



International Oil Pollution
Compensation Funds

Agenda Item 3	IOPC/OCT22/3/5	
Date	4 August 2022	
Original	English	
1992 Fund Assembly	92A27	
1992 Fund Executive Committee	92EC79	●
Supplementary Fund Assembly	SA19	

INCIDENTS INVOLVING THE IOPC FUNDS — 1992 FUND

REDFFERM

Note by the Secretariat

Objective of document:	To inform the 1992 Fund Executive Committee of the latest developments regarding the incident.
Summary:	<p>In January 2012, the Secretariat was informed of an incident which occurred in March 2009 at Tin Can Island, Lagos, Nigeria.</p> <p>The barge <i>Redfferm</i> sank following a transshipment operation from the tanker <i>MT Concep</i>. The <i>Redfferm</i> spilled an unknown quantity of cargo of low pour fuel oil (LPFO) into the waters surrounding the site, which then impacted upon the neighbouring Tin Can Island area.</p> <p>A claim for USD 26.25 million was filed in March 2012 against, <i>inter alia</i>, the 1992 Fund by 102 communities allegedly affected by the incident. At its October 2013 session, the Director informed the 1992 Fund Executive Committee, that due to the difficulties in assessing the losses of victims from an incident which occurred almost three years before the 1992 Fund was first informed about it, the Director regretted that he could not recommend that he be instructed to make payment of compensation to the claimants in respect of this incident.</p> <p>In February 2014, the Secretariat wrote to the claimants rejecting their claim on the following grounds:</p> <ul style="list-style-type: none"> (a) the barge <i>Redfferm</i> was not a ‘ship’ under Article I(1) of the 1992 Civil Liability Convention (CLC); (b) there was a large number of discrepancies between the claimed losses and other sources of information; and (c) there was a lack of information submitted to prove the claimants’ identities and occupations. <p>The legal proceedings in Nigeria are continuing. In early May 2018, Thames Shipping Agency Ltd (Thames Shipping) (agent of both the <i>MT Concep</i> and the <i>Redfferm</i>) filed an application seeking a stay of the proceedings pending in the Federal High Court, arguing that their appeal related to a jurisdictional issue which should be heard in the Court of Appeal. The Court of Appeal subsequently adjourned the hearing of</p>

Thames Shipping's application until January 2019. Subsequent hearings were delayed by the COVID-19 pandemic and by a judicial strike.

Also, in May 2018, the claimants filed an amended statement of claim, which increased the claim from the previously filed total of USD 26.25 million to USD 92.26 million. In view of the amended statement of claim filed by the claimants, the 1992 Fund was obliged to file a defence.

Recent developments:

During 2021, there were no substantive developments. However, in early 2022, a First Instance Judge delivered summary judgment against the first and second defendants (the owners /charterers of the *MT Concep* and the owners/charterers of the barge *Redfferm* respectively) and granted the claimants their claim in the sum of USD 92.26 million. The Judge also awarded the claimants the sum of USD 5 million as general damages. The summary judgment failed to take account of the various defences and counter affidavits filed by several of the defendants including the 1992 Fund.

In response, the first and second defendants filed appeals to set aside the summary judgment on the grounds of fraud. Before these appeals were heard, the claimants filed, and were granted by the Judge, garnishee proceedings against all the defendants including the 1992 Fund^{<1>}. The 1992 Fund's lawyers filed proceedings to remove the 1992 Fund from the list covered by the garnishee proceedings.

1992 Fund also currently awaits notification of the dates set for hearing Thames Shipping's application at the Court of Appeal and for the continuation of the trial at the Federal High Court.

Relevant documents:

The online *Redfferm* incident report can be found via the Incidents section of the IOPC Funds website.

Action to be taken: 1992 Fund Executive Committee

Information to be noted.

1 Summary of incident

Ship	<i>Redfferm</i>
Date of incident	30.03.2009
Place of incident	Tin Can Island, Lagos, Nigeria
Cause of incident	Barge sinking following transshipment operation
Quantity of oil spilled	Unknown. Reports range from the residues of oil on board to between 100–650 tonnes.
Area affected	Tin Can Island, Lagos, Nigeria
Flag State of ship	Nigeria
Gross tonnage	430 GT
P&I insurer	Not insured or unknown
CLC limit	SDR 4.51 million (USD 5.99 million) ^{<2>}
STOPIA/TOPIA applicable	N/A
CLC + Fund limit	SDR 203 million (USD 269.54 million)

^{<1>} The purpose of the garnishee proceedings is to list all the bank in which the defendants may be expected to have funds and to compel them to disclose what funds they have and ultimately, to satisfy the judgment debt.

^{<2>} The exchange rate used in this document as at 30 June 2022 is SDR 1 = USD 1.327780.

