THE VIEW

by

Robert Hunt

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A INTRODUCTION

A View is a common feature in arbitrations, particularly those involving technical issues. Views are often used in litigation of technical disputes, and can also be used in various forms of ADR.

This Practice Note is intended to provide a synopsis of the current state of the law on the View in arbitration, as well as some guidance on various procedural aspects to be borne in mind. The extent to which these principles can be applied in litigation or the various forms of ADR is variable (as well as being beyond the scope of the Practice Note). In adjudicative processes (ie. litigation and expert determination), this will depend on any applicable legislative provisions, what has been agreed between the parties, and what the decision-maker is required to do to afford procedural fairness. In consensual processes, it will depend on what has been agreed between the parties.

The various issues involved will be considered under the following further headings:

B Types of evidence.

C What use can be made of the View:

- C1 Agreements between the parties.
- C2 Common Law Principles.
- C3 The Position under the *Evidence Act 1995 (NSW)* and the *Evidence Act 1995 (C'th)*.

D Natural Justice.

E Procedural Arrangements for a View.

F Summary.

B TYPES OF EVIDENCE

A convenient starting point in considering what an arbitrator can derive from a View is to look at the various forms in which evidence may be given to discharge the burden of proof. It should be noted that there are some matters that do not require proof because **judicial notice** may be taken of them. Those matters include the law and practice of the courts, the provisions contained in

statutes and subordinate legislation, and *'things that everybody knows'*. What *'everybody knows'* is somewhat variable, and will depend on the circumstances of each case. For example, judicial notice may be taken of the fact that Melbourne is south of Sydney, but not how far it is from Sydney. Similarly, judicial notice may be taken of the fact that a particular date fell on a certain day of the week, even if an individual arbitrator must refer to a calendar to ascertain that.

Most evidence is **testimonial**. Witnesses give evidence to the court or tribunal on what they experienced with their senses (ie. sight, hearing, touch, smell etc), from which the court or tribunal will determine the facts in issue based on the weight which it feels it can give to the reliability of the testimony. Testimonial evidence may be either oral (*viva voce*) or documentary.

The other form of evidence is **real evidence**, namely what the court or tribunal experiences for itself rather than relying on the testimony of witnesses. By way of example, if a fact in issue concerns whether there was a written agreement between two parties, then business records such as contracts, quotations and orders would be *'real'* evidence available to the court or tribunal. Photographs are another form of *'real'* evidence[1].

'Real' evidence, as distinct from testimonial evidence, often involves an unconscious blurring of the distinction between judicial notice and arbitrators informing themselves. This is particularly so on a View.

Arbitrators who bring some degree of expertise and experience in the subject matter before them can derive a substantial benefit from *'real'* evidence, as they can make direct observations of the physical condition of an object instead of merely hearing about it from witnesses.

C WHAT USE CAN BE MADE OF THE VIEW

Is what an arbitrator experiences on a View *'real'* evidence? This will depend on the use that may be made of the View, which in turn will depend on things such as:

- what has been agreed between the parties concerning the use that can be made of that material;

- what has been agreed between the parties concerning the application of the rules of evidence;

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1 In the case of photographs, the identity of the photographer should be recorded, as well as the date and time each photograph is taken. A schedule or plan identifying the location and aspect of each photograph should also be prepared. The photographer may be required to give testimonial evidence to *'prove'* the photographs before they are admitted into evidence.

- if the rules of evidence apply, whether the arbitration is subject to common law principles, or the provisions of s. 54 of the *Evidence Act 1995 (NSW)* or the *Evidence Act 1995 (C'th).*

These matters are considered below.

C1 AGREEMENTS BETWEEN THE PARTIES

Agreement on whether the rules of evidence apply

Section 19(3) of the *Uniform Commercial Arbitration Acts* in Australia provides as follows:

> *'Unless otherwise agreed in writing by the parties, an arbitrator is not bound by the rules of evidence, but may inform himself or herself in relation to any matter in such manner as the arbitrator or umpire thinks fit.'*

The use that can be made of a View forms part of the rules of evidence. A substantial body of common law on Views has developed over the years. Those common law principles presently apply in all States with the exception of New South Wales, and are considered in C2 below. Following the enactment of the *Evidence Act 1995 (NSW)* and the *Evidence Act 1995 (C'th),* the position in New South Wales, the Commonwealth and the Australian Capital Territory now differs from the common law position, and is considered in C3 below.

