



CONSTRUCTION

AMENDING STANDARD FORM CONTRACTS – A PLOY?

CONSTRUCTION CONTRACTS: HINTS, TIPS AND
SOLUTION-FOCUSED ANSWERS

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RICHARD BOOTH
SENIOR ASSOCIATE

T: +44 20 7264 8385

E: richard.booth@hfw.com

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WHAT IS THIS TALK ABOUT?

When is it a **ploy** to amend the **Standard Forms**, e.g. removing **exceptionally inclement weather** or **discovery of antiquities** as causes for **delay**?

What is the legal position?

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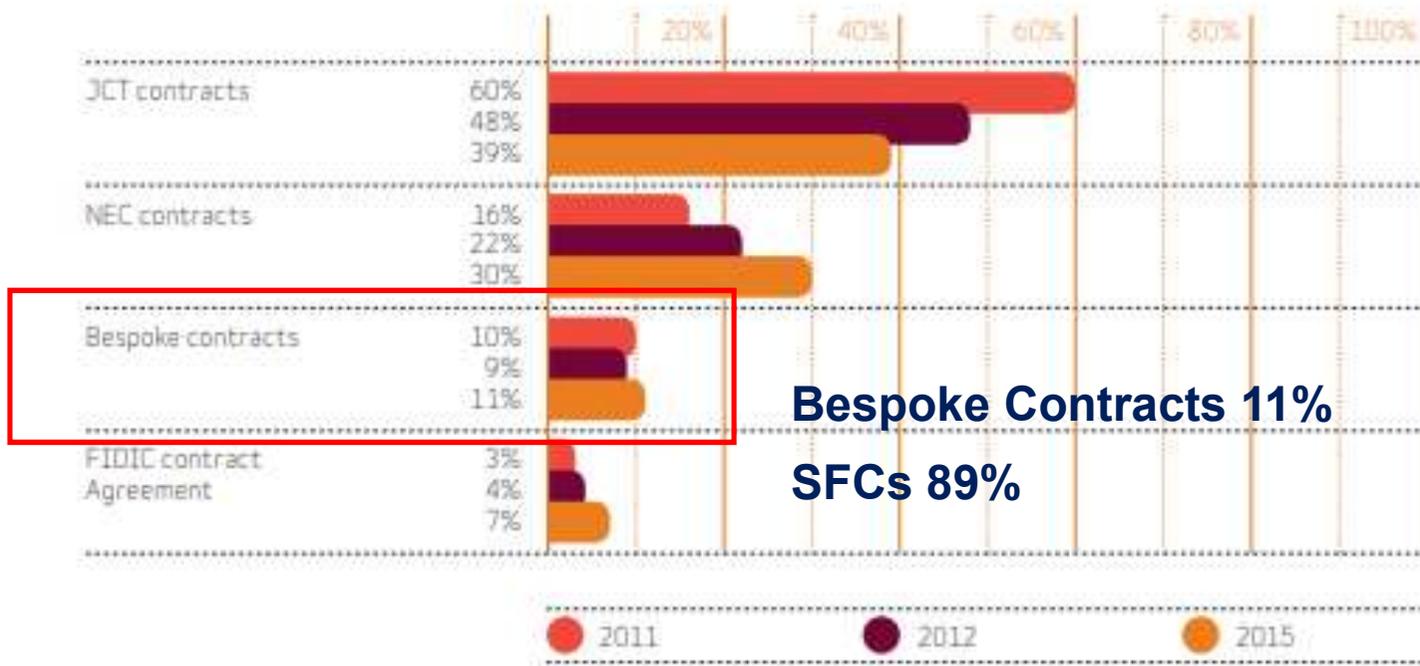
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NBS NATIONAL CONSTRUCTION CONTRACTS AND LAW SURVEY: 2015

Which suite of contracts have you/your organisation used most often?





BACK TO BASICS – WHY USE A SFC?

- Respond to different procurement routes
 - Capture key principles for construction contract – e.g.
 - Extent of contractor's liability for design & for defective work
 - Procedure for Variations to the Works
 - Payment Procedure
 - Insurance obligations
 - Suspension and Termination provisions
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BACK TO BASICS – WHY USE A SFC?

- Tried and tested
 - Practitioner and User familiarity
 - Reduces negotiation time and saves costs
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BACK TO BASICS – WHY USE A SFC?

- But judicial criticism of SFC, e.g. NEC:

“There are some siren or other voices which criticise these Conditions for some loose language, which is mostly in the present tense, which can give rise to confusion as to whether and to what extent actual obligations and liabilities actually arise”

Atkins v Secretary of State for Transport [2013]

“NEC4 uses clear and professional language to promote fair dealing, greater certainty and to help prevent litigation, even on the most complex and high-risk projects”

(NEC Website)



BACK TO BASICS – WHY AMEND?

- Why amend a SFC?
 - Not specific to Project requirements – e.g. offshore work
 - To reflect local Law
 - May require modification to reflect recent change in Law
 - Industry Practice
 - Funder requirements
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BACK TO BASICS – WHY AMEND?

- SFC amendment was criticised by HHJ Lloyd QC in *Royal Brompton Hospital National Health Trust v Hammond and Others* :

“A standard form is supposed to be just that. It loses its value if those using it, or at tender stage those intended to use it, have to look outside it for deviations from the Standard”

[2002] EWHC 2037

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A PLOY?

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A PLOY?

