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COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
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Agenda item 2

71FUND/AC.8/2
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INCIDENTS INVOLVING THE 1971 FUND

SEA EMPRESS

Note by the Director

Summary:	Compensation totalling £36 million has been paid to 792 claimants. Five claims for compensation totalling £1.4 million are the subject of legal actions. The 1971 Fund will apply shortly to the Court seeking summary judgments or dismissals in respect of three of these claims. The Court has decided that a fourth claim presented by a whelk processor that had been rejected by the Fund was not admissible. However, the claimant has appealed against the decision. A court hearing in respect of the fifth claim is scheduled for the autumn of 2002. 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 to recover the amount paid by the Fund and the insurer in compensation. MHPA has submitted defence pleadings in which it denies any liability. The defence pleadings are being examined by the 1971 Fund in consultation with its legal advisers.
Action to be taken:	Information to be noted.

1 Introduction

1.1 This document sets out the developments since the Administrative Council's 7th session, held in April/May 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).

1.2 With respect to the incident, the impact of the spill, the clean-up operations and the effects on fishery and tourism, reference is made to documents 71FUND/EXC.52/7, 71FUND/EXC.55/7, 71FUND/EXC.57/6, 71FUND/EXC.58/6, 71FUND/EXC.59/8, 71FUND/EXC.60/8, 71FUND/EXC.61/7, 71FUND/EXC.62/7 and 71FUND/EXC.63/5.

2 Claims situation

General situation

2.1 As at 12 June 2002, 1 034 claimants had presented claims for compensation and interest thereon for a total of £49.3 million. Payments have been made to 792 claimants totalling £36 million, of which £6.9 million has been paid by the shipowner's insurer, Assuranceforeningen Skuld (Skuld Club), and £29.1 million by the 1971 Fund.

Recent developments

2.2 In April 2002 the claims by Texaco Pembroke Refinery and Elf Oil UK in respect of clean-up response costs were settled for £871 000 and £115 000 respectively. Both companies withdrew the parts of their claims which related to economic losses in the form of demurrage. Elf Oil UK also withdrew the parts of its claims relating to sub-chartering of vessels, delays to deliveries of crude oil and reduction in refinery throughput. The settlement amounts were paid by the 1971 Fund in May 2002.

3 Legal proceedings against the 1971 Fund

Procedural matters

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. As at 15 June 2002, claims by 157 of these claimants had been settled, discontinued or withdrawn. Of the 38 claimants still pursing their claims in the limitation proceedings, 33 are pursuing only claims for legal and professional fees, which have not yet been quantified, or in respect of which the amounts offered by the Skuld Club and the 1971 Fund to the claimants have not been accepted. It is likely that most of these claims will be referred to court for assessment.

3.5 There are five remaining claims for compensation totalling £1.4 million that are the subject of legal action. Details of the status of these claims are given below. Three of the claims have been rejected by the 1971 Fund and the Skuld Club. The remaining two claims have been assessed by the 1971 Fund and the Skuld Club at £240 000 and interim payments have been made by the 1971 Fund to the claimants.

Claim by a whelk processor based in Devon

3.6 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 (lack of geographic proximity, low degree of dependence of the company on supplies from the affected area, company not considered as forming an integral part of the economic activity of the area affected by the spill).

3.7 According to the claimant, something in the region of half of his sales were accounted for in processed whelk, and most of these were Welsh in respect of which there was a lucrative market in Korea. The claimant has stated that he had a long-term sales contract with a Korean company, that he had supply contracts with fishermen who fished whelk in the area affected by the oil spill and that the spill had led to the imposition of a fishing ban as a result of which the claimant had lost profit that he would otherwise have made from processing whelks supplied by these fishermen.

3.8 In April 2001 the Court decided that the question of principle as to 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) should be tried as a preliminary issue. For the purpose of this preliminary issue, the Court was asked to assume that the facts alleged by the claimant were true. A hearing in respect of this issue took place in April 2002.

3.9 The claimant maintained that his economic loss was caused by contamination in that, but for the escape of oil, no fishing ban would have been imposed and that the contamination was an effective cause of the loss of profit. The claimant also argued that the loss was not too remote since it was of a kind which was obviously foreseeable.

3.10 The 1971 Fund argued that whilst the loss was foreseeable, this was not sufficient to render the economic loss recoverable and that the loss flowed from an interruption of a business relationship with the primary victims of the contamination, namely the fishermen. The Fund further maintained that such secondary or relational losses were not recoverable, citing the Landcatch decision by the Scottish courts (documents 71FUND/EXC.57/4, section 1 and 71FUND/EXC/62/5, section 3).

