Ankenævnet for Forsikring

Den 3. september 2012 blev i sag nr. 81.930:

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xxxxxxxx xxxxx
xxxx xxx
xxxxxxx

mod

Alpha Insurance A/S
Sundkrogsgade 21
2100 København Ø

afsagt

k e n d e l s e :

Forsikringstageren har retshjælpsforsikring i Alpha Insurance A/S. Hun klager over selskabets afvisning af dækning for sagsomkostninger i en retssag.

Det fremgår af sagen, at klageren ved en domstol i England anlagde sag mod en anden privatperson og dennes forsikringsselskab med krav, der havde udspring i et trafikuheld. Domstolen frifandt den 22/8 2011 klagerens modparter og pålagde klageren at betale den ene af modparternes sagsomkostninger. Klagerens advokat anmeldte efterfølgende et krav på i alt 14.301,12 britiske pund til det indklagede selskabs engelske forsikringsmægler, BRC Legal Group, til dækning af klagerens egne og modpartens sagsomkostninger. Forsikringsmægleren afviste dækning med henvisning til, at klagerens påstande i retssagen var svigagtige. Klagerens advokat henviste til, at retten ikke fandt det godtgjort, at der var tale om svig, men at klageren ikke havde løftet sin bevisbyrde, herunder for at være kommet til skade ved uheldet.

Klagerens advokat indbragte herefter sagen for den engelske Financial Ombudsman Service. I klagen af 27/10 2011 anførte klagerens advokat bl.a.:

> "We write with regards to the above client's who has instructed us to lodge a formal complaint against their ATE Providers of their failed personal injury cases.

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We attach the following documents for your perusal:

1. Duly completed FOS forms for our clients.
2. Barristers Attendance Notes at the Personal Injury Hearing dated 23th August 2011.
3. Copy of the Alpha Policy for each claimant dated 6th February 2009.
4. Disbursement Funding from Justice Capital Limited.
5. Copy of the ATE agreement that governs this insurance, i.e the Contract.
6. Court order dated 22 August 2011.
7. Letter from this firm to the ATE providers dated 26th August 2011.
8. Response from ATE Providers dated 9 September 2011.
9. Further letter from this firm dated 14 September 2011.
10. Final response from the ATE Providers dated the 12 October 2011.

The issue is that the ATE providers have interpreted the Court order dated 22 August 2011 to mean that our client's were fraudulent and that the ATE policy will not pay out when proven that fraud was the basis of a personal injury claim.

The Court did not find and did not make an order based of fraud. It is clear that the Court rejected the claims on the basis that the Claimant's were unable to discharge their burden of proof for a variety of reasons but certainly not fraud. A fraud order would have had far more serious consequences which did not happen in this case.

Our argument is that the Court's decision was not on the basis that our client's were fraudulent but rather failed to discharge the burden of proving their case.

We refer you to paragraph 4 and 5 of the Counsel's attendance note dated the 23th August 2011.

In Civil Proceedings, the burden to discharge the burden of proof is on the Claimant and where that burden has not been discharged then the Claimant would lose. This is different to a finding of fraud.

The ATE Providers have chosen to interpret the Court Order to say that our client's were fraudulent and that is why they were unable to discharge the burden of proof on their claims.

As such the ATE providers have decided not to pay out on the policy and have left the clients exposed to paying their disbursement funding and adverse costs to the Defendants.
As we have been unable to convince the ATE providers that their interpretation of the Court onder is wrong our client's have advised us lodge this formal complaint with the hope that your office would assist them in resolving this matter once and for all."

Den engelske Financial Ombudsman Service afviste sagen med henvisning til, at en afgørelse heraf lå uden for organets juridiske kompetence. Klagerens advokat har efterfølgende indbragt sagen for nævnet.

Selskabet har i brev af 10/2 2012 til nævnet heroverfor bl.a. anført:

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"**Background**
The complaint raised by … is lodged on behalf of the three insureds named above, due to the refusal by Alpha Insurance A/S agent, BCR Legal Assist (BCR), to pay the defendant's costs due from the insureds under After the Event (ATE) insurance provided in relation to a court action connected with a road traffic accident.

All the above claims were dismissed at … County Court on the 22nd August 2011 and the insureds were ordered to pay defendant's costs. [Klagerens advokat] had applied previously to BCR for ATE policies for their three clients and policies numbered …4, …3 and …2 were issued by BCR on 17th September 2010 on our behalf.

Following the unsuccessful court action, the claimants' solicitor [klagerens advokat] sought to claim under the policies for both defendant's costs and their own disbursements. In this connection they provided a copy of an attendance note dated 23rd August 2011 which was prepared by the claimants counsel… A full judgement was not provided.

