Court-based Mediation: A preliminary analysis of the small claims mediation scheme at Exeter County Court

A Report Prepared for the Civil Justice Council

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Executive Summary

Purpose and Scope of the Report

This report analyses data collected between the end of December 2003 and the end of February 2004. The data comprises a limited analysis of case files and personal interviews with parties attending mediation hearings at Exeter County Court. Additionally, all mediations, which took place during this period, were observed.

The purpose of this report is to provide a preliminary analysis of the Exeter small claims scheme, ie claims of up to £5,000, in order to determine whether the scheme achieves its objective to maximise efficiency in the use of the judicial resources at Exeter County Court as well as increasing satisfaction for the parties. At present the mediation service is provided free of charge to parties.

The Civil Procedure Rules (CPR) encourage the use of Alternative dispute processes which include mediation. ADR processes have been integrated into the small claims system at Exeter through the use of court-based mediation. At the time of this research there was no other similar small claims scheme operating in the UK.

Findings:

- A high proportion of small claims cases referred to mediation settle.
- The proportion of cases which settle is greater if the amount in dispute is at the lower end of the monetary threshold. It is not as easy to determine a link between the nature of the claim and the settlement rate. This is demonstrated by case studies which show a complex

mixture of reasons why parties may wish to settle or not wish to settle at mediation.

- Those mediations which involved a heavy emotional or complex personal or family relationship are less successful at time-limited small claims mediation than those where the parties had an interest in resolving the relationship eg business dealings.
- The scheme has saved a significant proportion of judicial time which can be dedicated to hearing other cases, paperwork etc.
- Parties involved in mediations generally felt that it was a useful process.
- Parties generally found the mediator to be more informal and a better listener than the judge.
- Mostly they liked the fact that it was informal, saved time and achieved a result.
- There was a perceived need for more information in advance of the mediation.
- Responses from parties were very positive a few weeks after the mediation had taken place.
- Most thought it was a positive process and 90% were prepared to use mediation again.
- A major advantage of mediation is that even if the case failed at the mediation hearing the parties were able to benefit from hearing issues put forward by the other side and receiving directions from the judge.

Recommendations:

- Further detailed analysis is conducted which compares results of the mediation scheme at Exeter to the results of small claims trials at a similar court which does not run such a scheme.

- Further research should be conducted to determine whether settlement is the most appropriate basis for measuring the success of the mediation process.

- Greater analysis of the training process of mediators should be conducted. This is to ensure that the mediators are trained specifically for the small claims scheme. It should also offer guidance as to whether the mediator's approach should clearly distinguish between 'information' and 'advice', and how to counter-balance any inequalities between the parties. This may require a statement of ethics as well as analysis of training provision.

- More information on the scheme should be provided in advance to participants so that they are better able to prepare for the process.

- Judicial selection of cases should be criterion-led so that it is easier to determine whether particular categories of claim are more amenable to mediation than others.

- The type of mediation conducted under the small claims mediation scheme needs a clear definition so that parties are aware of what the process entails. At present there is very limited knowledge of the objectives of the scheme. This would be supported by the employment of a dedicated mediation clerk or co-ordinator at the Court.

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Terms of Reference

The Civil Justice Council commissioned this research to provide a preliminary analysis of the Exeter small claims scheme. Its aim is to provide an initial exploration of the scheme, its operation and its success. The report covers a period of research conducted over 2 –3 months. Its focus is on the following matters:

1. An account of the establishment of the scheme.

2. An account of the process, including the judges' directions relating to use of the scheme. (This should also include an account of who undertakes the mediations; how they are selected; the training they have received; how this form of mediation compares with other types of mediation (e.g. in multi-track/or indeed in the big commercial dispute); how they are funded.)

3. Presentation of the available statistical information about the numbers of cases which have mediated and the outcomes of those mediations.

4. Presentation of a (small) number of case studies – setting out the nature of the dispute; whether or not an agreement was reached; and the terms of that agreement.

5. A preliminary assessment of the impact of the small claims scheme on the other work of Exeter County Court – considering the extent to which judicial time was released for other judicial activity.

6. Preliminary conclusions on key questions: is 'mediation' appropriate for small claims? How do cases which are mediated compare with other small claims cases which have to go to a hearing before a DJ – i.e. is this mediation route a more efficient route for users than the full post-Woolf small claims procedure? Does it achieve settlement? What is the quality of the outcome?

This report gives a foretaste of the scheme in operation rather than a detailed and in-depth scrutiny of the sort which would emerge from a study conducted over a longer period of time with more wide-ranging comparisons and resources. It is therefore intended, as stated on the face of the study, as a preliminary observation rather than a conclusive study. It offers some limited findings from some case analysis and interviews with the parties. A further and more detailed study would consider many more cases in depth in order to track the path of a case

from issue of claim to settlement at mediation or conclusion at trial, or settlement after mediation but still prior to trial. It would also contain more cross-referencing of data from parties to both mediations and small claims hearings. It was only possible to look at a selective number of case files for this project. It is proposed that a more detailed study would examine a greater proportion of relevant files.

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The purpose of this research is to provide an introductory exploration of the small claims mediation scheme at Exeter County Court.

Introduction

Mediation itself is not a new process in the UK. It has most commonly been available for many years for those involved in commercial, neighbour and family disputes. It is used to resolve grievances between youths in restorative justice programmes. Children in primary schools as young as 10 have even been trained to be peer mediators to help others untangle their playground quarrels.

Recent developments in the civil justice system have promoted the use of mediation as an alternative method of resolving disputes. In order to ensure that the legal process does not become over-burdened, other options to the formal legal system must be considered. Changes in the civil justice system, originally recommended by Lord Woolf, and later implemented by the Lord Chancellor through programmes of reform such as the introduction of Civil Procedure Rules (CPR) and Pre-action Protocols, have encouraged parties at least to consider mediation before a trial takes place. In Lord Woolf's 1996 Report on Access to Justice he envisaged a '…landscape of civil litigation …. fundamentally different from what it is now'.[1] This landscape relied upon an 'avoidance of litigation wherever possible' and the principle that 'litigation would be less adversarial and more co-operative'.

These fundamental differences require a sea-change in legal principle and litigation. In the recent case of *Cowl v Plymouth City Council*,[2] Lord Woolf said that the legal process was 'over-judicialised'. He argued for greater promotion of the possibility of alternative measures, saying that

[1] Lord Woolf, *Access to Justice: Final Report*, July 1996.
[2] *Cowl v Plymouth City Council* (The Times 8 Jan 2002)

'…sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible'.

This report analyses one particular method of incorporating ADR into court procedures to encourage people to use mediation rather than litigation. It focuses on providing a preliminary assessment of the court-based small claims mediation scheme which has been running at Exeter County Court since June 2002. It provides an account of the establishment of the scheme and the process of the mediations. It makes some preliminary assessments of the impact of the scheme on the other work of the court, concentrating on the saving of judicial time. It draws some preliminary conclusions on questions such as the appropriateness of mediation for such cases and the quality of the outcome for participants in the process.

Main Features of Mediation as a Form of Alternative Dispute Resolution

'Alternative Dispute Resolution' is defined in the glossary to the CPR as a 'collective description of methods of resolving disputes otherwise than through the normal trial process'. This is a collective term for many different process which may include, commonly, arbitration, conciliation and mediation. It is clear that 'alternative' is not expected to imply negative connotations to the processes involved and that they are just alternatives to the more traditional process of litigation.[3] The LCD have distinguished between 'alternative adjudication' and 'assisted settlement'.[4] 'Alternative adjudication' includes processes where a neutral third party is employed as a decision-maker, such as arbitration. 'Assisted settlement' is used to describe the process whereby the third party is employed to help the parties themselves come to an agreement. 'Assisted settlement' thus encompasses the mediation process because the mediator cannot force the parties to reach an agreement.

[3] See further Alternative Dispute Resolution: A Discussion Paper (LCD, Nov 1999), at 2.5.
[4] *ibid*, at 2.4.

The most important quality of the mediation process is that the onus is upon the parties themselves coming to an agreement. The mediator acts as a neutral. Mediation is itself a broad and generic term which encompasses a number of different constituents.

There is a wide body of literature, which discusses the definition of the term 'mediation', and the implications and connotations of the terminology.[5] The definitions are as wide as the purposes to which mediation can be put. Mediation can be used to settle or prevent disputes between any individuals or groups in any setting or circumstances. Historically it was used by the Chinese to resolve local difficulties. Parties were considered to have failed if they had to resort to court to solve their problems. A Chinese proverb states, "It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit".[6]

Mediation can have a considerable part to play in dispute-resolution. Examples where mediation has been utilised successfully in legal situations include commercial agreements to resolve disputes based on formal contractual agreements; or family and neighbour disputes where there may be little or no legal dispute but the relationship between the parties has broken down. The role of mediation in family law has been significant especially since the Family Law Act 1996 which envisaged mediation as a method of dispute resolution which could promote continuing relationships between family members.

The Definition of Mediation

Mediation is an indeterminate concept because it can have different meanings depending upon the context in which it is used and on whether the emphasis is put on the process or the outcome. There is no rigid definition of mediation and no rigid method of conducting it. This is because the characteristics of mediation may also describe other

[5] See, for example, L Boulle, M Nesic, '*Mediation: Principles, Process, Practice*' (Butterworths, London, 2001)
[6] J A Cohen, 'Chinese Mediation on the Eve of Modernisation' 54 *Cal Law Rev* (1966)1201.

alternative dispute resolution processes, such as conciliation or arbitration. The definition may also differ depending upon whether it is being applied as a pragmatic method of securing a settlement or an aspirational method of resolving disputes which implies a third party encouraging co-operation and empowerment of the parties involved. It has been said, for example, that "[mediation] is all process and no structure".[7] In the context of this report mediation appears, *prima facie*, to present a more inspirational model of conciliatory conflict resolution than more traditional, structured, adversarial methods of dispute resolution. The difficulty of defining mediation has not prevented attempts at distinguishing its characteristics.

Consequently, mediation has been defined widely and narrowly. It has been described narrowly as '…the intervention, by invitation of the parties, of an experienced, independent and trusted person [who] can be expected to help the parties settle their quarrel by negotiating in a collaborative rather than adversarial way'.[8]

This and other similar definitions of mediation emphasise the voluntary nature of mediation; the qualities of the mediator and the positive style of the negotiation. Yet, it may be that the mediation process is not always voluntary; or that the mediator is not experienced and cannot yet be trusted because the parties involved in the dispute are not clear as to the mediator's exact role. If such processes do not fit into this narrow definition of mediation can they still be described as mediation?

Mediation has been defined rather more broadly as 'assisted negotiation'.[9] This definition emphasises the negotiation aspect of mediation rather than the approach of the mediator. The broad definition may thus encompass a variety of approaches by the mediator, rather than the more neutral and conciliatory approach, which is implied by the more narrow definition. It implies that the parties are there to negotiate for

[7] L Fuller, 'Mediation – Its Forms and Functions', (1971) 44 *S Cal Law Rev* 305, at 307.
[8] M Noone, '*Mediation*' (Cavendish Publishing, London, 1996)
[9] See, for example, J Nolan-Haley, Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking, 74 Notre Dame L. Rev (1999) 775, at 777.

themselves and the mediator is a sort of referee but it does not give guidance on how much input the mediator will have into the dispute and whether the mediator is there to advise upon, or merely facilitate the agreement.

In the LCD's Discussion Paper on ADR a contrast was drawn between 'evaluative' mediation, where the mediator gives an assessment of the legal strength of a case, or 'facilitative' mediation where the mediator concentrates on assisting the parties to define the issues and does not input their own view.[10]

If the mediator takes a facilitative approach they will encourage the parties to change their positions through discussion with the other party and the recognition of joint interests. Their role is to enable to parties to communicate with each other rather than to direct the discussion. If the mediator takes an evaluative approach they will be more prepared to comment on the likelihood of success at trial or the legal rights of the parties. They may do this by speaking to each of the parties in separate rooms. The facilitative mediator would therefore concentrate on the process of mediation and the more evaluative on the outcome. Clearly, a more evaluative approach in mediation is suited to a mediator with expertise in the subject-matter of the mediation than one with no knowledge or understanding.

Different mediators may adopt different styles or approaches to the mediation. These approaches may well impact on the overall perception of the process and may affect the way in which it is defined.

These difficulties with definition are important in the context of court-based mediation as a definition helps those involved to understand the procedure.

In order to gauge whether there is a general consensus as to the definition of mediation parties who had attended the mediation hearings

[10] See further, Alternative Dispute Resolution: A Discussion Paper (LCD, Nov 1999), Annex A.

at Exeter were asked to define what mediation meant to them. The emphasis in many of their replies was on the result rather than the process. For example, 'neither side winning'; 'amicable resolution'; 'come to a compromise'; 'compromise resolution'. The process they had experienced in the small claims mediation at Exeter guided the way in which they defined mediation.

It would be useful in future research to ask participants to define mediation before they take part in the process so as to gain insight as to their knowledge of the process and to be better able to predict how they will act during the mediation. It has been stated that mediation has, '…a chameleonlike quality, whose character shifts with the perceptions of its participants'.[11]

This report analyses the core features of the court-based small claims mediation scheme at Exeter to determine whether it can be described as 'mediation'; whether it fulfils standard definitions and how the process is thus understood by court-users.

The Small Claims Track

The small claims track provides a simple procedure for parties wishing to resolve disputes with a value of less than £5000. The small claims hearing is informal and very often the parties want a decision on a question which may have tenuous links to the law. There is little formal procedure and the parties commonly lack legal representation. It is usually for the district judge to guide the parties through the process and give directions to clarify the issues in dispute.

In the Summary of Responses to the LCD's Discussion Paper on ADR, the majority of respondents who commented on court-based mediation schemes, stated that litigants in the fast track and small claims track would benefit from an ADR scheme.[12] The small claims track is

[11] S E Merry, 'Disputing Without Culture' 100 Harv Law Rev 2057 (1987).
[12] ADR Discussion Paper: Summary of Responses (LCD, 1999), at para 56. However there were a number of caveats to this view: fees should reflect value of mediation but be proportionate to the

appropriate for mediation because small claims hearings are less formal than other court hearings. Generally they take the form of an arbitration hearing rather than a formal trial with the judge acting as an arbitrator taking a more interventionist approach. Most parties appearing at small claims hearings are litigants-in-person and so the judge has to guide the parties through the legal issues. In a mediation hearing the focus on the law need not be so great and there is no need for legal determination – just agreement. Mediation for small claims may be the most proportionate way of dealing with a case with a low monetary value. A disproportionate amount of judicial time may be devoted to resolving small claims by guiding litigants-in-person through the law. Yet this is not to undervalue the small claims track because the limit is now a not insignificant £5000 and it offers a procedure which may offer to most individuals the greatest likelihood in their lifetime of coming into direct contact with the law. Thus the value of the claim may give some pointer although not clear guidance as to the complexity of the case.

One pragmatic reason for bringing mediation into this arena is that small claims work is not well regarded by District Judges. Professor Baldwin, in his evaluation of the work of the small claims court states that judges regarded dealing with small claims as "….difficult and demanding work, tolerable only in relatively small doses and when balanced by other more intellectually satisfying judicial work".[13] If judges are engaged for too long in low value cases the cost to the state is likely to not be proportionate to the cost of resolving the dispute.

Many civil disputes originate because of a breakdown of communication between the parties involved. Mediation offers a way of trying to rebuild the communication channels between the parties themselves rather than opting for a legal decision. A legal decision may offer the parties a solution but will not encourage them to reopen their own dialogue in order to repair their working or business relationships.

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claim; scheme should depend on nature of issue rather than track; schemes should not be compulsory; small claims mediation should be provided fre-of-charge; and ADR providers should tender to run such services. Other respondents disagreed.

[13] J Baldwin, '*Small Claims in the County Courts in England & Wales*' (Clarendon Press, Oxford, 1997), at p 162.

The Civil Procedure Rules

The emphasis in the CPR upon case management of disputes puts more importance on the co-operation of the parties in the resolution of the dispute and less on the traditional adversarial nature of court proceedings.

Alternatives to formal trials are considered not only as something which takes place away from the court but may occur in court buildings as an aspect of the proceedings themselves. The development of these civil justice reforms in England and Wales have led to a growth in court-based mediation schemes. The overriding objective in CPR r1.1(2) states,

> 'Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate;
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues, and
> (iv) to the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

The CPR defines ADR broadly as 'a collective description of methods of resolving disputes otherwise than through the normal trial process'. It relies on the principles underpinning mediation and other processes rather than specifying in detail which processes should be used.

The CPR explicitly requires the court to consider alternative dispute resolution as an aspect of active case management under CPR r1.4(2)(e) which states that active case management includes:

> (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

- CPR r1.4(2) also implicitly requires the court to consider alternative dispute resolution as an aspect of active case management under other sections of CPR r1.4(2) –

- Under CPR r.1.4(2)(a) whereby the court must 'encourage the parties to co-operate with each other in the conduct of proceedings'.

- Under CPR r1.4(2)(b) the court is required to 'identify the issues at an early stage'.

- Under CPR r1.4(2) (c) the court is required to 'decid[e] promptly which issues need full investigation and trial and accordingly disposing summarily of the others'.

- Under CPR r1.2 (f) the court is required to 'help the parties to settle the whole or part of the case' and - at r1.2(l) 'give directions to ensure that the trial of a case proceeds quickly and efficiently'.

- Each of these elements can be satisfied by the use of ADR procedures linked to the active management of the case by the court.

