



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1971

EXECUTIVE COMMITTEE  
59th session  
Agenda item 3

71FUND/EXC.59/5  
14 October 1998

Original: ENGLISH

## INCIDENTS INVOLVING THE 1971 FUND

### BRAER

Note by the Director

<b>Summary:</b>	During 1998 a number of claims have been settled out of court, withdrawn from the court proceedings or reduced in amounts. The total amount of the claims, originally £80 million, now stands at £43.9 million. The Court of Session in Edinburgh has rendered two judgements, against which the 1971 Fund has appealed. Except for these two claims there has been very limited progress in the court proceedings.
<b>Action to be taken:</b>	Instructions to be given in respect of the two claims covered by the judgements.

#### 1 Introduction

This document deals with developments in respect of the *Braer* incident which have taken place since the 57th session of the Executive Committee. In particular, information is given on the judgements rendered in respect of two claims.

#### 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, 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 documentation to substantiate their claims.

2.4 Except in respect of two claims, details of which are reported in paragraphs 3 and 4 below, there has been only limited progress in the court proceedings.

2.5 During 1998, a number of claims in court were settled, withdrawn or reduced in amounts. As a result, the total amount originally claimed in court has been reduced from £80 million to £43.9 million.

2.6 The claims situation as at 1 October 1998 is set out in Annexes I and II.

2.7 Contacts have been made with two groups of claimants as set out in paragraphs 5.2 and 6.9 below.

2.8 The 1971 Fund is aware that representatives of the United Kingdom Government have held informal discussions with some groups of claimants in order to see whether progress could be made.

### **3 Claim of Mr Derrick Black**

3.1 Mr Derrick Black raised an action against the shipowner, the Skuld Club and the 1971 Fund for £250 000 alleging that he has suffered adverse health effects as a result of contamination following the grounding of the *Braer*. He has maintained that he suffered stress, anxiety and depression as a result of pollution damage to livestock, fields and crops owned by a partnership of which he was a partner. It was argued at a preliminary hearing on admissibility (legal debate) by the shipowner, the Skuld Club and the Fund that the alleged stress and depression were not damage caused by contamination or pollution damage in terms of the 1971 Merchant Shipping (Oil Pollution) Act or the 1974 Merchant Shipping Act which implement the 1969 Civil Liability Convention and the 1971 Fund Convention into United Kingdom law. It was accepted by the shipowner, the Skuld Club and the Fund that damage for the purposes of the legislation could include physical injury. The Court held that it could not resolve the legal question as to whether psychological symptoms caused by contamination of livestock, fields and crops which Mr Black actively farmed as a partner were encompassed within the statutory provisions without having heard evidence as to the facts.

3.2 The shipowner, the Skuld Club and the 1971 Fund have appealed against this decision on the basis that claims in respect of stress, anxiety, depression or other such symptoms of a psychological nature do not fall within the ambit of damage caused by contamination within the above-mentioned Acts and that claims for psychological damage allegedly caused by the effects of witnessing damage by contamination to property were not sufficiently proximate to constitute damage caused by contamination or pollution damage in the terms of the Acts. The appeals will be heard in June 1999.

### **4 Claim of Shetland Sea Farms Limited**

4.1 At its 42nd session, the Executive Committee considered a claim by Shetland Sea Farms Limited which had contracted to purchase smolt from a company on the mainland of Scotland (Terregles

Salmon Company Limited). Both these companies were members of a group of aquaculture companies with a common shareholding. The smolt had eventually been sold at 50% of its purchase price to another company belonging to the same group. The Committee noted that in the Director's view the activities of Shetland Sea Farms Limited formed an integral part of the economic activity of the area affected by the *Braer* incident and that economic loss suffered by that company as a result of the contamination caused by the incident was in principle admissible for compensation. The Committee considered that, in the particular circumstances of this case, account should also be taken of any benefits derived by other companies in the same group consequent upon the obligation of Shetland Sea Farms Limited to mitigate any loss. The Committee authorised the Director to enter into negotiations with Shetland Sea Farms Limited (document FUND/EXC.42/11 paragraphs 3.4.5 - 3.4.9). It has not been possible, however, to settle the claim out of court.

4.2 Shetland Sea Farms Limited raised an action against the shipowner, the Skuld Club and the 1971 Fund for £2 747 303. In January 1998 a hearing on the admissibility in principle of the claim (legal debate) took place in the Court of Session in Edinburgh. The shipowner, the Skuld Club and the 1971 Fund argued that the claim by Shetland Sea Farms Limited should be rejected without the necessity of a trial on the grounds that, from the way in which the pleadings had been worded, Shetland Sea Farms Limited, which was seeking to recover loss on the resale of the smolt and loss of profit on the sale of salmon which would have been reared from the smolts, would be over compensated. They maintained that the company could not, as a matter of law, recover damages for loss of profits from the sale of a finished item (the salmon) and also recover the costs of the raw material (the smolt) needed to produce the finished item.

