Ankenævnet for Forsikring

Den 13. september 2017 blev i sag nr. 89912:

xxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxx

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. Han klager ved sin advokat over, at selskabet har afvist at yde dækning for omkostningerne til en retssag mod klagerens arbejdsgiver.

Selskabet har afvist at yde retshjælpsdækning med henvisning til, at klageren hævede sagen kort før hovedforhandlingen, uanset at selskabet afviste en anmodning om, at sagen blev hævet, hvorfor selskabet ikke er forpligtet til at dække omkostningerne i sagen.

I klagen af 21/9 2016 til nævnet har klagerens advokat blandt andet anført:

> "**1. Statement of claim, a brief outline of the case. A Supplementary statement may be enclosed.**
>
> The Insured was to pursue a civil claim against his Employer … for personal injury and the insured purchased the ATE LEI insurance underwritten by Alpha A/S.
>
> The insured's claim was supported by Expert evidence and proceeded through litigation with the insurer's consent. The defendant obtained their own Expert evidence and in accordance with court procedures was referred to the insured's Expert shortly before trial. Having viewed the new evidence the insured's Expert changed his opinion such that it no longer supported the insured's claim.
>
> We contacted the insured's Expert in order to establish that this was his final opinion, but it was clear the Expert could no longer support the insured's civil claim. As stated, this occurred shortly before trial and noting the insured no longer had any expert evidence to

support his claim and the defendants now had 2 Experts to counter the insured's civil claim, the matter no longer had any prospects of success. It was therefore clear the matter should be discontinued. In accorance with the policy terms we contacted the insurer's agents … to get their agreement to discontinue. However despite the policy terms stating the agreement to discontinue would not be unreasonably withheld, … refused to agree to our suggestion/request despite the matter almost certainly failing if it was to proceed and the only likely outcome of going to trial would be an increase in the insured's liablity and in turn that of the insurers. We were obviously obliged to act in our client's/the insured's best interest and so noting the matter had no prospects of success, we had no option but discontinue despite the lack of agreement from the insurer's agents. It should be noted our actions did not prejudice the position of the insurer, the liablity for costs and disbursements had already been incurred, with the insurer's agreement. It appears the insurers are relying upon on a technical breach they have caused, by unreasonbly withholding consent, in order to avoid their clear liability under the insurance contract.

2. What specifically do you want to achieve from the insurance company/what do you want the insurance company to do?

The insurer meets their obligations under the insurance contract by settling the insured's liablity for adverse costs (plus interest) but also the insured's disbursements"

Selskabet har i brev af 17/10 2016 til nævnet blandt andet oplyst:

"Alpha Insurance A/S has received the letter of complaint dated 5th October 2016 and accompanying documentation by post on 11th October 2016 and we have accordingly investigated this matter with … Legal Assist Limited (…), who takes care of administration of the policy on behalf of Alpha Insurance A/S and is referred to as the 'Underwriter's Representative' in the Claimprotect Legal Expensed Insurance Policy Document (already supplied with the complaint)

…

It has been brought to our attention by … that … Law's description of the situation surrounding the discontinuance of this claim is somewhat wanting, when they write that … did not issue the requested authority to discontinue the claim in time. We understand that authority to discontinue was in fact refused by … and that … Law was instructed in writing to proceed to trial.

… Law have provided copies of the relevant correspondence from the two days preceeding the trial date of 27th August 2015, and in our opinion, … acted as promptly as possible under the applicable time constraints. In support of this view, we draw the Board's attention to comments made by … of … in his letter to … Law dated 22'd March 2016 with a timeline of the correspondence and the copies of the relevant e-mails already supplied. It is worth noting in this context also that the notice of discontinuance indicates that the Court Office is open between 10am and 4pm on Wednesday 26th August 2015 and that the last e-mail from … was sent at 15.24 giving clear instructions to proceed to trial. These instructions were obviously ignored, since the notice of discontinuance was lodged regardless that day. Alpha has no way of knowing exactly when that occurred, but perhaps … Law would be prepared to enlighten us and the Board on this point?