The parties are also under an obligation to help to further the overriding objective under. CPR r1.3. More specifically, the parties can volunteer for ADR and have an option to choose to request a stay of one month to allow for ADR on their allocation questionnaire.

The CPR are strengthened by the use of pre-action protocols which support the principle that litigation should be seen as a measure of last resort. They emphasise the exchange of information before the issuing of proceedings and the early promotion of negotiations leading to settlement. The clinical negligence protocol, for example, explicitly states that the parties should consider ADR. Where no specific Practice Direction exists the recent amendment to the Practice Direction for Pre-Action Protocols applies. The objective is 'to enable the parties to avoid litigation by agreeing a settlement of the claim before the

commencement of proceedings'(para 1.4(2)). Parties are required to '… follow a reasonable procedure…' intended to avoid litigation(para 4.2). It lays down a procedure for both claimant (para 4.3 (f)) and defendant (para 4.6 (e)) which requires them to state whether they wish to enter into mediation or another form of alternative dispute resolution.

Relevant Case-Law

The use of mediation encouraged by the CPR has also been forcefully encouraged in the courts. Recent decisions have found that there may be cost implications if parties to proceedings decide not to consider using mediation. In the case of *Dunnett v Railtrack plc,*[14] the Court of Appeal disallowed the defendant's application for costs, despite finding in their favour because they had refused to mediate.

In this case the claimant had previously brought proceedings for damage to her three horses. They had strayed onto the railway line after the gate to their enclosure had been left unlocked. The court at first instance found in favour of Railtrack as they said that Dunnett had failed to establish the firm's liability. Dunnett therefore applied for leave to appeal the case. The Court of Appeal granted the appeal but said that the case should go to mediation. The claimant agreed to mediate but the defendants refused, being not even willing to consider it. Brooke LJ suggested that where emotional issues were concerned the case may be suitable for mediation. He said,

> "…it appears that passions were running fairly high on the claimant's side in relation to the death of her horses and the attitude that Railtrack, no doubt on sound legal advice, were adopting. It appears to me that this was a case in which … a real effort should have been made by way of alternative dispute resolution to see if the matter could be satisfactorily resolved by an experienced mediator, without the parties having to incur the no doubt heavy legal costs of contesting the matter at trial."[15]

[14] [2002] C P Rep 35.
[15] *Op cit*.

Brooke LJ highlighted the fact that the CPR placed a duty on both the court and the parties to further the overriding objective. For this reason he said that if parties,

> "…turned down out of hand the chance of alternative dispute resolution when suggested by the court… they may have to face uncomfortable costs consequence".[16]

The Court of Appeal gave some indication in this case of the sorts of cases which may benefit from mediation. As well as suggesting that it was suitable in cases where, 'intense feelings had arisen', the Court also said that mediation might be suitable where there could be imaginative solutions to disputes which were beyond the scope of a court to provide.

In *Hurst v Leeming*,[17] Lightman J reiterated the point that "…alternative dispute resolution is at the heart of today's civil justice system". Lightman J said that the only factor, which should be taken into account when considering mediation, is whether, on an *objective* viewpoint, the mediation has any real chance of success. This might mean that one of the parties themselves think that there is little chance of success in mediation but they must take into account the view of the court when the proceedings are brought before them. It might be that even though they think that they have a watertight argument and are going to win at full trial that the court will take a different view when presented with the strengths and weaknesses of the case presented by the other party. On the facts presented in *Hurst* the judge did accept that, because of the 'character and attitude' of the claimant, these particular proceedings would not have benefited from being subject to mediation. Nevertheless, he did say that this case involved 'exceptional circumstances' and if other parties in other proceedings chose to follow this route they would have to accept that they were taking a risk that the court might not agree with them and they might be penalised.

[16] *Op cit*.
[17] [2002] C P Rep 59.

In *Leicester Circuits v Coates,*[18] the parties agreed to go to mediation but then Coates withdrew from the process the day before the mediation was due to take place. The mediator had expressed dismay at this because he felt that, 'this was a matter that fell squarely within the category of those ripe for mediation.' Coates stated that he had withdrawn from the mediation because his insurers had insisted; that both parties had already tried and failed to sort out their disagreements and that he believed Leicester's attitude was that the case was going to go in his favour. The Court of Appeal penalised the defendant because the court was unhappy that 'at the eleventh hour' Coates decided that the mediation was 'pointless'. Judge LJ said,

> "We do not for one moment assume that the mediation process would have succeeded, but certainly there is a prospect that it would have done if it had been allowed to proceed. That therefore bears on the issue of costs".[19]

An assessment of these authorities, amongst others,[20] shows that the courts are willing to pursue cost penalties where it is clear that one party's refusal to mediate is unreasonable. In *Shirayama Shokusan v Danovo Ltd,*[21] the judge went as far as instigating an order for the parties to attend a mediation hearing relying on the authority of Rule 1.1 CPR.

Parties and their representatives now have to consider whether a refusal to mediate or to actively consider mediation might result in adverse cost penalties when their case goes to trial. Such an approach must heighten the interest in mediation as well as encouraging lawyers generally to increase their knowledge about the benefits and pitfalls of mediation as part of their general approach to clients and their cases.

Other Incentives

The Department of Constitutional Affairs have to contribute towards the Government Public service Agreement Targets which set out the aims,

18 [2003] EWCA Civ 333.

19 *Op cit*.

20 Cases including *Societ Internationale de Telecommunications Aeronautiques (SITA) v The Wyatt Co* [2002] EWHC 2401and *Valentine v Allen* [2003] EWCA Civ 915.

21 {2003] EWHC 3006.

objectives and key targets for each Government Department. The objective which closely relate to the encouragement of ADR is Objective II: to ensure a fair and effective system of civil and administrative law. Target 3 states the need to reduce the proportion of disputes which are resolved by resort to the courts. This target therefore supports the principle of regarding litigation as a last resort.

Other reasons for reform such as reducing the costs of legal aid led to the establishment of court-based mediation schemes before the implementation of the CPR. The first such scheme, promoting voluntary mediation, was piloted in Central London County Court in 1996.[22] Following extensive research on the scheme it was extended from a pilot to an established scheme.

Court- based Schemes

The emphasis upon co-operation between the parties and the notion that the trial itself should be seen as a last resort have meant that the principles underpinning the reforms as well as the clear directions in the CPR and pre-action protocols have encouraged court circuits to develop their own ADR schemes. Such schemes have been implemented in courts, including Central London, Birmingham, Guildford, Manchester, Exeter, Leeds and Cardiff.

A pilot scheme is to be introduced in April 2004 in Central London County Court whereby parties bringing certain types of claim will be required to attend a mediation appointment or give reasons for objecting to doing so. There will be a charge for the mediation hearing. This pilot project will be evaluated by the DCA to gauge the effectiveness of compulsory court-based mediation.

Methodology

[22] See further, H Genn, 'The Central London County Court Pilot Mediation Scheme: Evaluation Report' (LCD Research Series, 1998)

This report consists of an analysis of the Exeter small claims court-based scheme since it began in June 2002 until February 2004. An observation was made of mediation hearings between the end of December 2003 until the end of February 2004.

Data for the report comes from three main sources: (i) Case Files; (ii) Observations; and (iii) Interviews.

(i) Case Files

The main source of data for the collection of statistics on the cases allocated to mediations from the small claims track comes from a spreadsheet which has been consolidated by the court called the Small Claims Monitor. It provides basic data related to the case including:

- the date that the case was allocated to mediation;
- the date of the mediation;
- the initial time estimate provided by a district judge of the length of the trial if the case should go to trial;
- the total amount of the claim;
- whether a counterclaim has been issued and for how much;
- the nature of the settlement if the case settled at the mediation;
- the date the case will go to trial if it does not settle at mediation; and
- the name of the mediator and the judge.

This data although comprehensive provided a framework for the collection of data rather than a complete research base. It includes all cases which have been allocated to the scheme since its inception.

A number of court files were also analysed to provide a more detailed analysis of the process and further details which might help to extend the understanding of the process. Over 60 cases were analysed over the two months of the project. They were selected on a random basis from the

beginning of the establishment of the scheme to the end of January 2004. The additional information taken from these files provided:

- the nature of the dispute;
- the date the claim was filed;
- the date the defence was filed;
- the reason why the case did not go to mediation (if this was applicable);
- the reason why the case did not settle at mediation (if applicable);
- whether the time estimate was amended if the case did not settle at mediation but was allocated to trial (if applicable);
- what happened if the case did not settle at mediation and went on to a small claims hearing (if applicable);
- any other useful or relevant data or information about the case.

In addition, the monitoring sheets compiled by the mediators on behalf of the Devon and Exeter Law Society were also considered in order to provide any additional information, especially for those cases where the files had not been scrutinised.

All of the data discussed above was consolidated into a Main Database which was used to generate much of the data in this report.

(ii) Observations

The research team observed all of the mediation hearings conducted at Exeter County Court between 26th January and 29th February 2004. A total of 12 mediation sessions were held during this period. There were 65 individual cases allocated to mediation and of these cases 46 proceeded to a mediation hearing. 28 settled at the mediation and 18 cases which were mediated did not settle. Of all of the mediation hearings observed, 43% settled their dispute.

The aim of the observation was to be able to describe the mediation process and the contributions made by each of the participants (the

district judge, the mediator, the parties and any observers to the mediation). The fact that a number of mediations were observed over a limited period meant that an authentic description of the process could be provided. The similarities and differences of approaches of the individual mediators was useful to observe as well as the nature and character of the participants. The overall picture was helpful in order to consider how the whole complex web of issues and participants combines to effect either a mediation settlement or a return to the judge to ask for further directions when the case does not settle.

(iii) Interviews

There were two types of interviews conducted. The first were unstructured interviews conducted with the officials in the mediation process – judges, mediators and court staff. More structured interviews, based on a pre-prepared questionnaire were conducted with parties immediately after the mediation and then again several weeks later.

Interviews were conducted with all of those involved in the mediation process to learn more about the establishment of the mediation scheme and the mediation process. Interviews were conducted with two district judges from Exeter County Court, the Mediation Clerk and a number of mediators involved in the mediation scheme.

In addition interviews were also conducted with parties involved in the mediation hearing to assess their views and feelings on the mediation process in order to inform some preliminary assessments of the quality of the outcome of the mediation hearings. The interviews also informed the research conducted on the small claims mediation process as participants were asked whether they knew they were coming to a mediation at the court and what that mediation entailed. In order to clarify whether the parties to the mediations maintained their original views short follow-up interviews were conducted by telephone a few weeks after the mediation took place. In all 75 interviews were conducted with parties to small

claims disputes who took part in mediation hearings and 39 follow-up interviews were conducted. Copies of the questions asked at the interviews can be found in Appendix B.

It should be stated that this report is intended to be an exploratory study and as such is intended to provide a background to further study. It is intended that the work done for this report raises broader questions which can be answered in a longer, more in-depth study.

Chapter 2: The Establishment of the Exeter Small Claims Scheme

Exeter County Court is within the Western Circuit. There are 3 District Judges. The court deals with a total number of claims issued amounting to almost 6,000 over a one year period.[23] Of these cases approximately 25% are defended. In the last year, 512 of these cases were allocated to the small claims track.

The Launch of the Small Claims Scheme

Since the enactment of the CPR District Judges have been frequently encouraged by the Court Service to utilise mediation and also persuaded to set up their own pilot court-based mediation schemes. District Judge Wainwright at Exeter County Court was keen to develop such a scheme in the small claims court in order to reduce the proportion of disputes which had to be resolved at a trial hearing. Exeter was suffering from a surfeit of small claims trials, which meant a long delay between the date that a defence was issued and the date of hearing. Many of these cases when they did go before a judge suffered from being poorly or inadequately prepared so that the judge had to either adjourn the hearing or guide the parties through the dispute. This was itself considered to be a poor use of judicial time in an already over-stretched court system.

At the same time, the President of Devon and Exeter Law Society (DELS), and a local solicitor, Jeremy Ferguson, was learning more about the requirement in Germany for the parties to mediate before they could attend a small claims hearing. He was also keen to establish a scheme which would help local mediators develop and expand their mediation skills because there were many trained mediator-solicitors who were members of the local law society who did not have many opportunities to develop their skills. The District Judge and the solicitor therefore worked

[23] Period February 2003 – February 2004. Data supplied by Exeter County Court.

together to establish a scheme which could be applied to cases allocated to the small claims track.[24]

The scheme began at Exeter County Court on 16th June 2002, initially as a six month trial. From that date cases which were listed for the small claims track could be referred to a small claims mediation hearing instead. The objective of the scheme was to offer parties a procedure to help them to settle and resolve their small claims disputes without having to go to a trial and without incurring further costs. Even if the cases did not settle it was felt that relevant issues would be highlighted during the mediation which would help the parties prepare themselves more appropriately for the trial. It was hoped that the listings target could be reduced to one month from the date of the defence being filed.

In order to provide comprehensive training for all members on the small claims scheme a one day training course was run by Andrew Fraley, a respected professional mediator, based in the West Country. DELS advertised this training session in their regular Newsletter. DELS principally funded the mediation course, although those who attended contributed a small fee. 17 solicitors and barristers, and 1 observer attended this first training session. The emphasis is the session was on mediation skills and honing those skills to be appropriate for achieving results for a focused time-limited session.[25] This first training session received very favourable feedback from those who attended. 12 of those who attended thought that the content of the session was very good and 13 thought the presentation was very good.[26] 14 of the 18 attendees volunteered to take part in the court-based mediations on a pro-bono basis.

The first small claims mediation session was held on 16th July 2002. Each mediation was to last for 20 minutes and mediations would be scheduled between 10am – 1pm for two sessions each month. The mediators running the mediation sessions were members of the Devon and Exeter

[24] See further J Wainwright, 'Small Claims – ADR at Exeter' Assn of DJ Newsletter, Feb 2003.
[25] Training is discussed in the section on The Small Claims Mediation Process. See below.
[26] Analysis of DELS Seminar Evaluation Form, 20th June 2002.

Law Society, usually solicitors. Several of those who attended the initial training course were already trained mediators through providers such as ADR Group, or CEDR and were thus happy to run the first mediation sessions. Those who had more limited practice of mediation were required to observe 2 – 3 mediations in order to gain more experience before being allowed to conduct their first independent mediation session.

At the same time that the small claims mediation scheme was being established, a Steering Group of mediators and judges was set up to develop the mechanisms for a Mediation Scheme for cases assigned to the fast-track and multi-track. Baroness Scotland launched this scheme on 10th March 2003. Devising and developing the fast-track and multi-track scheme provided additional impetus and support to get the small claims scheme off the ground and getting the small claims scheme established gave support and strength to the launch and development of the fast-track / multi-track scheme. Minutes of the Steering Group show the aims of the small claims scheme were to:

- Save money in terms of court time; and
- Facilitate settlement; or
- Give guidance so that the parties would not be unprepared if they had to go on to a further hearing.[27]

In the first year of the operation of the small claims scheme 624 cases in total were allocated to the small claims track. Of these cases the District Judges referred 35% to mediation.[28] The Judges had taken an early policy decision not to refer road traffic accidents or cases where the parties lived a long way from Exeter. The decision not to refer road traffic accidents is currently under review. It is clear that judges are becoming more confident in referring cases. DJ Wainwright said, talking about the referrals to the scheme, "It started off being quite selective and we were very cautious about the cases that we referred to it.…[More recently] we had got to the stage whereby we were referring absolutely everything

[27] See Minutes of ADR Meeting, 2nd April 2002.
[28] Source: County Court Annual Report 2002 – 2003 (Court Service, 2004)

unless the parties, or one party, was living out of the area… I don't know how many it would have worked out to in actual terms but I think that across the board approach is not right…. We are being, we have started to be, a bit more selective."[29]

Both the Court and the Mediators have adjusted their approach to the Scheme since its inception. DELS have established a Mediation Sub-Committee and both the Court and DELS have monitoring schemes. It is clear that the Scheme itself has evolved significantly since it was launched and this is due to the reflective and adaptable approach of the Court and DELS.

The Evolution of the Small Claims Scheme

The Scheme was running on the goodwill of the mediators who were providing their services for free with the incentive of increasing their mediation skills and experience. Jeremy Ferguson submitted a bid for funding for the mediators to the Devon Community Legal Service Partnership (Devon CLSP) for Partnership funding which is awarded annually. However, the bid was not considered to be appropriate by the panel of the Devon CLSP and so was not put forward as a Devon bid.
Jeremy Ferguson then approached the LCD and was referred to Baroness Scotland who was supportive of the idea of funding the scheme. Heather Bradbury from the LCD (now DCA) visited Exeter and observed a mediation session. It was agreed that funding for the scheme be provided by the LCD. DELS mediators can now claim £75 + VAT per hour of mediation up to a maximum of 4 hours (£300 + VAT) per session. This funding was agreed to run initially from August 2003 until March 2004. It has now been extended from April 2004 until September 2004. It is clear that the funding of the Scheme is seen as vital for its continued existence and this is not only by the mediators themselves but also by the concerns of the District Judges. District Judge Harvey who did not come to Exeter County Court until after the start of the scheme said, "…. [The]

[29] Notes from interview with DJ Wainwright, February 2004.

time might come when, a very good scheme might collapse because you weren't able to find the people…, or not find enough of them."[30] The funding of the scheme is also important because it demonstrates that the scheme is endorsed by the DCA which gives it further legitimacy.

