Ankenævnet for Forsikring

924/13

Den 7. oktober 2013 blev i sag nr. 83.511:

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xxxxxxx xxxx
xxxxxxx xxxxxx xxxxx
xxxxxxxx
xxxxxx xxx

mod

Alpha Insurance A/S
Sundkrogsgade 21
2100 København Ø

afsagt

k e n d e l s e :

Forsikringstageren har flyforsikring i Alpha Insurance A/S. Hun klager over selskabets afvisning af at yde forsikringsdækning i forbindelse med et flyuheld den 10/4 2010.

Selskabet har annulleret forsikringen med tilbagevirkende kraft til tegningstidspunktet med henvisning til, at klageren ved tegningen af forsikringen afgav urigtige risikooplysninger. Selskabet har herefter tilbagebetalt hende forsikringspræmien og afvist at yde forsikringsdækning i forbindelse med flyuheldet den 10/4 2010.

Klageren tegnede forsikringen i forsikringsselskabet OnRisk.co.uk i august 2009. Det indklagede selskab har efterfølgende overtaget forsikringsforholdet. Det fremgår af selskabets brev af 24/2 2011 til klageren, at selskabet ikke har fået en kopi af den af klageren udfyldte forsikringsbegæring(proposal form) fra det oprindelige forsikringsselskab.

Flyuheldet blev undersøgt af det britiske "Air Accidents Investigation Branch" (AAIB), der på baggrund af undersøgelsen udarbejdede en rapport af 4/5 2010. Rapporten blev fremsendt til selskabet ved mail af 13/1 2011 fra klageren. I brev af 28/4 2011 til klageren fra selskabet hedder det bl.a.:

"We have reviewed the AAIB accident report on the accident that resulted in the loss of [klagerens fly] and we have reviewed the circumstance and associated history of [klagerens fly] and your policy of insurance. This review has raised a series of questions the most central of which relates to the condition of [klagerens fly] at the time of inception of policy … on 28th 2009.

The issues are stated in my letter of 24th February and are restated below;

1. The direct and proximate causes of the crash
2. The service and repair history of G-LORT
3. The terms on which policy ONR/AVIA/3250/09 was issued
   a. the information on which the policy was based
   b. the collection and location of the premium paid
   c. the reporting of the policy to Alpha Insurance A/S by OnRisk.co.uk
   d.

Taking these matters to position of conclusion;

Point 1.

Is resolved in my letter of 24th February.

Point 2.

Has been subject to further detailed enquiry. The AAIB incident report filed by [piloten] includes a statement that records the history of his association with the aircraft; of importance within this is the narrative of difficulties with the engine of [klagerens fly] and particularly two incidents in May 2009 which resulted in forced landings and the subsequent inspection of the engine and transmission systems which resulted in the aircraft's recovery to Targett Engineering with the report recording:

A characteristic of the engine was that it would run at roughly below 3000 rpm and actually stop at any lower settings after 30 seconds or so. Landing required immediate opening of throttle at end of landing run to prevent it stopping. on the runway - which it did several times during training. I was assured this was normal for this type of aircraft.

Soon after the training (22.5.09)I devoted a whole local flight to FLP - but note this was only at 3000 rpm - not idle, because the engine would stop. Two days after this the engine faded (the prop did not stop tuning) and I carried out a forced landing in a field at … near the ...

On recovery (wings folded/trailer etc) the engine started and ran OK, I checked everything. replaced the fuel with new and carried out 2 full half hour tethered ground runs at cruising revs. there were no indications of any problems. I assumed the failure was due to my inexpenence on this type of engine.

On 31th May. on a flight to … a progressive boss of power and loud back firing' occurred, but a landing with no effective power was made on runway 23 (while 05 was in use - radio contact - no traffic conflict). The engine did not actually stop, but when stopped would not restart.

The aircraft was recovered to [flyreparatør 1]. Inspection revealed the engine to be in appalling condition, with inadequate documentation (illegal - …) although PFA inspected.

Although the engine was repairable I felt no confidence in such a repair and asked for new engine to be fitted. At the same time, significant defects were found in the propellor so a new one was fitted and the gearbor overhauled by the Rotax agent - …

The AAIB accident report confirms this position and records that a new Rotex 582 engine was fitted in October 2009.

We have confirmed with [flyreparatør 1] of … that [klagerens fly] was taken in by … in the first week of July 2009, when it was decided to remove the engine and send it to Conair Sports for inspection/overhaul following engine failure.

