

FOOTS v. SOUTHERN CROSS MINE MANAGEMENT PTY LTD & ORS
(B26/2007)

Court appealed from: Court of Appeal, Supreme Court of Queensland

Date of grant of special leave: 24 April 2007

On 26 August 2005 the trial judge (Chesterman J) gave judgment in favour of the respondent against the appellant, Kenneth John Foots, and on 1 September 2005 made orders for damages against the appellant. On 15 September 2005 the appellant became bankrupt on the presentation of his own petition. On 22 November 2005 the trial judge heard argument as to whether section 58(3) of the *Bankruptcy Act* 1966 (Cth) (“the Act”) applied such that the respondent required the leave of the Federal Court to take a fresh step in proceedings (being the application by the respondent for an order for costs) where the fresh step was “in respect of a provable debt”. The trial judge concluded that section 58 of the Act did not apply, that the leave of the Federal Court was not required in order to seek costs. The trial judge then proceeded to consider whether to grant leave to the respondent to apply for a costs order against the appellant, on the basis that rule 72(1) of the *Uniform Civil Procedures Rules* 1999 (Qld) applied, which requires leave for a party wishing to take a step in a proceeding against another party who has become bankrupt. The trial judge concluded that the respondent’s application for a costs order was such a “further step in the proceeding”, and granted leave to seek costs.

The Court of Appeal (Jerrard and Holmes JJA; Mullins J dissenting) by majority dismissed the appeal, concluding that costs ordered against the appellant after his bankruptcy would not be a provable debt in the bankruptcy, even where those costs are incurred in respect of a “provable debt” and in which judgment had been pronounced before bankruptcy. Mullins J would have allowed the appeal on the basis that costs which were incidental to the judgment sum awarded against the appellant prior to his bankruptcy were a “provable debt”, and that therefore the leave of the Federal Court was required before the costs order could be made.

The grounds of appeal include:

- Whether an order for indemnity costs made after the appellant became bankrupt and made in proceedings in which judgment was given before he became bankrupt is a “provable debt” in the appellant’s bankruptcy, within the meaning of section 58 of the *Bankruptcy Act* 1966.