Reply
This attendance note, a copy of which was provided by [klagerens advokat] in their papers submitted with their complaint, was extremely damning of the claimants. The note should be read in its entirety; however the following are the most important observations:

- The defendants accepted the accident occurred but did not accept the claimants were occupants of the vehicle. This was the finding of the judge. (Paragraph 4)
- The judge determined that the claimants had failed to prove they were occupants of the vehicle and/or were injured as a result of the accident, because of the unsatisfactory nature of their evidence. (Paragraph 2)
- The claimants were frequently hesitant, evasive, vague and inconsistent when giving evidence. The most noticeable example being the first claimant's inability to give any sensible answer as to whether his 19 year old daughter, who was driving the vehicle and who lived with this claimant was also injured in the accident. (Paragraph 6)
- The judge referred to a number of factors of the case which gave considerable concerns. In particular none of the claimants sought treatment from their doctors after the accident. The third claimant visited her doctor three days after the accident about a viral complaint, yet did not mention the accident. (Paragraph 6)
- The judge pointed out that the schedule of special damages contained figures for which there was no evidence and appeared substantially exaggerated. (Paragraph 6)
- The claimants did not undergo recommended physiotherapy. (Paragraph 6)
- The second claimant stated in court that the injury was fully recovered in three months, whereas her claim was based on a prognosis of 6-7 months. (Paragraph 6)

On the basis of the above, our agent BCR informed the solicitors firm, [klagerens advokat], that as the claimant failed to prove they were the occupants of the vehicle at the time of the accident, we considered the claims to be fraudulent. (See letter from BCR dated 9th September 2011, copy provided with the complaint).

Alfred James replied on the 14th September 2011 that they believed that there was no finding of fraud by the District Judge, that the claimants were simply unable to discharge the burden of proof. They threatened to complain to the Ombudsman.

BCR replied on the 12th October 2011 that our position remained unchanged. They stated: 'Wc note your points but our position remains unchanged. The Court did not accept that the claimants were passengers in the vehicle. Accordingly the claims were not genuine. ATE is

to protect claimants who make genuine claims. Fraudulent and dishonest claims are excluded. This is our final letter and we are satisfied the Financial Ombudsman Service will agree with us that fraudulent and dishonest claims are repudiated'.

Our position

This complaint has never been referred directly to Alpha Insurance A/S for review prior to our receipt of it from Ankenævnet. This would have been the appropriate course of action, but it would in this case not have changed the adopted position.

In this case not only are we critical of the claimants themselves, but we are also critical of their appointed solicitors [klagerens advokat]. As legal representatives for the claimants the firm should have ensured that the schedule of special damages was supported by evidence and not substantially exaggerated. They should have checked the medical records actually supported the claims. They should have interviewed the claimants well in advance of the issue of proceedings to check the claims were genuine. In our opinion they have been negligent and have not complied with the policy terms and conditions.

Conclusion

To conclude, we believe that the claimants and/or their solicitors, Alfred James, are in breach of Conditions 1, 2 and 7 of the policy terms and conditions, which are reproduced below for ease of reference:

1 Compliance

The due observance and fulfilment of the terms and conditions of the Policy in so far as they relate to anything to be done or complied with by the Assured and the truth of the Assured's statements and answers made or given at the time of entering into the agreement with the Underwriter's Representative and which may be subsequently included in the Statement of Truth shall be conditions precedent to any liability of the Underwriter to make payment under the policy.

2 Conduct

The Assured and the Appointed Representative shall conduct the Proceedings with due care and diligence and shall take all reasonable steps to minimise or avoid the costs and expenses payable under the Policy. During the course of the Proceedings, the Assured shall comply with any orders made by the Court, all the rules of the Court and shall follow all proper and reasonable advice given by the Appointed Representative.

7 Fraud

Without prejudice to the Underwriter's rights of recovery, if the Assured makes any requests for payment under the Policy knowing it to be fraudulent or false in any respect (or in circumstances where it ought reasonably to be known to be so) or where there is collusion between the parties to the Proceedings, the Policy shall become void and any Premium paid to the Underwriter shall be forfeited.

Accordingly we do not believe that we have any liability to the insureds under these three policies. It is common in litigation for the claimant to fail to discharge the burden of proof and the claimant loses at court and the ATE policy pays out. For example where different parties have differing views on how the accident occurred, on medical evidence, or whether one

party was negligent at all etc. The solicitors for the insureds, …, are seeking to rely on this 'burden of proof' argument to defend, in our view, the indefensible.

The three insureds failed to satisfy the Court that they were passengers at the time of the accident and that they had incurred injuries from the accident. Accordingly the Court found, as a matter of fact, that the claims were not genuine and consequently Alpha Insurance A/S is not prepared to make payment."

Nævnet udtaler:

Parterne er uenige om, hvorvidt klagerens sagsomkostninger er dækket af retshjælpsforsikringen.

En afgørelse heraf afhænger bl.a. af, hvorvidt klageren og dennes advokat kan anses for at have ført den omhandlede retssag med fornøden omhu, herunder hvordan der vil kunne føres bevis for de under retssagen fremsatte påstande og anbringender.

På det grundlag, der er forelagt nævnet, finder nævnet ikke anledning til at kritisere selskabets afgørelse.

Som følge heraf

b e s t e m m e s :

Klageren får ikke medhold.

Poul Sørensen