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OIL POLLUTION
COMPENSATION
FUND 1971

ASSEMBLY
7th extraordinary session
Agenda item 3

71FUND/A/ES.7/2
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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originally £80 million, now stands at £4.3 million, after a number of claims have been dismissed, settled out of court, withdrawn from the court proceedings or reduced in amounts. Six claims totalling £170 000 relating to alleged damage to roofs were rejected by the court in February 2001. The claimants have not appealed against the judgement. Another 43 claims in this category, totalling £2.6 million, are pending in court.

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. The Director is considering whether further provisional payments should be made.

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 2nd session of the Administrative Council.

2 Claims settled out of court

By October 1995 some 2 000 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 previously 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>}

Shetland Islands Council

- 3.5 Shetland Islands Council submitted a claim totalling £1 508 317 for costs incurred as a result of the incident. At its 46th session, held in December 1995, the Executive Committee considered certain items of this claim, which related to environmental impact studies, to the handling of the media and other visitors and to some legal fees.
- 3.6 As regards environmental impact studies, the Committee noted that the reports on these studies were of a fairly general nature and did not include a level of detail which would support any particular claim, that the reports relied to a great extent on information that was available from other sources, and that due to the timing of their publication they did little to contribute to clarification of the issues relating to compensation. The Committee considered that, for these reasons, the studies did not contribute to the submission of admissible claims for compensation and that the claim for the costs associated with these studies should be rejected. The Committee considered that the items relating to the handling of the media and other visitors were not admissible, since the costs incurred could not be considered as damage caused by contamination. In the Committee's view, the legal fees for advice given by an American law firm on United States legislation were not admissible. The Committee further decided that fees incurred by two United Kingdom law firms were not admissible, since the advice given related mostly to matters

^{<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 paragraph 3.8-3.19 below.

^{<2>} Landcatch Ltd (document 71FUND/EXC.62/5, paragraphs 3.6-3.10)

other than the preparation and presentation of claims under the Civil Liability Convention and the Fund Convention (document FUND/EXC.46/12, paragraphs 3.3.17-3.3.19).

- 3.7 After lengthy discussions the Shetland Islands Council agreed in December 2000 to settle its claim at £651 721. This figure relates only to those parts of the claim which the 1971 Fund considered admissible. As a result of the settlement the Council withdrew its action.

Property damage claims

- 3.8 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.
- 3.9 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.
- 3.10 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.
- 3.11 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.
- 3.12 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.
- 3.13 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.

- 3.14 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.
- 3.15 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.
- 3.16 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.
- 3.17 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 emphasized that it was for the claimants to provide evidence in this regard.
- 3.18 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.
- 3.19 It is not yet known whether the remaining 43 claims in this category will be pursued. However, since the six claims considered by the Court had been selected as being representative, it is not unlikely that the remaining asbestos roof claims will be withdrawn.

Shetland Sea Farms Ltd

- 3.20 In 1995 the Executive Committee considered a claim 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 accepted that the claim was admissible in principle, but considered that account should be taken of any benefits derived by other companies in the same group. 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.
- 3.21 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. The Court's decision is expected some time in 2001.

Other claims pending in court

- 3.22 Claims for personal injury for £297 000 and for minor property damage for £217 360 are being pursued in court. It is not clear whether these claims will proceed as they are contained in the asbestos roofs claims. The claimants have in any event not presented evidence to support their claims.

3.23 A claim for £123 357 in the fishery sector was recently rejected by the Court. 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 rejected the claim as the offers had not been accepted within a reasonable time and hence had lapsed. 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.

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 the 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 have also been made in early 2001.
- 5.6 A claimant in the fishery sector has recently withdrawn his claim for £777 550.

- 5.7 Three personal injury claims totalling £200 000 have recently 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 £3 728 358 unpaid.
- 5.9 The following opposed claims are pending in court:

Shetland Sea Farms	£1 428 891
Personal injury claims	£ 297 000
Forty-three roof claims (including elements other than personal injury)	£2 600 190
Total	£4 326 081

- 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 Director is considering whether further interim payments should be made in respect of those claims that have been approved but not paid in full.

6 Action to be taken by the Assembly

The Assembly is invited to take note of the information contained in this document.
