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# Mediation and conflicts in the area of construction

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# The Use of Mediation in Construction Disputes

- The range of dispute resolution techniques
- The impact of ADR, adjudication and the Civil Procedure Rules
- The actual use of mediation in the resolution of construction disputes
- Key findings of the King's College and TCC mediation research
- When is the best time to attempt mediation?
- Are cost and time savings made by the use of mediation?



# Overview

- Arbitration, declined due to:
  - Growth of ADR, mediation
  - Introduction of adjudication
  - Improvements to the Court system (Woolf, CPR and PAP)
- Arbitrator's response – 100 day procedures (SCA)
- More proactive approaches to dispute avoidance
- Active case management in the Courts.



# Avoidance

- Risk analysis and risk management
- Risk identification and risk allocation
- New and “improved” forms of contract (JCT 2005, NEC, PPC)
- Partnering and Alliancing
- Projects based on “Virtual Companies”
- Project mediation (CEDR)



# ADR

- Growth of ADR – commercial mediation (USA, London, Europe)
- Not coercive
- In construction; CEDR, ADR Group, independents, CMC orders, court support, CPR, PAP, TCC's Court Supported Settlement Service
- King's College/TCC mediation research



# Adjudication

- The Latham Report 1994
- HGCRA 1996
- Adjudication (Section 108, HGCRA)
- Jurisdictional challenges
- Serial adjudications



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# Woolf - CPR

- Experts – Part 35
- Offers to settle – Part 36
- Costs Part 44





# TCC

- CPR – Part 60, dealing with the TCC
- Judges; HCJ SCJ
- TCC Guide
- Workload
- Number of Claim Forms served
- Pre-action protocol – construction and engineering disputes
- Impact of ADR and adjudication



## Other Methods

- Expert determination (*Jones v Sherwood* [1992] 1 WLR 277; *Nikko Hotels v NEPG* [1991] 2 EG 86)
- Early neutral evaluation
- Court Supported Settlement Services – TCC
- Min-trial or executive tribunal
- Med-Arb
- Med-Adj
- Adj-Med (See CEDR's recent amendment to CEDR Adjudication Rules and ANB procedure)



# Contractual and Multistage Procedures

- *Walford v Miles* [1992] 1 AER 453
- *Channel Tunnel Group v Balfour Beatty* [1993] 1 AER 664 (HL)
- Escalation clauses (*Cable & Wireless v IBM* [2002] ADR LR 10/11
  - Negotiation
  - Negotiation between most senior management (star chamber)
  - Mediation
  - Adjudication
  - Court-Arbitration



# Avoidance & Dispute Resolution Combined

- Dispute Review Adviser (DRA)
- Dispute Boards:
  - Dispute Review Board (DRB)
  - Dispute Adjudication Board (DAB)
  - Combined Dispute Board (CDB)
- Project Mediation (CEDR Model Project Mediation Protocol and Agreement, December 2006, see Building Magazine, 8 December 2006, page 46-47)



# Background to King's College Survey

- A King's College and TCC questionnaire survey
- Objective data to assist with efficient case management
- On 1 July 2006 to 31 May 2008 the TCC's Courts in London, Birmingham and Bristol issued questionnaires to two sub-groups:
  - Form 1 where a case had settled
  - Form 2 where judgment had been given
- Key aims:
  - To reveal in what circumstances mediation is an effective alternative to litigation; and
  - To assist the court to determine whether, and at what stage it should encourage mediation in future cases



## Responses in context

- Questionnaires sent to parties litigating in the TCC
- Responses returned to Centre of Construction Law at King's College and analysed with assistance from CIArb
- TCC Annual Reports – 1,136 cases started during 24 month period
- Approximately 800 cases concluded during same period
- Projected population at least 1600 (claimants, defendants and 3<sup>rd</sup> parties)
- 261 responses received: 221 to Form 1 and 40 to Form 2
- Overall response rate of 15%



