

# Mediation for Commercial Lease Disputes

## Presented by Fair Way Resolution

Samantha de Coning

**Head of Practice** 

May 2022



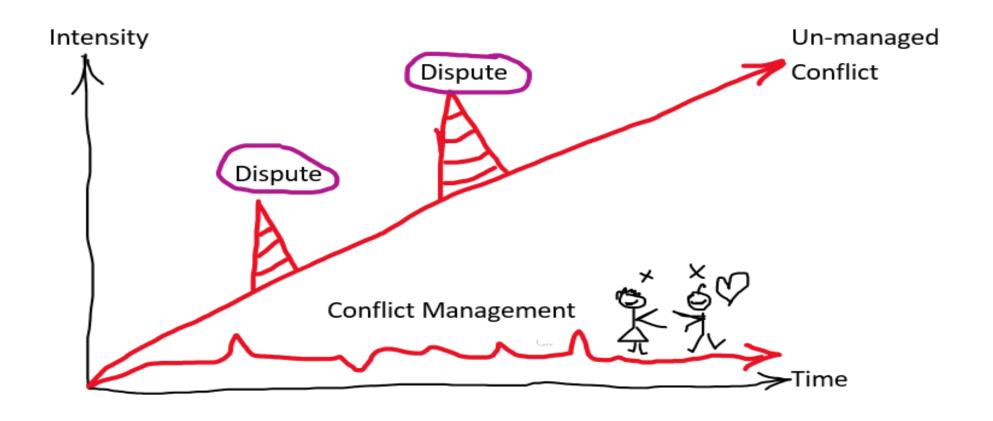
## What we will cover

- 1. Options for resolving disputes
- 2. What is mediation
- 3. The benefits of mediation
- 4. Initiating mediation
- Mediation process
- 6. Preparing for mediation





## **Conflict Escalation**





## Disputes in commercial lease agreements

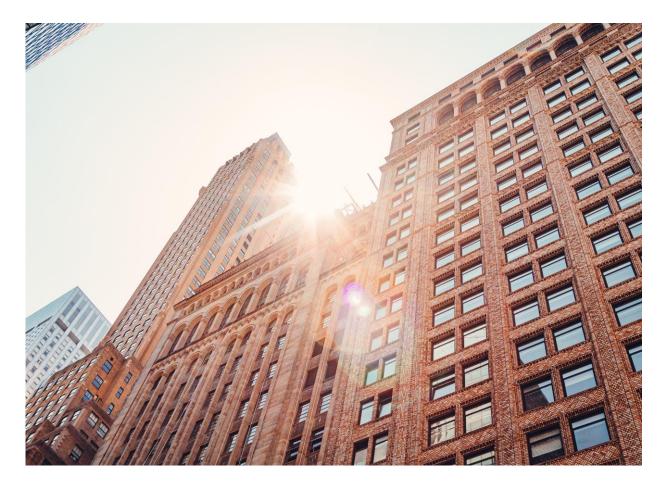
# Provisions in deed of lease (ADLS)

#### Clause 43.1

The parties shall first endeavor to resolve any dispute or difference by agreement and if they agree by mediation.

#### Clause 43.2

Unless any dispute or difference is resolved by mediation or other agreement within 30 days of the dispute or difference arising, the same shall be submitted to ... arbitration.





## What happens in practice

Unassisted negotiation

Arbitration



## **Mediation defined**

Mediation is a process in which the parties to a dispute, with the assistance of a mediator, the neutral third party:

- · Identify and clarify the issues in dispute
- Understand each other's viewpoint
- Develop options to resolve the issues
- Explore the usefulness of each option
- Identify their own solution(s) to the dispute
- Reach an agreement that accommodates the interests and needs of all parties.

#### The mediator will not:

- · give legal or other advice
- Impose a result on either party.
- make a decision for the parties





## **Benefits of mediation**

- Mediator provides a framework for discussions
- · Private and confidential
- Assists to eliminate misunderstandings/ communication failures between parties
- Prioritises the commercial relationship
- · Parties maintain control of the outcome
- Win/ win outcomes creative and durable solutions
- Flexible customization of the process
- Timeliness
- Cost effective





## Starting the mediation process

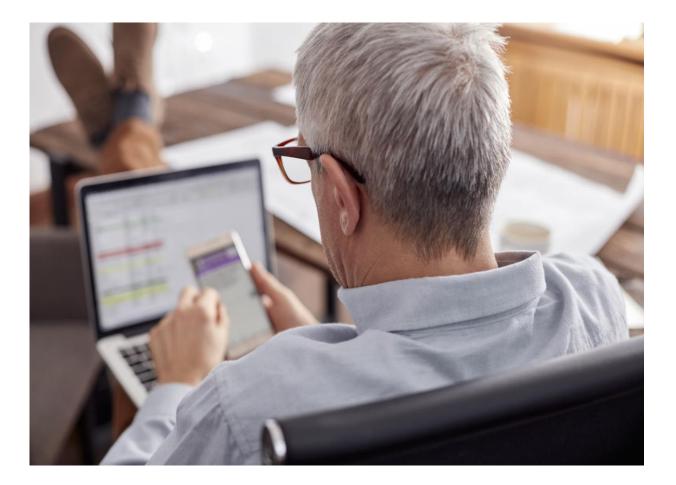
- Can be initiated by either party
- Can be initiated at any stage –
  the earlier the better
- Parties enter mediation by agreement
- Mediator appointed by agreement (AMINZ, Resolution Institute, NZLS)





