

AUSTRALIA / JUDGMENT

DLaw Pty Ltd v Croft Developments Pty Ltd

[2026] NSWCA 205**COURT**

Court of Appeal

DECIDED

25 September 2026

BEFORE

Kirk JA, Stern JA and McHugh JA

CASE / FILE NUMBER

2026/00134711

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Source record**Court of Appeal****Supreme Court****New South Wales****Medium Neutral Citation:** DLaw Pty Ltd v Croft Developments Pty Ltd [2026] NSWCA 205**Hearing dates:** 15 September 2026**Date of orders:** 25 September 2026**Decision date:** 25 September 2026**Before:** Kirk JA, Stern JA and McHugh JA**Decision:** Application for leave to appeal refused with costs.

Catchwords: APPEALS – Leave to appeal – judicial review – whether there is power to amend an application for costs assessment – issue of public importance – costs assessment of amended application completed and the subject of a review from which an appeal would lie – application both too late and premature – fragmentation of proceedings – unclear whether relief sought has utility – leave to appeal refused

Legislation Cited: Legal Profession Uniform Law Application Act 2014 (NSW), ss 73, 83, 85, 89, 93B
Legal Profession Uniform Law Application Act Regulations 2015 (NSW), reg 37
Legal Profession Uniform Law (NSW), ss 169, 193, 198
Supreme Court Act 1970 (NSW), s 69
Uniform Civil Procedure Rules 2005 (NSW), r 49.19

Cases Cited:	Cheng v Motor Yacht Sales Australia Pty Ltd t/a Boutique Boat Company (2022) 108 NSWLR 342; [2022] NSWCA 118 Chief of Navy v Angre (2016) 244 FCR 457; [2016] FCAFC 171 Diamond Conway Lawyers v Hale [2026] NSWSC 463 Fong BHNF Fong v Weller [2024] NSWCA 46 John Goubran & Associates Pty Ltd v The Owners – Strata Plan 57150 [2026] NSWCA 188 Kirk v Industrial Relations Commission of New South Wales (2010) 239 CLR 531; [2010] HCA 1 LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2024) 280 CLR 321; [2024] HCA 12 Wende v Horwath (NSW) Pty Ltd (2014) 86 NSWLR 674; [2014] NSWCA 170 Weston Energy Pty Ltd v National Ceramic Industries Australia Pty Ltd (2026) 400 FLR 323; [2026] NSWCA 7 Westwood Capital Pty Ltd v Croatian Club Ltd [2026] NSWSC 534
Category:	Principal judgment
Parties:	DLAW Pty Ltd (Applicant) Croft Developments Pty Ltd (First Respondent) Manager, Costs Assessment (Second Respondent)
Representation:	
Counsel:	J Doyle (Sol) (Applicant) P Doyle Gray (First Respondent)
Solicitors:	Houston & Associates (Applicant) M Nguyen (First Respondent) Crown Solicitor for NSW (Second Respondent)
File Number(s):	2026/00134711
Publication restriction:	Nil Decision under appeal
Court or tribunal:	Supreme Court
Jurisdiction:	Common Law
Citation:	[2026] NSWSC 191
Date of Decision:	11 March 2026
Before:	Ierace J
File Number(s):	2025/243922 [Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

KIRK JA: I agree with McHugh JA.

STERN JA: I agree with McHugh JA.

McHUGH JA: The applicant (DLaw) is a law practice. The first respondent (Croft) is the applicant's former client. The second respondent is the Manager, Costs Assessment appointed pursuant to s 93B(1) of the Legal Profession Uniform Law Application Act 2014 (NSW) (Application Act). DLaw issued a number of invoices to Croft for legal services provided over an extended period. Croft paid the invoices as they were issued, without seeking to have the legal costs payable under the invoices assessed prior to payment. Croft later applied pursuant to s 198 of the Legal Profession Uniform Law (NSW) (Uniform Law) for assessment of the legal costs payable to DLaw under each of the invoices that had been issued up until that point (the Original Application). DLaw subsequently issued further invoices, including in response to a "direction" made by the costs assessor, Mr Bentley. Croft amended its application to include the further invoices. The Manager accepted the amended application, referring it to the costs assessor who went on to determine it.