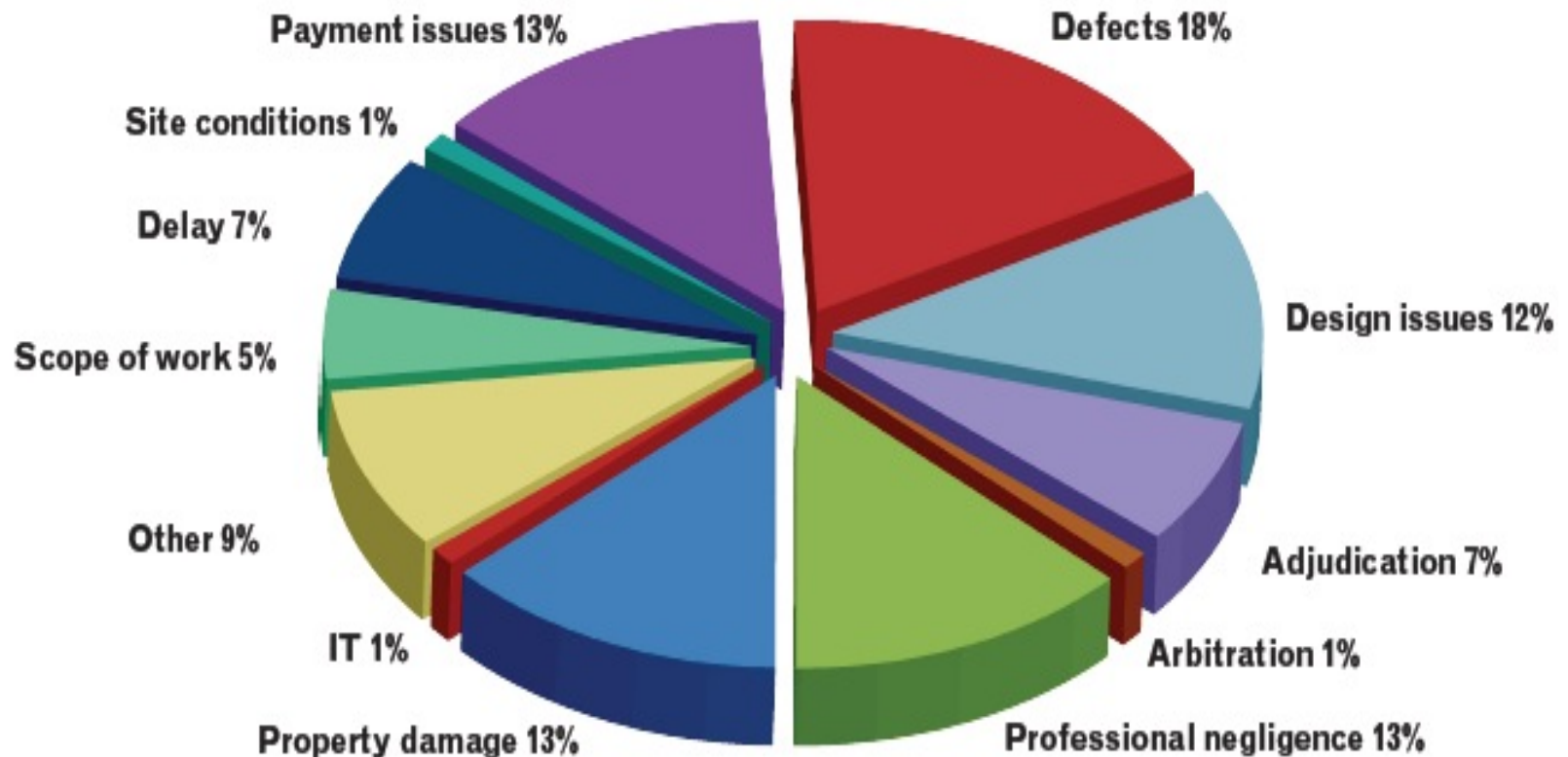
## Form 1 (Case Settled)

- Results are reliable given the high response rate
- The topics of the questions on Form 1 were as follows:
  - Q1 The nature of the case
  - Q2 The stage at which the action was resolved
  - Q3/4 How settlement was reached
  - Q5 Why mediation was undertaken
  - Q6/7/8 The mediator's profession, identity and nominating body (if applicable)
  - Q9 Approximate cost of the mediation
  - Q10 What would have happened without any mediation
  - Q11 Level of cost saved by mediation
- Focus on the responses to Qs 2, 3, 5, 6/7/8 and 11



# Q1: What was the nature of the case?

Figure 3b: What was the nature of the case?

