CA on appeal from Altrincham County Court (His Honour Judge Hardy) before Peter Gibson LJ, Mr Justice Blofeld. 14th April 1999.

JUDGMENT : MR JUSTICE BLOFELD:

1. This is an appeal by the plaintiff against an order made by His Honour Judge Hardy in Altrincham County Court on 2nd June 1998 when he dismissed her application to set aside an award made by District Judge Gaunt on a small claims arbitration on 16th March 1998. On that date the district judge dismissed the plaintiff's claim and granted a declaration as to the position of the boundary line between the plaintiff's and the defendant's properties. He also made an order for costs.

2. In this boundary dispute the plaintiff lives at 16 Fairview Road, Timperley. To the rear of her house she has a large garden. At the bottom of her garden there are some newer properties, Nos 1, 2 and 4 Spring Gardens. The defendant's property is No 2 and partly abuts No 16 and partly No 14 Fairview Road.

3. This case is concerned with the part that abuts on to 16 Fairview Road. The defendant was desirous to enlarge his garden. On 16th April 1993 he purchased, for £600, a piece of land from the plaintiff. There is a plan attached to that transfer which is not to scale. He also covenanted to erect a fence. At much the same time the plaintiff also sold small portions of the rear of her garden to owners of No 1 and No 3 Spring Gardens. The cost of erecting the boundary fence was to be shared equally between the vendor and the purchaser. When the fence was put up by the defendant and then the fence was put up by the vendor for the other two boundaries it was found that there was a slight kink in it. No action was taken at that time or, indeed, for several years afterwards. It was not until 1996 that matters erupted. In that year the plaintiff or somebody on her behalf planted a tree which had been growing in her garden up against the fence. That tree partly overhung the defendant's garden. There was a dispute about that tree, and it was that tree that initially brought this matter to court. At court there was also a question of the boundary line between the properties. The district judge decided the matter of the tree, and that ends that matter because that matter is not before this court. But the question of the boundary had proved a difficult one and comes before the court today.

4. Before the district judge gave judgment he visited the site. He then heard the evidence and had before him a substantial bundle of documents which was put in by the plaintiff, Mrs Michaelides, who was acting in person. He also heard from the defendant, Mr Wilkinson, also acting in person. There were a large number of different plans and it was difficult to follow precisely how they fitted together. There were clearly a number of differences between some of them. After his judgment the plaintiff appealed to the circuit judge. She again appeared in person. She submitted in paragraph 4 of her skeleton argument - *"I wanted to go over the claim Mr Wilkinson made on the previous owner of 16 Fairview in 1992 in particular a letter from Mr Wilkinson's solicitor (page 67 of my filed evidence) stating that Mr Wilkinson agreed the boundary was correct at that time and indeed his filed plan may be incorrect and also a letter from Bridgfords Estate Agents who had measured the land in 1992 confirming that it tallied with the transfer in my conveyance of 1928."*

5. A little later in the skeleton argument she said: *"When I started along this approach, Judge Gaunt said that he was not interested in what had gone on in the past and would not let me go down that avenue of evidence."*

6. She submitted that that evidence was relevant and appropriate and consequently that the district judge had erred in law in not allowing her fully to refer to the contents of those two letters. It was on that point, and that point only, that Lord Justice Schiemann and Lord Justice Brook gave leave to appeal on 22nd October 1998.

7. Before referring to the contents of the letters however it is appropriate to refer briefly to the law. The County Court Rules under Ord.19,r.8 make it clear that an award by an arbitrator in a small claims arbitration can only be set aside on grounds that there has been misconduct by the arbitrator or that the arbitrator has made an error of law: see rule 8 (1). The submission by Miss Gilmour, on behalf of Mrs Michaelides, was that the district judge did make an error of law and further that when the matter came before the circuit judge the circuit judge did not properly consider that error when giving his judgment. The notes of judgment are before the court. They are short. They were taken by Mrs Michaelides as the judgment was being given and sent to the judge who approved them.