4.3 On 10 September 1998 the Court rejected the argument of the shipowner, the Skuld Club and the 1971 Fund and indicated that, in its opinion, there was no rule of law that a pursuer could never recover both lost profits and wasted costs. Accordingly, the Court decided that the matter could not be resolved purely as a matter of law and that evidence had to be presented as to whether Shetland Sea Farms Limited was entitled to compensation and, if so, to what extent.

4.4 There was a subsidiary argument as to whether certain legal costs which Shetland Sea Farms Limited alleged that it had incurred prior to the raising of proceedings should, as a matter of law, be dismissed by the Court as not amounting to damage by contamination. However, the Court held that, before deciding whether in the particular circumstances these expenses constituted "damage caused by contamination", it would have to hear evidence as to precisely what they related to.

4.5 Shetland Sea Farms Limited had also sought to recover the sum of £729 000 which it alleged would be a liability which it would incur to Terregles Salmon Company Limited for breach of contract in respect of its having been unable to take delivery of the smolt. In the course of the legal debate before the Court, Shetland Sea Farms Limited abandoned this part of the claim.

4.6 The shipowner, the Skuld Club and the 1971 Fund have appealed against the Court's decision. It is unlikely that the appeals will be heard for at least twelve months.

## **5 Salmon price damage claims**

5.1 At the initiative of the 1971 Fund and the Skuld Club, a hearing was 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 began, no new evidence has been presented by the claimants to substantiate what has been claimed in this regard. This hearing has been postponed until November 1998.

5.2 In August 1998, a meeting took place between the claimants' representatives and the experts appointed by the shipowner, the Skuld Club and the 1971 Fund. A brief discussion on the substance of the salmon price damage claims took place following which more information is expected from the claimants.

## **6 Property damage claims**

6.1 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.

6.2 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 to the elements, and the standard of workmanship and maintenance. According to the consulting engineers, the physical and microstructural analyses revealed no evidence that oil from the *Braer* had contributed to the deterioration of the materials examined. The consulting engineers stated that the chemical analyses and the spectrographic examinations revealed no evidence that petroleum hydrocarbons had penetrated the materials or caused any kind of deterioration.

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

6.4 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.

6.5 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 neutral or slightly alkaline in nature.

6.6 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.

6.7 Since the Executive Committee's 57th session, 32 property damage claims totalling £2.1 million have been withdrawn.

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

6.9 A meeting has been proposed by the Skuld Club and the 1971 Fund at which claimants, their experts and their legal advisers will be represented.

## **7 Claim by Landcatch Ltd (smolt supplier)**

7.1 At its 57th session the Executive Committee was informed of a judgement by the Court of Session rejecting a claim by a smolt supplier, Landcatch Ltd. It was noted that Landcatch Ltd had appealed against the judgement.

7.2 It is expected that the appeal will be heard in January 1999.

**8 Limitation proceedings**

8.1 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 (£4.8 million).

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

**9 Suspension of payments**

9.1 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 3.4.45). 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).

9.2 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).

9.3 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.

9.4 Since the suspension of payments was imposed in October 1995, 208 claims for a total amount of £5.24 million have been approved but not paid.

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

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
- (b) to give the Director such instructions as the Committee considers appropriate in respect of the judgements regarding the claims referred to in paragraphs 3 and 4 above; 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>October 1998 £</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	103 217	0
Fish Processors	10 505 245	8 502 585
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	5 833 085
Loss of Income	650 000	650 000
Shipowner's LOF 90 claim	1 678 126	1 678 126
Salmon farming industry	21 863 523	15 314 395
Fishing industry	30 212 908	5 183 702
<b>Total</b>	<b>80 341 325</b>	<b>43 929 110</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 as at October 1998

Category	No of claims	Claimed £	Reduction £	Withdrawn £	Settlement amount £
Shetland Islands Council	1	94 330	94 330		
Fish processor	3	2 002 661		932 414	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	18	6 549 128	2 665 524	1 279 567	811 848
SFPO	1	36 109		36 109	
Tourism	1	149 038		149 038	
Property	34	2 136 649		2 096 000	40 649
Fishing	51	25 385 211		3 599 555	3 284 071
<b>TOTAL</b>	<b>112</b>	<b>36 768 259</b>	<b>2 821 770</b>	<b>8 342 683</b>	<b>4 268 149</b>