DISTRICT COURT OF QUEENSLAND

CITATION:	*Keene v R & K Bulk Logistics Pty Ltd & Ors* [2015] QDC 274
PARTIES:	**CYNTHIA MARGARET KEENE AS EXECUTOR OF THE ESTATE OF DAVID BARRY KEENE, CYNTHIA MARGARET KEENE & JASON SCOTT KEENE** **(applicants/plaintiffs)** **v** **R & K BULK LOGISTICS PTY LTD ACN 113 289 017** **(first respondent/first defendant)** **and** **RUSSELL STRASBURG** **(second respondent/second defendant)** **and** **KAREN STRASBURG** **(third respondent/third defendant)**
FILE NO/S:	55/13
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	30 October 2015 *ex tempore*
DELIVERED AT:	Toowoomba
HEARING DATE:	30 October 2015
JUDGE:	Samios DCJ
ORDER:	**THE ORDER OF THE COURT IS THAT:** **By consent:-** **1. The matter be adjourned to the call over of the Toowoomba District Court on 1 December 2015 for trial listing.** **2. The Plaintiffs file any Amended Reply within 28 days of this Order;** **3. The parties attend to disclosure within 28 days after the service of any Amended Reply;**

4. The parties file any interlocutory applications within 28 days after the service of any amended Reply;

5. The parties attend mediation within 28 days after any interlocutory hearings in accordance with Order 4.

Further, it is ordered

6. The costs of, and incidental to, the Application are to be paid by the Defendants on an indemnity basis.

CATCHWORDS:	PRACTICE – CERTIFICATE OF READINESS – COSTS – DISCLOSURE – where the plaintiffs brought an application seeking an order that the Court dispense with the signature of the defendants to the request for trial date – where the defendants resisted the matter being listed for trial – where the defendants alleged that the plaintiffs should have but did not plead mitigation of loss – where the defendants alleged that as a result of the failure of the plaintiffs to plead mitigation of loss the plaintiffs have not made complete disclosure to the defendants of documents relevant to the plaintiffs' action – whether the obligation to plead mitigation of loss or failure to mitigate loss rests on plaintiffs or defendants – whether the costs of and incidental to the application should be on the indemnity basis **Legislation** *Uniform Civil Procedure Rules 1999* (Qld) r 155, r 157
COUNSEL:	Mr S Trewavas (solicitor) for the applicants/plaintiffs Mr D Love (solicitor) for the respondents/defendants
SOLICITORS:	Creevey Russell Lawyers for the applicants/plaintiffs Dale & Fallu Solicitors for the respondents/defendants

[1] HIS HONOUR: The plaintiff is making claims against three defendants – against the first defendant for the sum of $3000 in rental moneys owing pursuant to an agreement in writing. In relation to the plaintiff Jason Scott Keene, against the first defendant for $158,349.75 for salary and superannuation moneys owing by the first defendant pursuant to an agreement in writing. And against the second and third defendants, the plaintiffs ask for $3000 being moneys owing pursuant to a guarantee in writing. And

in relation again to the plaintiff Jason Scott Keene, he claims against the second and third defendants $158,349.75 being moneys owing pursuant to a guarantee in writing.

[2] These claims arise out of the sale by the plaintiffs to the first defendant of a business known as JD Livestock. One of the terms of that sale was that Jason Keene would be kept on and he would be paid certain moneys. Further, the first defendant would pay rent to the plaintiffs. The claim is that the rent's been unpaid and the moneys not paid to Jason Keene. The claims made by the plaintiffs are said to be supported by the – a guarantee. Initially, the defendants had filed a defence. While there are a number of admissions made in the defence, there is a denial of the – there was a denial that the contract of employment was breached and deny the rental claim. The guarantee is also denied.

[3] The plaintiffs have been desirous of progressing the claim so that it could be listed for trial. The application before me is an application by the plaintiffs seeking an order that the Court dispense with the signature of the defendants in regards to the request for trial date in the proceeding. From what I can see – and I am generalising – the plaintiffs and the defendant solicitors are in dispute about whether the plaintiffs have made complete disclosure of documents to the defendants. For the defendants' part, it seems from the evidence I have before me the defendants' resistance to the matter being listed for trial is because the defendants say the plaintiffs have not pleaded that they have mitigated their loss and that there would be other documents that would be relevant to that plea.

[4] For the plaintiff's part, they contend that the obligation to plead mitigation and failure to mitigate the loss rests with the defendant. An amended defence of the first, second and third defendants has been filed today which makes substantial amendments to the defendants' defence. However, that amended defence does not plead a failure on the part of the plaintiffs to mitigate loss. The defendants contend that the defendants are not obliged to plead a failure to mitigate the loss. Rather, the defendants contend that the plaintiffs are under the obligation to plead sufficient facts including what they have done by way of mitigation of the loss.

