Ankenævnet *for* Forsikring

Den 6. juni 2018 blev i sag nr. 91619:

xxxxxxxxxxxxxxxxxxxxx

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xxxxxxxxxxxxxxx

mod

Alpha Insurance A/S under konkurs

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 ved sin advokat over selskabets ophævelse af forsikringsdækningen i forbindelse med en anmeldt retssag mod 4 af klagerens tidligere arbejdsgivere.

Selskabet har afvist dækning med henvisning til, at klageren har givet ukorrekte og urigtige oplysninger om sit krav, og at tegningen af forsikringen hvilede på et urigtigt grundlag.

I klageskemaet af 8/11 2017 til nævnet har klageren blandt andet anført:

> "1. Statement of claim, a brief outline of the case. A Supplementary statement may be enclosed.
> The Insurers have claimed I have breached the terms of the Policy and they now regard it as void on the basis of misrepresentation of crucial facts on my part when the policy was taken out and in respect of my ongoing claim for damages for industrial deafness. I completely deny that I have

misrepresented the facts in relation to my claim in any way and it is simply that the prospects of success with my claim have now reduced following a conference with my Barrister. I would like to point out that I am … years [in the 80's] old and as such I have had some difficulties accurately recalling my work history which may have resulted in some inconsistancies in my instructions to my solicitors dealing with my claim for damages but I have never in any way deliberately misrepresented the facts.

2. What specifically do you want to achieve from the insurance company/what do you want the insurance company to do?
To honour the cover provided by the ATE Insurance Policy and to cover any liability I may have in respect of legals costs up the negative Barristers advice on my prospects of success with my claim."

Selskabet har i brev af 15/12 2017 til nævnet blandt andet oplyst:

"Alpha Insurance A/S (Alpha) maintains its position as stated in previous correspondence, in particular the letter from [sagsbehandler] from 19th July 2017, in denying coverage on the basis of misrepresentation and the veracity of the insureds statements and cancelling the policy ab initio.

Below is a summary of key points in relation to the repudiation of any claim and cancellation of the policy.

This matter entails an 'After the Event' insurance policy issued by Litigate LLP (Litigate) on behalf of Alpha Insurance A/S on 13th June 2016.

The policy was to cover a legal case being brought by Mr … (the claimant) against a number of his previous employers as he alleged he was suffering from Noise Induced Hearing Loss (NIHL) allegedly as a result of being exposed to loud noise in the course of his employment with these employers.

When the matter was proposed to Litigate for insurance, the claimant's solicitors had provided a copy of the 'Particulars of Claim' which the claimant signed as a 'Statement of Truth', a copy is attached/enclosed for your information.

Counsel gave his advice on the basis of this and assessed the prospects of success in the case to be between 55% and 60%.

Proceedings were issued and counsel maintained his position on the merits.

On 6th September 2016, Litigate LLP was advised by the claimants solicitors by email that counsel had advised that following a meeting with the claimant, the claim could no longer proceed and a copy of the notes from the meeting were enclosed - (Also Attached).

In these notes from the meeting it, became clear that a number of the facts given by [the claimant] in the particulars of claim and signed as a statement of truth were in fact both incorrect and untrue. This led counsel to reassess the case, stating 'all this indicates that the industry he ([the claimant]) had worked in was not excessively noisy' and explain that it could no longer continue.

When confronted by counsel, the meeting concluded with the claimant stating 'he had nothing more to add, was only chancing his arm'.

Following this, Litigate investigated the matter and asked for a copy of the file (which was provided) from the claimants solicitors.
…
Since then there have been a number of letters and emails between Litigate LLP and [the claimants] solicitors.

In the form submitted to the Board, the claimant admits that the facts that he provided to his solicitors were not true:

'...I have had some difficulties accurately recalling my work history which may have resulted in some inconsistencies in my instructions to my solicitors dealing with my claim for damages,...'

It is as a result of these 'inconsistencies' that the case had to be discontinued, this was compounded by that claimant's admission in conference with counsel that he was 'only chancing his arm' which have lead both Litigates and Alphas underwriters to conclude and agree that the policy was under no obligation to respond in accordance with the clauses under Compliance and conditions reproduced above."

