



INCIDENTS INVOLVING THE 1971 FUND

BRAER

Note by the Director

Summary:

All claims except one have been settled and paid in full. The remaining claim, that by Shetland Sea Farms, is for £1.4 million. The Scottish Court of first instance held that the claim was based on false documents but allowed nevertheless the claimant to pursue the claim. Court hearings were held in April and September 2002. The Court issued its decision in May 2003 and reported the case to the Scottish Prosecuting Authority to consider whether two witnesses for Shetland Sea Farms should be prosecuted for their involvement in a fraudulent scheme to defraud the 1971 Fund. However the Court allowed the case to proceed on a restricted basis. An appeal has been lodged by the shipowner, his insurer and the 1971 Fund against that decision.

The Prosecuting Authority has contacted the Director, stating that he wished to interview certain persons who had dealt with the Shetland Sea Farms' claim on behalf of the Fund and that it was possible that they might be requested to testify in court in criminal proceedings. In this context, the question has arisen as to whether these persons enjoy immunity under the Headquarters Agreement between the United Kingdom Government and the 1971 Fund and, to the extent that such immunity exists, whether the Director should waive it.

Action to be taken:

To give the Director such instructions in respect of the immunity issue as it may deem appropriate.

1 Claims for compensation

- 1.1 All claims except that by Shetland Sea Farms Ltd have been settled and paid in full.
- 1.2 In 1995 the Executive Committee considered a claim for £2 million 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 experts engaged by the 1971 Fund and the shipowner's insurer, Assuransföreningen Skuld (Skuld Club), assessed the proven losses at £58 000. Attempts to settle the claim out of court failed.
- 1.3 The company took legal action against the shipowner, the Skuld Club and the 1971 Fund. During the proceedings the claim was reduced to £1.4 million. In October 2000 a hearing took place in order for the Court to consider whether certain documents relied upon by the claimant were genuine.

- 1.4 The Court of first instance rendered its decision in July 2001. In the decision the Court dealt with two questions, namely whether a responsible officer or officers of the claimant knowingly presented to the Court false documents in support of a claim for compensation and, in the event that the Court did so decide, whether in those circumstances the claim should be refused without any further procedure.
- 1.5 The Court answered the first question in the affirmative. Having heard the evidence, the Court resolved that responsible officers of the claimant had knowingly presented copies of fake letters in support of Shetland Sea Farms' claim for compensation. The Court held that these documents had been put forward with the intent to deceive the Claims Office established by the 1971 Fund and the Skuld Club into believing that the Shetland Sea Farms' alleged contractual commitments were based on contemporary correspondence setting out the terms of the contracts. The Court also held that they did so as part of a scheme to further a substantial claim for compensation.
- 1.6 The Court then addressed the second question, namely whether as a result of this finding the claim should be refused without any further procedure. The Court held that there had been a false narrative supported by fabricated documents, that this was clearly an abuse of process, that Shetland Sea Farms had attempted to seek to obtain compensation of over £1.9 million and that the attempt had been aggravated by the fact that those primarily responsible had been 'untruthful in denying their responsibility'. The Court further held that Shetland Sea Farms had misused the time and resources of the Court and had put the 1971 Fund and the Skuld Club to expense and inconvenience. The Court resolved, however, that as Shetland Sea Farms no longer was going to base its claim on the false letters, the company should be given the opportunity to present a revised case which should not depend on the false letters and that not to allow the claim to proceed in its revised version would be an excessive punishment.
- 1.7 The Court decided that the case should proceed to a hearing restricted to the question of whether Shetland Sea Farms could prove that a contract existed before the *Braer* incident occurred for the supply of smolts to Shetland Sea Farms without reference to false letters and invoices. Hearings were held in April and September 2002 and the Court rendered its decision in May 2003. The Court did not accept Shetland Sea Farms' evidence that there was a contract for the supply of smolts for which the company was legally obliged to pay independent of the false letters. The Court considered that the evidence disclosed that the management of the company had been involved in a fraudulent scheme and reported the matter to the Chief Prosecutor in Scotland to consider whether criminal proceedings should be brought against two of Shetland Sea Farms' witnesses. The Court allowed the case to proceed, however, restricted to a claim for loss of profit by Shetland Sea Farms to the extent that the company could establish the probable number of smolts which would have been introduced to Shetland but for the *Braer* incident. The shipowner, the Skuld Club and the 1971 Fund have appealed against that part of the Court's decision. The appeal will be heard in June 2004.
- 1.8 Any amount awarded by a final court decision will be paid by the Skuld Club.

2 Waiver of immunity

- 2.1 The Chief Prosecutor in Scotland has contacted the Director stating that he wished to interview certain persons who had dealt with the Shetland Sea Farms' claim on behalf of the 1971 Fund, namely the Claims Officer who was primarily responsible within the 1971 Fund Secretariat for handling Shetland Sea Farms' claim, the person in charge of the Claims Office established in Lerwick (Shetland) by the 1971 Fund and the Skuld Club, and the person who supervised the running of that Office and the claims handling. He also indicated that it was possible that these persons would be requested to testify in court in criminal proceedings. The question has arisen as to whether the Director should invoke immunity for these persons on the basis of the Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the 1971 Fund.
- 2.2 The relevant provisions of the Headquarters Agreement are reproduced in the Annex.

