Arbitration Expenses

Arbitrations, like all disputes, involve cost. The question is who should bear it at the end of the process ? Usually it's the party who is unsuccessful. But what happens when both are unsuccessful ? That was the situation in the recent New Zealand case *Gladvale Farms Ltd v. Batty* [2019] NZHC 249 in an arbitration arising from a sharemilking agreement.

FACTS

B were a partnership operating a milk farm on the South Island of New Zealand. They had a sharemilking agreement with the owners of the farm, GF. Under the agreement B were entitled to an additional payment for milk supplied to GF where GF were able to supply the milk to an ultimate purchaser in excess of a certain amount.

The agreement came to an end. Disputes arose between the parties. They agreed to arbitrate the disputes.

In the arbitration B claimed for the additional payment of NZ$ 163k while GF counterclaimed for losses of NZ$ 70k arising out of the the ultimate purchaser terminating the milk purchase agreement with them.

The arbitrator made an award on all the issues which resulted in B being successful in one but not the other claim and being entitled to NZ$ 56k and GF being successful in only one of a number of counterclaims and being entitled to NZ$ 24k, leaving net payment to B of NZ$ 32k. GF appealed on the basis that the arbitrator had made the award on a ground not argued by B or raised by the arbitrator. That appeal was upheld, the award annulled, and the case sent back to the arbitrator to reconsider.

The arbitrator reconsidered the evidence before him and the arguments and made a fresh award increasing the additional payment award to B and with it the net payment to B to NZ$ 45k.

He also made an award of costs (expenses) which involved GF being liable to 2/3 of B's legal fees and liable to pay ½ of the arbitrator's fees. Since GF had already paid ½ of the arbitrator's fees the effect of that was that GF became liable to pay the whole of the arbitrator's fees. The arbitrator had explained that had B been wholly successful he would have found GF liable for the whole of B's legal fees.

GF appealed against the award of expenses claiming there had been mixed success so the arbitrator had erred in not finding no expenses to be due to or against any party.

The Court found that it could only alter the award on expenses if the arbitrator had erred in applying the legal principles for award of expenses, taken an irrelevant factor into account, not taken a relevant factor into account or had reached a plainly wrong result.

The outcome was the arbitrator had :

- Not erred in his finding of GF's liability to 2/3 of B's legal costs as the reduction to 2/3 was sufficient to recognise B's failure in part of their claims

- Erred in finding that GF should bear the whole of the arbitrator's fees which did not recognise B's failure in part of their claims.

The Court went on to annul the part of the award relating to the arbitrator's fees thereby making both parties bear them.

DISCUSSION

Expenses

The basis rule in Scots law on arbitrator's expenses is rule 62(2) of the Scottish Arbitration Rules which provides:

"When making an award [allocating parties' liability between themselves for recoverable arbitration expenses] the tribunal must have regard to the principle that expenses should follow a decision made in favour of a party except where this would be inappropriate in the circumstances."

"Recoverable arbitration expenses" includes the arbitrator's fees and expenses.

A similar rule applied in NZ law. What the court found was that the arbitrator had not erred with regard to the legal costs in applying such a rule because he had awarded only 2/3 of these because of GF's partial success. However he had erred in not applying the same approach to the arbitrator's fees and expenses.

In other words having decided that GF should not bear the whole of B's legal fees, it was wholly wrong for GF to bear the whole of the arbitrator's fees.

That makes eminent sense.

Lessons

Arbitrations may involve the arbitrator having to decide many different issues. It's important for parties to appreciate that raising an issue in an arbitration is something which puts both the other side and the arbitrator to extra expense.

If what is a minor issue takes up a lot of time and the claimant in it is unsuccessful, then this can seriously affect entitlement to an award of expenses, which may well be reduced to take account of failure on the minor issue.