He confirms [flyreparatør 2] inspected the engine and advised [flyreparatør 1] by email on the 7th August that the engine was beyond economical repair. A new engine was purchased from [flyreparatør 2] and shipped to [flyreparatør 1] who carried out the installation and associated works required, invoicing the work for the permit renewal, inspection and engine change on the 20th October 2009.

[Flyreparatør 1] advise [klagerens fly] was collected by the owner somewhere around the end of October.

Point 3.
With regard to the terms on which policy … was issued; Alpha make no issue with regards to the accounting of the premium, whilst we cannot trace it passing to us from OnRisk with certainty (we have no access to the detailed banking records of OnRisk.co.uk) we do accept that the premium was paid to OnRisk and hence under the terms of the facility in place between Alpha and OnRisk risk and responsibility for the money passed to Alpha on its payment to OnRisk regardless.

It is a consequence of the facts established in Point 2 that at the date of proposal for policy … and its inception on 28th August 2009 the aircraft [klagerens fly] was not airworthy with a failed power unit and significant defects in the power train and transmission. This is clear from the fifth paragraph of the extract from the AAIB accident report filed by [piloten] as reproduced above and the statements of [flyreparatør 1]. This situation was not disclosed to Alpha Insurance Underwriters despite the fact that it is clearly of central importance in assessing the application for insurance coverage. In support and emphasis of the requirement that all facts are fully disclosed to the Insurer the proposal form for insurance carries two advisory statements:

At the head of the form;

Microlight Insurance
Proposal Form
Important Advice to all Porposers
All sections of the Proposal Form must be fully completed in BLOCK CAPITALS using a blue ballpoint pen. All details must be declared and you must give full and true answers to all questions using a separate sheet if necessary. Failure to disclose material information may invalidate this policy in the event of a claim.

Above the signature;
6. Declaration
To the best of my/our knowledge and belief the information provided in connection with this proposal, whether in my/our own hand or not is true and I/We have not withheld any material

fact. I/We understand that non-disclosure or misrepresentation of a material fact may entitle underwriters to void the insurance. I also understand that the insurers are entitled to consult with the British Microlight Association (BMAA) to verify any details disclosed in this proposal.

A material fact is one which is likely to influence acceptance of the proposal by underwriters. If you are in any doubt as to whether a fact is material or not, please disclose it. In offering this insurance we are relying on the information and statement which you are providing in the proposal form.

The Schedule of Insurance also clearly carries a notice in the form of the following statement;

It is understood that you have provided complete and accurate information to insurers and that you have complied with your legal duty to disclose, both before inception and during the period of the insurance contract, all material matters relating to the risk (i.e. all information which would influence the judgement of a prudent insurer in determining whether to underwrite the risk and if so upon what terms and at what premium). If all such information has not been disclosed, insurers have the right to void the contract from its commencement which may lead to claims not being met.

If you believe that you may not have complied with this duty, you should contact us immediately.

The matter has been subjected to a detailed and objective review the outcome of which is the adjudication that had the Alpha underwriters been fully appraised of the position and history;

1. The fact that the aircraft had suffered several previous engine failures that resulted in successful emergency landings should have been disclosed to Alpha but Alpha acknowledge the (regrettable) fact that engine failures in this class of aircraft are considered part of the risk of recreational flying. Hence taken in isolation Alpha would not hold this information to have constituted critical material facts.

2. The fact that [piloten] had made previous forced landings in [klagerens fly] - We accept pilots are trained to complete unpowered/emergency landings as part of their overall training and the fact that [piloten] completed at least two successful emergency landings would, from an Underwriting perspective, actually have enhanced his acceptability in so far that the pilot in an emergency situation had coped well. Hence, had the information been made available to Underwriters at the time of writing the risk they might have queried the fact that he had had two failures but his 100% successful landing rate would have influenced judgement and it is doubted we would have penalised him or amended the rating of the policy for his prior history alone.

But;
3. We do consider it a critical material fact that the engine and power train was unserviceable at the date of proposal and that the aircraft was in fact not airworthy and undergoing major repair when the proposal for insurance was made.

This is a critical material fact that should have been fully declared to Alpha at the time of the inception of the risk. From the time line it is clear that at the date and time of inception of the policy the aircraft was not airworthy. This would clearly and undoubtedly have affected the underwriters' judgement and rating of the risk presented at the time of the proposal to them.

Had a full disclosure of all facts been placed before the underwriters Alpha Insurance would have declined the risk.