The applicant brought proceedings in the Common Law Division of the Supreme Court of New South Wales, principally seeking declaratory relief (in the nature of administrative law relief) concerning the validity of the amended application and the Manager's decision to refer it to the costs assessor. The primary judge, Ierace J, held that there is an implied power to amend an application for assessment under s 198 of the Uniform Law: *DLAW Pty Ltd v Croft Developments Pty Ltd* [2026] NSWSC 191 (PJ). The applicant now seeks leave to appeal from a decision. The applicant's essential contention in this Court is that there is no power to amend an application for assessment of costs, such that Croft's amended application in this case was invalid.

Two related proceedings should be noted.

DLaw commenced other proceedings in the Common Law Division, also seeking judicial review of the cost assessment process that was to be conducted by Mr Bentley. Mr Bentley is a party to those proceedings while the Manager is not. In those proceedings DLaw seeks to agitate issues other than the power of amendment, as discussed below.

DLaw also sought review of Mr Bentley's determination pursuant to s 83 of the Application Act. (As to the nature of such a review, see *Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674; [2014] NSWCA 170 at [157]-[166]; *Westwood Capital Pty Ltd v Croatian Club Ltd* [2026] NSWSC 534 at [39]-[52] (Mitchelmore JA)). The Court was informed that the review panel has completed its determination but not yet published it because the relevant fee has not been paid.

The principles applicable to the grant of leave are not in dispute. The applicant invoked the well known formulation, recently set out in *Weston Energy Pty Ltd v National Ceramic Industries Australia Pty Ltd* (2026) 400 FLR 323; [2026] NSWCA 7 at [93] (quoting *Cheng v Motor Yacht Sales Australia Pty Ltd t/a Boutique Boat Company* (2022) 108 NSWLR 342; [2022] NSWCA 118 at [15]): "As has regularly been pointed out in decisions of this Court, a grant of leave to appeal generally

requires the identification of an issue of principle, a question of public importance or a reasonably clear injustice going beyond something that is merely arguable ...”.

However, as I recently observed in *John Goubran & Associates Pty Ltd v The Owners – Strata Plan 57150* [2026] NSWCA 188 at [38]-[39] (Free JA and Price AJA agreeing), that formulation is not to be treated like a statute, and the existence of a reasonably clear injustice (or, for that matter, a question of principle or public importance) will not automatically require a grant of leave:

[38] First, the familiar formulation referred to in *Weston Energy* should not be treated like a statute. As Kirk JA and I said in *Mohareb v Local Court of New South Wales* [2024] NSWCA 235, after referring to cases adopting substantially the same formulation as that in *Weston Energy*:

“[25] ... It is commonly sufficient to refer to those factors in deciding whether to grant leave to appeal. But as is implicit in the use of “usually” and “generally”, whilst those factors are important they are neither exhaustive nor necessarily determinative. Thus this Court has also said, for example, that “leave should be granted only where there are substantial reasons to allow an appellate review ... such as where there is an error of principle which, if uncorrected, will result in substantial injustice”: Collier v Lancer (No 2) [2013] NSWCA 186 at [7] (citations omitted); see also Rodi v Gelonesi [2012] NSWCA 424 at [24]; DEF v Trappett [2017] NSWCA 163 at [25].

[26] There are no “rigid and exhaustive criteria” as the “circumstances of different cases are infinitely various”: *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* [1981] HCA 39; (1981) 148 CLR 170 at 177. The ultimate issue is the interests of justice, taking into account both the circumstances of the particular case and broader interests in resolving matters of public importance and clarifying the law. A range of considerations may be relevant.

[27] For example, it has often been said that particular caution is called for in granting leave to appeal a decision pertaining to practice and procedure: eg *Adam P Brown* at 177; *PPK Willoughby Pty Ltd v Baird* [2019] NSWCA 48 at [3].

[28] As with any exercise of a discretionary power by a court, the utility of what is sought may be significant.

[29] The Court has also been cautious about granting leave to appeal where only small monetary sums are involved: see eg *Daily Examiner Pty Ltd v Mundine* [2011] NSWCA 126 at [4]-[5]; *Rodi* at [25]; *Toth v State of New South Wales* [2022] NSWCA 185 at [6]-[14]. The Court said the following in *Toth*:

[14] Leaving aside cases raising issues of principle or public importance, it will be rare that justice will require that an application for leave to appeal involving a small amount will merit the expenditure and use of resources in having an appeal determined by this Court.

