INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ASSEMBLY
24th session
Agenda item 19

71FUND/A.24/16/2
9 October 2001
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originally £80 million, now stands at £1.6 million, after a number of claims have been dismissed, settled out of court, withdrawn from the court proceedings or reduced in amounts. Only three claims are being pursued. As regards a claim by Shetland Sea Farms Ltd for £1.4 million the Scottish Court of first instance held that the claim was based on false documents. The Court allowed nevertheless the claimant to pursue the claim. In 2001 the Court rejected a claim in the fisheries sector for £123 357 but the claimants have appealed against this decision. A claim for £85 000 for damage to felt roofs is pending. In May 2000 the 1971 Fund resumed payments of compensation, which had been suspended since October 1995, by paying 40% of the claims which had been approved but not paid. These payments totalled £2.3 million. The total payments of claims stands at £48.2 million. As a result of a number of claims having recently been dismissed or withdrawn and the Skuld Club having made additional funds available, it is now possible to pay all established claims in full. Payments will commence shortly.
Action to be taken:	Information to be noted.

1 Introduction

This document deals with developments in respect of the *Braer* incident (United Kingdom, 5 January 1993) which have taken place since the 4th session of the Administrative Council.

2 Claims settled out of court

By October 1995 some 2000 claims for compensation had been settled and paid for a total amount of approximately £44.9 million. Due to the fact that legal proceedings had been brought against the shipowner, his insurer, Assuranceforeningen Skuld (Skuld Club) and the 1971 Fund for significant amounts, the Executive Committee decided at its October 1995 session to suspend further payments. Since then, claims amounting to £6.2 million have been accepted as admissible. The suspension of payments was lifted in May 2000, and part payments of these claims were made during 2000 and in early 2001.

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 in court was approximately £80 million.

3.2 The court actions related 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 had been 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 The majority of the opposed claims have either been dismissed by the Court or have been withdrawn from the legal proceedings.

3.4 It should be noted that the Court of Session has rendered four judgements relating to claims or groups of claims which had been rejected by the 1971 Fund.[<1>] The Court of Session also rejected these claims. One of the Court of Session's judgements was confirmed by the Scottish Appeal Court.[<2>]

Property damage claims

3.5 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.

3.6 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.

[<1>] Landcatch Ltd (document 71FUND/EXC.57/4, paragraphs 3.10-3.13), salmon price damage claims (document 71FUND/EXC.60/4, paragraphs 4.1-4.8), P & O Scottish Ferries Ltd (document 71FUND/EXC.60/4, paragraphs 6.1-6.4) and the roof claims referred to in paragraphs 3.8-3.19 below.

[<2>] Landcatch Ltd (document 71FUND/EXC.62/5, paragraphs 3.5-3.21)

3.7 Eighty-four claims in this category, for a total of £8 million, became the subject of legal proceedings, although subsequently 35 claims totalling £5.1 million were withdrawn. In the view of the Fund's experts, no satisfactory technical evidence had 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 later hypothesised, however, that the active component present in the dispersants used to treat the oil was the cause. The 1971 Fund's experts took the view that the report of the claimants' expert did not provide satisfactory evidence that the dispersants had caused the alleged damage.

3.8 A four-week hearing was held in the Court of Session commencing in June 1999 in respect of six property damage claims, totalling £170 735, which had been selected to provide a wide geographical spread and variety of types of roof materials. The claimants testified as to the conditions of their roofs, and experts engaged by the claimants gave evidence. Experts engaged by the shipowner, the Skuld Club and the 1971 Fund also gave evidence.

3.9 At the hearing, 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 nor had such problems been observed outwith the area affected by the aerial pollution, nor on the mainland of Scotland. Their expert indicated that the problems 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. Expert witnesses engaged by the shipowner, the Skuld Club and the 1971 Fund expressed the view however that only minute quantities of dispersant had reached the land and that in any event there was no scientific basis for the assertion that dispersants used to seek to break up the oil spill could cause damage to asbestos cement roofs.

