



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
15th session
Agenda item 16

71FUND/AC.15/14/4
1 October 2004
Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

PONTOON 300

Note by the Director

Summary:

Apart from a number of claims submitted by a municipality and a claim by the Ministry of Agriculture and Fisheries, all of which are the subject of legal proceedings, all other claims have been settled and 75% of the settlement amounts have been paid. The 1971 Fund has maintained that the claims by the municipality have become time-barred and that some of the claims are inadmissible. The Court appointed three experts to examine these claims. After the submission of their report, and in light of the comments by all the parties, the Court requested the experts to submit a further report. The Fund has participated in a number of meetings with the Court experts and the other parties with the aim of reaching agreement on the quantum of the losses, without prejudice to the issue of time bar in respect of the claim by the municipality. As a result of these meetings, an agreement in principle has been reached on the claim by the Ministry of Agriculture and Fisheries, and since this claim is not time-barred, it is expected that this claim will be settled in the near future.

The 1971 Fund is pursuing a recourse action against the owner of the tug *Falcon 1* which was towing the *Pontoon 300* when the incident occurred. The Court of Appeal found the charterer and the owner of the tug *Falcon 1* jointly and severally liable to pay compensation to the Fund, but for a lesser amount than was claimed. The Fund has appealed to the Court of Cassation in respect of the amount awarded by the Court of Appeal. The tug owner has also appealed.

Action to be taken: Information to be noted.

1 Introduction

- 1.1 The Saint Vincent and Grenadines barge *Pontoon 300* (4 233 GRT), which was being towed by the tug *Falcon 1*, sank in a depth of 21 metres off Hamriyah, in Sharjah (United Arab Emirates, UAE). An estimated 8 000 tonnes of intermediate fuel oil was spilled, which spread over 40 kilometres of coastline, affecting four Emirates. The worst affected Emirate was Umm Al Quwain.

- 1.2 The *Pontoon 300*, which was owned by a Liberian company, was not covered by any insurance for oil pollution liability. The tug *Falcon 1* was registered in Abu Dhabi and owned by a citizen of that Emirate.
- 1.3 This document focuses on developments in respect of the *Pontoon 300* incident that have taken place since the 12th session of the Administrative Council in October 2003.

2 Claims for compensation

Settled claims

- 2.1 Claims totalling Dhs 7.4 million (£1.1 million) in respect of clean-up operations and preventive measures have been settled for a total of Dhs 6.3 million (£958 000). The 1971 Fund has paid a total of Dhs 4.8 million (£817 000), corresponding to 75% of the settlement amounts.

Pending claims

- 2.2 In May 2000 the Municipality of Umm Al Quwain presented claims against the 1971 Fund totalling Dhs 199 million (£30 million) on behalf of fishermen, tourist hotel owners, private property owners, a Marine Resource Research Centre (MRRC) and the Municipality itself (see table below). Little or no documentation was provided in support of the claims, and the amounts involved appeared to be based upon estimates. The main claim by the Municipality was for environmental damage related to alleged losses of fish stocks and other marine resources, including mangroves. The estimation of the damage appeared to be based upon theoretical models.
- 2.3 The 1971 Fund informed the Umm Al Quwain Municipality that claims in respect of property damage and economic losses actually sustained were admissible in principle but that considerable supporting documentation was required before the Fund could assess the claims. The 1971 Fund also pointed out that claims for environmental damage based upon theoretical models were not admissible.

Legal actions

- 2.4 In September 2000 the Umm Al Quwain Municipality brought legal action in the Umm Al Quwain Court against the tug owner and the owner of the cargo on board the *Pontoon 300* in respect of its claims. The 1971 Fund was not joined as a defendant in the proceedings, nor was it formally notified of the proceedings. However, the plaintiffs requested the Court to notify the 1971 Fund of the action through diplomatic channels in accordance with Article 7.6 of the 1971 Fund Convention and through the Ministry of Justice in accordance with United Arab Emirates Law of Civil Procedure.
- 2.5 In June 2001 the Administrative Council considered the question of whether the claims by the Umm Al Quwain Municipality had become time-barred. Under Article 6 of the 1971 Fund Convention, rights to compensation from the 1971 Fund are extinguished unless an action is brought under the Convention against the Fund, or notification has been made to the Fund under Article 7.6 of the Convention of an action against the shipowner or his insurer under the 1969 Civil Liability Convention, within three years of the date when the damage occurred. However, notification under Article 7.6 can be made only in respect of actions against the shipowner liable under the 1969 Civil Liability Convention or his insurer. Actions against other parties would fall outside that Convention. Since none of the defendants listed in the Municipality's writ was the owner of the *Pontoon 300* or his insurer, the 1971 Fund considered that the action could not be based on the 1969 Civil Liability Convention and that Article 7.6 of the Fund Convention was not applicable.
- 2.6 Claims against the 1971 Fund became time-barred on or around 8 January 2001 at which point the Umm Al Quwain Municipality had not taken the measures laid down in the 1971 Fund