Agreements between parties on the use that can be made of the View

Pursuant to section 19(3) of the *Uniform Commercial Arbitration Acts,* parties may agree in writing on the use that can be made of a View. Where parties agree that the arbitration be conducted in accordance with the *Rules for the Conduct of Commercial Arbitrations (including the Expedited Commercial Arbitration Rules),* adopted by IAMA in August 1999, this issue is covered in Rule 14 (1), which says:

> *'The Arbitrator may, in his or her discretion, view the subject matter or site of any dispute, the view of which might assist the Arbitrator in determining the issues in dispute. The Arbitrator may use his or her own observation not merely to assist in understanding the evidence but also as material which he or she may use in determining the issues in dispute provided that, in so doing, the Arbitrator puts the parties on notice of any preliminary adverse conclusion which is based solely on the Arbitrator's observations on the view and then affords such parties a reasonable opportunity to meet it.'*

The proviso in Rule 14 (1) is an expression of the *audi alterem partem* rule of natural justice [2], namely that a party must be given a reasonable notice and opportunity to deal with the case

2 A Latin expression, meaning literally 'hear the other side'

against it, which is dealt with in more detail in D below.

3.2 COMMON LAW PRINCIPLES

The common law in Australia is that a View can only be used by a court for the purpose of enabling the judge to better understand the evidence adduced. This was the traditional view in England as well.[3]

In *Unsted v Unsted* [4] , there was a conflict of evidence about what was happening at a particular time. One version depended on whether there was an open fire burning. After the hearing, the trial judge inspected the premises unaccompanied by the parties or their representatives. In his judgement, he attached considerable significance to fluff and dust he discovered in the fireplace on his inspection. On appeal, the Full Court of the Supreme Court of New South Wales held that the trial judge had exceeded the purpose of a view, particularly since neither party to the litigation had an opportunity of meeting the evidence which the judge obtained for himself on his inspection.

Unsted v Unsted was approved by the High Court in *Scott v Numurkah Corporation* [5], which remains the leading Australian authority on Views. A motion picture exhibitor with an exclusive licence to use a municipal town hall to exhibit motion pictures alleged nuisance and breach of covenant by the council from noise made by bands and people at dances in other parts of the town hall building. At the completion of the evidence at the hearing, the trial judge visited the town hall, by arrangement and accompanied by counsel for both parties, on an occasion when motion pictures were being exhibited and a dance was being held in another room. In his judgement, the trial judge said that, if he could use the 'demonstration' as evidence, he would not have accepted that the band was the nuisance it was alleged to be. However, he held that he was not able to use it as evidence. On appeal, the Full Court of the Supreme Court of Victoria held that he was entitled to use the results of his 'view' for the purpose of deciding which of the conflicting evidence he preferred. On further appeal, the High Court held that the trial judge had been right, particularly given that what occurred was more in the nature of a demonstration than a view. In their joint judgement, Dixon CJ, Webb, Kitto & Taylor JJ said:

> *'A view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and to apply it, but not to put the result of the view in place of evidence. Yet, sometimes, for example in cases of passing off, or otherwise when what appears to the eye is the ultimate test, the Judge, looking at the exhibits before him or*

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3 See, for example, *Goold v Evans & Co* [1951] 2 TLR 1189, per Hodson LJ

4 (1947) 47 SR (NSW) 495; 64 WN (NSW) 183

5 (1954) 91 CLR 288

examined by him as if they were exhibits in the case, and also paying attention to the evidence adduced, can apply his own independent judgment notwithstanding what witnesses have deposed to on the particular point. It is not permissible however for the Judge to gather anything in the nature of extraneous evidence and apply it in the determination of the issues unless the facts are openly ventilated and exposed to the criticism of the parties.' [6]

It is noteworthy that, in both *Unsted v Unsted* and *Scott v Numurkah Corporation*, the Court referred to allowing the parties the opportunity to deal with what has been experienced on the View if that is to form part of the evidence (ie. the *audi alterem partem* rule of natural justice), which is dealt with in more detail in D below.