The insurance policy makes it clear under Exclusion 4 that, 'No indemnity ... shall be provided ... in respect of' ... '4. Proceedings which are ... discontinued ... by the Assured, unless prior written consent of the Underwriter has been obtained ...' Such consent was not provided and was in fact refused. Therefore, the further stipulation under exclusion 4. that,

such consent can be given only where … Law advises that the Assured has no reasonable prospects of success, is irrelevant in this case, as consent was specifically declined.

In the brief outline of the case provided in the Complaints Form, … Law state, 'It should be noted that our actions did not prejudice the position of the insurer ... '. We disagree with this comment. While the costs and disbursements had already been incurred with the agreement of … on our behalf, if the case had been successful at trial, these would have been recovered in full from the defendant. It is not for us to decide whether the trial would have been successful or not at this point in time. Our view is that, in discontinuing against our specific instructions, … Law as representatives of the insured removed any opportunity available to win the case. While expert evidence would of course have been relevant, we place weight on the fact that, already prior to the proceedings being issued, the third party insurers had admitted a breach of duty. As insurers we were willing to support taking this to trial and that opportunity was denied us by … Law's actions.

In these circumstances Alpha Insurance A/S cannot agree to pay any of the costs, interest or disbursements incurred and we maintain the position already communicated to … Law by …."

Klagerens advokat har i brev af 7/11 2016 til nævnet blandt andet bemærket:

"It is our understanding that when the Financial Ombudsman Service have considered disputes such as this, they have considered if the insurer is enforcing a particular policy term simply as a method of avoiding liability under the contract along with, if an insured has not met the strict policy term, if the actions taken has materially prejudiced the outcome and the position of the insurer and if the breach was reasonable in the circumstances. We therefore would be confident that a matter such as this would be founding favour of the insured if the matter was handled by the Financial Ombudsman Service

However we understand Alpha A/S no longer agrees to have their disputes dealt with by the Financial Ombudsman Service, we do not know why this changed or when. Alpha A/S did advise in their response to the complaint that Ankenævnet for Forsikring now deal with disputes under their policies and the Financial Ombudsman Service simply act as a conduit to do this. This is a substantial/material change to the policy that was not communicated to the insured at any time previously.
…
In respect of the actual complaint, we are not suggesting that … were slow to reply to our requests to discontinue, the point we were making was that we disagreed with their decision that the matter should continue to trial as the matter was bound to fail. We were trying to communicate this to … when we were faced with the deadline to act. We therefore had no real option (whilst acting in the best interest of the insured and the insurer - by limiting their obvious liability under the policy) but to discontinue.

It should be noted that the position of the insured's Civil Claim, (with all expert evidence against them and little, if anything to counter this) was the only realistic outcome if the Civil Claim had proceeded to trial, as 'required' by the insurer, would have been a judgement against the insured with the costs awarded against him (to be indemnified by Alpha NS) being substantially increased!

The policy states the agreement to discontinue should not be unreasonably withheld and it is our view that the refusal to discontinue, in view of the circumstances of the claim, was

unreasonable and is only being enforced in order to unreasonably avoid liability under the policy."

Af selskabets brev af 1/12 2016 til nævnet fremgår det blandt andet:

"We agree that the policy issued was subject to the laws of [udlandet]. This policy was issued in April of 2012 and the jurisdiction clause is typical of those from that time. Current legal expenses insurance policies make it clear that the parties are free to choose another jurisdiction. This is relevant if the policyholder wishes to make use of the alternative dispute resolution solution provided by Ankenævnet for Forsikring/The Insurance Complaints Board in Denmark. This was explained to [klagerens] legal representatives, … Law in the letter from Alpha Insurance A/S dated 6th July 2016, and we assume that in bringing the complaint before the Board, that they have agreed to the application of Danish law and practice in the adjudication of this complaint.

