



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1971

EXECUTIVE COMMITTEE  
57th session  
Agenda item 3

71FUND/EXC.57/4  
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## 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 55th session of the Executive Committee. In particular, information is given on the judgement rendered in respect of the claim by Landcatch Ltd.

#### 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 his P & I insurer (Assuranceforeningen Skuld, 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 The court actions relate 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 been rejected by the 1971 Fund, however, 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 Islands 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.

2.3 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.

2.4 Except in respect of Landcatch's claim, there has been only limited progress in the court proceedings. However, at the initiative of the 1971 Fund and the Skuld Club a hearing has been scheduled for October 1998 concerning the claims relating to losses allegedly suffered as a result of a drop in salmon prices. Since the legal proceedings have begun, no new evidence has been presented by the claimants to substantiate what has been claimed in this regard.

2.5 During 1997, a number of claims in court were settled, withdrawn or reduced. As a result, the total amount claimed in court has been reduced from £80 million to £47.8 million.

2.6 The claims situation as at 31 December 1997 is set out in Annexes I and II.

### **3 Claim by Landcatch Ltd: smolt supplier**

3.1 At its 40th session, the Executive Committee considered a claim presented by Landcatch Ltd (hereafter referred to as "Landcatch") for £2 601 506 plus interest. Landcatch supplied smolt to salmon farmers on Shetland from its installation on mainland Scotland some 500 kilometres from Shetland. The claim related to losses allegedly suffered as a result of the *Braer* incident having interrupted the normal stocking of salmon smolt in Shetland waters. For the following reasons the Committee rejected this claim as not fulfilling the criteria for admissibility laid down by the Committee (document FUND/EXC.40/10, paragraph 3.5.11):

The Executive Committee took into account a number of considerations including the following. The Committee was of the opinion that the loss allegedly suffered by Landcatch could not be considered as damage to property rights. The Committee noted the arguments advanced by Landcatch that the criterion of geographic proximity must be viewed in the light of the impossibility of Shetland to meet its own requirements for smolt, due to the lack of adequate freshwater on Shetland. Nevertheless, in the Committee's view, Landcatch's smolt-rearing activity was geographically more remote from the contamination than the activities of claimants who had received compensation in the *BRAER* case or in previous cases. The Executive Committee did not accept that Landcatch's smolt production should be seen as a joint venture with the Shetland salmon farming industry, as maintained by Landcatch's Counsel. In the view of the Committee, Landcatch should be considered as a supplier of raw material to the Shetland salmon farming industry. Although the Executive Committee noted the point made by the claimant that Landcatch and the Shetland salmon industry were financially inter-dependent, since, according to the claimant, the group of companies to which Landcatch belonged was a major employer and supporter of the Shetland economy, the Committee did not accept that a criterion of economic inter-dependency would be an appropriate test for the admissibility of claims. In addition, the Committee took the view that Landcatch's smolt-rearing activity did not form an integral part of the economic activity of the area. It was noted that Landcatch's Counsel had argued that a test should be whether the claimant's business was so inextricably linked with an operation carried out in polluted waters that the claimant must necessarily be affected by the inability to use those waters, whether this business was affected to a significant degree and whether the claimant had any opportunity to avoid the damage. The Committee did not accept that the concept of "inextricably linked" was an appropriate criterion for admissibility. In the Committee's view, the loss could not be considered as damage caused by contamination but was due to the unwillingness of customers to conclude contracts for the purchase of smolt and to Landcatch's lack of adequate alternative markets.

3.2 Landcatch pursued its claim against the shipowner (*Braer Corporation*), the Skuld Club and the 1971 Fund in the Court of Session.

3.3 A court hearing on the question of admissibility in principle of this claim ("legal debate") was held from 28 April to 9 May 1997.

3.4 In a judgement dated 11 November 1997 the Court dealt with two actions by Landcatch. The first action was taken against the 1971 Fund, and the second against the shipowner and the Skuld Club. The 1971 Fund intervened in the proceedings in respect of the latter action.

3.5 Copies of the judgement are available to delegates on request. A summary of the judgement is set out in Annex III to this document.

