



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
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Agenda item 4

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INCIDENTS INVOLVING THE 1971 FUND

SEA EMPRESS

Note by the Director

Summary:	The question has arisen whether certain claims in respect of angling clubs and associations and private owners of fishing rights have become time barred vis-à-vis the 1971 Fund.
Action to be taken:	Decide whether these claims have become time barred vis-à-vis the 1971 Fund.

1 Introduction

1.1 Claims against the shipowner, the insurer and the 1971 Fund become time-barred three years from the date when the damage occurred, unless the claimant has taken certain legal steps.

1.2 The question has arisen whether certain claims for compensation and for fees arising out of the *Sea Empress* incident, which occurred on 15 February 1996, have become time barred vis-à-vis the 1971 Fund.

2 Claims under consideration

2.1 A single writ was issued on 11 February 1999 on behalf of six angling associations, two angling clubs and two private owners of fishing rights, naming as defendants the shipowner and the Skuld Club. The 1971 Fund was not notified of these proceedings by 15 February 1999, ie within three years of the incident (cf document 71FUND/EXC.61/7, paragraph 3.18). The claims relate to legal and expert fees and to economic losses allegedly resulting from a statutory ban which was imposed on 20 March 1996

by the Welsh Office on salmon and migratory trout in all freshwater rivers and streams flowing into the sea between the Gower Peninsula and St David's Head. This ban was lifted on 3 May 1996 (cf document 71FUND/EXC.49/9, paragraphs 3.2 and 3.3).

2.2 At its 50th session the Executive Committee decided that a claim by an angling club for losses suffered due to a reduction in membership, allegedly as a result of the *Sea Empress* incident, was admissible in principle (document 71FUND/EXC.50/17, paragraphs 3.12.11 and 3.12.12). The Director subsequently accepted similar claims from five angling associations, one angling club and one private owner of fishing rights. Claims in respect of alleged economic losses of one angling club and one individual owner of fishing rights were rejected by the Skuld Club and the 1971 Fund well before 15 February 1999.

2.3 Most of the claims covered by the writ relate to fees paid for legal and expert advice. These claims for fees were assessed by the Skuld Club's and 1971 Fund's experts prior to the three year time bar, but the claimants did not accept the amounts offered. Additional information has since been provided by the claimants' legal adviser.

2.4 One angling association named as a plaintiff in the writ had not submitted any claim to either the Skuld Club or the 1971 Fund prior to the issue of the writ.

3 Relevant provisions of the Conventions

3.1 The question of time bar is governed by Article VIII of the 1969 Civil Liability Convention as regards the shipowner and his insurer and by Article 6.1 of the 1971 Fund Convention as regards the 1971 Fund. Article 7.6 of the 1971 Fund Convention is also of interest in this regard. These Articles read:

1969 Civil Liability Convention

Article VIII

Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence.

1971 Fund Convention

Article 6

1 Rights to compensation under Article 4 or indemnification under Article 5 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage.

Article 7.6

Without prejudice to the provisions of paragraph 4, where an action under the Liability Convention for compensation for pollution damage has been brought against an owner or his guarantor before a competent Court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the Court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to

the proceedings, any judgement rendered by the Court in such proceedings shall, after it has become final and enforceable in the State where the judgement was given, become binding upon the Fund in the sense that the facts and findings in that judgement may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.

3.2 The relevant provision in United Kingdom law is the Merchant Shipping Act 1995, Schedule 4, Section 178(1), which provides as follows:

"No action to enforce a claim against the Fund under this Chapter shall be entertained by a Court in the United Kingdom unless -

- a) the action is commenced, or
- b) a third-party notice of an action to enforce a claim against the owner or his guarantor in respect of the same damage is given to the Fund,

not later than three years after the claim against the Fund arose.

In this sub-section "third party notice" means a notice of the kind described in section 177(2) ..."

3.3 Section 177(2) reads:

"Where in accordance with rules of court made for the purpose of this sub-section the Fund has been given notice of proceedings brought against an owner or guarantor in respect of liability under Section 153, any judgment given in the proceedings shall, after it has become final and enforceable, become binding upon the Fund in the sense that the facts and evidence in the judgment may not be disputed by the Fund even if the Fund has not intervened in the proceedings."

