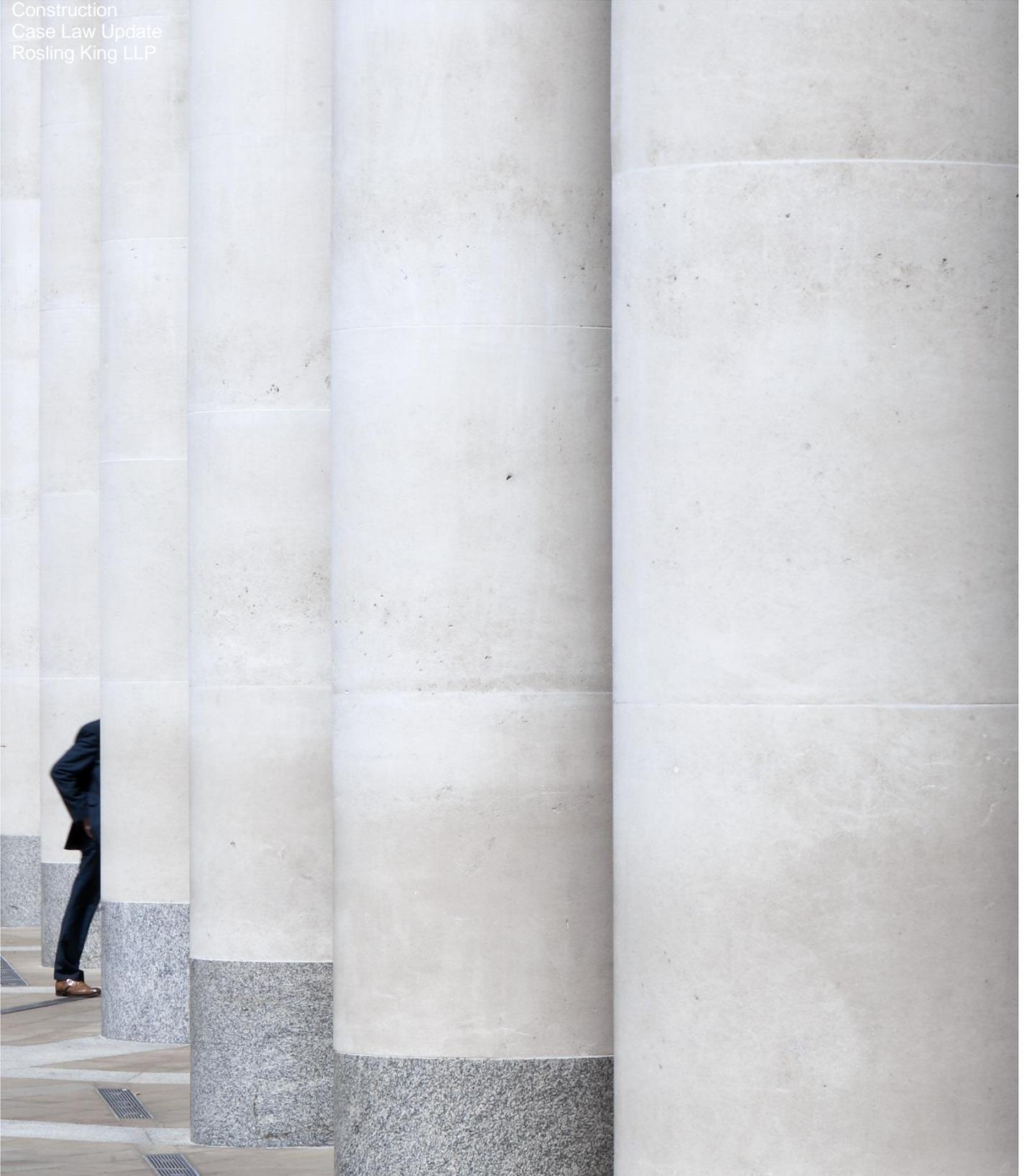


Construction
Case Law Update
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The Technology and Construction Court has recently held that a building contractor's cause of action in tort against negligent sub-contractors generally accrues on or before the date of practical completion, and that a failed assignment did not create a trust for the benefit of the intended assignee.