3.6 The main substantive issue dealt with by the Court which is of interest to the 1971 Fund was whether Landcatch's claim was admissible under the applicable United Kingdom statutes, ie the Merchant Shipping (Oil Pollution) Act 1971 and the Merchant Shipping Act 1974, which gave effect to the 1969 Civil Liability Convention and the 1971 Fund Convention, respectively. The question was whether the loss allegedly suffered by Landcatch constituted "damage caused ..... by contamination resulting from the discharge or escape" of oil (Section 1(1)a of the 1971 Act and Sections 4(1) and 1(3) of the 1974 Act).

3.7 The main argument invoked by Landcatch was that the 1971 and 1974 Acts imposed an absolute liability of indeterminate extent in respect of all losses caused by contamination. As a subsidiary argument, Landcatch maintained that the Court should pay close regard to the criteria adopted by the 1971 Fund in dealing with other claims for pollution damage.

3.8 The owner of the *Braer*, the Skuld Club and the 1971 Fund maintained that, although claims for pure economic loss may be admissible under the 1971 and 1974 Acts, it did not follow that all claims for pure economic loss were admissible. They argued that, on the contrary, the legislation in question was governed by the well established principle of common law by which a pragmatic limit was placed on the scope of liability, and that in any event Landcatch's claim fell outside that limit.

3.9 The Court rejected Landcatch's claim for the reasons summarised in paragraphs 3.10 - 3.13 below.

3.10 The Court stated that its first task was to look at the above-mentioned Sections of the Acts, since the Court should assume that Parliament had accurately implemented the treaty obligations set out in the Conventions. The Court maintained that, if the sections disclosed a clear-cut meaning, then that was the meaning they should be given, whether or not that meaning was at odds with the assumed purpose of the Conventions. In the Court's view, it was only if the statutory provisions were obscure or ambiguous that there was any need to resort to the Conventions themselves or to any secondary sources as an aid to construction. It took the view that the question of the admissibility of the claim could be decided by reference to the above-mentioned Sections of the Merchant Shipping Acts. The Court agreed with the position of the shipowner, the Skuld Club and the Fund that, although the statutory provisions imposed liability for pure economic loss, there was nothing in the provisions to suggest that the limitations upon the recoverability of economic loss in general law were to be displaced. The Court stated that Landcatch's primary argument would extend the scope of statutory liabilities in the case beyond any reasonable limit and beyond any limit which Parliament could have contemplated. It was also stated that although the purpose of the 1971 Fund was to provide full compensation to victims, the Fund's liability was limited. The Court stated that this suggested that the Fund was to compensate proximate claimants and not remote claimants. It was pointed out that, if the scope of the Fund's liability had been unlimited, the Fund would always be inadequate and no claimant could ever be fully compensated. In conclusion the Court held that the liability for pure economic loss could be satisfactorily interpreted to mean a liability for such loss where it was directly caused by the contamination in accordance with the established principles of Scots law.

3.11 The Court stated that the same conclusion could be inferred from the provisions of the Conventions which these Sections implemented and from the preparatory works.

3.12 The Court stated that it was not impressed by Landcatch's arguments based on the decisions of the 1971 Fund itself. While noting its surprise that Landcatch had relied on the 1971 Fund's own criteria and on its past decisions, given that by applying those criteria the Fund had rejected its claim, the Court held that its task was to identify what the relevant principles were and not how these may have been applied by the 1971 Fund, whether rightly or wrongly, in individual cases in the past. In any event, having

examined these decisions, the Court did not consider that these cases assisted Landcatch. In particular, the Court found that these decisions established that, while not excluding claims for economic loss, the Fund considered each such claim on its merits, that the Fund did not apply "but for" tests, that the Fund had interpreted the Convention as requiring a line to be drawn to exclude an indeterminate chain of causation, and, therefore, a liability of indeterminate scope, and that the Fund accepted that in cases of economic loss there must be a reasonable degree of proximity between the contamination and the loss.

3.13 Landcatch's reliance on common law was rejected by the Court. On examining what the Court termed the "unsatisfactory list of authorities" relied upon by Landcatch, it found that these did not assist Landcatch. The Court stated that an examination of the relevant case law rather exemplified the consistent refusal of the Courts to expose defendants to indeterminate liability and demonstrated a consistent distinction made by the Courts between principal or direct victims of loss and those who were secondary or remote. In the Court's view, there was nothing in Landcatch's pleadings to establish the necessary proximity on which claims for economic loss depended. According to the Court, Landcatch's argument that its business activities were "bound with the Shetland salmon fishing industry" and that these activities were "closely integrated with it" were empty phrases. The Court considered it plain that Landcatch was no more than a potential supplier to salmon farmers carrying out business in the contaminated area.

