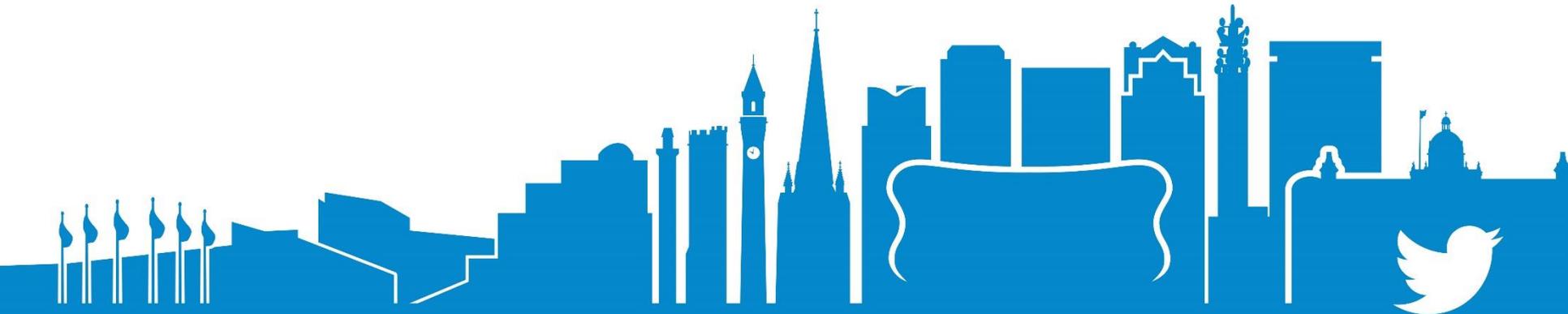


# Workshop 2c:

Are you overpaying under your contract and can you do anything about it?

Speakers: David Miller (Rand Associates),  
Andrew Millross (Anthony Collins Solicitors LLP)  
Chaired by: Steve Downing  
Room: London Room





# Current market conditions

## HCA Regulatory Framework

### “Rent cut”

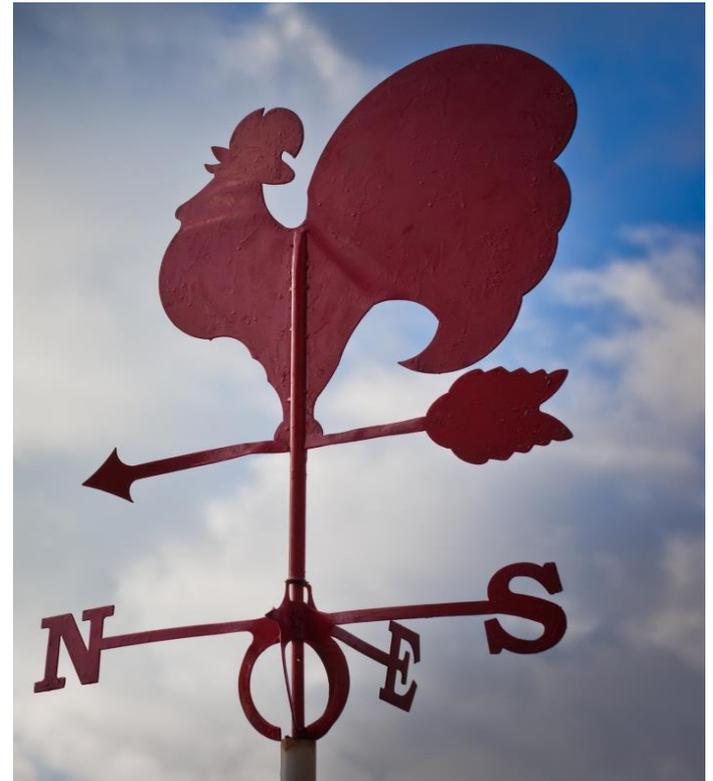
- welfare reforms

### Construction pricing

- labour shortage
- more work around

### Focus on vfm

- out-turn cost
- not the same as “cost after procurement”



# What are we actually talking about here?

<p><b>Paying what the contract says is due</b></p> <p><b>but that amount is not value for money</b></p>	<p><b>=</b></p>	<p><b>poor procurement</b></p>
<p><b>Paying more than the contract says is due</b></p>	<p><b>=</b></p>	<p><b>poor contract management</b></p>

# Different payment approaches

Price based	Cost based
<ul style="list-style-type: none"><li>➤ <b>Lump sum</b> (guaranteed maximum price)</li><li>➤ <b>Bill of quantities / Schedule of individual rates and items</b> (eg archetypes) separately priced</li><li>➤ <b>Schedule of pre-priced rates</b> with percentage adjustment (eg NHF SoR)</li><li>➤ <b>PPP/PPV / Gas 3*</b></li></ul>	<ul style="list-style-type: none"><li>➤ <b>Cost reimbursable:</b> actual cost plus fee</li><li>➤ <b>Target cost: cost reimbursable</b><ul style="list-style-type: none"><li>➤ with “pain and gain”, or</li><li>➤ “gain only” depending on whether costs above or below target</li></ul></li></ul>

# Implications of cost vs price



What does this mean?

- price means the client does not know (or care) what it costs
- price means contractor takes more financial risk
- cost means less certainty of final financial outturn cost

What factors govern the choice?

