SUPREME COURT OF QUEENSLAND

CITATION:	*McDermott v Manley & Anor* [2018] QSC 35
PARTIES:	**JOHN DAVID MCDERMOTT** (applicant) **v** **ALEXANDER MANLEY** (first respondent) **RACQ INSURANCE LIMITED** ACN 009 704 152 (second respondent)
FILE NO:	BS1891 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	2 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	1 March 2018
JUDGE:	Mullins J
ORDER:	**1. Application dismissed.** **2. The applicant must pay the respondents' costs of the application.**
CATCHWORDS:	INSURANCE – MOTOR VEHICLES – COMPULSORY THIRD PARTY INSURANCE AND LIKE SCHEMES – where applicant injured in motor vehicle accident – where insurer paid for rehabilitation services – where no notice given under s 51(4) of the *Motor Accident Insurance Act* 1994 (Qld) – where claim did not resolve at compulsory conference – whether insurer's mandatory final offer should be grossed up for the costs of the rehabilitation services *Motor Accident Insurance Act* 1994 (Qld), s 51, s 51A, s 51C *Motor Vehicle Insurance Regulation* 2004 (Qld), s 27A, s 29 *Aldridge v Allianz Australia Insurance Ltd* [2009] QSC 257, followed
COUNSEL:	G J Cross for the applicant K S Howe for the respondents
SOLICITORS:	The Personal Injury Lawyers for the applicant Jensen McConaghy for the respondents

[1] The applicant was injured in a motor vehicle accident on 4 December 2015. Liability for the accident is not in dispute. The second respondent is the compulsory third party insurer of the first respondent.

[2] The second respondent paid rehabilitation and other treatment expenses for the applicant in the sum of $22,318.11, commencing from 24 February 2016.

[3] On 18 January 2018 the applicant and the second respondent participated in a compulsory conference in accordance with s 51A of the *Motor Accident Insurance Act* 1994 (Qld) (the Act).

[4] The applicant's claim did not resolve at the compulsory conference and the applicant and the second respondent exchanged mandatory final offers in accordance with s 51C of the Act.

[5] The second respondent's offer was in the following terms:

> "We have considered all of the material presently available to us and we are prepared to offer your client the amount of $53,000 inclusive of all heads of damage and statutory refunds, **exclusive** of payments made to date to or on behalf of your client in the sum of **$22,318.11**.
>
> Pursuant to section 51C(6) of the Motor Accident Insurance Act (as amended), this offer remains open for a period of fourteen (14) days."

[6] The applicant's solicitors responded to that offer, characterising it as equating it to a gross offer of $75,318.11 which would result in the applicant being entitled to costs and outlays on a standard basis, if the applicant elected to accept that offer.

[7] The second respondent disputed the applicant's solicitors' characterisation of the offer, asserting that the second respondent had not given notice pursuant to s 51(4) of the Act and that the mandatory final offer was not an amount of $75,318.11. (It is common ground that no notice was given by the second respondent under s 51(4) of the Act.)

[8] On 1 February 2018, the applicant's solicitors confirmed the applicant accepted the second respondent's mandatory final offer on the basis that no reduction in the applicant's damages could be made on account of the rehabilitation payments made to the applicant, meaning the offer equated to a gross offer of $75,318.11 which then entitled the applicant standard costs and outlay and foreshadowing this application. If the applicant's characterisation of the offer was wrong, the acceptance was conditional and therefore did not result in acceptance of the offer that was binding on both parties as a contract.

[9] Another significance of whether the mandatory final offer was $53,000 or $75,318.11 is the difference in costs that apply: see s 51C(4) of the Act and s 27A and s 29 of the *Motor Accident Insurance Regulation* 2004 (Qld). If the former, the applicant's costs would be limited to $3,600. If the latter, the applicant seeks standard costs and outlays.

[10] In this proceeding, the applicant seeks a declaration that the second respondent's mandatory final offer amounts to a gross offer of $75,318.11 inclusive of statutory refunds plus standard costs and outlays to be agreed or assessed.

[11] Where there has been no notice given by the insurer under s 51(4) of the Act, the insurer has made an election to bear the costs of rehabilitation services, subject to the exception provided for in s 51(10) where the payment has been induced by the claimant's fraud. Where the notice is given under s 51(4) of the Act, s 51(9) and s 51(9A) cover how the costs of rehabilitation services may be taken into account in the assessment of damages and it is only then that the costs of rehabilitation services paid for by the insurer may be added to the claimant's damages. See the analysis of s 51(4), s 51(9) and s 51(9A) by Applegarth J in *Aldridge v Allianz Australia Insurance Ltd* [2009] QSC 257, particularly at [77]-[80].

[12] It follows from the election of the insurer to bear the costs of rehabilitation services provided to the claimant that those costs are then irrelevant to the offers exchanged as mandatory final offers. The applicant's claim in this matter to gross up the second respondent's mandatory final offer is unsupported by the statutory scheme in s 51 and inconsistent with the analysis in *Aldridge*.

[13] There has therefore been no acceptance by the applicant of the second respondent's mandatory final offer in the terms in which it was made. The application for a declaration cannot succeed and the application must be dismissed.

[14] The respondents seek costs of the application on the basis they should follow the event. The applicant submits that he raised an issue of importance to this area of litigation and there should either be no order as to costs or the costs should be costs in the proceeding to be commenced by the applicant in respect of his personal injuries claim.

[15] The answer to the applicant's contention was there to be found in the terms of s 51 of the Act and the decision in *Aldridge*. It was the applicant's choice to test his contention in the Supreme Court. In those circumstances, costs should follow the event. The applicant must pay the respondents' cost of the application.