In these circumstances, and after careful review of the facts as now known and having made the most complete enquiries possible as to the information held by OnRisk.co.uk, Alpha must conclude that a critical material fact was not disclosed at proposal for insurance on [klagerens fly], and that as a result of non-disclosure that it's underwriting of the insurance risk presented by [klagernes fly] was materially and criticaliy prejudiced. Alpha further conclude that had a full disclosure been made the outcome would have been that Hull coverage for flight risk in respect of [klagerens fly] would not have been offered and that policy … would not have been issued.

As a consequence of the above the coverage and indemnity under the issued policy … is held invalidated ab initia with the remitted premium consideration to be returned in full.

It follows from the above that Alpha Insurance denies liability for any claim concerning damage to [klagerens fly]."

I sin klage til nævnet har klageren bl.a. anført:

"Alpha Insurance refuse to pay out for loss of aircraft following accident in April 2010. They deny liability based on failure to disclose relevant information at time of insurance renewal in September 2009.
I dispute the information they refer to was relevant and they are unable to give me a clear indication of what is and what isn't relevant information."

Ved brev af 12/11 2012 til nævnet har selskabet hertil bl.a. bemærket:

"In English law, as under Danish law, it is permissible for an insurance company to cancel an insurance policy ab initio if material facts have been concealed at the inception of the policy. A material fact for insurance purposes is a fact deemed so important that the insurance company would not have written the insurance policy had the correct situation been known to them. This aircraft was not airworthy and was undergoing major repair as a result of a previous incident at the inception date of the policy.

A full discussion of our position is contained in the correspondence copied herewith and in our letter of 28th April 2011 we have demonstrated that we would have declined this risk if we had been in possession of all facts. We are therefore fully within our legal rights as insurers to cancel the policy, return the premium paid and the claim made under the policy is consequently rejected.

Our position is that had we known the true position back in August of 2009 this insurance policy would never have been issued and therefore the voiding of the policy and the return of premium is correct. We note however that the premium cheque enclosed with our letter of 28th April 2011 has never been cashed and is therefore no longer valid.

Therefore, if [klageren] cares to provide us with her bank details including IBAN and SWIFT numbers, we are prepared to arrange a bank transfer to her of the £411.08 we believe is the full extent of our liability to her. This sum will be paid without interest, since the payment was made available to [klageren] already in April of 2011."

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Med henvisning til selskabets bemærkninger har klageren i brev af 12/12 2012 til nævnet bl.a. oplyst:

> "The period of work for the renewal of a Certificate of Airworthiness or Permit to Fly in my experience takes at least 4 weeks and this regular, annual event represents a significant period of the insurance cover. During this period of time the aircraft is technically 'not airworthy' because it under repair. It is unusual to advise the insurers when this is being undertaken and no part of any documentation requires this notification.
>
> The risks at this time reduce to 'hangar risks' only.
>
> There is nothing on the proposal form to enquire of the status of the aircraft at the time of the declaration that forms part of the insurance proposal.
>
> A 'material fact' as set out in the declaration is assumed to be a fact that increases the risk of a claim under the policy.
>
> In Alpha's letter dated 28.4.11 it is stated that the previous engine failures are not such a 'material fact'. In the same letter, Alpha also states 'it is doubted we would have penalised him or amended the rating of the policy'.
>
> Thus, Alpha take the position that neither engine failures or pilot action resulting from them are 'material facts' requiring special disclosure on the proposal form. These are rare and unusual events - in over 20 years of flying these are the only failures MT [piloten] has experienced.
>
> However, Alpha take the position that a regular and planned annual maintenance is a 'critical material fact'.
>
> By any logic, the risk to the insurers of a claim in these positions are inconsistent. Disclosure of the length of time of period maintenance was not required on the proposal form and being a routine event cannot have 'constituted a material fact' affecting the risk to the insurers.
>
> Alpha's cancellation of the policy is based on their definition of 'not airworthy'
> (Alpha 28.4.11 pg 4 para 3). Alpha have used the term to claim the engine and power train were condemned and unrepairable. This was not the case (pg 2 of same document) clearly states that Targett assessed the engine as repairable. Therefore, the aircraft was only technically 'not airworthy' because it was undergoing repair, renewal, maintenance and recertification. A common occurrence for any aircraft."

Heroverfor har selskabet i brev af 9/1 2013 til nævnet bl.a. påpeget:

> 1. Status of the aircraft: It is a fundamental consideration in insuring an aircraft for the risks associated with flight that that aircraft is fit for that purpose.
>
> 2. The UK Certificate of Airworthiness for lightweight aircraft (Microlights) or 'Annual permit [condition] inspection' does not routinely take four weeks. The inspection will take but a few hours if no problems or snags are found. This has been confirmed by an accredited LLA Inspector and the inspection is conducted on an 'as presented basis'.

