Ankenævnet *for* Forsikring

Den 3. juli 2018 blev i sag nr. 91376:

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 (After-The-Event Legal Expenses Insurance Policy) i Alpha Insurance A/S, der gik konkurs den 8/5 2018. Han klager over selskabets ophævelse af forsikringsdækningen i forbindelse med en anmeldt retssag, og at selskabet har afvist at afholde omkostningerne til modparten.

Selskabet har afvist at yde dækning med henvisning til, at klageren ikke har givet fyldestgørende oplysninger i sagen.

I klageskemaet af 2/9 2017 til nævnet har klageren blandt andet anført:

> "1. Statement of claim, a brief outline of the case. A Supplementary statement may be enclosed.
> A few years ago, my brother and I were involved in a car accident, for which we filed a civil action in the UK, which lost at court. Our ATE insurance policy was underwritten by Alpha Insurance, who refused to pay out. We were then left personally with the costs incurred. After a long legal battle, and a case being filed with the UK Legal Ombudsman, our solicitors were ordered to pay half of the costs incurred In the case (as they had committed several mistakes which were fatal to the case) and it was said that the insurance company should be liable for all of the costs incurred up to that point. AU Insurance Ltd refused to pay out, and we passed the case on to the UK Financial Services Ombudsman. When the case was concluded, they said that as AU Insurance was underwritten by Alpha Insurance, a Danish Company, that the Danish FSO should have jurisdiction. I have attached all relevant information pertaining to this case, and I can confirm the following –
> 1. The case lost at court due to mistakes by our Lawyers

2. Our Lawyers paid all costs incurred AFTER their mistakes, leaving the case at a point where no mistakes had yet been made at all
3. Our ATE insurance policy was meant to cover these last few costs
4. Our ATE provider refused to pay out
5. Our ATE provider is now in administration, and so Alpha Insurance should be left to pay the last few costs
2. What specifically do you want to achieve from the insurance company/what do you want the insurance company to do?
We feel the decision to refuse indemnity was not justified and we believe that alpha insurance should be liable for outstanding costs that should have been covered by the policy."

Selskabet har i brev af 24/11 2017 til nævnet blandt andet oplyst:

"Alpha Insurance A/S (Alpha) is aware of our obligation under EU Directive 2013/11/EU to offer access to an alternative dispute resolution service to our customers. We are a member of Ankenævnet for Forsikring (the Danish Insurance Complaints Board 'the Board') precisely for this purpose and, if the Board wishes to adjudicate upon this complaint, we will participate fully in that process.

It is however our understanding that, in certain circumstances, the Board can refuse to deal with a complaint referred to them and, if the complaint is rejected, we as insurers will nevertheless be deemed to have complied with our obligations under the Directive and the complainant then has only legal recourse to the court system to take a complaint further.

In our afore-mentioned e-mail from 10th November, we drew the Board's attention to the fact that there are features of this particular complaint that we feel might place it outside the competence of the Board and make it more suited to a court of law in the U.K. We have been asked to elaborate upon that and in our view the reasons include, but are not limited to, the following:

1. The insurance policy involved is an 'After the Event' legal expenses insurance policy issued in 2012, which is stated to be subject to English law and jurisdiction. This in itself is not an automatic reason for the Board to refuse to deal with the complaint, as it is possible for the complainant to agree to the use of Danish law and practice in the adjudication process. However, indemnity under this policy was withdrawn more than three years ago. The legally proscribed limitation period under a contract in Denmark is three years, while it is six years in the U.K. Therefore, the complainant in this instance would seem to be better placed to be able to pursue any claim under English law.
2. This complaint does in fact relate to two policies, that of [klageren] ref. …18 and that of his brother … ref. …19 (…). The policies were taken out on the same date and related to Road Traffic Act claims connected to a single accident. The policies are linked, since it was the case of the brother of the complainant that was taken to court and failed due to inconsistent evidence and, since [klagerens] own case was based on the same evidence, the solicitors representing both brothers decided to discontinue [klagerens] case. Both policies were voided ab initio by Alpha's representative AU Insurance Services (now under administration) at that stage. One of the main elements of the complaint and voiding of the policies is the weight that can/should be placed on the inconsistent evidence and, in our experience, deciding if the burden of proof in evidence has been lifted is usually outside the scope of matters that can be decided by the Board and such decisions tend to be referred to a court of law.