The Facts

Birse Developments Ltd ('Birse') was instructed to design and build a warehouse in Rugby. Birse employed a number of consultants and sub-contractors to assist with the design and construction, including Stuarts Industrial Flooring Ltd ('Stuarts'); Jubb & Partners ('Jubb'); and Geofirma Soils Engineering Ltd ('Geofirma').

The warehouse was completed on 18 September 1998. Following completion, the warehouse was let to Co-Operative Retail Services Ltd ('Co-Op Retail'). Birse and Jubb provided collateral warranties in favour of Co-Op Retail. Jubb's collateral warranty provided that Co-Op Retail could assign the benefit of the leasehold agreement on two occasions, however no further assignment could take place without its consent.

Co-Op Retail later assigned the benefit of Jubb's collateral warranty to the Co-Operative Group Ltd ('Co-Op Group'). Co-Op Group then assigned the collateral warranty and underlet the warehouse to Woolworths. The collateral warranty was assigned back to Co-Op Group following Woolworths' collapse. Consent was not sought from or provided by Jubb in respect of this third assignment.

Defects in the construction of the warehouse were first noticed in 2004. Co-Op Group commenced proceedings against Birse in September 2010, and Birse commenced proceedings against Stuarts, Jubb and Geofirma seeking to pass on any liability.

The Issues

The Court ordered a trial of the following preliminary issues:

- Whether Birse's causes of action in tort in relation to the claim against Jubb and Geofirma were time barred pursuant to section 2 of the Limitation Act 1980.
- Whether the third assignment of Jubb's collateral warranty from Woolworths to Co-Op Group without consent gave rise to a trust of the benefit of that warranty in favour of Co-Op Group.

The Decision

Stuart-Smith J decided that:

- Birse's causes of action in tort were time barred; and
- The assignment of Jubb's collateral warranty from Woolworths to Co-Op Group without consent did not create a trust.

Limitation

Geofirma and Jubb submitted that Birse's cause of action in tort accrued on handover of the relevant element of the works or on practical completion. Birse submitted that time only

began to accrue when the claim by Co-Op Group was intimated or commenced.

The Court identified two ways of deciding whether actionable damage had occurred. Firstly, the damaged asset rule, which assesses the date that liability is incurred, and therefore when limitation begins to run, by reference to the date an asset is damaged. However, neither the asset nor the damage needs to be physical, so it could refer to the date on which a financial liability arose. Secondly, the package of rights rule, which provides for accrual of a cause of action when the claimant acts upon negligent advice, and subsequently does not receive certain benefits to which it is entitled as a result of that negligence.

Applying the above tests, the Court held that the building contractor's rights under the contract were assets which were capable of being devalued by the sub-contractors' negligence. Further, the building contractor's legal position changed to its financial detriment when it transferred the project to the sub-contractors, because that was when the building contract was breached. Consequently the Court concluded that time began to run on practical completion at the latest.

Assignment

The Court summarised four principles in respect of assignment: (1) Whether a trust exists depends on the parties' intentions; (2) In the case of a failed assignment, the parties' intentions can be derived from that contract of assignment and the admissible facts; (3) If there is a clear intention to transfer the assignment and that can only be achieved through a trust, that is a factor in favour of finding a trust; and (4) Assignments and declarations of trust are "different legal creatures", an assignment transfers the legal and beneficial interest but a trust does not transfer legal title.

The Court concluded that there was no trust of the benefit of the collateral warranty in this case, taking into account the language of the assignment which was not suggestive of a trust and the absence of a prior express declaration of trust to hold the warranty for the benefit of the intended assignee.

Commentary

The judgment is interesting in its application of existing case law on the tort of negligence in a construction-specific scenario and helpful in confirming general principles that a contractor's cause of action accrues on or before practical completion, although wide scope remains for exceptions to this conclusion depending on the particular circumstances.

The case also provides welcome clarification that an ineffective assignment arising from a simple failure to comply with contractual requirements does not give rise to a trust. From a practical perspective, parties to commercial projects should be careful to ensure that formalities are complied with in relation to assignment of rights, and to avoid any misunderstanding about the nature of previous transfers between related companies.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.