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3. The aircraft was unarguably not airworthy at the time of proposal. The condition of the aircraft was not disclosed and no !imitation to ground risk (in the policyholders terms 'Hanger risks' was requested.

4. A Material Fact in UK insurance usage is defined:

a. By the Lloyds Market Glossary http://www.11ovds.com/common/help/glossary?Letter=M
'A statement that is made to an underwriter during the negotiation of cover or the amendment or renewal of cover which would have influenced the judgment of a prudent underwriter in deciding whether to accept an insurance/reinsurance risk and the terms on which he would be willing to grant cover.'

b. By the British insurance Brokers Associationhttp://www.biba.org.uk/JargonBuster.aspx
'Any fact which would influence the insurer in accepting or declining a risk or in fixing the premium or terms and conditions of the contract is material and must be disclosed by a proposer, or by the insurer to the insured'
…
Beyond the above comments we state that had the full sequence of engine failure, forced landings and condition been fully declared there is no possibility that the risk would have been acceptable to Alpha. The situation with regard to disclosure of material fact is therefore, both by association of a series of non disclosed events, whilst adverse to underwriting, individually would likely not result in repudiation severally would have that result - together with a single critical fact (the condition of the aircraft at the date of inception) which would clearly and certainly result in the rejection of the proposal for cover made.

It is not and never has been Alpha's position that *'neither engine failures nor pilot action resulting from them are 'material facts' requiring special disclosure on the proposal form'* (sic). This statement by the policyholder is a clear mis-statement / interpretation of our letter and comments.

Turning to the issue of "regular and planned maintenance. We are not considering such action: The replacement of the engine was not 'planned maintenance'. It was the consequence of multiple failures in flight and a condition of 'illegality' (as per comment within AAIB report above). 'Planned maintenance' is unconnected to the insurance proposal or the facts in question.

The lack of disclosure by the policy holder as to the true history of the aircraft at the time of inception is in the firm opinion of Alpha a material fact from an underwriting viewpoint. We have stated that taken in isolation each of the events of engine failure / forced landing would [probably] be overlooked, but cumulatively they paint a different picture that would almost certainly have caused the underwriter to look at the risk more cautiously. The fact that the aircraft was not airworthy at the date of proposal would certainly have frustrated any consideration of the issue of cover and so, as a statement of fact, the policy would not have been accepted."

Ved brev af 27/6 2013 har nævnets sekretariat anmodet selskabet om en kopi af de relevante tegningsregler for forsikringen. Vedlagt brev af 12/7 2013 til nævnet har selskabet fremsendt kopi af ”Underwriting Guidelines” samt en ikke udfyldt ”proposal form”.

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Nævnet udtaler:
Det er selskabet, der har bevisbyrden for, at forsikringstageren ved uagtsomhed har afgivet urigtige oplysninger på tegningstidspunktet.

Det er oplyst, at klageren tegnede forsikringen i august 2009. Tegningen skete tilsyneladende bl.a. på baggrund af en af hende udfyldt "proposal form". Selskabet gør gældende, at klageren i forbindelse med tegningen af forsikringen burde have oplyst, at flyet på tegningstidspunktet fik udskiftet motor og propel samt repareret gearkassen. Selskabet har ikke fremlagt dokumentation for, hvilke spørgsmål der blev stillet til klageren i forbindelse med tegningen – eller hvad hun svarede til spørgsmålene i den omtalte "proposal form".

Således som sagen foreligger oplyst, finder nævnet, at selskabet endvidere ikke har bevist, at klageren burde have indset, at oplysningen om, at flyet fik udskiftet motoren og propellen samt repareret gearkassen, var af betydning for selskabet ved tegningen af forsikringen, samt at hendes eventuelle undladelse af at oplyse herom kan tilregnes hende som grov uagtsomhed, jf. forsikringsaftalelovens § 7.

Nævnet finder herefter på det foreliggende grundlag, at selskabet ikke har løftet sin bevisbyrde. Nævnet finder det således ikke godtgjort, at klageren ikke har afgivet urigtige oplysninger om flyet på tegningstidspunktet.

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Som følge heraf

b e s t e m m e s :

Selskabet, Alpha Insurance A/S, skal anerkende, at klageren ikke afgav urigtige oplysninger i forbindelse med tegningen af forsikringen. Selskabet skal genoptage sagsbehandlingen og yde forsikringsdækning for det anmeldte flyuheld. En eventuel erstatning skal tillægges renter, jf. forsikringsaftalelovens § 24.

Poul Sørensen