Environmental justice: The cost barrier: Speech by Lord Justice Brooke at the David Hall Memorial Lecture

This is, I think, the third time I have been asked to give a memorial lecture to a society which operates on the frontiers of different disciplines that include the law. On each occasion I have given the lecture in memory of somebody I never knew. But David Hall will have been known to many of you, and from what I have read about him I can understand how lucky the Foundation was to have such a distinguished scientist as one of its founder members. In my experience we are all much too prone to live in our comfortable bunkers, whether law or medicine or science; to talk to our own kind; and not to venture out to confront matters of common interest with people who come from different disciplines but who share our values and concerns. David Hall was someone who broke that mould, and I am honoured to have been picked to give this fifth annual lecture in his memory.

I want to start by telling you a little about where I come from. When my father joined Mr Macmillan's cabinet nearly 50 years ago to become minister of housing and local government, with the lead responsibility in the field of planning, he had already had 25 years' experience of dealing with housing and land use issues, as a leading backroom policy-maker for a political party and as an elected member of a London borough council and the old LCC. When I was young I remember him talking to me about the problems created by pre-war ribbon development and the overwhelming importance of protecting the Green Belt round London to prevent uncontrolled urban sprawl. At a local level I remember going for walks with him on the weekends before a council meeting when we would visit the streets and parks where tree-planting or other environmental improvements were being proposed so that he could consider the merits of the proposals for himself. At a national level I remember him saying that he hoped he might be remembered as the man who saved the famous view of St Paul's from Hampstead Heath. He had spotted, as nobody else had done before the papers were placed before him, that a development proposal would block that view, and that the danger could be avoided by some fairly minor adjustments to the plans.

What I learned from him was the immense importance of attention to detail. There will always be the charismatic leaders, the blue-sky visionaries, who create newer and better worlds by the force of their personality. As a senior judge, I was lucky enough to serve under Harry Woolf for five years, and he had qualities that made us all feel better if we were working in his shade. But if a Churchill needed an Alanbrooke, so there will always be a need for people in the engine room, as well as people on the bridge, and the skills that are needed in the engine room are every bit as important if the ship is to stay afloat. Tonight, when I speak about problems affecting access to justice for the environment, I will not be indulging in blue-sky thinking. Instead I will be down in the engine room, telling you what the practical problems are and what has been done and might be done to mitigate some of them.

When I turn to my own experience, for my first 20 years at the Bar I had very little to do with what are now called environmental law cases. I appeared a few times for clients objecting to road schemes at local planning inquiries, and a few times for less meritorious clients appealing against enforcement notices, and that was about that. I was not aware of any particular problem about affordability. If people felt strongly enough about a roads scheme, they all pitched in to instruct solicitors and counsel and experts, and often a local amenity society would organise a whip-round, too. I see from an old fee-book that when I appeared for seven days for some private clients and the Kew Society in February 1972 to object to a scheme for widening the South Circular Road at Kew Bridge I was paid a lump sum of £400 for my services. One of my clients was a BBC television producer, and I remember him telling me, quite inaccurately, that I was a better advocate than Perry Mason. The important thing about these inquiries was that people could control their own expenditure and nobody was at risk of paying anyone else's costs unless they behaved unreasonably. Successful opposition to a scheme would often protect the value of people's properties, so that there would be a private financial incentive as well as a public interest incentive in raising money to instruct professional people to oppose an unwanted scheme.

It is hard to remember now that in those days a challenge to the grant of planning permission at High Court level was very problematical. Immediate parties always had a right to a statutory appeal on a point of

law. But if permission was granted for a development which was felt to be defective in point of law, we were back in the days of the old prerogative orders, with an obstacle course to confront and strict rules on standing. It was not until the reforms to judicial review in the late 1970s,[1] and the relaxation of the rules on standing in the early 1980s,[2] that the way really became open for legal challenges to the granting of permission in the courts. And even then there was the occasional hiccup over standing, like the *Rose Theatre* case in 1989.[3].

The judge said that an ordinary member of the public did not obtain a sufficient interest in such a decision simply by making an application to the Secretary of State and receiving his reply, and because the members of the newly formed trust company had no standing as individuals, their company also had no standing to apply for judicial review.

This all seems a bit dated now. It reminds me of what I described in another memorial lecture about the way we have changed our attitudes towards patients' rights.[4] As the twentieth century wore on, people became more and more impatient of the "Nanny knows best" or "Doctor knows best" syndrome. This intolerance of the idea that we should be happy to trust the way our rulers exercise the discretions given to them was one of the factors that led to the enactment of the Human Rights Act. Even if wide discretions were granted to governmental authorities, people now had legal rights which gave them standing to object in a court of law if they considered those rights were being violated.

But I have gone ahead too far, and I must go back now to the early 1980s and my experiences at the Sizewell Inquiry. In December 1979 the Government announced its plans to embark on a programme of building ten nuclear power stations, if the necessary consents and licences were forthcoming. In July 1981 the CEGB announced its proposal to build a "first of a kind" pressurised water reactor at Sizewell, and Sir Frank Layfield QC was appointed to conduct a statutory inquiry under the Electric Lighting Act 1909. The Three Mile Island incident had occurred recently, and there had been huge cost over-runs in the earlier nuclear power station programmes. Add to all this widespread public scepticism about the safety of nuclear power, and its historical links with the nuclear weapons programme, and it is not surprising that the Government promised a full, fair and thorough inquiry. It also announced a long list of issues into which the inspector had to inquire and report. It added that safety was to be paramount, whatever that meant.

