



HIGH COURT OF AUSTRALIA

Public Information Officer

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KENNETH JOHN FOOTS v SOUTHERN CROSS MINE MANAGEMENT PTY LTD,
ENSHAM RESOURCES PTY LTD, BLIGH COAL LIMITED, IDEMITSU QUEENSLAND PTY
LTD, EPDC (AUSTRALIA) PTY LTD, LG INTERNATIONAL (AUSTRALIA) PTY LTD,
FOOTS PTY LTD, LITTLE DIGGER MINING LIMITED, NORMA AGNES FOOTS AND
KENNETH JOSEPH HILL

A costs order made against a bankrupt after he entered bankruptcy is not a debt provable in his bankruptcy, even though it related to a damages award made before the bankruptcy, the High Court of Australia held today.

In the Queensland Supreme Court in 2005, Justice Richard Chesterman heard a complex multi-party action concerning the ownership of machinery at an open-cut coal mine. On 26 August he gave judgment for Ensham in its cross-claim against Southern Cross Mine Management and Mr Foots, who had been Ensham's chief executive officer. Justice Chesterman found that Mr Foots had breached his fiduciary and contractual duties of good faith towards Ensham, and that he had also been liable for breaches by Southern Cross of section 52 of the *Trade Practices Act* relating to misleading and deceptive conduct. On 1 September 2005, Justice Chesterman awarded damages of \$2.46 million to Ensham. Two weeks later, Mr Foots entered bankruptcy.

On 22 November 2005, Justice Chesterman heard argument as to whether a stay under section 58(3) of the *Bankruptcy Act* applied so that Ensham would require leave of the Federal Court to take a fresh step in proceedings, in this case applying for costs, where the fresh step was in respect of a provable debt. If the costs order was a debt or liability provable in his bankruptcy within the meaning of section 82(1) of the *Bankruptcy Act*, the proceedings in which the costs order was made would be stayed under section 58(3). If the costs order was not a provable debt or liability Mr Foots remains liable to meet those costs after his discharge from bankruptcy. A release from bankruptcy only applies to debts provable in the bankruptcy. Justice Chesterman held that since the costs order would not be a debt provable in Mr Foots's bankruptcy, section 58(3) was no impediment to his making a costs order. On 3 February 2006, Justice Chesterman ordered Mr Foots to pay Ensham's costs. Rather than awarding costs on the usual party-and-party basis, on application from Ensham Justice Chesterman awarded them on an indemnity basis in light of Mr Foots's wrongdoing. By majority, the Queensland Court of Appeal dismissed an appeal by Mr Foots.

In the High Court, he argued that the costs order was, in the terms of section 82 of the *Bankruptcy Act*, a debt or liability arising from the award of damages, an obligation incurred before his bankruptcy. Alternatively, Mr Foots submitted that the costs order was a liability incidental to a provable debt. The Court, by a 4-1 majority, rejected both arguments and dismissed the appeal. It held that the award of costs is discretionary, and arises independently of the entry of judgment against Mr Foots. The costs order fell outside section 82(1) because it was made after bankruptcy and was not a liability to which he was subject at the date of bankruptcy. Mr Foots was also not under a pre-existing obligation to pay costs until the order was made against him. The stay in section 58(3) of the Act therefore did not apply.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*