8. I turn to the only point of this appeal, namely that the arbitrator misdirected himself on a point of law. The arbitrator gave a written decision. This matter is dealt with in this way by the circuit judge: *"He [the arbitrator] was entirely correct in legal respects and nothing in the judgment causes me to take the view that he misapplied the law or misinterpreted the law. In consequence the request to set aside the award on this ground fails."*

9. That is all the judge said about this matter. That indicates he did not specifically deal with the issue raised by Mrs Michaelides in paragraph 4 and later in her skeleton argument to which I have referred. Consequently, we have no way of knowing what his view was about that matter.

10. When this appeal started there was a second subsidiary point raised which can be disposed of quickly. Subsequent to the hearing before the district judge, the parties have been touch with the land registry and the land registry has written letters to both parties. Miss Gilmour, in a somewhat muted manner, submitted that this court should consider those letters. Mr Wilkinson was asked his view. He did not appear to be particularly concerned because he took the view that they took the matter no further.

11. Effectively, Miss Gilmour took that submission no further, recognising that there were inherent difficulties raising matters of fact now which were not canvassed before the district judge.

12. Consequently, I, for my part, say no more about those two letters.

13. I return to the two letters which are the subject matter of the complaint in paragraph 4 of the skeleton argument. The first letter is 12th May 1992. It is written by Robinson King, who were then the solicitors acting for Mr and Mrs Wilkinson. At that time they were writing to Messrs Hill & Co who were solicitors for Mr and Mrs Smith, the owners of 14 Fairview Road, Timperley, the adjacent property to Mrs Michaelides' property.

14. Before I read the letter I should make it clear that the previous owner of 16 Fairview Road was a Miss Powell. The relevant three paragraphs are the first three paragraphs of that letter and read as follows: *"We refer to your letter of the 22nd April since which time our clients have had a discussion regarding the fence between their rear gardens. Our clients have instructed us to write to you since they are most anxious to deal with this matter amicably.*

We wrote to your clients on 15th April last following our clients' inspection of their rear garden, the dimensions of which did not appear to tally with the HM Land Registry Filed plan. The plan appears to indicate that our clients' property extended beyond the fence for a distance of about 10 feet. Since our clients' rear garden also adjoins the property adjacent to your clients' property, 16 Fairview Road, which we understand is owned by a Miss Powell, it appeared that our clients had title also to land beyond the fence on Miss Powell's side, again to a distance of about 10 feet.

Your clients have recently shown ours a plan contained in their title deeds and our clients accept that the fence between their two gardens appears to be in the correct position and that our clients' filed plan may therefore be incorrect. Our clients are however [keen] to purchase a strip of land at the bottom of your clients' garden and we should be grateful if you would kindly take their instructions as to whether they would be agreeable to a sale at this stage."

15. The other letter of 16th April was from a firm of auctioneers in Altincham called Bridgfords. They wrote to Hill & Co, the solicitors of Mr and Mrs Smith. That letter really takes the matter no further, and I do not find it necessary to read any of that letter.

16. The relevance of those letters appears to be this. At the hearing before the district judge both sides called expert evidence. The plaintiff called a Mr Hamer who produced specifically a drawing, No 4883.1. He gave his views about where the boundary line should be. The defendant's expert was a Mr Furness, a land surveyor. He produced a plan which, at first sight, is somewhat difficult to follow. It appears that he has set out the plan from the title deed of Mr Wilkinson's conveyance of the property and then has put overlays on them taken from the file plans. His conclusion was that the boundary fence as put in by Mr Wilkinson in 1992 was, broadly speaking, the boundary line give or take an inch or two.

17. The relevance of the two letters seems to me to be this. If Mr Furness had been asked questions about the contents of those letters he might well have answered that he was not aware of them or indeed he might have said that they changed his opinion. Unfortunately, he was not allowed to a deal with those matters.

