



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
63rd session
Agenda item 3

71FUND/EXC.63/3
24 March 2000
Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

BRAER

Note by the Director

Summary:	The total amount of the claims in court, originally £80 million, now stands at £20.5 million, after a number of claims have been dismissed, settled out of court, withdrawn from the court proceedings or reduced in amounts. Claims totalling £12.9 million will be withdrawn from the proceedings in the near future. The 1971 Fund will then be able to resume payments of compensation, which have been suspended since October 1995.
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Action to be taken:	Information to be noted.
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1 Introduction

This document deals with developments in respect of the *Braer* incident (United Kingdom, 5 January 1993) which have taken place since the 62nd session of the Executive Committee.

2 Claims settled out of court

As at 20 March 2000 some 2 000 claims for compensation had been paid, wholly or partly, for a total amount of approximately £44.9 million. Out of this amount the 1971 Fund had paid some £40.6 million and the shipowner's P & I insurer, Assurance-föreningen Skuld (Skuld Club), some £4.3 million. In addition, claims amounting to £5.8 million had been accepted as admissible but had not yet been paid.

3 Court proceedings

General situation

- 3.1 Claims against the 1971 Fund became time-barred on or shortly after 5 January 1996. By that date some 270 claimants had taken action in the Court of Session in Edinburgh against the shipowner, the Skuld Club and the 1971 Fund. The total amount claimed was approximately £80 million.
- 3.2 The court actions relate mainly to claims for reduction in the price of salmon, loss of income in the fishing and fish processing sector, personal injury and damage to asbestos cement roof coverings. The majority of these claims were rejected by the 1971 Fund on the basis of decisions taken by the Executive Committee, or because the claimants had not presented sufficient supporting evidence. Some claimants, eg the United Kingdom Government and a number of fishermen, took legal action to preserve their right to make it possible to continue discussions for the purpose of arriving at out-of-court settlements.
- 3.3 Most of the claimants did not include in their original court action sufficient details of the alleged losses to enable the 1971 Fund to assess the validity of their claims.
- 3.4 By the end of February 2000 a number of claims had been withdrawn from the legal proceedings. The 98 claims remaining in the legal proceedings total £20.5 million.
- 3.5 On 14 March 2000 the United Kingdom Government informed the Director that it would not pursue its claim for compensation for some £3.6 million. The Director has also been informed that the Skuld Club will not pursue its claim for £1.7 million relating to salvage operations.

Salmon price damage claims

- 3.6 A number of salmon farmers have maintained that the price of Shetland farmed salmon sold from outside the exclusion zone was depressed for a period of at least 30 months as a result of the incident and claimed compensation for the losses from such price depression. The shipowner, the Skuld Club and the 1971 Fund concluded, on the basis of advice from their experts, that there was a fall in the relative price of Shetland salmon for six months following the *Braer* incident, and the Fund - with the agreement of the shipowner and the Skuld Club - paid compensation totalling £311 600 to a number of claimants on that basis, but further compensation for the period thereafter was rejected.
- 3.7 Claims in this category became the subject of legal proceedings.
- 3.8 One salmon price damage claim was the subject of a hearing in November 1998 as to whether it was admissible in principle. In a judgement rendered in December 1998 the Court of Session rejected the case on the ground that the salmon farmer's claim was no more than one for relational economic loss.
- 3.9 The claimant appealed against the judgement but has recently withdrawn the appeal. All the remaining claims in this group pending in Court, totalling some £6.7 million, were withdrawn in February 2000.

Claim by P & O Scottish Ferries Ltd

- 3.10 In 1995 the Executive Committee considered a claim for £900 000 submitted by P & O Scottish Ferries Ltd for alleged loss of income from its ferry service between Aberdeen and Shetland as a result of a reduction in the number of tourists visiting the Shetland Islands and a reduction in the volume of freight. P & O Scottish Ferries Ltd, whose main office is in Aberdeen, is the only operator of passenger ferries between Shetland and the United Kingdom mainland (Aberdeen).

- 3.11 The Committee took the view that the criterion of reasonable proximity had not been fulfilled. In particular, it was considered that there was not sufficient proximity between the claimant's activity and the contamination. It was also considered that the claimant's business did not form an integral part of the economic activity of Shetland. For these reasons, the claim was rejected.
- 3.12 The company took legal action against the shipowner and the Skuld Club, and notified the 1971 Fund of the actions, claiming compensation for an amount of £900 000, subsequently reduced to £680 000.
- 3.13 In a judgement rendered on 7 January 1999 the Court of Session accepted the arguments advanced by the shipowner, the Skuld Club and the 1971 Fund and dismissed the actions. The Court considered *inter alia* that the losses were not a direct consequence of the oil spill but were no more than an indirect consequence of the adverse publicity affecting the image of Shetland as a source of fish and fish products and as a holiday destination, and that the adverse publicity was in its turn a consequence of the contamination of other parties' property.
- 3.14 The company appealed against the Court of Session's decision but has recently withdrawn the appeal.