It was easy to use words like these, but how was the aim to be achieved?

When the Inspector convened the first preliminary meeting, he could see that most of his leading contemporaries at the planning Bar were appearing for the big battalions. The Central Electricity Generating Board (CEGB), the National Nuclear Corporation, who would build the nuclear island, the Department of Energy, the Nuclear Installations Inspectorate, and the Suffolk County Council all instructed leading and junior counsel, backed by cohorts of solicitors, experts and other support resources paid for by the taxpayer or the electricity consumer. At this inquiry the local county council was adopting a neutral role, in contrast to the adversarial role adopted by Cumbria and Somerset at other nuclear inquiries, when they took forward the objectors' main points of challenge at public expense.

Opposed to them were a miscellaneous array of NGOs and private individuals who had no access to public funding, with Ken Livingstone's Greater London Council (GLC) playing a rather idiosyncratic role. Nearly all the other objectors had to raise funds by appeals to the public, coffee mornings, bring and buy sales and any other honest way of raising enough money to mount a respectable case against what they perceived to be a massive threat to the environment. After all, it was not one but ten nuclear power stations which were really in issue. There were other objectors, like a consortium of Yorkshire councils, which intervened to state their case on discrete issues, such as the threat that such a programme posed to the way of life of their mining community. And there came a time when the Inspector invited the nationalised Scottish electricity authority to present the case for continued investment in gas-cooled reactors.

But in general the scene at those early meetings resembled a cadre of Goliaths, with their clubs and battle axes, in the red corner, and a squad of Davids, with their slings and pea-shooters, in the blue corner. After hearing submissions from the parties the Inspector reported to the Minister that he could not undertake a fair inquiry on this basis. He transmitted the objectors' wish that a "pot" of public money should be

allocated to help them mount their cases with proper support. They had already divided among themselves different aspects of the opposition: the Campaign to Protect Rural England (CPRE) concentrated on opposing the economic case, the Friends of the Earth the nuclear safety case, and so on. But there would inevitably be a limit to what they could achieve with the sums they were likely to raise.

The Minister said “no”. I believe that the Department of Energy might have been prepared to help, in order to save the integrity of its inquiry, but the Department of the Environment, which was much more heavily involved in the public inquiry scene, was anxious that no kind of precedent should be created. The Inspector convened another meeting to help him decide what to do next.

This time he reported that he could not conduct an inquiry fairly on this basis if he were to be both inquisitor and judge. At the very least, he said, counsel to the inquiry must be appointed, so that he and his assessors would be able to deploy leading counsel to pursue the inquiries they wished to pursue.

And this is where I came in.

Sir Frank had structured the inquiry so that it would start in January 1983 and the first 40 days would be taken with the proposers’ witnesses reading their proofs of evidence and then answering questions posed to clarify what they were saying. When this stage was over the witnesses would return, one by one, to be cross-examined. About four days after the inquiry started, I was invited by the Treasury Solicitor to act as Counsel to the Inquiry. My job was not to present a case, but to pursue such lines of inquiry into the proposals as I, or the Inspector and his assessors, wished to pursue. In essence I had a roving remit on behalf of the sceptical British public to probe every aspect of the case that was being put forward for this massive new public investment in nuclear power. I remember meeting Harry Woolf at that time when he said it must be one of the most interesting tasks ever given to an English silk. I did not disagree.

This is not the occasion to say very much about the details. I started asking questions in April 1983 and I went on asking questions until the evidence stage of the Inquiry ended 21 months later. I was allotted junior counsel, a solicitor, and eventually an administrative assistant as well. I was also allowed access to expert advice on matters on which the Inspector and his assessors were not qualified to instruct me, or on which I needed additional help. Although one never earned a fortune when acting for the Crown, I am sure that the cost of my team’s involvement was greater than the cost of providing a pot of money for objectors would have been. On my last day at the Inquiry the Inspector was good enough to say that he did not know how he could possibly have conducted the Inquiry without me.

What is much more relevant in the present context is my impression of this method of ensuring appropriate protection for environmental issues at a major inquiry. In this country we are wedded to our love of adversarial confrontations at courts and inquiries. We think that inquisitorial methods of inquiry savour of a continental way of doing things, and that they aren’t likely to elicit all the facts or satisfy people that controversial proposals have been properly looked into. From my own experience I know that I could not have done that job properly if there had not been a substantial adversarial element on which I could build. I would read the expert evidence produced by the Town and County Planning Association (TCPA) or the CPRE or the Friends of the Earth or the Electricity Consumers’ Council. After questioning their witnesses I would have a foundation on which to continue to probe the merits of the proposals after those objectors had run out of money. The TCPA, for instance, was represented by its director, another David Hall, and they were grateful when I picked up points their witnesses had made and pressed them home when I was cross-examining relevant witnesses.