Notwithstanding the reference to a 'tribunal' in the passage in *Scott v Numurkah Corporation* quoted above, some academic writers have questioned why there should be any such constraints on an arbitrator, who is usually chosen by the parties for his or her special knowledge, skill and expertise in the subject matter.

There is English authority which suggests that an arbitrator in a 'look and sniff' arbitrations (or similar arbitrations dealing with such matters as quality or valuation) may rely on his or her expertise in relation to what is experienced on a View. In *Jordeson & Co v Stora,* Branson J said:[7]

'Now, I think that the fact that the umpire was an expert in the timber trade and was appointed because he was such an expert must not be lost sight of. I think the parties must be taken to have assented to his using the knowledge which they chose him for possessing; I do not mean to say knowledge of special facts relating to a special or particular case, but that general knowledge of the timber trade which a man in his position would be bound to acquire. For example, had he gone and examined this cargo by himself and had looked and seen with his own eyes that it contained a large percentage of timber which to his own knowledge was faulty, I have no doubt that he could probably use that knowledge without having to do what a Judge might have to do, and that is, call in an expert to give evidence before him that those timbers were unsound and for particular reasons. It is not right to apply to that type or arbitration, the strict rules of law and evidence which are applied in this Court.'

Jordeson & Co v Stora has been referred to with approval in some decisions of judges at first

6 (1954) 91 CLR 288, at page 313

7 (1931) 41 Lloyds Law Reports 201, at pages 202 - 203

instance in Australia, sometimes in in *obiter dicta* remarks. [8]

The question remains whether this approach can be extended beyond 'look and sniff' arbitrations or similar arbitrations dealing with such matters as quality or valuation. Proponents of this view point to a passage in *Buckley v Bennell Design & Constructions Pty Ltd* , in which Barwick CJ said:[9]

> *'Unlike a juryman,* (an arbitrator) *is able to use his own expert knowledge of the subject matter. If sensibly chosen, he is selected because he has such knowledge and perhaps, as well, a certain expertise in its employment ... He may use a view to inform himself, not being limited as is judge and jury as to the use to be made of a view, assuming of course he makes the view in the presence of the parties of their representatives or does so in their absence with their concurrence.'*

While that passage has been cited by various academic writers, it is important to recognise that the remarks were made *obiter dicta*[10] in a dissenting judgement. They have not been approved in any subsequent reported decision in Australia, and should be treated with caution.

In contrast to a View in the strict sense, a court or tribunal may be offered a demonstration of some activity or the re-enactment of some event. Demonstrations and re-enactments are often regarded with suspicion by courts, because of the difficulty in accurately reproducing the circumstances in which the disputed event occurred.

C3 THE POSITION UNDER THE *EVIDENCE ACT 1995 (NSW)* AND THE *EVIDENCE ACT 1995 (C'TH)*

The Dictionary in the *Evidence Act 1995 (NSW)* provides that *'court'* includes *'any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.'* There is a similar definition in the Dictionary in the *Evidence Act 1995 (C'th)* [11]. Accordingly, a 'court' includes an arbitrator applying the rules of evidence.

In contrast to the common law position, the *Evidence Act 1995 (NSW)* and the *Evidence Act 1995 (C'th)* expressly provide that what is experienced on a View is 'real' evidence, on which the arbitrator may rely. The arbitrator is not limited to merely using that material for the purpose of

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8 See *Ajzner v Cartonlux Pty Ltd* [1972] VR 919 at pages 922 - 923, and *Hammond v Wolt* [1975] VR 108 at page 113 - *obiter dicta* is an observation by a judge made 'by the way', which is not binding as a precedent -

9 (1977 - 1978) 140 CLR 1, at pages 10 - 11

10 *Buckley v Bennell* concerned whether the award of an arbitrator was equivalent to a jury verdict, and not the use which an arbitrator may make of a View

11 The *Evidence Act 1995 (C'th)* applies in all federal courts and in the courts of the Australian Capital Territory

understanding the evidence, and accordingly may prefer what is experienced on the View to testimonial evidence subject to giving the parties a reasonable opportunity of dealing with that material.