- [30] As referred to in Toth at [9], s 60 of the Civil Procedure Act 2005 (NSW) may be relevant. It requires that “the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute”.
- [31] More broadly, the matters addressed in ss 56-58 of the Civil Procedure Act may also be pertinent. ...”
- [39] It follows that even in cases where it can be said that the judgment or order from which leave to appeal is sought gave rise to a reasonably clear injustice, it does not automatically follow that leave will be granted. Other factors may militate against the grant of leave, and may be determinative in a particular case.

The underlying question in this application for leave to appeal is whether, as the Manager, the costs assessor and the primary judge determined, there was power to amend Croft’s Original Application to include legal costs payable under invoices which were not issued until after that Application had been made. That question is of some importance for the practical operation of the system of costs assessment in this State. There is no express power of amendment in the costs assessment regime. Authority on the question is scant. And the evidence indicates that the Manager has a practice of accepting amended applications for assessment of costs.

The resolution of that underlying question is not immediately clear. At least three possibilities were canvassed at the hearing of this matter in potential support of a power of amendment.

The first respondent submitted that reg 37 of the Legal Profession Uniform Law Application Act Regulations 2015 (NSW) confers on a costs assessor a power to require a party to a costs assessment to provide a further bill of costs. Incidental to this power, construed in light of the objectives identified in s 169 of the Uniform Law, may be a power to amend the application to include legal costs under such further invoices.

As the primary judge held at PJ [40], a power to amend may be implied as a matter of construction of the statutory scheme.

As the first respondent embraced at the hearing, a power to amend may be an aspect of the implied incidental power of either the Manager or the costs assessor respectively to refer or to determine costs applications under the statutory scheme.

Notwithstanding the importance of the underlying question, which is plainly arguable, leave to appeal should be refused. The present application is both too late and premature. The proceedings have already become unnecessarily fragmented, and the relief sought may well lack utility in any event.

The application is too late because it arises out of what was in substance a proceeding for judicial review of a threshold question as to the scope of the legal costs that were to be assessed by Mr Bentley. But Mr Bentley has given his determination, and that determination has been reviewed.

Pursuant to Division 6 of the Application Act, upon publication of the review panel's decision, the parties will have rights of appeal that are much broader in scope than judicial review. In particular, s 89 provides:

89 Appeal on matters of law and fact

- (1) A party to a costs assessment that has been the subject of a review under this Part may appeal against a decision of the review panel concerned to—
 - (a) the District Court, in accordance with the rules of the District Court, but only with the leave of the Court if the amount of costs in dispute is less than \$25,000, or
 - (b) the Supreme Court, in accordance with the rules of the Supreme Court, but only with the leave of the Court if the amount of costs in dispute is less than \$100,000.
- (2) The District Court or the Supreme Court (as the case requires) has all the functions of the review panel.
- (3) The Supreme Court may, on the hearing of an appeal or application for leave to appeal under this section, remit the matter to the District Court for determination by that Court in accordance with any decision of the Supreme Court and may make such other order in relation to the appeal as the Supreme Court thinks fit.
- (3A) The Supreme Court may, before the conclusion of any appeal or application for leave to appeal under this section in the District Court, order that the proceedings be removed into the Supreme Court.
- (4) An appeal is to be by way of a rehearing, and fresh evidence or evidence in addition to or in substitution for the evidence before the review panel or costs assessor may, with the leave of the Court, be given on the appeal.

The present application is premature because consideration of the issues arising out of Mr Bentley's costs assessment has become procedurally fragmented, and the utility of these proceedings may well be affected by the outcome of the other proceedings. There are currently on foot:

the present proceedings (to which the Manager but not Mr Bentley is a party), which seek to agitate the question whether there is any power of amendment;

the other proceedings in the Common Law Division (to which Mr Bentley but not the Manager is a party), which seek to agitate issues other than the power of amendment; those proceedings are listed for hearing in November 2026; and

the review panel proceedings which are completed (although the determination is as yet unpublished), which is liable to be appealed pursuant to Application Act s 89 as explained above.

It is far more appropriate for all issues arising out of the costs assessment process to be determined in the one proceeding, than for this Court to embark upon an examination of the power to amend an application for costs assessment in circumstances where other issues that may be relevant or that may overlap are to be determined in separate proceedings.