DELS followed their first Andrew Fraley training course with two further one day events for members and associate members of DELS interested in being involved in the scheme. The qualifications for being added to the rota are being a member of DELS or qualification as a barrister or legal executive and having attended one of the Fraley training sessions. Once a potential mediator has attended the training they are then required to observe 3 mediation sessions at either Exeter, Torbay or Barnstable. Once these requirements have been fulfilled the mediator will be added to the DELS rota. There are currently 30 DELS trained mediators and 5 who have attended the training course and are observing mediations.

DELS manages the scheme through a Mediation Sub-Committee of DELS which was set up after the scheme had been running for one year. This Sub-Committee reports to the main DELS Committee. Its membership currently numbers 8 and is made up of solicitor mediators, DJ Wainwright, and the DELS Vice President. The Committee is responsible (from the DELS perspective) for initiating policy, disseminating information on the impact of the Scheme; funding and monitoring the scheme, and organising training sessions. The Mediation Sub-Committee is also responsible for DELS input into the fast-track and multi-track mediation scheme. Minutes of the meetings show that the scheme is still evolving:

Initiating Policy: "[It was agreed to] call an informal meeting of all DELS mediators once every 6 months to exchange experiences, review the situation and practices with a view to producing a do's and don'ts summary."[31]

[30] Notes from Interview with DJ Harvey, February 2004.
[31] See Minutes of DELS Mediation Sub-Committee 14 July 2003, at point 4.

Disseminating Information on the Scheme's Impact: "[The Chairman] has been invited to facilitate a Mediation workshop and talk about DELS initiative in the Small Claims Court at the President and Honorary Secretaries' Conference in London on 24 September".[32]

Funding the Scheme: "Heather Bradbury, Civil Servant at the Department for Constitutional Affairs attended the Small Claims sessions in Exeter on 8 July. She holds her own budget which is not exhausted and has indicated that if DELS Scheme was found to be acceptable from her end, she would be happy to fund it."[33]

Monitoring the Scheme: "The Vice Chair proposed, and it was agree, to expand DELS monitoring form in order to obtain more information when cases don't succeed. In particular it would be useful to know the nature of the case (some are not always suitable for mediation); information about the parties and the amount of money involved".[34]

Training: "The meeting felt that Andrew Fraley's model was right for Exeter and Barnstaple Courts: to achieve success mediators are trained to settle cases".[35]

The meetings for the Small Claims Mediation Sub-Committee take place 3 times a year. The minutes show a clear commitment from DELS towards the Scheme and also towards disseminating as much as possible any points of good practice which come from the process which may help other local Law Societies establish a similar scheme.

One such development introduced by the Sub-Committee is a General Meeting of mediators involved in the Scheme to discuss the issues that have arisen during the mediations and to exchange and discuss good practice and areas of concern between themselves. There has been one of these meetings and it is intended to be an annual event. There is

[32] See Minutes of DELS Mediation Sub-Committee 14 July 2003, at point 3
[33] *Op cit,* at point 3.
[34] See Minutes of DELS Mediation Sub-Committee 28th October 2003, at point 3(e).
[35] See Minutes of DELS Mediation Sub-Committee 14 July 2003, at point 4.

evidence that the Court listen to the concerns of the mediators. In the first six months of operation the mediations were listed for 20 minute hearings. The mediators felt that this was not long enough. In Autumn 2002 the Court agreed to allow 30 minutes per mediation which also meant that it was easier for the Judge to allocate other work into the time between mediations (see Appendix C for an example of the structure of the breakdown of judicial time).

Chapter 3: The Small Claims Mediation Process

a) Allocation to ADR

When a defence has been filed the case filed is passed to a District Judge. The District Judge will allocate the case to a track. If the case is allocated to the small claims track the Judge will consider whether the case is appropriate for mediation. The policy is that if one of the parties is not within a reasonable reach of Exeter, normally about half an hour's travelling distance, the case will not be referred to mediation. This is because parties may not want to travel a long distance to attend court for a half hour appointment which may not settle so that they then have to return at a later date for a final hearing.

The DJ will consider whether the case is suitable for mediation, whether or not the parties have requested a stay for mediation on their Allocation Questionnaire. The criteria for the decision are intuitive rather than clearly stated and a question for the future is whether this selection should be criterion-led. The Judge will ask him or herself the question 'Would the parties like to settle the case without going to trial?' and try to consider the answer by looking through the file. The question is whether the parties could sit down together with an independent third party and resolve the issues.[36]

If the judge does consider that the case is suitable for mediation he or she will complete a form which confirms the small claims track (SCT) directions on allocation (See Appendix A). This will state that the judge thinks that the case is suitable for entering in the SCT mediation list. It also states the initial time estimate that the Judge gives to the case should it have been listed for a hearing.

Upon receipt of this direction the court office issues an order pursuant to CPR r23.9, ordering that the case be allocated to the small claims track and has been identified as one which may benefit from mediation (See Appendix A). The court can make this order, after the proceedings have

[36] Notes from interview with DJ Harvey 24th February 2004.

commenced, where doing so best furthers the overriding objective. The aim is that the appointment for the mediation hearing is made within 28 days of being allocated to the SCT. The reality is that this may be 4 – 6 weeks depending upon the dates the mediation hearings are scheduled. The parties are sent the Order and a Note giving a small amount of information about the Mediation Schemes operating out of Exeter County Court (see Appendix A).

b) The Mediation Process

The mediations are listed in blocks of six. Six mediations take place in each session. Sessions are scheduled to take place between 10am and 1pm and there are 2 mediation sessions per month. The Court notifies the DELS Administrator of the dates of the mediations about three months in advance. The Administrator then requests availability from the mediators on the list. Mediators are required to have attended the training session and observed three mediation sessions before being allowed to conduct mediations independently. The Administrator will allocate a mediator and an observer to each mediation session.

On the day of the hearing the Judge will receive the files and give them to the Mediator who has about an hour to familiarise themselves with the issues arising before the morning list begins. The mediations take place in a room either next to or near to the Judges Chambers. If a Judge happens to be absent the mediations may take place in the Chambers itself.

Prior to the mediation itself the file is given back to the Judge. Upon arrival at the court the parties should be asked to complete an Agreement to Mediate form (see Appendix A). Both parties and the mediator sign this form. The mediator may choose to ask the parties to sign this form at the beginning of the mediation and use it as a platform to explain the nature of the mediation process. At this point the parties will be given ‘Guidelines for Mediation’ (see Appendix A).

At the specified time for the mediation hearing the Judge will call the case into Chambers and the mediator will also attend. The Judge is responsible for explaining to the parties something about why the case has been allocated to mediation. The Judge will say something similar to the following: "Your case has been identified as one which will benefit from mediation. The success rate for mediations is high. The benefit of mediation is that both parties go away with something they are content with. If it doesn't work then you will come back and see me and directions will be given for a full hearing."[37]

The Judge will then ask the parties if they are agreeable to the mediation and if so they will be asked to go with the mediator to the room allocated for the mediation sessions and the mediation will begin.

Each mediator has a different style and approach to the mediation. The following structure generally applies to each mediation:

- *Introduction:* The mediator will explain something about the nature of mediation. For example, that the point of the mediation is not to decide the case but to see if there is room for a settlement. They will explain that the mediator is objective and that their role is not to impose a decision as a judge would do but to help the parties to find a solution which everyone will be happy with. The mediator will explain that the mediation session is confidential and that whatever is discussed is not to be used in any future action if the mediation does not settle. The mediator will make it clear that the session is time-limited and that the parties only have 30 minutes before they have to go back before the judge This introduction usually lasts a couple of minutes.

- *Opening Statements:* The mediator will usually ask the parties to sum up in a couple of minutes the main issues in dispute. In some cases

[37] Instruction given by DJ Harvey 7/01/03.

the mediator will sum up themselves based on the knowledge of the case they have gleaned from the files.

- *Mediation:* The body of the mediation involves the mediator looking for common ground between the parties and trying to narrow the breadth of the dispute. Some mediators will allow the parties to engage in discussion together and some will keep them apart but this part of the mediation is usually pure negotiation on trying to reduce the amount of the claim. This period is necessarily short because there is likely to be 15-20 minutes from the start of this section of the mediation before the next mediation is due to begin.

- *Closure:* There is a Mediation Report to be completed at the end of the mediation (See Appendix A). The mediator will conclude one of the following:
    - The parties reached agreement and request by consent the claim/ counterclaim is withdrawn.
    - The parties have reached agreement and request by consent that there be judgement for the Claimant/Defendant for the sum of £_ with no order as to costs/ costs agreed at £_.
    - The parties have reached agreement and request that by consent all proceedings be stayed on the terms set out in the schedule overleaf (it is for the mediator to write the schedule).
    - The parties have not reached agreement and request a final hearing and directions.

  The mediator and the parties to the mediation will sign the Mediation Report and will then go back to see the Judge.

- *Resolution*: At the end of the session the mediator will take the parties back before the Judge. If the case has been settled at mediation the judge will make an order based on the Mediation Report. If the case has not been settled the Judge will make directions

for the trial hearing and will take advice from the mediator and the parties to determine the time estimate for the hearing. The Judge will also give the parties a trial window and ask them to notify the court if the dates are not acceptable.

The Mediators

At present there are 30 DELS trained mediators. There are also an additional 5 who have attended the training course and are observing mediations. All of the DELS mediators are legally qualified Of the 30 mediators, 15 have received training from an accredited ADR Provider such as CEDR, ADR Group, or ADR Chambers. Mediators are not selected for the scheme but there are criteria which they must fulfil before being allowed to conduct a small claims mediation. The criteria are:

1. Legal qualification as a solicitor, barrister or senior legal executive;
2. Attendance on the Fraley mediation course; [38]
3. Observation of 3 small claims mediation sessions (training by an accredited mediation provider may reduce the number of observations required by individual mediators).

Having attended the training course all participants are invited to confirm their willingness to be placed on the rota of mediators. The observations can be described as a form of pupillage. Observers sit with mediators during their preparation for the mediation and the mediation sessions themselves. As they are required to observe 3 sessions they are able to see different mediation styles; different types of cases and different parties' approach to the process. One solicitor who has just completed three observations stated:

> "I was able to observe three different mediations, and took things from all three that I put in to practice when conducting my own mediations. These were things like how to introduce the sessions, whether to have all parties in the same room etc. It was also useful to see what the mediators thought of the cases when reading the files beforehand."[39]

[38] See below for more information on DELS Mediation Training.
[39] Interview with Mediators March 2004.

Due to the number of mediators currently being trained most mediation sessions involve one mediator and one observer. One incentive for mediators is that once they have led three mediation sessions independently they are then qualified for the fast-track / multi-track mediation scheme.

Training

The training provided by Andrew Fraley for DELS is very practical with the emphasis being on negotiation skills rather than the procedure or organisation of the scheme. The emphasis on the time-limited nature of the mediation. Andrew Fraley is a highly qualified mediator. He trained with CEDR and was Technical and Training Director of ADR Group for 9 years. He now runs his own mediation company, ADR Technical and Training Services, which is based in North Somerset.

Style and Nature of Training

The training sessions are focused on developing a settlement strategy for each mediation wit h the emphasis on time-limited mediation. The structure of the training session is on negotiation skills, mediation theory and anecdotal accounts of mediations. The weight is therefore on strong practical advice for those about to undertake mediations. Although called time-limited the emphasis is upon mediations which last longer than half an hour, involving large and complex financial sums where the parties are usually represented.

There is no role play or any opportunity for those attending to test out the skills and processes discussed. There is plenty of opportunity for input by those attending and the sessions are run more as a lecture with questions rather than as a workshop. The feedback from those attending the training sessions is overwhelmingly positive. Indeed, in discussions with mediators on the small claims scheme there was a unanimous view that the training had been excellent and was very helpful.

Yet this training does not purport to be directed specifically towards mediating on the small claims scheme and there is an emphasis upon negotiation with legal representatives which would rarely apply to the small claims procedure. The training therefore requires would-be mediators to be selective over how they utilise the advice given. It would seem appropriate that the training should be directed more specifically to the small claims mediation in the first instance so that those attending the session will have a true flavour of the nature of the proceedings they will encounter when they first attend court. The recommendation is that the training should include some form of role play and a specific discussion of the structure and form of the small claims mediation sessions.

Comparison between small claims mediation and Main mediation scheme

The small claims mediation scheme has an identity of its own. It is different to commercial mediation processes and also to other court-based schemes, such as the fast-track / multi-track (main scheme) which also takes place at Exeter County Court. Some of the most important differences are listed in the chart below:

Characteristic	Small Claims Scheme	Main Scheme (Fast-track/ multi-track)
Time Limit	Each small claims mediation is listed for 30 minutes. Although some mediators may make use of a little more time if they think this will induce a settlement most of the mediations observed were approximately this length. This short imposed time limit focuses the mediator and the parties on the process and the need to achieve a result. There is little time therefore to discuss complex issues. Most mediators will allow each side about 2 minutes to state their case. Some mediators did not want to consider the issues stated in the files at all. It is very clear that the aim of the mediation session is to try and achieve a settlement.	The main scheme mediations are scheduled for 3 hours. They are still time-limited and the time plays an important management role in the process. Yet in comparison to the small claims mediations there is more time to consider the issues and for the parties to put forward their case. There is also more time for the mediator to explain the process and the structure of the mediation session. Yet there have been examples in both the main scheme and the small claims scheme were the mediator does not appear to be achieving a result and the parties suddenly settle in the last couple of minutes. This demonstrates that for some parties it is the pressure of the deadline which forces them to accept a settlement or a compromise position.

Voluntary Nature	An order is sent to both defendants and claimants asking them to attend a mediation hearing. It is possible for the parties to write to the court and explain why the process is not appropriate for their case. There is little evidence that the parties resist the idea of mediation once they have a date for a hearing. A few examples can be cited from the files: One case file contains a letter from a claimant stating that, 'I think in this case attempt to mediation (sic) would be a waste of time'. The Court replied to the claimant stating that the District Judge had considered the request to remove from the ADR list but thinks that the appointment will be of benefit to the parties and the court in isolating issues in dispute if final settlement cannot be achieved. This case did not go forward to mediation as neither party attended and so it was struck out. In a further case the claimant argued that the case was 'too technically legal for a mediator'. The District Judge ordered that the case should proceed to mediation. At the hearing the case did not settle but there is evidence in the case file that the parties were trying to negotiate a settlement away from the court. The claimant wrote to the court to say that mediation was not appropriate as he was not prepared to accept anything other than full payment of his outstanding fees. In this case the District Judge revoked the allocation to mediation and listed the case for a hearing. Once the parties attend court there is no compulsion to mediate if they refuse to do so but they will have to listen to the District Judge's reasoning for the allocation to mediation. The parties are not forced into mediation but they are persuaded that this is what the court wants them to do. Yet many of those arriving for mediations at Exeter Court were not sure what a mediation was or the role of the mediator.[40]	There is a stronger compulsion to mediate in the small claims scheme than in the main scheme. In the main scheme the judge will determine whether the case is suitable for mediation – whether or not the parties have requested it. The parties receive an invitation to mediate form. If they do not choose to mediate the onus is on the parties to supply the court with a reason why it is not appropriate in their case. If the judge still believes that mediation is appropriate he or she will order an allocation hearing.

Cost / Funding	There is no fee to the parties for the small claims mediation. Funding for the mediators is provided by the DCA.	There are set fees in place for the mediation which are to be split between the parties equally. The costs are £450 for fast track claims and £650 for multi-track. The rationale for the level of fees is that it is set at a high enough level for the parties to take the mediation session seriously.
Case Files / Complexity of the Case	When a mediator arrives at the court in advance of a mediation session they normally have to wait a little while for the files to arrive from the court office. This means that they may only have 40 minutes to read the 6 files for the cases in the small claims session. Many of the cases are not complex because they are small claims but because they are small claims does not mean that they are not complex. The result is that the mediator may only have a loose understanding of the issues in the case. There are limited possibilities for the mediator to explain their role in advance at the small claims sessions.	Mediators on the main scheme have a couple of hours to read the files and consider the complexities of the issues which will arise. Sometimes they are able to read the file a couple of days in advance of the mediation. In some cases it is possible for the mediator to be able to contact the parties in advance of the mediation and introduce themselves and explain their role.
Style of Mediators	The mediators are provided through the Devon and Exeter Law Society. They are all legally qualified as solicitors or barristers. Each mediator has a different style and method of approaching the mediation. The length of the small claims mediations gives little leeway to the mediators but some mediators choose to separate the parties to speak to them individually. The small claims mediations require the mediator to be more directive than in other mediation hearings. This is evidenced, for example, by mediators suggesting to the parties what the procedure may be should the case go to a full hearing, or giving a party reasons why it may be sensible for them to settle because of the inherent faults in their case.	The approach of the mediator is not as obvious in other forms of mediation including the main scheme. There is a tension between different mediator styles and it is clear by observing the process that some mediators tend towards a more evaluative style and some are more facilitative.[41] There are 7 approved mediation providers who operate on a rota. These providers range from those who are most used to mediating large legal and business disputes to Mediation UK who are all volunteers and specialise in neighbour and community disputes. They do not have legal specialisation.

[40] See the discussion on the nature of the mediation in Part 5.
[41] See discussion on this point in Chapter 1.

