778/07

Den 3. september 2007 blev i sag nr. 70.571:

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xxxxxx

mod

Pantaenius
Østerbro 11
Postboks 110
7800 Skive

afgivet sålydende

u d t a l e l s e :

_____

Forsikringstageren, der har tegnet lystfartøjsforsikring i Pantaenius, klager over størrelsen af den af selskabet tilbudte erstatning i forbindelse med et anmeldt forlis.

Selskabet er ikke tilsluttet Ankenævnet for Forsikring, men nævnet har i medfør af § 2, stk. 1, 2. pkt., i nævnets vedtægter besluttet at afgive en udtalelse.

Den forsikrede båd er en 28 fods Great Dane. Forsikringen er tegnet med en "agreed fixed value" på 140.000 kr.

Det fremgår af sagen, at den omhandlende sejlbåd forliste i fransk farvand i januar 2006. Skaden blev anmeldt til selskabet, som herefter lod fartøjet besigtige. Af den på baggrund af besigtigelsen udfærdigede "Preliminary Survey Report", som er dateret 20/2 2006, fremgår bl.a.:

"**I/. Circumstances of the Event**
Yacht 'O.' had arrived from Germany through the canals with her mast resting on deck, some three weeks ago.
She had been moored outboard of a barge that was itself aground.

The owners, Mrs C.M.O.B. and Mr P.W.L.T. were living on board and were carrying out maintenance work, varnishing the mast and painting the deck.
During the early morning of 28th January 2006, the wind was blowing from the south east. From information obtained from the nearest signal station, at Couronne, some 9nm to windward of the yacht, that day at 00.00 hrs wind at 22 knots, at 12.00 hrs wind at 38 knots.
The yacht was moored with the wind on starboard bow, and was being stroke by the waves.
During the night, the three headlines broke and the yacht swung through 180°. When at about 90° to the barge, the mast came into contact with the barge and broke.
Then, with the transom into the wind, the waves broke into the cockpit, which flooded, and then into the hull. When the battery was under water, the bilge pump stopped working.
Mr L. went to fetch a powerful pump lent by a friend but they could not start it.
O.' sank at about 12.00 hrs, 28th January 2006.
...

V/. Repairs

Taking into account all the damages sustained by the yacht, the amount of the works carried out by professionals should plainly exceed the insured value of 140 000 DKK.

…

VI/. **Causes of the event**

- *The mooring area*

The 'Carteau fishing port' was in the past a quay for fishing boats, but it now is a free moorings. It is situated at the north of a lagoon, where the predominant wind is from the north west, which makes it appear to be secure. However, when the wind is blowing from the south east, as on 28th January 2006, the waves are driven in from open water, directly throw the narrows and on to this mooring.

- *The mooring position*

It is not a safe mooring for a small yacht, alongside the barge, in such bad weather conditions. Each wave buffets the yacht against the barge.

- *The mooring lines*

The rusty barge was about 25m length and the deck was at about 2m above the sea. Consequently, the lines of the 'O.' were with insufficient length and were rubbing against the deck of the barge. The yacht rode against the barge, lifted by the waves, and the moorings were shocked and strained. The head lines broke.

- *The cockpit of 'O.'*

In the aft part of the floor of the cockpit, are two small drain pipes of diam. 1/2 inch. Other pipes are situated at the fore part of the cockpit but they were nearly totally obstructed by a sheet of plywood bolted down on the floor. Furthermore, for an incomprehensible reason, the sea-cocks of the outlet pipes were covered by filters. We noticed also that the hatches of the cockpit lockers were not watertight and these lockers communicate with the accommodation.

The result of these fittings was that the filters were obstructed by seaweed brought in the cockpit by the waves. Then the cockpit filled up and the water entered the hull.

