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COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
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Agenda item 3

71FUND/EXC.60/4
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INCIDENTS INVOLVING THE 1971 FUND

BRAER

Note by the Director

Summary:

The total amount of the claims in court, originally £80 million, now stands at £41.9 million, after a number of claims have been settled out of court, withdrawn from the court proceedings or reduced in amounts. The Court of Session in Edinburgh has rendered a judgement rejecting a claim for losses allegedly sustained by a salmon farmer as a result of a depression in salmon prices. The Court has also rejected a claim by a ferry operator for losses allegedly sustained as a result of the incident.

Action to be taken: Information to be noted.

1 Introduction

This document deals with developments in respect of the *Braer* incident which have taken place since the 59th session of the Executive Committee. In particular, information is given on Court decisions rendered in respect of three actions.

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 (Assuranceföreningen 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 claimants who had only notified the 1971 Fund of the claims were obliged to take legal action against the Fund within six years of the incident, ie by 5 January 1999, to prevent their claims from being time-barred. It appears that all but one of these claimants have taken such action. The exception is a claim by a butcher for £650 000 which appears now to have become time-barred.

2.3 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.

2.4 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 documentation to substantiate their claims.

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 £41.9 million.

2.6 The claims situation as at 1 January 1999 is set out in Annexes I and II.

3 Claim of Shetland Sea Farms Limited

3.1 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. The Committee authorised the Director to enter into negotiations with Shetland Sea Farms Limited, but it was not possible to settle the claim out of court (cf document 71FUND/EXC.59/5, paragraph 4.1).

3.2 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. In the course of the hearing the company abandoned part of its claim for £729 000, and the amount claimed was therefore reduced to £2 018 303.

3.3 The shipowner, the Skuld Club and the 1971 Fund argued that the remaining parts of 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 smolt, 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.

3.4 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.

3.5 At the Executive Committee's 59th session, it was reported that the shipowner, the Skuld Club and the 1971 Fund had appealed against the Court's decision and that they were waiting for further legal advice as to whether to pursue the appeals (document 71FUND/EXC.59/17, paragraph 3.4.7). After a

detailed examination of the judgement and further legal advice from the respective Counsel these appeals were withdrawn in November 1998. This claim will now be the subject of a hearing on the facts in advance of a decision on the legal merits of the case (known as "proof before answer" in Scots law). The hearing has been scheduled for November 1999.

4 Salmon price damage claims

4.1 A number of salmon farmers have maintained that the price of Shetland farmed salmon sold from outside the exclusion zone was depressed for a period of at least 30 months as a result of the incident and have claimed compensation for the losses from such price depression. The shipowner, the Skuld Club and the 1971 Fund concluded, on the basis of advice from their experts, that there was a fall in the relative price of Shetland salmon following the *Braer* incident during the months to June 1993 (ie for some six months), and the Fund - with the agreement of the shipowner and the Skuld Club - paid compensation totalling £311 600 to a number of claimants on that basis, but further compensation for the period thereafter was rejected.

4.2 Further claims in this category for a total of £11.3 million became the subject of legal proceedings. Three of these claims, for £598 113, were later withdrawn.

4.3 One salmon price damage claim was the subject of a legal debate at a hearing held in November 1998. The claimant argued that the Court had been mistaken in its decision in respect of the claim of Landcatch Limited⁴¹, where the Court held that claims for relational economic loss were not admissible. The claimant identified four factors which in his view distinguished the salmon price damage claim from the claim of Landcatch, namely the fact that there was a proximity between the claimant's farms and the exclusion zone, that the claimant's business was in aquaculture, that the claimant shared the same market as fish farms located in the exclusion zone, and that Shetland salmon was a recognised product with a special market identity.

4.4 The shipowner and the Skuld Club maintained that the claim was inadmissible, since the salmon farmer had not suffered any loss caused by contamination. They argued that the claimant had suffered no more than relational economic loss and referred to the Court's judgement in the Landcatch case.

4.5 The 1971 Fund, which had intervened in the proceedings, did not make any submission on the general question of admissibility of this claim, having made provisional payments to the claimant as set out in paragraph 4.1 above.

