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INCIDENTS INVOLVING THE IOPC FUND

BRAER

SETTLEMENT OF CLAIMS FOR ON-GOING LOSSES BY WAY OF LUMP SUM PAYMENT

Note by the Director

1 Introduction

At its 47th session the Executive Committee considered various claims arising out of the *Braer* incident that had become the subject of legal proceedings in the Court of Session in Edinburgh. In this context, the question arose whether the IOPC Fund should pay compensation for on-going losses by way of lump sum settlements. The Committee is invited to reexamine this issue.

2 Consideration of this issue by the Executive Committee at previous sessions

2.1 At its 44th session the Executive Committee dealt with claims for loss of income sustained by the owners of four small whitefish vessels which normally fish in an area to the west of the island of Burra (known as the Burra Haaf). The Committee had considered two alternative methods for compensating losses sustained by the owners of these vessels which continued to be affected by the scarcity of fish in the Burra Haaf area, and which, by virtue of the small size of their vessels, had very limited opportunities to mitigate their losses by fishing on more distant fishing grounds or by using alternative fishing methods. The Committee decided that the IOPC Fund should not pay compensation for on-going losses by way of lump sum settlements in advance, but should maintain its policy of assessing and compensating such losses as and when they arose (document FUND/EXC.44/17, paragraph 3.4.12).

2.2 The issue was considered again by the Committee at its 47th session. The Committee noted that the preliminary advice of counsel^{<1>} was that there was no realistic prospect that the Court would deal with the Burra Haaf fishermen's claims otherwise than by the awarding of a lump sum. In view of the fact that these claims were now subject to court proceedings, the question was raised whether the Committee should reassess its previous decision in respect of these claims. Some delegations considered it acceptable that the Fund settled claims in a lump sum in certain situations, provided that the loss was certain and could be quantified with a degree of accuracy. Other delegations considered, however, that the IOPC Fund should maintain its previous policy of assessing compensation of losses as and when they arose. A number of delegations stated that, although they would be prepared to reassess the Fund's position on this point, they would not be prepared to make a decision at this session (document FUND/EXC.47/14, paragraph 3.3.8).

2.3 The Executive Committee decided to maintain its policy in respect of future losses, at least for the time being. It also decided that this matter should be re-examined at a future session on the basis of a document prepared by the Director (document FUND/EXC.47/14, paragraph 3.3.9).

3 Further study by the Director

As instructed the Director has studied the issue further. He has obtained a more detailed opinion on Scottish law from counsel. In addition, he has obtained advice from lawyers as to the legal situation in eleven IOPC Fund Member States other than the United Kingdom.

4 Position of Scottish law

4.1 As regards the position of Scottish law, counsel has confirmed his opinion that there is no realistic prospect that the Court would deal with the Burra Haaf fishermen's claim otherwise than by award of a lump sum. Any other method of compensation would in his view not be regarded as admissible. He has stated that two principles are established beyond question in Scots law: firstly, that the whole damage resulting from a single wrongful act must be recovered in one action, and secondly, that (in absence of express legislative provision to the contrary) damages awarded must take the form of a single lump sum.

4.2 The first principle was established by the Scottish appeal court in 1887 in the case of *Stevenson v Pontifex & Wood* ((1887) 15R. 125 at p.129). The presiding judge stated:

"I am of the opinion that a single act amounting either to a delict or a breach of contract cannot be made the ground of two or more actions, for the purpose of recovering damages arising within different periods but caused by the same act. On the contrary, I hold the true rule of practice based on sound principle to be, that though the delict or breach of contract be of such a nature that it will necessarily be followed by injurious consequences in the future, and though it may for this reason be impossible to ascertain with precise accuracy at the date of the action or of the verdict the amount of loss which will result, yet the whole damage must be recovered in one action, because there is but one cause of action. The most familiar illustration of this rule is to be found in actions for injury to the person, in which the practice is invariable."

