INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
12th session
Agenda item 15

71FUND/AC.12/13/4
19 September 2003
Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

SEA EMPRESS

Note by the Director

Summary:	Compensation totalling £36.8 million has been paid to 797 claimants. All claims for compensation arising from this incident have been settled. In accordance with the Executive Committee's decision, the 1971 Fund, together with the shipowner's insurer, has taken recourse action against the Milford Haven Port Authority (MHPA) to recover the amounts paid by the Fund and the insurer in compensation. MHPA has submitted defence pleadings in which it denies any liability. The oil company Texaco has also taken action against MHPA and against Milford Haven Pilotage Limited.
Action to be taken:	Give instructions in respect of the recourse action.

1 Introduction

This document sets out the developments since the Administrative Council's 9th session, held in October 2002, in respect of the *Sea Empress* incident, which occurred on 15 February 1996 in the entrance to Milford Haven in South Wales (United Kingdom).

2 Claims situation

2.1 One thousand and thirty-four claimants have presented claims for compensation for a total of £49.3 million. Payments have been made to 797 claimants totalling £36.8 million, of which £6.9 million has been paid by the shipowner's insurer, Assuranceforeningen Skuld (Skuld Club), and £29.9 million by the 1971 Fund.

2.2 There are no outstanding claims.

3 Legal proceedings against the 1971 Fund

3.1 Legal proceedings were commenced against the shipowner, the Skuld Club and the 1971 Fund in respect of the majority of those claims where agreement had not been reached prior to the expiry of the three-year time bar period, ie on or shortly after 15 February 1999.

3.2 In April 1999, the Admiralty Court granted the shipowner and the Skuld Club a decree limiting their liability under the relevant provisions of United Kingdom law to 8 825 686 SDR

(approximately £7.4 million). The decree required all claims to be filed in the limitation proceedings by 18 November 1999 and stayed all other proceedings against the shipowner and the Skuld Club.

3.3 In June 2000 the Admiralty Court granted a temporary stay of proceedings against the 1971 Fund until all claims against the shipowner and the Skuld Club in the limitation proceedings had been determined. In addition, the Court ruled that the 1971 Fund, as well as those claimants whose claims against the 1971 Fund had been stayed, should be bound by any findings of fact made by the Admiralty Court in any judgement given in respect of claims filed in the limitation proceedings.

Developments in respect of settlement of claims

3.4 Fifty-nine writs were issued against the shipowner, the Skuld Club and the 1971 Fund in respect of 194 claimants prior to the expiry of the three-year time bar period, 51 of which were served. At the end of 2002 all outstanding claims had been settled, discontinued or withdrawn except the claims set out below.

Claim by a whelk processor based in Devon

3.5 A claim for £645 000 presented by a whelk processor based in Devon had been rejected by the 1971 Fund and the Skuld Club on the grounds of lack of reasonable proximity between the oil pollution and the alleged loss.

3.6 On 29 May 2002 the High Court (Court of First Instance) considered the preliminary issue of whether the claim for loss of profits constituted pollution damage within the meaning of the United Kingdom Merchant Shipping Act 1995 (which implements the 1969 Civil Liability Convention and the 1971 Fund Convention). The Court found in favour of the 1971 Fund and held that the claim was inadmissible for substantially the same reasons as those given in the Landcatch decision by the Scottish Inner House (Appeal Court), ie that the claim was secondary, derivative, relational and/or indirect and that this lack of proximity rendered the processor's claim too remote.

3.7 The claimant was granted permission to appeal on the grounds that the case raised issues of principle of general importance in the development of substantive law. The Court of Appeal heard the appeal on 17 January 2003 and the Court's judgement was rendered on 7 February 2003. The Court of Appeal, composed of three judges, in a unanimous judgement, dismissed the appeal and upheld the decision by the High Court to reject the claim.