3. This complaint is further complicated by side-comments made by the Legal Ombudsman in the UK in the complaint raised by [klageren og klagerens bror] against their representative solicitors … and whose decision the complainant seeks to rely upon. The Legal Ombudsman is a body with the authority to decide in complaints about lawyers:

'The Legal Ombudsman for England and Wales was set up by the Office for Legal Complaints (our Board) under the Legal Services Act 2007.
We are independent and impartial. This means that when we receive complaints, we will look at the facts in each case and weigh-up both sides of the story. We are not consumer champions or part of the legal profession, and we are also independent of government. Our service is paid for by legal and claims management companies and is free to consumers to use.'

The Legal Ombudsman has no authority over insurance companies and no expert knowledge of insurance matters. Nevertheless, in deciding the complaint against the solicitors in this case, the Legal Ombudsman has made certain assumptions and comments with regard to the After the Event insurance policy (policies) which are fundamentally incorrect. Alpha, as insurers, would not wish the Board to regard any of the statements of the Legal Ombudsman as being automatically valid, simply because they have been written into a formal decision. We do not agree with several of the side-comments made by the Legal Ombudsman and we would wish to introduce our own expert evidence to challenge the incorrect comments made, as they fundamentally affect our position. If the Board decides to proceed to deal with this complaint, we will obtain such evidence in order to bring it to your attention. Again, it might be more appropriate for such evidence on the validity of the Legal Ombudsman's comments to be argued before a court of law.

As stated above, if the Board prefers to deal with this complaint, we are happy to co–operate. In that case we would simply ask for at least 15 working days to present our position, due to the copious nature of the paperwork involved and the expert opinion that we will wish to introduce.

If the Board chooses not to deal with the complaint for any reason, we did mention in our previous e-mail, that an unusual feature of the relevant insurance policy is that, in addition to the usual recourse of taking the matter to court, there is a contractual option for mediation. This is by no means an alternative dispute mechanism equivalent to that offered by the Board, since it does not comply with the requirements of the Directive. It is however available to the complainant, should he choose to invoke that clause."

Selskabet har i brev af 4/1 2018 til nævnet blandt andet anført:

"**Background to ATE**
Although ATE insurance is a form of legal expenses cover, it is not provided as an add-on to another insurance product (as in Denmark), but is a stand-alone policy, a concept introduced by the English Access to Justice Act 1999. For a solicitor to take on a case under a Conditional Fee Agreement (CFA), he has to believe initially that the prospects are good and that same evaluation is a criteria imposed by Alpha Insurance A/S (Alpha) through the appointed administrators of the policy, which in this case was AU Insurance Services Limited (AU). In order for [advokatfirma] to be able to provide an Alpha ATE policy to [klageren og klagerens bror], [advokatfirma] had to abide by the terms of the ATE policy and the Panel Solicitors Agreement between them and AU.

Alpha does not have a copy of the actual Panel Solicitors Agreement, [advokatfirma] have refused to release a copy without being provided with an indemnity for any losses they may incur by releasing it to us, and it would be subject to confidentiality provisions in any event, but we do have a copy of the 'standard' document and can advise the Board that the following is written there:

*1) **PANEL SOLICITOR'S DUTIES***
The Panel Solicitor will at all times:
3.1 consider claims for compensation for consideration for Legal Expenses Insurance, ensuring that the Insurance Policy is appropriate for the prospective Insured and that the prospective Insured is eligible for the Insurance and that their case has at least 60% prospects of success;

This is an on-going obligation that must be adhered to at all times.

The complaint
[Klageren] and his brother … were involved in a Road Traffic Accident (RTA) on 7th September 2012. Another vehicle was at fault and the brothers contacted [advokatfirma] to raise their claims for compensation. [Advokatfirma] agreed to act under a CFA (no win no fee) and they offered the brothers the opportunity to enter into After the Event (ATE) insurance policies with Alpha. A copy of the Certificate and Policy of [klagerens bror] is enclosed (Doc 1) and that of [klageren] would to all extents and purposes have been identical.

[Klagerens] claim proceeded to court in 2014, his claim was unsuccessful and he was ordered to pay the defendant's costs in the sum of £11,063.80. [Klagerens brors] claim, which was inextricably linked with his brother's, being based on the same circumstances, and with both brothers having given evidence at the hearing of [klagerens] claim, was subsequently discontinued, with adverse costs being payable of £2,851.40.

