



Friday, 21 June 2024

## Weekly Construction Law Review

Selected from our Daily  
Bulletins covering Construction

### Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

### Executive Summary (One Minute Read)

**Rizk v Basseal** (FCA) - builder's labourer/carpenter who provided services in house renovations was not an employee

**M. & S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd** (NSWCA) - summonses stated a wrong date for commission of an environmental offence, which was before the relevant section commenced - primary judge erred by dismissing the summonses and refusing leave to amend the date



## HABEAS CANEM

Small dog, big surf



# Benchmark

## Summaries With Link (Five Minute Read)

### **Rizk v Basseal [2024] FCA 647**

Federal Court of Australia

Shariff J

Employment law - the appellant was a builder's labourer and carpenter who had assisted with house renovations - he claimed that he had been an employee and that he was underpaid as a result of various alleged contraventions of the *Fair Work Act 2009* (Cth) - the primary judge was not satisfied that the appellant was an employee and dismissed the proceedings - the appellant appealed - held: then appeal was an appeal by way of rehearing and the appellant had to demonstrate error of law or fact on the part of the primary judge - making a finding whether a worker is an employee is not an exercise in, or akin to, discretionary decision-making - although there may be evaluation involved, the worker is either an employee or an independent contractor - the appropriate standard of review in this case was therefore the "correctness standard" set out in authorities such as *Warren v Coombes* (1979) 142 CLR 531 - however, the appellant did not challenge any of the findings made by the primary judge as to his credit and reliability, or the finding that certain documentary evidence which he tendered was unreliable - the Court therefore proceeded on the basis that the primary judge had all the advantages of making an assessment of the evidence at trial, noting that findings of fact based on the credibility of witnesses can only be reversed by an appellate court "in exceptional cases" - the Court therefore had to do a real review of the evidence that was before the primary judge but noting that the primary judge enjoyed all the advantages of being the trial judge - where there is no written contract, the identification of the parties' contractual rights and duties must proceed somewhat differently from where there is a written contract, but the fundamental task remains the same: the parties' contractual rights and obligations are to be ascertained and characterised - on the evidence before the primary judge and facts as found, once the appellant accepted the engagement, he decided which days to work, when to work on those days and for how long - the primary judge had not failed to consider and apply binding authority - appeal dismissed.

[Rizk](#)

[From Benchmark Friday, 21 June 2024]

### **M. & S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd [2024] NSWCA 151**

Ward P, Mitchelmore JA, Preston CJ of LEC

Environmental law - M&S commenced proceedings, charging the defendants with each committing an offence against s144AAA of the *Protection of the Environment Operations Act 1997* (NSW) by unlawfully disposing of asbestos waste - the summonses stated that the offence was committed during a particular period - this period was before the Act had been amended to add s144AAA - M&S sought to amend the summonses to alleged breaches after s144AAA commenced, and the defendants applied to have the summonses dismissed - the primary judge dismissed the summonses - by two applications, M&S sought to appeal from and sought review of the primary judge's decision - held: s15(2) and s16(1) and (2) of the *Criminal Procedure Act*

1986 (Cth) provided that the summonses were not "bad, insufficient, void, erroneous or defective" on the ground that they stated time wrongly or stated an "impossible day", and that no objection could be taken to the summonses on the grounds of any alleged defect in substance or form - the general rule is that a statement in an indictment or other process by which criminal proceedings are commenced, including a summons, of the date on which the offence was committed is not a material matter, unless it is actually an essential part of the alleged offence - contrary to the primary judge's finding, the summonses did disclose an offence known to law, and so were not nullities for failing to do so - the stated date of the offence may have been "an impossible day" on which to commit the offence, but that did not make the offence one that is now not known to the law - the primary judge erred in deciding to dismiss M&S's notice of motion seeking leave to amend the summonses - appeal allowed.

[View Decision](#)

[From Benchmark Friday, 21 June 2024]

# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**Food and Drug Administration v Alliance for Hippocratic Medicine** (SCOTUS) - Plaintiff pro-life doctors and medical associations challenged Food and Drug Administration (FDA) decision to relax prescribing restrictions on a drug used to terminate pregnancies. The Court held the plaintiffs lacked standing to challenge the FDA decision

### Summaries With Link (Five Minute Read)

**Food and Drug Administration v Alliance for Hippocratic Medicine [2024] 602 US \_\_\_\_**  
Supreme Court of the United States

In 2021, the Food and Drug Administration (FDA) relaxed regulations for prescribing mifepristone, an abortion drug, to make the drug more accessible to women. The plaintiffs, consisting of pro-life doctors and medical associations, brought suit, alleging that the FDA regulations violated the *Administrative Procedure Act*. The District Court granted plaintiffs an injunction. The Court of Appeals found that plaintiffs had standing to sue and were likely to win on the merits. Reversing the lower courts, a unanimous Supreme Court held that the doctors and medical societies lacked standing to bring suit. Article III of the US Constitution limits the jurisdiction of federal courts to actual cases and controversies. The Court said that this is a matter of separation of powers. General complaints about how the government conducts its business are matters for the legislative and executive branches, not the judiciary. To establish standing, a plaintiff must demonstrate that (1) the plaintiff will likely suffer an injury in fact; (2) that the injury would likely be caused by the defendant; and (3) that the injury can be redressed by judicial relief. The plaintiffs are pro-life and do not prescribe the abortion drug. Nothing contained in the FDA regulations requires doctors to prescribe this drug. In short, the plaintiffs are acting to restrict the availability of the drug to others. While plaintiffs argued that they have suffered injury because doctors may suffer conscience objections when forced to perform abortions or perform abortion related treatment, the argument failed because federal conscience laws explicitly protect doctors from being required to perform abortions or other treatment that violates their consciences. The Court also rejected arguments that, if plaintiffs were not allowed to sue, then no one would have standing to challenge the FDA's actions. The Court said that even if this were true, it could not create standing and that some issues must be dealt with through the political and democratic processes and not the courts.

[Food and Drug Administration](#)



## Poem for Friday

**"Hope" is the thing with feathers (314)**

**By** Emily Dickinson (10 December, 1830-15 May, 1886)

Hope is the thing with feathers -  
That perches in the soul -  
And sings the tune without the words -  
And never stops - at all -

And sweetest - in the Gale - is heard -  
And sore must be the storm -  
That could abash the little Bird  
That kept so many warm -

I've heard it in the chilliest land -  
And on the strangest Sea -  
Yet - never - in Extremity,  
It asked a crumb - of me.

Emily Dickinson [https://en.wikipedia.org/wiki/Emily\\_Dickinson](https://en.wikipedia.org/wiki/Emily_Dickinson)

Emily Dickinson Museum [https://en.wikipedia.org/wiki/Emily\\_Dickinson\\_Museum](https://en.wikipedia.org/wiki/Emily_Dickinson_Museum)

Hope is the thing with feathers, sung by Nazareth College Treble Choir, Linehan Chapel,  
Nazareth College

<https://www.youtube.com/watch?v=gDlSo4hEzmE>

Recitation by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada.

Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir

# Benchmark

Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

[Click Here to access our Benchmark Search Engine](#)