Arbitrators: the importance of fairness

A key purpose of arbitration is to provide a speedy and cost-effective means of dispute resolution with a final decision that does not lead to appeal. For that reason arbitration awards are almost never overturned unless the aggrieved party can prove the arbitrator's conduct was seriously irregular or their decision (award) on a point of law was obviously wrong, or if of general importance, open to serious doubt.

In *Patel v. Patel* [2019] EWHC 298 (Ch), the English High Court found both of these features to be present and overturned the award of the arbitrator in a partnership dispute.

FACTS

The two parties had entered into two separate partnership agreements for the running of two separate dental practices. The Claimant was the uncle of the Respondent's then husband. The Claimant had provided most of the capital for each partnership. However it was the understanding that the Respondent would carry out the work at the practices. Both partnership agreements provided that the parties would share the profits and losses equally. That was in any event the default position under section 24 rule (1) of the Partnership Act 1890.

For the first two years of business the Claimant agreed in each year that the Respondent could have 100% of the profits of practice A. There was no such agreement for practice B. After the Respondent and the Claimant's nephew divorced a dispute arose over the division of the profits. It was submitted to arbitration. The Claimant sought a binding decision that he was entitled to half of the profits of both practice A and practice B

The arbitrator fixed a hearing for evidence from the parties. While giving evidence under cross-examination the Claimant agreed that the Respondent's work in practice B should be recognized in the division of the profits. Also under cross-examination the Respondent agreed that the Claimant would need a share of the profits in order to service a loan which he had obtained to provide some capital to the practice B partnership.

At the end of the hearing, in his award the arbitrator found that this evidence amounted to an agreement between the parties to change the profit sharing provisions of the partnership agreement for practice B to 65% to the Respondent and 35% to the Claimant. No such division had been suggested by either party. Nevertheless he made an award to that effect.

The Claimant sought to annul the award in Court on a number of grounds, including

1. an "obvious error of law" in finding that their evidence in cross-examination amounted to an agreement to change the partnership agreement;
2. "serious irregularity" in acting unfairly in not putting his suggested division of profits and his suggestion of an agreement in the evidence to the parties for their comments – this is the equivalent of rule 68(2)(g) of the Scottish Act and breach of rule 24(1)(b) of the Act.

The Court found that the arbitrator had obviously erred in law in finding that evidence in cross-examination amounted to an offer and acceptance by the parties to vary the partnership agreement.

It also found that the arbitrator had acted unfairly and committed a serious irregularity in not putting his suggested finding to the parties for their comment when neither had contemplated that evidence in cross-examination could amount to a change of the partnership agreement.

DISCUSSION

General fairness (equity) v. Application of Law

This was a case of an arbitrator trying to reach a 'fair' decision on his own initiative. Well intentioned perhaps but fundamentally flawed. Arbitration is a process which requires the application of the law and not merely a decision according to a result that the arbitrator thinks is fair.

If parties wish the arbitrator to have that power (which does sometimes happen) then they must specifically give the power to him. In this case they did not and the arbitrator made an obvious legal error in finding a change of partnership agreement being made in the course of the giving of evidence to him.

Fairness of Procedure

In addition in his enthusiasm to give his decision the arbitrator forgot about the need to allow each party a reasonable opportunity to comment on a case that is being made against them. While an arbitrator has an inquisitorial power to raise legal arguments on his own initiative it is key to maintaining confidence in the process for him to give the parties an opportunity to comment on those arguments.

In this case the arbitrator forgot to do so.

Lessons

It is important for an arbitrator to apply the law and to give parties fair notice if he intends to make an award on a basis quite different to that put to him by the parties.