For example, one of the issues between the parties arises out of ss 198(3) and 193(2) of the Uniform Law. Section 198(3) relevantly provides that an application for assessment of legal costs under s 198 “must be made within 12 months after ... the bill was given to ... the client”. Many of the invoices which Croft submitted to assessment were issued more than 12 months before Croft made its s 198 application. However, s 193 provides:

193 Interim bills

- (1) A law practice may give a person an interim bill covering part only of the legal services the law practice was retained to provide.
- (2) Legal costs that are the subject of an interim bill may be assessed under Division 7, either at the time of the interim bill or at the time of the final bill, whether or not the interim bill has previously been assessed or paid.

Division 7 is headed “Costs assessment” and includes s 198. Croft relied on s 193(2) to argue that all of the invoices other than the last invoice it had received (i.e., “the final bill”) were “interim bill[s]” (“covering part only of the legal services the law practice was retained to provide”), and that the legal costs that were the subject of those invoices were therefore assessable without any extension of time under s 198(4). DLaw argues that there was a new retainer each month under the terms of its cost agreement with Crofts such that each monthly invoice was a “final” invoice in respect of a separate retainer. Alternatively, even if there was only one retainer, DLaw argues (but Croft appears to dispute) that one or other of the further invoices it issued was the “final invoice” for purposes of s 193(2). Those further invoices were not the subject of Croft’s Original Application and, on DLaw’s case, there was no power to amend the Original Application. On DLaw’s case, the final invoice is thus not the subject of any application for costs assessment; s 193(2) is not engaged; and there is no power to assess the legal costs payable under any of the “interim bills” issued more than 12 months before the making of the Original Application.

These questions are not before this Court on the present application for leave to appeal but some or all of the s 193 questions appear to have been expressly put in issue in the applicant’s other proceedings in the Common Law Division of the Court. Questions relating to the construction of s 193 may have a bearing on the question whether the statutory scheme confers a power to amend. Moreover, as set out below, if the s 193 issues are determined adversely to the applicant, it would appear that the present proceedings as a whole lack any real purpose in circumstances where the same result could be obtained now (subject to an extension of time under s 198(4)) without any “amended” application.

It is also relevant to the issue of leave that even if leave were granted, relief in judicial review proceedings is discretionary. Where proceedings in a statutory tribunal have involved alleged errors which would be capable of correction through an available statutory procedure, the risk that judicial review will result in fragmentation of proceedings will loom large in the exercise of that discretion. As the Full Court of the Federal Court explained in *Chief of Navy v Angre* (2016) 244 FCR 457; [2016] FCAFC 171 at [83]-[84]:

[83] In some circumstances, there may be utility, or necessity, in the Court's supervisory jurisdiction on judicial review being exercised notwithstanding the "decision" under review is but a step in the process towards the making of a final decision by a statutory tribunal. A decision of that character may not be reviewable under s 5 the AD(JR) Act on well-established principles, although s 6 of the AD(JR) Act may be applicable. Relief under s 39B of the Judiciary Act may be available if the interim decision affects rights and interests. However, it will not ordinarily be appropriate to fragment ongoing proceedings in a statutory tribunal and to exercise the Court's supervisory jurisdiction unless there is a real prospect of a person's rights and interests being affected in a way that would not be capable of correction on a statutory appeal from a final decision under a provision such as s 52. I emphasise that such circumstances will be out of the ordinary.

[84] In *Commissioner of Taxation v Cancer and Bowel Research Association* [2013] FCAFC 140; 305 ALR 534 at [13] the Full Court expressed, in terms with which I respectfully agree, the correct approach to an application for judicial review under s 39B in such circumstances:

"The grant of relief pursuant to 39B of the Judiciary Act is a matter of discretion. In Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, Gaudron and Gummow JJ at [55] noted that:

'Some guidance, though it cannot be exhaustive, as to the circumstances which may attract an exercise of discretion adverse to an applicant is indicated in the following passage from the judgment of Latham CJ, Rich, Dixon, McTiernan and Webb JJ in a mandamus case, *R v Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust) Limited*. Their Honours said [(1949) 78 CLR 389 at 400];

For example the writ may not be granted if a more convenient and satisfactory remedy exists: if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or to which the Court towards the application is made. The Court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that remedy should be withheld

“Ordinarily, the availability of appeal as an avenue to correct an error of law would be a powerful discretionary reason not to grant certiorari. Ordinarily also, a court would be reluctant to entertain a judicial review application where the challenge is to an intermediate direction or determination made along the way to reaching an ultimate determination of the substantive issue. As the cases illustrate, these principles ordinarily should lead the Court to exercise its discretion to refuse relief under s 39B of the Judiciary Act.”

