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FUND 1971

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Agenda item 8

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INCIDENTS INVOLVING THE 1971 FUND

BRAER

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 All claims but one have been dismissed, settled out of court or withdrawn from the court proceedings.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 £1 428 891. The Scottish Court of first instance held that the claim was based on false documents but allowed nevertheless the claimant to pursue the claim.

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.

As a result of a number of claims having been dismissed by the courts or withdrawn from the court proceedings and the shipowner's P & I insurer having made additional funds available, in October 2001 it became possible to pay all established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

The compensation payments total £51 782 893 of which the 1971 Fund has paid £45 725 441 and the shipowner's insurer £6 057 452.

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 6th session of the Administrative Council, held in October 2001.

2 Claims for compensation

General situation

- 2.1 Claims against the 1971 Fund became time-barred on or shortly after 5 January 1996. By that date some 2 000 claims for compensation had been settled and paid for a total amount of approximately £44.9 million. Some 270 claimants had taken action in the Court of first instance (Court of Session) in Edinburgh against the shipowner, his insurer, Assuranceöeningen Skuld (Skuld Club), and the 1971 Fund. The total amount claimed in court was approximately £80 million. Since then, claims amounting to £6.2 million have been accepted as admissible.
- 2.2 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.
- 2.3 All the opposed claims but one, that of Shetland Sea Farms, have either been dismissed by the courts or have been withdrawn from the legal proceedings.

Shetland Sea Farms

- 2.4 In 1995 the Executive Committee considered a claim for £2 004 867, later reduced to £1 513 020, 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.
- 2.5 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 and the company took legal action against the shipowner, the Skuld Club and the 1971 Fund. During the proceedings the claim was reduced to £1 428 891.
- 2.6 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.
- 2.7 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.
- 2.8 There are three companies in the Group, namely Ettrick Trout Company Ltd and the subsidiaries Shetland Sea Farms Ltd and Terregles Ltd, all controlled by the same person.
- 2.9 Shetland Sea Farms had produced in support of its claim for compensation two letters from Shetland Sea Farms ordering from Terregles a substantial number of smolts which orders predated the grounding of the *Braer*, with a view to giving the impression that Terregles and Shetland Sea Farms had entered into a forward contract at arm's length to supply Shetland Sea Farms a substantial number of smolts on fixed terms with the quantity and price specified. Two invoices were specially drawn up by the financial controller of Shetland Sea Farms on Terregles letterhead to support the claim that the contract existed between Terregles and Shetland Sea Farms for the supply of these smolts.

- 2.10 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 they did so in the knowledge that Shetland Sea Farms had no documentary evidence showing the existence of a contractual commitment on Shetland Sea Farms' part entered into before the *Braer* incident to take and pay for smolts. The Court further 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 held that they did so as part of a scheme to further a substantial claim for compensation and that the claims having been rejected by the Claims Office they persisted with it on the same false basis.
- 2.11 Having held that both the person controlling the three companies and an employee of Shetland Sea Farms, as responsible officers of the claimant, had false documents presented to the Court in support of the Shetland Sea Farms' claim for compensation, the Court addressed the second question, namely whether as a result of this the claim should be refused without any further procedure.
- 2.12 It was argued by the 1971 Fund and the Skuld Club that it would be contrary to public policy for the Court to adjudicate upon the claim in these circumstances and that, where the claimant had used the court process to further an unlawful purpose, the claims should be rejected without further procedure. They maintained that the Court had an inherent power to prevent misuse of its procedure, where this misuse would be manifestly unfair and would in any event bring the administration of justice into disrepute. The 1971 Fund and the Skuld Club made the point that there had been a deliberate attempt to deceive the Court and that those responsible had falsely denied doing anything wrong.
- 2.13 Shetland Sea Farms argued that to refuse the claim would unfairly penalise the company and that refusing to allow the claim to continue would be out of all proportion to the alleged wrongdoing. Shetland Sea Farms also advanced an argument under the United Kingdom Human Rights Act that in effect to deny the right to a trial in the circumstances would be a breach of Article 6 (1) of the European Convention on Human Rights which entitled every person to a fair and public hearing. The company stated that it was now prepared to seek to prove its claim without reference to the false letters.
- 2.14 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.
- 2.15 Shetland Sea Farms did not appeal against the position taken by the Court as regards the company's use of false documents.
- 2.16 The Director considered whether the 1971 Fund should appeal against the Court's decision not to refuse the claim without any further procedure, but decided that the Fund should not do so.
- 2.17 As regards the continuation of the proceedings 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. This hearing will be held in late April 2002.