3.10 At the conclusion of the June 1999 hearing the Court indicated that it wished to receive written submissions from the lawyers for the parties on the issues raised at the hearing. Following receipt of the submissions oral hearings were held in December 1999 and January 2000. The Court rendered its judgement on 14 February 2001.

3.11 In its judgement the Court held that the claimants had failed to provide scientific or circumstantial evidence linking the alleged defects to their roofs, which are known to occur naturally in asbestos cement roofing materials, to the *Braer* incident.

3.12 The expert engaged by the claimants had submitted that whenever oil spray landed on a roof, the spray must have included dispersants. The Court considered that the expert's contention was the merest speculation and was demonstratively wrong. The Court expressed the view that the claimants should have carried out a programme of monitoring of their properties and of control of properties and stated that the evidence presented by the claimants was not based on a systematic methodology of this kind. The Court referred to the fact that the claimants had not established a boundary of the area where dispersant was deposited.

3.13 The Court held that the claimants had failed to prove that dispersant in any measurable quantity had been deposited on any of their roofs. The Court also stated that there was no evidence that the oil from the *Braer* had caused damage to the roofs. In addition the Court considered that it was not proved that the defects of the roofs emerged after the *Braer* incident.

3.14 In conclusion, the Court held that the claimants had failed to produce a credible scientific theory or a convincing body of scientific evidence that dispersant was capable of causing damage to asbestos cement roofing materials. The Court stated that the claimants' expert had merely suggested a possible mechanism by which the damage could have been caused, but that it was no more than a speculative hypothesis which the expert was in no position to confirm. The Court held that the scientific evidence provided by the expert of the shipowner, the Club and the 1971 Fund was authoritative and convincing in disproving such a hypothesis. Although the Court was critical of this expert evidence regarding the conditions and age of the claimants' roofs in comparison with control roofs, the Court emphasised that it was for the claimants to provide evidence in this regard.

3.15 On the basis of these considerations the Court rejected five of the claims. A sixth claim was rejected on procedural grounds. The claimants did not appeal against the judgement.

3.16 At the Administrative Council's June 2001 session, the United Kingdom delegation drew attention to the fact that one of the obstacles to these claimants withdrawing their actions was that the shipowner's insurer and the 1971 Fund were requesting each claimant to contribute to the insurer's and the 1971 Fund's legal costs. That delegation noted that although it was usual practice for the IOPC Funds to pursue such costs he pointed out that these claimants were not companies but were all individuals, some of whom were pensioners, and that many considered themselves badly treated. The United Kingdom delegation requested the Council to allow the Director the flexibility not to pursue the Fund's legal costs in this particular instance with a view to reaching a settlement of the *Braer* incident on a global basis.

3.17 The Director informed the Council that the 1971 Fund and the insurer had in early April 2001 made an offer in writing relating to the claimants' contributions to the Funds' and the insurer's legal costs, that the claimants' solicitors had not replied to this offer and that the 1971 Fund had through its lawyers been trying repeatedly but unsuccessfully to contact the claimants' solicitors with a view to discussing this issue.

3.18 Several delegations expressed concern that the IOPC Funds could be setting a precedent by not seeking to recover its legal costs, but stated that in circumstances such as those described by the United Kingdom delegation the 1971 Fund should show some flexibility when trying to settle the issue of legal costs with claimants.

3.19 The Administrative Council instructed the Director to take a flexible approach on this issue in order to reach agreement with the claimants on the amount they should contribute towards the 1971 Fund's legal costs and urged the claimants or their representatives to contact the 1971 Fund Secretariat to facilitate a resolution of this matter (document 71FUND/AC.5/A/ES.8/10, paragraph 5.8.4).

3.20 In July 2001 the claimant's solicitors approached the 1971 Fund regarding the cost issue. In August 2001 an agreement on this issue was reached between the claimants on the one side and the 1971 Fund and the Skuld Club on the other.

3.21 In August 2001 the Director was informed that the remaining 43 claimants in this category had instructed their solicitors that they did not want to pursue their claims. The claims, some of which included claims for damage other than to asbestos roofs, were withdrawn at a court hearing held on 28 September 2001.