In many respects the Sizewell Inquiry may have been a one-off, because the subject- matter was so important and so difficult, the volume of public scepticism so intense, and the strength of the competing parties so lop-sided. The experience taught me, however, that when matters of great public interest are to be examined at a public inquiry, something extra may have to be done to level the playing-field if the public are to be satisfied that the inquiry process being conducted in their name is really full, fair and thorough, and not a public relations whitewash. I was interested to see that the Friend of the Earth reiterated recently the points they made to Sir Frank Layfield in 1982 about the need for public funding of objectors when the public interest warranted it.

This is all I want to say about some of the steps that may have to be taken to protect the integrity of the public inquiry process when the environment is at risk. I want now to return to litigation in which people feel they have to resort to the courts to protect the environment when they believe that adverse decisions have been taken unlawfully. When I use the word "unlawfully" I do not just mean that the decision-maker has got the law wrong. He may have got the procedure awry in a material respect, or reached an irrational decision, or failed to take into account material considerations or been influenced by immaterial considerations. Where human rights are involved, he may have got the balance disproportionately out of kilter when weighing the public interest against the interests of those who possess rights that are under threat. In a democracy governed by the rule of law, the courts are there to rule on questions like this, and the courts should be accessible to those who reasonably want to use them.

What are the obstacles to public access?

Three are immediately obvious. The cost of the courts (in terms of high court fees); the cost of lawyers (in terms of even higher professional fees); and, above all, the risk of having to pay one's opponent's costs if one loses, and the uncertainty at the outset of litigation as to how large those costs will be.

When I joined the Law Commission in January 1993, we were half way through a project concerned with procedural aspects of judicial review and statutory appeals. I remember very well the strength of the representations we received about the way in which people were afraid of bringing worthwhile public law cases to court for fear of adverse costs orders. In those days there were two recent decisions of the House of Lords which illuminated the rules on costs. In the *Aiden Shipping* case[5] it was decided that section 51 of the Supreme Court Act 1981 gave the court a wide power to order costs to be paid by a non-party if it considered it just to do so. In the case of *Steele Ford and Newton*[6] it was decided that a court had no power, without express permission from Parliament, to order a party's costs to be paid out of central funds even if it seemed just to do so.

We decided not to recommend any form of costs protection order at the outset of litigation. The ideas that costs follow the event in litigation in this country, and that nothing should be done to pre-empt the discretion of the "trial judge". were too deeply entrenched. Parliament had created the legal aid scheme which set out the parameters for state-funded aid to litigants and for their protection from adverse costs orders, and the latest Legal Aid Act was only six years old. But we did recommend that when public law litigation brought in the public interest was finally decided, the court should have power to order a party's costs to be paid out of central funds instead of by the other side. That recommendation has been ignored.

By now, the rules on standing were being relaxed all the time, and the value of the courts in developing public law had come to be better recognised. The courts could make orders giving effect to people's rights where ministers might be afraid to take action for fear of political consequences. And if Government insisted on an interpretation of legislation, particularly new legislation, which seemed to be quite simply wrong, it was only the courts that could put things right.

I think it was in Australia that the risks in environmental litigation first came to be articulated clearly. In 1989 Mr Justice Toohey, a member of the High Court of Australia, said, extra-judicially[7]:

"Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation) with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation."

Following this trumpet call it was in Australia that the jurisdiction to make a special costs order in an environmental case was first recognised at the highest appellate level. In New South Wales the legislature had relaxed the rules on standing in environmental cases, and Mr Oshlack, a concerned citizen, made a

legal challenge to a planning consent because of his worries about the threat to the habitat of the Koala bear. He complained that there had been no fauna impact statement before the consent was granted. Although his challenge failed, the trial judge made no order as to costs, and although this decision was set aside on appeal, it was restored by a 3-2 majority of the High Court of Australia.[8]

In our judgment in the *Corner House*[9] case we summarised some of the reasoning of the majority. In short they decided that the wide discretion on costs created by the New South Wales statute entitled the judge to take into account the following matters when he decided to depart from the ordinary rule on costs:

i. Mr Oshlack had nothing to gain from the litigation "other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna";
ii. A significant number of members of the public shared his stance, so that in that sense there was a public interest in the outcome of the litigation;
iii. The challenge had raised and resolved significant issues about the interpretation and future administration of statutory provisions relating to the protection of endangered fauna, and about the present and future administration of the development consent in question, which had implications for the council, the developer and the public.

Four years earlier the Privy Council had adopted a similar approach in the exercise of its own discretion as to the costs of an unsuccessful appeal by the New Zealand Maori Council.[10] It refused to make an order for costs in favour of the Government because the Maori Council had not been pursuing the proceedings out of any motive of private gain but in the interests of an important part of the heritage of New Zealand. The judgments in the New Zealand Court of Appeal had left an undesirable lack of clarity in that part of the law. The Privy Council made a similar order nine years later, when it dismissed an application for an interim injunction made by an Alliance of Conservation Non Governmental Organisations (NGOs) from Belize, on the grounds that it was a public interest case.[11]

What these judgments were doing was to identify the fact that public law litigation could give rise to different questions from private law litigation in those cases where the court considered that it was in the public interest that the case should have been heard and decided. The judgments focused, however, on the decision on costs at the end of a case. They did not touch on the need for anticipatory protection against an adverse costs order at the start of a case. In this area there have been two main developments since the Law Commission reported in 1994. First, in the field of legal aid, and then with protective costs orders.