3.14 Landcatch has appealed against the judgement to the Inner House of the Court of Session (the Court of Appeal for Scotland). In its appeal Landcatch has maintained that the test for admissibility under the 1971 Act is causation alone (the "but for" test) and that the correctness of this test could also be inferred from the 1971 Fund Convention and the preparatory works. Landcatch has stated that, having regard to the principles laid down by the 1971 Fund's 7th Intersessional Working Group, it could not be said that Landcatch's claim was bound to fail, and that Landcatch should therefore be allowed to present evidence of the damage suffered. In addition, Landcatch has maintained that the Court did not pay proper regard to the principles adopted by the 1971 Fund in drawing a line on the scope of recovery. Finally, Landcatch has argued that at common law Landcatch's pleadings set out a sufficiently close relationship with the Shetland fish farming industry to establish the necessary proximity for a claim for economic loss to be admissible even where there was no property damage.

3.15 The 1971 Fund will submit its counter-arguments in due course.

3.16 An appeal can be made to the House of Lords against a decision by the Inner House of the Court of Session.

#### **4 Property damage claims**

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.

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.

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, however, for an amount of £8 million have become the subject of legal proceedings. Many of these claims include other elements, such as losses associated with farming.

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 was that it would be expected that the slightly acidic nature of the dispersant modified the chemical composition of the exposed edges of the roof tiles, which, in the atmospheric conditions that prevailed, would cause the roof tiles to deteriorate more quickly than might otherwise have been expected. The claimants have therefore amended the grounds for their claims and maintained that the damage was caused by the dispersants.

4.5 The consulting engineers engaged by the 1971 Fund and the Skuld Club made preliminary enquiries with the Marine Pollution Control Unit (MPCU) of the United Kingdom Department of Transport. The result of these enquiries indicates that the dispersants used were not acidic but were in fact either pH neutral or slightly alkaline in nature.

4.6 The consulting engineers engaged by the Skuld Club and the 1971 Fund have reviewed the report of the expert appointed by the claimants. The consulting engineers are of the view that the work carried out by the claimants' expert does not reveal any evidence that oil from the *Braer* or the dispersants used in any way contributed to the deterioration of the sample of asbestos roof tiles examined.

4.7 Since the Executive Committee's 55th session, 32 property damage claims totalling £2.1 million have been withdrawn.

4.8 Other claimants in this category have indicated that they intend to commission further scientific analysis to support their claims.

## 5 Limitation proceedings

5.1 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 Special Drawing Rights, SDR (£4.9 million).

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

## 6 Suspension of payments

6.1 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 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).

6.2 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).

6.3 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.

6.4 Since the suspension of payments was imposed in October 1995, 207 claims for a total amount of £5.2 million have been approved but not paid.

**7 Action to be taken by the Executive Committee**

The Executive Committee is invited to:

- (a) to take note of the information contained in this document;
- (b) to give the Director such instructions in respect of Landcatch's appeal as it may deem appropriate; and
- (c) to give the Director such other instructions as it may consider appropriate.

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**ANNEX I****Summary of claims in court**

	<b>January 1996 £</b>	<b>December 1997 £</b>
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	5 828 085
Loss of Income	650 000	650 000
Shipowner's LOF 90 claim	1 678 126	1 678 126
Salmon farming industry	21 863 523	16 699 415
Fishing industry	30 212 908	6 713 842
<b>Total</b>	<b>80 368 325</b>	<b>47 771 685</b>

One fishing claim has been increased by £356 000.

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**ANNEX II**

**Claims in Court which have been settled, withdrawn or reduced up to 31 December 1997**

Category	No of claims	Claimed £	Reduction £	Withdrawn £	Settlement amount £
Shetland Islands Council	1	94 330	94 330		
Fish processor	2	1 070 247			67 581
Fishermen's agent	1	103 217			64 000
Property damage	1	61 916	61 916		
Tourism & Property	1	250 000		250 000	
Salmon Farming	13	5 164 108	1 936 516	1 123 556	770 000
SFPO	1	36 109		36 109	
Tourism	1	149 038		149 038	
Property	33	2 141 649		2 101 000	40 649
Fishing	48	23 855 071		2 069 415	3 284 071
<b>TOTAL</b>	<b>102</b>	<b>32 925 685</b>	<b>2 092 762</b>	<b>5 729 118</b>	<b>4 226 301</b>