3.8 In its judgement the Court of Appeal, applying the Landcatch case, held that the loss suffered did not fall within the ambit of the Merchant Shipping Act 1995. The Court's reasons can be summarised as follows:

> The Court took account of the fact that the claimant was not engaged in any local activity in the physical area of the contamination and that his loss arose from his inability to carry out processing and packing and deliveries of processed and packed whelks at points far away from the contaminated areas. The claimant's loss, like that of the claimant in the Landcatch case, was caused by the inability of the persons with whom he had (or would, but for the fishing ban, have had) trading relations to carry on their operations within the designated area. The Court found that this was a form of secondary economic loss, which was outside the intended scope of a statute which was closely focused on physical contamination and its consequences. The Court thought it reasonable to assume that the intention of the Contracting States who were parties to the 1971 Fund Convention was that those who established the causal link between their loss and the contamination should be compensated in full (so far as

that were possible within the Fund's limit). The Court considered that it was consistent with that intention for the Fund to operate so as to enable those whose loss was more proximate to recover in full by excluding from participation in the common fund those whose loss was less proximate. There was no doubt as to the need to draw a line to include some claims and exclude others. This claim fell on the wrong side of that line. However the Court of Appeal did not think it appropriate to offer guidelines as to the causative test to be applied by the Fund when making decisions in the future. The precise extent of the Fund's obligations under the statute was best left for determination on a case by case basis.

3.9 The Court of Appeal also awarded costs to the 1971 Fund. In this regard £50 000 was subsequently paid by the claimant to the 1971 Fund in full and final settlement in respect of costs.

Claim by the owner of a windsurfing and watersports school

3.10 A claim for £226 196 which had been presented for loss of earnings suffered by a windsurfing and watersports school during 1996, 1997 and 1998 was withdrawn following the decision of the Court of Appeal in respect of the claim by the whelk processor.

Claims for legal and professional fees

3.11 Twelve claims for £627 000 relating to legal and professional fees were pursued. These claims were settled for a total of £324 000. This amount was paid in August 2003.

4 Recourse action by the 1971 Fund

4.1 At its 62nd session, held in October 1999, the Executive Committee instructed the Director to take recourse action on behalf of the 1971 Fund against MHPA (document 71FUND/EXC.62/14, paragraph 3.6.23).

4.2 In February 2002 the 1971 Fund and the Skuld Club commenced proceedings against MHPA in the Admiralty Court in London. The action was brought by the 1971 Fund and the Skuld Club in their own names as well as on behalf of – and in the names of - 786 claimants to whom compensation totalling £34.1 million had been paid, and on behalf of – and in the names of – 32 claimants who at that time were pursuing claims totalling £3.9 million. Since then a further £2.5 million has been paid to 29 claimants in the latter category. A few claimants, whose claims for principal and interest had been settled in full, but who had taken legal action against the 1971 Fund and the Skuld Club to recover their legal costs did not give such authorisation. The 1971 Fund and the Skuld Club have also claimed administrative and legal expenses in the region of £2.6 million arising from the incident.

4.3 The 1971 Fund has maintained that MHPA failed to take reasonable care to avoid the risk of a laden tanker grounding and spilling oil and that, in particular, MHPA failed to give proper consideration to the risk of a laden tanker going aground and causing serious oil pollution and failed to put in place procedures to control or reduce the risk as much as possible. The 1971 Fund has set out a detailed claim against MHPA, which includes the following allegations of negligence and/or breach of duty:

(a) MHPA failed to put in place a proper system to satisfy itself that the proposed entry of a particular vessel into Milford Haven at a particular time was safe and/or for refusing permission for a vessel to enter the port at such time unless MHPA was so satisfied;

(b) MHPA failed to have in place an effective and fully operational Vessel Traffic Services facility using radar to enable the duty marine officer to give advice and information to vessels and to assist them to remain within the relevant channel boundaries;

(c) MHPA failed properly to mark the entrance to the West Channel;

(d) MHPA's system of pilot allocation was negligent; and

(e) MHPA's system of pilot training was defective.

