subsequent meeting. Somerfield states that it is relevant to note:
    (1) The absence of any reason for Mr Smale and Mr Shardlow to limit the 12 December 2002 meeting to jobs already submitted on CIA. They wanted to clear the decks of all old jobs, whether already submitted on CIA or not.
    (2) Mr Hendry's evidence that his office had done all that they could to submit reports for old jobs.

128. On 12 December 2002, that meeting took place at Skanska's offices at West Byfleet between Mr Smale and Mr Shardlow on behalf of Somerfield and Mr Laidlaw, Mr Hendry and Mr Foster on behalf of Skanska. Somerfield contends that at this meeting the parties reached a binding settlement agreement, which was noted by Mr Smale.

129. Somerfield says that this issue depends primarily on conflicting witness evidence: that of Mr Smale and Mr Hendry on behalf of Somerfield, and Mr Laidlaw on behalf of Skanska. Somerfield relies on Mr Smale's evidence that here was a clear agreement at the meeting and contends that his evidence is supported by his brief note of the meeting; by the surviving list of items and by the parties' implementation of the settlement. Somerfield also relies for support on the evidence of Mr Hendry, who at the time was working for Skanska and was present at the meetings on 5 and 12 December 2002.

130. Somerfield rejects Mr Laidlaw's evidence that the purpose of the meeting was only to review the 300 jobs then rejected and that all that was agreed was the allocation of new budget codes. Somerfield submits that his evidence is implausible on both counts. First it states that Mr Smale and Mr Shardlow would not have taken the trouble to travel to West Byfleet and spend all day there discussing only 300 jobs and, secondly, job coding that did not have any effect on the availability of funds for payment.

131. Somerfield states that the fact that there is no letter confirming the settlement is again unsurprising, since Mr Smale had no reason to think there would be any controversy about it, and the figures in issue were relatively low, being understood to be only about £168,000.

132. Somerfield contends that the settlement was in respect of all old jobs, not just those on the lists tabled by Skanska. Specifically, the settlement covered all jobs pre-dating 23 September 2002; and it relies on the note made later that afternoon by Mr Smale, *"Jobs not on the list pre-dating 23/9 are all timed out"*.

133. Skanska, on the other hand, contends that there was no full and final settlement agreement made on 12 December 2002 in the terms alleged by Somerfield.

134. Skanska relies on the evidence of the "timing-out" provision culminating in the meeting on 23 October 2002 at which no binding agreement was reached. It states that, despite this, Somerfield continued to reject CIA notifications on the basis that jobs were timed out. Skanska says that it did not accept this and Mr Smale knew as a fact that Skanska was dissatisfied with Somerfield's refusal to pay.

135. As to the meeting on 5 December 2002, Skanska states that the purpose of that meeting was to discuss matters relating to the finalisation of the contract and to operational issues. In advance of the meeting, Mr Laidlaw had asked his regional managers to provide him with details of the value of jobs that had been rejected. At that meeting, Mr Laidlaw voiced his concerns as to the fact that Somerfield was refusing to accept timed-out jobs and advised that as at that date, some £168,000 of work had been rejected as timed-out. Skanska states that all present understood that the £168,000 related to work that had been logged onto the CIA system and rejected after 23 September 2002, being the date when Somerfield had commenced enforcing the "timed-out" clause.

136. Skanska contends that at that meeting, it was agreed that a further meeting would be held to go through the list of the £168,000 worth of "timed-out" work. The specific and advertised purpose of the further meeting was so that Somerfield could review the individual jobs recorded on the list so as to determine what work would, exceptionally, be paid.

137. Skanska relies on the fact that following the meeting of 5 December 2002, each of the Somerfield regional managers had printed off from the CIA system a list of the rejected jobs. The further meeting took place on 12 December 2002 and at that meeting, the lists of the rejected jobs were considered. Somerfield, through Mr Smale and Mr Shardlow, indicated which jobs it, would exceptionally, pay for. This was done by marking jobs with a tick or a cross.