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**ANNEX III****Summary of the judgement rendered by the Court of Session on  
11 November 1997 concerning the claim by Landcatch Ltd****Parties**

- Action 1** Landcatch Ltd (pursuers)  
against  
The International Oil Pollution Compensation Fund (defenders)
- Action 2** Landcatch Ltd (pursuers)  
against  
Braer Corporation (and its directors) (defenders)  
Assuranceföreningen Skuld (defenders)  
The International Oil Pollution Compensation Fund (minuters<sup><1></sup>)

**1 Issues addressed by the Court**

The judgement deals with five questions namely:

- 1 the competency and prematurity of the action<sup><2></sup> against the 1971 Fund (action 1);
- 2 the relevancy<sup><3></sup> of the claims in both actions;
- 3 the relevancy of the claim for "expenses of pursuing claims" in both actions;
- 4 the relevancy of seeking a judgement directly against the insurer in the action against the shipowner and the Skuld Club (action 2); and
- 5 the choice of law in action 2.

The first question arose only between Landcatch and the 1971 Fund, and raised further procedural questions. The second and third questions involved all parties, while the fourth and fifth questions arose between Landcatch and the Skuld Club only.

**2 Competency and prematurity of action 1****2.1 Arguments by the parties**

2.1.1 Landcatch contended that, as the 1971 Fund had invited, considered and paid out substantial sums to various parties in settlement of claims, the Fund had waived any requirement that Landcatch should pursue legal remedies against the owner or the insurer of the *Braer*. Landcatch also claimed that these actions caused it to incur expenses in the negotiation of its claim and that the 1971 Fund was

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<sup><1></sup> "Minuter" is the term in Scots law to designate an intervening party.

<sup><2></sup> That the action against the 1971 Fund alone was not permitted in law (ie incompetent) and in any case raised too soon.

<sup><3></sup> For a claim in Scotland to be allowed to proceed under Scots law to the stage where evidence is heard the claim must be a "relevant" one, ie that the facts alleged in the written pleadings must if proved entitle the party to the remedy he is seeking. Thus an action will not be allowed to proceed if (as in the Landcatch case) the Court holds that even if all the facts alleged were proved, the pursuer would not be entitled in law to the remedy he is requesting. In such a situation the Court will decide that the case is "irrelevant" and will dismiss it, ie will not allow it to proceed.

therefore barred from insisting that Landcatch should exhaust its legal remedies against the owner and the insurer.

2.1.2 The 1971 Fund argued that action 1 was both incompetent and premature and should therefore be dismissed. In the Fund's view, liability on the part of the Fund under Section 4 of the Merchant Shipping Act 1974 cannot arise unless liability has already been established on the part of the owner and the insurer under the Merchant Shipping (Oil Pollution) Act 1971 and then only when the claimant has failed to achieve recovery in full.

2.1.3 While Landcatch accepted that this was the general rule, it insisted that there should be a full hearing to establish whether by its own actions in settling claims direct with claimants the 1971 Fund was prevented from insisting that Landcatch should first pursue legal remedies against the owner and the insurer.

## 2.2 Court's decision

### 2.2.1 *Competency and prematurity*

The Court accepted the 1971 Fund's argument that unless waiver or personal bar <sup>44</sup> applies, the Court cannot grant a decree against the Fund until the conditions set out in Section 4(1)(b) of the 1974 Act had been satisfied. In other words, whether the 1971 Fund could be found liable in terms of action 1 depended in the Court's view on the outcome of action 2. However, in dismissing action 1 the Court held that the action was premature rather than holding that an action against the Fund could never be permitted.

### 2.2.2 *Waiver*

The Court noted that the payments already made by the 1971 Fund were "provisional" in the sense of Article 18.7 of the 1971 Fund Convention as opposed to final payments made under Section 4 of the 1974 Act. While payments under Section 4 required legal remedies to be pursued first against the owner or the insurer, provisional payments did not. Provisional payments might be made conditionally and, in particular, might be subject to repayment in certain events. On this basis the Court considered that the making of a provisional payment could not constitute a waiver by the 1971 Fund of the requirement under Section 4 of the 1974 Act that Landcatch should pursue legal remedies against the owner and the insurer.