Nevertheless, it is important to point out that it is a fundamental part of insurance Law in [udlandet] that a condition precedent in an insurance policy must be complied with for the insurance company to have any liability under the policy. In this case both Condition 5(a)(ii) and Exclusion 4 make it absolutely clear that the insurer/underwriter has no liability to pay under the policy unless the underwriter, Alpha Insurance A/S (Alpha), or … Legal Assist Limited (…), as the underwriter's representative, have provided written authority for the solicitor and/or their insured to discontinue the case, such permission not to be unreasonably withheld.
…
We are confident that under [Law the failure by … Law to follow the requirements of Condition 5(a)(ii) and Exclusion 4 would be interpreted to mean that Alpha has no liability under the policy, as … Law failed to comply with a condition precedent of the policy.

In failing to comply with the policy terms and conditions of the policy, … Law may have been negligent towards their client. We are therefore disappointed that … Law have failed to recognize their conflict of interest and that they clearly have not advised [klageren] to seek alternative legal representation in pursuing his complaint.

As set out previously … and Alpha do not consider that permission was unreasonably withheld. Indeed, … involved the firm's senior partner, Mr …, in the two days remaining before trial. … acted quickly and provided their decision that the matter should be continued to trial. … now accepts that … did not unreasonably withhold their decision, as he states in his letter of 7th November that '...we are not suggesting that … were slow to reply to our requests to discontinue.' It must be concluded on the basis of … Law's own evidence therefore that the decision was in fact not unreasonably withheld.

… in previous correspondence had argued that they had run out of time and had a deadline to meet so could not wait for …'s decision on whether they agreed to the request to discontinue. In his latest letter, he is now arguing that they disagreed with the request for them to continue to trial.
…
You first contacted … on 25th August 2015 by telephone and email at 12.54pm requesting their agreement to a discontinuance. This email was forwarded to … at 13.22 on the 25th. Despite the fact that the person dealing with the case at … was in business meetings in … on the 25th and 26th. He forwarded the email correspondence to your … at 9.30 am on the 26th August asking him to look at this urgently expressing concerns that … were being asked to discontinue two days before trial. … then replied to that email (sent at 9.30 am)

on the 26th August at 14.05 pm. … then replied to … at 15.24 pm stating 'I think we should proceed to trial'. He did not reply until 17.16 pm.

We consider that … did reply to … Law's request for a discontinuance in a reasonable timeframe, following consultation both internally and with your firm's senior partner. Not only did … not agree to a discontinuance, but they specifically instructed … Law to continue to the trial the following day.

…

It is evident from the above that … has changed his argument from not receiving …'s instruction to continue to trial the next day 'in time' to disagreeing with their decision that the matter should have continued to trial as the matter was bound to fail. This however is a poor argument, as insurers we are entitled to disagree with the acting solicitor. We will expand further on this:

There are numerous cases where the acting solicitor wishes to continue to trial and … acting on Alpha's behalf refuse and also there are numerous occasions when the solicitor does not wish to continue to trial yet we do. It is …'s role to decide whether under the insurance policy that indemnity should continue. Sometimes, even where prospects are substantially diminished, as in this case, we make the decision that it is in the best interest of the client and Alpha to continue to trial. In this case the engineering evidence was supportive, although the medical expert had changed his mind that, on the balance of probabilities, the accident did not cause the injury.

So perhaps prospects of success had fallen from substantially in excess of 50% to much less than 50%. However prospects remained and we believed that, given it was only the day before trial so that defendant's costs and own disbursements to pay would be high, it would make sense to continue to trial, albeit with the reduced prospects. Furthermore, in our experience, when losing at trial the Judge often assesses costs summarily and, when he does this, he typically reduces the costs substantially. Therefore, from our point of view, even had we lost at trial, the costs to pay if summarily assessed by the Judge on the day, would have been significantly lower that the costs to pay on discontinuance the day prior to trial. … were entitled to instruct … Law to continue to trial in accordance with the terms and conditions of the Legal Expenses policy.