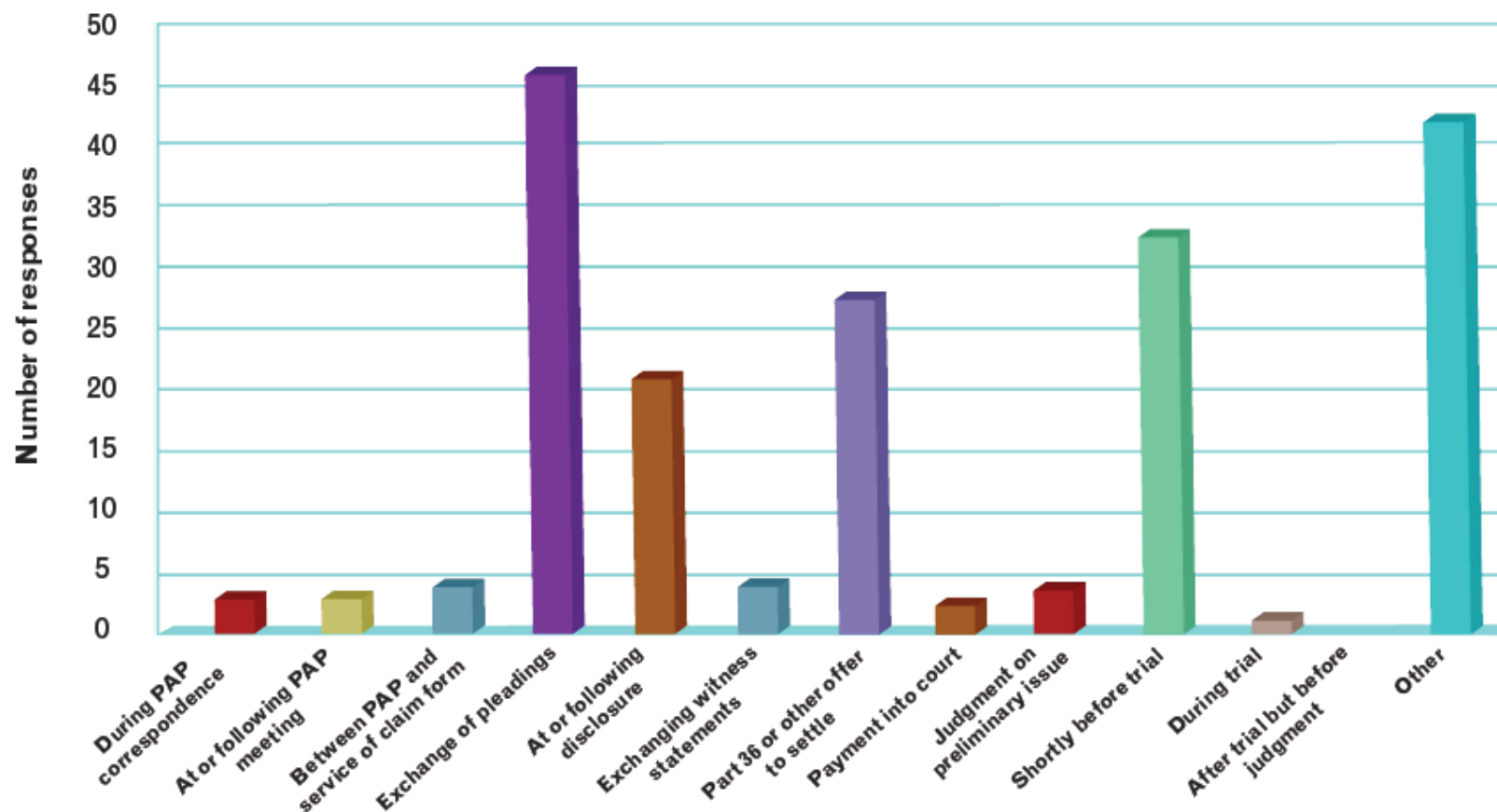






## Q2: At what stage did the action settle?