Section 53 of the *Evidence Act 1995 (NSW)* and section 53 of the *Evidence Act 1995 (C'th)* are in identical terms, and provide as follows:

'53 Views

(1) A judge may, on application, order that a demonstration, experiment or inspection be held.

(2) A judge is not to make an order unless he or she is satisfied that:

(a) the parties will be given a reasonable opportunity to be present, and

(b) the judge and, if there is a jury, the jury will be present.

(3) Without limiting the matters that the judge may take into account in deciding whether to make an order, the judge is to take into account the following:

(a) whether the parties will be present,

(b) whether the demonstration, experiment or inspection will, in the court's opinion, assist the court in resolving issues of fact or understanding the evidence,

(c) the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time,

(d) in the case of a demonstration—the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated,

(e) in the case of an inspection—the extent to which the place or thing to be inspected has materially altered.

(4) The court (including, if there is a jury, the jury) is not to conduct an experiment in the course of its deliberations.

(5) This section does not apply in relation to the inspection of an exhibit by the court or, if there is a jury, by the jury.'

Section 54 of the *Evidence Act 1995 (NSW)* and section 54 of the *Evidence Act 1995 (C'th)* are in identical terms, providing as follows:

> ***'54 Views to be evidence***
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> *The court (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.'*

Under the *Evidence Act 1995 (NSW)* and the *Evidence Act 1995 (C'th)*, demonstrations are treated in exactly the same manner as Views, and the court or tribunal may draw reasonable inferences from what it observes during the demonstration.

It is noteworthy that, while s. 53 (2)(a) imposes a condition that *'the parties will be given a reasonable opportunity to be present'* on the making of an order for a View, neither s. 53 nor s. 54 expressly deal with allowing the parties the opportunity to deal with what has been experienced on the View (or demonstration). However, the requirement to do so would be implied from the express provisions of s. 53 (2)(a) & (3)(a) and the arbitrator's duty under the *Uniform Commercial Arbitration Acts* to comply with the rules of natural justice. This is dealt with in more detail in D below.

It should also be noted that s.53 of the *Evidence Act 1995 (NSW)* and s. 53 of the *Evidence Act 1995 (C'th)* each provide that a view (defined as meaning a demonstration, experiment or inspection) is not to be held except on application by a party, and unless the court (or tribunal) is satisfied that the parties will be given a reasonable opportunity to be present and that the judge (and jury, if any) or arbitrator(s) will also be present. The statutory provisions do not require that the parties are actually present, provided they have been given a reasonable opportunity to attend. Their absence will not affect the admissibility or cogency of evidence obtained from a view.

4 NATURAL JUSTICE

As noted above, s. 19(3) of the Uniform Commercial Arbitration Acts provides that, unless otherwise agreed in writing by the parties, an arbitrator or umpire *'may inform himself or herself in relation to any matter in such manner as the arbitrator or umpire thinks fit.'* However, this is subject to compliance with the rules of natural justice, which were summarised by Marks J in *Gas & Fuel Corporation of Victoria v Wood Hall Ltd.* in the following terms:[12]

> *'There are two rules or principles of natural justice... The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim - nemo judex in causa*

12 [1978] VR 385, at page 396

sua. The second principle is that the parties must be given adequate notice and opportunity to be heard. This in turn is expressed in the familiar Latin maxim - audi alteram partem. …… it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done..... Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties.'

Procedural Fairness

Two related issues which arise on a View are the extent to which the arbitrator may use his or her expertise concerning what was experienced on the View in reaching his or her decision, and the duty which an arbitrator has to put to the parties his or her conclusions based on that expertise. The decision of the English Court of Appeal in *Annie Fox & Ors v P J Wellfair Limited* [13] is instructive on these issues. In that case, the arbitrator was a practising barrister, chartered architect and chartered surveyor. The owners of a flat sought damages against the builders, which were said to arise out of defects in the block of flats. Only the owners appeared at the hearing. A number of experts gave evidence on behalf of the owners that the repairs would cost 93,000 pounds. That evidence was not contested due to the builder's non-appearance. The arbitrator awarded the owners only 13,000 pounds. The owners appealed, seeking to set aside the award on the grounds of misconduct. In an affidavit filed in the appeal proceedings, the arbitrator set out the basis of his decision, indicating that he had rejected much of the expert evidence given on behalf of the owner and had replaced this evidence with his own opinions. His award was set aside. The Court of Appeal held that he was in error in not communicating to the owners that he was rejecting the evidence led by them. The relevant principles were stated by Lord Denning M.R., with whom Dunn L.J. agreed, in the following terms:[14]