3.4 The rules of court dealing with claims against the Fund have until 26 April 1999 been set out in Order 75, Rule 2A of the Rules of the Supreme Court. Rule 2A(2) provides:

"For the purposes of Section 177(2) of the Merchant Shipping Act 1995, any party to proceedings brought against an owner or guarantor in respect of liability under Sections 153 and 154 of the Merchant Shipping Act 1995 may give notice in writing on the Fund together with a copy of the Writ and copies of the pleadings (if any) served in the action".

3.5 In response to a request from the 1971 Fund, the solicitor acting for the shipowner/Skuld Club, sent a fax to the 1971 Fund on 25 February 1999 attaching a copy of the writ which had been served on them.

3.6 The solicitor representing the claimants sent a letter on 26 February 1999 notifying the 1971 Fund of the writ which had been issued and served on the shipowner and Skuld Club. A copy of the writ was attached to the letter, which did not reach the 1971 Fund until 2 March 1999, ie 15 days after the third anniversary of the date of the incident, due to it having been sent to the wrong address.

3.7 The claimants have maintained that what defines the time for commencing proceedings against the 1971 Fund and/or giving notice to it is the date on which the damage occurred and not the date of the incident. They have further argued that they did not suffer pollution damage until the closure of the river fishery and that, had the fishery not been closed, no damage would have occurred. Since the river fishery was closed by Parliamentary Order of 19 March 1996, to take effect on 20 March 1996, in the claimants' view the earliest date on which damage occurred to the claimants was 19 March 1996. The claimants have therefore maintained that notice was given to the Fund within the relevant period.

3.8 Without prejudice to the arguments set out in paragraph 3.7, the claimants have argued that they were entitled to apply to the Admiralty Registry for leave to add the 1971 Fund as third defendants to

the existing proceedings under the provisions of Order 15, Rule 6/4 of the Rules of the Supreme Court, which gives effect to the Limitation Act 1980, and in particular to section 35. The claimants have stated that this section provides that a new party can be added after expiry of any limitation period, provided that the proceedings had been issued within the relevant period and that the addition of a new party was necessary for the determination of the action. They have mentioned that Section 35(6) further states that the court will be satisfied that the addition is "necessary" when, inter alia, any claim in the original action cannot be maintained by or against an existing party unless the new party is joined in the action. The claimants have expressed the view that it is necessary for the 1971 Fund to be joined in the proceedings as the action cannot be maintained against the shipowner and its insurer unless it is so joined.

3.9 The claimants have also maintained that it is not proper for the 1971 Fund to reject in any event the claims for outstanding costs on the grounds that they relate to settlements of claims by the Fund before any material limitation period had expired and that the costs follow the event of an admitted claim.

4 The Director's view

4.1 The question is at what date the damage allegedly suffered by the claimants occurred. In the Director's view, the damage in question should be considered as not having been sustained before 20 March 1996, ie the date when the fishing ban became effective.

4.2 The Director also takes the view that the letter of 26 February 1999, which was received by the 1971 Fund on 2 March 1999, fulfils the requirements as to notification under Article 7.6 laid down in United Kingdom law. For this reason, he considers that the claimants have properly notified the 1971 Fund before the expiry of the three year period laid down in Article 6.1 and that these claims are not time barred.

4.3 If, as the Director considers to be the case, the claims have already been properly notified to the 1971 Fund, there is no need for the 1971 Fund to be joined as third defendant to the existing proceedings. Order 15, as referred to by the claimants, has been superseded by new rules of court introduced on 26 April 1999. Under the new rules (Civil Procedure Rule 19.4), the claimants would have to satisfy the court that the addition of the 1971 Fund was necessary on the grounds that the claim cannot properly be carried on against the original parties unless the 1971 Fund is added as a defendant. It is at this stage unclear how the courts will interpret this rule and, therefore, uncertain whether the claimants would be able to obtain an order for the 1971 Fund to be added as third defendant.

4.4 The Director's position in respect of the time bar issue should not be considered as an acceptance on the 1971 Fund's part that the claims covered by the writ are admissible.

5 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 decide whether the claims in question should be treated as time barred.
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