

CASE NOTE

Loss and expense recovery depends on notice discipline before valuation begins

What *ISG Retail v FK Construction* reveals about contractual notices, entitlement and the evidence needed to recover loss and expense.

THE COMMERCIAL POSITION

Entitlement is preserved before the claim is valued.

Loss and expense is often approached as a factual and valuation exercise: what caused the delay, what additional cost was incurred, and how can those costs be evidenced? Those questions matter, but they arise within a contractual framework that may require the contractor to notify an event, provide particulars and comply with defined procedures before a right to payment can be established. A project may have suffered genuine disruption, with substantial additional cost, yet the first dispute may concern the steps taken to preserve entitlement rather than the amount ultimately claimed.

That distinction sits at the centre of *ISG Retail Ltd v FK Construction Ltd*. Following an adjudication in which FK had obtained an extension of time and prolongation costs, ISG sought declarations concerning FK's alleged failure to comply with a contractual condition precedent. The court declined to determine the contested notice, waiver and estoppel questions through Part 8 proceedings because substantial disputes of fact were likely to arise. For contractors, the case illustrates why notices, project correspondence and the parties' conduct deserve the same disciplined attention as the later preparation of a valuation.

01 The commercial lesson from *ISG v FK*.

The importance of *ISG Retail Ltd v FK Construction Ltd* lies in the distinction between delay suffered in fact and recovery available under the contract. A contractor may incur additional preliminaries, prolonged site management, labour, plant or supervision costs as works are delayed, but the paying party can still question whether the relevant contractual requirements were satisfied. The existence of a real event and genuine expenditure does not, by itself, answer the separate question of entitlement; a coherent commercial position must demonstrate both the underlying circumstances and the procedural route relied upon.

This makes timely notification part of commercial protection rather than a formality to be addressed when the final account is assembled. The team should be able to identify what happened, when the relevant contractual clock began to run, what was communicated to the required recipient and how any subsequent particulars developed. Whether a communication constitutes a valid notice will depend on the wording of the contract and the circumstances, so contemporaneous records of issue, receipt and the parties' responses are essential to a defensible account of the claim.

02 What the court decided.

After an adjudication had awarded FK an extension of time and prolongation costs, ISG sought declarations that FK had failed to comply with an alleged condition precedent to entitlement. The dispute raised questions about the contractual notices, the effect of the parties' subsequent conduct and whether waiver or estoppel might be relevant. The Technology and Construction Court declined to determine those matters in the Part 8 proceedings because they were likely to require resolution of substantial factual disputes, rather than a decision on an agreed or sufficiently clear factual basis.

The judgment should not be read as establishing that every deficient notice defeats a contractor's claim, nor as deciding the underlying notice issues in FK's favour. Its practical significance is that formal notice requirements and the way parties act during delivery can remain live points of contention after an adjudication. Contractors should therefore preserve the notices themselves, the surrounding correspondence and the evidence of how the parties dealt with the event, rather than assume that the valuation outcome alone settles the question of entitlement.

CASE SIGNIFICANCE

A procedural dispute can precede valuation.

The judgment illustrates how disputed notice compliance, waiver and estoppel can move loss and expense claims into contested questions of entitlement before cost is valued.

03 Notice discipline before valuation.

Notice provisions are part of the commercial machinery of a construction contract. Depending on their wording, they may operate as conditions precedent or impose other procedural obligations that shape the strength of a claim. The relevant event should be assessed as it arises: what clause applies, whether a deadline has started, who must be notified and what information must be included? A timely notice can preserve the contractual route while the programme and financial effects are still emerging; waiting until those effects are fully measured may mean that an important deadline has already passed.

An initial notice does not need to present an artificial level of certainty about consequences that are not yet known. It should identify the event with the clarity required by the contract, be issued through the prescribed channel and be supported by further particulars, updates or substantiation where required. Separating early notification from later quantification allows the contractor to acknowledge developing evidence without losing sight of the contractual process. A clear record of each issue and subsequent update also helps prevent the claim narrative from becoming detached from what the project team knew at the time.