Shetland Sea Farms Ltd

3.22 In 1995 the Executive Committee considered a claim for £2 004 867, later reduced to £1 513 020, 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 Committee decided that in the assessment of the claim account should be taken of any benefits derived by other companies in the same group (document 71FUND/EXC.42/11, paragraphs 3.4.5 – 3.4.9).

3.23 The experts engaged by the 1971 Fund and the Skuld Club assessed the proven losses at £58 000. 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. During the proceedings the claim was reduced to £1 428 891.

3.24 In October 2000 a hearing took place in order for the Court to consider whether certain of the documents relied upon by the claimant were genuine.

3.25 The Court rendered its decision on 4 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 claims should be refused without any further procedure.

3.26 It will be recalled that there are three companies in the Group, namely Ettrick Trout Company Ltd and the subsidiaries Shetland Sea Farms Ltd and Terregles Ltd, all controlled by a Mr Baxter.

3.27 Shetland Sea Farms had produced in support of its claim for compensation two letters from Terregles ordering from Shetland Sea Farms a substantial number of smolts which orders predated the grounding of the *Braer*, with a view to giving the impression that Terregles and Shetland Sea Farms had entered into a forward contract at arm's length to supply Shetland Sea Farms a substantial number of smolts on fixed terms with the quantity and price specified. Two invoices were specially drawn up by the financial controller of Shetland Sea Farms on Terregles letterhead to support the claim that the contract existed between Terregles and Shetland Sea Farms for the supply of these smolts.

3.28 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 they did so in the knowledge that Shetland Sea Farms had no documentary evidence showing the existence of a contractual commitment on Shetland Sea Farms' part entered into before the *Braer* incident to take and pay for smolts. The Court further 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 held that they did so as part of a scheme to further a substantial claim for compensation and that the claims having been rejected by the Claims Office they persisted with it on the same false basis.

3.29 Having held that both Mr Baxter and Mr Baird, an employee of Shetland Sea Farms, as responsible officers of the claimant had false documents presented to the Court in support of the Shetland Sea Farms' claim for compensation, the Court addressed the second question, namely whether as a result of this the claim should be refused without any further procedure.

3.30 It was argued by the 1971 Fund and the Skuld Club that it would be contrary to public policy for the Court to adjudicate upon the claim in these circumstances and that, where the claimant had used the court process to further an unlawful purpose, the claims should be rejected without further procedure. They maintained that the Court had an inherent power to prevent misuse of its procedure, where this misuse would be manifestly unfair and would in any event bring the administration of justice into disrepute. The 1971 Fund and the Skuld Club made the point that there had been a deliberate attempt to deceive the Court and that those responsible had falsely denied doing anything wrong.

3.31 Shetland Sea Farms argued that to refuse the claim would unfairly penalise the company and that refusing to allow the claim to continue would be out of all proportion to the alleged wrongdoing. Shetland Sea Farms also advanced an argument under the United Kingdom Human Rights Act that in effect to deny the right to a trial in the circumstances would be a breach of Article 6 (1) of the European Convention on Human Rights which entitled every person to a fair and public hearing. The company stated that it was now prepared to seek to prove its claim without reference to the false letters.

3.32 The Court acknowledged that it had an inherent power to dismiss the claim where a party has been guilty of an abuse of process but stated that that was a drastic power. 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.

3.33 Shetland Sea Farms did not appeal against the position taken by the Court as regards the company's use of false documents.

3.34 The Director considered whether the 1971 Fund should appeal against the Court's decision not to refuse the claim without any further procedure, but decided that the Fund should not do so.

3.35 As regards the continuation of the proceedings the Court decided on 21 August 2001 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.