Litigants-in-person	There are more litigants-in-person on the small claims track than on the fast-track / multi-track because of the limitation on costs. There is more likelihood that the parties will need to be guided through the legal process because their focus may be on anything but the legal issues of the case. It is also likely that they will not have been able to obtain the necessary evidence to support the case they are making. The advantage of the small claims mediation in these cases is that even if the parties are unable to reach an agreement the District Judge and the parties will have a better idea of the issues in the case. The Judge is able to give more appropriate directions and to assess a more realistic time for the length of the trial. The parties may have a better understanding of the evidence they need to provide at trial and the main points at issue.	It is more likely that parties will be represented on the main scheme although many of the parties do not rely on their representatives for the mediation session. There may be an issue about power imbalance if one side is represented and the other side is not. This may be especially important if the mediator has no legal knowledge.

Settlements	Litigants-in-person using the small claims track may be looking for a resolution in the form of a 'day in court'. This may be personified in a number of ways and not necessarily by a judicial determination of a legal or financial nature. The small claims mediation allows for greater creativity of settlement than a court hearing. It probably also allows for greater creativity than fast-track/ multi-track mediations because the emphasis may be on a small financial sum and great emotional investment. If the mediation happens early enough in the process it may be possible for the parties to resolve their issues and repair their relationships. Although many mediations observed involved a huge levels of emotion and often irreparable relationships there were examples where the parties agreed to a settlement which meant they were able to continue dealings with each other. Two businessmen who had maintained a business relationship over a number of years were able to reach an agreement which both could bear and also agree that they could continue to do business with each other. The settlement involved a part payment and a substantial discount off a new car. The defendant hoped that by offering the discount and showing that the action which led to the claim had been a mistake they would be able to rebuild their trading relationship. Other creative settlements could be offered when the parties felt that the financial settlement was not appropriate eg donations to charity, repair of a window, part-payment and a case of wine, etc.	Observations of the main scheme have shown that there is less flexibility for creative solutions than there is the small claims scheme. Most mediations focus on the negotiation of acceptable settlements for both parties.

Judicial Input	The judge 'tops and tails' the mediation hearing which gives the mediator some authority and also allows the parties to consolidate a settlement with an court order. The judge is usually working in the room next door or nearby to the mediation room so the parties are aware of their presence. The judge states at the beginning of the session that the court has selected their case as being appropriate for mediation so the parties are aware that there is a justifiable reason for the mediation.	The judge does not 'top and tail' the main scheme mediations. The fast-track / multi-track mediations take place at the end of court business or in a separate building which gives the mediator more overall control but does not allows for the same transfer of authority. If the mediation results in settlement the judge will issue an Order confirming the agreement.

Chapter 4: The Functioning of the Scheme

The purpose of this section of the report is to present the available statistical information about the numbers of cases which have mediated and the outcomes of those mediations. This data provides an account of the use of the scheme since its inception. It gives some guidance on the types of cases which have been successful or unsuccessful on the small claims mediation scheme. It also provides some other statistical information such as the length of time from defence being filed to mediation hearing and the result of cases which do not settle at mediation. It also gives some data from the parties about their views of the mediation process.

a) Court-based Research

This data presents information about the number of cases that have mediated since the small claims mediation scheme began and the types of cases which have been successful or unsuccessful since the scheme began. It can be analysed to generate information about the quality of the scheme. There are 3 data sources for the court-based research.

1. **Main Database:** All cases referred to mediation.
2. **Mediated Cases:** All cases where the parties attended a mediation hearing.
3. **Sample of Cases:** Cases where the files have been examined in detail to track the proceedings from filing of defence to conclusion.

i) Total Number of Settlements

This chart (Fig 1) shows the number of settlements of *all cases that were assigned to the small claims track and then referred to mediation*. A number of these cases did not go through the mediation process because they settled prior to the mediation or one of the parties failed to turn up

so the judge made an order or struck out the case. Some of these cases settled after the mediation yet before the trial. The total number of cases referred to mediation in the period July 2002 – February 2004 is 340 cases. This is the sum of cases which have been referred to mediation since the scheme was launched in July 2002.

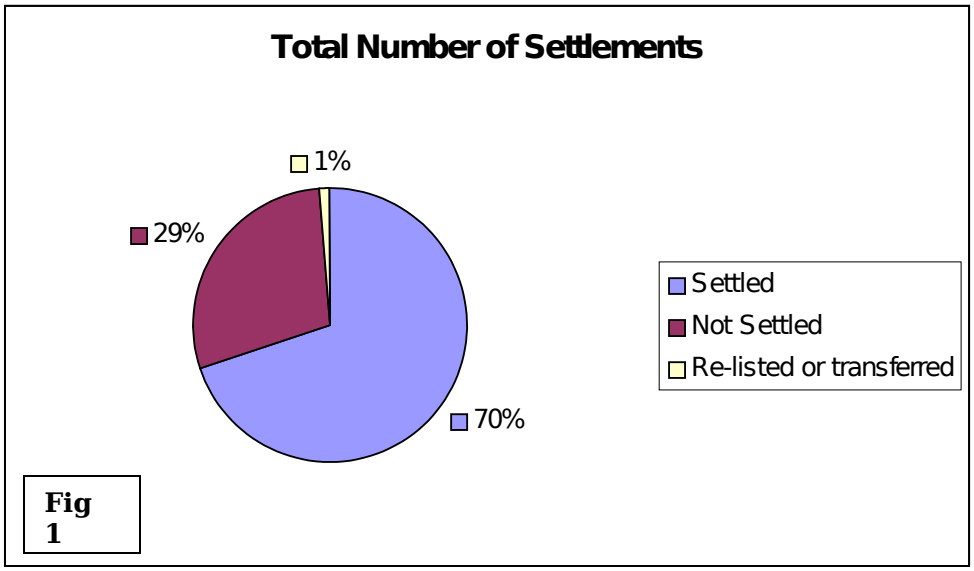
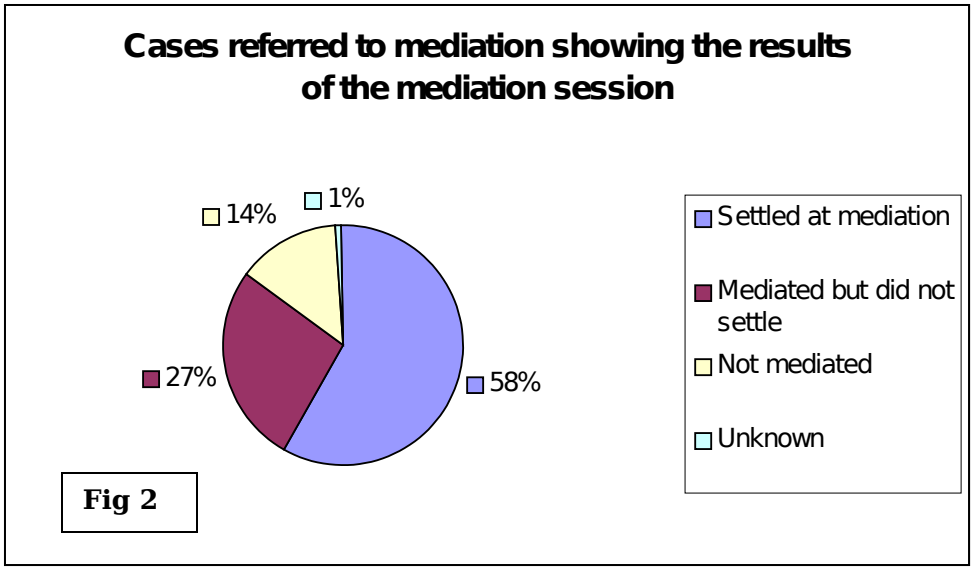


Fig 1

The chart below (Fig 2) shows the numbers of cases that settle as a result of a mediation hearing, ie that do not settle in advance or are struck out prior to hearing, etc.



ii) Type of Case

The issues that arise in disputes on the small claims track have been categorised according to groupings suggested by DELS.[42] From our limited analysis of 77 cases it is hard to discern a particular pattern in relation to the type of case most likely to settle at mediation as there are very few cases in each category. The picture may become clearer if a more detailed analysis was conducted on all case files or a larger sample. However research from the US supports the view that it is difficult to clarify which cases are best suited to mediation by looking at the nature of the case.[43]

Looking at the main database of all cases that have been referred to mediation it is possible to get a clearer picture (Fig 3). Figure 3 shows that most categories of cases which are referred to the SCT at Exeter are amenable to mediation:

Type of case	Mediated and Settled	Total	% Settled
Landlord Tenant Dispute	8	11	72.73
Building Dispute	10	17	58.82

[42] These groupings are broad and necessarily vague so a judgement must be made where a case could fall into more than one category.
[43] Clarke, Stevens; Keilitz, Susan L. National Symposium on court-connected dispute resolution research : a report on current research findings--implications for courts and research needs [Williamsburg, Va.] : National Center for State Courts, 1994

Dishonoured Cheque	0	1	0.00
Supply of Services	9	18	50.00
Failure to Repair	1	4	25.00
Sale of Goods	6	12	50.00
Advertising Dispute	0	3	0.00
Contract Dispute	9	22	40.91
Professional Fees	8	15	53.33
Holiday Claim	2	2	100.00
Repayment of Loan	3	7	42.86
Disputed Ownership	2	4	50.00
Commission Fees	3	3	100.00
Negligence	5	5	100.00
Unknown	124	211	58.77
Employment	0	1	0.00
School Fees	1	1	100.00
Towing Away Charges	0	1	0.00
Company Penalty	0	1	0.00
Neighbour Dispute	1	1	100.00
Total	192	340	56.47

N.B. There are a large number of cases included in the 'Unknown' category because a true classification of type of dispute involves analysis of every case file which has not

Fig 3

Somewhat more decisive data has been generated through observing mediation sessions where it is possible to see the many different elements in operation which contribute to a successful mediation. By observing the mediations it was possible to see that those which involved a heavy emotional, or complex personal, or family relationship were often more difficult to resolve than those where the parties had a strong financial interest in resolving the relationship eg business dealings. In cases where complex relationship issues emerged there was not enough time in a short 30 minute mediation for the parties or the mediator to start to deal with the actual dispute because of the baggage which was brought into the mediation.[44]

[44] This is reflected in the intransigent stance reported in some of the case studies in Part 4.

iii) Amount in Dispute

The charts below demonstrate the correlation between the amount in dispute and whether the case resulted in settlement. Figure 4 shows the high number of settlements achieved (63%) where the amount in dispute is below £500.

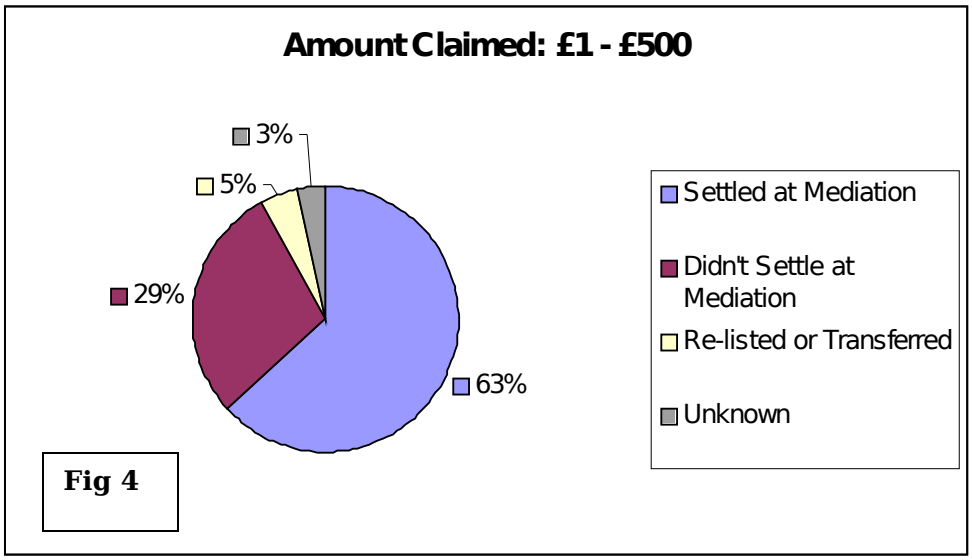


Figure 5 (below) shows the number of cases that settled where the amount of the claim was between £501 - £1500.

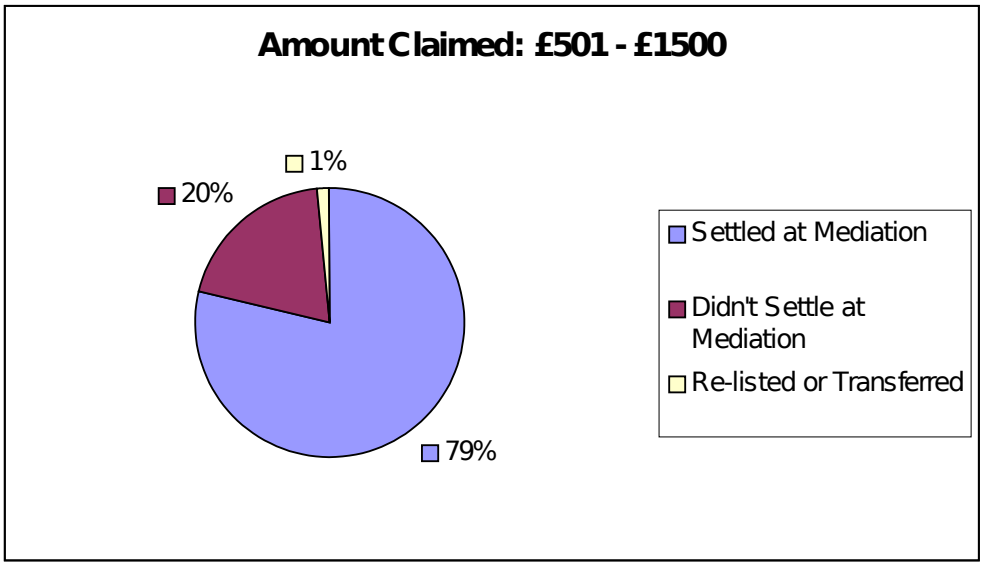


Fig 5

Figure 6 (below) shows the number of cases that settled where the amount of the claim was between £1500 - £3000. This chart and the ones which follow in this section show a decreasing number of settlements as the amount of the claim increases.

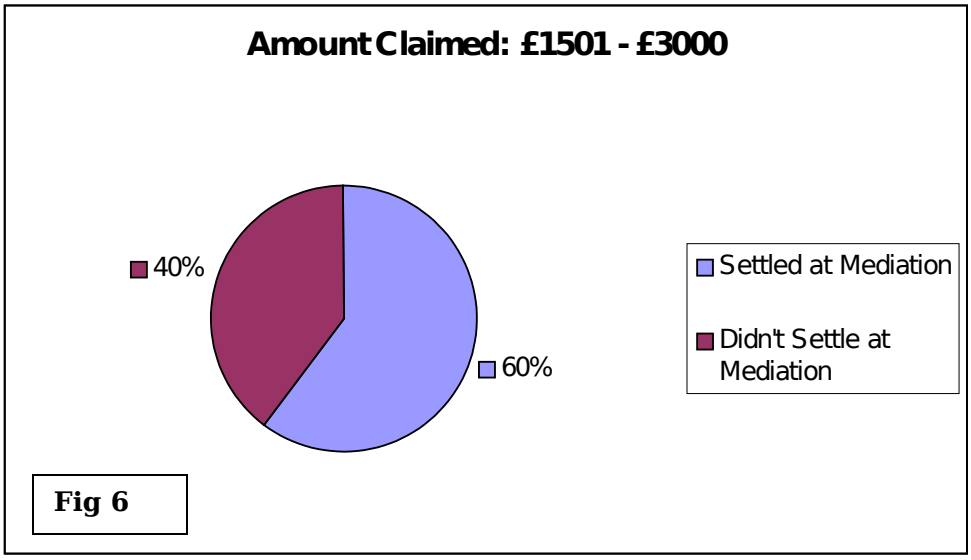
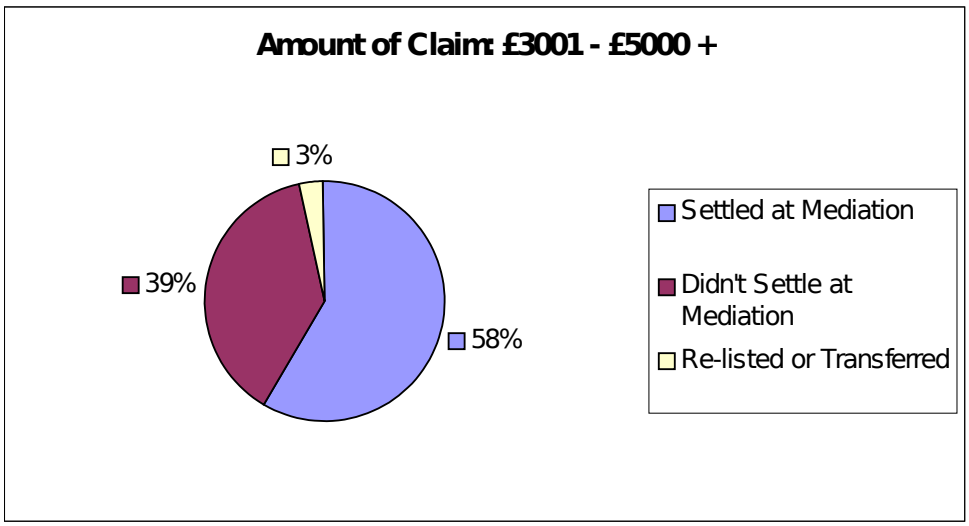


Fig 6

Figure 7 (below) demonstrates that the percentage of settlements decreases as the amount claimed reaches or exceeds the limit of claims for the small claims track.