In normal circumstances, the ATE policy would have been called upon to pay the defendant's costs. However, in this case, upon reviewing the position, AU on Alpha's behalf rejected the claim of [klageren] due to the following:

- The Judge found the Claimant's evidence to be unreliable and noted numerous inconsistencies with the salient points of the claim
- The Defendant alleged Low Velocity Impact (LVI)
- Inconsistencies in the Claimant's evidence such as: mechanism of the accident (whether the vehicle was stationary or moving), his employment status, time off work, lost earnings, vehicle damage, and injuries
- Mechanism of impact – initially the Claimant stated his vehicle was slowing down when struck from the rear (his speed 30 mph, Third Party speed 15-20 mph), then he told the medical expert he was in a queue of traffic and stretching at the time of impact and in his witness statement he said he was in a queue of traffic and had turned his head to speak to his brother at the time of impact
- In the Claimant's Part 18 responses he also claimed his vehicle was shunted forward a few feet (despite being in a queue of traffic, claiming the impact was at 15-20mph, and not hitting the vehicle in front)
- Injuries – the Claimant alleged that he struck his knee on the dashboard (exacerbating a previous injury) – however made no reference to striking his knee in his witness statement (only that his knee was painful), made no reference to knee injury during the contempora-

neous attendance at A&E following the accident (despite alleging to be in intense pain immediately)
- Inconsistency as to how long his neck injury took to heal
- Inconsistent as to his time off work and lost earnings
- Vehicle damage – the Claimant averred in his witness statement that there was more vehicle damage than there actually was, despite the engineers report predating his witness statement
- The only vehicle damage as per the Engineers report was to the rear bumper – in the initial telephone note the Claimant averred there were cracks on the rear bumper, damaged paintwork, appears to be wobbly and loose – the witness statement then goes on to claim the rear bumper was broken, damaged exhaust and damaged boot lid (wouldn't open) – this was unsupported and the vehicle was sold without repairs being undertaken, despite liability being admitted and the vehicle being roadworthy with minor temporary adjustment
- The Claimant attempted to explain the inconsistent vehicle damage at Trial, by stating that the engineer did not have the car keys on inspection – despite the report including photographs inside of the vehicle
- Both Claimant's alleged to have taken photos at the scene – which never materialised
- The Judge referred to how the Claimant attempted to blame others for inconsistencies, instead of saying he could not remember – culminated in him proving to be an unreliable witness

During the course of preparation of the case for trial, certain things were not disclosed to AU:
- The vehicle damage reported in the Claimant's witness statement was more extensive than supported by the engineers report (which gave total repair cost at £675.80) – [advokatfirma] did not send AU the engineers report
- …'s LVI report, which strongly asserted that the mechanism of the accident was not consistent with the injuries allegedly suffered, was not supplied
- AU were not made aware of the inconsistencies throughout the Claimant's evidence
- It was a case of one parties word against the other – lack of supporting evidence, and the claim was based on Claimant's evidence
- Counsel emailed [advokatfirma] on 27.02.2014 highlighting a number of inconsistencies and advising them to seek settlement prior to trial if possible, and to make a sensible Part 36 offer – AU were not sent this, and were only provided with Counsel's initial email (dated 06.06.2013) which notes no specific concerns
- The solicitors told AU on 24.10.2013 that they had a supportive medical report (in the questionnaire) – …'s report is dated 09.10.2013 – no medical reports were disclosed to AU

Additional comments:
- [Advokatfirma] made a part 36 offer of £3,200 on 18.05.2014 (just over a month before trial), which was refused – no further attempts to settle were made
- Following receipt of the defence, AU reserved Alpha's position as to indemnity (fraud caveat)

Due to the above, AU sent a letter dated 24th September 2014 to [klagerens] apparently advising him that indemnity had been withdrawn. Alpha does not have a copy of that letter, AU has entered into administration and we are not able to access their files, but the contents thereof are referred to in Document 3, which is seemingly an undated email from [advokatfirma], explaining

AU's comments and the reasons why the brothers were deemed to have been in breach of the policy terms. In the enclosed Documents 31-34 AU explain further the reasons for the withdrawal of indemnity and the position held is reiterated by BCR on Alpha's behalf culminating in Document 47.

The initial formal complaint to Alpha dated 1st February 2016 (Document 35) was referred on to AU for assistance with a reply. Alpha was provided with a draft of the reply which we believe was despatched to [klagerens] by AU (Document 37) where, once again, AU sets out the position of Alpha. It was around this time that AU ceased trading and it was formally put into administration in April 2016. If that letter has not been received by [klageren] previously we must apologise, but the letter serves mainly to confirm the position maintained throughout – that the policy was voided on valid grounds and that no indemnity can be provided.

