



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUNDS

Agenda item: 3	IOPC/MAY14/3/10/2	
Original: ENGLISH	7 May 2014	
1992 Fund Assembly	92AES18	
1992 Fund Executive Committee	92EC61	
1971 Fund Administrative Council	71AC32	•
1992 Fund Working Group 7	92WG7/3	

INCIDENTS INVOLVING THE IOPC FUNDS – 1971 FUND

NISSOS AMORGOS

Note by the Secretariat

Summary:	To inform the 1971 Fund Administrative Council of the recent developments in respect of the application for a freezing injunction made by the Gard P&I Club against the 1971 Fund.
Action to be taken:	<u>1971 Fund Administrative Council</u> Information to be noted.

1 **Background information**

The background information in respect of the application for a ‘freezing injunction’ made by the Gard P&I Club against the 1971 Fund is provided in document IOPC/MAY14/3/10/1.

2 **Judgement on the application for a ‘freezing injunction’**

- 2.1 On 7 May 2014 the High Court in London decided that the Gard P&I Club was entitled to the freezing order relief it had requested against the 1971 Fund in support of its claim in England. The Court also decided not to grant an injunction in support of the proceedings brought in the Bolivarian Republic of Venezuela.
- 2.2 In the decision, the Court dealt first with the issue of whether the 1971 Fund had immunity from freezing injunctions in all circumstances.
- 2.2.1 Section 6 of the International Oil Pollution Compensation Fund (Immunities and Privileges) Order 1979, (the ‘Order’) which gives effect to the Headquarters Agreement under UK law states:
- (1) within the scope of its official activities the Fund shall have immunity from suit and legal process except:
 - (a) to the extent that it shall have waived such immunity in a particular case;
 - (b) in respect of actions brought against the Fund in accordance with the provisions of the Convention;
 - (c) in respect of any contract for the supply of goods or services, and any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation;
 - (d) in respect of a civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Fund or in respect of a motor traffic offence involving such a vehicle;

- (e) in respect of a civil action relating to death or personal injury caused by an act or omission in the United Kingdom;
- (f) in the event of the attachment or, in Scotland, arrestment, pursuant to the order of a court of law, of the salaries, wages or other emoluments owed by the Fund to a staff member;
- (g) in respect of the enforcement of an arbitration award made under Article 23 of the Agreement; and
- (h) in respect of a counter-claim directly connected with proceedings initiated by the Fund.

(2) Paragraph 1 of this Article shall not prevent the taking of such measures as may be permitted by law in relation to the property and assets of the Fund in so far as they may be temporarily necessary in connection with the prevention and investigation of accidents involving motor vehicles belonging to, or operated on behalf of, the Fund.

2.2.2 The Court held that this provision does not have the effect of granting the Fund a general immunity from freezing injunctions.

2.2.3 The words 'suit and legal process' in section 6 of the Order clearly include freezing injunctions, and the Judge therefore found that the effect of the Order is that immunity from freezing injunctions only exists in respect of matters which do not fall within any of the exceptions listed in section 6(1) of the Order.

2.2.4 The Judge acknowledged that the immunity granted by the Order appears to be less extensive in this respect than under the Headquarters Agreement, which provides:

- (1) Within the scope of its official activities, the Fund shall have immunity from jurisdiction and execution except:
 - (a) to the extent that the Fund waives such immunity from jurisdiction or immunity from execution in a particular case;
 - (b) in respect of actions brought against the Fund in accordance with the provisions of the Convention;
 - (c) in respect of any contract for the supply of goods or services, and any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation;
 - (d) in respect of a civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Fund or in respect of a motor traffic offence involving such a vehicle;
 - (e) in respect of civil action relating to death or personal injury caused by an act or omission in the United Kingdom;
 - (f) in the event of the attachment, pursuant to the final order of court of law, of the salaries, wages or other emoluments owed by the Fund to a staff member of the Fund;
 - (g) in respect of the enforcement of an arbitration award made under Article 23 of this Agreement; and

(h) in respect of a counter-claim directly connected with proceedings initiated by the Fund.