Fish processors' claims

- 3.15 Compensation totalling £3.2 million has been paid to 17 fish processors and associated services, mainly for losses suffered as a result of being deprived of the supply of fish from the exclusion zone.
- 3.16 Five claims submitted by fish processors totalling £7.6 million are pending in court. The claims relate to losses allegedly suffered as a result of a reduction in the processing of certain types of fish and shellfish during the period 1993 - 1995.
- 3.17 A hearing was scheduled in the Court of Session during May 1999 for a legal debate on the admissibility of these claims. At the request of the claimants, however, the hearing was postponed until June 2000.
- 3.18 The claimants in this group have recently informed the 1971 Fund that these claims will be withdrawn.

Smolt purchaser

- 3.19 In 1995 the Executive Committee considered a claim by a Shetland-based company, Shetland Sea Farms Ltd, in respect of a contract to purchase smolt from a related company on the mainland. The smolt had eventually been sold at 50% of its purchase price to another company in the same group. The Executive Committee accepted that the claim was admissible in principle, but considered that account should be taken of any benefits derived by other companies in the same group. Attempts to settle the claim out of court failed and the company took legal action against the shipowner, the Skuld Club and the 1971 Fund.
- 3.20 Shetland Sea Farms Ltd claimed compensation for some £2 million allegedly relating to losses on the resale of the smolt and loss of profit on the sale of salmon which would have been reared from the smolt. The shipowner, the Skuld Club and the 1971 Fund maintained that the company could not, as a matter of law, recover damages for loss of profits from the sale of a finished item (salmon) and also recover the costs of the raw material (smolt) needed to produce the finished item.
- 3.21 In September 1998 the Court rejected the argument of the shipowner, the Skuld Club and the 1971 Fund and decided that the matter could not be resolved purely as a matter of law and that evidence had to be presented as to whether the company was entitled to compensation and, if so, to what extent. After a detailed examination of the judgement, the shipowner, the Skuld Club and

the 1971 Fund decided not to pursue an appeal against the Court's decision. This claim is to be the subject of a hearing on the facts in September 2000.

Legal action by a fish sales company

- 3.22 In October 1998 a fish sales company took legal action against the 1971 Fund requesting a declaration judgement on two points. The claimant requested a declaration to the effect that the 1971 Fund was not entitled to take into account payments made prior to the establishment of liability on the part of the shipowner and his insurer, when calculating the upper limit of the Fund's liability. The claimant also requested that the liability of the 1971 Fund should be calculated by reference not to the Special Drawing Right but to the free market value of gold.
- 3.23 A hearing took place in December 1998 at which the Skuld Club and the 1971 Fund requested that this action should not be considered until it had been determined whether this compensation claim was admissible. The Court granted this request.
- 3.24 This company belongs to the group of claimants referred to in paragraph 3.15 who have indicated that they will withdraw their claims. If this withdrawal takes place this legal action will be dismissed.

Property damage claims

- 3.25 Claims were submitted for damage to asbestos cement tiles and corrugated sheets, used as roof coverings for homes and agricultural buildings, which the claimants alleged was a result of pollution.
- 3.26 A detailed investigation was carried out by consulting engineers engaged by the 1971 Fund and the Skuld Club, who concluded that the analysis of the physical characteristics of the materials revealed nothing which was inconsistent with the age of the roofs, their degree of exposure and the standard of workmanship and maintenance. According to the consulting engineers, the physical and microstructural analyses revealed no evidence that oil from the *Braer* had contributed to the deterioration of the materials examined. The consulting engineers stated that the chemical analyses and the petrographic examinations revealed no evidence that petroleum hydrocarbons had penetrated the materials or caused any kind of deterioration. In the light of the results of the investigation, the 1971 Fund rejected the claims relating to the asbestos roofs.
- 3.27 Eighty-four claims in this category, for a total of £8 million, became the subject of legal proceedings, although subsequently 34 claims totalling £5.1 million were withdrawn. No satisfactory technical evidence has been presented in support of these claims which were originally based on the assumption that the alleged damage was caused by oil. The claimants' expert now hypothesises, however, that the active component present in the dispersants used to treat the oil was the cause. The 1971 Fund's experts do not consider that the report of the claimants' expert provides satisfactory evidence that the dispersants caused the alleged damage.
- 3.28 During a four-week hearing in June 1999 evidence was heard in the Court of Session in respect of five property damage claims which had been selected to provide a wide geographical spread and variety of types of roof materials.
- 3.29 The claimants described various problems associated with their roofs, including the curling of their slates and curling, cracking and softening of the corrugated sheet roofs which had not been observed prior to the incident. Their expert indicated that this might have been caused by the dispersant chemical, which was sprayed on the oil slicks, being blown onto the land and then onto the claimants' roofs. It was accepted by the 1971 Fund that of the 110 tonnes of dispersant sprayed, a very small quantity could have been blown onto the land but only over a restricted geographical area. Expert witnesses engaged by the shipowner, the Skuld Club and the 1971 Fund stated that only minute quantities of dispersant reached the land and that in any event there

was no scientific basis that dispersants used to seek to break up the oil spill could cause damage to asbestos cement roofs.