In his complaint mail (Document 35), interestingly [klageren] refers to a case that has been decided in the UK on the subject of when it is permissible to void an ATE policy. In their response, AU reply on that specific case and we are taking the opportunity to enclose as Documents 48 and 49, two commentaries on the case, which both support Alpha's position – that the established rules under English law relating to non-disclosure, misrepresentation, avoidance and waiver apply to ATE insurance contracts and must therefore be taken into consideration by the Danish Insurance Complaints Board when adjudicating upon this complaint.

In our view, one of the main elements of the complaint relating to the voiding of the policies is the weight that can/should be placed on the inconsistent evidence and, in our experience, deciding if the burden of proof in evidence has been lifted is usually a decision reserved to a court of law.

The Legal Ombudsman
[Klageren] and his brother have referred their complaint against the actions of [advokatfirma] to the Legal Ombudsman in the UK (Docs 24-30) and reached an informal resolution set out in Document 26, whereby [advokatfirma] paid the defendant's solicitors £6,300 in the case of [klageren] and £1,250 in the case of [klagerens bror]. The brothers also received a further £250 each in compensation.
…
The Legal Ombudsman has no remit in respect of an insurance policy, no authority over insurance companies and no expert knowledge of insurance matters.

Nevertheless, in deciding the complaint against the solicitors in this case, the Legal Ombudsman has made certain assumptions and comments with regard to the After the Event insurance policy (policies) which are fundamentally incorrect.

One such comment can be found in the second paragraph of Page 2 of Doc 26, where an assumption is made that 'on the balance of probability' ... if the Barrister believed the chances of winning the case were more than 51%, that the insurance may have agreed to continue.

We have already demonstrated on the first page of this response that 51% is by no means sufficient – a case must have prospects of success of at least 60% in order for the claimant to continue to be eligible for ATE cover. Had we been kept fully informed on this case the claimant would

clearly not have been eligible/continued to be eligible for ATE cover, so the comments of the Legal Ombudsman must be disregarded as far as they apply to Alpha.

Exclusion 2.2.7 of the policy (Document 1) makes it clear that:
This **policy** excludes and the insurer shall not be liable for any:
Non-disclosure
opponent's costs or **disbursements** where the insured or the **appointed solicitor** has failed to disclose material facts;

Conclusion
We maintain our position as supported by the policy wording and explained in the various correspondence sent on our behalf, latest in Document 47, that the policy was properly cancelled. No premium has been paid by [klageren]. No indemnity is due and we respectfully request the Board to make a ruling to this effect.

If [klageren] or his brother have not yet settled the outstanding defendant's costs connected with the failed and discontinued cases from 2014, we can only suggest that they do so immediately."

I mail af 15/3 2018 til nævnet har klageren fremsendt en kopi af et brev skrevet til engelske "Legal Ombudsman" i 2014 vedrørende hans advokats behandling af retssagen. Han har hertil blandt andet bemærket:

"I find it extremely unreasonable that an insurance company that we depended on can use the very thing that we were insured for, to void our insurance policy. Surely any case that is ruled against in court means that the Judge preferred the other side's evidence, and so we should still be covered.

After a long process of filing a previous document with the Financial Services Ombudsman, we found that A U Insurance were underwritten by a Dutch firm, which mean that the UK FSO had no jurisdiction. We were then directed to the Dutch FSO, who after a long process told us that the company in question was now no longer trading. We were advised that a company called BCR Legal were handling the company's affairs.

We followed their complaints procedure fully and came up against the following issues -
1. We were asked for the same documents over and over again over a matter of months
2. Until they were given a deadline of two weeks to respond, there was minimal correspondence
3. When we gave them a deadline to reach a decision, they responded after a few days with just a PDF of an irrelevant letter sent from A U Insurance to my brother some years ago (it was my brother they were supposed to be corresponding with), and when we asked why we had just received a blank email with an attachment, not a proper response, they simply reiterated what A U Insurance said some years ago, and just shrugged the case away.

It is our belief that they did not review our case at all, and just kept us at arms length to stall the process as they did not want to pay out.

I feel that we have been failed by the legal justice system, and that this is the only way to turn.

I therefore ask you to please help us, as we are worried that this will affect us for years to come. It is our belief that BCR Legal should honour the agreement and pay the rest of defendant's costs on our behalf."