Other claims pending in court

3.36 A claim for £123 357 in the fishery sector was rejected by the Court earlier in 2001. The claim was made directly against the 1971 Fund on the basis of offers made on behalf of the Fund, ie on the basis of contract. The 1971 Fund maintained that the offers had expired since they had not been accepted within a reasonable period of time. The Court accepted the argument advanced by the 1971 Fund that the offers had not been accepted within a reasonable time and hence had lapsed and rejected the claim. The claimants had previously brought an action under the Merchant Shipping Acts 1971 and 1974 (which implement the 1969 Civil Liability Convention and the 1971 Fund Convention) but this action had been abandoned. The claimants have appealed the decision to reject the claim.

3.37 A claim for £85 000 was submitted for damage to various felt roofs. Discussions are being held with the claimant and his representatives in an attempt to reach a settlement.

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 (£4 883 839.80). The Court has not yet considered the question of whether or not the shipowner is entitled to limit his liability.

4.2 At its 46th session, held 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 Present claims situation

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.

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 At its 62nd session, in October 1999, 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).

5.4 In April 2000 the United Kingdom Government withdrew its claim for compensation for some £3.6 million. The Skuld Club undertook not to pursue its claim for £1.7 million relating to salvage operations. In addition, five fish processors withdrew their claims, totalling £7.6 million. As a result the total amount of the claims pending in court and the claims which had been approved but not paid fell below £20 million. The claims pending in Court totalled £7 611 436, and the claims settled but not paid totalled £5 558 077, or together £13 169 513. The condition for resumption of payments laid down by the Executive Committee was met in April 2000. On that basis the Director decided that the Fund should pay 40% of the claims that had been approved but not paid. Payments at 40% totalling £2 022 068 were made during 2000 in respect of these claims and claims settled thereafter.

5.5 The settlement of a claim by Shetland Islands Council in December 2000 resulted in a further reduction of the claimed amount by £856 596. In January 2001 the 1971 Fund paid £260 688 to the Council, representing 40% of the settlement amount of £651 721. Further payments totalling £3 902 were made in early 2001.

5.6 In early 2001 a claimant in the fishery sector withdrew his claim for £777 550.

5.7 Three personal injury claims totalling £200 000 have been settled at £33 500, but so far no payments have been made.

5.8 The claims which have been settled but not paid in full total £6 209 798. As regards these claims there remains £3 729 354 unpaid.

5.9 After the withdrawal of the remaining 43 roof claims referred to in paragraph 3.21, there are only three opposed claims pending in court, namely that of Shetland Sea Farms for £1 428 891, the claim in the fishery sector for £123 357 and the claim for damage to felt roofs for £85 000.

5.10 So far, the total amount paid in compensation is £48 208 644, out of which the 1971 Fund has paid £42 926 938 and the Skuld Club £5 281 706. There is, therefore, £2 400 636 available for further compensation payments.

5.11 The shipowner and the Skuld Club are entitled to indemnification under Article 5.1 of the 1971 Fund Convention for £1 211 780. The Skuld Club has informed the Director that the shipowner and the Club are prepared to make available the indemnification amount for payments for claimants, resulting in an additional amount of £1 211 780 being available for compensation payments. The total amount available for such payment is therefore £3 612 416.

5.12 As set out in paragraph 5.8 there remains an amount of £3 729 354 unpaid in respect of the claims which have been settled and not paid in full. As a result of the position taken by the shipowner/Skuld Club in respect of indemnification, an amount of £3 612 416 would be available for compensation payments. There would therefore be a deficit of £116 938 plus any amount which may be awarded by the Court in respect of the claim by Shetland Sea Farms and the other two remaining claims. The Skuld Club has undertaken to make funds available to cover this deficit and to guarantee the payment of the amount, if any, which may be awarded by a final court judgement in respect of the three pending claims.

5.13 As a result of this undertaking, all established claims can be paid in full. It is expected that the payments of the balance of 60% to those claimants who have so far only received 40% of the approved amount will start during October 2001, as will payments in respect of established claims for which no payments have been made.

5.14 The Skuld Club is also considering how the limitation proceedings are to be terminated.

6 Action to be taken by the Assembly

The Assembly 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 *Braer* incident as it may deem appropriate.

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