<1> Colin J Tyre, advocate

4.3 The statement in the 1887 judgement quoted above was cited with approval by the House of Lords in 1988 in *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* (1988 SLT 874)^{-2>} in which it was regarded as "trite law that all claims arising out of a single act of negligence must be pursued in the same action".

4.4 In the case of the *Burra Haaf* fishermen it would not accordingly, in counsel's opinion, be legally possible for them to accept settlement (or obtain decree for payment) of their claim in respect of a particular period of loss, and then raise a second action in respect of a subsequent period. Counsel has taken the view that the whole of each fisherman's loss, of whatever nature, caused by the grounding of the *Braer* must be recovered in a single action.

4.5 With regard to the powers of the court in relation to awarding damages, counsel has stated that he believes there is no difference between the laws of Scotland and those of England. In his view, both jurisdictions require claims to be settled on a once-and-for-all basis, and do not regard it as admissible to leave part of a claim open to be quantified in future, in the light of circumstances as they turn out. He has stated that this approach can cause particular difficulties in the context of personal injury, where it may be very difficult indeed to assess the effects, many years ahead, of the injury on the pursuer's physical capabilities and on his earning capacity. Counsel has referred to a case decided by the House of Lords in 1980 (*Lim v Camden and Islington Area Health Authority* (1980 AC 174)), in which it is stated:

"The course of this litigation illustrates, with devastating clarity, the insuperable problems implicit in a system of compensation for personal injuries which (unless the parties agree otherwise) can yield only a lump sum assessed by the court at the time of the judgement. Sooner or later – and too often later rather than sooner – if the parties do not settle, a court (once liability is admitted or proved) has to make an award of damages. The award, which covers past, present and future injury and loss, must, under our law, be of a lump sum assessed at the conclusion of the legal process. The award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate. Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering – in many cases the major part of the award – will almost surely be wrong. There is really only one certainty: the future will prove the award to be either too high or too low."^{-3>}

4.6 More recently, in a case decided by the Scottish appeal court (*O'Brien's Curator Bonis v British Steel plc*, 1991 SLT 477), the presiding judge stated:

"The purpose of an award of damages for future expenditure is to place the pursuer as near as may be in the same financial position as he would have been in if the accident had not occurred. ...Since the whole damage must be recovered in one action, the award which the court must make once and for all for the future has to take the form of a capital sum."

4.7 Counsel has stated that the rationale behind the principle of compensation by a single lump sum, which clearly is not without its critics, appears to be that a defender is entitled to have liability determined once and for all by the court, rather than having it left open to indeterminate increase in the future. As is pointed out in the cases referred to above, future loss, whether in the form of disability, lost earnings, or other financial loss, invariably involves an element of uncertainty and even speculation. The attitude taken by the court is, in counsel's opinion, that it is part of its duty to assess, on a balance of probabilities, the likely extent of future loss, and to award damages accordingly, acknowledging that its assessment may, with the benefit of hindsight, turn out to have been incorrect.

^{-2>} See also *Aberdeen Development Co. v. Mackie, Ramsay & Taylor*, 1977 SLT 177.

^{-3>} Cf. *Stevenson v Pontifex & Wood*, *supra*.

4.8 Although most of the above discussion concerns personal injuries, there are in counsel's view no differences in principle between those cases and others such as breach of contract or, as in the *Braer* cases, a claim arising under statute. Counsel has stated that he does not consider that there is any feature of the Burra Haaf fishermen's claims which distinguishes them from other cases in which the Court must assess future loss. He has expressed the opinion that a view would be taken by the judge, on the basis of evidence before him, as to when the Burra Haaf fishing would be likely to return to its pre-1993 level. The fishermen would, in counsel's view, receive lump sum compensation calculated with reference to the judge's best estimate of their lost annual profits.