138. Skanska submits that the meeting on 12 December 2002 led to an agreement that the jobs which had a tick against them would be re-submitted for payment but that there was no agreement by Skanska that any of the other items, either with a cross or left blank, would not be paid.

139. I therefore turn to consider the background to the meetings on 5 and 12 December 2002. It is evident that Somerfield wished to apply a "timing-out" provision to Skanska's work and that from about 23 September 2002 the CIA system started to reject invoices which were submitted outside the relevant period. As I have found, there was no binding "timing-out" provision at this stage.

140. The documents show that, for example, on 10 October 2002 Skanska submitted on the CIA system a number of orders as batch SkanskaWB13017 and that on 14 October 2002 Somerfield sent Skanska a list of "deleted jobs" showing, for the majority of the items, the message "payment timed out".

141. By 5 December 2002 it is evident that a substantial number of invoices had been rejected by the CIA system on the basis that they were "timed-out". On that date there was a meeting held between Mr Smale and Mr Shardlow on behalf of Somerfield and Mr Laidlaw, Mr Miller, Mr Foster and Mr Hendry on behalf of Skanska at which a number of matters were reviewed, including the fact that the contract was to be chased through to engrossment. Mr Laidlaw then raised the fact that there were "timed out jobs" and gave a value of about £168,000, divided between the three regions. Mr Smale's note of that meeting records that and states that Mr Shardlow and Mr Smale were to go to Skanska/s offices at West Byfleet "to go through timed out jobs".

142. The announced purpose of the meeting on 12 December 2002 is of some importance. In his witness statement Mr Laidlaw says that the purpose of the meeting was "*to review the batches currently rejected as "Timed-Out."* Mr Hendry states that Mr Smale and Mr Shardlow wanted to bring the payment system up to date and to clear all outstanding items for which Skanska wanted payment whether or not they had been logged on the CIA system and rejected for various reasons, or had not been logged at all. He says that he was told to prepare full lists of everything he had that he still wanted to claim payment for and to bring those lists to a meeting at West Byfleet. He also says that Mr Smale and Mr Shardlow made clear that this was a "*clearing the decks exercise*" and that once completed the "timed-out" clause would be strictly enforced.

143. Mr Smale in his first witness statement confirms that he and Mr Shardlow told Skanska to "put together a list of everything which was or could be timed out, whether or not yet submitted together with everything else that was lying on the system which had been rejected but for which Skanska maintained payment was due." However, later on in that witness statement at paragraph 141 he provides an explanation of why he did not put any subsequent agreement into writing and says "I was doing a deal for Somerfield on a list of timed out items valued at its highest at £168,000". Also, in his second witness statement Mr Smale says that what happened about "timing-out" at the meeting on 5 December 2002 was that Skanska put forward values for the works that were timed out and "Brian Shardlow and I agreed to go to West Byfleet to go through them."

144. In the oral evidence, Mr Laidlaw maintained that the announced purpose of the meeting on 12 December 2002 was that the parties were to go to discuss the jobs that were currently timed out. In his oral evidence Mr Hendry accepted that the purpose of the meeting on 12 December 2002 was to see whether or not Skanska could get some payment against the jobs that were on the speadsheet list produced in advance of the meeting on 5 December 2002, that is the list of "timed-out" jobs. He was asked in re-examination whether the lists that were to be produced on 12 December meeting were to be limited to the spreadsheets that Mr Laidlaw had on the 5 December. He responded that the lists were not necessarily so limited as he was also asked if he could find any supporting paperwork. This evidence supported that of Mr Laidlaw. Significantly, it limited the purpose of the meeting on 12 December 2002 to a consideration of the matters on the list produced on 5 December but with additional supporting paperwork.