### 2.2.3 *"Personal bar"*

The Court was of the view that Landcatch's position that the 1971 Fund was barred from insisting that Landcatch must pursue legal remedies against the shipowner and the insurer was also unfounded. For the reasons given above, it could not be said, in the Court's view, that by making provisional payments or by inviting and considering claims, the 1971 Fund had led Landcatch to believe that it would not insist on Landcatch's pursuing these legal remedies.

### 2.2.4 *Conclusion*

The Court stated that, if this had been the only question in the case, it would have stayed action 1 pending the outcome of action 2 as this would not have put the 1971 Fund at any practical disadvantage, given that the Fund had tabled a full defence to action 2. However, this consideration was superseded by the Court's decision on the general relevancy of both actions, namely that both actions should be dismissed.

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<sup>44</sup> Personal bar in Scots law is equivalent to estoppel under English law and is the doctrine under which someone who has led someone else to believe that a particular set of circumstances exists may be prevented later from arguing that a different set of circumstances exists.

### **3 The relevancy of the actions**

#### **3.1 The issues**

3.1.1 The essential point which the Court was required to consider was whether, on a true construction of the 1971 and 1974 Acts, the losses which Landcatch alleged to have sustained were to be regarded as constituting "damage caused ... by contamination resulting from the discharge or escape" of oil (1971 Act, Section 1(1)(a)) or "pollution damage" (1974 Act, Sections 4(1) and 1(3)).

3.1.2 Landcatch put forward three main propositions regarding the way in which the Court should address this point:

The provisions of the 1971 and 1974 Acts placed upon the shipowner, the insurer and the 1971 Fund a burden of absolute liability of indeterminate extent in respect of all losses caused by the contamination.

If that was not the case, the Court should pay close regard to the criteria adopted by the 1971 Fund in dealing with other claims for pollution damage.

If the relevancy of the cases was to be considered according to common law principles, the facts and circumstances in these actions entitled Landcatch to a full hearing on the facts.

3.1.3 The shipowner, the Skuld Club and the 1971 Fund contended that, while a claim in respect of pure economic loss might be admissible under the 1971 and 1974 Acts, it did not follow that all claims for pure economic loss were admissible. On the contrary, the legislation was governed, in their view, by the well-established principle of common law by which a pragmatic limit was placed upon the ambit of liability and that in any case Landcatch's claim fell outside that limit.

#### **3.2 The arguments presented by Landcatch**

3.2.1 In support of its first proposition, Landcatch argued that the words "shall be liable" in Section 1(1) of the 1971 Act and Section 4(1) of the 1974 Act established an absolute statutory liability unrelated to fault with the only question being as to its extent. The absence of any words qualifying the words "damage" and "loss" indicated in Landcatch's view that all of the damage and loss caused by the incident came within the scope of the liability if, "but for" the incident, that loss would not have occurred. It was also argued that these Sections dealt with international obligations of a public nature and that their scope ought not to be abridged by the importation of restrictive concepts of domestic law. Landcatch accepted that on this argument no theoretical limitations could be conceived which would restrict the range of relational losses for which the shipowner, the Skuld Club or the 1971 Fund could be liable.

3.2.2 In support of its second proposition Landcatch argued that the Court should look at the decisions of the 1971 Fund in numerous claims world wide and, by reference to these decisions, adopt the Fund's own criteria for the acceptance of claims or at any rate adopt similar criteria of its own. Reference was made in particular to the 7th Intersessional Working Group of the 1971 Fund. Landcatch also referred to specific decisions of the 1971 Fund in order to demonstrate how the 1971 Fund had dealt with certain claims arising from this and other incidents. With reference to these decisions, Landcatch sought to show that it had a close relationship with the Shetland salmon industry analogous to other admitted claims and that it thus would qualify for compensation by the 1971 Fund's own criteria. If the Court were not to adopt those criteria, it should in Landcatch's view apply general criteria of a similar nature, namely the proportionality of the loss to the claimant's undertaking and the vital importance to the claimant's business of its economic relationships in the affected area.

3.2.3 In support of its third proposition, Landcatch argued that if the case law on economic loss could be held to be relevant to these cases, its pleadings demonstrated a sufficient degree of proximity between Landcatch and the Shetland salmon farming industry to entitle Landcatch to proceed to a full hearing. In particular, Landcatch argued that in Scots law a claim for pure economic loss could be admitted in appropriate circumstances and that, where physical damage had been sustained by a third party, a claim

for pure economic loss was not ruled out where the claimant was closely bound up with the third party in a real sense.