The old Legal Aid Board faced the problem that it was not allowed to consider the public interest when deciding whether to fund litigation at public expense. It had to concentrate on the interests of the legally aided party, and it had to refuse a certificate if the benefit to that party would be slight even if the court's judgment was likely to clarify an important area of public law. In practice, genuinely important cases, like challenges on welfare benefits, would often receive funding because Area Committees would turn a Nelsonian blind eye to the letter of the regulations. Although the benefit to the individual litigant might be small, a favourable result could provide benefits for millions of people.

The Access to Justice Act 1999 changed all this. It required the preparation of a Funding Code which would determine entitlement to funding under the new Community Legal Service. One of the criteria that had to be included in the Code was the "public interest".[12] This posed problems, because the funds available to the new Legal Services Commission ("LSC") were limited, and they wanted to deploy them as usefully as possible. What emerged from a consultation process was a definition of "wider public interest" in these terms:

"The potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which normally flow from proceedings of the type in question)."

Whether an endangered Koala bear would count as an individual for the purposes of this definition I do not know. This definition focused on the facts of the particular case, and it did not refer to an "important issue of law". My Law Commission experience taught me that there are corners of the law that are of absorbing interest to lawyers, particularly academic lawyers, which do not affect very many people. The LSC has

adopted a very wide approach to what constitutes a benefit for the purposes of the Code. The word covers everything from direct financial gain to intangible issues such as quality of life and the protection of the environment.

The Commission also sets out to identify cases which have significant wider public interest. This exercise involves a value judgment which will take into account the number of people who may be affected by the case and the nature of the benefit. There are a number of important advantages if a case is placed in this category. For present purposes I will mention only three of them. Instead of requiring the prospects of success to be 50% or more, it is only necessary to assess the prospects of success as borderline. In other words, there has only to be a good arguable case. Next, the cost-benefit equation is different. For this type of case the Funding Code weighs up the public benefits against the cost, and these cases can now be funded even though the individual applicant is likely to receive no significant personal benefit in the outcome. And finally, where a case has significant wider public interest, the LSC has power to waive the statutory charge, so that if the individual litigant wins the case, the benefit he gains is not subjected to the usual charge in favour of the LSC when a case is won with LSC funding.

One further important change has been made. In a multi-party action the LSC can waive the usual financial eligibility levels and bring all the clients under the umbrella of legal aid, provided that public funding is restricted to the generic issues in the case.

These arrangements would not work if different people all over the country were trying to apply these quite subtle definitions. This is why the LSC's Public Interest Advisory Panel was set up. It is chaired by a member of the Commission, but it is mainly composed of independent members with a strong interest in public interest litigation. It meets about once every six weeks, and they are asked to decide whether a case does involve a wider public interest, and how that interest should be classified within the categories of "significant", "high" and "exceptional".

The LSC publishes a summary of most of the Panel's decisions on its website. In 2004 it considered 71 cases at its nine meetings. It categorised 28 of them as having significant wider public interest, and gave seven a "high" rating. On the other hand it rejected 36 cases and adjourned the rest. When I looked at the evidence on the website over a 3-year period, on my arithmetic the Panel rejected 105 cases, or just less than half the total number. On the other hand they categorised 116 as being of significant wider public interest, of which 7 were placed in a borderline category "significant to high", 30 were categorised as "high" and one as "high to exceptional". These more refined definitions may be called in aid in deciding priorities when cases get very expensive.

Only ten of these cases involved an environmental challenge. Nine of them were considered to have significant wider public interest, of which four received the "high" rating. These involved a judicial review (and a subsequent appeal) relating to the Environment Agency's identification of the safeguards required in the disposal of nuclear waste; a judicial review of the question whether there should be a public inquiry into the decommissioning of nuclear submarines; and a judicial review concerned with the modification of a waste management licence to allow the scrapping of warships at a waste management site. The five cases which did not attract a "high" categorisation included a group action arising from a nuisance caused to members of a local community by activities at a landfill site; a similar claim relating to odours escaping from sewage treatment works; representation at a public inquiry into the disposal of special waste in disused salt mines; judicial review of the grant by the Environment Agency of a waste management licence to permit storage of meat and bone meal; and a challenge to a planning decision to allow the building of a waste disposal incinerator.

There is one feature of the LSC's new funding policies which deserves particular attention. In a number of these cases success in the litigation will confer benefits not only on those who are seeking LSC funding but also on a wider body of people. For instance, if a court establishes that a claimant is entitled to damages for nuisance arising from unwelcome activities at a local landfill site or a local sewage treatment facility, the way will then be open for a lot of other people to benefit from that decision by putting their own claims forward. The Code allows legal representation to be refused altogether if there are other persons or bodies who might benefit from the proceedings who could reasonably be expected to bring or fund the cases themselves. On the whole, however, the LSC prefers to work in partnership with other bodies on a cost-

sharing basis. If no such body exists, the Commission may need to consider whether any funding should be provided by the members of the public who stand to benefit from the outcome of the case through the establishment of a local fighting fund.