Klagerens advokat har i mail af 7/2 2018 til nævnet blandt andet anført:

"In response to correspondence from Alpha Group dated 15th December we would point out that the whole thrust of [the claimants] complaint is that any perceived inconsistencies in his account were due to genuine difficulties in him accurately recalling precise details of his employment decades ago, particularly given his age. We have been satisfied at all times that he had done his best to give an honest account of his employment, including during his conference with Counsel. It is therefore unreasonable for the ATE insurers to seize on any inconsistencies as evidence of 'misrepresentation', which they have done largely on the basis of one off hand remark made by the client at the end of a conference with Counsel which they appear to have interpreted as some form of admission that [the claimant] had not been entirely truthful, which in fact it isn't. This comment could and should be interpreted as just another way of [the claimant] saying that that the claim was 'worth a try' and that he was being philosophical about being advised he could not take it any further. We would also point out that at no time did Counsel give any indication that he doubted the clients credibility as a witness, but only that he now doubted that we could effectively prove actionable levels of noise exposure."

Af selskabets brev af 5/3 2018 til nævnet fremgår det blandt andet:

"Our position as insurers is not solely based on the remark made by [the claimant] at the end of a conference with Counsel, but it was that remark that alerted our administrators to the inconsistencies and led to the subsequent investigation of the full file.

The reason that Counsel doubted that he could effectively prove actionable levels of noise exposure was that the facts provided by [the claimant] previously, for example in the signed particulars of claim, were shown to be incorrect and untrue.

> It was [the claimant] and his solicitors' obligation to ensure that any inconsistencies were resolved prior to him being provided with an Alpha After the Event policy. His age and the difficulties he had in accurately recalling his work history were known to both [the claimant] and his solicitors from the outset and cannot be used as an excuse.
>
> The facts are clearly material for the prospects of success. The discontinuance of the case was wholly due to the fact that the inconsistencies revealed at and following the conference with Counsel indicated a fatal weakening of the case and the insurance policy does not provide cover in these circumstances. Our position is maintained and the claim denied."

I et referat af 6/9 2016 fra et telefonmøde mellem klageren og hans advokat er det blandt andet anført:

> "I advised [the claimant] of why I had called this meeting and introduced … … then took over the conference, and said the aim was to take stock of the issues in this claim - exposure, causation and limitation.
>
> He confirmed an engineer was needed for evidence of exposure but that … and … could form a preliminary opinion on likely exposure due to our experience in the field.
> …
> [The claimant] interrupted again at this point and ranted and raved about his experience at …, about how disorganised it was and how he clearly didnt know what he was doing. … interjected once more and said he was trying to speak and would appreciate it if the client would let him. He asked him if he was sat down and put through a hearing test. [The claimant] said he couldnt remember. … questioned him on how he could rememeber [ørelæge] in 2013 but not … which was merely a few months before. Said it seemed to him that it was purely because [ørelæge] had a better beside manner than … Asked him if this was correct, [the claimant] said yes. … then reitterated that his audio did not display a classical sign of NIHL but that all this was secondary to the main issue which [the claimant] had distracted him from when he interrupted... that of the levels of noise he was exposed to.
>
> Asked if at all defs he worked in injection moulding. [the claimant] confirmed yes. asked if all roles - managerial, not operating - confirmed yes. confirmed out of 8/10 hour shifts - amidst the machines for 50% of the day. confirmed yes. asked if machines were running throughout that time he was amidst them – [the claimant] said he was only called down to the floor when there was a problem. went off on a tangeant about the backgroun noises and operations etc. didnt know levels of noise. how would he know... … interjected and asked if he could speak to colleagues stood 1 metre from him. [The claimant] confirmed he could. … said that this was the cut off. explained the general rule surrounding having to shout to communicate.
> …
> then asked when he set up his own comany, if he had a large workforce - [the claimant] said it was him to start with and grew to 32. asked if he owned the company. he confirmed he did. asked if he was the boss. he said yes. asked if he had surveys done - no. went on a tangeant once again talking about health and safety not being a huge concern until 5 years after he set up his business... then … people came in about 20 years ago and said that [høreværn] was needed.

asked if he provided [høreværn]. confirmed he did. asked if he enforced it - [the claimant] said no as his concern was making a profit, not going round checking people had plugs in.
…
… then asked if he knew his workplace was noisy. [The claimant] did not respond. … then asked if he knew the machinery he operated was noisy - *he* said no. went off on another tangeant about hydraulic pumps and how they went wrong after about 5 years...

