



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
50th session
Agenda item 3

71FUND/EXC.50/5
2 October 1996

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INCIDENTS INVOLVING THE 1971 FUND

BRAER

Note by the Director

1 Introduction

This document deals with the developments which have taken place as regards the *Braer* incident since the Executive Committee's 49th session, in particular in respect of the legal actions taken against the 1971 Fund in the Court of Session in Edinburgh.

2 Legal action in the Court of Session in Edinburgh

2.1 Claims against the 1971 Fund became time-barred on or shortly after 5 January 1996. Some 250 claimants had by that date taken legal action against the shipowner and the Skuld Club and notified the 1971 Fund of the action, or in some cases taken action also against the 1971 Fund. The total amount claimed has been reduced from £80 million to approximately £75 million, due to the withdrawal of certain actions or, for certain claims, agreements on amounts lower than those claimed.

2.2 The summonses submitted in the Court give, with a few exceptions, very little information as to the details of the alleged losses or how the amount claimed has been calculated.

2.3 A summary of the claims presented in the Court is set out in tabular form in the Annex to this document.

2.4 It should be noted that a large number of these claims have previously been rejected by the Executive Committee as inadmissible in principle. In addition, it is the Director's view that the amounts claimed are in most cases highly inflated.



2.5 Defences have been prepared on behalf of the 1971 Fund in respect of each claim, on the basis of the relevant decision of the Executive Committee and the general policy of the 1971 Fund as regards the admissibility of claims, taking into account that the claims are brought under the United Kingdom legislation implementing the Civil Liability Convention and the Fund Convention (Merchant Shipping Acts 1971 and 1974).

2.6 Some claims appear to be admissible in principle. Subject to any instruction which the Executive Committee may wish to give him, the Director intends to pursue negotiations with these claimants for the purpose of reaching an agreement on the admissible quantum, although some claimants have indicated that they do not wish to participate in settlement discussions at this time.

2.7 Two informal hearings have been held by the judge appointed to handle all aspects of the legal proceedings arising from the *Braer* incident.

2.8 The shipowner and the Skuld Club have presented summonses to the Court requesting an order that they should be entitled to limit their liability.

2.9 Two claimants, Landcatch Limited and Framgord Limited, have challenged the shipowner's and the Skuld Club's right of limitation. In support of this challenge they have maintained that the *Braer* was unseaworthy on leaving Mongstad in Norway. In particular they have argued that there were defects in the boiler and the steam system which prevented the adequate heating of the ship's fuel oil, thus necessitating extra consumption of diesel oil, and that the vessel ran out of "usable diesel oil". They have maintained accordingly that there was fault and privity on the part of the shipowner. It is not clear on what ground these claimants are challenging the Skuld Club's right of limitation.

2.10 Complications have arisen due to the fact that there are two different types of proceedings in this case, the shipowner's limitation action and the claimants' actions for compensation.

2.11 The applicable provisions (Section 5.1 and 5.2) of the Merchant Shipping (Oil Pollution) Act 1971 read:

5.-(1) Where the owner of a ship has or is alleged to have incurred a liability under section 1 of this Act he may apply to the court for the limitation of that liability to an amount determined in accordance with section 4 of this Act.

-(2) If on such an application the court finds that the applicant has incurred such a liability and is entitled to limit it, the court shall, after determining the limit of the liability and directing payment into court of the amount of that limit, -

- (a) determine the amounts that would, apart from the limit, be due in respect of the liability to the several persons making claims in the proceedings; and
- (b) direct the distribution of the amount paid into court (or, as the case may be, so much of it as does not exceed the liability) among those persons in proportion to their claims, subject to the following provisions of this section.

2.12 The Act thus provides that the Court shall determine the amounts of compensation after the Court has decided whether the shipowner is or is not entitled to limit his liability. The judge has indicated a desire that individual claims should not be delayed. The 1971 Fund, the shipowner and the Skuld Club have proposed, with a view to avoiding delay, that individual claims should proceed in parallel with the limitation proceedings. They have proposed that all legal questions arising from the claims and the evidence to establish the quantum of individual claims should be heard, although accepting that the final court order making the formal "determination" on the claims cannot be pronounced until a final decision has been made in the limitation proceedings.

2.13 Landcatch Limited and Framgord Limited have proposed that the shipowner's limitation proceedings should be stayed until the total quantum of the admitted claims is established, while Skuld's limitation action should proceed.

2.14 The judge has stated that there should be a formal hearing on whether or not the limitation action should be stayed. However, the judge has stated that he wishes that the written pleadings in respect of all the claims which are in court should be finalised in the meantime. In response to a request from the 1971 Fund the judge has indicated, in view of the unique nature of these proceedings, that he expects claimants to provide more detailed specification and substantiation of their claims than would be normal at this stage. The judge has indicated that he intends to hold further informal meetings with a view to considering and identifying claims or groups of claims which for convenience could be dealt with together.

3 Suspension of payments

3.1 At its 44th session, the Executive Committee instructed the Director to suspend any further payments of compensation until the Committee had re-examined at its 46th session the question of whether the total amount of the established claims would exceed the maximum amount available under the Civil Liability Convention and the Fund Convention, viz 60 million Special Drawing Rights (SDRs).

3.2 In December 1995, at its 46th session, the Executive Committee decided, in view of the remaining uncertainty as regards the outstanding claims, that the suspension of payments should be maintained until the matter had been re-examined at its 47th session in February 1996 (document FUND/EXC.46/12, paragraph 3.3.23). At its 47th session, the Executive Committee decided that the suspension of payments should be maintained (document FUND/EXC.47/14, paragraph 3.3.12). This matter was not considered at the Committee's 48th and 49th sessions.

3.3 In view of the remaining uncertainty as regards the outstanding claims, the Director takes the view that the suspension of payments should be maintained until developments in the court proceedings allow the Executive Committee to assess whether the total amount of the established claims will exceed 60 million SDRs.

3.4 The Director would like to draw the Committee's attention to the fact that for a number of individuals, in particular some fishermen, whose claims are admissible in principle, the suspension of payments is causing severe financial hardship.

4 Action to be taken by the Executive Committee

The Executive Committee is invited to:

- (a) take note of the information contained in the present document;
- (b) note the situation in respect of the legal actions taken against the 1971 Fund;
- (c) give the Director such instructions in respect of the Fund's position in the legal proceedings as it may deem appropriate (paragraph 2 above); and
- (d) decide whether the 1971 Fund should maintain the suspension of payments (paragraph 3 above).

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ANNEX**Summary of claims pending in the court proceedings as at 1 October 1996**

| | Total £ |
|--|--------------------|
| United Kingdom Government (Dept of Transport and Scottish Office) | 3 571 181 |
| Shetland Islands Council | 1 508 317 |
| P & O Scottish Ferries Ltd | 902 561 |
| Personal Injury | 500 000 |
| Westside Fishermen Ltd - Fishing Agent | 130 217 |
| Fish Processors | 10 505 245 |
| Shetland Fish Processors Association | 229 489 |
| Shetland Fish Producers Organisation | 36 108 |
| Tourism - Trustees of Lerwick Harbour, owners of the Shetland Hotel | 149 000 |
| Tourism & Property Damage | 400 000 |
| Property Damage | 8 031 650 |
| Loss of Income - Magnus Smith - Wholesale Butcher | 650 000 |
| Shipowner's LOF 90 claim | 1 678 126 |
| Salmon farming Industry | 17 644 480 |
| Fishing Industry | 28 919 353 |
| Total amount claimed | 74 855 728 |