- 3.30 At the conclusion of the hearing the Court indicated that it wished to receive written submissions from the lawyers for the parties on the issues raised in the evidence. Following receipt of the submissions an oral hearing was held in December 1999. The final hearing took place in January 2000, and the Court is expected to render its decision in the near future.

4 Right of limitation of the shipowner and his insurer

- 4.1 In September 1997 the Court of Session decided that the Skuld Club was entitled to limit its liability in the amount of 5 790 052.50 SDR (£4.9 million). The Court has not yet considered the question of whether or not the shipowner is entitled to limit his liability.
- 4.2 In December 1995 the Executive Committee decided that the 1971 Fund should not challenge the shipowner's right of limitation or take legal action against him or any other person to recover the amounts paid by the 1971 Fund in compensation.

5 Suspension of payments

- 5.1 At its 44th session, held in October 1995, the Executive Committee took note of the total amount of the claims presented so far and noted that a number of claimants intended to bring legal actions against the shipowner, the Skuld Club and the 1971 Fund. The Committee decided to suspend any further payments of compensation until the Committee had re-examined the question of whether the total amount of the established claims would exceed the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention, viz 60 million SDR. The suspension of payments is still in operation.
- 5.2 The total amount of compensation available under the 1969 Civil Liability Convention and the 1971 Fund Convention is 60 million SDR, which converted at the rate applicable on 25 September 1997 (the date on which the shipowner's limitation fund was established) corresponds to £50 609 280.
- 5.3 So far, the total amount paid in compensation is £44 959 834, out of which the 1971 Fund has paid £40 640 278 and the Skuld Club has paid £4 319 556. There is, therefore, £5.6 million available for payments in respect of the remaining claims. As mentioned above claims totalling £5.8 million have been approved but not paid.
- 5.4 The claims pending in court total £20.5 million.
- 5.5 At the Executive Committee's 62nd session the United Kingdom delegation reminded the Committee that many claims had been approved since the suspension of payments and that some of these claims had remained unpaid for some four years. This delegation stated that as the uncertainties surrounding the claims which were the subject of legal proceedings became clarified, and once the maximum amount of the 1971 Fund's exposure could be established, then a partial payment of the approved claims should be made.
- 5.6 The Executive Committee decided to authorise the Director to make partial payments to those claimants whose claims had been approved but not paid, if the claims pending in the court proceedings together with the claims which had been approved but not paid fell below £20 million. The Committee further decided that the proportion of the approved amounts to be paid should be decided by the Director on the basis of the total amount of all outstanding claims (document 71FUND/EXC.62/14, paragraph 3.4.5).
- 5.7 As mentioned above the United Kingdom Government and the Skuld Club have decided not to pursue their claims, totalling £5.3 million. In addition, the fish processors referred to in paragraph 3.18 have indicated that they will withdraw their claims, totalling £7.6 million. As a

result the total amount of the claims pending in court and the claims which have been approved but not paid will fall below £20 million. The condition for resumption of payments laid down by the Executive Committee has therefore been met. The Director is assessing what proportion of the agreed amounts of the claims which have been settled but not paid can be paid at this stage. Preparations are being made for making such provisional payments. The Director hopes that further claims will be withdrawn from the proceedings in the near future, enabling the 1971 Fund to make additional payments in respect of the settled claims.

6 Action to be taken by the Executive Committee

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

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**71FUND/EXC.63/3
ANNEX**

Summary of claims in court as at 20 March 2000

	Actions against the shipowner/Skuld/Fund ^{<1>}	Outstanding claims in limitation proceedings ^{<2>}	Court action against 1971 Fund only
	1 January 1996 £	20 March 2000 £	
United Kingdom Government (Dept of Transport and Scottish Office)	3 571 181	3 587 049	
Shetland Islands Council	1 508 317	0	1 508 317
P & O Scottish Ferries Ltd	902 561	0	
Personal injury	500 000	352 500	
Fishermen's agent	103 217	0	
Fish processors	10 505 245	7 640 159	
Shetland Fish Processors Association	229 489	64 269	
Shetland Fish Producers Organisation	36 108	0	
Tourism – Shetland Hotel	149 000	0	
Tourism & property damage	400 000	0	
Property damage	8 031 650	2 647 190	
Loss of income	650 000	0	
Shipowner's LOF 90 claim	1 678 126	1 708 126	
Salmon farming industry	21 863 523	2 018 303	
Fishing industry	30 212 908	927 500	93 357
Total	80 341 325	18 945 096	1 601 674

<1> Actions commenced prior to the third anniversary of the incident

<2> Actions transferred to the limitation proceedings