### 3.3 The Court's decision on the three propositions by Landcatch

#### *The first proposition (the "but for" test)*

##### Interpretation of the statutory provisions

3.3.1 The Court noted that the first task for it in interpreting the relevant provisions was to look to the Sections of the Acts themselves, as the Court should start from the assumption that Parliament had accurately implemented the treaty obligations set out in the relevant Conventions. If the Sections disclosed a clear cut meaning, then that was the meaning which they should be given, whether or not that meaning was at odds with the assumed purpose of the Convention. It was only if the statutory provisions were obscure or ambiguous that there was any need to resort to the Conventions themselves or any other secondary sources as an aid to construction. The Court took the view that the question could be satisfactorily decided by reference to the Sections alone. The Court accepted the arguments of the shipowner, the Skuld Club and the 1971 Fund that while the statutory provisions imposed liability for pure economic loss, there was nothing in them to suggest that the limitations upon the recoverability of economic loss in the general law were to be displaced. In particular, the Court noted:

"The primary argument for the pursuers would extend the ambit of the statutory liabilities in this case beyond any reasonable limit and beyond any limit that Parliament could have contemplated. In my view, the most cogent answer to the interpretation advanced for the pursuers is that if that had been the intended result of the legislation, Parliament would not have left the matter to inference. It would have said so explicitly and unambiguously in the sections themselves. . . In my view it is inconceivable that in the 1971 and 1974 Acts Parliament should by mere implication have introduced indeterminate liability of the kind suggested by the pursuers .".

3.3.2 The Court also considered it significant that the 1971 Act specified two further heads of liability, namely the cost of measures reasonably taken and the damage which those measures cause. If liability was indeterminate, it would have been unnecessary in the Court's view for Parliament to have made these additions. Finally, while the 1974 Act implied that the purpose of the Fund was to provide full compensation to victims, the liability of the Fund itself was limited. This suggested, in the Court's view, that the Fund was to compensate proximate claimants and not remote claimants. The Court pointed out that, if the Fund's liability were unlimited, the Fund would always be inadequate and no claimant could ever be fully compensated.

3.3.3 In conclusion, therefore, the Court held that liability for pure economic loss could be satisfactorily interpreted to mean a liability for such loss where it was directly caused by the contamination in accordance with the established principles of Scots law. Accordingly, the Court rejected Landcatch's first submission.

##### The Conventions and the preparatory works

3.3.4 While the Court reached a conclusion by reference to the Sections of the statutes alone, it considered that the same conclusion could be inferred from the Convention provisions which these Sections implemented (cf. 1969 Civil Liability Convention, Articles II and IX and 1971 Fund Convention, Article 3) and from the preparatory works. In particular, reference was made to the Official Records of the International Legal Conference on Marine Pollution Damage (1969) which showed that the definition of "pollution damage" was in terms which had been proposed by the United Kingdom delegation by way of an amendment which was designed, according to the note to the proposal, "to ensure that damage covered by the convention is confined to damage by contamination whether to persons or property and does not extend to damage consequential on an escape of oil such as fire or explosion" (Official Records, page 566). In the Court's opinion, the adoption of this amendment supported its conclusion on the interpretation of the statutes.

*The second proposition (adoption of Fund criteria)*

3.3.5 This second proposition was rejected by the Court, which was not impressed by Landcatch's arguments based on the decisions of the Fund itself. While noting its surprise that Landcatch had relied on the 1971 Fund's own criteria and on the latter's past decisions, given that by applying those criteria the Fund had rejected Landcatch's claim, the Court held that the task of the Court was to identify what the relevant principles were and not how these might have been applied by the 1971 Fund, whether rightly or wrongly, in individual cases in the past. In any event, having examined these decisions the Court did not consider that these cases assisted Landcatch. In particular, the Court found that:

"They establish that the Fund, while not excluding claims for economic loss, considers each such claim on its merits, that the Fund does not apply "but for" tests; that the Fund has interpreted the Convention as requiring a line to be drawn to exclude an indeterminate chain of causation, and, therefore, a liability of indeterminate scope; and that the Fund accepts that in cases of economic loss there must be a reasonable degree of proximity between the contamination and the loss".

