

DEALING WITH DISPUTES

THIS MONTH OUR RESIDENT LEGAL GURU JONATHAN KAPLAN DISCUSSES HOW MEDIATION CAN BE THE SOLUTION TO ALL YOUR PROBLEMS.

I recently found myself mediating in an extraordinary number of lease disputes involving, amongst other things, inability to pay rent (due to a variety of reasons), shopping centre landlords changing tenancy mixes, leaking premises, failing to "make good", tenants' unauthorised alterations, landlords' failure to repair, disputes over outgoing... I could go on and on.

So I thought that this would be a good opportunity to highlight mediation as a means of resolving disputes rather than court proceedings.

What struck me in almost all of the disputes was that many had escalated to the point of dispute due to either a refusal or inability to communicate because of clashes of personalities, or communication going "off the rails" due to frustration, confusion, anger and a host of other emotions overcoming the parties (or their employees responsible for dealing with the dispute).

Statistically around 80 per cent of disputes are resolved by mediation. The remaining 20 per cent are usually disputes involving large sums of money or very substantial issues where legal costs are irrelevant, or where disputes have reached such a level of toxicity that the dispute is irreconcilable through the mediation process. These disputes often involve parties who are particularly self-

absorbed and who have dug their heels in "as a matter of principle" or hold the view that "I know I am right" or "the law (or God) is on my side". I always have difficulty convincing a party who has such blind faith and confidently puts the decision-making process in the hands of a third party that mediation is a good alternative. To encourage participation I have often suggested to parties that the arbiter hearing their matter may once have been a tenant "burnt" by a landlord or conversely a landlord whose premises were trashed by a tenant. Which one will hear their matter? One thinks of the words of Forrest Gump: "Life is like a box of chocolates. You never know what you're gonna get."

Disregarding mediation undoubtedly results in a winner and a loser (a draw is a rarity!) and robs the parties of the opportunity of being able to determine the outcome themselves.

In Victoria, under the Retail Leases Act, before a dispute may proceed to the Victorian Civil and Administrative Tribunal attending mediation is compulsory. However if parties in dispute find themselves in court there is a strong chance that they will be ordered to participate in mediation at some stage of the process. Would it therefore not be far more beneficial to engage in mediation before it reaches that stage? Who is the best person to mediate your dispute? Most likely a mediator who is properly suited to your industry by way of background experience. A mediator with an in-depth understanding of the type of difficulties encountered by the parties can often be the difference between



achieving a good outcome or not.

A significant function of the mediator is to facilitate discussion and guide the participants to an outcome themselves but the mediator must always remain impartial and must not impose decisions or enforce remedies and, importantly, must not give legal advice, decide who is right or wrong or who is at fault.

Mediation sessions are private and confidential and no information disclosed at mediation, should it fail, may be used in subsequent proceedings unless everyone who attended the mediation agrees. The process can be set up fairly quickly

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and, depending on whether or not solicitors are involved, can be extremely cheap compared to the considerable costs of court proceedings.

Whereas a final resolution may be a desired outcome of mediation, this is not always the result. Mediation often fails because of the deeply entrenched view of a party. If at least you are able to recognise that each other does have a problem it's much easier to engage in future conversations later, which could potentially develop into a better outcome and hopefully resurrect a relationship with those important to the future success of your business. ■

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