'I cannot think it right that the defendants should be in a better position by failing to turn up. Nor is it right that the arbitrator should do for the defendants what they could and should have done for themselves. His function is not to supply evidence for the defendants but to adjudicate upon the evidence given before him. He can and should use his special knowledge so as to understand the evidence that is given....and to appreciate the worth of all that he sees upon a view. But he cannot use his special knowledge - or at any rate he should not use it - so as to provide evidence on behalf of the defendants which they have not chosen to provide for themselves. For then he would be discharging the role of an impartial arbitrator and assuming the role of advocate for the defaulting side. At any rate he should not use his own knowledge to derogate from the evidence of the plaintiffs'

13 (1981) 2 Lloyds Reports 514
14 At pages 521 – 5 22

experts - without putting his own knowledge to them and giving them a chance of answering it and showing that his own view is wrong.....

I am afraid that the arbitrator fell into error here. He felt it was his duty to protect the interests of the unrepresented party - in much the same way as a Judge protects a litigant in person. But in a case like this I do not think it is the duty of the arbitrator to protect the interests of the unrepresented party. If defendants do not choose to turn up to protect themselves, it is no part of the arbitrator's duty to do it for them. In particular, he must not throw his own evidence into the scale on behalf of the unrepresented party - or use his own special knowledge for the benefit of the unrepresented party - at any rate he must not do so without giving the plaintiffs' experts a chance of dealing with it - for they may be able to persuade him that his own view is erroneous .'

Similar views were expressed by McInerney J of the Victorian Supreme Court in *Slapjums v City of Knox (No 1),* namely: [15]

'I am of the view that the arbitrator was not entitled to make a finding of fact based on evidence (collected by him on his own enquiries) not disclosed to the parties before judgment and which neither party had the opportunity of investigating, testing or answering.'

This is consistent with the so-called *'Rule in Browne v Dunn'*, in which it was said: [16]

'Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him, and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.'

Applying those principles, an arbitrator should notify the parties if the arbitrator experiences something on the View (or demonstration) which, based on his or her expertise, leads the arbitrator to an opinion which differs from the testimonial evidence led by the parties. The

15 [1978] VR 325, at page 341
16 (1893) 6R 67

arbitrator should disclose to the parties the opinion which he or she has formed from what was experienced on the View (or demonstration), and give the party (or parties) adversely affected by that opinion a reasonable opportunity of persuading the arbitrator to a contrary view.

An arbitrator who tells the parties that he or she intends to have a view, but in fact does not do so, may be guilty of misconduct in failing to afford procedural fairness, especially if the parties are thereby misled in their decisions about presentation of evidence. [17]

Reasonable Perception of Bias

In conducting a View, an arbitrator needs to be conscious that he or she acts in a manner which does not give rise to a reasonable apprehension of bias. Arrangements for the View need to be made (and followed) with this in mind, as can be seen from E below.

E PROCEDURAL ARRANGEMENTS FOR A VIEW

Before the View

There are three related preliminary matters which require consideration before a View is held, namely:

- the intended purpose for the View, namely as 'real' evidence, or merely to assist the arbitrator in understanding the testimonial evidence;

- whether a View should be held; and, if so

- when the View should be held.

In addition, if the *Evidence Act 1995 (NSW)* or the *Evidence Act 1995 (C'th)* apply, then the arbitrator must be satisfied that the parties will be given a reasonable opportunity to be present (as well as the arbitrator being present), and must give consideration to the various matters set out in s. 53 (3).

Even if the *Evidence Act 1995 (NSW)* or the *Evidence Act 1995 (C'th)* do not apply, it would be sensible for an arbitrator to give consideration to those sorts of matters in deciding whether or not a View should be held.