VII/. Conclusion

We have noted that the causes of this sinking were several, the mooring itself, the weather, the yacht and her skipper Mr L.
Mr L. considered in his opinion that 'O.' was safety moored in the lagoon for all weather conditions. He trusted in his yacht. The build quality of the "Great Dane 28" can not be denied, but "'O.' was not in her original condition when purchased by Mr Leonard, particularly her cockpit.
Mr L. himself is a barrister by profession but is an inexperienced yachtsman. He had not taken note of the defects of the yacht when he bought her.
It is for this reason we believe he will be unable to repair the damages himself.

In view of the above elements, this case appears to be a contructive total loss."

Henset til rapportens indhold afviste selskabet at dække skaderne på båden, hvilket blev meddelt klageren ved e-mail af 14/3 2006. I samme skrivelse gav selskabet dog tilsagn om at dække selve bjergningen og de indtil da afholdte øvrige omkostninger.

Klageren var utilfreds med afgørelsen, hvorfor han senere samme dag tilskrev selskabet. I den af klageren afsendte e-mail hedder det:

"Could you please explain how you come to the conclusion that you now reject further payment in regards to the sinking of my boat O.

In regards to the various points covered under section VI of the report of the expert maritime:

The moorings area:
The area is a free moorings area and at the time there were four other boats also tied up. I had as stated to Mr. B. that there was no warning of the change in weather at the seven o'clock weather report. The change came through at about three that morning. I had as stated to Mr B. actually been at the same spot where my boat went down for the last three weeks and had not just arrived and had received information from other people tied up at the same spot that there had not been a southerly wind there for some time. If I would have had notice of the change in weather I certainly would have moved the boat as Port Napoleon is within four minutes from where I was moored. I was tied up to the barge because it was at the time the safest place to be.

If you have seen the pictures of the area where the boat went down they clearly show that the area is a quiet on most of the time.

The mooring lines
As was not stated in the report it was not just the lines which broke the three bow bollards actually broke with the main aluminium bollard breaking off from the deck. The barge I was tied to was the same height as the bollacirs normally as in a port such as Port St Louis and I had, as was also not stated in the report, three bow lines out; three stern lines out and also a forward and stern spring line - at least eight lines. I also had my anchor down. There is not much more one can do. Also as stated to the maritime expert and he knew, was that a boat actually went down in Port St Louis which is the main port of the area, so I was not the only boat. It was a very serious storm.

Most of the lines were also new and a thickness of thirteen mil.

The cockpit floor.
The drain pipes are actually about two inches wide. The floor of the cockpit is covered by a piece of timber which as stated to Mr B. fitted, however, it is exactly the same design as was in the boat when I bought her. There is space for the water to drain out between the boat and the timber. The two fittings on the exit pipes for the self drainers were also there when I bought the boat. I have talked to people about these and some people do choose to have them.

The hatches in the cockpit have direct access to the accommodation of the boat also a design problem of the boat. I had a rubber lining between the hatch covers and the cockpit fibreglass, however after so much water filled the boat the combing acted as a big bath tub and the boat ultimately filled.

If you have problems with the design of the boat it should have been your responsibility to undertake a survey of the boat before you offered the insurance. You thus undertook the insurance for the boat as was.

I hope that you take this information into consideration because one happens to have insurance for changes in the weather and in the event of a boat sinking. I find it amazing that Pantaenius are conducting themselves in such a poor manner after I had a claim free insurance policy for so long.

I would also like to add that the salvaging of the boat took eight and a half hours because the people raising the boat used blow up balloons which once blown up on the bow would deflate and the same with the balloons on the stern. The balloons at either end of the boat went down at least five times. The exterior damage to the boat was also caused by the people whom raised the boat. The motor is now with the same mechanic whom would not sell me a rubber joint for my motor - although he is suppose to be a Volvo specialist.

Mr B. stated that the insurance would have to pay the complete amount for the insurance because the damage to the boat was so excessive. There are three witnesses to his statements. He has not yet arranged payment for the boat to be on hard standing although I have asked him and the staffs at Navy Services have asked him to come to some arrangement since the day the boat was lifted out.