Although there is a greater number claims at the lower rather than the higher limit of the small claims track it appears that there is an apparent correlation between the amount claimed and the likelihood of the case settling at mediation. Cases with a claim of less than £1500 are more likely to settle at mediation. This is more clearly demonstrated in the table (Fig 8) below:

Fig 7

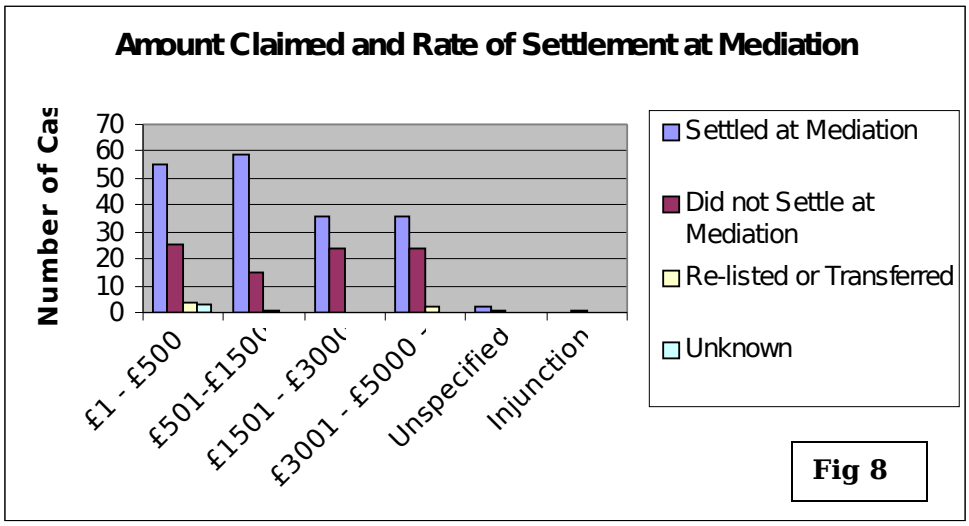


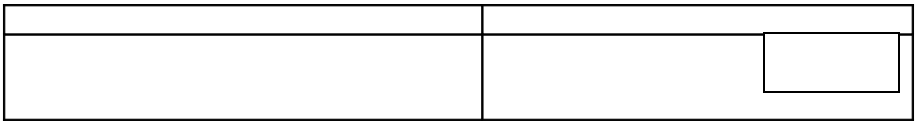
Fig 8

In percentage terms the graph looks like this (Fig 9) –

This analysis suggests that the amount of the claims may be a more accurate predictor of the potential success of a mediation than its classification. It is recommended that further research be conducted on a gr mber of small claims cases to clarify this point.

Fig 7

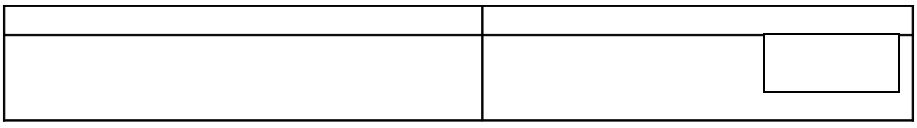
One of the primary aims of establishing of the small claims mediation scheme was to reduce the time between the filing of defence and potential settlement of the action. This chart (Fig 10) shows the average time between defence filing and the date of the mediation hearing.



The data in the sample above was taken from the sample of 77 files. It shows an average length of time between defence being filed and the mediation hearing of almost 90 days.

The procedure is that once the defence is filed the defendants are asked to complete an Allocation Questionnaire. They are given two weeks to do this although in reality they may take longer to send the form back to the Court.

A more accurate picture is therefore provided by analysing the length of time between the cases being referred to ADR and the date of the hearing. This information has been taken by looking at all the cases referred to mediation (Fig 11)



The average length of time from the issuing of the order and the date of the ADR is almost 48 days. From the total of 338 cases 112 were 28 days or under. This represents 34% of cases. Over 50% were under 35 days.

This statistic is affected by the scheduled date of the ADR sessions as there are 2 ADR sessions per month and so the date from the issue of the

Order to the date that the mediation takes place may be affected by the timetable of hearings. It is therefore more realistic to set a more flexible target of 4 – 6 weeks between the date when the ADR order is issued and the date of the ADR hearing rather than specifying 28 days.[45] Another crucial factor which affects this statistic is that since funding for the mediation sessions has been provided by the DCA sessions have become more frequent and so since October 2003 there has been a reduced time between Order and mediation.

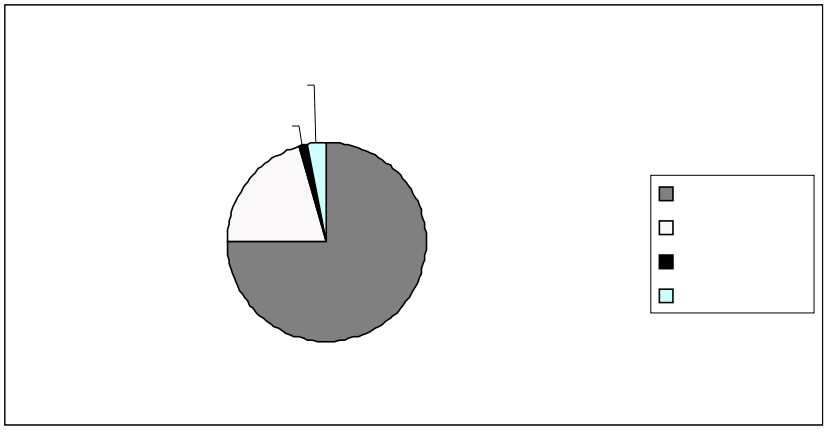
The amount of judicial time saved over the period since the scheme began is 318 total hours. This figure is calculated by totalling the time estimates for all cases which have been referred to mediation. 10 minutes have been deducted from the time estimates as this is the amount of time devoted to the mediation by the judge when they 'top and tail' the mediation hearing. Those cases which did not settle at mediation and were allocated to the small claims track have been excluded from the calculation.

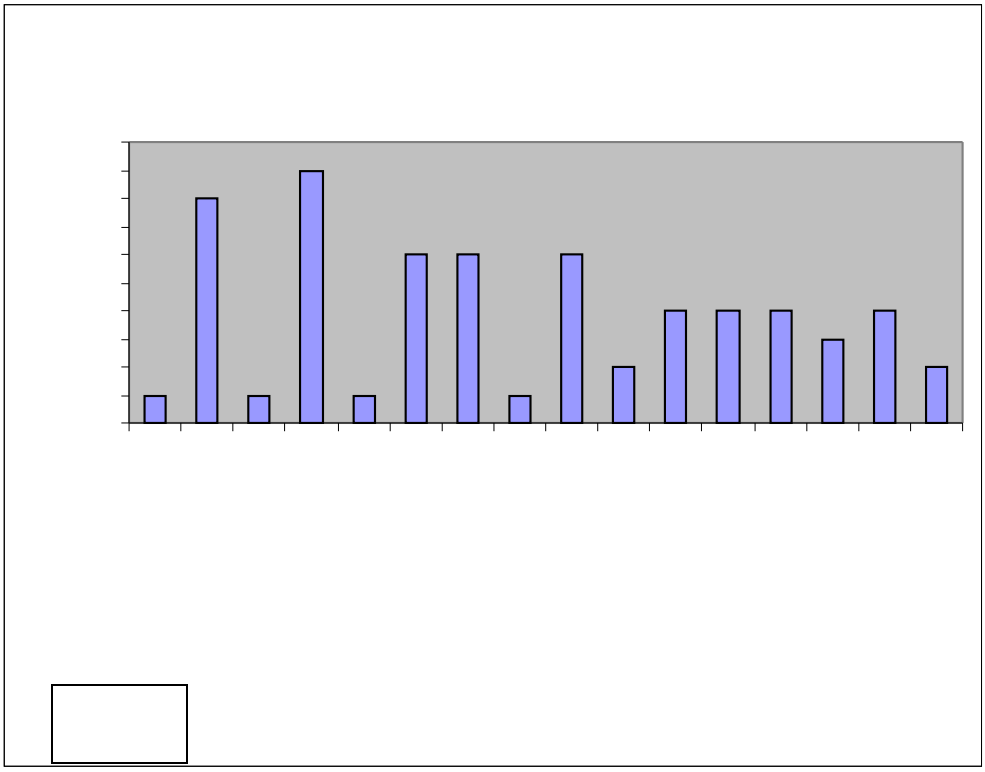
[45] Please note that these figures do not represent a typical time period at Exeter County Court due to long-term absence of DJ's during summer 2003. At one point all the DJ's were absent on sick leave. It would be more accurate to take a three month period from January 2004 and analyse those figures.

Two sets of interviews were conducted with parties taking part in the mediation process. The first were with parties at the end of individual mediation hearings. Follow-up telephone interviews were conducted with parties a couple of weeks after the mediations. 75 interviews were conducted immediately after the mediations and 39 follow-up interviews.

We conducted interviews with parties who had taken part in mediation hearings immediately after the mediation had finished. These were short interviews, based upon a questionnaire, designed to gauge individual's feelings and their first impressions of the mediation process.

Those who had taken part in the mediation were asked whether they thought they had experienced a useful process. 75% thought it had been useful. The other 25% thought it either had not been useful; that it hadn't helped or they were uncertain as to whether or not it had been useful. The breakdown is given in the chart below (Fig 12).

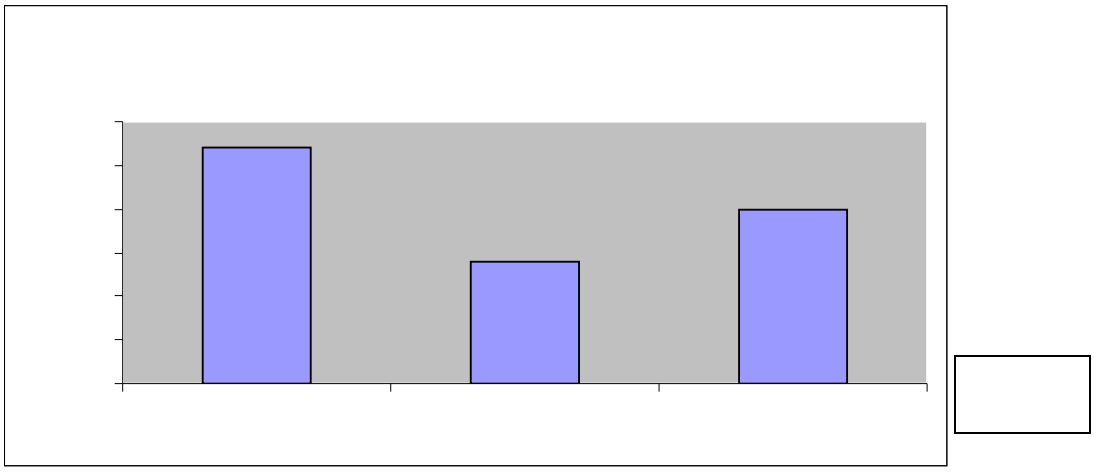




The parties were asked what they most liked about the mediation they had just taken part in. There were a variety of answers given which are recorded on the chart below (Fig 13). The most common replies we received were that that process saved time (14%) and was informal (13%). The parties also liked the fact that the mediation sorted out the problem (10%) and that it offered a face-to-face approach (10%) and both sides could put their point across (10%).

Feelings were running high after individuals had taken part in mediations. Most of those we observed who attended the court for these hearings were very nervous whilst they waited for their cases to be

called. We tried to capture some of the feelings of participants after the mediation. It can be seen from the chart below that feelings ran from positive to negative taking in the extremes of happiness to anger and disappointment. 45% of respondents felt relieved or glad that the hearing was over.



Parties were asked how they would change the mediation to make it more useful. There was a broad range of replies as shown in Fig 15.

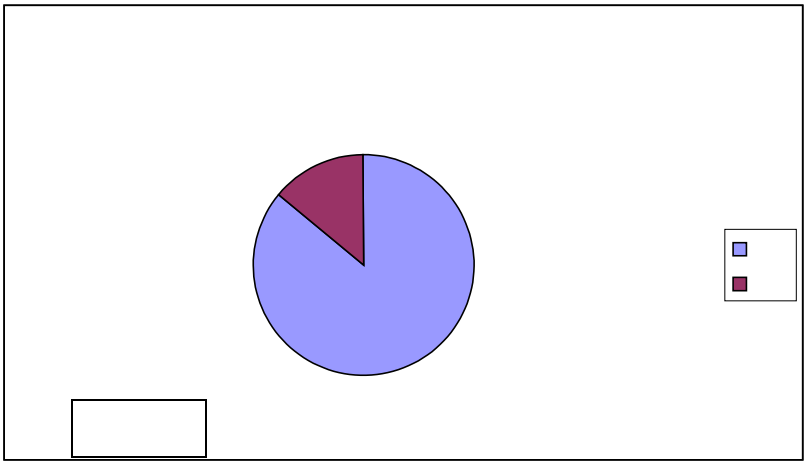
22% thought that they should have been able to have been placed in separate rooms during the mediation rather than having to be face-to-face with the other party. Some of the mediators on the DELS scheme do separate the parties but the facilities and the time are limited so this is not always practical. 16% thought that the mediator should be more prepared to give legal advice. This demonstrates not only that the parties sometimes feel confused in a legal environment such as a court but also that they have limited knowledge of mediation and the process involved. 11% wanted more information to be provided about the mediation and what it involved.

- Parties found that mediation was a useful process.
- They liked the fact that it was informal, saved time and achieved a result.
- Parties generally had strong feelings immediately after the mediation. Most were relieved it was over.
- Most who suggested improvements wanted to be in separate rooms from the other party. Others wanted more input from the mediator

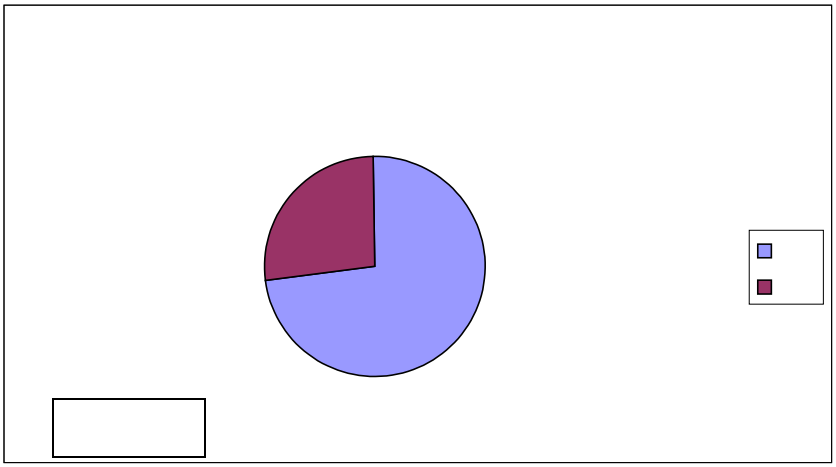
Interviews were conducted with the same parties several weeks after the mediation to gauge their opinions of the mediation process after they have had a period to reflect on the process.

This data is drawn from telephone interviews conducted with parties some time after they had gone through the experience of mediation. 39 of the initial 77 were contactable by telephone.

Parties were asked whether they thought the mediation they had taken part in had been a positive experience. 86% agreed that it had been positive.

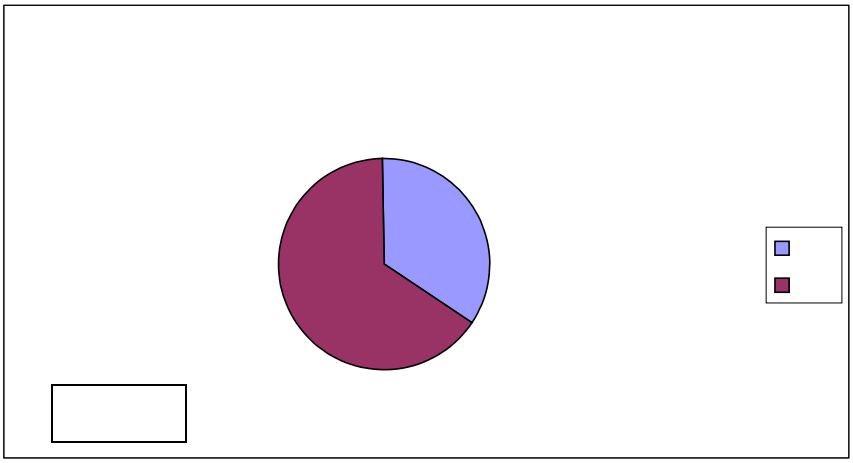


The parties were asked whether they thought that the fact that the mediations took place in the court building helped the mediation process. 73% said they did find this helpful.

