



DWF Law LLP

When is it a ploy to amend the standard forms?

Jonathan Gaskell
21 May 2019

Ploy

NOUN

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

Oxford English Dictionary

The background of the slide is a photograph of a person's hands and arms. The person is wearing a checkered shirt and is sitting at a desk. They are holding a pen in their right hand and writing on a document. Their left hand is holding the edge of the document. In the background, there is a laptop and a glass of water, but they are out of focus.

Why do we use standard forms?

Why do we use standard forms?

- Industry familiarity
- Precedent on interpretation
- Reduces negotiation time and costs
- Contractors may price for unfamiliarity
- Drafted by/with input of industry professionals
- Sometimes mandated/encouraged (e.g. NEC, FIDIC)

Criticism of standard forms e.g. NEC

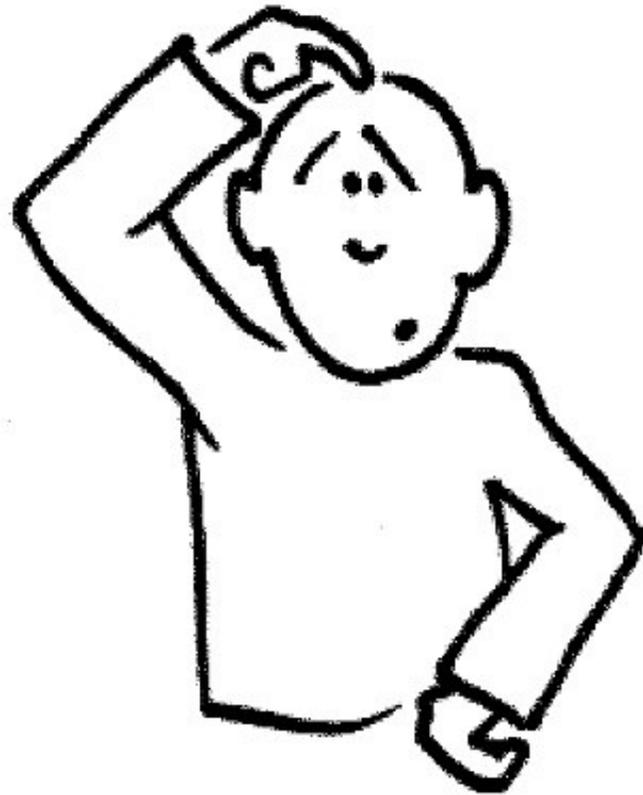
“There are some siren or other voices which criticise these Conditions for some loose language, which is mostly in the present tense, which can give rise to confusion as to whether and to what extent actual obligations and liabilities actually arise”

Atkins v Secretary of State for Transport (2013)

Contrast...

“*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



Why do we amend standard forms?

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CONTRACT

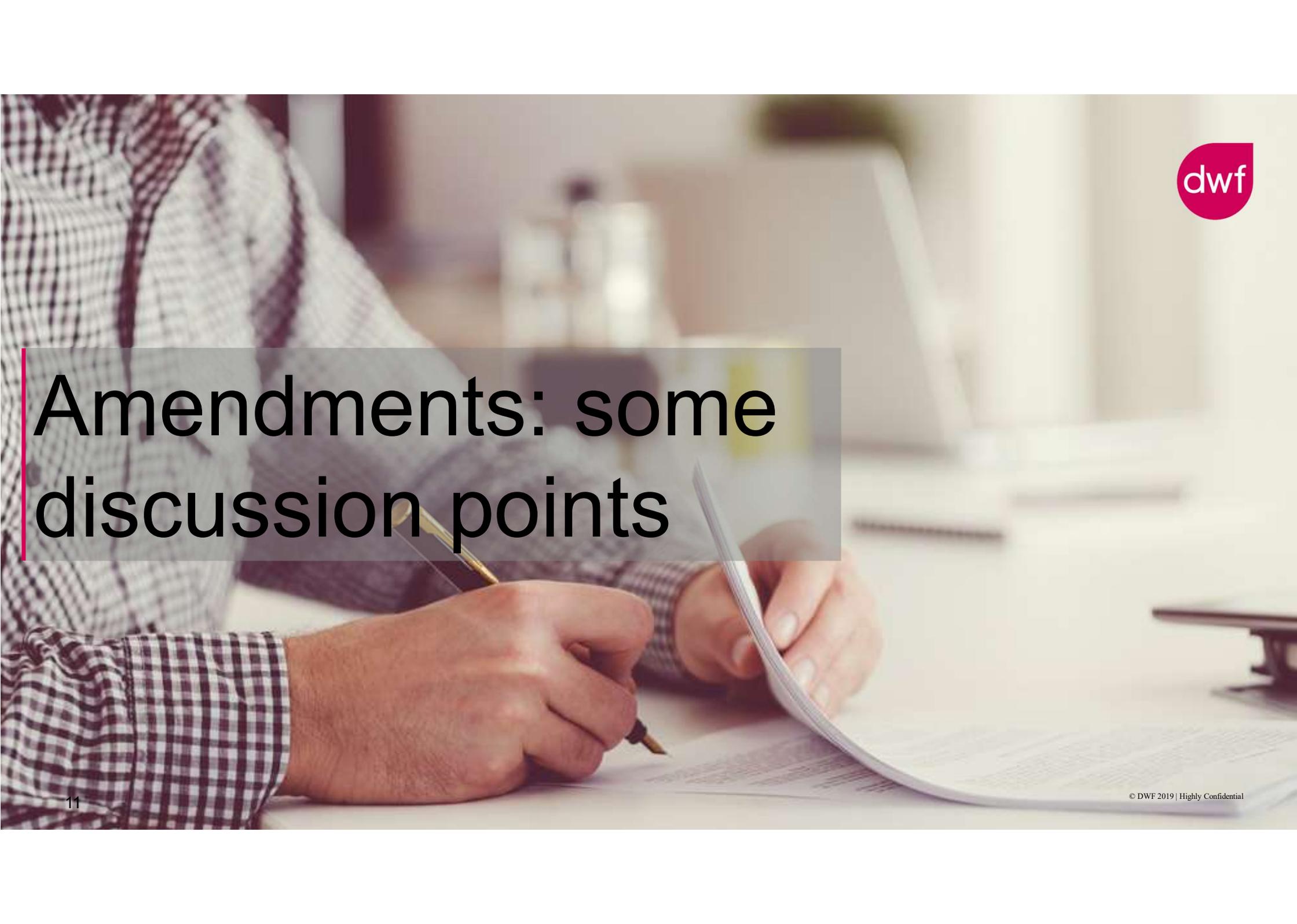
Why do we amend standard forms?