Other claims

- 2.18 A claim for £123 357 in the fishery sector was rejected by the Court of Session early in 2001. The action was raised directly against the 1971 Fund on the basis of offers made on behalf of the Fund, ie on the basis of an alleged contract. The 1971 Fund maintained that the offers had expired since they had not been accepted within a reasonable period of time. The Court accepted the argument advanced by the 1971 Fund that the offers had not been accepted within a reasonable time and hence had lapsed and rejected the claim. The claimants appealed against the decision to reject the claim. However, in December 2001 the Appellate Court confirmed that decision. 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.
- 2.19 A claim for £85 000 for damage to various felt roofs which was pursued in court was settled in February 2002 for £17 500.

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 yet considered the question of whether or not the shipowner is entitled to limit his liability.
- 3.2 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.
- 3.3 The Skuld Club is considering how the limitation proceedings are to be terminated.

4 Suspension of payments

- 4.1 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.
- 4.2 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 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. 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.
- 5.2 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 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 £2 286 658 were made during 2000 and in early 2001 in respect of these claims and claims settled thereafter.

- 5.3 After the withdrawal of the remaining 43 claims relating to damage to asbestos cement tiles and corrugated sheets in September 2001, there were only three opposed claims pending in court, namely that of Shetland Sea Farms for £1 428 891, the claim in the fishery sector for £123 357 and the claim for damage to felt roofs for £85 000.
- 5.4 In October 2001 the total amount paid in compensation was £48 208 644, out of which the 1971 Fund had paid £42 926 938 and the Skuld Club £5 281 706. There was, therefore, £2 400 636 available for further compensation payments.
- 5.5 The shipowner and the Skuld Club are entitled to indemnification under Article 5.1 of the 1971 Fund Convention of £1 211 780. The Skuld Club informed the Director that the shipowner and the Club were prepared to make available the indemnification amount for payments to claimants, resulting in an additional amount of £1 211 780 being available for compensation payments. The total amount available for such payments was therefore £3 612 416.
- 5.6 There remained an amount of £3 729 354 unpaid in respect of the claims which had been settled and not paid in full. As a result of the position taken by the shipowner/Skuld Club in respect of indemnification, an amount of £3 612 416 would be available for compensation payments. There would therefore be a deficit of £116 938 plus any amount which may be awarded by the Court in respect of the claim by Shetland Sea Farms and the other two remaining claims. The Skuld Club undertook to make funds available to cover this deficit and to guarantee the payment of the amount, if any, which may be awarded by a final court judgement in respect of the pending claims.
- 5.7 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 balance of 60% to those claimants who had only received 40% of the approved amount were made during the period November 2001 - March 2002, as were payments in respect of established claims for which no payments had been made. These payments total £3 948 134. As mentioned in paragraphs 2.18 and 2.19 the Appellate Court has recently rejected the remaining fishery claims and the pending felt roof claim has been settled. Payments totalling £192 050 are outstanding in respect of six claims. It is expected that three of these claims will be paid shortly. It has not been possible to contact one of the claimants. One claimant is in bankruptcy. One claim may be offset against legal costs owed by the claimant to the Fund.
- 5.8 The total amount of compensation paid in respect of this incident is £51 782 893 out of which the 1971 Fund has paid £45 725 441 and the Skuld Club £6 057 452.
- 5.9 As mentioned above, the only remaining claim subject to court proceedings is that of Shetland Sea Farms. Any amount awarded by a final court judgement in respect of this claim will be paid by the Skuld Club.

6 Action to be taken by the Assembly

The Assembly 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.
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