I et udateret brev til nævnet har klagerens bror blandt andet anført:

"1. The Judge in her official statement merely stated that she 'preferred the defendant's evidence', and made NO OFFICIAL FINDING OF DISHONESTY. Alpha Insurance are presuming to interpret the Judge's findings in a way that suits them, to try and save them some money.
2. The defendant alleged LVI, which was never in dispute, so this is an irrelevant point.
3. The inconsistencies in the evidence were shown to be due to the poor recording of such facts by the appointed persons, not my brother and I. The discrepancies about my brother's employment status were completely irrelevant and blown out of proportion by the defendant's counsel. In one document he was listed as an …, and in another document he was listed as a self-employed … This is an irrelevant and completely pointless distinction. A self-employed … is STILL an …
4. Mechanism of impact. We always stated that we were both in a queue of traffic, and in the process of slowing down, as the location in question is a slip road off of a major dual carriageway. This is simply a case of witness testimony being affected slightly by the passage of time.
5. It is good road safety to drive, leaving a gap in front of the car that is proportional to the speed of the car. We were indeed impacted from behind, whilst in a queue of traffic slowing down off of a major road, and shunted forward a few feet. This distance was not enough to cause us to impact the car in front, as we were leaving a safe distance as is good driving practise.
6. My brother did mention to the doctor at A & E about his knee hurting, however this was not recorded by the doctor in question. A point which we raised numerous times. The fact that Alpha Insurance believe it is appropriate to mention that my brother alleged that he hurt his knee, but in his witness statement only mentioned that his knee hurt is ridiculous. Why would he mention his knee pain in his statement if it was not due to the accident?
7. Inconsistency as to how long his neck injury took to heal. This was another example of witness testimony being affected by the passage of time. Alpha Insurance have not even included any details on this point, suggesting that they understand why this has happened.
8. Inconsistencies as to his time off work and loss of earnings. My brother reported to our firm of solicitors that he lost two days work at £50 per day. Our firm of solicitors recorded that his loss of earnings was £50. This was discovered too late to change and my brother made everyone involved aware as soon as he discovered this discrepancy.
9. Vehicle damage. My brother always maintained the same level of damage that was caused throughout the case. There was some damage that was only evident after my brother had to continue to use the car, as some was not immediately evident.
10. The boot lid was damaged and was very difficult to open, exhaust issues WERE caused by the impact, and my brother had no choice but to sell the car at a £2400 loss as no money was ever paid out to get the car repaired, and he depended on the car for work. If the case had been handled properly then money should have been paid out as an interim payment in order to keep the car in original working order, however this was never done.
11. My brother maintained that the engineer did not have the keys to his car because he believed it to be true. He only found out later that our mother had given the engineer the spare key which she held. This was NOT dishonesty.
12. Both my brother and I took photos at the scene, which we immediately passed on to our firm of solicitors, these photos were accepted by our firm of solicitors to have been lost by them. Again, not dishonesty on our part, we did everything that we could.

13. The fact that the Judge referred to my brother as blaming others for the inconsistencies in his case is very relevant. We have shown that the inconsistencies in this case WERE the fault of others.
14. Using the 'fraud caveat' is not applicable in this case, as there was NO FINDING of fraud or dishonesty by the Judge. An insurance company CANNOT infer fraud where there was no such finding and use this to withhold indemnity.
15. Alpha insurance have stated that any comments made concerning the case of Alpha should be disregarded as they had made a mistaken assumption (the balance of probability being 51%). This is a ridiculous suggestion, as in English civil law, the balance of probability is 51%, which is the statistic that the Ombudsman was referring to. Alpha have attempted to make it seem as if the UK Legal Ombudsman has made an incorrect legal assumption when in fact they have not, which is insulting. They are simply attempting to hide the UK Legal Ombudsman's comments, as they were in agreement with us, that A U Insurance have acted unreasonably, I would urge you to consider these comments.

In reference to Alpha Insurance's comments on page 2 of their letter. I would like to assist them with this in every way possible, as we were not aware of any such information being withheld. Alpha insurance stated that they were not provided with a copy of the Panel Solicitor's Report, as our firm of solicitors believed that they stood to suffer losses based on the release of such information. We will be making a request for this information."

Nævnet har fået forelagt bilag fra sagen.

I brev af 17/9 2014 fra klagerens advokat til selskabet er det blandt andet anført:

"We must ask you to reconsider your position and let us have funds of £11,063.80 to discharge the defendants costs. This is a matter where we believe you should indemnify.

Firstly, you refer to the inconsistencies noted by the Trial Judge. Counsel has already highlighted and identified these prior to the Trial, but was still of the opinion these were not fatal and the claim had reasonable propects.