Convention to prevent the claims becoming time-barred. However, the 1971 Fund's UAE lawyers drew attention to the fact that under the procedural law of the UAE there was no legal distinction between an actual defendant and a notified party and that the Court might identify and confirm the 1971 Fund as a defendant rather than as a notified party to get around the problem. Furthermore, since the Municipality's writ was filed in court before the three-year time bar period, the Fund's lawyers believed that it might be considered sufficient by the Court to prevent the Municipality's claim becoming time-barred.

- 2.7 In December 2000 the UAE Ministry of Agriculture and Fisheries joined the Umm Al Quwain Municipality's action as a co-plaintiff, claiming Dhs 6.4 million (£1.2 million), which corresponded to the claim by the MRRC centre included in the Municipality's claim. However, the Ministry also joined the 1971 Fund as a co-defendant in its action. Although the action had not been served on the 1971 Fund, the Administrative Council decided that this claim was not time-barred, since the Fund had been brought in as a defendant in the action before the expiry of the three-year time bar period (document 71FUND/AC.5/A/ES.8/10, paragraph 5.5.12).
- 2.8 In the proceedings, the 1971 Fund maintained that the claims submitted by the Municipality were time-barred. In December 2001 the Umm Al Quwain Court issued a preliminary judgement in which it decided to refer the matter to a panel of experts experienced in oil pollution and the environment, to be appointed by the UAE Ministry of Justice. The Court further decided to combine all the pleadings relating to issues of jurisdiction and time bar and to review these after the experts had submitted their report.
- 2.9 The experts submitted their report to the Umm Al Quwain Court of First Instance in February 2003. The pending claims and the court experts' assessment of the claims are summarised in the table below:

Claim	Claimed amount (Dhs)	Assessed amount (Dhs)
Fishing		
- Loss of income	10 008 840	1 137 048
- Property damage	306 593	123 429
Tourism	765 389	122 570
Property damage	7 000 000	0
MRRC	6 352 660	335 000
Environmental damage		
- Marine organisms	130 294 415	0
- Mangroves	24 280 000	1 500 000
Clean-up	19 744 600	0
Total	Dhs198 752 497 (£30 million)	Dhs3 218 047 (£490 000)

- 2.10 The 1971 Fund submitted to the Court its comments on the experts' report stating that, notwithstanding the Fund's position that the claims were time-barred, the assessments of the claims by the panel of experts was generally in line with the 1971 Fund's policy as regards the admissibility of claims for compensation.
- 2.11 The Umm Al Quwain Municipality submitted pleadings stating that the experts had not performed their duty as instructed by the Court, especially in relation to investigating the losses claimed. The Municipality requested that the Court should refer the matter back to the experts with the instruction to reassess the claims in the light of its comments.
- 2.12 The Ministry of Agriculture and Fisheries submitted pleadings stating that the amount assessed by the experts in respect of the claim by the Marine Research Centre was not acceptable. The Ministry stated that in relation to the Centre's claim the experts had not taken into account the additional cost it had incurred in maintaining various fish species. The Ministry requested the Court to refer the matter back to the experts with instruction to re-assess the claim.

- 2.13 The owner of the tug *Falcon I* submitted pleadings maintaining that the experts had failed to assess the claims in an objective manner. He stated that the report had been issued contrary to local law and jurisprudence and contained contradictions as regards facts and conclusions. He also stated that the report was faulty and incomplete and requested the Court to set aside the entire report.
- 2.14 In October 2003 the Court decided to refer the case back to the experts for them to respond to the objections raised by the various parties.
- 2.15 The Fund has held a number of meetings with the experts and the other parties with the aim of reaching agreement on the quantum of the losses, without prejudice to the issue of time bar in respect of the claims by the Umm al Quwain Municipality. As a result of these meetings an agreement in principle has been reached on the claim by the Ministry of Agriculture and Fisheries in respect of the MRRC at Dhs1.6 million (£240 000). Since this claim is not time-barred, it is expected that it will be settled in the near future. As regards the claims by the Municipality, no agreement has been reached on the quantum. The Court experts will therefore have to submit their final report on these claims to the Court in October 2004.

