



**INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971**

EXECUTIVE COMMITTEE
55th session
Agenda item 3

71FUND/EXC.55/5
15 October 1997

Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

BRAER

Note by the Director

1 Introduction

This document deals with developments in respect of the *Braer* incident which have taken place since the 53rd session of the Executive Committee.

2 Legal actions

2.1 Claims against the 1971 Fund became time-barred shortly after 5 January 1996. Some 270 claimants had by that date taken legal action in the Court of Session in Edinburgh against the shipowner and the Skuld Club and notified the 1971 Fund of their action, or in some cases taken action also against the 1971 Fund. The total amount claimed was some £80 million.

2.2 There has been only limited progress in the court proceedings.

2.3 The court action relates mainly to the following heads of damage: damage to asbestos cement roofs, reduction in the price of salmon, loss of income in the fishing and fish processing sector, loss of fishing quotas and personal injury. The majority of these claims had however 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. Claims were also presented in court by the United Kingdom Government and the Shetland Island Council. Some of these claimants, eg the United Kingdom Government and a number of fishermen, took legal action to preserve their rights while discussions continued for the purpose of arriving at out-of-court settlements.

2.4 Most of the claimants did not include in their original court action sufficient details of the alleged losses to enable the 1971 Fund to assess the validity of their claims. Most claimants have still not produced sufficient documents to substantiate their claims.

3 Summary of Claims Developments

3.1 United Kingdom Government

3.1.1 The United Kingdom Government submitted a claim for compensation for costs incurred for clean-up operations at sea and on shore, for disposal of oily waste, for monitoring the operations carried out for the purpose of salvaging ship and cargo, and for the cost of carrying out tests on water to establish the extent of hydrocarbon content. The claim is for a total amount of £3.6 million. An amount of £1.3 million has been approved, and further information has been requested in respect of a number of outstanding items of the claim.

3.1.2 A substantial quantity of documents has been received in support of the costs incurred by the Scottish Office for the analysis of samples of fish and shellfish from the exclusion zone, for the analysis of samples of soil and animals to determine the effects of the contamination on the agriculture of Shetland, and for a study on the health of the people living in the area close to the wreck of the *Braer* on the southern part of Shetland. These documents are being examined by the 1971 Fund and the Skuld Club. Discussions with the Scottish Office and the Department of Transport are expected to take place in the near future.

3.2 Shetland Islands Council

3.2.1 Negotiations between the Shetland Islands Council and the 1971 Fund took place at the end of August 1997. As a result of these discussions, the situation in respect of the Council's claim can be summarised as follows:

Accepted	£651 722
Rejected	£115 614
Queried	£191 138
Disputed	£488 042
Interest	<u>£54 928</u>

£1 501 444

Queried Items

3.2.2 The 1971 Fund has queried an item relating to the cost of helicopter flights in February and March 1993 (£11 761) and legal costs incurred by the Council (£179 377).

3.2.3 The claim for legal fees was considered by the Executive Committee at its 46th session. The Executive Committee agreed with the Director that the advice given by the firms engaged by the Council did not, for the most part, relate to subjects which might form the basis of admissible claims against the Fund and that the fees relating to these matters were therefore not admissible (document FUND/EXC.46/12, paragraph 3.3.19).

3.2.4 The 1971 Fund has reviewed the legal advice obtained by the Council following the *Braer* incident. In November 1995 the 1971 Fund indicated to the Council that £15 002.50 could be accepted as admissible. The Council is expected to provide further information to justify why, in the Council's view, more of the legal costs incurred by the Council should be accepted by the shipowner, the Skuld Club and the 1971 Fund.

3.2.5 The Council has indicated that it intends to pursue the totality of its claim for legal costs in court.

Disputed items

3.2.6 The largest of the disputed items of the Council's claim is the cost of the "Braer Impact Assessment Team" in the amount of £402 911.45. This team commissioned studies in respect of various aspects of the Shetland economy, including the seafood industry, tourism, transport, the environment and agriculture.