4.9 The process of calculating lump sum damages was described, with regard to domestic care of a disabled pursuer, by the presiding judge of the Scottish appeal court in the O'Brien case *supra* as follows:

"The mechanism by which the capital sum is arrived at is the selection of a multiplicand, as representing the estimated annual cost of the care as at the date of the proof, and a multiplier which, when applied to the multiplicand, will provide the amount which can be expected to achieve the desired result. There may be cases where, because the period is so short or the circumstances are so uncertain, this method is inappropriate and it is better to make a broad estimate of the damages in the form of a lump sum. But everyone is agreed that in this case, the traditional method of estimating the amount of future loss by using a multiplier is the one to use."

4.10 Counsel has stated that, in the O'Brien case the presiding judge made reference to "the unspoken assumption" that the principal sum will earn interest at about 4% or 5% over the relevant period. Counsel has expressed the view that this assumption is the reason why the lump sum awarded is effectively discounted, to recognise the fact that it is all being received by the pursuer immediately. He has made the point that if there were to be no discounting the pursuer would be over-compensated by virtue of receipt of the interest in addition to a sum estimated to be equivalent to his total future loss. He has also stated that as a general rule future inflation is disregarded in assessing an appropriate multiplier.

4.11 Counsel has expressed the view that in the *Braer* case discounting could be achieved in one of two ways. He has stated that if the court were to take the view that the multiplier approach should be followed, the multiplier applied to estimated lost profits would not be equal to the total number of years before the fishing was expected to return to normal. He has indicated that if, for example the court found that the fishing was likely to return to normal in five years, a multiplier of three or four might be used to calculate the lump sum; if on the other hand the court took the view that the period prior to return to normal was likely to be short it might award a lump sum to cover that whole period. He has emphasised that once again that lump sum would be less than the total estimated lost profits during that period.

5 Legal situation in other Member States

5.1 The Director has obtained opinions on the legal position in eleven Member States on the question under consideration. These States, which have been chosen so as to represent various legal systems, are: Algeria, Canada, France, Germany, Ghana, Italy, Japan, Netherlands, Republic of Korea, Spain and Sweden. The opinions can be summarised as follows.

5.2 Algeria: The court determines the amount of compensation in the light of the circumstances. If it is not possible to determine the amount of compensation in a definitive manner, the court may reserve the victim's right to request, within a fixed period, a reassessment of the compensation. Compensation consists of a sum of money. It may be divided into several payments or may be awarded in the form of annuities.

5.3 Canada: Under Canadian law future losses would be compensated, provided that it can be shown that such losses are certain. The loss would be recovered as a lump-sum payment equal to the

discounted value of the amount obtained by multiplying the average income lost in a year by the number of years during which income can be expected to be lost. There is a special provision in the Canadian Shipping Act under which the Ship-Source Oil Pollution Fund is liable to pay compensation to those who have suffered a loss or "will suffer a future loss of income" resulting from an oil spill. This provision applies, however, only if the victim is not able to recover his loss under the Civil Liability Convention and the Fund Convention.

5.4 France: In principle, French law allows compensation to be granted for future losses. Compensation for future loss is often awarded in respect of personal injury. It appears that in principle compensation could also be awarded for future losses resulting from oil pollution. However, compensation will only be granted for future losses if it is certain that the claimants will suffer losses in the future. In addition, it is also required that it is possible to assess the amount of the future damage.

5.5 Germany: There is no German statute defining the concept of "damage". It is common understanding, however, that "damage" means only damage which has already occurred. Compensation cannot therefore be granted for damage which will or may occur in the future. This would also apply to loss of profit. There is only one exception to this principle, namely that compensation may be granted in respect of personal injury also for future damage by means of annuities.

5.6 Ghana: Under common law, a victim may be awarded compensation for future losses in respect of both personal injury and other loss or damage. Where the loss cannot be quantified with certainty, the court will make a determination on the basis of the information available for the particular claim. It is unlikely that the court will refuse to award compensation solely on the ground that the future loss cannot be quantified. The courts have in a few cases fixed compensation in the form of a lump sum.

