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COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
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Agenda item 15

71FUND/AC.9/13/4
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INCIDENTS INVOLVING THE 1971 FUND

SEA EMPRESS

Note by the Director

Summary: Compensation totalling £36.3 million has been paid to 797 claimants. Two claims for compensation totalling £900 000 are the subject of legal actions.

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 amount 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: Information to be noted.

1 Introduction

- 1.1 This document sets out the developments since the Administrative Council's 8th session, held in July 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

- 2.1 As at 20 September, 1034 claimants had presented claims for compensation and interest thereon for a total of £49.3 million. Payments have been made to 797 claimants totalling £36.3 million, of which £6.9 million has been paid by the shipowner's insurer, Assuranceforeningen Skuld (Skuld Club), and £29.4 million by the 1971 Fund.

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 20 September 2002, claims by 176 of these claimants had been settled, discontinued or withdrawn. Of the 18 claimants still pursuing their claims in the limitation proceedings, 16 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 hoped that the outstanding claims for legal and professional fees will be settled by the end of the year.
- 3.5 There are two remaining claims for compensation totalling approximately £900 000 that are the subject of legal action. Details of the status of these claims are given below.

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.
- 3.7 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 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), ie that the claim was secondary, derivative, relational and/or indirect and that this lack of proximity rendered the processor's claim too remote.
- 3.8 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 on the grounds that the case raised issues of principle of general importance in the development of substantive law. The claimant lodged an appeal on 12 June 2002. The appeal will be heard in January 2003.

Claim by the owner of a windsurfing and watersports school

- 3.9 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.
- 3.10 The claimant has agreed that no further action should be taken in respect of his claim pending the decision of the Court of Appeal in respect of the claim by the whelk processor (cf. paragraphs 3.6 – 3.8 above).

Other claims pending in court

- 3.11 As regards three other claims which were pending in court, namely a claim by a fish processor, a whelk fisherman and a share fisherman, the proceedings have been or are in the process of being discontinued. The claim by the fish processor, which the 1971 Fund considered to have been fully compensated, was struck out by the Court in July 2002, whereas the claims by the two fishermen which had been rejected by the Fund were withdrawn.

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. 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 action (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 £2.2 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 denying any liability for the incident and the ensuing oil pollution. The defence was served on the 1971 Fund on 31 May 2002. 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 has examined, in consultation with the 1971 Fund's legal advisers^{<1>}, the defence as well as the MHPA's Request for Further Information in relation to the Particulars of Claim. On 26 September 2002, the 1971 Fund submitted its Response to that Request, in which it provided further details of certain allegations contained in the claim, together with a schedule showing a breakdown of claims paid by category. The 1971 Fund also served on the MHPA a Request for Further Information in respect of the Points of Defence. The 1971 Fund has reserved the right to reply on particular points which may emerge in the course of disclosure of documents.
- 4.14 It is expected that the next stage in the proceedings will be an initial Case Management Conference. At that Conference, the Court will make any appropriate procedural orders. Such orders are likely to include orders relating to disclosure of documents and the future conduct of the Texaco proceedings. They may also include orders in relation to the use of alternative dispute resolution, such as mediation and conciliation.

5 Action by Texaco

- 5.1 On 14 February 2002, Texaco, which operates an oil terminal in Milford Haven, commenced legal action against the 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 the 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.

^{<1>} Solicitors: Clifford Chance. Counsel: Julian Flaux QC, David Goldstone and Nicholas Craig.

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 in Groups A and B 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 this incident as it may deem appropriate.
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