4.4 It is also alleged that MHPA's response to the grounding of the vessel was *ad hoc*, improvised and negligent and resulted in the unnecessary escape into the Haven of some 69 300 tonnes of crude oil.

4.5 MHPA has indicated in press reports that it is covered by insurance and that the insurers will be vigorously defending the claim.

4.6 MHPA submitted a lengthy and detailed defence denying any liability for the incident and the ensuing oil pollution. MHPA's position can be summarised as follows.

4.7 MHPA has argued that it did not owe any duty of care and/or statutory duty to claimants in respect of the economic loss suffered. MHPA has also denied owing any duty of care to the 1971 Fund. It has further maintained that under the Pilotage Act 1987, MHPA is not liable for any loss or damage caused by an act or omission of a pilot authorised by it by virtue solely of that authorisation and that in any event the pilot in question was not employed by MHPA but by another (wholly-owned) company for whose acts MHPA is not liable.

4.8 MHPA has in its defence also invoked the provisions in the Merchant Shipping (Oil Pollution) Act on channelling of liability and the Milford Haven Conservancy Act 1983 relating to salvage operations, and has maintained that by reason of these Acts MHPA is not liable for any pollution damage resulting from the *Sea Empress* incident. MHPA has further invoked Section 22 of the Pilotage Act 1987 which, in its view, would entitle it to limit its liability to £12 000 in respect of the *Sea Empress* incident.

4.9 MHPA has in particular made the following points:

(a) MHPA had given full and proper consideration to the risk of a laden tanker grounding and as a result thereof put in place appropriate and sufficient aids, guidelines and procedures to control and reduce that risk.

(b) MHPA had in place a proper and sufficient system for satisfying itself that the proposed entry of a particular vessel into the port at a particular time was safe and/or for refusing permission to enter until MHPA was so satisfied. The proposed entry of the *Sea Empress* was safe.

(c) The radar system was never intended to be used to give direct navigational instructions or advice to a ship and in any event, even if such a radar system had been in place, it would not have prevented the grounding.

(d) The system of pilot allocation was appropriate.

(e) The pilots working in Milford Haven had received adequate training and had extensive, detailed and hands-on experience of the port and of the West Channel.

(f) The grounding of the *Sea Empress* was not caused by lack of training or experience of the pilot but by his failure on the day in question to adopt a course appropriate for the prevailing tidal conditions.

(g) MHPA had an Emergency Plan and an Anti-Oil Pollution Plan, which were effective and sufficient to deal with the grounding of a laden tanker.

(h) The escape of a further 69 300 tonnes of crude oil and substantially all of the alleged pollution damage were not caused by the initial grounding but by events which occurred and decisions taken thereafter and MHPA is not liable for the consequences thereof.

4.10 MHPA has not admitted that any of the loss or damage covered by the claims by the 1971 Fund and the Skuld Club was caused by the grounding of the *Sea Empress*. No admissions have been made as to the nature of the alleged loss or damage nor as to whether the alleged loss or damage (or any of it) is sufficiently proximate to be recoverable from MHPA.

4.11 In their reply the 1971 Fund and the Skuld Club made the following points:

(a) MHPA cannot bring itself within Section 22(8) of the Pilotage Act 1987 to the effect that there is no liability for any loss or damage caused by an act or omission of a pilot authorised by MHPA 'by virtue solely of that authorisation'.

(b) MHPA cannot avoid liability for pollution damage by relying upon the Milford Haven Conservancy Act 1983 relating to salvage.

(c) The 1971 Fund contests MHPA's allegation that substantially all of the alleged pollution damage was caused, not by the initial grounding, but by events which occurred and decisions taken thereafter.

(d) Having chosen to arrange its affairs so that the pilots were employed by a subsidiary company (thereby enabling MHPA to avoid vicarious liability for any negligence on the part of the pilots), MHPA cannot then contend that the pilots were 'employed' by it for the purpose of Section 22(3) of the Pilotage Act 1987, so as to obtain the benefit of the limitation of liability contained within that section.