… gained control and said he hadnt answered the question and said that if he didnt think he had exposed his workers to noise, why did he think he had been exposed of noise using the same machinery. [The claimant] then went into the story about [ørelæge] again and that he had never thought about making a claim or noise damage until [ørelæge] told him he had a claim.

… asked him to confirm that he never thought his workplace was noisy. [The claimant] confirmed that was correct.

… said that on the basis of what had been discussed, his claim was not going to succeed - he was only near the machines for 1/2 his working life, had been able to converse and nobody had expressed concerns about noise for the entirety of his career.

asked if any of his workers had claimed against him. confirmed not.

said all this indicates that the industry he had worked in was not excessively noisy

[The claimant] interrupted and asked if we were saying that [ørelæge] was wrong, and that *he* didnt show evidence of NIHL. … gave an analogy of him coughing and going to the [praktiserende læge] and him asking if he had worked in dust as his chest was showing signs of dust exposure. when he confirmed he had not been exposed to dust at work, other causes of the problem needed to be looked into. merely because [the claimant] showed signs consistent with NIHL didnt mean it was simply NIHL. asked him if he was purely suing these companies because of what [ørelæge] had said. [the claimant] confirmed this was correct.

… said that he could not recommend taking this claim any further, especially not on a CFA as we would not manage to prove breach. confirmed that I would still continue to try to obtain a settlement which i confirmed was correct.

[The Claimant] said he had nothing more of add. was only chancing his arm."

Af brev af 7/7 2017 fra klagerens advokat til selskabet fremgår det blandt andet:

"Having reviewed this case it is clear to us that in fact our client has not significantly altered his account of the extent of his noise exposure between his initial instructions in March 2013 and the conference with Counsel in September 2016. In questionnaires that our client completed in May 2015 he indicated that during his employment with all of the Defendant companies he was able to hold a conversation with his colleagues who were nearby without having to shout and that he was not exposed to noise for the entirety of his working day. His witness statement reflected those instructions.

> As our client repeatedly commented during the conference with Counsel he was initially prompted to seek legal advice with regard to pursuing a claim for damages when he was advised by a professional audiologist following a hearing test that the results of his test were demonstrating signs typical of noise induced hearing loss. That was later endorsed by the medical expert, an … Consultant, who confirmed in his own report following a further hearing test that he was of the same opinion, notwithstanding that concerns were later expressed by Counsel about the basis of the medical expert's conclusions. The fact that our client had simply not thought that he might be suffering from noise induced hearing loss until he was so advised by medical professionals is a perfectly typical and normal scenario. Similarly the fact that our client was only encouraged to pursue a claim when he received that medical advice is perfectly normal and cannot in any sense therefore be described as a form of misrepresentation. I would respectfully suggest therefore that the only reasonable interpretation of our client's apparent remark during the conference with Counsel that he had been 'chancing his arm' was that he had been by no means certain that he had a valid claim for compensation, but on the basis of advice he received from the Audiologist, a medical expert and the legal advice he had thought that it was at least worth attempting to pursue a claim, so long as he was advised that there was a reasonable prospect of success."

Klagerens advokat har i mail af 25/7 2017 til selskabet blandt andet bemærket:

> "With regard to the relevant section of the Particulars of Claim, Counsel was not actually presented with a statement from our client that described the levels of noise in quite those terms. Counsel therefore obviously drafted the Particulars of Claim putting those allegations at their absolute strongest and our client believed that was legitimate in signing the Particulars. With hindsight Counsel could have requested a conference with our client to discuss in more detail the extent of his noise exposure prior to drafting the Particulars of Claim but the priority was to serve the proceedings to protect our client's position and we then arranged the conference at the earlier opportunity. The fact that our client clearly gave honest and direct answers to the more detailed questions put to him by Counsel demonstrates that he was essentially honest in his dealings with his legal representatives."

Af den fremlagte "Particulars of Claim" af 6/6 2016 fremgår det blandt andet:

> 1. For periods between 1966 and 1974 the Claimant was employed by the First Defendant, or those for whose acts and omissions it is liable.
>
> 2. He worked as … Draftsman at its … premises.
>
> 3. During the course of this employment the Claimant was exposed routinely to excessive noise from machinery and processes within the workplace, principally injection moulding machines.
>
> 4. It was not possible to converse without shouting or using sigestures, even over a distance of a few feet.
>
> 5. The Claimant was not provided with any hearing protection.
>
> 6. For periods between 1974 and 1978 the Claimant was employed by the Second Defendant, or those for whose acts and omissions it is liable.'