In conclusion, this was not a minor technical breach of the policy terms and conditions, as … alleges. … Law discontinued on behalf of the claimant the day prior to trial without our written permission. Because our instructions to continue to trial were received after they discontinued, they initially argued that we failed to provide this instruction to continue in time. Following presentation by us of the evidence that we did indeed act on a timely basis, … Law have now changed their argument that we were 'wrong' to instruct them to continue to trial."

Klagerens advokat har i brev af 8/1 2017 til nævnet blandt andet anført:

"We note the insurer states the claim should have been pursued as the engineering evidence supported the insured's claim, this is disputed.

The insured was initially examined by a medical expert who stated the claimants hearing loss could have been sustained due to an acoustic trauma. He stated a short exposure of a high level noise with exposure to sound pressure levels of 140-150dB could have caused the injury claimed.

The subsequent report from the acoustic engineer found that the noise levels the insured would have been exposed to would likely have exceeded the upper exposure action limit of 85dB however, this is in respect of Noise Induced Hearing Loss where the insured would have been continuously exposed continuously to such noise levels over a long periods of time (months/years). So whilst the engineer would have supported a Noise Induced Hearing Loss claim, the insured was not/unable to pursue this as he had only been employed and exposed to the noise for just 2 days!

It must also be noted in view of the above the policy was not incepted or accepted as 'Industrial Disease' but as a standard `Employers Liability' claim (see attached Schedule).

The acoustic engineer stated in his opinion, the sound pressure level the insured could have been exposed to would not have exceeded 135 dB (see attached extract of the report)

The Acoustic Engineer therefore did not support the insured's claim being pursued as the maximum noise pressure the insured could have been exposed to was significantly below the minimum level that would have been necessary to cause the claimed injury.

Therefore the Acoustic Engineer did not support the insured's claim."

Af selskabets brev af 2/2 2017 til nævnet fremgår det blandt andet:

"As previously advised, … makes decisions as to whether to discontinue or to continue to trial as the underwriter's representative on behalf of Alpha Insurance A/S (Alpha) in accordance with the policy terms and conditions. Sometimes … are right in their decision to discontinue and sometimes they are not, but this is not the issue. Perhaps we would have lost at trial. Perhaps we would have won. We will never know. The fact is that the policy terms and conditions make it clear that the solicitor does not have the authority to discontinue without the underwriter's permission. The solicitors clearly knew this, as they wrote to … to ask for permission to discontinue the matter two days before the trial and it is therefore our firm belief that… Law have acted negligently by discontinuing the case without …'s prior acceptance.

We fail to understand why … Law is now alleging that the engineering evidence failed to support the claim. When … were e-mailed by …, … Law's senior partner, in the last two days before trial, he replied as follows on 26th August 2015, inter alia, quoting the fee earner as follows; 'This case has been conducted throughout as an accident at work i.e. an acoustic accident. Accordingly, an EL [Employers Liability] policy was requested as opposed to an ID [Industrial Disease] policy as this case relates to a one-off incident at work where it was suspected the Claimant had suffered an acoustic accident/trauma; this is entirely different to a case of Noise Induced Hearing Loss which relates to prolonged periods of exposure. Prior to the issue of proceedings, the third party insurers admitted breach of duty.