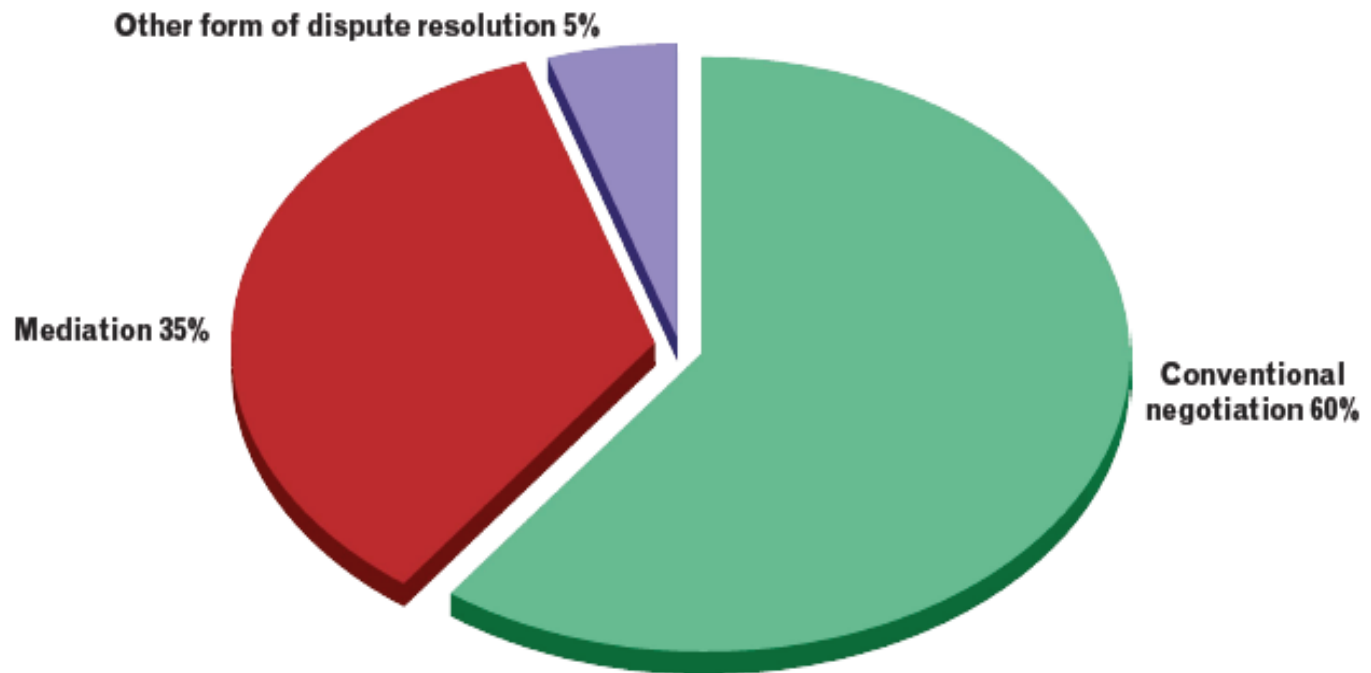
Figure 5a: At what stage was most of the litigation settled or discontinued?