Ploy:

“a cunning plan or action designed to turn a situation to one's own advantage”

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A PLOY?

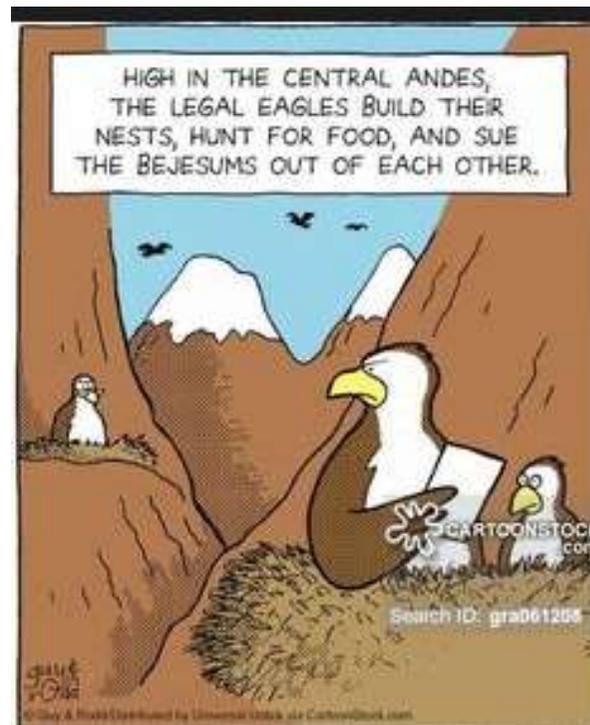
legal eagle

An especially clever, aggressive, or skillful attorney.



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A PLOY?





SFC AMENDMENTS: CAUTION REQUIRED!

- The risk of amendments to a SFC:
 - Creating Inconsistent Terms
 - ❖ *MT Hojgaard A/S v E.ON* [2017] UKSC 59
 - Interaction with Common Law
 - ❖ *Peak Construction v McKinney Foundations* [1970] 1 BLR 111
-



SFC AMENDMENTS: CAUTION REQUIRED!

- Implied Terms
 - Understanding how to complete the “blanks” in the Contract Particulars
 - ❖ *Temloc Ltd v Errill Properties* [1987] 39 BLR 30
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TIPS FOR SUCCESSFUL SFC AMENDMENTS

- Consistent drafting – defined terms
 - Do you really need to make the amendment?
 - Keep it simple
 - Is the meaning obvious?
 - If you need to read the drafting twice then it is not clear
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AMENDING DELAY EVENTS

- Risk of delay is allocated between the Parties by the Contract
 - If the Completion Date is missed then Contractor is liable for LADs
 - Contractor may get relief if the delay is caused by an event for which an EOT is available
 - EOT grounds are often carefully negotiated
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AMENDING DELAY EVENTS

- JCT 63 excused the C for the results of “*exceptionally inclement weather*”:
 - Difficult to quantify “exceptionally”
 - EOT if the weather that causes delay to the completion date is bad to the point of being wholly unusual?
 - SFCs now typically refer to “*exceptionally adverse weather*”
 - Following the long hot summers of the 1970s
 - Exceptionally adverse must therefore be out of the ordinary
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AMENDING DELAY EVENTS

- Problem of finding evidence that weather is “*exceptional*”
 - Assessed over a 100 year period?
 - More commonly over 5 or 10 years
 - What about the impact on a Tower Crane?
 - Low wind speeds are “adverse”
 - If those speeds are maintained over several days, is this “exceptionally adverse”?
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AMENDING DELAY EVENTS

- NEC3 is clearer:
“Only the difference between the weather measurement and the weather which the weather data shows to occur on average less frequently than once in ten years is taken into account in assessing a compensation event”
 - Should Contractor take the risk of exceptionally adverse weather conditions if it is in culpable delay?
 - Often Contractor is asked to take the risk of all weather conditions, save for Force Majeure events (time only)
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AMENDING DELAY EVENTS

- Discovery of Antiquities:
 - Reasonably discrete
 - Effect is usually to suspend Works to allow instructions to be given as to how to react to the discovery
 - If unforeseeable, then reasonable for Contractor to expect time and cost relief, particularly as it is the Employer's site
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AMENDING DELAY EVENTS: CONCURRENT DELAY

- *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744
 - Concurrent delay may be said to occur when two or more critical delay events occur at the same time, and their effects are felt at the same time
 - English common law position: time, but not costs (*Henry Boot v Malmaison*)
 - JCT DB 2005 with bespoke “anti-malmaison” clause:
 - “*any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account*”
 - Parties’ freedom to contract, and clarity of provision, meant the Court upheld the anti-malmaison clause
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AMENDING DELAY EVENTS: CONCURRENT DELAY

- resist anti-malmaiison clauses - they are not “market”
- very unfair, if both Parties in concurrent delay then:
 - C does not get an EOT
 - C suffers LADs
 - C also incurs its own costs for delay period
 - E recovers LADs, even though it would always be on site due to its own concurrent delay



CONCLUDING THOUGHTS

- SFCs reduce the time and cost of a tender/ contract negotiation, and give certainty that key principles caught
 - However careless drafting can create uncertainty and lead to the Courts interpreting them in an unintended manner
 - Delay Events – need to be carefully negotiated. Contractor needs to understand the risk it is accepting if an event occurs and it is not listed as an EOT ground
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QUESTIONS





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