



INCIDENTS INVOLVING THE 1971 FUND

BRAER

Note by the Director

Summary:

The total amount of the claims in court was originally £80 million. All claims but one have been dismissed, settled out of court or withdrawn from the court proceedings. Only one claim is being pursued, that by Shetland Sea Farms 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 three 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 against that decision.

As a result of a number of claims having been dismissed by the courts or withdrawn from the court proceedings and the shipowner's P & I insurer having made additional funds available, in October 2001 it became possible to pay all established claims in full. All these claims but one have been paid.

The compensation payments total £51 938 938, of which the 1971 Fund has paid £45 725 441 and the shipowner's insurer £6 213 497.

Action to be taken: Information to be noted.

1 Introduction

This document summarises the situation in respect of the *Braer* incident (United Kingdom, 5 January 1993) and sets out the developments since the 9th session of the Administrative Council, held in October 2002.

2 Claims for compensation

General situation

- 2.1 All claims but one have been settled and the total compensation paid amounts to £51 938 938, of which the 1971 Fund has paid £45 725 441 and the shipowner's insurer Assuranceforeningen Skuld (Skuld Club) £6 213 497.

Shetland Sea Farms

- 2.2 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 Committee decided that in the assessment of the claim account should be taken of any benefits derived by other companies in the same group. 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.
- 2.3 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.
- 2.4 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.
- 2.5 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 further held that they did so as part of a scheme to further a substantial claim for compensation.
- 2.6 The Court then addressed the second question, namely whether as a result of this the claim should be refused without any further procedure. 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.
- 2.7 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/May and September 2002.
- 2.8 The Court issued its decision in May 2003. The Court did not accept Shetland Sea Farms' evidence that there was a contract for 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 management of the company had been involved in a fraudulent scheme and has reported the matter to the Chief Prosecutor in Scotland to consider whether criminal proceedings should be brought against three of Shetland Sea Farms' witnesses. The Court however allowed the case to proceed, 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 on the grounds that the loss of profit claim is

based on numbers and cost of smolts as set out in the claim which is based on the alleged contracts which have been held to be false. The appeal will be heard in June 2004.

- 2.9 Any amount awarded by a final court decision will be paid by the Skuld Club.

3 Right of limitation of the shipowner and his insurer

- 3.1 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 considered the question of whether or not the shipowner is entitled to limit his liability.

- 3.2 The Skuld Club is considering how the limitation proceedings are to be terminated.

4 Suspension of payments

- 4.1 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.

- 4.2 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.

5 Resumption of payments

- 5.1 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. When this condition was met, the Director decided that the Fund should pay 40% of the claims that had been approved but not paid. Payments at 40% totalling £2.3 million were made during 2000 and in early 2001 in respect of these claims and claims settled thereafter.

- 5.2 The Skuld Club informed the Director that the shipowner and the Club were prepared to make available the indemnification amount of £1.2 million to which they were entitled under Article 5.1 of the 1971 Fund Convention for payment to claimants. The Skuld Club also undertook to make additional funds available to make it possible to pay all established claims in full and to guarantee the payment of the amount, if any, which may be awarded by a final court judgement in respect of the pending claim.

- 5.3 As a result of the Skuld Club's undertaking, the Director decided in October 2001 that all established claims could be paid in full. The payments of the outstanding balance were made during the period November 2001 - July 2002, amounting to £3.7 million. A payment for £6 656 is outstanding in respect of a claimant whom it has not been possible to contact. There may be a further claim for £5 257 but it may be offset against legal costs owed by the claimant to the Fund.

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 the *Braer* incident as it may deem appropriate.
