



There is another way

Compensation cases are a great example of the kind of litigation that could be replaced with mediation, argues **Craig Howell Williams QC**

Mediation is not much used in compensation cases. Many professional advisers are not familiar with it and sometimes it is simply overlooked.

The Tribunal Procedure (Upper Tribunal Rules) (Lands Chamber) Rules 2010 encourage the use of mediation and the tribunal's guidance note 'ADR and Mediation' (Lands Chamber Form MED01) states:

“Mediation might not work where there is an important question of law which ought to be decided, but complex legal or evidential issues are no strangers to mediation”

“Mediation is often more cost effective and quicker than going to a court or tribunal. It is a flexible process that can be used to settle disputes in a whole range of situations. It is also an excellent tool to stop problems becoming worse. “The rules and guidance provide for and encourage the use of ADR. The tribunal in particular recognises the benefits of and encourages the use of mediation in appropriate cases. Importantly, it can award costs against a party for unreasonably refusing to consider it.

So what is mediation? It is a process conducted confidentially in which a neutral person assists parties in resolving disputes but where the parties are in ultimate control of the terms of resolution.

Mediation is a flexible process, but the following is typical.

Before the mediation, the parties send to the mediator an agreed bundle of the documents and a position statement setting out what they seek to achieve at the mediation.

At the mediation, the litigants must be present, normally with a lawyer or trusted friend to advise them. Experts may be required to consider technical issues (experts on land valuation, for example). The mediator will first hold an open session with both parties present, so that they can briefly identify matters that they think should be discussed.

The mediator will then hold private sessions with each party in order to explore options for settlement. He will assist the parties in their negotiations, acting as a go-between, but he will not pass on information or make offers unless he is instructed to do so. There is also the opportunity to have break-out sessions, in which for experts (such as valuers) discuss specific issues. If the mediation is successful, the parties will record the result in writing and this can be a binding agreement.

The mediator is not a judge or arbitrator but his role is crucial. First, they must remain independent and impartial throughout. Second, they must help the parties define the issues and identify the differences between them. Third, they must act as a facilitator and help the parties find a mutually acceptable settlement. There is no legal requirement for the mediator to have specialist knowledge of the subject matter but this will help.

What cases are suitable for mediation? Mediation can be used to settle disputes in whole range of situations. In simple terms, if a dispute is capable of being negotiated by the parties, it is capable of being mediated. A typical compensation case is well suited to mediation since it involves

Potential benefits of mediation

1. Disputes can be resolved in a very short time (most mediations take no more than one day).
2. Opportunity to avoid higher costs of a trial (which might take several days).
3. Even if unsuccessful in resolving the whole dispute, mediation can serve to reduce the differences between the parties (e.g. success in resolving an issue over disturbance but not an argument over valuation).
4. Opportunity to avoid the stress of adversarial litigation.
5. More likely to maintain valued long term relations between the parties.

two parties each with a different view about the financial value of land or rights. Mediation might not work where there is an important question of law which ought to be decided, but complex legal or evidential issues are no strangers to mediation.

There is then significant potential for the use of mediation across a range of cases involving claims for compensation following the acquisition of land or rights and under various acts, including for example sections 237 and 226(1)(a) of the Town and Country Planning Act 1990.

There are significant potential benefits to mediation. All those involved in conducting compensation cases should routinely advise their clients to consider resolving their dispute by mediation and not fall into default mode and continue with trial based litigation.

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