4.12 At a Case Management Conference (CMC) held on 19 February 2003, the 1971 Fund applied for the Court's permission to amend its claim after the expiry of the time bar period so as to include also the ground that the actions or omissions of MHPA had created or caused a public nuisance, which is a concept of common law. MHPA opposed the request. In a judgment rendered on 21 February 2003, the Court granted the 1971 Fund permission to amend its claim.

4.13 Also at the CMC, the 1971 Fund and MHPA agreed with the Court's proposal that the parties should explore the possibility of settlement at a mediation which will take place in October 2003. The Administrative Council will be informed of the outcome of the mediation in due course.

4.14 The trial has been fixed to take place before the Admiralty Court during June and July 2004, should an out-of-court settlement not be reached. Eight weeks of court time have been set aside.

4.15 As required under English law, both parties have completed extensive disclosure of documents, in which documents relevant to the issues in dispute case in the possession or power of each party have been disclosed to the other. The parties have also exchanged witness statements. A further CMC has been fixed to take place on 7 November 2003 to address procedural issues, including the timetable for exchange of expert reports.

5 Action by Texaco

5.1 On 14 February 2002, Texaco, which operates an oil terminal in Milford Haven, commenced legal action against MHPA and Milford Haven Pilotage Limited (MHPL), the company which employed the pilots working in the port of Milford Haven. The 1971 Fund was informed of this

action in early July 2002. Texaco submitted its statement of claim on 30 July 2002. In its action against both defendants, Texaco claimed compensation as follows:

a) US$10.5 million (£6.8 million) for loss or damage to cargo
b) US$272 500 (£176 000) for the loss of benefit of the freight paid by Texaco
c) US$5.3 million (£3.4 million) for payment of a claim in contract for salvage
d) £18 000 for payment of a claim in salvage at common law
e) £53 000 for liabilities incurred by Texaco in demurrage
f) £23 600 for additional costs incurred for lightering operations and diverting cargo.

5.2 Texaco based its claim against MHPA on similar legal grounds as the 1971 Fund invoked in its action against the same defendant. However, as regards the Fund's arguments against MHPA dealing with pilotage allocation and pilot training, Texaco has also raised these arguments against MHPL. Texaco has also argued that MHPA and MHPL created or caused a public nuisance resulting in the said losses.

5.3 As regards Texaco's claim for liabilities incurred in demurrage (paragraph 5.1e), Texaco initially pursued a similar claim in the limitation proceedings against the 1971 Fund and the shipowner, but this claim was rejected by the 1971 Fund due to the claim not being considered as relating to 'pollution damage'. That claim was withdrawn by Texaco in May 2002.

5.4 Texaco informed the Court in February 2003 that it was in advanced discussions with MHPA to the effect that the proceedings in the claim by Texaco against MHPA be stayed generally, pending the outcome of the claim by the 1971 Fund against MHPA.

6 Agreement with the Skuld Club

6.1 The Skuld Club has authorised the 1971 Fund to pursue the recourse action in the Club's name and after consultation to take all decisions relating to the conduct of the proceedings.

6.2 An agreement was reached between the 1971 Fund and the Skuld Club as to the distribution between them of any amount recovered as a result of the recourse action. Under that agreement the 1971 Fund will be entitled to retain any sums recovered up to a level at which the Fund has been reimbursed in full for all sums paid by the 1971 Fund to claimants as well as the costs incurred by the 1971 Fund in relation to the claims handling and the costs of pursuing the recourse action. Any balance will be passed to the Skuld Club. The 1971 Fund will indemnify the Skuld Club in respect of certain specified legal costs that the Club may incur in connection with and after commencement of the recourse action.

6.3 In April 2002 the 1971 Fund paid the Skuld Club the amount due to it by way of indemnification of the shipowner under Article 5.1 of the 1971 Fund Convention, 2 189 832 SDR or £1 835 035, less a deduction in respect of the Club's share of joint costs.

7 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 recourse action as it may deem appropriate.