The LSC has published details of the way it approaches these cases. If there does exist a reasonably ascertainable group of people who could reasonably be expected to contribute to the cost of the litigation, its broad starting point is that the group should fund half of the likely costs of the case at first instance, and the Community Legal Service ("CLS") fund should fund the remainder. This proportion may vary depending on the wealth (or otherwise) of the people in the fighting fund catchment pool, and whether they are likely to receive direct financial benefit from the proceedings. In these cases the LSC will not refuse funding outright, but will consider what contributions should be sought from others.

These arrangements are now only five years old, and the LSC appears to be exercising a good deal of imagination in deciding how and when to make their limited funding available. I find it striking that applications have been made in so few cases involving environmental challenges, and that some of these are simply group actions for personal injury damages after an environmental nuisance has been put right. I wonder if the Foundation might play a useful role in disseminating information about the LSC's new policies more widely. It would also be useful to know what the taxpayer's net outlay has been after these cases involving a significant wider public interest have been decided in court. If they are successful, the defendant should pay the costs, and the net cost to the taxpayer may be comparatively small. Indeed the LSC's statistics show that a net total of only about £7 million was spent in 2004 on funding representation in every type of public law case: there is a further sum of £15 million called "miscellaneous" which might conceivably embrace some environmental challenges. At all events, these figures show that the net amount of taxpayers' funds now spent on funding cases involving environmental protection in the courts is miniscule. Are our MPs aware of this?

A recent High Court decision[13] showed how the Code is being operated in practice in an environmental case which does not possess any special classification. Developers were granted permission for a scheme which would result in the closing of a popular local swimming pool in a low-income area of York. A local community group opposed the scheme, but they were never likely to be able to raise more than about £3,000 as a fighting fund for a High Court challenge. The LSC required them to contribute 50% of the likely cost, and to spend this money first before it would advance funding for the individual applicant it was willing to support. No local or national amenity group was willing to help.

The judge held that the LSC had been too rigid in the way it applied the Code. He said:

> "The appropriate approach … amounted to this. The area was a public interest claim. It was imminently due to be heard. It merited public funding. The challenge was essentially environmental. The ascertainable group was small. It could reasonably contribute to the costs. Its general financial resources were low. The nature of any benefit was intangible.
> It does seem to me that the code should be applied with a view to facilitating, not frustrating, the objects of the grant of funding. There is nothing to suggest it was. There is nothing, too, to suggest that [the LSC] had regard to the environmental nature of the claim for judicial review.
> In short, it does not seem to me that [the LSC] was entitled effectively to maintain [its] requirement of a contribution of 50%. Had [it] reasonably applied the guidance in the light of the factors to which I have referred, [it] would not have done so."

I want to return to this subject at the end of this lecture, but I must now say something about protective cost orders ("PCOs").

I wrote the Court of Appeal's judgment in the Corner House Research case[14] just over a year ago. In that case we conducted the first in-depth review by any higher court in this country of the jurisdiction to make "protective costs orders" ("PCOs") in public law cases concerned with matters of general public interest. We started by reviewing the practices in private litigation that enabled a court to direct that a party be indemnified as to his costs in advance from a "private fund". These cases might involve the funds of a company in an action brought by a minority shareholder, or the funds available to pension fund trustees in an action brought by beneficiaries of the trust. We said that public law proceedings raised rather different considerations. In the course of our judgment we reviewed the thinking on these issues in Canada, Ireland

and Australia.

In that case we benefited from the fact that the new Civil Procedure Rules have contributed greater transparency to the principles on which orders for costs may be made. Section 51 of the Supreme Court Act 1981 gives our courts “full power to determine by whom and to what extent the costs [of proceedings] are to be paid”. CPR 44.3(2) provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but the court has power to make a different order. CPR 44.3(4) states that in deciding what order (if any) to make about costs, the court must have regard to all the circumstances.
CPR 3.2(m), for its part, gives the court an unqualified power to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective." The overriding objective in CPR 1.1 includes, so far as is practicable, ensuring that the parties are on an equal footing, and ensuring that the case is dealt with fairly.

It was not argued that we had no jurisdiction to make a protective costs order. We considered that this concession was correctly made, because there was nothing in the House of Lords' interpretations of the wide words in section 51 of the 1981 Act or in CPR 44.3 to preclude the court from making such an order as to costs as affected only the parties to the case (as opposed to central funds) as it considered appropriate in the interests of justice. The important difference from private litigation is that in addition to the interests of the individual litigants there is a public interest in the elucidation of public law by the higher courts. One should not therefore necessarily expect identical principles to govern the incidence of costs in public law cases.

The first time the possibility of a PCO had been ventilated in this jurisdiction was in a judgment of Dyson J in 1999.[15] He made some suggestions at High Court level about the principles on which such orders might be made. He said that before making a PCO the court had to be satisfied, following short argument, that it had a sufficient appreciation of the merits of the claim that it could conclude that it was in the public interest to make the order.

In general, we adopted what he said, but we thought that he had set too high a hurdle. Often when a court has to take an important decision at an early stage of proceedings it has to do no more than conclude that the applicant's case has a real (as opposed to a fanciful) prospect of success, or that its case is "properly arguable". To place the threshold any higher was to invite time-consuming and expensive ancillary litigation. We said that in future no PCO should be made unless the judge considered that the application for judicial review had a real prospect of success and that it was in the public interest to make the order.