3.2.7 This item of claim was considered by the Executive Committee at its 46th session. The Committee noted that, in the Director's view, 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 upon 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 decided that these 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 (document FUND/EXC.46/12, paragraph 3.3.17).

3.2.8 Most of the balance of the part of the claim identified as "disputed" relates to costs associated with handling the press and monitoring the media. At its 46th session the Executive Committee shared the Director's view that these costs could not be considered as damage caused by contamination and that they were therefore not admissible (document FUND/EXC.46/12, paragraph 3.3.18).

3.2.9 The Shetland Islands Council has indicated that it intends to pursue its claim in court and seek recovery of the costs associated with the Braer Impact Assessment Team, and the expenses relating to handling the press and monitoring the media.

3.3 Fishing Claims

3.3.1 Since the Executive Committee decided, at its 44th session held in October 1995, to suspend payment (cf paragraph 4 below), there had until August 1997 been very little progress in respect of the fishing claims.

3.3.2 At the request of the fishermen, representatives of the 1971 Fund and the Fund's advisers met with the Shetland Fishermen's Association and individual claimants during the last week of August 1997. Negotiations took place with individual fishermen who had submitted 45 claims to Court. An assessment of the fishermen's loss of income for the period October 1995 - August 1997 was made.

3.3.3 Offers of settlements totalling £3.16 million made by the 1971 Fund and the Skuld Club have been accepted in respect of 43 claims which totalled £19.9 million. Settlement offers in respect of two claims have not been accepted, and it is expected that these claimants will pursue their legal actions.

3.3.4 Fourteen fishing claims remain outstanding for a total amount of £6.9 million. Seven of these claims for £2.48 million have been made by fishermen or shellfish divers whose claims have been rejected by the 1971 Fund. Two claims (£1.3 million) are from the fishermen who did not accept the offer of settlement referred to in paragraph 3.3.3, one is from a mussel farmer (£294 000) and four claims (£2.8 million) are from the fishermen who normally operate in an area to the west of the island of Burra (known as the Burra Haaf).

3.4 Property damage claims

3.4.1 Claims were submitted for damage to asbestos cement tiles and corrugated sheets that were used as roof covering for homes and agricultural buildings, which the claimants alleged was a result of pollution.

3.4.2 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 analysis revealed no evidence that oil from the *Braer* had contributed to the deterioration of the materials examined. The consulting engineers stated that the chemical analysis and the petrographic examinations revealed no evidence that petroleum hydrocarbons had penetrated the materials or caused any kind of deterioration.

3.4.3 In the light of the results of the investigation, the 1971 Fund rejected the claims relating to the asbestos roofs. Eighty-four claims in this category for an amount of £8 million have, however, become the subject of legal proceedings. Many of these claims also include other elements, such as losses associated with farming.

3.4.4 A report by the claimants' expert on damage to asbestos cement roof tiles was made available to the 1971 Fund in July 1997. The expert's conclusion is that the slightly acidic nature of the dispersant is expected to have modified the chemical composition of the exposed edges of the roof tiles, which would, in the atmospheric conditions that prevail, cause the roof tiles to deteriorate more quickly than might otherwise be expected.

3.4.5 The report, together with the results of chemical analysis relied upon by the expert, is being reviewed by consulting engineers appointed by the 1971 Fund and the Skuld Club. Preliminary enquiries with the Marine Pollution Control Unit (MPCU) of the United Kingdom Department of Transport indicate that the dispersants used were not acidic but were in fact either pH neutral or slightly alkaline in nature.

3.5 Farming

3.5.1 Twenty-four claimants who have started legal proceedings in respect of damage to their roofs have also claimed losses associated with their farming activities. The losses include disruption of the reproductive cycle of animals, unexpected deaths due to vitamin deficiencies, damage to grazing land and damage to galvanized metal materials.

3.5.2 No new information has been presented in support of claims for losses relating to farming. The 1971 Fund has engaged experts to examine any evidence that might be submitted by the claimants.