7. He worked as an … manager at its … premises.

8. During the course of this employment the Claimant was exposed routinely to excessive noise from machinery and processes within the workplace, principally injection moulding machines.

9. It was not possible to converse without shouting or using sign language or gestures, even over a distance of a few feet.

10. The Claimant was not provided with any hearing protection.

11. For periods between 1978 and 1982 the Claimant was employed by the Third Defendant, or those for whose acts and omissions it is liable.

12. He worked as a … manager. He worked in the Machine Shop.

13. During the course of this employment the Claimant was exposed routinely to excessive noise from machinery and processes within the workplace, principally injection moulding machines.

14. It was not possible to converse without shouting or using sign language or gestures, even over a distance of a few feet.

15. The Claimant was not provided with any hearing protection.

16. For periods between 1985 and 1989 the Claimant was employed by the Fourth Defendant, or those for whose acts and omissions it is liable.

17. He worked as a … director. He worked in the … Machine Shop.

18. During the course of this employment the Claimant was exposed routinely to excessive noise from machinery and processes within the workplace, principally injection moulding machines.

19. It was not possible to converse without shouting or using sign language or gestures, even over a distance of a few feet.

20. The Claimant was not provided with any hearing protection.

21. The Defendants owed the Claimant a duty to take reasonable care for him safety, and to provide him with a safe place and safe system of work.

22. The exposure to noise was such that it was likely to damage 11 earing and to cause deafness, as it did to the Claimant.

23. As a result of his exposure to excessive noise the Claimant has suffered high frequency sensorineural hearing losses and these injuries were caused by reason of the breach of statutory duty and/or negligence of the Defendants, their servants or agents."

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I forsikringsbetingelserne hedder det blandt andet:

> "THIS IS TO CERTIFY that in consideration of the Premium as set out in the Schedule attached hereto which Schedule forms part of this Insurance Policy, the premium of which will become payable
> at the Conclusion of the Case, the Insurer is hereby bound to insure in accordance with the terms, Limit of Indemnity, Conditions and Exclusions as hereinafter appear or endorsed hereon.
>
> WHEREAS the Insured named in the Schedule herein has made a declaration of the fact(s) of the Case to the Legal Representative, and hereby agrees that the same is a clear and fair representation of the circumstances pertaining to the Case and upon being insured by the Insurer, the material particulars of such will be relied upon and incorporated herein.
>
> THE COVER
> NOW THE INSURER hereby agrees, to the extent and in the manner set out herein, and subject to the terms, Limit of Indemnity, Conditions and Exclusions set out in this Insurance Policy and Schedule, to indemnify the Insured against costs incurred in the Case as follows:
>
> Where damages are not paid or payable to the Insured:
> A. Defendant's Legal Costs and Disbursements.
> B. Premium and Own Disbursements
> Less: Own Costs and Own Disbursements paid or payable by the Defendant to the Insured
>
> Or; where damages are paid or payable to the insured:
>
> C. Shortfall in Damages
> D. Defendant's Legal Costs and Own Disbursements associated with the Insured's failure to beat a defendant's Offer where the legal advice was to refuse that offer.
> All sections of cover defined hereinafter.
> …
> CONDITIONS
> **1. Compliance -General**
> (a) The due observance and fulfilment of the terms and conditions of this Insurance Policy in so far as they relate to anything to be done or complied with by the Insured and the truth of the Insured's statements and answers made or given at the time of entering into the agreement with the Legal Representative and which may subsequently be included in a statement of truth shall be conditions precedent to any liability of the Insurer to make payment under the Insurance Policy.
> (b) The Insured and the Legal Representative shall conduct the Proceedings with the same due care, economy and diligence as if the policy was not In force and shall take all reasonable steps to minimise or avoid the costs and expenses payable under the Insurance Policy.
> …
> **14. Fraud**
> Without prejudice to the Insurer's rights of recovery, if in relation to the formation of the contract for this insurance or the conduct of the Proceedings or a request for payment under this Insurance Policy, the Insured knowingly commits a fraudulent or false act in any respect (or in circumstances where it ought reasonably to be known to be so) or where there is collusion between the parties to the Proceedings, this Insurance Policy shall become void and any Premium paid to the Insurer shall be forfeited.