Turning to the impact, the Claimant has always stated that the impact was hard. You ask if the Claimant's vehicle was stationary in a line of traffic and was shunted forward a few feet, then how did he not collide with the vehicle in front. This point was not raised at Trial. You have assumed that the claimant had stopped immediately behind the vehicle in front and had not left a large enough gap.

The engineering evidence clearly supports this was anything but a very minor impact.

Turning to the Claimant's injuries, paragraph 51 of the Claimant's statement confirms that he had his injuries included pain, stiffness and limited movement to his neck. His right knee was also swollen and painful.. Paragraph 57 confirms that the Claimant has pain, swelling and stiffness to his right knee. This is an old injury from an accident approximately 8 or 9 years ago. This accident has caused it to flare up again. Paragraph 63 of his statement goes onto say that the Claimant cannot work in small, tight spaces as he cannot bend or kneel. Paragraph 66 of his statement, states that driving is difficult and painful due to the lack of movement in his neck and knee."

I brev af 19/5 2015 fra "Legal Ombudsman" til klagerens bror er det blandt andet oplyst:

> "I have looked at the information that you and [advokatfirma] have provided about your complaint
>
> I have concluded that the firm's failure to send Counsel's email of the conference call dated 27 February 2014 to the Insurance Company was poor service. I have also concluded that it would be appropriate for the firm to offer you and your brother a financial remedy in recognition of the poor service.
>
> It is clear that in that email advice there were some discrepancies which the ATE insurance company were entitled to be aware of and therefore at that point and particularly in light of the Barristers view that they should try to settle out of Court first (with a part 36 order), I agree that the firm should have provided this document to the Insurance Company for their consideration and not proceeded with the case from that point, without them giving consent.
>
> By not sending it, the firm denied them the opportunity to make that decision. I must reiterate that you and your brother would have still been in a very difficult situation had they sent it and the Insurance had chosen to cancel your cover from that point. Both of you would have then found yourself responsible for all the firms costs up to that point as is stated in the terms and conditions of the agreement.
>
> From my investigation it appears that we will never know what decision the ATE would have made had they had that advice in February 2014. However, given that the Barrister who was also working on a conditional fee agreement, was willing to proceed to trial in the case, this gives a clear indication that despite the discrepancies mentioned, that he did not believe that the prospects of winning had been reduced below 51% (as this is a condition of the CFA agreement for him to proceed to Court). So, it is reasonable on the balance of probability to say that if your Barrister still believed that your chances of winning the case were more than 51%, that the insurance may have agreed to continue. They may have requested up to date prospects from the Barrister before making that decision to be fair and they did not have the opportunity to do this, this is where I have found the firm at fault for not providing them with a copy."

Af selskabets brev af 2/7 2015 til klagerens bror fremgår det blandt andet:

> "As per your request for us to reassess this matter further, we therefore advised that a copy of the Legal Ombudsman decision was required, given that this was the only material change in your case since our last correspondence. We were merely giving you an opportunity to furnish us with the same, in order for us to consider whether this had any bearing on our stance.
>
> You will appreciate that, our stance as to indemnity was adopted given that our position was grossly prejudiced (which we note has now been accepted by your appointed Solicitors). Furthermore, due to the numerous inconsistencies noted throughout the course of the claim, cover was withdrawn accordingly.
>
> As insurers, we are reliant upon regular updates from the appointed Solicitors, and it is a condition of the policy that the appointed Solicitors disclose any material facts, in order for us to risk

assess and/or consider our position fully. Whilst it may seem unfair to taint the insured with any material non-disclosure of the appointed Solicitors, however, as representatives for the insured, such term also naturally extend to the insured.

As previously advised, we cannot specify (with hindsight) what juncture we would have withdrawn cover. However, after careful consideration of the paperwork furnished to us, we have noted numerous inconsistencies which were also unveiled at Trial, leading to the ultimate dismissal of the claim. You will appreciate that, the evidence tendered therefore changed from the outset/inception of the policy and/or documented under a statement of truth. The policy was thus void ab initio, as previously advised.

Similarly, we would have reviewed the matter at the juncture you refer to (had we been provided that opportunity), and reached the same conclusion, given the issues unveiled."