- To reflect project specific requirements
- To deal with some (widely accepted) criticisms of standard forms
- To satisfy funders and other interested parties
- To reflect local laws



Accepted by some publishers

- JCT Digital
- FIDIC Particular Conditions and licence to amend
- NEC “Z” clauses

The background of the slide is a photograph of a person in a checkered shirt sitting at a desk. They are holding a pen and writing on a document. A laptop is visible in the background, and the scene is brightly lit. A semi-transparent grey box with a red vertical line on the left side is overlaid on the image, containing the text.

Amendments: some discussion points

Design liability

- Clause 2.17.1 of SBCC Design and Build equates design standard to that of a professional designer
- *Co-operative Insurance Society Ltd v Henry Boot (Scotland) Ltd (2002)*
- Designer should establish that design proposals are acceptable starting point

Design liability

— Clause 2.11, SBCC Design and Build

“ *...the Contractor shall not be responsible for the contents of the Employer’s Requirements or for verifying the adequacy of any design contained within them* ”

— Substantial derogation from *Henry Boot*

Practical completion

- A definition is often added
- *Mears Ltd v Costplan Services (South East) Ltd & Others (2019)*
- For certifier to decide in the absence of contractual definition
- Often necessitated by other project agreements

Practical Completion

JCT Major Project Construction Contract 2016

“Practical Completion takes place when the Project is complete for all practical purposes and, in particular:

- the relevant Statutory Requirements have been complied with and any necessary consents and approvals obtained;
- neither the existence nor the execution of any minor outstanding works would affect its use;
- any stipulations identified by the [employer’s] Requirements as being essential for Practical Completion to take place have been satisfied; and
- the health and safety file and all “as built” information and operating and maintenance information required by this Contract to be delivered at Practical Completion has been so delivered to the Employer.”



Unforeseen Ground Conditions

- Unforeseen adverse site conditions can be a contractor risk at law
- May be advantageous to share risk where unforeseen ground conditions
- Objective test of foreseeability?

Liquidated damages and termination

- Orthodox view: liquidated damages apply up to termination
- But *Triple Point Technology Inc v PTT Public Co Ltd (2019)*
- Possible amendment:

“ *The payment of, withholding or deduction of liquidated damages shall be the sole remedies for delay save for in the event of any termination of this contract, in which case the Employer shall have a claim for general damages in respect of any delay from the date of termination* ”

Exceptionally adverse weather and delay

- **SBCC** : “*exceptionally adverse weather*”
- Difficult to quantify “*exceptionally*”
- Problem of finding evidence that weather is “*exceptional*”
- **NEC4** : a weather measurement recorded in a calendar month that occurs on average less frequently than once in 10 years when compared with the recorded weather data

Consents

- Whose responsibility is it to obtain statutory consents?
- *Clin v Walter Lilly & Co Ltd (2018)*
- Court implied a term that the employer should use “all due diligence” to obtain any permission, consent, approval or certificate required
- Preferable for contract to allocate responsibility

Others

- Assignment
- Conditional copyright licenses
- Collateral warranties

Problems in amending standard forms



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Problems in amending standard forms

“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”

Royal Brompton Hospital National Health Trust v Hammond & Others

Problems in amending standard forms

- *“Off-the-shelf” amendments*
- *Risk of internal inconsistencies (e.g. MT Hojgaard AS v E.ON (2017), University of Warwick v Balfour Beatty Group (2018))*
- *Gives impression that Employer will be difficult*
- *Problems for public sector in departing from terms*

Problems in amending standard forms

“Without prejudice to any warranties implied by common law or statute, the Contractor warrants and undertakes to the Employer that he has exercised and will continue to exercise in the design of the works reasonable skill and care...”

Too clever?

Viking Grain Storage v T H White Installations Ltd (1985)

When is it a ploy to amend the standard forms?

When should it be a ploy?

- **Never!**
- Amendments should be sensible, focused and no more than strictly necessary



Questions?

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