3.11 On 29 May 2002 the High Court (Court of First Instance) decided the preliminary issue in favour of the 1971 Fund and found that the claim was inadmissible for substantially the same reasons as those given in the Landcatch decision by the Scottish Inner House (Appeal Court). In its decision on the preliminary issue, the High Court held that there was no relevant factual distinction between the processor's claim and that of Landcatch in that both were equally secondary, derivative, relational and/or indirect and that this lack of proximity rendered the processor's claim too remote.

3.12 The claimant applied to the High Court for permission to appeal on the grounds that the claim was for a substantial sum and that, although the point of law raised was a narrow one, it was important. The High Court granted permission to appeal to the Court of Appeal on the grounds that the case raised issues of principle of general importance in the development of substantive law. The claimaint lodged an appeal on 12 June 2002. It is expected that the appeal will be heard within 6 – 9 months.

Claim by the owner of a windsurfing and watersports school

3.13 A claim for £226 196 has been presented for loss of earnings suffered by a windsurfing and watersports school during 1996, 1997 and 1998. The 1971 Fund and the Skuld Club has paid compensation totalling £134 970 for losses suffered in 1996 and for the cancellation of a training instructor course in 1997. The Club and the Fund have maintained that there was no causative

link between the contamination and any other losses suffered by the business after 1996. It is expected that the case will be heard in the autumn of 2002.

Other claims pending in court

3.14 Three other claims are pending in court, namely a claim by a fish processor totalling £465 000, which has been assessed at £105 000, and claims by a whelk fisherman and a share fisherman for £63 000 and £5 730 respectively, both of which have been rejected by the Club and the Fund.

3.15 The 1971 Fund and the Skuld Club have prepared an application to the Court seeking summary judgments or dismissals in respect of the claims by the fish processor and the whelk fisherman, since there are in their view no reasonable grounds for bringing the claims and the claimants have consistently failed to comply with Court orders. The Club and the Fund have prepared a similar application to the Court in respect of the claim by the share fisherman since in this case there is in their view no cause of action against the Skuld Club and the 1971 Fund. These applications will be submitted to the Court shortly unless the claimants withdraw their claims in the meantime.

4 Recourse action

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. The Director was also instructed to keep the Committee informed of any developments so as to enable it to reassess the 1971 Fund's position if required (document 71FUND/EXC.62/14, paragraph 3.6.23).

4.2 On 14 February 2002 the 1971 Fund and Skuld Club commenced proceedings against MHPA in the Admiralty Court in London. The action was brought by the 1971 Fund and Skuld Club in their own names as well as on behalf – and in the names – of 786 claimants to whom compensation had been paid (Group A), and on behalf of – and in the names of – 32 claimants who at that time were still pursuing claims against the 1971 Fund and the Skuld Club and who had expressly authorised the Fund and the Skuld Club to take such actions (Group B). A few claimants whose claims for principal and interest had been settled in full, but who had taken action against the 1971 Fund and the Skuld Club to recover their legal costs did not give such authorisation.

4.3 As at 14 February 2002, the total amount paid to the claimants in Group A was £34 117 663.83 whereas the total amount indicated in respect of the claimants in Group B was £3 933 842.56 (excluding interest and costs). Since then a further £1.9 million has been paid to claimants in Group B. The 1971 Fund and the Skuld Club have also claimed in respect of administrative and legal expenses incurred as a result of the incident (mainly the costs of claims handling). These administrative and legal expenses are in the region of £2.6 million.

4.4 The 1971 Fund maintains 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.

4.5 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.

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.

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

4.7 MHPA submitted a lengthy and detailed defence pleading on 5 June 2002 denying any liability for the incident and the ensuing oil pollution. The position taken in this pleading is substantially as expected and can be summarised as follows.

4.8 MHPA has argued that it did not owe any duty of care and/or statutory duty to the Group A and Group B 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.

4.9 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.

4.10 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.

4.11 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.

4.12 The 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.

4.13 The Director is examining, in consultation with the 1971 Fund's legal advisers [<1>], the defence pleadings, and the Fund will submit its reply in due course.

5 Agreement with the Skuld Club

5.1 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.

5.2 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 in Groups A and B as well as the costs incurred by the 1971 Fund in relation to the claims handling and the pursuing of 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.

5.3 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.

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.

[<1>] Solicitors: Clifford Chance. Counsel: Julian Flaux QC and David Goldstone.