- 2.3 The Director's immunity under the Headquarters Agreement (Article 16) would cover both interviews by the Public Prosecutor and testifying in court since he enjoys total immunity from United Kingdom jurisdiction. However, the Public Prosecutor has not requested to interview the Director. The question as to whether the Director's immunity should be waived is therefore not an issue. Were such a request to be made, the Director would submit the issue of waiver of immunity to the Administrative Council for decision.
- 2.4 As regards staff members and experts, under the Headquarters Agreement they shall have immunity from jurisdiction in respect of acts done by them in the exercise of their functions, including words written and spoken (Articles 17 and 18 respectively).
- 2.5 It should be noted that the immunities accorded in the Headquarters Agreement to staff members and experts are provided solely to ensure in all circumstances the unimpeded functioning of the 1971 Fund and the complete independence of the persons to whom they are accorded. The Agreement further provides that the Director has the right and the duty to waive such immunities (other than his own) when he considers that such immunities are preventing the carrying out of justice and when it is possible to dispense with them without prejudicing the interests of the Fund and that in respect of the Director, the Assembly or the Executive Committee may waive his immunities.
- 2.6 The Claims Officer in the 1971 Fund's Secretariat who dealt with the Shetland Sea Farms' claim has since left the Secretariat, but the provisions on immunity (Article 17.1) apply even after an officer is no longer employed by the Fund. The person responsible for running the Claims Office and the person supervising the operations of the office and the claims handling would probably fall within the category of experts (Article 18).
- 2.7 In the Director's view, it is not clear whether the provisions in the Headquarters Agreement relating to officers and experts apply to the situation created by the Public Prosecutor's request. However, the Director considers that he should in any event waive the immunity, to the extent it exists, in respect of the Public Prosecutor's request both as regards interviews in the context of criminal investigations and as regards appearances as witnesses in court, since such a waiver would not prejudice the interests of the 1971 Fund whilst invoking the immunity of these persons could prevent the carrying out of justice. Subject to any instructions which the Administrative Council may wish to give him, the Director intends to waive any immunity which may exist in respect of the three persons referred to in paragraph 2.6 above in relation to the Public Prosecutor's investigations concerning Shetland Sea Farms' claim and any request that they should testify in court in relation to these claims.
- 2.8 The Director would like to state that if the question of waiver of immunity were to be raised in the future, he would consider each case on its merits in the light of the particular circumstances.

3 Action to be taken by the Administrative Council

The Administrative Council is invited:

- (a) to take note of the information contained in this document; and
- (b) to give the Director such instructions in respect of the immunity issue as it may deem appropriate.

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ANNEX

Relevant provisions of the Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Oil Pollution Compensation Fund 1971

Article 16

Director

In addition to the privileges and immunities provided for in Article 17 of this Agreement, the Director, unless he is a citizen of the United Kingdom and Colonies or a permanent resident of the United Kingdom, shall enjoy the privileges and immunities (other than priority for telecommunications) to which a diplomatic agent in the United Kingdom is entitled.

Article 17

Staff members

Staff members of the Fund:

- (a) shall have (even after they have left the service of the Fund) immunity from jurisdiction in respect of acts done by them in the exercise of their functions, including words written or spoken; this immunity shall not however apply in the case of a motor traffic offence committed by a staff member nor in the case of damage caused by a motor vehicle belonging to or driven by him;
- (b) shall, together with members of their families forming part of their households, be exempt from any obligations in respect of military service, provided that this exemption shall not apply to any person who is a citizen of the United Kingdom and Colonies;
- (c) shall enjoy inviolability for all their official papers and documents;
- (d) shall enjoy exemption from all measures restricting immigration, from charges for visas and from registration formalities for the purpose of immigration control; and members of their families forming part of their households shall enjoy the same facilities;
- (e) unless they are citizens of the United Kingdom and Colonies or permanently resident in the United Kingdom shall be accorded the treatment in matters of exchange control which is accorded to a diplomatic agent in the United Kingdom: and
- (f) unless they are citizens of the United Kingdom and Colonies or permanently resident in the United Kingdom, shall, at the time of the first taking up of their post in the United Kingdom, be exempt from customs and excise duties and other such charges (except mere payments for services) in respect of import of their furniture and personal effects (including one motor car each) in their ownership or possession or already ordered by them and intended for their personal use or for their establishment. Such goods shall normally be imported within three months of their first entry into the United Kingdom, but in exceptional circumstances an extension of this period may be granted. The privilege shall be subject to the conditions governing the disposal of goods imported into the United Kingdom free of duty and to the general restrictions applied in the United Kingdom to all imports.

Article 18

Experts

In the exercise of their functions in connection with the Fund or in carrying out missions for the Fund, experts, other than staff members, shall enjoy the following to the extent necessary for the carrying out of their functions, including during journeys made in carrying out their functions and in the course of such missions:

- (a) even after they have ceased to be employed by the Fund immunity from jurisdiction in respect of acts done by them in the exercise of their functions, including words written or spoken, except in the case of a motor traffic offence committed by an expert or in the case of damage caused by a motor vehicle belonging to or driven by him;
- (b) inviolability for all their official papers and documents; and
- (c) unless they are citizens of the United Kingdom and Colonies or permanently resident in the United Kingdom, the treatment in matters of exchange control which is accorded to a diplomatic agent in the United Kingdom.

Article 21

Object of privileges and immunities

Waiver

- (1) The privileges and immunities accorded in this Agreement to staff members and experts are provided solely to ensure in all circumstances the unimpeded functioning of the Fund and the complete independence of the persons to whom they are accorded.
- (2) The Director has the right and the duty to waive such immunities (other than his own) when he considers that such immunities are preventing the carrying out of justice and when it is possible to dispense with them without prejudicing the interests of the Fund. In respect of the Director, the Assembly or the Executive Committee may waive his immunities.