# Q3: How was settlement reached or the matter discontinued?

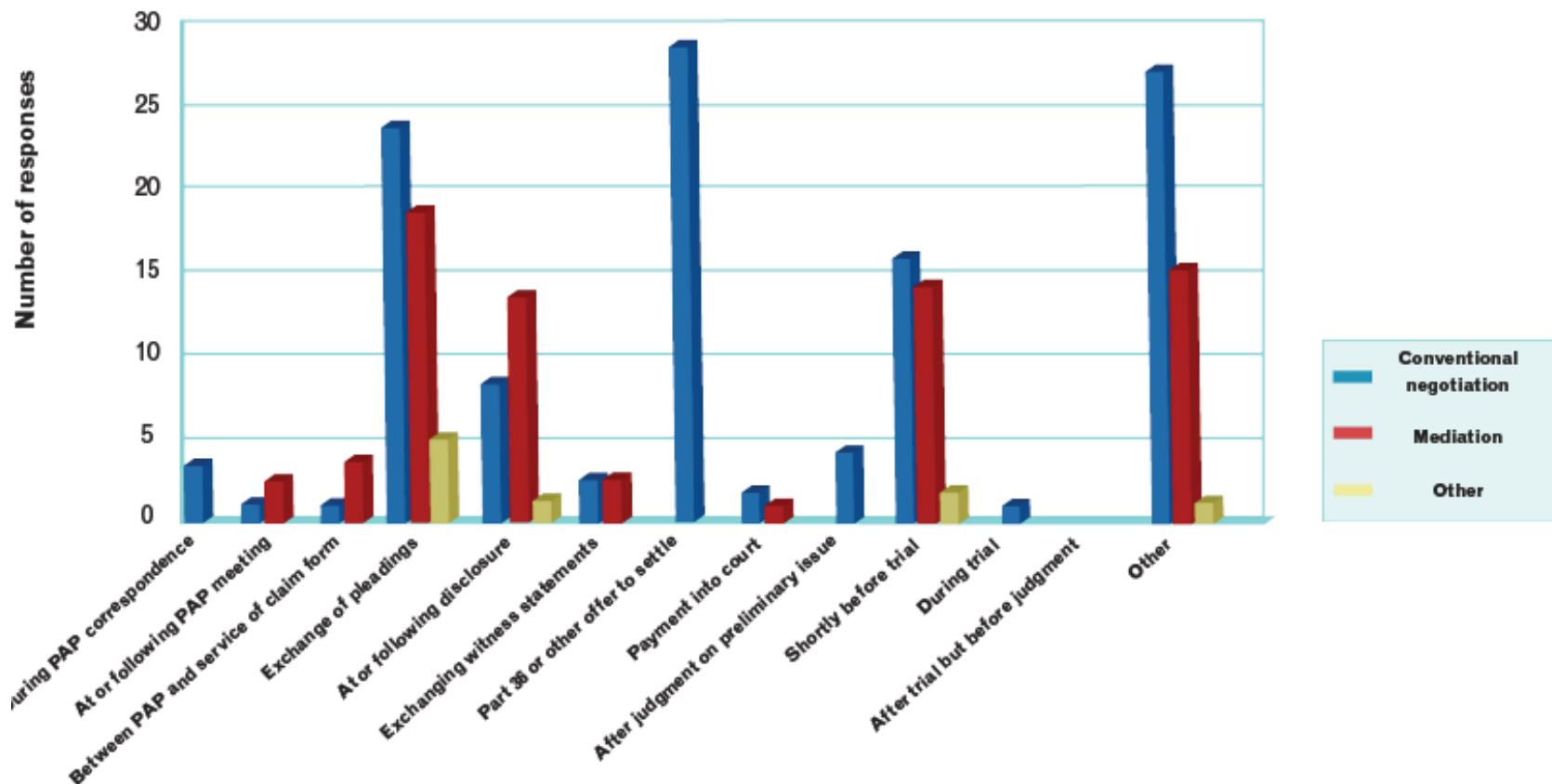
Figure 7b: How was settlement reached or the matter discontinued?





## Use of ADR at each stage

Figure 12: Type of ADR used at various stages of litigation





# Mandatory / “encouraged” Mediation? (1)

- Difficult dividing line between being:
  - ordered by a Judge; and
  - “encouraged” with a very real costs risk attached to refusal
- Halsey:
  - Potential breach of Article 6(1) of the ECHR to order mediation
  - Must show other party acted **unreasonably** in refusing mediation
  - 6 guidelines for determining unreasonableness



## Mandatory / “encouraged” Mediation? (2)

- Mixed evidence to support mandatory mediation including:
  - Ontario scheme
  - Boston study
  - VOL scheme

