



Laying the foundations: Tips on how to mediate high-profile construction disputes

By Hannah Aziz

Top tips for mediating high-profile construction disputes

Tip 1: Fail to prepare, prepare to fail

As with any legal dispute, preparation is key. There will likely be additional, external pressures in high-profile disputes, including publicity considerations and government involvement. It is vital that parties understand what the mediation process entails and how its particular characteristics can be utilised to reach a favourable outcome for everyone concerned. Ask: does my client understand the procedural aspects involved and that multiple mediation sessions might be needed? And: has my client considered what

areas it would be prepared to compromise/ not compromise on? Would a pre-mediation conference assist to agree on strategy and the exchange of information? Front-footing these issues and thoroughly preparing the client helps to manage their expectations and provides a handy point of reference during negotiations.

Tip 2: Ensure the key decision-makers are involved and present

It can be tempting, especially in the preparation phase, to delegate tasks relating to the mediation to individuals who will not be making the key, final decisions. While this is an understandable commercial position to adopt, it means that those who have the negotiating power may not be fully conversant with the specific facts of the dispute. As part of the mediation preparation, try to involve these key decision-makers at the earliest opportunity. In this way, they can be fully cognizant of the issues in dispute and operate from a stronger negotiating position. Remember, knowledge is power.

Tip 3: Confidentiality is key

Mediation is a confidential dispute resolution process, but this fact is of particular importance in high-profile matters. High-profile disputes often deal with commercially sensitive information that the parties are rightly keen to keep under wraps. It can be helpful for a mediator to reassure the parties that any matters discussed are strictly confidential. In instances where there is government involvement or other high-profile decision-makers are present, special consideration will need to be given as to whether there is benefit



in allowing these individuals to separate into a different group to ensure discussions can remain candid and kept behind closed doors.

Tip 4: Selecting a mediator

The choice of mediator is vast and can seem overwhelming. In high-profile disputes where there are significant non-legal but parallel factors to consider, like publicity, it is worth selecting a mediator who is not only well-versed in the technical, legal side of the issues in dispute but who is also adept and experienced in dealing with matters of a high-profile nature. This can provide comfort to the parties knowing that the mediator is already experienced and aware of the issues encountered in these types of disputes. Having this level of comfort and confidence can help empower the parties to have candid and fruitful negotiations and make for a successful mediation all-round.

Tip 5: Mediation as a means to preserve existing relationships

This tip applies to all mediations, but none more so than in high-profile disputes. Mediation offers the parties an invaluable opportunity to settle a dispute on terms that cannot be reached in the course of court proceedings. This commercial flexibility should be at the fore of the parties' minds during negotiations. Any dispute causes significant financial loss and directs attention away from everyday matters. Mediation can throw a commercial lifeline in this way as it can help to preserve relationships so that businesses can continue to interact in the future. It is always worth reiterating this point to the parties before and during the process.

Tip 6: Use the mediator's neutrality as a means of saving face and avoiding the perception of submission

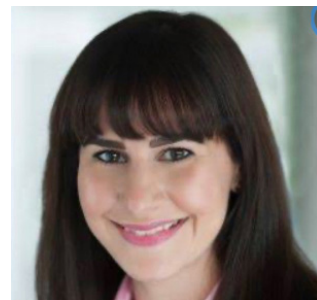
The mediator's unique position as a neutral third party can be utilised as a helpful safety net. In certain instances, the mediator can be held "accountable" or "take the blame" for a proposal that could, for example, imply fault or be seen as critical of a party. This allows the parties to save face and helps to avoid any implication that a party is weak in the face of what could be perceived as an embarrassing commercial proposal.



Our approach

Both domestically through the Building Disputes Tribunal and NZDRC, and internationally through NZIAC, we are able to provide mediation services that recognise and address the issues faced by parties in high-profile disputes. Our mediators have significant experience in this area and are adept at dealing with such matters. For more guidance on mediation or any other dispute resolution process we offer, please visit our websites at Building Disputes Tribunal (<https://www.buildingdisputestribunal.co.nz/>) for commercial and building matters, NZDRC (www.nzdrc.co.nz) for domestic matters and NZIAC (www.nziac.com) for international matters.

ABOUT THE AUTHOR



Hannah is a commercial litigation solicitor by background and qualified in England and Wales. Hannah has experience advising clients across various sectors including energy, banking and retail and she also has experience in regulatory matters and IP litigation. Prior to moving to New Zealand, Hannah worked in house for a European insurer. She now works as a Knowledge Manager in NZDRC's Knowledge Management Team which provides support to the Building Disputes Tribunal.