If the View is not to be treated as 'real ' evidence, then strictly speaking the arbitrator may decide whether or not to hold a View without obtaining the consent of all parties subject to:

17 See *Micklewright v Mullock* (1974) 232 Estates Gazette 337

- the arbitrator informing the parties of his or her proposal to hold a View, and allowing the parties to make submissions on the proposal [18] ; and

- there being evidence that the conditions existing at the time of the View are not materially different from those existing at the relevant time. [19]

It is desirable for the arbitrator to confirm with the parties beforehand the procedural arrangements proposed for the View, as well as the use which the arbitrator may make of what is experienced on the View.

The remaining preliminary issue concerns when to conduct the View. One factor which may be significant is whether the subject of the dispute will be covered up if the View is not undertaken earlier rather than later. Another matter requiring consideration is the extent to which what is viewed is self-explanatory, or whether some evidence may be required for the arbitrator to properly appreciate the significance of what is being viewed.

The purpose of the View will have a bearing on whether it is desirable to hold the View at the conclusion of the evidence, or at some earlier time. If the purpose of the View is merely to assist the arbitrator in understanding the evidence, then logically it may be preferable to wait until all of the evidence has been given. On the other hand, if the View is to be treated as 'real' evidence, then it would be desirable to hold it before the evidence has closed, to give the parties the opportunity to address anything which arises from the View.

My preference is to hold the View at a time reasonably early in the period fixed for the hearing. This gives me the opportunity of perusing the witness statements, expert reports, and other documents (for the purpose of understanding the respective positions of the parties), and allows the parties to address in oral evidence and submissions any matters arising from what is experienced on the View.

Conducting the View

Various procedural matters should be addressed and agreed (as far as possible) before the View, including:

(1) travel arrangements for the arbitrator to and from the View;

(2) the date and time of the View, who is to attend, and what they will do and say while the View is being conducted;

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18 See *Tito v Waddell* [1975] 3 All ER 997, at page 1000; and *Hodge v Williams* [1974] 47 SR (NSW) 489, at pages 492 - 493 (Full Court)

19 See *R v Alexander* [1979] VR 615 (Full Court), per McInerney and Murphy JJ at pages 629 - 630

(3) what is to be viewed;

(4) how the View is to be conducted, including the manner in which things will be brought to the attention of the arbitrator, or raised by the arbitrator;

(5) the extent, if any, to which a record is to be kept of the View (eg. photographs, transcript etc);

(6) the extent, if any, to which the arbitrator should provide the parties with a record of what was experienced on the View, and its perceived significance.

It should be borne in mind that circumstances may be such that one party may be at a disadvantage in its ability to point out matters on the View. For example, in domestic building disputes, it is not uncommon for a builder (or its expert) to be refused access by the owner to inspect alleged defects.

Although obviously less formal than a hearing, a View should be conducted in a business-like manner. To avoid any suggestion of perceived bias, the arbitrator should travel to and from the View either independently or with representatives of all parties (not just one party), and should ensure that the parties or their representatives are present during the whole of the View by the arbitrator.

Arbitrators should exercise caution in their interaction with the parties on a View, so that a charge of misconduct (even of the technical kind) cannot be made. This may mean that an arbitrator may have to curb oral exchanges at the site.

F SUMMARY

If what is experienced on the View is to be treated as 'real' evidence, by agreement of the parties or operation of law, it is essential that the arbitrator give the parties a reasonable opportunity to address any conclusion which the arbitrator draws from the View which differs from the testimonial evidence led by the parties, including an opportunity to lead further evidence and / or make further submissions to persuade the arbitrator to a contrary view.

Even if what is experienced on the View is to be treated only as something to assist the arbitrator in understanding the testimonial evidence, because there is a fine line between an arbitrator relying on his or her own expertise in evaluating the evidence (which is permissible) and taking account of what has been experienced on the View as evidence in its own right (impermissible), it would be prudent for the arbitrator to inform the parties of what the arbitrator has derived from the View, and to afford an opportunity for any party adversely affected to make further submissions or to lead further evidence to persuade the arbitrator to a contrary view.