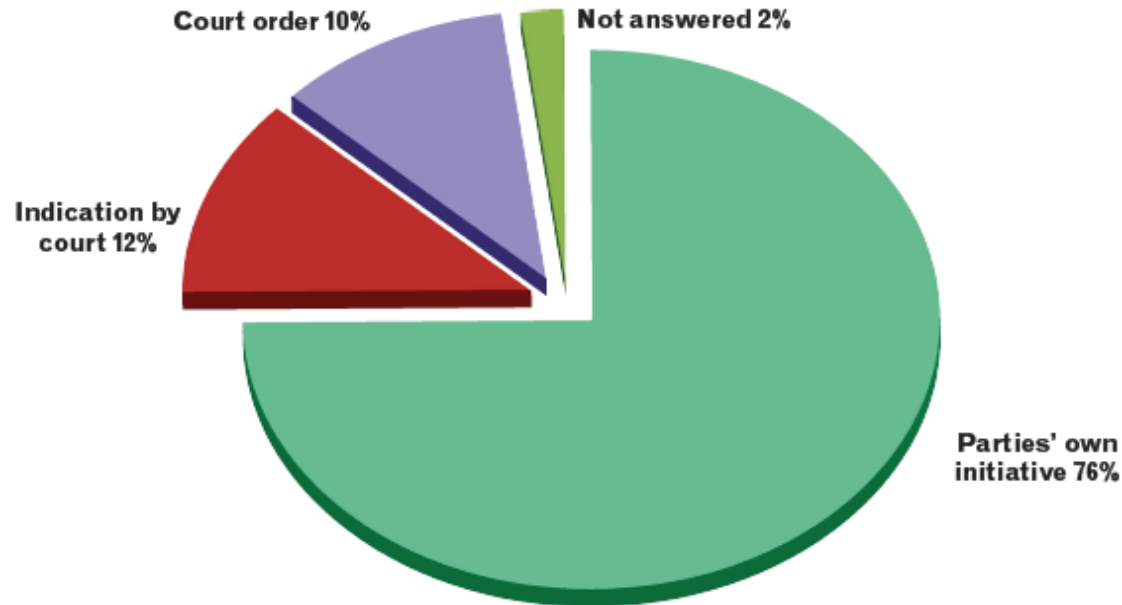


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## Q5: Why was mediation undertaken?

Figure 8b: Why was mediation undertaken?



Implications?

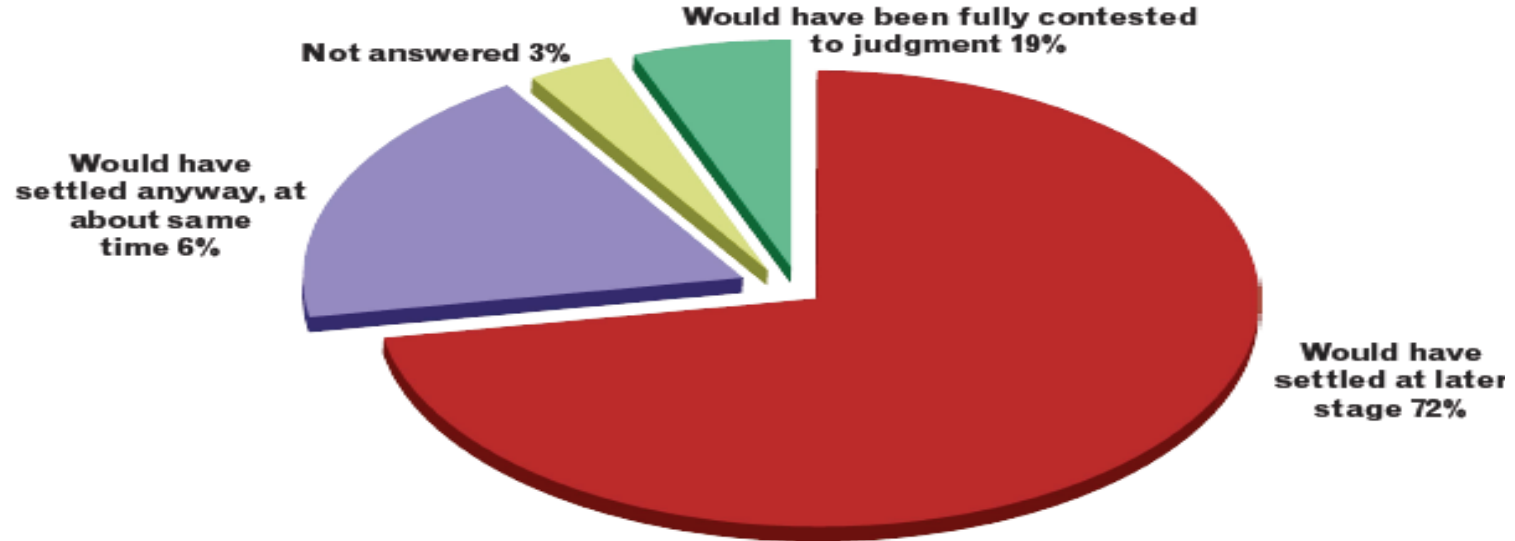
- Suggests pressure to mediate is less needed than it once was



## Benefits of Mediation (1)

- Q10: If mediation had not taken place, what would have happened?