It took me three weeks to clean out the boat so that the marine expert could view the boat. He visited the boat five times. I find it outrageous that I had to organise with a friend to tow the boat to Navy Service and this was not supplied - because it took so long to raise the boat that Port Napoleon had closed and it was a Friday. I had to pay my friend 20 euros for the petrol and steer the boat myself to Navy service.

I hope that you reconsider your attitude in this matter because of the reasons explained and if not I am sure you will appreciate I have no other option but to undertake legal proceedings."

Hertil svarede selskabet i e-mail af 15/3 2006 til klageren bl.a.:

"I can only act out from the report
...
Out from abovementioned O. has not been secured moored and in seaworthy condition.

And my comments to Mr. B. stated that en complete insured sum will be paid, I have spoken to Mr. B. and he told me it is not right.

Pantaenius is not interested to go to court and we will offer you a cash compensation DKK 50.000,00 without prejudice and Pantaenius will pay the salvage and the cost until now to full and final settlement in this claim. And the wreck will belong to P.L.

I hope we can agree with this."

Efterfølgende modtog selskabet den endelige "Survey Report", der er dateret 31/3 2006. Rapportens indhold svarer næsten ordret til den tidligere udfærdige "Preliminary Survey Report". Konklusionens ordlyd afviger dog fra den først udarbejdede rapport. Af den endelige rapport fremgår således:

"**VII/. <u>Conclusion</u>**
We could have a good knowledge of the circumstances of this event. We have noticed the several causes of the sinking.
'O.' is badly damaged after her sinking.
The amount of professional works necessary to put the yacht in original conditions should plainly exceed the insured value of 140 000 DKK.
The wish of Mr. L. was to repair himself his yacht but we don't think that he has the necessary skills."

Ved e-mail af 6/6 2006 meddelte klageren selskabet, at han ikke ville acceptere den tidligere tilbudte erstatning på 50.000 kr. Efterfølgende fulgte yderligere korrespondance

mellem parterne, hvilket imidlertid ikke resulterede i enighed. Sagen blev herefter indbragt for Ankenævnet for Forsikring.

I klageskemaet, som er underskrevet af klageren den 16/8 2006 og modtaget af nævnet den 7/11 2006, har klageren opgjort sit krav således:

> "Full payment of insurance policy and full payment for boat to be on hard standing in France until they have settled this claim (850€) Financial compensation (3rd party cover) Mrs C.M.O.B. (3000€) + financial compensation Mr S.P (200€). Pantaenius to have licence withdrawn of insurance company.
> …
> 140,000 DK Kr. and for as many people as possible to know what type of organisation Pantaenius is. Plus other costs 4,500€."

Selskabet har over for nævnet fastholdt sin afgørelse. Til støtte herfor har selskabet i skrivelse af 20/11 2006 til nævnet henvist til sagens akter.

Nævnet har fået forelagt de fotos, der er vedlagt sagen.

Af forsikringsbetingelserne fremgår bl.a.:

> "**§ 3. FORSIKRINGSBEGIVENHEDER**
> 1. Forsikringen dækker tab og beskadigelse af de forsikrede genstande opstået af følgende årsager:
> ...
> b) I alle tilfælde stranding, vandindtrængen, synkning, grundstødning samt havari på master, bomme, stående og løbende rig og sejl.
> ...
> **§ 7. UNDTAGELSER**
> Nærværende police dækker ikke i følgende tilfælde
> ...
> b) Tab eller skade, der skyldes forsætlig handling eller grov uagtsomhed.
> ...
> d) Tab eller skade på grund af fejlkonstruktion, fejlproduktion, materialefejl eller på grund af normalt slid på de pågældende dele."

Nævnet udtaler:

Efter sin gennemgang af parternes indlæg og de fremlagte sagsakter finder nævnet, at der til en udtalelse kræves en nærmere bevisførelse vedrørende skadeårsagen. En så-

dan bevisførelse kan ikke ske for nævnet, men må i givet fald foregå ved domstolene. I medfør af § 4, stk. 1, i nævnets vedtægter må nævnet derfor afstå fra at viderebehandle sagen.

Poul Sørensen
formand