Compensation paid	None paid to date
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The background information to this incident is summarised above and an analysis of the claims submitted and the reasons for rejection of the claim, is provided in more detail in the online *Redfferm* incident report.

2 Claims for compensation

- 2.1 The only claim submitted to the 1992 Fund as at July 2022 was the claim filed in March 2012, on behalf of 102 communities, for USD 26.25 million^{<3>}. In May 2018, the claimants were granted leave to amend their statement of claim. The amended statement of claim increased the claim from the previously submitted total of USD 26.25 million to USD 92.26 million, but no calculations or evidence of the losses claimed was presented.
- 2.2 The claim filed at court in March 2012 is not time-barred pursuant to Article VIII of the 1992 Civil Liability Convention (CLC).
- 2.3 The details of the valuations submitted to the 1992 Fund are shown in the online *Redfferm* incident report.

Reasons for rejection of claim

- 2.4 Following a full analysis of the claim submitted by the claimants conducted by the 1992 Fund's experts, in February 2014, the 1992 Fund wrote to the claimants' representative rejecting the claims submitted on the following grounds:
- (a) the barge *Redfferm* was not a 'ship' under Article I(1) of the 1992 CLC;
 - (b) there were a large number of discrepancies between the claimed losses and other sources of information on the number of items of fishing gear in the Lagos lagoon area; and
 - (c) there was a lack of information submitted to prove the claimants' identities and occupations.
- 2.5 Further information on the reasons for the rejection of the claim is provided in more detail in the online *Redfferm* incident report.

3 Civil proceedings

- 3.1 In March 2012, a claim for USD 26.25 million was filed by the lawyer representing 102 communities allegedly affected by the spill against the owner of *MT Concep*, the owner of *Redfferm*, Thames Shipping Agency Ltd (Thames Shipping) and the 1992 Fund.
- 3.2 The claim filed at court on behalf of the 102 communities is comprised of: claims for clean-up operations and pollution prevention measures (USD 1.5 million); claims for property damage (USD 2.5 million); claims for economic loss in the fisheries, mariculture and fish processing sectors (USD 10 million); claims for economic loss in the tourism sector (USD 1.5 million); claims for environmental damages (USD 750 000); and general damages (USD 10 million).
- 3.3 In February 2013, the 1992 Fund applied to be removed from the proceedings as a defendant and replaced as an intervenor on the basis that primary liability for the spill rested with the owner of the

<3> Before the claim was filed at court, the claimants' lawyer stated that the claim amounted to USD 16.25 million but when the claim was filed at court, this had increased to USD 26.25 million. This was subsequently amended to USD 92.26 million in May 2018.

Redfferm. The claimants' lawyer agreed to stay the proceedings against the 1992 Fund, in order that the claims assessment process could commence without the need for the 1992 Fund to simultaneously defend a legal action. Later, however, the claimants' lawyer opposed the 1992 Fund's application to be removed as a defendant and replaced as an intervenor. At first instance, the Judge denied the 1992 Fund's application, so the 1992 Fund appealed the judgment.

- 3.4 In September 2013, the Court sat for a hearing of an application by Thames Shipping, the agent of the owner of the barge *Redfferm*, to set aside service of the writ claiming that it was defective. In October 2013, the Judge ruled against Thames Shipping. In November 2013, Thames Shipping filed an appeal against the ruling.
- 3.5 The Judge also stayed the proceedings pending the determination of the 1992 Fund's appeal against the first instance ruling in which the Judge had refused to remove the 1992 Fund as a defendant and replace it as an intervenor.
- 3.6 Subsequently, on a number of occasions throughout 2014 and 2015, the 1992 Fund's lawyers wrote to the Registrar of the Court of Appeal, requesting that the 1992 Fund's appeal against the first instance ruling be listed for a hearing date. Thereafter, the legal proceedings continued very slowly with no further substantive legal steps taken during 2016 or 2017, apart from the Court of Appeal referring the case back to the Federal High Court for continuation of the trial.
- 3.7 As a result of the transfer to the Federal High Court, and since the Court of Appeal declined to hear the 1992 Fund's appeal against the joinder of the 1992 Fund as a defendant in the case, the 1992 Fund was obliged to file a defence to the claim.
- 3.8 However, before the defence was filed, in early May 2018 Thames Shipping filed an application seeking a stay of the proceedings pending in the Federal High Court. The matter was heard on 7 May 2018 and related to an appeal earlier filed by Thames Shipping against a Ruling of the Federal High Court. The application argued that Thames Shipping's appeal related to a jurisdictional issue and, therefore, the Court of Appeal should entertain it. Thereafter, the Court of Appeal adjourned the hearing of the application until January 2019.
- 3.9 Subsequently, at a hearing of the Federal High Court on 10 May 2018, the claimants were granted leave to amend their statement of claim. The amended statement of claim against the owner of *MT Concep*, the owner of *Redfferm*, Thames Shipping and the 1992 Fund, repeated its allegations that the claimants had suffered economic loss under various heads of claim as follows: claims for costs of clean up and pollution prevention measures; claims for properties damaged; claims for economic loss in the fisheries mariculture and fish processing sectors; and claims for economic loss. The amended statement of claim increased the claim from the previously submitted total of USD 26.25 million to USD 92.26 million. No calculations or evidence of the losses claimed has been presented.
- 3.10 The 1992 Fund filed a defence stating, *inter alia*, that the barge *Redfferm* was not a 'ship' under Article I(1) of the 1992 CLC and that the 1992 Fund had no liability.
- 3.11 During 2019, the case came up in court for a number of procedural issues but there were no substantive developments to report.
- 3.12 In February 2020, the matter was listed for trial but was adjourned until March 2020 due to faulty recording equipment. In March 2020, the claimants made an application for a default judgment against the owner/charterer of the *Redfferm*. The case was adjourned until April 2020, but the court hearing did not take place due to the impact of the COVID-19 pandemic. The case was adjourned until October 2020, but the Court did not sit, and the case was further adjourned until December 2020, for hearing of the claimant's Motion for judgment.