We therefore restated the governing principles in these terms:

1. A protective costs order might be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court was satisfied that:
    i. The issues raised were of general public importance;
    ii. The public interest required that those issues should be resolved;
    iii. The applicant had no private interest in the outcome of the case;
    iv. Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that were likely to be involved it was fair and just to make the order;
    v. If the order was not made the applicant would probably discontinue the proceedings and would be acting reasonably in so doing.
2. If those acting for the applicant were doing so without a fee this would be likely to enhance the merits of the application for a PCO.
3. It was for the court, in its discretion, to decide whether it was fair and just to make the order in the light of these considerations.

We were greatly helped by the research into the law across the world that had been carried out pro bono by counsel for the Public Law Project. I have always regarded what we said in that case as just constituting a beginning in a sensitive area in which it would be dangerous to try and move too far too fast. Our judgment, I know, provided a stimulus to the work of a working group chaired by Lord Justice Maurice Kay,

and the debate stimulated by the Corner House judgment is bound to continue.

We also said that it was likely that a cost capping order that limited the recoverability of the claimants' costs (if they won) would be required in every case in which their lawyers were not acting pro bono, and we suggested some guidance about this. We added that we did not consider that an English court would have any power to make the type of order which was made in a recent case in the Supreme Court of Canada whereby the defendants were obliged to finance the claimant's costs at first instance as the litigation proceeded.[16] This would be to trespass into judicial legislation in a way which the House of Lords has forbidden.[17]

I have been speaking about recent developments generally. In an environmental law context the 1998 Aarhus Convention should have changed things more than it has. Kofi Annan has described the Convention as the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations. Its full title describes it as a Convention on Access to Information, Public Participation and Decision-making and Access to Justice. It is Article 9, entitled Access to Justice, that is important in the context of this lecture. Article 9(2) creates a right of access to a review procedure before a court of law or other independent or impartial body to challenge the substantive and procedural legality of an environmental decision of a type mentioned in the Convention. Article 9(4) speaks of a duty to ensure that such procedures provide adequate and effective remedies and are fair, equitable, and not prohibitively expensive. And Article 9(5) imposes an obligation to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. The preamble to the Convention articulates concern that effective judicial mechanisms should be available to the public in environmental cases, so that its legitimate interests are protected and the law is enforced.

In 1999 Mr Justice Carnwath, who has done so much to promote the cause of environmental justice, said in a published article[18]:

> "Litigation through the Courts is prohibitively expensive for most people unless they are poor enough to qualify for legal aid, or rich enough to be able to undertake an open-ended commitment to expenditure running to tens or hundreds of thousands of pounds."

He said he was confident that the creation of an environmental court, or tribunal, was an idea whose time would come.

Although Dyson J had identified the possibility of making a PCO in 1999, very little was achieved in this direction over the next five years, to a great extent because he set the entry level quite high - the court had to embark on an examination of the likelihood that the case would succeed, and those who thought of seeking an order was deterred by the risk of having to pay the costs of the application if they failed. In 2002, however, the Divisional Court imposed a cap of £25,000 on the costs which CND would have to pay if it failed in a legal challenge to the Government's policies in Iraq.[19]

Over these years there had been increasing interest in developing different ways of regulating the cost of litigation more fairly. The Civil Justice Council set its face against a general cost-capping regime, while working towards the creation of a fixed fees regime in certain areas of bulk volume, low value personal injuries litigation.

Other options under consideration included:

1. the retention of our arrangements whereby a successful party can recover its reasonable or proportionate costs at the end of the case:
2. the adoption of arrangements piloted in New Brunswick, whereby a successful litigant can expect to recover 40% of its solicitor-client costs;
3. the abolition of what is called "fee-shifting" in particular types of cases, or in relation to particular types of litigant. I have seen discussion of "one-way fee shifting", for instance, in connection with group actions, representative actions and public law cases;
4. permitting no cost recovery at all unless a party has behaved unreasonably or the proceedings are an

abuse of process.

In 2003 the Foundation published its report on Civil Law Aspects of Environmental Justice.[20] The author analysed hundreds of potential claims that did not make it to court. He concluded that in 31% of these cases it was the cost of pursuing a legal action which was the main reason why the challenge was not advanced. The clients had been advised that they had a reasonable case, but they abandoned it when told about the likely costs. The study also revealed that only 30 solicitors' firms in England and Wales had a full LSC franchise for public law. And because of the perceived lack of profit in environmental law, UK lawyers in general had little interest in it.

A study published by University College, London, at about the same time[21] considered a number of environmental law judicial review challenges in depth, and said that only 7% of them had had the benefit of public funding. An article written by authors associated by Liberty at the end of 2003 reawakened interest in protective costs orders.[22] They suggested that the phrase "public interest litigation" might be defined, in a non-human rights context, as litigation involving a real (as opposed to a manufactured or academic) challenge to legislative policy or practice of wide or potentially wide application or consequence, or exciting wide controversy.