Further, the medical expert initially advised that the …'s hearing loss was, on the balance of probabilities, caused by an acoustic accident whilst at work. Proceedings were issued. Post issue the defendants made an application to alter their position on liability which they then wished to dispute. They have no documents relating to the work environment, specific equipment being used or noise levels on the day in question nor any risk assessments; the locus had changed and was not capable of inspection. The court however ordered an engineers report be prepared on a joint basis. That 'desktop' report was favourable. A

copy of the report from the acoustic engineer was sent to the medical expert; the defendants raised some questions of the medical expert as did we. Unfortunately the expert backed off from his original opinion. We sent an update as to the position in our letter dated 7 July 2015 which also enclosed a copy of the engineer's report. Further questions were raised of the medical expert in light of the fact that the engineering evidence was favourable but the defendants continued to dispute causation - questions we had specifically asked the expert to deal with in our letter of instruction to him. The expert's replies were only received by email on Monday 24 August 2015 and contrary to his initial advices, he now confirmed that on the balance of probabilities, the Claimant's hearing loss was not as a result of an acoustic accident. Our request for authority to discontinue was emailed to you the following day, in light of the change of opinion by the medical expert. We have kept the ATE Insurer appraised of key developments as per the attached correspondence.'

Twice in the foregoing it is stated that the engineering evidence was favourable. It was only the medical expert's interpretation of the engineering evidence which changed the medical expert's prospects of success.

Finally, … Law's comment that '...the refusal to agree discontinuance was unreasonable.. is remarkable. Having considered matters fully and, having very little time to digest the situation, and even taking the time to consult directly with the firm's senior partner, … came to the conclusion that it was in everyone's best interest to continue to Court. … accepted that the prospects of success were reduced but prospects nevertheless remained, based on the information provided by … Law. We fail to understand why … Law were so keen to discontinue without waiting for …'s final decision. These `arguments' are an afterthought. The simple facts are that they asked … to agree to a discontinuance two days before trial and, after due consideration, … informed them to continue to trial on the day before trial, yet they had already discontinued."

Klagerens advokat har i brev af 3/3 2017 til nævnet blandt andet anført:

"When the Engineers report was received it was seen, broadly, to be supportive having detailed the noise levels exceeded the levels deemed acceptable under the Noise at Work Regulations 2005 and were sufficient to cause hearing loss/damage.

It was noted that the maximum noise limit was below that stated by the Medical Expert. However noting the engineering report was simply a desk top assessment, based upon a rough plan and building in question, with the supporting medical expert stating the likely cause of the injury was acoustic trauma, it was felt, on the balance of probabilities, that a court would accept the report as establishing the insured was working a noisy environment capable of causing the hearing loss/damage as claimed, and thus the matter had reasonable prospects of success.

However as we are all aware following questions by the Defendant, the medical expert changed their opinion to no longer state the injury was caused by acoustic trauma and instead state the likely cause of the injury was an ongoing medical condition. We put questions to the expert to try and obtain a favourable revised opinion, in order to be successful in the claim and thus prevent a claim under the policy etc, however this proved unsuccessful.

Therefore with medical evidence now stating the injury was caused by an ongoing medical condition and engineering evidence, albeit a 'desk top assessment', stating the maximum

noise was not sufficient to cause the claimed injury, the claim no longer had prospect and was therefore discontinued to act in the best interests and limit the liability for all parties.

We are satisfied that the claim the claim has been handled correctly protecting the insured's and Alpha's position in this matter as this claim was not going to be successful at Trial following the medical expert's change of opinion.

If Alpha do believe our assessment of the engineering evidence and the subsequent handling of the case that followed was incorrect, as suggested in their latest letter, we strongly dispute this. However, even if this was the case this would not has altered the ultimate outcome of the matter and therefore should not invalidate and prejudice all cover under the policy, but only those costs liabilities incurred following this.

Also noting we are panel members, if Alpha has concerns in relation to our handling of this matter, this should not this prejudice the insured's position. It instead would be appropriate to indemnify the insured and if they do feel we have prejudiced their position should look to ourselves for recovery of the losses caused from ourselves."

Selskabet har i brev af 17/3 2017 til nævnet blandt andet bemærket:

"We wish to point out to .. Law that this complaint is based on the contract relationship between [klageren] and Alpha Insurance A/S and that the decision of the Danish Insurance Complaints Board (the Board) is restricted to evaluating the terms and conditions of the relevant insurance policy. If the Board's decision indicates that it is the actions of [klagerens] solicitors that have resulted in a loss to [klageren], that is a matter for the solicitors firm and [klageren] to settle between them."