145. Mr Smale in his oral evidence accepted that he told Skanska at the 5 December meeting that the purpose of the meeting on 12 December was to go through the list of the timed out jobs and to determine which would be paid. The effect of his evidence was that he accepted that everyone understood that at the meeting on 12 December 2002 Somerfield would go through the lists of the jobs that been identified at the meeting on 5 December 2002. However, he said that he was also prepared to look at anything that Skanska cared to put in front of him at the meeting on 12 December 2002.

146. As I have previously observed Mr Smale's oral evidence was more tentative than might appear from his statements. Both Mr Laidlaw and Mr Hendry seemed to have a clearer recollection in their oral evidence of the background and matters discussed at the meeting on 5 December 2002. Mr Hendry's oral evidence differed from or, at least qualified, what is set out in his short statement and to the extent that there are differences, I prefer his oral evidence tested in court.

147. On the basis of that evidence, I have come to the clear conclusion that at the meeting of 5 December 2002 the purpose of the meeting on 12 December 2002 was understood by both parties as being to go through the invoices for jobs which had been rejected on the basis that they were "timed-out", stated at the meeting of 5 December to represent about £168,000, and to decide which ones Somerfield would accept. Those rejected invoices were the ones "timed-out" by the CIA system by Somerfield's implementation of Clause 4.22 and Appendix 11 of the draft FMA. The only elaboration on the items raised at the meeting of 5 December 2002 which would be carried out before the meeting on 12 December 2002 was, I am satisfied, that Skanska would provide further supporting paperwork in support of those items. Whilst Mr Smale and Mr Shardlow might clearly have been prepared to consider anything else, I find that there was no common understanding that items which were not yet entered on the CIA system would be considered or that all outstanding "jobs" would be dealt with at the meeting on 12 December 2002.

148. It might well have been in the minds of both parties that the draft FMA was fast approaching the stage where it was to be engrossed and signed and in the then current form a "timing-out" provision would apply. which might, depending on its terms, prevent Skanska from raising old "jobs" which had not been previously invoiced. However, absent a signed FMA to that effect, I do not consider that the purpose of the meeting on 12 December 2002, as viewed on 5 December 2002, was intended to have the effect of precluding Skanska from making any claims. Rather, it was intended that Somerfield would accept for payment some of Skanska's invoices which had been rejected on the basis that they were "timed-out".

149. I now turn to the meeting on 12 December 2002 to see what was discussed and agreed at that meeting. That meeting was attended by Mr Smale and Mr Shardlow on behalf of Somerfield and Mr Laidlaw, Mr Hendry and Mr Foster on behalf of Skanska. The list of rejected "jobs" was tabled and Mr Smale and Mr Shardlow went through each item and put a tick or a cross against each one or left it blank as can be seen from the surviving pages attached to Mr Smale's cover sheet.

150. Mr Laidlaw's evidence in his witness statement was that items which could be accepted were given a new code. He says that there were no discussions with regard to any full and final settlement or any reference to any final agreement. He says that the figures which were agreed by Somerfield were subsequently paid. Mr Hendry states in his witness statement that the lists were ticked or crossed for items that were or were not going to be paid and on some items Mr Smale and Mr Shardlow stated that payment might be made if certain other documents or information could be supplied. He says that at the end of the meeting Mr Shardlow said words to the effect "that is it is it?" and everyone confirmed that it was and Mr Shardlow reiterated that the timed out provision would be strictly enforced.

151. Mr Smale confirms in his witness statement that the lists were ticked with items he accepted or crossed for the ones rejected. He adds that those marked with a question mark were ones that might be paid if more information was supplied and that those left blank were disallowed. He states that Mr Laidlaw, he and Mr Shardlow agreed that "*in return for payment of the accepted items and those marked with a question mark which could later be satisfactorily substantiated, Skanska accepted they would have no entitlement to payment for the rest of the items on the lists and any other jobs not on the list would be timed out as at 23 September 2002*".

