INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ASSEMBLY
9th extraordinary session
Agenda item 8

71FUND/A/ES.9/7
5 April 2002
Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

SEA EMPRESS

Note by the Director

Summary:	Compensation totalling £35.5 million has been paid to 800 claimants. A number of claims in respect of which legal proceedings had been brought against the shipowner, the shipowner's insurer and the 1971 Fund have been settled or withdrawn. Six claims for compensation totalling £2.3 million are currently in court. 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.
Action to be taken:	Information to be noted.

1 Introduction

1.1 This document sets out the developments since the Administrative Council's 6th session, held in October 2001, 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 5 April 2002, 1034 claimants had presented claims for compensation and interest thereon for a total of £49.3 million. Payments have been made to 802 claimants totalling £35.5 million, of

which £6.9 million has been paid by the shipowner's insurer, Assuranceforeningen Skuld (Skuld Club), and £28.6 million by the 1971 Fund.

Recent developments

2.2 Since October 2001 five claims from the fisheries sector and two from tourism-related businesses totalling £3.6 million have been settled at £2.4 million. In addition, a claim by the Milford Haven Standing Conference on Anti-Oil Pollution has been paid in the amount of £973 000.

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.

3.4 For the purposes of the limitation proceedings, the claims have been divided into the following categories: clean-up, fishing, tourism, economic loss and professional fees. A Case Management Conference (CMC) was held before the Admiralty Registrar on 21 March 2001 to consider the future management of the claims in the limitation proceedings. In relation to each category, directions were made by the Registrar regarding, *inter alia*, disclosure of documents and the timing for exchange of witness statements and expert reports. Following the CMC, trial dates were fixed for each category with a view that each of the claims in the category will be heard consecutively at the same trial.

Writs by shipowner/Skuld Club

3.5 Three writs were served on the 1971 Fund by the shipowner/Skuld Club. One writ relates to limitation of liability and names as defendants the 1971 Fund, the Secretary of State for the Environment, Transport and the Regions and all persons claiming or entitled to compensation as a result of the *Sea Empress* incident. A second writ relates to indemnification of the shipowner under Article 5.1 of the 1971 Fund Convention and names the 1971 Fund as the only defendant. The third writ, also naming the 1971 Fund as the only defendant, relates to a subrogated claim in respect of compensation payments made by the Skuld Club.

Developments in respect of settlement of claims

3.6 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 5 April 2002, claims by 155 of these claimants had been settled, discontinued or withdrawn. Of the 39 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.

3.7 There are six remaining claims for compensation that are the subject of legal action. Details of these claims are given below. As initially presented, the claims totalled £2.3 million. Two of the claims have been rejected by the 1971 Fund and the Skuld Club. The remaining four claims have been assessed by the 1971 Fund and the Skuld Club at £735 000 and, in three cases, interim payments have been made by the 1971 Fund. Attempts are being made by the Fund to settle those claims which are considered admissible in principle, but where final agreement has not been reached on the quantum of the losses.

- *Claim by Texaco* - A claim presented by Texaco Pembroke Refinery for £920 000 for costs incurred in its involvement in the clean-up operations and for losses in the form of demurrage has been provisionally assessed at £495 000, pending further information on a number of items. The demurrage element of the claim (£77 000) was rejected by the Executive Committee (cf document 71FUND/EXC.60/17, paragraph 3.7.7).

- *Claims by Elf* - A claim presented by Elf UK Oil for £73 000 for costs incurred in its involvement in the clean-up operations is under assessment. The company's claims totalling £384 000 in respect of demurrage, sub-chartering of vessels, delays to deliveries of crude and reduction in refinery throughput were rejected by the Executive Committee at its 60th session, held in February 1999 (cf document 71FUND/EXC.60/17, paragraph 3.7.8).

- *Claim by the owner of a windsurfing and watersports school* – A claim has been presented for loss of earnings (£226 196) suffered by a windsurfing and watersports school during 1996, 1997 and 1998. Compensation of £134 970 has been paid for losses suffered during 1996 and for the cancellation of a training instructor course in 1997. The Skuld Club and the Fund maintain that there is no causative link between the contamination and any other losses suffered by the business after 1996.

- *Claim by a whelk processor based in Devon* – This claim for £645 000 has been rejected on the grounds of lack of reasonable proximity between the oil pollution and the alleged loss (lack of geographic proximity, low degree of dependency 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). A similar claim was rejected by the Executive Committee at its 49th session, held in June 1996 (cf document 71FUND/EXC.49/12, paragraphs 3.8.9 and 3.8.10).

- *Claim by a business processing molluscs and handling whelks* – A claim has been presented for loss of income (£464 866) by a business which processes molluscs and handles whelks. These losses have been assessed at £104 944 by the Skuld Club and the Fund, and this amount has been paid to the claimant. In March 2002 the claimant's lawyers informed the Court that they did not have any instructions to take any steps in the proceedings.