I forsikringsbetingelserne hedder det blandt andet:

"**1.4 Primary purpose of this Policy**
By this **policy**, the **insurer** agrees, subject to the **policy**'s terms, limitations, exclusions and conditions, to indemnify the **insured** in respect of **opponent's costs** and **disbursements** to the extent more fully described in clause 2.
…
2.2 Exclusions and limitations
This **policy** excludes and the **insurer** shall not be liable for any:
…
2.2.4 **Insured's conduct**
opponent's costs or **disbursements** where:
a) the **legal action** is abandoned, discontinued, settled or lost at trial as a result of the dishonesty of the **insured**; or
b) there is any failure of the **insured** to act in accordance with the advice of the **appointed solicitor** or to provide full instructions promptly to the **appointed solicitor** or to co–operate with the **appointed solicitor** or to comply
with any order made by the **court** or any Civil Procedure Rule;
…
2.2.7 **Non-disclosure**
opponent's costs or **disbursements** where the **insured** or the **appointed solicitor** has failed to disclose material facts;
…
2.2.9 **Wasted costs, damages or enforcement proceedings**
a) wasted costs or any **increased opponent's** costs or **disbursements** arising from any unreasonable delay or negligence or wilful act or omission by the **insured** or the **appointed solicitor** which in the **insurer's** opinion is prejudicial to the conduct of the **legal action**;
…
2.2.15 **Fraud**
opponent's costs or **disbursements** where the **insured** or the **appointed solicitor** has made any fraudulent, false or misleading representation or allegations of the same that the **insurer** conclude are justifiable or allegations or the same that cause the **claim** to be abandoned by the **appointed solicitor**;
…

3.2 **Insured duties**
3.2.1 A claim form must be completed with full particulars.
3.2.2 The **insured** shall provide to the **insurer** and the **appointed solicitor** all **information** and, in addition, shall provide all necessary assistance to enable the **insurer** or its agents to investigate and/or defend any **claim** under this **policy** and/or to enable the **insurer** to determine its liability under this **policy**.
…
4 General terms and conditions
4.1 Applicable law
This **policy** will be governed by and interpreted in accordance with the laws of England and subject to the exclusive jurisdiction of the courts in England and Wales.
…
4.6 Co–o**peration**
4.6.1 The **insured** hereby gives irrevocable instructions to the **appointed solicitor**:
a) to provide the **insurer** with full and prompt co–operation to include providing such **information** as is requested by the **insurer** from time to time;
b) to notify the **insurer** if the **insured** is no longer more likely than not to succeed in the **legal action**, assuming that it is determined at trial (including the prospects of any judgment and/or costs in the **insured's** favour being successfully recovered).
4.6.2 The **insured** must comply with court orders and the Civil Procedure Rules and in all respects conduct the **legal action** in a reasonable manner in order to minimise costs.
…
4.8 Dispute resolution
4.8.1 All matters in dispute between the parties arising out of or in connection with this insurance will be referred to a mediator to be agreed by the parties within ten (10) working days of a written notice served on one party by another requesting such an agreement. If a mediator is not agreed then either party may apply to the Centre for Effective Dispute Resolution ('CEDR') for the appointment of a mediator. The parties agree to share equally the costs of CEDR and of the mediator and that the reference of the dispute to mediation will be conducted in confidence.
…
If, after making a complaint, the insured feels that the matter has not been resolved to its satisfaction then if it is an eligible complainant the insured may contact:
Alpha Insurance A/S Harbour House, Sundkrogsgade 21, DK2100 Copenhagen, Denmark..
…
The Financial Ombudsman Service, South Quay Plaza 2, 183 Marsh Wall, Docklands, London E14 9SR.
Making a complaint to the Financial Ombudsman Service (FOS) does not affect the **insured's** rights under this **policy**, but if the insured is not an eligible complainant then the informal complaint process ceases."

Ankenævnet *for* Forsikring

13. 91376

Nævnet udtaler:

Klageren og hans bror var involveret i en trafikulykke den 7/9 2012, hvor den bil, som de sad i, blev påkørt bagfra. De anlagde efterfølgende sag mod modparten med krav om kompensation for skaderne på bilen og dem selv. Klagerens sag blev ført ved domstolen, mens hans brors sag afventede resultatet. Klageren fik ikke medhold i sit krav og blev pålagt at betale modpartens omkostninger med £11.063,80.

Selskabet har afvist at dække omkostningerne til modparten og har ophævet forsikringsdækningen fra tegningstidspunktet med henvisning til, at klageren har afgivet utroværdige og uoverensstemmende forklaringer i løbet af sagen, både for så vidt angår skademekanismen, omfanget af skaderne på bilen og klageren selv. Herudover har selskabet afvist at yde dækning med henvisning til, at flere oplysninger omkring sagen ikke blev videregivet til selskabet under forberedelsen af sagen, og at dette først er kommet til selskabets kundskab efter sagens afgørelse.