152. In oral evidence, Mr Laidlaw was asked about ticks and crosses against items of the list discussed on 12 December. It was suggested to him that items which had a cross were never going to be paid. He responded: "*I do not know if that was the case. The ticks represented items that were going to be put in a separate batch with a different title so it can be re-submitted. They were going to be paid. There was nothing said that these [the ones with a cross] were not going to remain outstanding debts.*"

153. Mr Hendry was taken to examples of items in the list and referred to an item which was left blank but which was marked "MUAA" meaning "misuse and abuse". He said that his recollection was that these MUAA items would be paid but in re-examination he indicated that it would depend on the cause of the problem.

154. Mr Smale was asked questions about two documents which are relevant to the issue. First, there is an entry in Mr Smale's notebook in which he states: "*Went through timed out jobs and PM costs submitted to STEPS. TL to submit timed out through CIA or has done. Went + verified lists of acceptable jobs. Jobs not on the list + pre-dating 23/9 are all timed out. OK to all.*"

155. The note in his notebook was, Mr Smale stated, produced whilst he was at Reading Service Area with Mr Raw of Somerfield "yammering" in his ear on the mobile phone. As demonstrated in cross-examination the note has ambiguities. In relation to the phrase "*Jobs not on the list + pre-dating 23/9 are all timed out*" the date of 23 September 2002 was significant as that was the date from which Somerfield stated that they would apply the provisions of Clause 4.22 and Appendix 11 of the FMA. Mr Smale agreed that this note referred to that fact. He said that his understanding was that agreement was reached that those jobs which had not been submitted for consideration at the meeting of the 12 December 2002 were to be treated as "timed-out" and not then eligible for payment subsequently, even though they were submitted at some point in the future. He accepted that the period from 23 September to 12 December 2002 was 80 days and was less than the 100 day period and that it was unlikely that there could be any agreement for jobs "*pre-dating 23/9*".

156. The second document is Mr Smale's email of 24 February 2003 to Mr Raw. This was produced as an internal email after the 8090 missing calls had been discovered. In that email he sets out his recollection of the meetings on 5 and 12 December 2002. He states that the purpose of the meeting on 5 December 2002 was "*to go through a list of timed out jobs and determine which, exceptionally, would be paid. This we did*". He then refers to his note: "*Jobs not on the list + pre-dating 23/9 are all timed out*". After stating that the contract has not been signed he then said: "*Although the contract has not been signed by Skanska my notes show that they were fully aware of the time out KPI and accepted it. It would be our intention to use these notes (plus a statement from [Mr. Shardlow] and myself) to support our position that it was the intention (very important point legally) of both parties, Skanska and Somerfield, to work to the contract on this point and therefore it should be considered binding upon both.*"

157. I am satisfied that there was no agreement reached on 12 December 2002 in the nature of a full and final settlement. The position, I find, was that Somerfield were trying to enforce the "timing-out" provisions of the draft FMA (as it interpreted them) and had done so for Skanska from 23 September 2002. Skanska did not agree with that. The meeting on 12 December 2002 was therefore held to deal specifically with the jobs which had been "timed-out" by Somerfield to see which ones Somerfield would accept could be paid, despite Somerfield having

applied the "timing-out" provision. The purpose, as understood on 5 December 2002 and as expressed in Mr Smale's email of 24 February 2003 was to determine which of those items would be paid.

158. On the basis of the evidence, I do not consider that there was anything "agreed" in the sense of a binding compromise agreement. The purpose of the meeting was not to reach such an agreement. Mr Smale's note made after the meeting on 12 December 2002, is ambiguous and does not bear the interpretation which he subsequently sought to put on it in his email of 24 February 2003. It is instructive that at the meeting on 18 February 2003 when the 8090 calls were raised by Skanska, he did not refer to a full and final settlement agreement but rather to claims being "timed-out". That, of course, would only be the position if the long awaited draft FMA had reached the stage of engrossment and signature by Skanska and Somerfield.