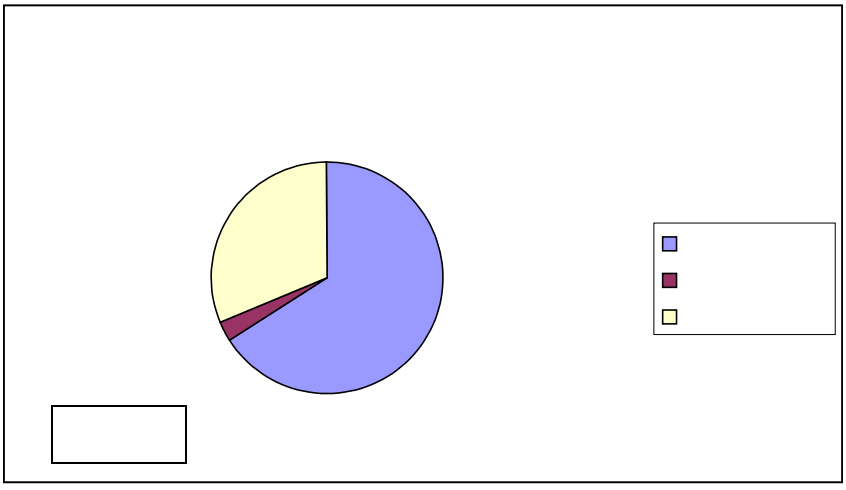


Parties were asked whether they were happy with the information they had received in advance of the mediation. Only 34% said that they had

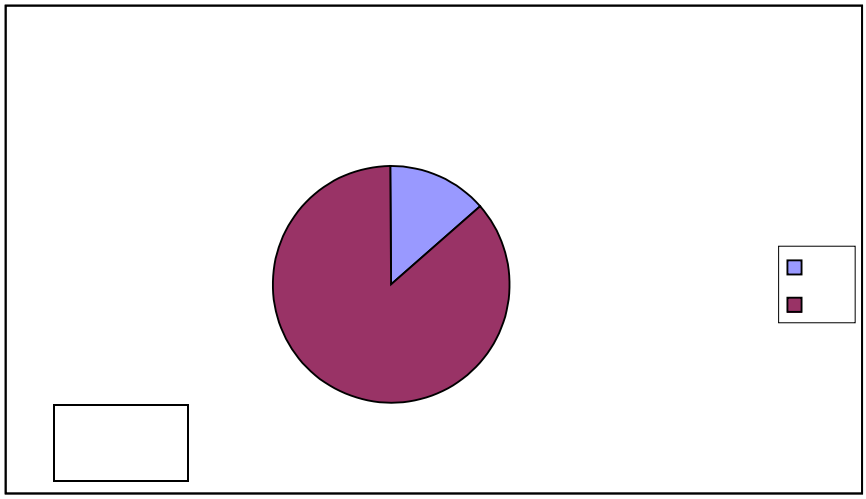
received enough information. Those who thought they had received sufficient information included those who had telephoned the court to ask about the scheme or those who had asked solicitors or bought themselves a book on mediation.



Parties were asked whether they thought the mediation process was easier or more complex than if they had been before a judge in the court. In Fig 19 (below) it can be seen that 66% thought the mediation process was easier than their experience of a trial or their perception of a trial.



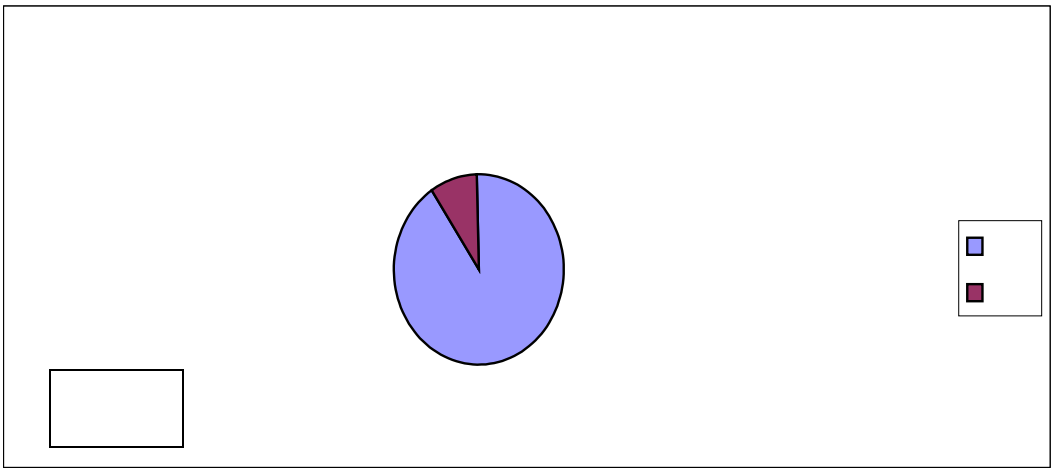
The parties were asked whether there was any pressure put on them to settle the case during the mediation(Fig 20 below). The pressure may have been generated by either the mediator, the other party or both of these. Very few, 14%, felt that they had received any pressure to settle their case. This is despite observations which seems to indicate the contrary. This was surprising given our observations of the process which are described earlier in this report.



Looking to see whether there was any endorsement of the process we asked those who had taken part in mediations whether they would be happy to take part in a mediation again in the future. The overwhelming answer was yes, they would be happy to mediate again. Only 9% said they would not be happy to use mediation in the future.

There were a number of positive reasons given. The majority stated that they were happy with the process because mediation saves both time and money. Others commented that it offers a commonsense approach; and that when the parties are face-to-face it is harder for either of them to lie. One party said that the process was less difficult than a trial:

- *'Because its small claims I feel its more easy to discuss things than in front of a Judge – you get a chance to say what you wanted to.'*



Those who had been through the process seemed to have gathered what mediation involved. When asked what advice they would give to a friend who was about to go through the small claims process many said they would recommend being prepared and finding out more about mediation before the session begins. Other friendly advice included:

- *'Negotiate an agreement'*
- *'Have faith in the system'*
- *'Try to sort out your differences in advance'*
- *'Be prepared to compromise'*
- *'Make sure you have your facts right'*
- *'Next time I would stick up for myself – say it is nothing to worry about... Don't worry, it is well controlled, there is no judge breathing down your neck telling you what to do'*
- *'Go into it willing to be realistic and open to compromise'*
- *'Be aware that if you don't agree you will have to go to trial'*
- *'Come to a reasonable settlement – save time and grief as a trial is a lottery'*

Even where the individual had suffered a bad experience of mediation there was still room to be positive when advising others about mediation:

- *'Each person is an individual so I would still advise them to accept mediation as it may work for someone else'*

It is clear from the responses that the parties felt that the more prepared the more confident they would be in the mediation.

- Responses more positive after a period of reflection than straight after the mediation.
- Most thought it was a positive experience.
- Better that it took place in the court.
- Not enough information provided in advance.
- Easier than a trial.
- No pressure to settle.
- 90% would mediate again.
- Advice for those about to go through mediation: Be prepared.

Part 4: Case Studies

This section comprises 5 case studies which will give a more detailed account of individual mediations. In some of these case studies it has been possible to cross-reference interview data with the case study in order to show the parties reactions to the mediation. Each case study states what it contributes to the overall picture of small claims court-based mediations.

2 HOURS

: Landlord/Tenant

£671 (total value of deposit in question £750)

: She gave a general (brief) introduction in plain language to the parties, telling them what would happen and introducing both the mediators and myself.

: The Mediator's style is very informal and chatty - he jokes with them. He begins by outlining the nature of mediation and that everything that is said is confidential. Following this he outlines the case in brief, telling them of his experience and tries to settle their nerves. He also goes on to make them aware of what could/will happen if they fail to reach settlement today - the procedure and what is involved.

The mediator then gives both parties an opportunity to outline the case as they see it, asking each party not to interrupt the other. Following this the mediator says, that in his opinion, some monies should be returned to the claimants, at the minimum £80 (this equates to the sum between the initial deposit of £750 and the claimed cost of repairs £670). He then goes on to say that, whilst he shouldn't say it, he guesses that the Judge will return half of the deposit if this proceeds to trial. Why not, he says, move on - get on with life and find some middle ground. The Mediator then suggests a figure that he thinks is reasonable for the defendant to pay the claimant, £250. The claimants agree to this but the defendant feels rather aggrieved. Rather than accepting this initial rejection of settlement the Mediator continues, acting as a salesman he attempts to sell the deal to the defendant on the grounds of common sense and nuisance. Further concessions are made but settlement is continually rejected by the defendant. This, however, does not discourage the

Mediator and he continues to pitch the value of settlement to the defendant. The defendant begins to get confused with the sums of money and what he has agreed to concede and not - the Mediator outlines that they sum in question is only very small. Ultimately the defendant agrees that he will pay £175 (this is made up of the £95 he has conceded at the mediation and the outstanding balance between £670 (money actually paid out on repairs) and £750 (the deposit).

Two of the defendants are present, they are both students (one a law student). Both parties appear to be reasonable and the claimants wish to settle the claim today, not wishing to move forward to trial. The Claimants do not dispute that they should not receive the full value of the deposit they paid (£750) to their landlord as they concede repairs were necessary. However, they do dispute the fact their ex-landlord has withheld the entire sum.

As they outline their case both parties make varying concessions to one another about the state of affairs, i.e. agreeing costs for repairs and responsibility for varying breakages /wear and tear. The defendant is concerned that if he accepts settlement he is accepting responsibility for wear and tear and that some legal precedent may be set. The Mediator reassures him that this is not the case.

45 minutes

: Defendant to pay Claimants £175 (total sum) in full and final settlement.

This case demonstrates strong intervention on behalf of the mediator, with a certain amount of pressure applied to reach settlement. Many mediators would argue that this is too interventionist to be a ‘true’ mediation but the settlement was achieved and perhaps the approach was proportionate to the sum in dispute.

: 1 Hour

: £300

: Debt- query over loan/gift

Mrs J arrives with her husband and Mrs C is on her own. It is clear from the their body language as they sit in the waiting room that neither of the parties know what is going on.

The case is called before the judge. The judge says from the file the case seems appropriate for mediation and suggests that the parties might like to go with the mediator to see if they can sort out their differences.

The mediator takes them into the mediation room and sits them down. He explains the nature of mediation and that everything that is said is confidential. He says that he wishes to speak to the parties individually. He asks Mrs C to go into the waiting room whilst he speaks to Mrs J.

Mediator speaks to Mr & Mrs J in mediation room.

The claimant (Mrs J) states that she lent 3 dresses to the defendant (Mrs C) and the dresses were not returned. The dresses are valued at £100 each. She says that she felt sorry for Mrs C because she was having marital problems and as a result was going to visit her sister for a break. Mrs J suggested that Mrs C might like to take some of her dresses with her in case she needed anything smart for a special occasion. She selected some dresses and Mrs C came to the house to collect them from her. Mr & Mrs J drove Mrs C to the airport – they were friends – as her sister lived in South Africa. When Mrs C came back from South Africa a couple of months later Mrs J waited for her dresses to be returned but they were not mentioned. Mrs J was trying to be polite by waiting for

Mrs C to mention the dresses. She left it for several months before she asked for the dresses back. Mrs C said she had left them in South Africa with her sister. When she phoned her sister to ask for them to be sent back they had been given to a charity shop. She wants to recover the value of the dresses – not more than £300.

The mediator goes to talk to the defendant who is sitting in the waiting room.

The defendant (Mrs C) says that she thought the dresses were a gift. She took them on a trip to South Africa where her sister inadvertently gave them away to a charity shop. She says the dresses were only old summer frocks. She says the dresses were old there was nothing in writing and the question of payment was not raised for some time.

Mediator focuses mainly on legal issues. He asks Mrs C if she is adamant that the dresses were a gift. He says that unless Mrs J is prepared to discontinue the claim the case will go to a small claims hearing. If there is no solution reached today the case will go back before a judge who will list it for a hearing. He asks, “Is there no sum which you can offer to help Mrs J dispense with the case?” He says there is a nuisance value in avoiding the hearing that may be worth putting some money in.

Mrs C is outraged. She says she had no doubt at the time that it was anything other than a kind gesture. She says the dresses were only worth £2.50 each. She never wore them – only took them to South Africa to avoid offending Mrs J and there wasn’t room in her case to bring them back again. Left them in South Africa with other things and her sister gave them to the charity shop.

The mediator asks, “Is there a figure of more than £2.50 you would be prepared to go to?”

Mrs C says she feels very strongly about the matter. She has apologised to Mrs J. The mediator says there is no offer therefore that can be made.

The mediator goes back to talk to Mrs J and asks if she is prepared to make an offer. Mrs J says that no one gives away 3 dresses – maybe 1 or 2 but not three. Mrs C did not say anything about the dresses being a gift until she received the paperwork from the court. Mrs J waited to be given back the dresses because it was embarrassing to ask directly for them.

The mediator says he is only looking to try to find some middle ground. He says in court if one says gift and one says loan the burden of proof will be on Mrs J. He says that Mrs J has three options at this stage – withdrawal, settle or go to court. Mrs J asks the mediator for his view. He says that she may win in court which will make her feel good but now you have the chance to withdraw which means you remain in control.

Mrs J says her feelings are upset because there was a number of months when Mrs C's sister was to bring the dresses back from South Africa before she found they had been given to a charity shop.

The mediator says that she is choosing the option of going to court with the risks that entails and the fact that she lives nearby to Mrs C. Her husband says that they want to get on with Mrs C.

The mediator reiterates the difficulties with going on to a full hearing. He says Mrs J may win and may have to deal with the consequences of her victory. Then again she may loose. Mrs J is adamant that she wants to go ahead with the hearing.

The mediator goes back to Mrs C. He says that Mrs J is adamant that the dresses were a loan. She is not prepared to walk away. The quality of the goods meant that she would not have given them away.

The parties and the mediator go back before the judge who says she is sorry that they have not been able to resolve their differences and clarifies that they want to go to a trial. She asks both parties to file statements with the court and with each other.

: No settlement – refer to SCT

: 30 minutes : 1 Hour

The judge told the parties that the small claims hearing was to be an informal but legal procedure. The judge listens to each party in turn. Both appear very nervous and quiet. The finding was of no fault on either side but as this was a legal claim the solution was to be found in the law of conversion. On a balance of probabilities found in favour of the claimant. The value of the claim would be reduced as these were second-hand dresses so order made for £60.00. Costs to be split between the parties.

: This case shows that even where the amount in dispute is relatively small and the claim is straightforward the intractable nature of both of the parties prevented them from finding a way of resolving this dispute in an amicable way. The claimant seemed determined to have her 'day in court' at all costs and the defendant refused to see the dispute as a serious court action. At one point in the trial the parties engaged in a discussion over whether one of the dresses had been pink or not before the judge managed to refocus their attention on the issues.

During the mediation there was no real discussion about how the case will affect their future relations or how they can learn to avoid future disputes. In the trial both sides stated their cases as they had at the mediation. Both parties appeared totally intractable throughout the whole process

: 2 Hours

: commercial dispute. PM supplied a car engine to CM but received no payment. CM counter-claiming for fault to car.

: £2165.96 : £1731.67

The judge speaks to both parties and sends them off with the mediator. The mediator explains that he is a solicitor but he is not here to apply his legal brain but to see whether there is any middle ground. He asks each party to present their case in a few words. He then separates the parties and asks the claimant to wait outside in the corridor.

The mediator concentrates the mediation on whether the parties wish to do business again. He says that reports and witnesses are going to be expensive if the case goes to trial. He emphasises the point that the parties may wish to do business again. The mediator moves between the parties – one in the corridor and one in the mediation room.

It is clear that the parties are not sure of the role of the mediator despite being told by the judge and the mediator himself. At one point during the negotiations the claimant asks the mediator – what would you do? The mediator states that it is not in his remit to say what he would do. The claimant replies – Yes but you are a judge! The mediator replies, No I am not a judge. I am a mediator and should be impartial.

It is noticeable that the on-going business relationship is especially important to the claimant. The parties settle. The nature of the settlement is that the defendant will pay the claimant £2000 and in return the claimant will sell the defendant a new Ford vehicle at cost price. Both parties shake hands.

Both parties were familiar with the legal system as they had been involved in previous disputes. Yet there was clear confusion as to the role of the mediator in the dispute.

The claimant said he knew he was attending a mediation hearing. He thought that the point of mediation was to try to reach an agreement between two people saving time and money. He said he had an idea of what was involved in the process. He thought the mediator was pleasant. He said he thought the depth of inquiry would be greater in front of a judge. After the mediation the claimant said he felt relieved as they had been friends for many years. Now he thinks they can continue to be friends.

The defendant was aware of what mediation was and had taken legal advice about what it entailed prior to coming to court. The first impressions of both the mediation and the mediator were very good. The main differences between the mediation and going before a judge was that the process is more informal and saved costs. The mediation was a useful process, mostly because it reached a conclusion. He felt relieved that the process was over. He said, 'It's a shame that we couldn't have sorted this out sooner as we have known each other and trusted each other for years. By settling this without a full hearing before a judge I think it has helped our relationship.'

: This case study shows how mediation can provide a creative solution and cement a relationship between old friends. It also shows that an incentive for settlement is the repair of a business relationship which is likely to involve fewer emotional issues that a neighbour dispute or marital relationship. This case study also demonstrates that the parties saw the value in the mediation as a process for repairing their relationship as well as for resolving the dispute.

Initial T/E:

£250

Monies owed relating to the purchase of holiday tickets

Not present, interviewing.

In his introduction he reminds the parties of the time pressure (this is reinforced by the presence of his watch on the table in front of them) and asks them to state their positions briefly. He tells them that the purpose of mediation is settlement and to help them avoid trial. He does not discuss objectivity, neutrality or the nature of the mediation with them.

His style is very polite but firm, he pushes the parties to focus only on the relevant factors (as he sees it). He provides a type of settlement that he thinks would be necessary to halt proceedings and is quite directive in his approach. For example, he tells the defendant that she could pay half the initial sum in instalments (the total includes the defendant's boyfriend's share of the debt which the claimant agrees is a separate issue). Both parties seize on this and he writes an agreement.

Whilst he does allow a certain amount of venting he is very keen in his attempts to keep them focussed on the issue of settlement. He does not split the parties up, nor does he suggest it may be a desirable option.