Klagerens advokat har brev af 4/4 2017 til nævnet blandt andet bemærket:

"It is clearly unreasonable for Alpha group to force their insured to almost certainly incur additional liabilities by going to trial, contrary to professional legal advice, simply as an extremely unlikely gamble to save them from having to make a payment under the contract.

The insured's actions were clearly reasonable in the circumstances and for the insurer to repudiate the claim on due to the insured acting reasonably, by following professional legal advice, which also had the benefit of restricting his and ultimately the insurers ultimate liability, is unfair and unjust.

It must also be considered that if this matter is found in favour of the insurer, such a decision would provide insurers with the opportunity to avoid their contractual liability under the policy by acting taking such an unreasonable and unfair stance in the future."

Selskabet har i brev af 5/5 2017 til nævnet blandt andet oplyst:

"… Law refer to the claim on the policy as 'reasonable'. That has no relevance as the terms and conditions of the insurance contract were not complied with and therefore Alpha has no liability under the contract. Had … Law continued to trial and lost, any claim on the policy would have been 'reasonable'.

We have no issue with the fact that the insured followed the professional advice of … Law, it is simply that … Law were wrong not to follow the specific instruction from … to continue.

… Law are arguing that Alpha's refusal to discontinue was unreasonable. We disagree but we note that this is an 'after the event' argument which … Law use, which has no relevance to the facts, as … Law, chose to discontinue before they received the instruction from … to continue to trial.

We do not accept that to continue to trial would force the insured to incur additional liabilities. Had the matter been continued to trial in accordance with …'s instructions and the matter failed at trial, all liabilities would have been paid by Alpha as a valid claim under the policy.

By failing to follow …'s instructions to continue to trial, … Law have unnecessarily placed the insured at risk. It is for the insurer, not the acting solicitor, to decide whether the matter should proceed to trial under the ATE insurance contract. It is not for … Law to discontinue an action against the express wishes of the insurer."

Af brev af 25/5 2017 fra klagerens advokat til nævnet fremgår det blandt andet:

"We note Alpha do not have their insured, the complainer form following the advice of their solicitors i.e…. Law as thye did however they have an issue with us not following their instructions to us.

This is clearly contradictory; Alpha seem to be saying they agree the insured was right to withdraw as the claim does not have reasonable (any real) prospects of success, but then we cannot act upon these instructions because … say so as they will then need to honnor a claim? I am interested in what we should have done, ignored the instructions of our client and negligently force them to proceed to trial?

…

At best (in all likelihood in view of the lack of any real prospects), the client's claim would have been dismissed at trial and an Order for adverse costs on a standard basis (which obviously would be greater than those being pursued in view of the costs of the trial etc) would have been awarded against him.

However, given the prospects were so poor, (against the weight of evidence/lawyers advice etc) there would have been a risk of costs being awarded to the defendant on an indemnity basis to reflect the court's displeasure of pursuing such a weak case to trial.

There was also a risk of a non-party costs order against the ATE provider (on the basis that the ATE insurer forced the client/the insured to proceed to trial - against the weight of evidence/lawyers advice - failing which indemnity would be withdrawn/not be provided) again on an indemnity or even, possibly, a punitive basis and should the Judge so wishes summonsed them to attend a hearing to explain their unreasonable actions.

And as to the suggestion that Alpha/… would have happy settled the claim had it proceeded to trial and lost etc. we doubt this very much in view of their current stance on this matter, also if indemnity costs had been awarded this may have breach the indemnity limit."