3 Level of the 1971 Fund's payments

- 3.1 The maximum amount of compensation available under the 1969 Civil Liability Convention and the 1971 Fund Convention is 60 million SDR (£48.9 million).
- 3.2 In April 1998 the Executive Committee decided that, in view of the uncertainty regarding the total amount of claims for compensation, the 1971 Fund's payments should be limited to 75% of the loss or damage actually suffered by each claimant (document 71FUND/EXC.63/11, paragraph 3.7.4).
- 3.3 Once the claim by the Ministry of Agriculture and Fisheries referred to in paragraph 2.15 has been settled, the Fund's total exposure will be Dhs 200.3 million (£30.3 million). As mentioned above, the 1971 Fund considers that the claims by the Umm Al Quwain Municipality, which total Dhs 192.4 million (£29 million), are time-barred. However, the Fund's lawyers have indicated that the UAE courts might not agree with the Fund on this point. The UAE law is also unclear as to whether claimants can increase the amount of their claims in court, but in any event they would be entitled to interest at 9% per annum on any amounts awarded, either from the date of filing the claims in court or from the date of judgement.
- 3.4 The Director is of the opinion that in view of the continuing uncertainty as to the total amount of the admissible claims, the Fund's level of payments should be maintained at 75% of the total loss or damage suffered by each claimant.

4 Criminal proceedings

- 4.1 In November 1999 a Criminal Court of first instance found the master of the tug *Falcon I*, the alleged cargo owner, the general manager of the tug owner and the general manager of the alleged cargo owner guilty of misuse of the barge *Pontoon 300*, which was not in a seaworthy condition and thus in violation of United Arab Emirates law, and of causing harm to the people and the environment by use of the unseaworthy barge. The master of the tug *Falcon I*, the tug owner and his general manager appealed against the judgement, but the alleged cargo owner and his general manager did not.
- 4.2 In February 2000 the Criminal Court of Appeal found the tug owner and his general manager not guilty. The Court of Appeal confirmed the guilty verdict against the master of the *Falcon I*, the alleged cargo owner and his general manager.
- 4.3 The master of the tug *Falcon I* lodged an appeal in the Federal Court of Cassation, which sent the case back to the Court of Appeal to consider the issues of the seaworthiness of the *Pontoon 300*

and the master's defence of 'force majeure'. In October 2001 the Criminal Court of Appeal issued a preliminary judgement in which it appointed three experts from the UAE Ministry of Justice to provide a report to the Court of Appeal on the cause of the incident. In June 2002 the experts submitted their report to the Criminal Court of Appeal. The 1971 Fund has not been allowed access to that report since it is not a party to those proceedings. In November 2002 the Court of Appeal referred the matter back to the same group of experts instructing them to examine whether the incident was caused by the negligence of the master or by the weather. The Court also instructed the experts to give their opinion on a report by an independent expert engaged by the master of the tug.

4.4 In December 2003 the experts submitted their supplementary report to the Criminal Court of Appeal. This report concluded:

- the tug and barge were both un-seaworthy,
- the barge was not fit to transport petroleum products,
- the storm encountered by the tug and barge was a serious risk to maritime safety which could have been avoided by the crew by employing sound marine principles, and
- the master of the tug was responsible for the sinking of the barge and the resultant pollution

4.5 In May 2004, the Court of Appeal re-opened the proceedings at the request of the master of the tug *Falcon I*.

5 Recourse action by the 1971 Fund

5.1 In January 2000 the 1971 Fund took legal action against the owner of the tug *Falcon I* maintaining that, since the sinking of the *Pontoon 300* had occurred due to its unseaworthiness and the negligence of the master and the owner of the *Falcon I* during the towage, the tug owner was liable for the ensuing damage. The Fund claimed Dhs 4.5 million (£680 000), corresponding to the major part of the compensation it had paid for clean-up operations and preventive measures.

5.2 The owner of the tug *Falcon I* opposed the 1971 Fund's action stating that the Dubai Court had no jurisdiction and that the 1971 Fund had no title to pursue a claim against him. The tug owner further maintained that since the Court of Appeal had found the tug owner and the general manager not guilty, they had no liability in civil law for pollution damage resulting from the incident. The tug owner also pleaded 'force majeure' on the ground that the incident resulted from severe (Force 11) storms and argued negligence on the part of the local authorities in attempting the salvage of the *Pontoon 300*.