15. Misrepresentation
In relation to either the formation of the contract for this insurance or the conduct of the Proceedings:
(a) In the event of negligent or reckless misrepresentation, misdescription or non-disclosure of any material particular by the Insured, the Insurer shall become entitled to avoid the policy forthwith upon giving notice of such avoidance to the Insured and any Premium paid to the Insurer may be retained.
(b) In the event of a careless misrepresentation, misdescription or non-disclosure of any material particular where the Insured should reasonably have known that the fact was material, in whole or in part, to the Insurer's acceptance of the risk the Insurer may refuse to indemnify against losses caused as a consequence of the carelessness.

18. Jurisdiction
The Insurance Policy shall be subject to and construed in accordance with the laws of England and Wales as applicable."

Nævnet udtaler:

Klageren har tegnet en såkaldt After-The-Event Legal Expenses Insurance i selskabet i forbindelse med, at han har indledt retssag mod 4 tidligere arbejdsgivere for et konstateret høretab. Det fremgår af sagen, at klageren begrunder sit krav mod arbejdsgiverne med, at han over en mangeårig periode har arbejdet i et støjfyldt miljø uden høreværn, og at han som følge heraf har pådraget sig et delvist høretab.

Han er utilfreds med, at selskabet har ophævet forsikringsdækningen med tilbagevirkende kraft til forsikringens ikrafttrædelsestidspunkt med henvisning til, at han har givet forkerte oplysninger i forbindelse med opstarten af sagen.

Selskabet har anført, at ophævelsen af forsikringen er berettiget med henvisning til, at klageren ikke har givet korrekte informationer omkring arbejdsforholdene på sine tidligere arbejdspladser. Selskabet har henvist til forsikringsbetingelsernes punkt 1 og punkt 15.

Det fremgår af et fremlagt dokument "Particulars Of Claim" af 6/6 2016, at klageren i løbet af sine ansættelser var udsat for "excessive noise from machinery and processes within the work-

place", og at "it was not possible to converse without shouting or using sign language or gestures, even over a distance of a few feet". Det fremgår også, at han ikke anvendte høreværn.

Det fremgår videre, at klagerens advokat havde vurderet chancerne for succes med kravet til at være 55-60 %.

Af et referat af et møde den 6/9 2016 mellem klageren og hans advokat fremgår det, at klagerens opfattelse af støjmiljøet på hans tidligere arbejdspladser blev drøftet. Det fremgår af referatet, at klageren oplyste, at han kun var "på gulvet" noget af tiden, og når der var problemer, og at han godt kunne tale til kollegaer, når de stod en meter fra ham. Det fremgår videre, at han ved forespørgsel bekræftede, at han ikke mente, at hans arbejdsplads var støjende. Klageren bekræftede, at han havde forfulgt sagen, på baggrund af en ørelæges udtalelser om, at han led af et støjfremkaldt høretab. Klageren blev oplyst om, at det ikke kunne anbefales at fortsætte sagen, idet der kunne være flere årsager til høretabet. Klageren bemærkede, at han "was only chancing his arm".

I klageskemaet til nævnet har klageren blandt andet henvist til sin alder, og at han har problemer med præcist af genkalde sig sin ansættelseshistorik, hvilket kan have været årsag til uoverensstemmelser i instruktionerne til advokaterne, men at der ikke har været tale om bevidst forkert fremstilling af fakta.

Klagerens advokat har i mail af 25/7 2017 til selskabet blandt andet anført, at "Counsel was not actually presented with a statement from our client that described the levels of noise in quite those terms. Counsel therefore obviously draftet the Particulars of Claim putting those allegations at their absolute strongest and our client believed that was legitimate in signing the Particulars".

Nævnet finder efter en gennemgang af sagen, at selskabet har været berettiget til at ophæve forsikringsdækningen med tilbagevirkende kraft til tegningstidspunktet.

Nævnet har blandt andet lagt vægt på den betydelige uoverensstemmelse mellem oplysningerne dokumentet "Particulars Of Claim" og referatet af mødet mellem klageren og advokaten den 6/9 2016. Nævnet har blandt andet lagt vægt på, at det i POC-dokumentet klart og tydeligt beskrives et støjende arbejdsmiljø med behov for at råbe eller tale ved brug af tegn ved selv korte afstande, hvorimod klageren i referatet afviser, at han har befundet sig i et støjende arbejdsmiljø.

Det som klageren i øvrigt har anført, kan efter nævnets opfattelse ikke føre til andet resultat.

Som følge heraf

b e s t e m m e s :

Klageren får ikke medhold.

Peter Thønnings