(2) The Fund's property and assets wherever situated shall be immune from any form of administrative or provisional judicial constraint, such as requisition, confiscation, expropriation or attachment, except insofar as may be temporarily necessary in connection with the prevention of, and investigation into, accidents involving motor vehicles belonging to, or operated on behalf of, the Fund.

2.2.5 The Judge considered the meaning and effect of section 6 of the Order to be clear and unambiguous. He therefore found that effect should be given to it without regard to the differing text of the Headquarters Agreement and indeed without regard to the Conventions, which might otherwise aid the construction of the Order. This was regardless of (in the Judge's words) "whether it means that the UK would be in breach of its obligations under the HQ Agreement".

2.3 The Court then considered whether the Gard Club had a 'good arguable case' that its claims fell within the exceptions from immunity in section 6(1) of the Order.

Claim by the Gard Club in England

The Judge found that the Gard Club had a good arguable case that its claim in England based on the alleged claims handling agreement with the Fund falls within the exception from immunity in section 6(1)(c) of the Order on the grounds that the alleged funding arrangements amount to a 'loan' or at least a 'transaction for the provision of finance'.

2.4 The Court then considered whether the Gard Club has satisfied the requirement for a "good arguable case on the merits" of its substantive claim against the 1971 Fund.

2.4.1 Whilst noting that real issues are likely to arise on the facts, the Judge considered that the Gard Club could satisfy the good arguable case threshold in respect of its English claim based on the alleged claims handling agreement with the Fund.

Claim by the Gard Club in Venezuela

2.4.2 However, the Judge held that the Gard Club had failed to make out a good arguable case that the Venezuelan court proceedings brought by the Gard Club against the Fund fall within the exception to immunity at section 6(1)(b) of the Order for claims brought 'in accordance with the provisions of the [1971 Fund] Convention'. The Judge found that the claim in Venezuela is not a 1971 Fund Convention claim.

2.4.3 Although the issue did not arise in view of the Judge's finding on immunity relating to the Venezuelan proceedings, the Judge noted that the only evidence before the Court from the Gard's Venezuelan lawyer was that Gard had a good arguable case in Venezuela.

3 Effect of the freezing injunction

3.1 The effect of a freezing order made by the English High Court is that:

(a) The 1971 Fund, and any persons made aware of the order (including, for example, the 1971 Fund's bankers), may not remove from England or dispose of the Fund's assets up to the sum of US\$58 million (effectively, any of the 1971 Fund's assets).

(b) However, the 1971 Fund is not prevented from dealing with its assets in the ordinary course of its business, including making compensation payments under the 1971 Fund Convention and paying its ordinary expenses, or from spending reasonably on legal representation.

3.2 The text of the judgement, in English, is published in the IOPC Funds' website (<http://www.iopcfunds.org/>).

4 Director's considerations

4.1 The freezing injunction granted by the High Court in London will prevent the 1971 Fund from removing from England or disposing of its assets; however it does not have any effect in practice on the normal course of its activities since the 1971 Fund is not prevented from making compensation payments, including making out-of-court settlement of claims, paying expenses, and the cost of the Fund's legal representation.

4.2 In the Director's view, the injunction, unless it is discharged, would however prevent the 1971 Fund from reimbursing any surplus monies to contributors after the October 2014 session of the 1971 Fund Administrative Council.

4.3 It is the Director's intention that the 1971 Fund should appeal against the judgement.

4.4 The Director also intends to examine the judgement and what implications it might have in relation to the Headquarters Agreement between the United Kingdom Government and the 1971 Fund with the 1971 Fund legal advisers. He will also look at the implications the judgement might have in respect of the 1992 Fund and the Supplementary Fund. The Director will revert to the governing bodies at their October 2014 sessions.

5 Action to be taken

1971 Fund Administrative Council

The 1971 Fund Administrative Council is invited to take note of the information contained in this document.