159. In the absence of the signed agreement, I do not accept that the argument raised by Mr Smale in the last paragraph of his email of 24 February 2003 to Mr Raw can be sustained from the wording of the note he made of the meeting held on 12 December 2002. Rather, I consider that the email indicates that on 24 February 2003 Mr Smale did not consider that there had been a full and final settlement. Instead, it seems that the intention was to try and use the note to support a legal argument that the parties had agreed to work to the contract and, for that reason, the "timing-out" provisions of the FMA should be considered as binding on both parties.

160. At the meeting on 12 December 2002, it is evident that Somerfield accepted that they would make payment of the items against which a tick was put and these would be resubmitted by Skanska. They did not accept that they would make payment against the ones which had a cross against them but I am not satisfied that there was a binding agreement that these would not be paid. Equally, I am not satisfied that there was any binding agreement as to what would happen to those without either a tick, cross or a question mark. They certainly were not accepted for payment by Somerfield but I am not satisfied that Skanska made any binding agreement that they would not be paid. It seems to be common ground that for those with a question mark Skanska could provide additional information in order to persuade Somerfield to make payment. In any event, I am not satisfied that they were the subject of any binding settlement agreement.

161. Rather, following the meeting on 12 December 2002, apart from the items accepted by Somerfield, the fate of any "timed-out" would depend on the terms of the FMA, in particular Clause 4.22 and Appendix 11, of the version as finally signed.

162. As a result, I find that no settlement agreement was made between the parties in December 2002, whether in the terms alleged by Somerfield or at all.

Summary : I now summarise my answers to the Issues:

Issue 1 : "*Under the contract made on or about 21 August 2000 between the parties ("the August 2000 Contract"), was it agreed that the services required of the Claimant thereunder should be provided under (1) all, or (2) some, and if so which, of the terms of the contract document entitled "Facilities Management Agreement" and referenced "JRB/2240842 Draft 3 – 14th June 2000" ("the June 2000 FMA")*".

It was agreed that the Services should be provided under some only of the terms of the June 2000 FMA, being limited to the terms necessary to define the Services which Skanska was to provide and included Clause 4 "Services" (excluding Clauses 4.21 and 4.22 which are in square brackets and Clause 4.23 which is a provision relating to Clauses 4.21 and 4.22); such other provisions of the June 2000 FMA as are referred to in that Clause to the extent necessary to define the Services to be provided; the relevant definitions in Clause 1.1 and Appendix 9, to the extent that is consistent with the limited obligation to provide the Services.

Issue 2 : "*Did the August 2000 Contract continue in force after 21 January 2001*"

The August 2000 Contract continued in force after 21 January 2001.

Issue 3 : "*If the answer to Question 2 is "no", are the parties estopped from denying that the August 2000 Contract continued in force after this date*".

This issue does not arise.

Issue 4 : "*If the answers to Question 2 and 3 are "no", then : - Was there instead a series of mini-contracts? If so, then did each such mini-contract incorporate the terms of the June 2000 FMA*".

This issue does not arise.

Issue 5 : "*Was a binding agreement reached between the parties about "timing out"? If so, when, on what terms and with what meaning and effect?*".

No binding agreement was reached between the parties about "timing-out" either in September 2001 or subsequently at the meeting between Mr Laidlaw and Mr Smale on 23 October 2002.

Issue 6 : "*If the answer to Question 5 is "yes", then is the Defendant now estopped from relying thereon*".

This issue does not arise.

Issue 7 : "*Was a settlement agreement made between the parties in December 2002? If so, what was settled thereby*".

No settlement agreement was made between the parties in December 2002, whether in the terms alleged by Somerfield or at all.

Stephen Dennison QC and Serena Cheng (instructed by Nigel Cornwell, Legal Department, Skanska UK. PLC) for the Claimant
Jeremy Nicholson QC and Adrian Hughes (instructed by Clarke Willmott, Bristol) for the Defendant