## How Fair Way can assist

- Get in touch
- Explain the process and our fees
- Engage the other party
- Appoint a mediator
- Prepare for mediation
- Pre-mediation meetings
- Mediation





# <u>Past</u>

#### **Private Meeting**

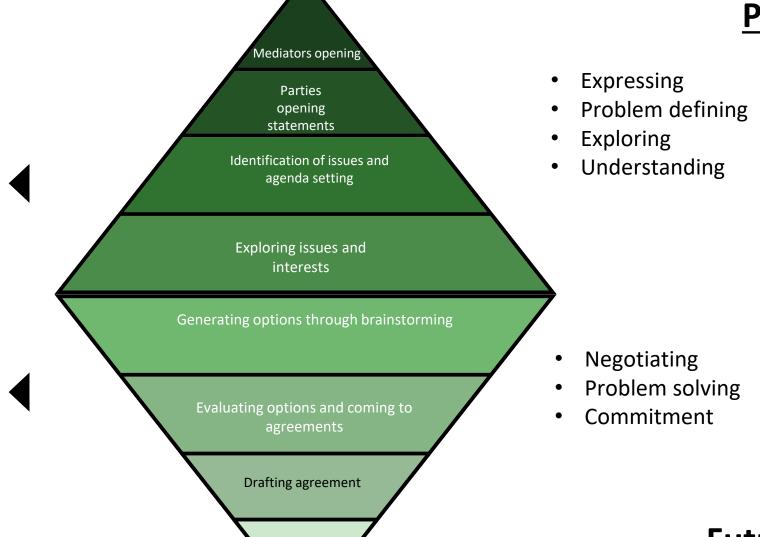
If things are stuck

To discuss private matters

To check best and worst outcomes

To explore options

To coach



Closure





## **Getting ready**

#### **Practical considerations**

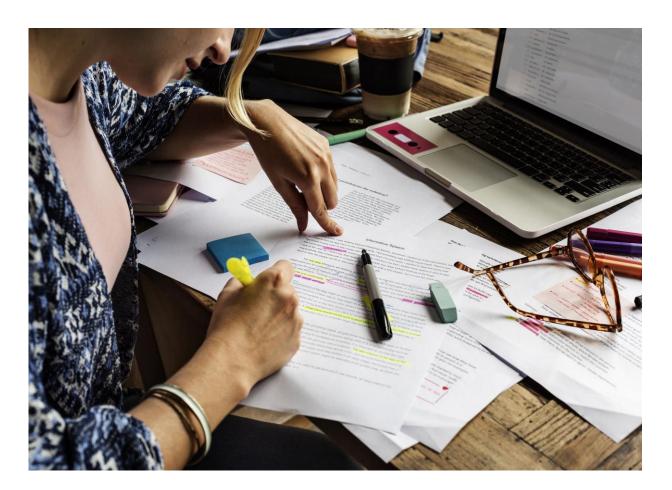
- Timeframe
- Logistics
- Who will attend?
- Authority to settle
- Information needs
- Information sharing





## **Preparing for mediation**

- Wider than knowing your own legal case and rights
- Requires us to look at the dispute from our own perspective and that of the other party
- Requires full exploration of both parties' positions, needs and interests
- Objective assessment of your BATNA (best alternative to a negotiated agreement) - what alternatives do you have away from the table





## **PIANO**

#### **Position**



#### **Interest**





#### Need

#### Options



## What do you want? What do they want?

Positions are our demands. When there is a problem to be solved (the issue or dispute), our position is what we see as the best outcome, usually for us. This is based on our view, bias and perception.

Positions are informed by our understanding of our legal case and rights.

#### Explore:

What is the problem to be solved?

What outcome are you seeking?

### Why is this important to you?

Interests are the reasons we take positions. This is our why.

The hidden motivators, these are things that motivate us to negotiate:

Values, Needs, Beliefs, Hopes and Fears.

- Psychological
- Substantive
- Process

#### Explore:

What are the interests – yours and theirs?

Are these shared, differing or conflicting?

How can shared or differing interests create value?

How will you deal with conflicting interests?

## How is the current situation affecting you?

**Affect** 

Understanding how the conflict is affecting us and the other party can shine a light on the true cost of the conflict for us and others. It can also enable us to better understand the other person's position and view.

#### Explore:

How is the current situation affecting you?

How is it affecting them?

How is it affecting the commercial relationship?

## What do you need in order to move forward?

What is the need that must be fulfilled in order for you to let go of this conflict. What needs to happen in order for you to 'unhook'?

Needs relate to our interests and what must happen to satisfy these.

#### Explore:

What needs to happen (stop, start, continue) for you to let go of the conflict?

## What are the different ways you can solve the problem?

Identify the options available to satisfy interests.

Identify objective criteria.

Both sides are encouraged to consider all the possible options for resolution and to then jointly decide on an option (the best option for mutual gain).

#### Explore:

What are the different ways that this can be achieved? What option will satisfy both of your interests? What would a win/ win or fair outcome look like?



# Questions