Selskabet har i brev af 1/1 2017 til nævnet blandt andet oplyst:

> "Further to our previous correspondence in this matter and, in particular, to our latest reply dated 5th May 2017, we have further information which we find to be of the utmost relevance.
> …
> In a different 'After the Event' matter, Alpha's Coverholder … Legal Assist Limited recently received an urgent request to discontinue a court action two days prior to the court hearing date. The similarities with the circumstances of [klageren] are striking, but in this other claim, … Law wrote in the penultimate paragraph:
>
> We note however that it is an express terms of the policy that we seek your prior authority to discontinue a claim against a Defendant ...
>
> (Copy letter enclosed, with private information relating solely to that claim redacted out.)
>
> We find the comment by … Law in the other case to be an acknowledgment of our right as insurer to provide (or deny) authority to discontinue a claim, which therefore supports our own position in the complaint being dealt with by Ankenævnet."

Af en supplerende speciallægeudtalelse af 19/8 2015 fremgår det blandt andet:

> "**Review of Records.**
>
> The records indicate that the claimant saw his GP on 4 February 2012 complaining of left sided hearing loss following working in a noisy basement the previous month. He complained again at another visit on 18 February and an audiogram was arranged. An audiogram dated 5 March 2012 shows left-sided sensorineural hearing loss of moderate to severe degree. At a further consultation on 25 February the hearing had not returned.
>
> A letter from Mr …, Specialist Registrar at the …clinic of … Hospital, indicates that the claimant was seen there on 19 March 2012 with left sided hearing loss which was noticed when he awoke the day after working in a basement with a Kango hammer in January. An audiogram is reported to show noinial hearing on the right and 'on the left he has mild and high frequency severe sensorineural hearing loss. My impression is that this is noise induced acoustic trauma.' An MRI scan was arranged to exclude a left sided acoustic neuroma. A subsequent letter indicates that the claimant had been reviewed by the Consultant Mr. … on 20 June 2012 and that the scan was normal; hearing protection was discussed.
>
> **Opinion.**
>
> In my opinion the claimant's sudden left sided hearing loss is likely, on the balance of probabilities, to be due to noise exposure only if the sound pressure levels were sufficient to cause sudden acoustic trauma, i.e. in the region of 140dB,
>
> Chronic cumulative noise exposure causes slowly progressive, bilateral hearing loss over some years affecting mainly the frequencies around 4 to 6kHz. There is no evidence that intermediate noise exposure at a level of 90 - 135dB over a shorter period would cause measurable hearing loss, (which, in any case, would be bilateral).

I do not agree with the Otolaryngologists at the … Hospital, who did not have the information about the sound pressure levels involved subsequently provided by the acoustic engineer.

It therefore remains my opinion, in the light of the acoustic engineer's report, that the claimant's hearing loss is likely, on the balance of probabilities, to be due to microvascular disease secondary to diabetes and not to noise exposure."

I mail af 26/8 2015 fra selskabet til klagerens advokat er det blandt andet anført:

"On 26 Aug 2015, at 15:24, … wrote:

Especially as we have positive engineering advice and the Court requested this I would have thought we should proceed to trial tomorrow. I still don't understand why the medical expert is less positive now given the positive engineering evidence. Perhaps simple nervousness. I think we should proceed to trial."

I forsikringsbetingelserne hedder det blandt andet:

"**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.

…

5. Payment

(a) The Underwriter shall only be liable to make a payment under the Policy if either:

(i) the Court orders the Assured to pay Opponent's Legal Costs and the Proceedings are not the subject to any further legal action; or

(ii) The Underwriter has agreed to the terms of a settlement of the Proceedings in circumstances where the Appointed Representative advises that the Assured has no reasonable prospects of success on the question of liability of the Opponent and the Underwriter's Representative has their prior written consent, such consent not to be unreasonably withheld, to the compromise, discontinuance or withdrawal of the proceedings including the terms of such settlement.