4.6 In a judgement rendered on 1 December 1998 the Court took the view that the factors advanced by the claimant did not provide any material ground for distinction between the case under consideration and the Landcatch case. The Court pointed out that all that had happened was that damage to other parties' property had caused the claimant to suffer economic loss. The Court held that the salmon farmer's claim was no more than one for relational economic loss, similar to that of Landcatch which had been rejected by the Court in the previous judgement. The fact that the 1971 Fund had made interim payments to the claimant was in the Court's view irrelevant. Accordingly the salmon farmer's claim was dismissed.

4.7 Copies of the judgement are available to delegates upon request.

4.8 The salmon farmer has given notice that he will appeal against the judgement. It is unlikely that this appeal will be heard before October 1999.

<1> As regards the judgement in the Landcatch case, reference is made to document 71FUND/EXC.57/4.

5 Legal action by Framgord Ltd

5.1 In document 71FUND/EXC.59/5/Add.1 the Executive Committee was informed of a legal action taken by Framgord Ltd against the 1971 Fund in the Court of Session requesting a declaration judgement on two points. The claimant requested a declaration to the effect that the 1971 Fund was not entitled to take into account payments made prior to the establishment of liability on the part of the shipowner and his insurer, when calculating the upper limit of their liability. The claimant also requested that the liability of the 1971 Fund should be calculated by reference not to Special Drawing Rights but to the free market value of gold.

5.2 A hearing took place in December 1998 at which a request was made by the Skuld Club and the 1971 Fund for this action to be sisted (stayed), pending the determination of whether the compensation claim of Framgord Ltd was admissible.

5.3 The Court decided on 30 December 1998 that this action should be sisted pending decision as to the admissibility of that claim.

6 Claim by P & O Scottish Ferries Ltd

6.1 At its 44th session, the Executive Committee considered a claim for £902 561 submitted by P & O Scottish Ferries Ltd for alleged loss of income from its ferry service from Aberdeen to Shetland as a result of a reduction in the number of tourists visiting the Shetland Islands and a reduction in the volume of freight.

6.2 The Executive Committee noted that P & O Scottish Ferries Ltd, whose main office was in Aberdeen, was a wholly owned subsidiary of the Peninsular and Oriental Steam Navigation Company. It was noted that the claimant was the only operator of passenger ferries between Shetland and the United Kingdom mainland (Aberdeen), whereas there were also two other companies which operated cargo services to and from Shetland.

6.3 The Executive Committee took the view that the criterion of reasonable proximity was not fulfilled. In particular, it was considered that there was not sufficient proximity between the claimant's activity and the contamination. It was also considered that the claimant's business did not form an integral part of the economic activity of Shetland. For these reasons, the claim was rejected (document 71FUND/EXC.44/17, paragraph 3.4.25).

6.4 The company took legal action against the shipowner and the Skuld Club, notifying the 1971 Fund of the actions, claiming compensation for an amount of £902 561, subsequently reduced to £682 715. The company argued that the Court had been mistaken in the decision in the Landcatch case, where it was held that claims for relational economic loss were not admissible. The company further maintained that this case was distinguishable from the Landcatch and salmon price damage cases in that there was sufficient proximity between the company and the contamination to establish liability.

6.5 The shipowner, the Skuld Club and the 1971 Fund maintained that this case was one concerning relational economic loss, that the damage covered by the claim was too remote and that the action should therefore be dismissed.

6.6 In a judgement rendered on 7 January 1999, the Court of Session accepted the arguments advanced by the shipowner, the Skuld Club and the 1971 Fund and dismissed the actions. The Court considered *inter alia* that the losses were not a direct consequence of the oil spill but were no more than an indirect consequence of the adverse publicity affecting the image of Shetland as a source of fish and fish products and as a holiday destination, and that the adverse publicity was in its turn a consequence of the contamination of other parties' property.

6.7 Copies of the judgement are available to delegates upon request.

7 Fish processors' claims

7.1 Compensation totalling £3.2 million has been paid to 17 fish processors and associated services, mainly for loss suffered as a result of being deprived of the supply of fish from the exclusion zone.

7.2 Six claims submitted by fish processors totalling £7.7 million are pending in court. The claims relate to losses allegedly suffered as a result of a reduction in the processing of certain types of fish and shellfish during the period 1993-1995. The 1971 Fund has been unable to take a position on these claims, as the evidence submitted by the claimants to substantiate the losses is insufficient to make an assessment of the alleged losses.