3.13 Regrettably, the claimants' lawyer failed to appear for the court hearing in December 2020 and the case was adjourned until March 2021 but due to the transfer of the presiding Judge to a different Judicial division, he was unable to hear all the matters listed in the timetable, except for judgments and rulings, so the case was adjourned until June 2021 for hearing of pending applications.

3.14 However, in June 2021, the Court did not sit because of a strike by the Judiciary Staff Union of Nigeria.

Developments since November 2021

3.15 In February 2022, a First Instance Judge delivered summary judgment against the owner/charterer of the *MT Concep* (the first defendant) and the owner/charterer of the barge *Redffferm* (the second defendant) and granted the claimants their claim in the sum of USD 92.26 million. The Judge also awarded the claimants USD 5 million as 'general damages'. In his judgment, the Judge did not refer to the Memorandum of Appearance and Statement of Defence filed by the first defendant, nor did he refer to the counter-affidavit filed by the 1992 Fund in opposition to the claimants' application for final judgment against the first and second defendants.

3.16 The first and second defendants filed appeals to set aside the summary judgment on the grounds of fraud on the basis that the Court had been misled into believing that the first defendant had failed to enter appearance or file a Defence, when it had in fact done both.

3.17 In early June 2022, the claimants' lawyer filed, and the Judge ordered, garnishee proceedings against all the defendants including the 1992 Fund, in pursuance of the summary judgment against the first and second defendants. The 1992 Fund's lawyer filed pleadings seeking to remove the 1992 Fund from the list. A decision is awaited.

3.18 The 1992 Fund's lawyers have advised that at present there are a number of scenarios which may occur but the 1992 Fund's lawyers have advised that it is too early to say with any degree of certainty which of the following scenarios will occur:

- a) The 1992 Fund is **at liberty at any stage to apply to be struck out of the proceedings on the grounds that there is no nexus between the 1992 Fund and the alleged damage**. The 1992 Fund can **argue that judgment cannot be given against the 1992 Fund for the sums claimed by the claimants**. However, if the 1992 Fund is struck out from the proceedings, the 1992 Fund will take no further part in the proceedings since it was unsuccessful in its attempt to be listed only as an intervener. Accordingly, the 1992 Fund would not be entitled to cross-examine the claimants on the damages claimed.
- b) Alternatively, if, the judgment against the first defendant is eventually upheld for the damages claimed and the claimants seek enforcement against the 1992 Fund in the erroneous belief that the 1992 Fund should settle the judgment sum, then the arguments, *inter alia*, that the barge is not a 'ship' within Article 1(I) of the 1992 CLC, will be used as part of the 1992 Fund's defence, as has been already pleaded.
- c) If the first and second defendants' pleadings and appeals succeed, and the summary judgment is set aside, then the Judge will have to set the matter down for trial and the matters in scenario a) above will arise.
- d) If, at the end of the trial, the Judge holds that the 1992 Fund is liable, the 1992 Fund shall have no option but to appeal.

3.19 The Secretariat has sought advice from its Nigerian lawyers, and has been provided with assurance that the 1992 Fund still retains its arguments regarding the applicability of Article 1(I) of the 1992 CLC.

4 **Director's considerations**

- 4.1 The Director notes that a range of scenarios regarding the future course of the legal proceedings exist and that the 1992 Fund has already filed a defence, rejecting the claims submitted on the grounds that the barge *Redfferm* was not a ship within Article 1(I) of the 1992 CLC.
- 4.2 The Director continues to follow the legal developments closely bearing in mind the potential effects on the 1992 Fund.

5 **Action to be taken**

1992 Fund Executive Committee

The 1992 Fund Executive Committee is invited to take note of the information contained in this document.