3.6 Landcatch Ltd

3.6.1 The Executive Committee had rejected a claim by a company (Landcatch Ltd) supplying salmon smolt from its installation on mainland Scotland, some 500 kilometres from Shetland. The reasons for the Committee's decision are set out in paragraphs 3.5.11 and 3.5.12 of document FUND/EXC.40/10. The company has pursued this claim, totalling £1 961 347, in the legal proceedings.

3.6.2 A Court hearing on the question of admissibility in principle of this claim ("legal debate") was held from 28 April to 9 May 1997. The judgment is expected in the very near future.

3.7 Limitation proceedings

3.7.1 On 25 September 1997, the Court of Sessions decided that the Skuld Club was entitled to limit its liability in the amount of 5 790 052.50 SDR (£4.9 million). The Court ordered that the sterling equivalent in cash, a bank guarantee or any other security approved by the Court should be lodged within 28 days of the order.

3.7.2 The Court has not yet considered the question of whether or not the shipowner is entitled to limit his liability.

4 Suspension of payments

4.1 At its 44th session, held in October 1995, 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 1969 Civil Liability Convention and the 1971 Fund Convention, viz 60 million Special Drawing Rights (SDR) (document FUND/EXC.44.17, paragraph 3.4.46). At its 46th and 47th sessions, the Committee decided, in view of the remaining uncertainty as regards the outstanding claims, that the suspension of payments should be maintained (documents FUND/EXC.46/12, paragraph 3.3.23 and FUND/EXC.47/14, paragraph 3.3.12).

4.2 At its 50th session, the Executive Committee decided that the suspension of payments should be maintained until developments in the court proceedings allowed the Committee to assess whether the total amount of the established claims would exceed 60 million SDR (document 71FUND/EXC.50/17, paragraph 3.4.6).

4.3 Many claimants whose claims have been agreed as to the quantum but not paid have made representations to the 1971 Fund, maintaining that they are suffering severe financial hardship.

4.4 Since the suspension of payments was imposed in October 1995, 196 claims for a total amount of £5.2 million have been approved but not paid.

5 Action to be taken by the Executive Committee

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

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ANNEX I**Summary of claims**

	January	October
	1996	1997
	£	£
United Kingdom Government (Dept of Transport and Scottish Office)	3 571 181	3 571 181
Shetland Islands Council	1 508 317	1 413 987
P & O Scottish Ferries Ltd	902 561	902 561
Personal Injury	500 000	500 000
Fishermen's Agent	130 217	0
Fish Processors	10 505 245	9 434 999
Shetland Fish Processors Association	229 489	229 489
Shetland Fish Producers Organisation	36 108	0
Tourism - Shetland Hotel	149 000	0
Tourism & Property Damage	400 000	150 000
Property Damage	8 031 650	7 889 084
Loss of Income	650 000	650 000
Shipowner's LOF 90 claim	1 678 126	1 678 126
Salmon farming industry	21 863 523	16 601 437
Fishing industry	30 212 908	6 927 637
Total amount claimed	80 368 325	49 948 501

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ANNEX II

Claims which have been settled, withdrawn or reduced during 1997

Category	No of claims	Claimed £	Reduction £	Withdrawn £	Settlement amount £
Developments during 1996			1 936 516	2 451 198	878 230
Reduction in total claim amount as at 1.1.97		8 184 844			
Shetland Islands Council	1	94 330	94 330		
Fish processor	1	1 052 666			50 000
Fishermen's agent	1	130 217			64 000
Property damage	1	61 916	61 916		
Tourism & Property	1	250 000		250 000	
Fishing	1	479 911		479 911	
Tourism	1	149 000		149 000	
Property	1	40 000		40 000	
Fishing	43	19 976 939			3 162 091
Reduction in total claim amount during 1997		22 234 979			
			2 092 762	3 449 684	
Total reduction in claims to 1 October 1997		30 419 823			