Both were very amenable, polite, friendly and keen to settle. The Claimant was a serial litigant and was well versed in the procedure; the defendant, on the other hand was very young and inexperienced. I was under the impression that the defendant would not have questioned whether she should pay the debt and felt that she was unaware of her rights/position.

20 minutes.

Def pays Clmt £182.00

The claimant had had previous experience of the civil court process. He knew he was attending a mediation hearing because he remembered it from the letter he received. He did not know what mediation meant and thought the case was going before a judge. He did not know what the court-based mediation scheme was and no one had given him any information about it in advance of the session. First impressions of the mediation were that it was a good process – saved time for the judge. Thought it was user-friendly. Happy with the mediators approach and thought mediation was a useful process. Most liked the fact that the mediator was talking to us and was clear. The mediator looked at it properly. He said there should be more of it in other courts so as to be able to spend the judges time on bad cases. Asked how he felt at the end

The defendant had no previous experience of going to court. She knew it was to be a mediation hearing rather than a trial. Asked what she thought mediation was, she said - scary – didn't have a clue. Didn't know what mediation was before she came to court. The first impression of the mediation was – help! But she did feel the process was user-friendly. She thought the difference between the judge and a mediator was the judge was more formal and direct whilst the mediator was friendly, understood the problem and was easier to talk to. The mediation was a useful process because it avoided a trial. Most liked about the mediation was that it resolved the problem. She felt relieved that the mediation was over and she could put the whole thing behind her.

Could not contact claimant

The defendant said she thought the mediation had been a positive experience. Expected the process to be more scary. She liked the fact that the mediation took place in the court building. She would be happy to use mediation in the future although she hoped it would not arise again in the future. Her advice to a friend about to attend a mediation

This case represents swift and amicable settlement between parties. It also demonstrates the role of the mediator as a facilitator as the defendant was clearly overwhelmed and fearful of the process.

AV v SWC ***Initial T/E: 1 Hour 30 minutes***

£1700 + court fee = £1833

Unpaid invoice re: installation of telephone monitoring software.

Outlined that the case had been identified as being suitable for mediation and explains the physical process of mediation.

Initially he outlines the case as he sees it and introduces himself. He points out the uncertainty of trial and gives a very brief definition of his role. He doesn't explicitly raise the issues of objectivity, confidentiality, or the nature of mediation.

Attempts to get parties to construct resolutions, seeking middle ground. Essentially, however, he is engaging in managed negotiation, he suggests modes of resolution and pitches them to both parties; even when the parties are disinclined to talk figures. He does suggest creative settlement, however, he very much focuses on 'bottom lines' and figures. Any talk of creative settlement is a last ditch attempt to snatch settlement.

He did not separate the parties but offered them the opportunity to do so if they felt it would help.

Both were reasonable and conceded that there was some ambiguity about certain areas of the dispute. That said, neither could see any middle ground or room for conciliation. In a sense the fact that they were both representing their companies removed the impetus to negotiate; although they were both rational in their approach and could see the potential merits of settlement. I was under the impression that what they wanted

was a ruling so that they could invoke relevant procedure within their individual firms.

Both parties said they would endeavour to pass the issue on to the supplier to see if the relevant technology could be replaced, this would allow the claimant to then discontinue and the defendant to have the technology that would provide the analysis he needed. However, they requested directions for a hearing.

: 25 minutes

none.

Chapter 6: The Impact of the Scheme on the Work of Exeter County Court

This section provides some preliminary conclusions on key questions such as is 'mediation' appropriate for small claims? How do cases which are mediated compare with other small claims cases which have to go to a hearing before a DJ – i.e. is this mediation route a more efficient route for users than the full post-Woolf small claims procedure? Does it achieve settlement? What is the quality of the outcome? The statistical information presented in Chapter 4 will be analysed for the purposes of some preliminary assessments of the impact of the scheme on the judicial and administrative work of the court.

The main reasons for the existence of the small claims scheme are:

- the saving of court and especially judicial time by encouraging parties to settle their cases before going to trial;
- the generation of greater user-satisfaction in court-related procedures.

This section considers the nature of the scheme itself and how it relates to more traditional definitions of mediation; its impact the work of the judiciary; the nature of settlement and the impact of the scheme on individual court-users through a process of information and education.

This section focuses on the following issues:

- Defining Small Claims Mediation
- Impact on the Judiciary – Saving of Judicial Time
- The Goal of Settlement and Quality of the Mediation
- Information and Education

Resort to law is resort to a formal dispute resolution mechanism which relies on rules to enforce authoritative mechanisms of social control.[46] The small claims mediation scheme is not part of 'formal dispute resolution' but rather an ambiguous form of 'informal justice'. It is funded by the state and free to participants and as such has the appearance of being linked to the court but not a direct component of it.[47] The difference between a judicial trial and a mediation is that the judge uses the law as a framework to determine the legal rights of the parties before him or her. The judge will rely on the adversarial structure of the legal system within with to make a legal determination. Mediation relies on a more communicative and conciliatory ideology to achieve a variety of goals.[48] The introduction of mediation into the legal process challenges the traditional adversarial court structure and conversely, the use of the court and the associated legal procedure challenges the accepted perception of mediation.

This contradictory dilemma is reflected in the process which emerges from the conflict as the 'small claims mediation scheme'. It aims to construct a process which achieves its desires aims by selecting elements of both mediation and law to create a process which will achieve the desired goals. This adaptation of the mediation process to fit into the court process has been described as '*assimilative mediation*'.[49]

Assimilative mediation is characterised by:

- mediation sessions which also have the authority of the courtroom;
- the mapping of legal language onto the mediation; and
- an emphasis on the processing of cases.[50]

[46] 'The object of adjudication is the implementation and application of positive law made by the legislator to promote utility' W Twining 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) 56 *MLR* 380
[47] See ' R L Abel, 'The Contradictions of Informal Justice' in Abel, 'The Politics of Informal Justice' (Academic Press, 1982)
[48] See RA Baruch Bush and J P Folger, 'The Promise of Mediation' (Josey Bass Wiley, San Francisco, 1994) who identify several goals or 'true stories' of the mediation movement. 1)creative problem-solving; 2) maximising bargaining power for the 'have-nots'; and 3) the development of moral growth through empowerment and 4) applying pressure so as to unfairly disadvantage. (at pp 15 - 25). They say, '… there are in fact different approaches to mediation practice, with varied impacts. …. the existence of divergent stories suggest that, while everyone sees the mediation movement as a means for achieving important societal goals, people differ over what goal is most important" (at pp15-16).
[49] D J Della Noce, J P Folger, J R Antes, ''Assimilative, Autonomous or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Comnnection' 3 *Pepp Disp Resol L J* 11 (2002-2003).
[50] *ibid*, at p 21 – 22.

The small claims mediation scheme has all of these characteristics:

1) The mediator sits with the judge as the parties enter the courtroom and then takes them to the mediation room. He or she clearly derives their authority as a mediator from the judge as very often the parties know little more about them than that they are the 'duty mediator'.

2) There is not only an emphasis on legal language and the risks of taking the case to a full court hearing but the parties are made aware that the mediator has read the file on the case and the process results in the completion of a form. If successful this form results in a court order.

3) There is an unambiguous emphasis in the mediation session on the prospect of achieving settlement. The short time given to the mediation imposes the constraint. For the same reason many of the mediators involved in the scheme are not prepared to let the parties discuss the issues but only to discuss how they can resolve the dispute. They tend to take an evaluative, rather than facilitative, approach to the mediation. It is also clear from observing the sessions that the mediators judge their own success or failure on whether or not the mediation resulted in a settlement. For this reason the mediators are described as impartial but not neutral. They are impartial during the process but are not neutral as to the outcome of the mediation.

4) This assimilation does not mean that the mediation process is over-shadowed by the law as the mediators have opportunities to direct the parties towards creative outcomes and also enable them to have greater insight into the process which results in greater user-satisfaction.

Due to its assimilation into the legal system the small claims mediation scheme may not compare substantively to definitions of mediation such as those cited in the introduction to this report. The diagram below contrasts the core features of traditional definitions of mediation with those of litigation and the mediations conducted on the small claims scheme:[51]

Voluntary process	Coercive process	Cases allocated to mediation
Flexible procedure ie can be conducted anywhere	Formal process although less formal than other court proceedings	Relatively rigid process - Conducted on court premises / topped and tailed by judge
May be time constrained but not a core feature	Judge allocated time estimate for trial	Strictly time-limited to 30 minutes
Neutral facilitator	Judge	Impartial rather than neutral facilitator
Evaluative or facilitative mediator	May be inquistorial to an extent but still generally adversarial	Mediators differ in style but tend to be evaluative
Encouragement of co-operative dialogue	Legal due process	Encouragement of settlement rather than discussion of issues
Future focused	Past focused eg evidence and facts	Generally future focused

[51] Based upon a similar diagram contrasting the principles of litigation and mediation in L Boule & M Nesic, *'Mediation: Principles, Process, Practice'* (Butterworths, London, 2001).

Confidential	Public	Cases listed but procedure is confidential
Variable purposes eg dispute resolution, negotiation of contracts, improvement of communication.	Dispute Resolution	Dispute resolution and settlement
Consensual conclusion	Judicially imposed decision	Consensual conclusion
Possibility of creative solutions and reconciliation	Winner and loser	Possibility of creative solutions and reconcilliation
Variable consequences depending upon purpose of mediation	Norm creating and appealable	Settlement or referred to judge usually for directions for trial

The small claims mediation scheme is premised on a pragmatic desire to achieve an outcome which the parties can live with and which discontinues the action. It is measured on the ability to produce a settlement. The Exeter small claims mediation scheme is measured on the number of settlements achieved over the period of the scheme. Yet very few cases brought before the small claims court are dependent upon legal rights or points of law. Usually there is a breakdown of communication. This pragmatic determination of the issues involved can often result in a conclusion which is satisfactory for the parties involved.

It can be generally defined as a *court-based*, *time-limited* scheme whereby *legally qualified* mediators *assist parties* who have instituted formal court proceedings to *reach a settlement* in order to avoid going to trial.

Some formal definition of the term as it applies to court-based mediation is important to this report for two reasons:

1) To provide a benchmark as to whether the court-based small claims scheme which operates at Exeter can be truly defined as 'mediation'

so that others are aware of the specific qualities it contains which make it either successful or unsuccessful; and

2) A definition of mediation that people can understand is important because if they are ordered to attend a 'mediation hearing' they need to have some shared understanding of what they are to engage in so they can have confidence about the process itself.[52]

The time saved by the scheme is stated as 318 hours over the first 20 months of the scheme. This section considers the extent to which judicial time was released for other judicial activity.

The greatest impact that the small claims scheme has on the judiciary at Exeter County Court is the saving of judicial time. The judges are able to allocate the time that they have saved on small claims hearings to other cases as well as paperwork. Initially when the scheme began and the mediations were 20 minutes long the judges were able to process paperwork for the duration of the mediation. In October 2002 when the length of the mediation increased to 30 minutes there was a greater ability to utilise the time profitably because short hearings could be slotted into the time between mediations.[53] District Judge Harvey stated that, "The saving of court time is enormous … [the judges] time is immediately filled up by other cases so what it does mean in fact is that other cases are getting to a hearing a lot faster, faster than they would otherwise have done."[54]

The implication is that the small claims mediation scheme generally improves the efficiency of the court process and not just of small claims.

[52] Although a definition of the particular mediation that is used in the small claims scheme is important for clarification there is no criticism intended in this report engendered by a lack of similarity with other types of mediation.
[53] See the example of case listing in Appendix C.
[54] Interview with DJ Harvey, February 2004.

This is because anything with a time estimate of up to 20 minutes can be allocated whilst the mediation hearing takes place. This includes short applications, telephone applications, CPR work, etc.

The saving represented in judicial time have been reflected in the funding of the scheme by the DCA. It is important that sessions should be properly funded to reflect the value placed upon the mediators volunteering for the scheme. If it is acknowledged that mediation brings qualities to the legal process other than the saving of judicial time it is important that the further savings should not be made by withdrawing funding from the mediators.

Administratively, the small claims mediations do not add a huge burden on court staff because once the case is scheduled the District Judge allocates the case to mediation so the administrator draws one Order for the parties.[55] The administrator then liases with the DELS administrator to arrange mediation dates. If the mediation fails the administrator must then draw up a new date for the hearing. Yet the mediations involve a level of specialisation and understanding of the process which would benefit from the involvement of a dedicated mediation clerk. The saving of judicial time would thus be supported by the appointment of a form of administrative mediation co-ordinator.

Parties who have attended a mediation but have not settled have an advantage when they attend court for a SCT trial because they have more insight into the arguments that will be presented to the other case. This makes the hearing fairer because both sides have a greater opportunity to prepare their case. They have also been before a judge to receive directions and are able to ask questions and raise points in connection with those directions. This provides individuals with a greater

[55] A more complex procedure is associated with the fast-track / multi-track scheme.

understanding of what to expect when the case comes to trial. As DJ Wainwright stated, "Both parties come and if they have been to mediation first they know what the case is about, they know what their paperwork should be ....."[56] This should enable a fairer system especially where one party has more experience of the court process that the other.

The impact of the scheme on the judiciary cannot only be measured in respect of time saved or efficiency. It is also the quality of the service offered to those who attend the court which is important. If their case can be processed quickly without the trauma of having to prepare for an adversarial trial this may prevent future cases coming to court. The focus is very much upon settlement and it may be an additional help if participants could understand something more about the process in order to help them find ways to avoid court in the future. There is little evidence in this research that this secondary objective is being realised at present.

A criteria-referenced approach by the judges in the selection of cases could aid future research into the success of the process. This may involve a checklist of factors which the judge could select. Examples of evidence which may increase the likelihood of settlement include:

- the need for a continuing professional or business relationship;
- clear tangible issues which need resolution;
- lack of legal content; and
- equality of bargaining power between the claimant and defendant.

It is difficult to determine the reasons why some cases settle and some do not because of the complex and diverse range of factors involved in each

[56] Interview with DJ Wainwright, February 2004.

case. There are many variables such as the nature of the dispute; the amount involved; whether the parties have an interest in a legal resolution because they regularly use the legal system; and the style of the particular mediator. What was very clear from the beginning of this research study was that all mediators have very different styles. This difference affects the nature of the mediation. Some only wish to focus on settlement and have no interest in the issues, others wish to focus more on resolution of issues. We also observed cases where the parties settled and yet were unhappy with the nature of the settlement. Thus there is not an obvious correlation between settlement and satisfaction. It has been said that, "Mediation is not a mechanical, replicable process but a dynamic interaction with many intangibles and unknowns arising from unique sets of circumstances."[57] This was very much the initial conclusion taken from this study. This is reflected in our inability to find a correlation between the nature of the case and the rate of settlement.

It was concluded that the main aim of the mediators in the small claims mediation is to produce a settlement. The mediator relies on an assumption of why the parties take the position they have taken in the mediation and gives them reasons why they might want to reflect upon that position. The mediator will focus the parties' attention on the trial process and the risk of going to court; the cost of the time taken away from the workplace to sit in the courtroom; the stressful nature of the legal process; and the uncertainty of the outcome. These factors will be used to encourage the parties to settle their differences in the friendly environment of the mediation. It should be noted that parties interviewed after the mediations spoke warmly of the user-friendliness of the mediators' approach as opposed to the formality of meeting the judge.

There is an advantage to the mediators being lawyers because they are able to read and understand the court file in a short amount of time and discuss the issues that are raised in an intelligent way. Parties that are arguing their case in court expect even a facilitator to be familiar with the law and the legal issues that are raised by their case. The lawyer-

[57] B Wilson, 'The Triumph of Uncertainty – Or Measuring Mediation' [2002] *Fam Law* 64

mediator can bring their experience of the law into the mediation but must be careful not to advise or show that they feel one side or the other have a 'better' case. There is a difference between legal information and legal advice. However, it was not clear that this distinction had been agreed by DELS, nor where many of the mediators involved in the scheme drew the line. The lawyer-mediator may also find it difficult to change their adversarial approach to a more co-operative one. This is characterised by the little encouragement given by the mediators to the building of trust between the parties. There were examples of parties showing signs of feeling 'forced' into settlement during the observations. Some parties commented that they felt the mediator was clearly favouring the 'other side' or that they had felt forced into agreeing upon a particular form of settlement.

Observations also showed that mediations usually involve a lot of intervention on the part of the mediator. When the mediations are so short it is difficult to for the mediator to engage in the sort of 'softly softly' approach which characterises more traditional perceptions of mediation.[58] From observations of the mediations conducted at Exeter the mediators seem to use their skills primarily to effect settlement rather than to repair relationships or resolve issues. This is not to say that there is no emphasis on co-operation or creative settlements as this is an obvious advantage of such a scheme. The mediator seeks to avoid the 'winner takes all' approach of litigation and tries to find common ground which will satisfy both parties.

Just because a mediation resulted in a settlement this does not mean that it achieved the best result for the parties involved.[59] It is possible that those looking in on the mediation scheme are distracted by the emphasis on settlement and do not look any further to see how the mediation affects the quality of the service of the court. Settlement is not only

[58] J Alfini, 'Trashing, Bashing and Hashing it Out: Is This the End of 'Good Mediation'? 19 *Fla St U L Rev* 47 (1991)
[59] M Gallanter & M Cahill, '"Most Cases Settle": Judicial Promotion And Regulation Of Settlements'46 *Stan Law Rev* 1339.

benefit of mediation as illustrated by the quote below from DJ Harvey at Exeter County Court:

> "It would be very nice if people would think about mediating before they issue proceedings but for whatever reasons they frequently and usually don't. And therefore to build it into to Court process seems to be a good thing in that it reminds them all, almost forces them, to think about that option and that without a doubt is a better service. So, from the Judge's point of view wanting to ensure that people who come to Court get a good service, one would say we must do it anyway. Whether it is costing a little bit more or a little bit less is irrelevant to that point of view, from the Judge's point of view. It is simply a better service and a better service is a good thing."[60]

There is a warning in this statement that settlement is but one aspect of the mediation process and it needs to be considered as a part of mediation's contribution to a broader legal process. Focussing too strictly on cost-benefits may result in ignoring the richer rewards of mediation.

