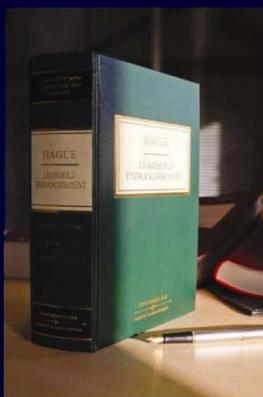


# Guide to Mediation



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## **The Ballantyne Grant Guide to Mediation**

### **Introduction**

Anyone involved in the business of litigation will tell you that it is to be avoided if at all possible. The process is fraught with uncertainty, delay and expense. Sometimes it is unavoidable and for the unfortunate few that are forced to go down that route, it can be an extremely difficult time.

However, it is rare for somebody to find themselves involved in litigation and have no choice about the methods which they can utilise to resolve the dispute.

These days mediation is nothing new. It has been around a long time. Mediation is a voluntary process that is entered into by two parties that are in dispute both of whom wish to resolve the argument in the most cost-effective and sensible way possible.

The court itself will encourage parties to engage in mediation as an alternative to using the court system. The judges take the view that litigation should be a process of last resort once all other options have been exhausted.

With that in mind we have prepared a short guide to mediation for those that find themselves engaged in the process. It is not designed to replace legal advice and should certainly not be relied upon without seeking advice upon the merits of one's own position. Each case is entirely different and will involve differing factors.





### **Appointing a mediator**

Once an agreement to mediate has been reached the next stage is to appoint a suitable mediator. Although there are many mediators practising in this field in our experience it is best to locate a mediator that has practical experience of the area which is in dispute. Therefore, if one is dealing with a property dispute it may be useful to appoint a mediator that is a surveyor or an architect. If one is dealing with a dispute that involves complicated financial issues then one should consider appointing an accountant as they will find it easier to understand difficult financial concepts. Therefore, it is vital to appoint a mediator that has both practical experience of being a mediator and also has experience of dealing with the types of issues that are in dispute. This enables them to bring an extra facet of experience to the dispute and adds value to their involvement.

Once you have identified a mediator you must then approach them and formally instruct them to act on the mediation. They will send to each party a mediation agreement which will set out the name of the parties that are involved in the mediation (together with the legal representatives if appropriate) and it will also set out the terms upon which the mediator agrees to act. In reality the terms are fairly standard and for instance the agreement will generally say that all discussions are confidential and the parties agree not to call the mediator as a witness in any subsequent court proceedings should the mediation prove unsuccessful. The terms are generally fairly uncontentious. The mediator's fees are generally shared equally by the parties.

Once the mediation agreement has been signed and the fee paid the mediation process can then begin.



## **Mediation – First Stage**

Whilst each mediator may choose to adopt their own processes one generally finds that there are common steps taken in every mediation.

The first step is that the mediator will request that both parties send to them a document outlining their case. Where appropriate this should be supported by appropriate evidence in the form of correspondence, emails etc. This document is generally known as a position statement.

The position statement informs the mediator and the other side of the background to the case and the view that each party takes of both their own case and the case that is being advanced by the opposition. It gives everybody time to consider the position prior to the second phase of the mediation process.



## **Mediation – Second Stage (phase 1)**

Once the mediation agreement has been signed by the parties and forwarded to the mediator and once each party has submitted their own position statement a meeting will then be arranged.

The meeting will be at a venue agreed between the parties.

However, prior to the meeting taking place it is important that one undertakes a thorough review of the case, giving appropriate consideration to both the strengths and weaknesses of one's own case and the strength and weaknesses of the opponent's case. The reason for this is that mediation will only succeed if the parties adopt a reasonable view as to the merits of their own position. If one adopts a totally unreasonable stance the mediation is unlikely to succeed and will result in a waste of both time and money. Therefore, as far as mediation is concerned compromise is key.

Once you have undertaken a thorough review of the case you will need to give consideration to the question of settlement and in particular what terms you require in order to achieve a resolution.

## **Mediation – Second stage (phase 2)**

Once you have considered the important features of the case, the state of the evidence, the strengths and weaknesses of both sides case and your settlement parameters, then you are ready to attend the mediation meeting.

Again there are no hard and fast rules as to how to conduct a mediation but there are some common approaches that are frequently used.

Frequently, the mediator will have an open session where all parties start the day together in one room. Each side then gets the opportunity to voice their position before the parties separate into separate rooms for the duration of the meeting.

If feelings are running high between the parties the mediator may dispense with this part of the process.

Once the parties adjourn to separate rooms the mediator then embarks upon identifying the things that are important to the parties and tries to get them to focus upon those factors that tend to strengthen or weaken their case. This is to try and introduce a sense of reality into the proceedings as it is not uncommon for parties to have unrealistic expectations or an over inflated belief in the strength of their own claim.

Thereafter the mediator embarks upon a form of shuttle diplomacy going back and forth between the parties to see if a deal can be brokered by narrowing the issues and encouraging settlement where possible and sensible.

Mediation is certainly not a soft option and the mediation process can run on for several hours from morning and continue late into the night. It is a stressful and intense process and settlement rarely happens quickly but rather after a period of several hours negotiation.

If a settlement cannot be achieved the parties simply leave at the point when the mediator considers that no further progress can be made.

However, if an agreement is reached then a formal document is drawn up which records the terms of the settlement and the agreement is signed by the parties.

At this point the agreement is legally binding and forms the basis of a legal contract which can be enforced if the terms are not honoured.

## **Conclusion**

This is just a brief guide giving an overview of how a standard mediation would work in practice. Because of the flexible nature of mediation it can be structured in anyway which the parties agree upon.

The strengths of mediation lie in the fact that (in our experience) they have a high success rate. Ballantyne Grant has been involved in over 35 mediations and we can say that all resulted in a settlement being reached. In some cases this was after the parties had been involved in litigation for periods in excess of two years.

A successful mediation can save thousands of pounds in legal fees and remove the uncertainty from the outcome. Because the process is entirely voluntary you remain in control at all times.

If you require any further information on any of the issues addressed in this guide please do not hesitate to contact Andrew grant on (01244) 394230 or send an email to [agrant@bglegal.co.uk](mailto:agrant@bglegal.co.uk)

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## Guide to Mediation

This article is intended as a general statement only and does not purport to render any specific advice, legal or otherwise. Specific advice on a particular problem should always be sought.

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[www.bglegal.co.uk](http://www.bglegal.co.uk)

Ballantyne Grant  
1 King's Buildings  
Kings Street  
Chester  
CH1 2AJ

T: 01244 394 230

F: 01244 851 908

E: [agrant@bglegal.co.uk](mailto:agrant@bglegal.co.uk)