In the same year the European Parliament and the EU Council issued a directive[23] to give teeth to the features of the Aarhus Convention that are concerned with environmental impact assessments. Member States were obliged to implement this directive by 25th June 2005, and it created an obligation to provide a review procedure before a court or other independent and impartial body that would be fair, equitable, timely and not prohibitively expensive. When the UK ratified the Convention in February 2005, DEFRA announced that this country's administrative and judicial systems were fully compliant with the requirements on access to review proceedings for members of the public.

In 2004 the report of the Environmental Justice Project[24] took things one stage further. One of its suggestions was that a judge might be given power to certify that an environmental challenge was within the scope of the Aarhus Convention. If a certificate was issued, he might then order that each side should bear its own costs and waive court fees. He might also waive the need for a cross-undertaking in damages if persuaded to issue an injunction to freeze the position until the challenge was heard. The report asserted that the improvements most urgently needed related to costs and interim relief.

The authors said that on average 13 environmental law judicial review cases had been brought in the High Court every year since 1990. There was now a bit of a plateau. The success rates had not been particularly high, compared with the general record for judicial review challenges. Success in recent years seemed to centre round the treatment of environmental impact assessments. Respondents believed that the current costs rules represented the single largest barrier to environmental justice. Concerns centred on the rule that costs followed the event, the paucity of public funding for environmental cases, and the size of lawyers' fees. One very experienced solicitor reported that uncertainty about costs caused great difficulty for all his firm's non-publicly funded clients in all domestic courts. A case was quoted in which a private firm of solicitors on the other side had quoted a figure of over £100,000 for a single day's hearing in the High Court over a dispute about the approval of an out of town college. A similar figure was quoted for a case in which the Friends of the Earth had been recently involved.

All this thinking was brought together in June 2004 by the so-called Coalition for Access to Justice for the Environment, in which the Foundation played a prominent role. The Coalition asserted that the cost of enforcing environmental law in England and Wales had been too high for too long for most people and organisations. It was generally regarded as the highest in Europe. Expense and uncertainty about costs were again identified among the greatest problems. In the short term rights of access to justice could not be enforced, and potentially unlawful decisions were going forward for lack of a suitably wealthy challenger. In the longer term people would feel disempowered.

In discussing a "public interest" case that might qualify for an "Aarhus certificate" the Coalition distinguished between a case brought exclusively to protect a private interest (such as an interest in land) and a case brought wholly or partly to protect or advance a wider public interest. If a case in the latter

category was regarded as arguable, the court might have three options. It might direct in advance that there would be no order as to costs if the applicant lost. It might make an order capping the costs he/she might be ordered to pay. Exceptionally, it might order that an unsuccessful applicant might recover costs because an important point of wide public importance had been clarified by the court's judgment. It observed that environmental decisions usually affected large numbers of people now and for generations to come, as well as the environment itself. If the court certified that bringing the case was in the general public interest, it was claimed that it must be right that the cost of meeting that general public interest be met from the public purse.

At a seminar organised by the Coalition at the House of Commons in July 2004 a leading environmental law solicitor said that problems never really arose over his firm's own costs: the problem always arose over the risks associated with the other side's costs. "Affordability" of access to justice in an environmental law context always meant being able to afford, or to be protected against, the other side's claim if the case failed. He distinguished between the modest costs usually incurred by the Treasury Solicitor and most local authorities, and the costs incurred when developers instructed private firms of solicitors to protect their interests.

In his experience conditional fee agreements were not really suitable in this class of litigation because of the difficulty in obtaining "after the event" insurance at an acceptable cost. It seemed odd to him that someone poor enough to obtain LSC funding enjoyed complete costs protection, whereas someone else who had two thousand pounds too much to qualify for funding could not obtain any costs protection at all and had to put all his assets at risk if he/she chose to proceed.

So much for the scene two years ago. What has happened since then?

I am not aware of any Government initiative to improve the situation, and as you will know the money available to fund civil litigation has been decimated in the last ten years by the uncontrolled increase in LSC expenditure elsewhere, particularly on criminal legal aid. To make matters worse, the Treasury still insists that HM Courts Service fully covers the cost of providing the judges and the courts from fee income, even in public law litigation brought in the public interest, and there are moves afoot to increase court fees by a substantial amount.[25]

So far as the judges are concerned, in addition to the Corner House judgment, the Court of Appeal has made it clear in the King case that the courts do have power to make a cost capping order if it seems just to do so.[26] In Burkett[27] we referred to the size of the legal fees being claimed by each side, and expressed concern whether the Aarhus ideals could ever be achieved if fees like these were commonplace. In Ewing[28] we explained that the initial acknowledgment of service in response to a judicial review claim must be a low cost affair. And in Arkin,[29] we said that it was fair that private funders who were to receive an agreed share of the spoils, if successful, should be liable to pay the other side a sum equal to, but not greater, than the contribution they had made to their own side's costs.