*The third proposition (application of the common law)*

3.3.6 This third proposition was also rejected by the Court. On examining what the Court termed the "unsatisfactory list of authorities" relied on by Landcatch, it found that these did not assist Landcatch. Rather, an examination of the relevant case law exemplified the consistent refusal of the Courts to expose defendants to indeterminate liability and demonstrated a consistent distinction made by the Courts between principal or direct victims of loss and those who were secondary or remote. The Court stated that there was nothing in Landcatch's pleadings to establish the necessary proximity on which claims for economic loss depended. According to the Court:

"The central weakness in the pursuers' pleadings is that the essence of the claim is based on the use of descriptive phrases that are unsupported if not contradicted, by the averments of primary fact.

The pursuers aver that their business activities were 'bound with' the Shetland salmon fishing industry and they were 'closely integrated' with it. These are empty phrases, in my view. They are inferences from primary fact rather than averments of primary fact. When one examines the primary facts averred by the pursuers it is plain that the pursuers were no more than potential trade suppliers to salmon farmers carrying on business in the area of the contamination."

*The Court's conclusion*

3.3.7 Having rejected all three of Landcatch's propositions in respect of this part of the case, the Court concluded that Landcatch's pleadings had failed to set out a relevant case that the losses which they claimed constituted "damage caused .... by contamination resulting from the discharge of escape" of oil, or constituted "pollution damage in the United Kingdom". Accordingly both actions were dismissed on this ground.

3.3.8 Although the actions were dismissed on this ground, the Court nevertheless proceeded with the remaining three questions which arose in the course of the legal debate.

#### **4 The relevancy of the expenses claim**

4.1 Landcatch sought to recover expenses incurred in pursuing its claim. It was argued on behalf of the shipowner, the Skuid Club and the 1971 Fund that Landcatch should do so by means of judicial expenses in the normal way. In their view attempts to do so as a separate head of compensation could lead to double recovery of the same outlays.

**4.2** The Court stated that, had it not dismissed the whole action on other grounds, it would have allowed this point to go to a full hearing on the facts as there might have been outlays that were reasonably and necessarily incurred in the pursuit of a claim, for example in assembling and vouching the details of the claim and in having them valued, which could be recoverable as costs relevant to the statutory claims but which might not be recoverable as judicial expenses.

**5 The relevancy of the remedy sought against the Skuld Club in action 2**

**5.1** In action 2, Landcatch sought a decree against the shipowner and, as an alternative, a decree against the Skuld Club for the same sum.

**5.2** The Skuld Club argued that the alternative claim was irrelevant as it was not open to Landcatch to seek a decree in the alternative against the shipowner or the insurer. If Landcatch were to fail to obtain a decree against the shipowner, there could be no question in the Skuld Club's view of its being granted a decree against the Club.

**5.3** The Court agreed with the Skuld Club. It observed that, if the Court had been requested to decide the case on this point alone, it would have dismissed the action in so far as it was directed against the Club.

**6 The choice of law question (action 2)**

**6.1** This point arose only between Landcatch and the Skuld Club. The 1971 Fund did not participate in this part of the legal debate.

**6.2** Landcatch sought by relying on Norwegian law to circumvent the Skuld Club's absolute right to limitation of its liability under Section 12(3) of the 1971 Act. Landcatch contended that there was nothing in the 1971 Act which would preclude recourse to a foreign system of law as its provisions were concerned with jurisdictional matters. Accordingly, while the Skuld Club in this case could be sued only in Scotland, the question of choice of law had to be determined by private international law principles which in Landcatch's view should be the law of the insurance contract, namely Norwegian law.

**6.3** The Skuld Club argued that Landcatch could not claim the benefit of the jurisdictional provisions of the 1971 Act while evading the limitation of liability for which the Act provided. The Club also maintained that to attempt to evade the statutory limitation of liability would be contrary to the policy of the law.

**6.4** The Court took the view that Landcatch's case failed on the fundamental point that it sought to treat the various provisions of the 1971 Act as being independent of each other and relied only on those that were to Landcatch's advantage in pursuing its claim. If a claimant sought to take advantage of the jurisdictional, compulsory insurance and strict liability provisions of the Act, he was not in the Court's view entitled to seek to avoid the limitation of liability provision by reliance on a foreign system of law. The Court stated that this conclusion was strengthened by reference to the 1969 Civil Liability Convention which made plain that the only recourse against the insurance monies available from the compulsory insurance was under Article VII.8 and that the funds available were exclusively for the satisfaction of claims brought under the Convention (Article VII.9). The Court concluded that, as this claim fell outside the 1971 Act, it fell outside the Convention.

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