5.3 The 1971 Fund's lawyers advised the Fund that the Dubai Court had jurisdiction since one of the defendants had a place of business in Dubai and that the Fund had the right to take recourse action based on Article 9 of the 1971 Fund Convention which forms part of the law of the United Arab Emirates. The Fund's lawyers maintained that the tug *Falcon I* was in control of the *Pontoon 300* and therefore legally responsible for the *Pontoon 300* in accordance with the principles of law on towage. They stated that under the Maritime Code of the Emirates the towing vessel and the vessel being towed were jointly liable for any loss suffered by third parties arising out of the towage operation.

5.4 In December 2000 the Dubai Court rendered a judgement in which it rejected the 1971 Fund's claim against the owner of the tug *Falcon I* but ordered the owner of the cargo on board the *Pontoon 300* to pay the Fund Dhs 4.5 million (£680 000).

- 5.5 The basis of the rejection of the claims against the owner of the *Falcon I* was that under the terms of the charter party the master of the tug was under the control of the charterer. The 1971 Fund appealed against the judgement, contesting the validity of the charter party and maintaining that in any event the charter party was only binding upon the parties thereto and not upon the Fund. At a hearing in November 2001 the Fund amended the claimed amount to Dhs 4.7 million (£710 000) to reflect the amounts actually paid by the Fund.
- 5.6 In February 2002 the Dubai Court of Appeal upheld the judgement of the Court of first instance against the same parties, but amended the judgement to the effect that the amount payable by the owner of the cargo on board the *Pontoon 300* was increased to Dhs 4.7 million (£710 000) on the basis of the Fund's revised claim.
- 5.7 The 1971 Fund appealed to the Dubai Court of Cassation against the Court of Appeal's judgement on the ground that under UAE maritime law, even if the cargo owner had chartered the tug, the management of the tug would remain under the control of the tug owner unless the charter party specified otherwise. The Fund also argued that a photocopy of the charter party submitted by the tug owner was not sufficient evidence to support an alleged charter arrangement between the owner of the tug and the cargo owner.
- 5.8 In his pleadings to the Court of Cassation, the tug owner maintained that the original charter party was submitted in the criminal proceedings and that he could therefore only submit a photocopy thereof in connection with the recourse action. The tug owner further maintained that since the Criminal Court had accepted the validity of the original charter party, it should be deemed valid for the purpose of the recourse action.
- 5.9 In October 2002 the Court of Cassation allowed the Fund's appeal and referred the matter back to the Dubai Court of Appeal for it to reconsider the matter. Both parties submitted further pleadings in December 2002.
- 5.10 In January 2003 the Court of Appeal issued a preliminary judgement appointing a local marine expert to review all documents relating to the case in order to determine if the tug was in fact on charter to the cargo owner. The expert, who was one of the experts appointed by the Criminal Court of Appeal referred to in paragraph 4.4, was also instructed to establish the terms of the charter party, its commencement date and duration and the identity of the tug owner. He was further instructed to verify the extent of the pollution damage suffered by the victims who had been paid compensation by the Fund.
- 5.11 In December 2003 the expert filed his report with the Dubai Court of Appeal. In the report, the expert concluded that the charter party had transferred both maritime and commercial control to the charterer, that both the tug and the barge had been seaworthy and that the sinking of the barge had been due to bad weather. The expert's conclusions regarding the seaworthiness of the barge were contrary to his conclusions as reported to the Criminal Court of Appeal.
- 5.12 The 1971 Fund submitted detailed objections to the conclusions of the expert at a court hearing held in February 2004 and drew attention to the contradiction between his and the other experts' findings in the criminal proceedings referred to in paragraph 4.4.
- 5.13 In April 2004, the Court of Appeal issued its judgement in favour of the 1971 Fund. The Court held that both the charterer and the owner of the *Falcon I* were jointly and severally liable to pay the Fund an amount of Dhs 3 526 398 (£533 000). In the judgement, the Court concluded *inter alia* that:
- the master of the tug and its owner were together responsible for the damage caused arising from this incident,

- the *Pontoon 300* was not seaworthy and the question of the tug's seaworthiness did not need to be ascertained as both the tug and tow formed one floating unit, and
- the liability provisions in the charter party were only effective between the owner and the charterer and did not extend to third parties (cf paragraph 5.5 above).

5.14 The Fund has appealed against this judgement to the Court of Cassation on the question of the quantum. The owner of the *Falcon 1* has appealed against the judgement on procedural grounds, including, *inter alia*, that the civil case should have been suspended pending the final judgement in the criminal proceedings relating to the incident.

6 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 this incident as it may deem appropriate.