I was involved in all these decisions, and although I am retiring this summer, it is possible that I may return to decide future cases as a retired judge, and I must be careful what I say. But I think I may safely contribute a few final thoughts:

i. The problems inherent in achieving access to justice in environmental cases are now well documented. They are available to be taken into account as material considerations by judges when exercising their discretion on costs when a wider public interest is clearly involved;
ii. The making of advance cost capping orders and PCOs has now been given a fair judicial wind;
iii. In a group claim the idea that an individual claimant's liability for costs can properly be limited to the financial contribution he/she has made to his/her own side's costs now has a respectable pedigree;
iv. Whether or not EU directives do more to require implementation of Article 9(4) of the Aarhus Convention more generally, there must surely be room for argument that the courts are entitled to take the existence of this international obligation into account when exercising their discretion as to costs orders;
v. There is surely scope for the Court of Appeal to develop the idea that a PCO may be made even

where the applicant has a private interest, so long as an appropriate formula can be developed as to the potential liability for the other side's costs it is fair that that applicant should bear;

vi. The public-private costs-sharing concepts now being developed by the LSC are surely fairer and offer more promise for the future than the old regime whereby one litigant on income support could mount a successful legal challenge on behalf of hundreds of people with no potential liability falling on any of them if the litigation failed.

It is perhaps appropriate to end this lecture by noting that in the recent Barker case[30] the European Court of Justice has ruled, in publicly funded litigation, that even where a grant of outline planning permission has been hotly contested at Court of Appeal level, with no complaint at all being made about the absence of an environmental impact assessment, that issue must be considered again, if it is raised, at the stage of detailed permission. This just shows what can be achieved by resort to the courts, and how important it is for the environment that access to the courts should not be prohibitively expensive.

Footnote:

1. The reforms to RSC Order 53, implementing recommendations by the Law Commission, came into effect in 1977, followed by the enactment of s 31 of the Supreme Court Act 1981 four years later. [Back to footnote 1]

2. R v Inland Revenue Commissioners, ex p National Federation of Small and Self-Employed Businesses Ltd [1982] AC 617. [Back to footnote 2]

3. [1990] 1 Q.B. 504. A trust company had been created to preserve the remains of the Rose Theatre in Southwark, which had been unearthed in the course of a commercial development. Today we would take it for granted that the Trust would be treated as having standing to mount a High Court challenge to a refusal to list the site, but this was not the view taken in 1989. The judge devoted most of his judgment to rejecting the Trust's challenge on its merits. But he ended it by saying that the Secretary of State's decision not to schedule the remains of the theatre was a governmental decision in respect of which members of the public had insufficient interest to be entitled to apply for judicial review. [Back to footnote 3]

4. Lord Justice Brooke, Patients, Doctors and the Law (1963-2003): A few Reflections, Medico Legal Journal, Vol 72, Part 1, p 17 (2004), [Back to footnote 4]

5. Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965. [Back to footnote 5]

6. Steele Ford and Newton v CPS (No 2) [1994] 1 AC 22 [Back to footnote 6]

7. In his address to a conference of the National Environmental Law Association [Back to footnote 7]

8. Oshlack v Richmond River Council [1998] HCA 11. [Back to footnote 8]

9. R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192. [Back to footnote 9]

10. New Zealand Maori Council v Attorney-General of New Zealand [1994] 1 AC 466 [Back to footnote 10]

11. The Privy Council's opinion is reported as Belize Alliance of Conservation Non-Governmental Organisations v. Department of the Environment & Anor (Belize) [2003] UKPC 63. [Back to footnote 11]

12. Access to Justice Act 1999, s 8(2)(g). [Back to footnote 12]

13. R (Anderson) v Legal Services Commission [2006] EWHC 617 (Admin), Goldring J. [Back to footnote 13]

14. R (Corner House Research) v Secretary of State for Trade & Industry [2005] EWCA Civ 192. [Back to footnote 14]

15. R v Lord Chancellor ex p Child Poverty Action Group [1999] 1 WLR 347. [Back to footnote 15]

16. British Columbia (Minister of Forests) v Okanagan Indian Band (2003) 114 CRR 2d 108. [Back to footnote 16]

17. In Steele Ford & Newton v Crown Prosecution Service (No.2) [1994] 1 AC 22. [Back to footnote 17]

18. Sir Robert Carnwath: Environmental litigation: A way though the maze? (1999) JEL Vol 11, p 3, [Back to footnote 18]

19. R (CND) v Prime Minister [2002] EWHC 2712 (Admin). [Back to footnote 19]

20. P. Stookes, Civil law aspects of environmental justice, Environmental Law Foundation (2003). [Back to footnote 20]

21. R.Macrory and M.Woods, Modernising Environmental Justice: Regulation and the role of an environmental tribunal, UCL (2003). [Back to footnote 21]

22. Whose cost the public interest? S.Chakrabarti, C.Gallagher and J.Stephens (Public Law, Winter 2003). [Back to footnote 22]

23. Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 06/61/EC. [Back to footnote 23]

24. Report of the Environmental Justice Project (London, March 2004). [Back to footnote 24]

25. See H.M.Courts Service's Business Strategy, February 2006. [Back to footnote 25]

26. King v Telegraph Group Ltd [2004] EWCA Civ 613. [Back to footnote 26]

27. R (Burkett) v Hammersmith & Fulham LBC [2004] EWCA Civ 134. [Back to footnote 27]

28. R (Ewing) v Office of Deputy Prime Minister [2005] EWCA Civ 1583. [Back to footnote 28]

29. Arkin v Borchard Lines Ltd [2005] EWCA Civ 655. [Back to footnote 29]

30. Barker v Bromley LBC [2006] EUECJ C-290/03 (4th May 2006). [Back]