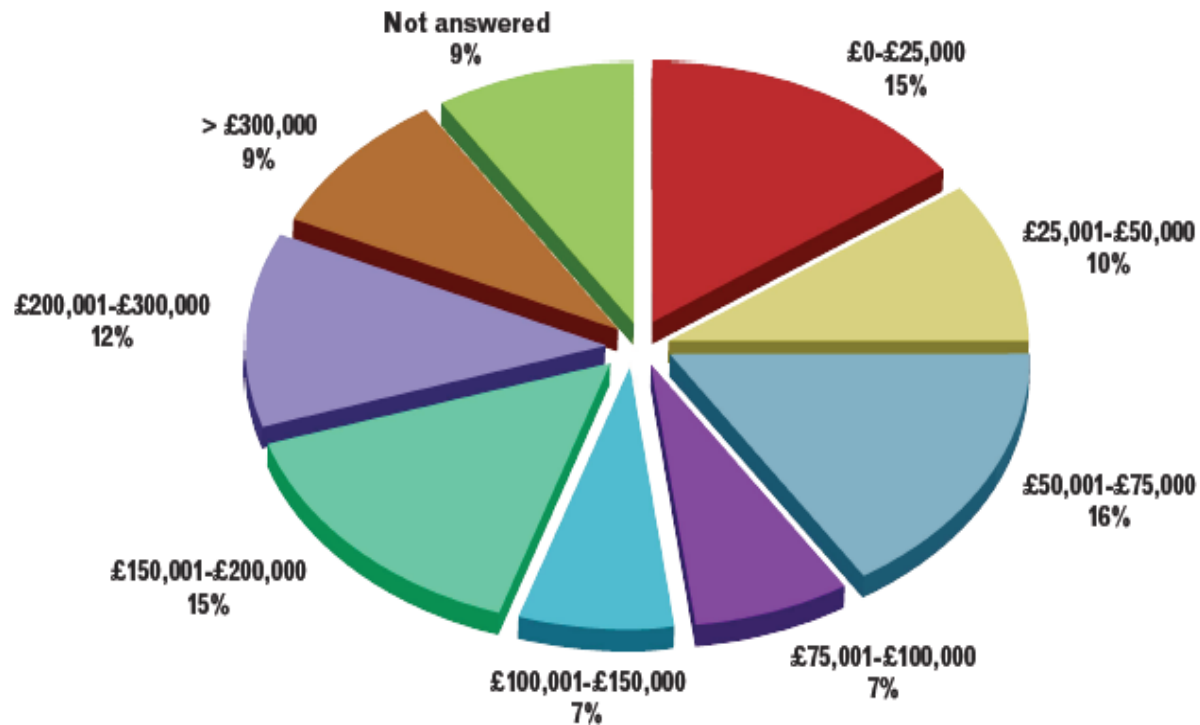
Figure 10b: What would have happened, had the mediation not taken place?





## Benefits of Mediation (2)

- Q11: If you ticked the second or third box for Q10, what costs do you consider were saved by the mediation?







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## Is greater regulation needed?

- Concerns raised by some about the power of mediators
- Proponents argue regulation would:
  - Provide better standards and safeguards for consumers
  - Enhance status of mediation
  - Improve legitimacy of service offered in eyes of consumers
  - Protect practitioners
- Survey results support “*light touch*” of EC Mediation Directive:
  - Majority of mediators members of the legal profession
  - Appointments suggest well-informed choices



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## Obtaining the Report

- A full copy of the report can be downloaded at:

<http://www.fenwickelliott.com/mediating-construction-disputes-download>

- A summary of the key points arising from the mediation report can be downloaded at:

[http://www.fenwickelliott.com/files/summary\\_of\\_key\\_points\\_mediation\\_report\\_%202\\_.pdf](http://www.fenwickelliott.com/files/summary_of_key_points_mediation_report_%202_.pdf)



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**THANK YOU**

Questions?