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## LEGAL BRIEFING

### *Uncertain terms*

### *Somerfield Stores Ltd v Skanska Rashleigh Weatherfoil Ltd*

Court of Appeal, Neuberger LJ, Richards LJ, Leveson LJ, [2006] EWCA Civ 1732

#### ***The Facts***

This was an appeal against a decision on a preliminary issue relating to the interpretation of a contract between Somerfield and Skanska.

Somerfield intended to enter into a facilities management agreement with Skanska for a term of three years. Between June and August 2000, discussions between Skanska and Somerfield took place as to the exact scope and terms of such an agreement. By mid-August discussions were still ongoing and Somerfield was in need of maintenance services immediately. By letter dated 17 August 2000 Somerfield wrote to Skanska requesting the provision of the services for an initial two-month period (the “Temporary Agreement”). The letter stated that the services were to be provided under the terms of the “Contract”. The “Contract” was the facilities management agreement that was still under discussion and which had not yet been finalised (the “Draft Contract”).

A dispute later arose as to which of the terms of the Draft Contract had been incorporated into the Temporary Agreement. Skanska argued that only those terms of the Draft Contract that defined the services that Skanska were to carry out had been incorporated into the Temporary Agreement. Somerfield argued that all of the provisions of the Draft Contract were incorporated, save those that were inconsistent with the Temporary Agreement.

The judge accepted Skanska’s argument. He considered that the one thing that the parties had yet to agree, and were anxious not to agree for the moment, was whether they should be bound by all the terms of the Draft Contract. It was those terms that they were seeking to negotiate, and it was because they had not reached agreement as to all of those terms that they had not reached a binding agreement there and then. Accordingly, he thought it highly unlikely that the parties would have intended to have been bound by the Draft Contract.

Somerfield appealed.

#### ***The Issue***

The issue was whether all of the terms of the Draft Contract were incorporated into the Temporary Agreement or whether only those terms that defined the services to be provided by Skanska were incorporated.

#### ***The Decision***

The Court held that the natural meaning of the words “you will provide the services under the terms of the [Draft] Contract” was that the Draft Contract governed the terms upon which the services were to be provided under the Temporary Agreement. The fact that the parties still wished to negotiate the

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terms of the Contract because they did not want to commit to its precise terms for some three years did not mean that they were not prepared to be bound by those precise terms over a short two-month period while the negotiations continued.

Accordingly, the appeal was allowed.

***Comment***

This is an interesting case in which the court took the view that whilst factual circumstances and commercial sense are relevant, they do not represent a licence to the court to re-write a contract merely because its terms seem somewhat unexpected, a little unreasonable, or not commercially very wise. The court's view was that a contract will contain the words the parties have chosen to use in order to identify their contractual rights and obligations and, therefore, a court should be careful before departing from the natural meaning of a provision in a contract merely because it conflicts with notions of commercial common sense of what the parties must have thought or intended.

***Iftikhar Khan***  
***January 2007***

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