18. It is common ground that the district judge dealing with this arbitration did firmly refuse both parties to put in a substantial amount of evidence. No doubt he wished to try and keep the proceedings as simple as possible. One cannot fail to have sympathy with him. It is unusual for a dispute of this nature to be dealt with by a small claims arbitration.

19. In addition to the actual contents of the letters, particularly the letter from Mr Wilkinson's solicitors to Mrs Smith's solicitors, they might have alerted the district judge further to the plans attached to a conveyance of 20th September 1998 and the recitals contained therein which show a plan taken of 16 Fairview Road where the actual measurement is set out in yards and inches. It is taken from the middle of the road to the rear boundary and if that plan had been considered by Mr Furness, as it may have been, that again might have led him to alter his view. As I have said, the district judge excluded evidence in order no doubt to try and keep this matter within bounds.

20. It is Miss Gilmour's submission, on behalf of Mrs Michaelides, that unfortunately he excluded relevant and potentially probative evidence, that he was wrong in law in doing so and should not have done so.

21. Mr Wilkinson submits that in fact the district judge did consider the contents of these letters and made the comment that they were only the opinion of the solicitor. But the reading of the letter which I have already given in this short judgment indicates that that would have been an unlikely view for the district judge to

22. have taken because it is expressed in clear terms. Mr Wilkinson, apart from that matter, dealt with a number of other matters in an attempt to persuade us that the district judge was correct. I find his other submissions are not strictly relevant to my decision. He furnished us with some photographs and a number of plans which demonstrated the complexity of the case because of the multiplicity of the plans. He said there was a fence that had been there many years and raised the question of whether or not he might have possessory title at common law. He pointed out after erecting the new fence no objection had been taken to it by, or on behalf of, Mrs Michaelides for some 4 years or so, and he said the judge was correct in referring to the evidence of his expert rather than the expert of the plaintiff's, Mr Hamer.

23. At the end of the day I have come to the conclusion that the district judge was wrong in law in not considering the content of the two letters to which I have referred, and the circuit judge did not deal with that matter in a satisfactory manner when he gave his short judgment because he did not refer to that matter at all.

24. In those circumstances it seems to me that justice can only be done by allowing this appeal and remitting this matter for rehearing.

LORD JUSTICE PETER GIBSON:

25. This dispute is over a small piece of land. In so many boundary disputes feelings have been aroused wholly disproportionate to the value of the land in question. I do not doubt that the judge tried conscientiously to arrive at a fair and common sense result. Unhappily, it does appear that he did not allow Mrs Michaelides, appearing in person, to rely on the two letters of 16th April 1992 and 12th May 1992 in support of her argument as to where the true boundary lay. Mr Wilkinson has told us that the letter from his solicitor was said by the District Judge merely to express the opinion of the solicitor. That letter, however, when one looks at it, is written on the instructions of Mr Wilkinson himself and it is quite clear from that letter that at that time Mr Wilkinson took a different view from that which he was to take in these proceedings.

26. The two letters are relevant and of some probative force although they may not be conclusive. I do not think that the District Judge could properly have ignored the evidence which those letters contained.

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In my judgment, he erred in law in so doing. The judge, on the appeal to him, does not appear to have addressed himself specifically to the two letters, and I am afraid that I think he was wrong on that.

27. For these as well as the reasons given by my Lord, I too would allow the appeal and order a new trial. Having said that, I would urge on parties to think hard whether it is sensible for them to incur the costs of a further trial with the possibility that that may lead to a further appeal and yet more costs. The amount involved, I stress, is very small indeed. I hope that the parties will seriously consider mediation. Most courts these days have facilities which allow alternative dispute resolution; certainly this court has, and I do not doubt that alternative dispute resolution is available in the county court. It would make a good deal of sense if the parties resorted to mediation rather than going to a new trial. But, for the reasons which I have given, a new trial is what we must order.

Order: Appeal dismissed with costs.

MISS SUSAN GILMOUR (Instructed by Collier Littler of Timperley, Altrincham) appeared on behalf of the Appellant
The Respondent appeared in person