(citations omitted)

As noted above, in this case there is a right of review to a review panel from the determination of the cost assessor, and, from the review panel, a right of appeal to either the District Court or the Supreme Court. Moreover, there is a facility under s 93B(3) of the Application Act to review decisions of the Manager in the same manner as decisions of other registrars are reviewable, which engages Uniform Civil Procedure Rules 2005 (NSW) r 49.19(1): see *Diamond Conway Lawyers v Hale* [2026] NSWSC 463 at [23]-[25]. Yet the applicant disclaimed reliance in these proceedings on s 93B as founding the jurisdiction of the Supreme Court, choosing to rely only on the supervisory jurisdiction. It follows that there were, and are, avenues available to correct any error which would not involve the fragmentation of proceedings in the manner sought by the applicant. The applicant has actually pursued one of those avenues. A basis for exercising the discretion to decline to grant relief in judicial review cases is if there is another equally effective and convenient remedy which the party could have pursued: *Fong BHNF Fong v Weller* [2024] NSWCA 46 at [29].

A further consequence of the jurisdiction in which the applicant chose to proceed is that, to the extent that the applicant invokes s 69 of the Supreme Court Act 1970 (NSW), it must demonstrate jurisdictional error, or, possibly error of law on the face of the record. It is not clear whether error of law on the face of the record would suffice because of s 73 of the Application Act, which provides that “a costs determination is binding on all parties and no appeal or other assessment lies in respect of the determination, except as provided by this Part”; cf *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; [2010] HCA 1. Moreover, no attention was paid in this Court to whether the alleged error was jurisdictional or satisfied any requirement of materiality: see *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321; [2024] HCA 12 at [5]-[7]. Alternatively, to the extent that the jurisdiction the applicant invokes is merely declaratory, its utility is far from clear in light of the matters below.

Another matter which would be relevant to the exercise of the discretion to grant relief by way of judicial review, and thus is relevant to the question of leave, is the utility of the relief sought. In this case, there appears to be a real prospect that the declaratory relief sought will be of no utility, in circumstances where the costs assessor is not joined as a party and there is an extant determination by the costs assessor which is not sought to be quashed. As the applicant accepted in oral argument, relief in these proceedings will not formally bind the costs assessor. Nor would it bind the review panel. And the role of both appears in substance to have come to an end, so a declaratory judgment would not have some prophylactic effect as regards their future decisions.

The as yet unknown outcome of the review panel's determination may also be relevant to the utility of the present proposed appeal.

A final matter relevant to leave arises out of the fragmentation of the proceedings. The practical utility of the present proposed appeal (i.e., whether the existence of a power of amendment actually matters in all the circumstances) depends on the outcome of issues to be determined in other proceedings. In the event that the s 193 issues are determined adversely to the applicant (which properly falls to be determined in other proceedings), it does not appear to be controversial that the first respondent's Original Application would not have required an extension of time. Nor (making the same assumption about s 193, and subject to payment of the requisite fee — a matter of some controversy which need not be resolved) would there have been any reason why assessment of all the first respondent's costs could not, at the time of the "amendment" of its application, have been sought in a fresh application without any extension of time being necessary. Nor (making the same assumptions) does there appear to be any substantial likelihood that, were the first respondent to make a fresh application now, any necessary extension of time would be refused, given that the Manager (on this hypothesis) had wrongly accepted the amendment.

Thus, depending on the outcome of the s 193 issues, it may be that precisely the same result as obtained by reason of the amendment (i.e., the assessment of all of the invoices in a single costs assessment) still can be achieved, even if there was no power of amendment. The utility of the present proposed appeal is thus dependent on the outcome of the s 193 issues, and the fact that those issues would not be before the Court on the proposed appeal in these proceedings militates strongly against a grant of leave.

It follows from the above matters that, notwithstanding the existence of an issue of some public importance, the order I propose is:

Application for leave to appeal refused with costs.

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