5.7 Italy: Compensation will be awarded for future losses in the form of a lump sum, provided that there is certainty that such losses will arise. In some recent cases, however, it was considered sufficient that there was more than 50% probability of such losses. The amount is assessed on the basis of the claimants' earning capability, and the period of compensation is determined on the basis of the foreseeable duration of the loss. The amount of compensation is reduced by interest to take into account the time factor.

5.8 Japan: As regards personal injury cases, compensation for loss of earnings due to permanent disability may be awarded also for future losses. In the case of damage to aquaculture installations, the loss of earnings in coming years would not be considered as future losses, since the damage to the produce has already occurred. On the other hand, it is considered that under Japanese law claims relating to loss suffered in the future would in principle not be admitted in the case of fishermen operating on open sea fishing grounds.

5.9 Netherlands: Under the new Civil Code (in effect from 1 January 1992), compensation may be awarded for future losses. If it is certain that the claimant will suffer losses in the future and there are elements available which make an assessment of the damage possible, the court may award compensation in the form of a lump sum or in the form of periodical instalments. Should these conditions not be fulfilled, the court may postpone its decision or award compensation for proven damage in instalments which can be increased when the future losses can be established.

5.10 Republic of Korea: Future losses suffered by fishermen and small businesses may be compensated on a lump sum basis, provided that it is possible to make a reasonable estimate of the quantum of those losses. The Court will determine the amount of the annual losses and the period of the losses on the basis of an expert opinion. The amount of compensation will be reduced to take account of the fact that the claimant will receive the compensation in advance of the losses being actually suffered, normally on the basis of a rate of interest of 5% pa.

5.11 Spain: The courts may only assess the damage suffered up to the point in time when the judgement is rendered or in the procedure for execution of the judgement. The Spanish courts would not accept claims for future losses, since the calculation of the losses is too uncertain. The victim is

entitled to bring a new action in respect of losses suffered after the time when the judgement is rendered or the procedure for execution is completed.

5.12 Sweden: The legal situation in Sweden on the point in question is somewhat uncertain, since the Swedish courts are very restrictive in considering compensation for pure economic loss where there is no criminal liability. It is possible, however, that in oil pollution cases the Swedish courts would award fishermen fishing in open waters compensation for future losses, at least if it is certain or almost certain that future losses will be sustained. If it were to be difficult to calculate the exact loss, the courts would assess the damage in the form of a lump sum which is considered appropriate and equitable.

6 Director's analysis of this question

6.1 In the light of counsel's opinion on Scottish law, the Director considers that in the case of the Burra Haaf fishermen and in other similar cases, the Scottish Courts would award compensation covering also ongoing future losses, in the form of a lump sum. The opinions obtained in respect of the other ten Member States referred to above seem to indicate that also in some other Member States the courts award compensation for future losses in the form of a lump sum and that in some other Member States it is possible, at least in principle, that the Courts would grant compensation for future losses. It must be recognised, however, that in two of these States the courts would not accept such claims.

6.2 In view of the legal situation referred to in paragraph 6.1 above, the Director takes the view that the IOPC Fund should be prepared, in certain circumstances, to agree to out-of-court settlements including a lump sum for ongoing losses. Such settlements could in his view be accepted by the IOPC Fund if:

- (a) it is certain that the claimant will continue to suffer loss for some time;
- (b) there is an acceptable technical basis to allow a reasonable estimate to be made of the probable period for which the ongoing loss will continue; and
- (c) there exists documentation or other evidence which enables a reasonable estimate of the level of the future losses to be made.

7 Action to be taken by the Executive Committee

The Executive Committee is invited to:

- (a) take note of the information contained in this document; and
 - (b) take such decisions as it may deem appropriate as to the position to be taken by the IOPC Fund on compensation for ongoing losses.
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