- *Claim by a share fisherman* – This claim for loss of earnings (£5 730) by a share fisherman has been rejected by the Skuld Club and the 1971 Fund on the basis that compensation was paid to the skipper of the boat with which the fisherman alleged to have fished. The skipper, who has been joined in the proceedings, acknowledges that he was under an obligation to pay his crew, but denies that the claimant was a member of his crew at the time of the incident. It appears, therefore, that there is no cause of action against the Skuld Club and the 1971 Fund.

4 Criminal proceedings

4.1 Criminal proceedings were brought by the United Kingdom Environment Agency against two defendants, namely the Milford Haven Port Authority (MHPA) and the Harbour Master in Milford Haven at the time of the incident. Both defendants faced a charge that they had caused polluting matter, namely crude oil and bunkers, to enter controlled waters, contrary to

Section 85(1) of the Water Resources Act 1991, and that the discharge of crude oil and bunkers amounted to public nuisance. In addition, it was alleged that MHPA had failed properly to regulate navigation and to provide proper pilotage services in the Haven.

4.2 At the opening of the criminal trial in January 1999 the Harbour Master pleaded not guilty, and that plea was accepted by the Environment Agency. MHPA pleaded guilty to the charge under the Water Resources Act 1991 of causing or permitting polluting matter, namely oil and bunkers, to enter controlled waters, the penalty for which is imprisonment for a term not exceeding two years, or a fine, or both. The Port Authority pleaded not guilty to all other charges. Those pleas were accepted by the Environment Agency. As a result, the full trial did not take place. The Court sentenced MHPA to pay a fine of £4 million and to pay £825 000 towards the prosecution costs. In passing sentence the trial judge made a number of highly critical comments relating to MHPA and the way in which it had operated the port.

4.3 MHPA appealed against the sentence. In March 2000 the Court of Appeal gave judgement and held that the original fine was excessive and should be reduced to £750 000, to be paid in three instalments on 1 June, 1 September and 1 December 2000. MHPA has also paid costs of £825 000 as ordered by the Court of first instance.

5 Recourse action

Consideration by the Executive Committee

5.1 At its 62nd session, held in October 1999, the Executive Committee considered whether the 1971 Fund should take recourse action against various third parties to recover the amount paid by the Fund in compensation as a result of the *Sea Empress* incident (cf document 71FUND/EXC.62/7/1).

5.2 At that session the Committee decided that, due to the channelling provisions of the Merchant Shipping Act 1995 implementing the 1969 Civil Liability Convention, which preclude action for compensation against salvors, and the position of the pilot and his employer under the law of England and Wales, there would be no point in taking recourse action against those parties. The Committee also took the view that there was no evidence of negligence on the part of the Marine Pollution Control Unit of the United Kingdom Department of Transport or the Coastguard Agency which would justify recourse action against them (document 71FUND/EXC.62/14, paragraph 3.6.12).

5.3 It was noted that the legal advice given to the 1971 Fund indicated that the basis of a recourse action against MHPA would be that, as a harbour authority and a pilotage authority, MHPA was in breach of both common law and statutory duties (under the Milford Haven Conservancy Act 1983 and the Pilotage Act 1987). It was also noted that, in the view of the 1971 Fund's legal advisers, there were good prospects of establishing that MHPA was in negligent breach of duty in relation to safe navigation within the Haven and its approaches and that the necessary causative link between the breaches and the incident existed (document 71FUND/EXC.62/14, paragraph 3.6.13).

5.4 The Committee was aware that there was a risk element inherent in any litigation and that a recourse action against MHPA would give rise to complex legal issues. It was noted that it was likely that certain evidence concerning the running of the port would not become available until after the proceedings had begun, which added to the difficulty of predicting the outcome of the case.

5.5 The Executive Committee decided to instruct 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).

Preparations for the recourse action

5.6 It was originally anticipated that useful evidence concerning MHPA's involvement in the incident would become available during the course of the criminal trial. However, as mentioned in paragraph 4.2 above, no full trial was held in the criminal proceedings brought against MHPA and consequently the 1971 Fund was unable to benefit from a full consideration of the evidence in open court. The 1971 Fund therefore decided to carry out its own detailed investigation into all aspects of the incident.

5.7 After the Executive Committee's October 1999 session, the Director, together with the 1971 Fund's legal advisers[<1>] and its technical experts, carried out a thorough investigation into the operations of the Port of Milford Haven and the events which led up to the incident and made a careful analysis of the legal issues involved. The Fund drew on the advice from experts in navigation, naval architecture and pilotage.

5.8 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 daims 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.

5.9 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 £1.4 million has either been paid or agreed to be 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.

5.10 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.

5.11 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;

(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.

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

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.

5.12 MHPA has indicated in recent press reports that it is covered by insurance and that the insurers will be vigorously defending the claim. MHPA has until 15 May 2002 to serve a defence.

5.13 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.

5.14 An agreement has been 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.

5.15 The 1971 Fund has agreed to pay to 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.

6 Action to be taken by the Assembly

The Assembly is invited:

(a) to take note of the information contained in this document;

(b) to give the Director such instructions in respect of the recourse action as it may deem appropriate; and

(c) to give the Director such instructions in respect of other aspects of this incident as it may deem appropriate.