- uncertainty/risk – innovation, ground conditions, “volume”
- partnering/traditional approach & Employer’s level of “control” over work
- leaseholders/tenants paying variable service charges – need for cost certainty

# David's slides



# Construction Act (as amended)



## What is the Construction Act?

- Housing Grants, Construction and Regeneration Act 1996
  - amended by Local Democracy, Economic Development and Construction Act 2009
  - Scheme for Construction Contracts 1998 (amended 2011)
- s110(1) Every construction contract must
  - have an “**adequate mechanism**” for determining “payments due”
  - set a **final date for payment** of “sums which become due”
    - Scheme says 17 days from due date if contract is silent

# Construction Act – key payment provisions



## s110A – Payment notice

- construction contract must provide for payer, a specified person (eg Client Rep) or payee to give a **payment notice**
- must be given no later than 5 days after **payment due date**

## s111 – Employer must pay “**sum notified**”

- unless **notice of intention to pay less** served in time

## s112 – Contractor can suspend for non-payment

# Payment notice

## A payment notice must:

- be given “no later than 5 days after the payment due date”
- state the sum considered due on the payment due date
- state the basis on which that sum is calculated



If payer fails to give notice when contract requires:

- payee can give notice “at any time”
  - final date for payment calculated from payee’s notice; but
- payee’s advance “**notification of sum due**” treated as the payment notice
  - final date for payment calculated from due date (as usual)

# Is an application a notification of sum due?

To be a valid “notification of the sum due” an application must:

- say clearly that it is a payment application (C, S)
- be unambiguous (H, C, S)
- be clear as to the due date to which it relates (H)
- not be made early or substantially late – unless the Employer has agreed to this (L)
- state the total amount due and basis of calculation (S)

- *Henia Investments v Beck 2015 (H)*
- *Leeds CC v Waco, 2015 (L)*
- *Caledonian Modular v Mar City, 2015 (C)*
- *Severfield v Duro Felguera UK 2015 (S)*



# Pay up or serve pay less notice

## A pay less notice must:

- be given no later than “prescribed period” before final date for payment
- state the sum considered due on the date the notice is served
- state the basis on which that sum is calculated

## “Prescribed period”

- can be specified in contract
- 7 days under Scheme

Disagreement over meaning of “date the notice is served”

## Must pay full amount claimed unless pay less notice is served in time

- other than where contractor is insolvent

## *ISG Construction v Seevic College, 2014*

- “parallel” adjudication outlawed



# Payment notice problem areas

Practical Problems	Legal problems
<ul style="list-style-type: none"><li>➤ Disputes over whether communication/invoice is a valid payment application</li><li>➤ Client Representative challenges a valuation (or requests additional info) but does not notify a lesser “notified sum”</li><li>➤ Pay less notice not issued in time</li></ul>	<ul style="list-style-type: none"><li>➤ Some challenge whether the final date for payment can be linked to a VAT invoice</li><li>➤ Technical uncertainty of meaning of “<u>on the date the notice is served</u>” may lead to pay less notice being challenged</li><li>➤ Unclear how far amount can be “clawed back” by negative next valuation</li></ul>

# Summary of Construction Act notices

Payment notice	Pay less notice
<p data-bbox="160 379 871 515"><b>Served before or within 5 days after “due date”</b></p> <p data-bbox="160 639 494 691"><b>Must state:</b></p> <ul data-bbox="160 733 813 1029" style="list-style-type: none"><li data-bbox="160 733 813 862">➤ amount considered due on due date</li><li data-bbox="160 901 813 1029">➤ basis on which that sum is calculated</li></ul>	<p data-bbox="929 379 1773 743"><b>Served at least “prescribed period” before final date for payment (7 days unless contract prescribes otherwise)</b></p> <p data-bbox="929 776 1244 828"><b>Must state</b></p> <ul data-bbox="929 872 1798 1239" style="list-style-type: none"><li data-bbox="929 872 1798 1082">➤ amount the payer considers to be due on the date the notice is given</li><li data-bbox="929 1115 1798 1239">➤ basis on which that sum is calculated</li></ul>

# Variations – opportunities, risks and tactics

To deals with the “poor procurement” issue

## Negotiation strategy

- is the change “substantial”?
  - change to Employer’s advantage is unlikely to be “substantial” – *Denfleet v NHS*
- possible use of break clause

## Risks & protection

- ineffectiveness
- damages for breach of PCR 2015
- VEAT notice

## Ineffectiveness

- Risk is for for 6 months after change
- Effective from the date of the hearing – does not affect validity of anything done in reliance on varied contract before hearing
- Accompanied by “civil penalty”
- *Varney* – sets aside the variation but not the original contract

# A warning on contract changes

Variation can be agreed by conduct

Can override (per *Mears v Shoreline*):

- clause prohibiting “changes not effective unless agreed in writing”
- “entire agreement” clause



## *Mears v Shoreline, 2015*

- During mobilisation discovered that (bespoke) SoR was incomplete
- Core Group agreed composite rates
- Shoreline said no need to amend contract
- Shoreline deducted £300K saying composite rates did not apply
- Mears recovered £300K saying they had relied on the Core Group “agreement” to their detriment

# Questions



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Disclaimer: Whilst every effort has been made to ensure the accuracy of these materials, advice should be taken before action is implemented or refrained from in specific cases. No responsibility can be accepted for action taken or refrained from solely by reference to the contents of this presentation.

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