The interviews conducted with parties demonstrate a clear need to provide much greater information to participants about the small claims mediation scheme. Many of the participants arrive at court with no knowledge of the procedure or nature of the mediation. They are not sure of the role of the mediator. In the middle of one mediation the claimant in the case said to the mediator – "…but you are a judge!" He was clearly confused about the role of the mediator. When the parties are taken before the judge it may be hard for them to concentrate on what the judge is saying to them as they have come face-to-face with the party with whom they are in dispute. Within a matter of minutes they are asked to leave that room and sent somewhere else with the mediator. Whilst they realise this is a different process it may be hard for them to take in all the information the judge and the mediator say to them in the first few minutes of the mediation. It would be useful to have more

[60] Interview with DJ Harvey, Exeter County Court, March 2004.

information, perhaps in the form of a court leaflet, which could be sent to the parties in advance and also given to them to read if necessary in the waiting room whilst they wait for their case to be called.

If the parties are asked to attend a mediation but are not informed about the process any implication of voluntariness in the process cannot apply. The parties are not attending the mediation with any knowledge of what to expect which reduces their ability to prepare and reduces the quality of the mediation process. Thus the emphasis placed upon settlement implies to the party that this is sanctioned by the judge. The judge has read the file and believes mediation is appropriate. This gives settlement a legitimacy when the participant may have other reasons, eg legal rights for pursuing the action before the court for wanting the case to go on to a full hearing. If the party is informed properly about the process and the aims of mediation the value and benefits of the mediation process may increase. In addition, the number of those volunteering for mediation may also rise.

Another consequence of a lack of information is that the parties have no real understanding of the role of the mediators. They are told the mediator's name and that he or she is a solicitor or a barrister but nothing further. In order to increase openness and enhance understanding the leaflet about the scheme should include some information about DELS and the qualifications for the scheme. A notice could also be placed in the waiting room on the day of a mediation session which gives further details about that day's mediator.

5.

Advantages of the process are that:

- It is forward-looking because it emphasises future relationships and bringing the issue to a close;

- The parties are empowered by the process because they are helped in trying to determine their own resolution;

- Settlement can be adapted to the needs and desires of the parties and made easy to understand. In a trial the judge has to make a more concrete decision on the law and this may not be the sort of solution which the parties are seeking or be the decision that best improves their relationship;

- The mediator is not a judge and looks for a co-operative way of resolving the dispute rather than focusing on legal issues. The mediator can talk to the parties individually or together. The mediator does not need to concentrate on issues or evidence or who offers the most believable version of events because they only need to understand what the parties need to resolve the case. If this turns out to require a legal solution the case can be referred back to the judge.

Disadvantages of the process are that:

- The mediator needs to draw a firm line between giving legal advice and legal information. Many of the parties appearing at the court are looking for help and guidance. The mediator has limited knowledge of the case and will not be in a position to hear evidence or weigh facts.

- The mediator is not accountable for his or her actions as a judge is accountable. The focus is on achieving settlement but if there is a power imbalance between the parties it is for the mediator to determine how or whether this should be taken into account. An obvious imbalance will occur where one party is represented or where one party is a 'repeat player' and has experience of the legal system whilst the other party does not have such experience.[61] It may also arise where the party wishes to discuss principles and the mediator is focused on finding a route to settlement. It is suggested that

[61] M Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' 9 Law & Soc Rev 95 (1994)

mediators could benefit from some discussion on how or whether to equalise power imbalances.

- The mediator is a figure of authority in the small claims mediation despite his lack of accountability. Power is bestowed upon the mediator by the judge who tells the parties to go with the mediator who will try to help them resolve their dispute. This raises questions about the rule of law and whilst the law can be justified through its objective formality there is no such protection for mediation.[62] Mediators are not employees of the state as judges are. They do not have an obligation other than to their ADR provider (not nationally regulated) or their own moral code. As solicitors or barristers the mediators on the DELS small claims mediation scheme are bound by their professional Code of Ethics. This is one advantage of using solicitors and barristers as court-based mediators. It is also suggested that the Court and / or the DELS ADR Committee discuss the creation of guidelines which will draw boundaries between the role of the judge and the role of the mediator, ie the difference between legal advice and provision of legal information.

This exploratory study raises more questions than it is possible to answer in such a limited analysis conducted over such a short period of time. The following list of questions are amongst those highlighted by this research:

- Can a definition of mediation be provided that gives a true explanation of the small claims court-based mediation process?
- Should judicial selection of cases be criterion-led?
- Should the mediators have a more intensive training and selection procedure to build upon their negotiation skills so that they are able to aim for the 'best solution' rather than just a settlement? Or is this not the role of a court-based mediation scheme?

[62] R Ingleby, cited above.

- Do mediators need a statement of ethics which helps them to determine the boundary between giving 'advice' and providing 'information'?
- Is settlement always desirable?[63] Is it the best measurement of successful mediation?
- Can an audit of the passage of all small claims cases at Exeter be done as a comparison with another similar sized court to determine whether cases are generally being processed faster because of the small claims mediation scheme?
- Is it possible to classify cases which are more suitable for mediation than others? If it is not possible to compile such classifications is it possible to classify the type of parties who may be more or less amenable to mediation?
- The role of the court is as either a) a last resort or b) authoritative, independent and just 3rd party with the power to rule decisively. This role characterises the particular type of mediation which takes place once a claim / defence have been issued. Can this be measured?

This study is designed to encourage more focused thoughts about court-based mediation and to contribute to the broad discussion on the value of mediation to the legal process. As Cappelletti said, "We have to be aware of our responsibility; our duty is to contribute to making law and legal remedies reflect the actual needs, problems and aspirations of civil society."[64]

[63] This question is asked by R Ingleby, 'Court Sponsored Mediation: The Case Against Mandatory Participation' 56 MLR (1993) 441, at 442.
[64] M Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' 56 MLR [1993] 282, at 296.

The Central London County Court Pilot Mediation Scheme: Evaluation Report'

Court-based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal

Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales

Access to Justice: Final Report

, 'Small Claims in the County Courts in England & Wales

Mediation: Principles, Process, Practice'

Mediation'

Fla St U L Rev

S Cal Law Rev

Law & Soc Rev

Stan Law Rev

MLR

Exeter County Court Mediation Schemes.

Small Claims Cases (claims less than £5,000, unless a) there is a personal injury claim which a financial value in excess £1,000 or b) there is a claim by a tenant of residential premises against a landlord requiring an order for repairs with estimated costs in excess of £1,000)

Exeter County Court has been operating a mediation scheme for small claims cases since 16th June 2002. Upon receipt of the Allocation Questionnaires, a mediation appointment will be given to those cases which are felt suitable for the scheme. This appointment will be within 28 days of allocation to the small claims track. It is important that you bring with you to that appointment all documents that you intend to use for your case, but you do not need to bring any witnesses.
Both parties will then be able to discuss their case with the District Judge and a qualified mediator. These discussions can lead to an early settlement of your dispute, or to a narrowing of the issues. If the mediation appointment does not bring the case to a settlement, the District Judge will give necessary directions for a Final Hearing on another date before a different District Judge.

Fast Track and Multi Track Cases (claims over £5,000 unless they fall into the special provisions as stated above)

A mediation scheme for fast track and multi track cases has been operating since 10th March 2003. An information booklet ('Court based mediation at Exeter') is enclosed. Please read this carefully and then complete the Form 'Med 2 – Mediation Reply', and return it to Exeter County Court with your allocation questionnaire. Further details can be found in the booklet.

EXETER COUNTY COURT

Case No

Small Claims Track Directions on Allocation

☐ **ALLOCATE TO SMALL CLAIMS TRACK**
☐ Suitable for entering in the SCT mediation list
☐ List within 28 days on Form JW1.
☐ If this were to have been listed for hearing now what time estimate would you have given?.....

Date..... Signature.....

RESULT OF MEDIATION

Attending: Claimant sol/rep/ip/letter/message/tel
Defendant sol/rep/ip/letter/message/tel
Date of mediation..... Amount of claim..... Amount of counterclaim.....
Name of mediator ..... Settled yes/no/n/a
Terms of settlement.....OR
Result of hearing .....
Type of dispute: holiday/ supply of services/goods/statutory/ wedding/tenancy/other please identify.....
Signature DJ..... date.....

☐ Stay requested
☐ Issue standard order staying for one month

☐ **FORM A**
☐ Fix hearing with time estimate of (not before DJ ..... who conducted the ADR appointment)
☐ Standard directions with documents to be filed and served
☐ By .....
☐ not less than 14 days before the hearing
☐
☐ Statements of each party and their witnesses must be included in the documents filed and served
☐ Road traffic accidents : Standard Directions in Form B
☐ Other directions – PTO
☐ Leave to parties to instruct a jointly appointed expert to report on the nature of the complaint(s) made by the Claimant/Defendant as to the quality of the Defendant/Claimant workmanship. The parties to pay the costs equally, the same to be filed no later than 14 days prior to the hearing

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NOTE TO MEDIATION CLERK - PLEASE INPUT THE ABOVE ONTO SPREADSHEET.

Date _____ District Judge Wainwright

General Form of Judgment or Order

To the

In the EXETER County Court	
Claim Number	EX200100
Claimant (including ref.)	Faheys Concrete FC351
Defendant (including ref.)	Mr J Britton
Date	14 November 2003

Before **DISTRICT JUDGE** sitting at Exeter County Court, The Castle, Exeter, Devon, EX4 3PS.

Direction pursuant to Rule 23.9 Civil Procedure Rules 1998

Upon reading the court file

IT IS ORDERED THAT

1) Allocate to the Small Claims Track.

2) Your case has been identified as one which may benefit from a mediation scheme.

There will be a mediation hearing with a qualified mediator initiated by a District Judge on at with a time estimate of 30 minutes. The mediator will help you each consider the possible solutions to your case. there will be no cost for this service to either party, and if your case is not capable of being resolved at that stage, directions (detailing what documentation and evidence you will need to produce) Will be given by the Judge for the final hearing to take place before a different District Judge.

3) You MUST therefore bring with you all the paperwork relating to the claim/defence and any possible counterclaim **AND YOU/YOUR REPRESENTATIVE MUST BE FULLY AUTHORISED TO ENTER INTO NEGOTIATIONS AND TO SETTLE THE CASE.**

4) If you do not attend the mediation hearing then an order may be made disposing of the case in your absence.
Dated 14 November 2003

NOTICE TO THE PARTIES

This order has been made without a hearing. Any party affected may apply within 7 days of its service to vary or set it aside.

EXETER COURT/DELS SMALL CLAIMS ADR SCHEME **No action……**

AGREEMENT FOR MEDIATION

WE AGREE TO A MEDIATION OF THIS DISPUTE CONDUCTED BY THE DELS MEDIATOR

……Claimant

signed……

and

……Defendant

signed……

and

……Third Party

signed……

……Mediator

Confidentiality

Everyone attending the mediation agrees that the mediation is private and confidential, and nothing that is prepared for or said in the mediation can be used elsewhere save for any agreement made by the parties. The Mediator and any Co-Mediator cannot under any circumstances be called on to give evidence.

DATE ……

GUIDELINES FOR MEDIATION in the Exeter County Court/DELS small claims scheme July 2002

1. **Application of these Guidelines**

Mediation is available to parties who have a dispute or difference which has led to a small claim action being issued and a referral to mediation being made by the judge.

2. **Commencement of Mediation**

The parties should sign the agreement to mediate in the form attached.

Mediation will be both confidential and privileged. At no stage can any of the notes arising during the mediation be used to prejudice one or other of the parties and the Mediator can never be called on to give evidence in any subsequent process.

3. **Procedure**

The Mediator will act in an independent, impartial and just manner. The informal procedure is intended to assist the parties to reach an amicable and equitable settlement of their dispute or difference and the Mediator may conduct the proceedings in any manner he or she considers appropriate, but will have particular regard to

(a) the general circumstances of the cases;
(b) the relationship between the parties, if any;
(c) the parties' wishes;
(d) the need for a just settlement that is, so far as possible, also speedy and economic..

Unlike a Judge or Arbitrator, the Mediator can see the parties separately. However, any information disclosed can only be disclosed to the other party for comment providing the disclosing party consents.

4. **Settlement of Disputes and Narrowing the Issues**

A Mediator shall not express his or her personal view on the dispute or difference referred to them unless the parties expressly request that the Mediator gives such a preliminary view. It must be stressed that such a step would be unusual.

Where a settlement is reached, the parties must draw up a settlement agreement with or without the assistance of the Mediator. This agreement when signed and witnessed by the Mediator will make the settlement legally binding. The contents of the agreement will be confidential and may not be disclosed by a party except for the purposes of enforcing it in legal proceedings. Without a written agreement, further disputes may arise as to what was agreed.

5. **Termination of the Mediation**

The Mediation may be concluded at any time by:-

(a) upon the parties reaching a settlement agreement
(b) the withdrawal of any party from the proceedings;
(c) the Mediator stating that continued attempts to mediate are no longer in his or her estimate fruitful;

6. **Enforcement**

Once the mediation proceedings have been brought to an end any agreement will be ratified by the court. Then the only further reference to the court will be on such questions that have not been settled by the mediation or any questions arising out of the settlement agreement itself.

In any subsequent proceedings the parties may not call in evidence:-

(a) the views expressed by either party or the Mediator in connection with the settlement or proposed settlement;
(b) admissions made by either party during the mediation;
(c) proposals (if any) suggested by the Mediator;
(d) evidence of abortive or draft settlement agreements or other document arising out of or during the mediation.

7. **Quality Assurance and Feedback**

Devon and Exeter Law Society is concerned to maintain the best possible quality for all mediations. All panel Mediators have completed their training and have been approved as Mediators by their training providers. You may be asked to complete a questionnaire about this service, feedback is always helpful.

In the event of any complaint or comment about the way the mediation was conducted by the Mediator, users should write to the Secretary, Devon and Exeter Law Society (DELS) The Lodge The Castle, Exeter.

MEDIATION REPORT

Name of parties:

Case no:

Date of mediation:

- The parties reached agreement and request by consent the claim/counterclaim is withdrawn
- The parties have reached agreement and request by consent that there be judgment for the Claimant/Defendant for the sum of £ with no order as to costs/costs agreed at £
- The parties have reached agreement and request that by consent all proceedings be stayed on the terms set out in the schedule overleaf
- The parties have not reached agreement and request a final hearing and directions

Signed ; Mediator.....

Claimant .....

Defendant .....

Dated.....

EXETER COUNTY COURT
SMALL CLAIMS MEDIATION SCHEME
QUESTIONNAIRE

16.7.02

1. Did you find the Mediation helpful? Yes ☐ No ☐

2. Were you able to settle your case? Yes ☐ No ☐

3. If you were not able to settle your case, was the Mediator able to help you by discussing the Court procedures? Yes ☐ No ☐

4. Was the time allowed for the mediation sufficient Yes No

5. Did you find the intervention of the Mediator:-

   (a) Very Helpful ☐

   (b) Helpful ☐

   (c) No Help ☐

   (d) Unhelpful ☐

6. If an out of court mediation scheme had been available before the issue of proceedings, would you have been prepared to use it? Yes/No

7. Were you Claimant or Defendant in the case Claimant/Defendant

8. Observations .....

.....

PLEASE COMPLETE THIS FORM AND LEAVE AT COURT FOR THE ATTENTION OF THE MEDIATION CLERK.

EXETER COUNTY COURT

DATE: Wednesday 18th February 2004

LIST OF APPOINTMENTS BEFORE: DISTRICT JUDGE WAINWRIGHT
SITTING AT THE CASTLE, EXETER

IN ROOM 6

THE FACT THAT YOUR CASE IS LISTED IS NO GUARANTEE THAT IT WILL BE HEARD AND IT MAY BE RELEASED TO ANOTHER JUDGE POSSIBLY AT A DIFFERENT COURT

Time of hearing	Case Number	Claimant	-v-	Defendant	Type of Hearing
10:00	SE310909	BAKER WESTERN LTD		JONES	ADR
10:10	QZ328907	MID DEVON GLASS		STUCKEY	
10:30	EX305127	DOT COM COMPUTERS		SW EVENTS	ADR
10:40	EX306743	STAGG		LOUIS	DIRS
11:00	EX305914	NORWOOD		WILLIAMS	ADR
11:10	EX306171	KNIGHT		COUNTRY WEST TRDG	TEL CONF
11:10	EX301904	BLACK HORSE		HUTCHINGS	APPLN
11:30	EX303207	MICHELMORES		WALKER	ADR
11:40	EX306573	COT		GURWOOD	APPLN
12:00	EX306038	KNIGHT		A & S KINGDOM LTD	ADR
12:10	EX302652	SMITH		WILTSHIRE COUNTY COUNCIL	CMC
12:20	EX303774	GAVIN		GREENHORN	TEL CON
12:30	TQ302939	S MACKENZIE		MCCAFFREY T/A TAW CONSTRUCTION	