…

EXCLUSIONS

No indemnity under this insurance shall be provided by the Underwriter in respect of:

…

4 Proceedings which are compromised (including by any consent, judgement or Court order) or discontinued or withdrawn by the Assured unless the prior written consent of the Underwriter has been obtained including their agreement to contribute to the terms of such a settlement, such consent to be given only where the Appointed Representative advise that the Assured has no reasonable prospects of success on the question of liability against the Opponent"

12. 89912

Nævnet udtaler:

Klageren havde anlagt retssag mod sin arbejdsgiver med henblik på at opnå erstatning for et høretab på venstre øre. Det fremgår af sagen, at det var klagerens opfattelse, at høretabet var opstået som følge af støj under udførelsen af hans arbejde, og der var nedlagt påstand om, at der var tale om et traumatisk høretab opstået i forbindelse med en enkelt begivenhed.

Det fremgår af sagen, at klageren havde indhentet en medicinsk sagkyndig udtalelse, der understøttede hans påstand om, at høretabet sandsynligvis var opstået på grund af støj på hans arbejde. Der blev imidlertid indhentet yderligere oplysninger omkring støjforholdene på hans arbejdsplads, og efter en fornyet vurdering anførte klagerens medicinske sagkyndige i udtalelse af 19/8 2015, at det var hans vurdering, at "in light of the acoustic engineer's report, that the claimant's hearing loss is likely, on the balance of probabilities, to be due to microvascular disease secondary to diabetes and not to noise exposure".

Det fremgår af sagen, at klagerens advokat modtog oplysning om den medicinske sagkyndiges fornyede vurdering den 24/8 2015. På baggrund af de nye oplysninger i sagen ønskede klageren at hæve sagen, der skulle hovedforhandles i retten den 27/8 2015, hvilket klagerens advokat sendte meddelelse om til selskabet den 25/8 2015. Klagerens advokat mente ikke, at der var udsigt til, at klageren ville få medhold.

Klagerens advokat hævede sagen forud for hovedforhandlingen. Selskabet har anført, at det den 26/8 2015 klokken 15.24 svarede klageren, at det fandt, at sagen burde hovedsforhandles. Da klageren hævede sagen ved retten, har selskabet afvist at dække omkostningerne forbundet med sagen.

Selskabet har henvist til forsikringsbetingelsernes punkt 5 (a) (ii) og Exclusion 4, hvoraf det fremgår, at selskabet alene er forpligtet til at foretage udbetalinger i sagen, hvis selskabet har godkendt vilkårene for et forlig under omstændigheder, hvor den forsikredes

repræsentant vurderer, at den forsikrede ikke har nogen rimelige muligheder for at få medhold, og hvis selskabet har givet samtykke på forhånd. Et sådan samtykke må ikke tilbageholdes på urimelig vis. Det fremgår videre, at selskabet ikke forpligtet til at betale godtgørelse, hvis sagsførelsen standses af den forsikrede uden selskabets samtykke, som kun gives, hvor den forsikredes repræsentant har vurderet, at der ikke er grundlag for et positivt udfald af sagen.

Nævnet finder efter en gennemgang af sagen og efter en samlet vurdering, at selskabet har været uberettiget til at afvise at yde retshjælpsdækning til sagen.

Nævnet har blandt andet lagt vægt på den medicinske sagkyndiges ændrede vurdering, og at sagen efter alt at dømme ville blive tabt af klageren, og at klageren ved at hæve sagen forud for hovedforhandlingen begrænsede omkostningerne til sagsførelsen. Endvidere har nævnet lagt vægt på, at det efter nævnets opfattelse ikke er sandsynligt, at selskabet har lidt noget tab som følge af, at hovedforhandlingen ikke blev gennemført. Nævnet finder, at forsikringsbetingelsernes bestemmelser om, at selskabet skal samtykke, hvis en sag hæves, under disse særlige omstændigheder ikke kan føre til andet resultat.

Som følge heraf

b e s t e m m e s :

Selskabet, Alpha Insurance A/S, skal anerkende, at sagen berettiger til retshjælpsdækning. Selskabet skal opgøre og udbetale forsikringsdækning i henhold til forsikringsbetingelserne.

Klagegebyret tilbagebetales.

Peter Thønnings