Klageren har over for nævnet anført, at sagen ikke er blevet afgjort med henvisning til uærlighed, og han har redegjort for uoverensstemmelserne i sagen, og at eventuelle uoverensstemmelser ikke skyldes hans forhold.

Det fremgår af brev af 19/5 2015 fra den engelske Legal Ombudsman til klagerens bror, at klageren og hans bror havde klaget over advokaten, der havde ført sagen. Legal Ombudsman vurderede, at advokaten havde begået fejl i forbindelse med sagsbehandlingen af sagen og orienteringen til forsikringsselskabet. Det vurderes, at der var dokumenter, som selskabet burde havde modtaget fra advokaten undervejs i sagen, og at sagen ikke burde have fortsat uden selskabets samtykke. Legal Ombudsman bemærker, at eftersom advokaten arbejdede i henhold til et såkaldt "conditional fee agreement" og var villig til at fortsætte sagen, havde selskabet måske også været indstillet på at fortsætte sagen uanset oplysninger om uoverensstemmelser, idet advokaten må have vurderet, at der var mere end 51 % sandsynlighed for at vinde sagen.

Selskabet har overfor nævnet anført, at Legal Ombudsman ikke har kompetence i forhold til forsikringsselskaber, og der uanset dette er foretaget formodninger og kommentarer vedrørende forsikringen. Selskabet har blandt andet anført, at en sag skal have udsigt til succes med mindst 60 %, før klageren ville være berettiget til dækning. Selskabet har videre anført, at hvis selskabet havde modtaget tilstrækkelig information i løbet af sagen, ville klageren ikke havde været berettiget/fortsat berettiget til dækningen.

Af selskabets brev af 2/7 2015 til klagerens bror fremgår det blandt andet, at "As previously advised, we cannot specify (with hindsigt) what juncture we would have withdrawn cover". Herudover er det noteret, at selskabet havde noteret sig "numerous inconsistencies" der blev afsløret ved retssagen, og som førte til afvisningen af kravet. Det er også noteret, at "the evidence tendered therefore changed from the outset/inception of the policy and/or documented under a statement of truth".

Af forsikringsbetingelsernes punkt 2.2.7, som selskabet har henvist til, fremgår det blandt andet, at policen undtager dækning, og at selskabet ikke skal afholde modpartens omkostninger, hvis den forsikrede eller dennes advokat har undladt at oplyste om "material facts". Herudover er der i henhold til punkt 2.2.15, ikke dækning for modpartens omkostninger, hvis der til selskabet gives falske eller misledende oplysninger fra sikrede eller advokaten.

Nævnet finder efter en gennemgang af sagen, at selskabet ikke har været berettiget til at ophæve dækningen fra tidspunktet for tegningen af forsikringen. Nævnet finder, at selskabet skal yde dækning for den del af omkostningerne til modparten, som ikke er afholdt af advokaten.

Nævnet har blandt andet lagt vægt på, at sagen fra starten har baseret sig på forskellige opfattelser omkring uheldet, og at det ikke er ualmindeligt, at en sag udvikler sig under forberedelsen, og at der tilkommer nye beviser eller vidneudsagn. Nævnet har også lagt vægt på, at selskabet ikke har fremlagt dokumentation for, at retten har afvist klagerens krav med henvisning til uærlighed eller svig. Nævnet har også lagt vægt på, at det ikke fremgår af forsikringsbetingelserne, at der skal være udsigt til succes i sagen med 60 %.

15. 91376

Nævnet finder, at der undervejs i sagen burde være tilgået selskabet yderligere oplysninger, således at selskabet havde haft mulighed for at tage stilling til, om sagen skulle fortsætte. Nævnet finder imidlertid ikke grundlag for at fastslå, at selskabet som følge heraf har været berettiget til at ophæve dækningen fra tegningstidspunktet.

Som følge heraf

b e s t e m m e s :

_____

Selskabet, Alpha Insurance A/S, skal anerkende at ophævelsen af dækningen tilbage til tegningstidspunktet ikke har været berettiget, og selskabet skal yde dækning for den del af omkostningerne til modparten, som ikke er afholdt af advokaten.

Klagegebyret tilbagebetales.

Svend Bjerg Hansen
Udskriftens rigtighed bekræftes

Mette Eisenhardt