04 The risk during live delivery.

Live project teams are required to maintain progress, manage relationships and resolve operational problems, often while the cause or extent of disruption remains uncertain. In that environment, a formal notice may be delayed because it appears confrontational, because the event is still being investigated or because the commercial consequences are assumed to be matters for the final account. Those decisions can create avoidable exposure: a loss and expense claim requires an entitlement route as well as evidence linking the relevant event to delay, disruption and additional cost. A late or incomplete notification can therefore complicate both the contractual and factual sides of recovery.

Meeting minutes, early warnings, instructions and routine correspondence can help establish what each party knew and when it knew it, but they should not automatically be treated as substitutes for a notice required in a specified form or addressed to a particular recipient. The better approach is to align operational communication with contractual administration while keeping their distinct purposes clear. That means escalating potentially compensable events promptly, recording the decision on whether notice is needed and following the issue through as programme assessments and cost records become available.

LIVE ENTITLEMENT

Do not wait for the final account.

Early notices and developing particulars protect the contractual route while the consequences of delay or disruption are still being established.

05

Control the contractual requirements.

Commercial control starts with the executed contract, including its bespoke amendments, rather than an assumption about what a familiar standard form usually requires. Before delivery begins, the team should identify notice triggers, deadlines, prescribed recipients, required content and any obligation to provide continuing particulars or updates. The loss and expense procedure should then be considered alongside extension of time, variation, payment and final-account provisions so that a single event is not dealt with under one mechanism while a separate contractual requirement is overlooked.

A project-specific notice register turns that review into a working control. For each material event, it can record the relevant clause, trigger date, deadline, notice recipient, issue and receipt evidence, outstanding particulars and the individual responsible for follow-up. Reviewing the register alongside programme, change and payment matters each week makes approaching obligations visible while the team can still act. It also creates a readily accessible record of contractual compliance for later valuation discussions, final-account negotiations or adjudication preparation, without relying on a retrospective search through scattered correspondence.

06

Build the record as events develop.

A recoverable claim must connect the event, its effect on the works and the resulting financial consequence. Programme updates, site diaries, labour and plant records, instructions, photographs, RFIs, meeting minutes, correspondence and valuation material each provide part of that picture. The construction team may be able to explain how progress was affected while the commercial team can identify the expenditure incurred, but neither account is complete unless the contractual notices and contemporaneous records show how those points relate. Evidence should therefore be assembled as events unfold, not reconstructed only when a final account or adjudication is imminent.

For each significant event, the project file should build a continuous chronology from notification and instruction through programme response, resource effects and the costs said to have followed. That chronology helps distinguish expenditure attributable to the event from costs the contractor would have incurred in any case, and makes it easier to test competing explanations before they harden into a dispute. When entitlement, notices, particulars and supporting records are managed together during delivery, a later submission can concentrate on explaining and valuing an established position rather than attempting to repair missing links in the evidence.

EVIDENCE CONTROL

Connect the event to the cost.

A coherent record links each notified event to its programme effects and demonstrable cost consequences, strengthening both entitlement and valuation.

LEGALBUILD VIEW

Recovery begins with the contractual route.

ISG v FK reinforces a central commercial point: loss and expense recovery is not secured by proving additional cost in isolation, but by preserving the contractual route to that cost while the works are live. Notices, particulars, programme records, cost evidence and correspondence should operate as one connected record, enabling the contractor to explain both why it is entitled to recover and how the claimed amount arises. When those elements are late, incomplete or fragmented, the paying party has greater scope to challenge compliance, causation and valuation.

Contractors are better placed when the notice machinery is understood at mobilisation, deadlines are actively controlled and supporting evidence is developed alongside each event. This is not simply a matter of producing more paperwork: it is the disciplined connection of contractual obligations, live project decisions and measured commercial consequences. A properly maintained record gives the contractor a clearer basis for negotiation and, where necessary, a more coherent position in adjudication.

POSITION PRINCIPLE

Manage loss and expense as a live entitlement process, not a retrospective claim-writing exercise.

Case reference: *ISG Retail Ltd v FK Construction Ltd* [2024] EWHC 878 (TCC), Technology and Construction Court, 18 April 2024.