7.3 A meeting took place in early December 1998 with representatives of some of the claimants and a representative of the 1971 Fund together with their respective legal advisers and experts. The purpose of this meeting was to determine whether the claimants had any more evidence to substantiate their claims in order to allow the Fund to review its assessment of these claims. The claimants and their advisers indicated that they did have evidence to support the claims, but that they had so far only presented the minimum amount of information since preparation of all of the evidence would be time consuming. They stated that this work would not be done until after there had been a debate and an ensuing court decision as to the admissibility of the claims.

7.4 It is likely that the Court of Session will hold a hearing for a legal debate on the admissibility of these claims during June and July 1999.

8 Property damage claims

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

8.2 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 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 petrographic examinations revealed no evidence that petroleum hydrocarbons had penetrated the materials or caused any kind of deterioration.

8.3 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, although subsequently 32 of these claims totalling £2.1 million were withdrawn. No satisfactory technical evidence has been presented in support of these claims which were originally based on the assumption that the alleged damage was caused by oil. However, the claimants' expert now hypothesises that the active component present in the dispersants used to treat the oil was the cause. Many of these claims also include other elements, such as losses associated with farming.

8.4 On 9 November 1998 there was a meeting between the lawyers and experts of the claimants, and representatives of the Skuld Club and the 1971 Fund and their lawyers and experts. The purpose of the meeting was to discuss the report of the claimants' experts. The 1971 Fund's experts do not consider that this report provides satisfactory evidence that the dispersants caused the alleged damage.

8.5 On 17 December 1998 a court hearing was held at which the Court expressed frustration at the lack of progress of the claimants in finalising their pleadings. An order was given that the pleadings by the claimants in this group should be finalised by 8 January 1999.

8.6 These claims include not only damage to asbestos cement roof coverings, but also damage to galvanised metal products, additional costs associated with animal husbandry, and personal injury claims. It is hoped that once the claimants' pleadings have been finalised, the elements of each claim will be known and quantified. It is expected that as a result of this exercise the total amount of claims in this category will be reduced.

8.7 It is expected that a court hearing concerning the property damage claims will take place during May 1999.

9 Suspension of payments

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

10 Dates of court hearings during 1999

The following Court hearings have been tentatively scheduled for 1999.

Landcatch Limited - appeal by claimant	12 - 15 January and 16 - 19 March
Property damage claims - legal debates	4 - 28 May
Derrick Black, personal injury claim - appeal by shipowner/Skuld Club/1971 Fund on whether alleged psychological damage as a result of property damage is admissible. (cf document 71FUND/EXC.59/5, paragraph 3)	10 and 11 June
Salmon farming/fish processing/fishing claims - legal debates	15 June - 23 July
Shetland Sea Farms Ltd - proof before answer	16 November - 3 December

11 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document; and
- (b) to give the Director such instructions in respect of the *Braer* incident as it may consider appropriate.

ANNEX I**Summary of claims in court**

	1 January 1996 £	1 January 1999 £
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	682 715
Personal injury	500 000	500 000
Fishermen's agent	103 217	0
Fish processors	10 505 245	7 745 026
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	4 763 990
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	5 183 697
Total	80 341 325	41 882 606

One fishing claim has been increased by £356 000.

ANNEX II

Claims in court which have been settled, withdrawn or reduced as at 1 January 1999

Category	No of claims	Claimed £	Reduction £	Withdrawn £	Settlement amount £
Shetland Islands Council	1	94 330	94 330		
Fish processor	4	2 760 219		1 689 972	67 581
Fishermen's agent	1	103 217			64 000
Tourism & property	1	250 000		250 000	
Salmon farming	18	6 549 128	2 665 524	1 279 568	811 848
SFPO	1	36 109		36 109	
Tourism	1	149 038		149 038	
Property	41	3 267 660	1 131 014	2 096 000	40 649
Fishing	51	25 385 211		3 599 555	3 284 071
P&O Scottish Ferries	1	219 846	219 846		
TOTAL	121	38 814 758	4 110 714	9 100 241	4 268 149