[5] In particular, the rules 155 and 157 are relied upon by the defendants. That is, rules 155 and 157 of the *UCPR*. Mr Trewavas, who appears for the plaintiffs, has cited to me extracts from *McGregor on Damages* and *Bullen and Leake on Principles of Pleading and Practice*. Both textbooks support the position that it is for the defendants to plead a failure to mitigate the loss. Mr Love, who appears for the defendants, submits that the *UCPR* rules have effected a change. The particular rule that I think needs to be considered is rule 155, sub-rule (4) of the *UCPR*. It provides:

> In addition, a party claiming damages must specifically plead any matter relating to the assessment of damages that, if not pleaded, may take an opposing party by surprise.

[6] Mr Love contends that it is for the plaintiffs to plead facts showing they have mitigated the loss. I am not overlooking other parts of rule 155 and rule 157 in considering what is to be the outcome of this dispute. In the end, I come to the view that rules 155 and 157 do not support the defendants' position on this application today. In particular, I do not accept that rule 155, sub-rule (4) requires the plaintiffs to plead facts relating to what might have been done by way of mitigation of the loss. Having come to that conclusion, it is clear that the correspondence between the parties

shows that the defendants have been contending for disclosure of documents that the plaintiffs were not required to provide. It was for that reason regarding that argument about the failure to mitigate loss that the defendants did not sign the request for trial date.

[7] The parties have sought to resolve the dispute to the extent they can and they are commended for doing so. I have in front of me an order. The parties consent to paragraphs 1, 2, 3, 4 and 5 of the order. Clearly, the order that they are prepared to consent to that the parties attend mediation is a very desirable order. This is a dispute that clearly should be, if it can be, resolved at a mediation. What has remained outstanding from my decision but it did require, in effect, considering the application in its entirety is that the plaintiffs contend that the order should be that the costs of and incidental to the application be paid by the defendants on an indemnity basis.

[8] The defendants contend that there is even an argument here that the plaintiffs pay their costs, although Mr Love conceded the order could be the other way. But there would not be an indemnity basis made to the costs order. He may have even intended to submit that there be no order to costs or the costs be costs in the cause. I'm not overlooking those possibilities. As I have come to the view that it was for the defendants to plead the failure to mitigate the loss, that position has meant that the plaintiffs have not been able to get the matter listed for trial. The application in that respect could not have been resisted. In addition, the defendants have been indicating a number of times that an amended defence was going to be prepared but it was only today that it was filed.

[9] Again, that is a step that the defendants have taken which has meant the plaintiffs could not get, as they were entitled to, the order sought in the application for the certificate of listing for trial be dispensed with. Of course, when indemnity costs are made, there should be some reason over and above the usual considerations to think that indemnity costs should be ordered. I come to the view that while the defendants have failed in their resisting the application to dispense with the certificate for listing and they've only lately filed their amended defence, that it makes me pause.

[10] However, I go on because there's no evidence for why the defendants have not been able to file their amended defence at a much earlier date rather than file it today after the chain of correspondence that has been going on for months. So it's for that reason, in the end, with some reluctance that I agree with the proposed costs order of the plaintiffs and therefore it will be ordered that the costs of and incidental to the application are to be paid by the defendants on an indemnity basis. There'll be an order as per the draft initialled by me and left with the papers. Yes. Nothing further, then?

[11] MR LOVE: There is one.

[12] HIS HONOUR: Yes.

[13] MR LOVE: And I apologise, your Honour. Given the way – given your finding, could I ask that my client have seven days to put in the mitigation? I have that in my – in another version of the draft. Myself and counsel discussed it and formed the view that I've put up which has obviously failed. So we're in a position to file that.

[14] HIS HONOUR: Well, you can go ahead and do that without any order from me, can you?

[15] MR TREWAVAS: Three-seven-seven, your Honour, of the *UCPR*. No trial – 377. No trial date's been set so he's free to - - -

[16] HIS HONOUR: Free to do what you like.

[17] MR TREWAVAS: We would just obviously seek an indulgence to obviously extend the timeframes in accordance with your Honour's orders.

[18] HIS HONOUR: Yes. Look, I - - -

[19] MR TREWAVAS: And I would think that my friend and I should be able to resolve that between ourselves, hopefully.

[20] HIS HONOUR: Yes. Yes. Well, you've done very well on one to five. But it was number six that's the sticky point.

[21] MR LOVE: Thank you, your Honour.

[22] HIS HONOUR: All right. No need to wait. Thank you very much.

[23] MR TREWAVAS: Thank you, your Honour.

[24] HIS HONOUR: Yes. Thank you.