



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1971

EXECUTIVE COMMITTEE  
62nd session  
Agenda item 3

71FUND/EXC.62/5  
8 October 1999

Original: ENGLISH

## INCIDENTS INVOLVING THE 1971 FUND

### BRAER

Note by the Director

<b>Summary:</b>	The total amount of the claims in court, originally £80 million, now stands at £34 million, after a number of claims have been dismissed, settled out of court, withdrawn from the court proceedings or reduced in amounts.
<b>Action to be taken:</b>	Information to be noted.

#### 1 Introduction

This document deals with developments in respect of the *Braer* incident (United Kingdom, 5 January 1993) which have taken place since the 61st 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 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 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2.3 Since 1996 a number of claims in court have been dismissed, settled, withdrawn or reduced in amount. As a result, at the time of the Executive Committee's 61st session in April 1999 the total amount of claims pending in court had been reduced from £80 million to £37 million.

2.4 Since April 1999 claims in court totalling £3.2 million have been settled, withdrawn or reduced in amount. Thus, the claims remaining in court have been reduced to £34 million.

2.5 The claims situation as at 8 October 1999 is set out in the Annex.

### 3 Claim by Landcatch Ltd

3.1 Landcatch Ltd ("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.

3.2 At its 40th session the Executive Committee rejected the claim as not fulfilling the criteria for admissibility laid down by the Committee. The reasons for the Executive Committee's decision are set out in document FUND/EXC.40/10, paragraph 3.5.11.

3.3 Landcatch Ltd pursued its claim against the shipowner, the Skuld Club and the 1971 Fund in the Court of Session, which also rejected the claim.

3.4 Landcatch pursued its claim against the shipowner, the Skuld Club and the 1971 Fund in the Court of first instance in Edinburgh. The main argument invoked by Landcatch was that the United Kingdom Merchant Shipping (Oil Pollution) Act 1971 and Merchant Shipping Act 1974, which gave effect to the 1969 Civil Liability Convention and the 1971 Fund Convention, imposed an unrestricted liability for all losses which would not have occurred but for the incident (the 'but for' argument).

3.5 In a decision rendered in November 1997 the Court of first instance agreed with the position of the shipowner, the Skuld Club and the 1971 Fund that, although the statutory provisions could impose liability for pure economic loss, there was nothing in the provisions to suggest that the limitations on 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. The Court referred to the fact 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. In conclusion the Court held that the liability for pure economic loss could be satisfactorily interpreted to mean a liability for such loss directly caused by the contamination in accordance with the established principles of Scots law. The decision is summarised in document 71FUND/EXC.57/4, section 1.

3.6 Landcatch appealed against the Court of Session's decision that its claim was not admissible in principle. The appeal was heard from 12 to 19 January and from 16 to 19 March 1999.

3.7 Landcatch's main argument in the appeal proceedings was that common law principles of remoteness could not be applied, that the Merchant Shipping Acts did not place any restriction on the liability of the shipowner, and that it was therefore enough for Landcatch to establish that if the incident had not occurred, Landcatch would not have suffered the losses. Landcatch also argued that the Court should take the 1971 Fund's practice into consideration and that the Court should arrive at an interpretation consistent with the Fund's criteria for admissibility under which the claim was admissible. In addition Landcatch maintained that there was such a close relationship between Landcatch and the Shetland salmon farming industry that Landcatch would necessarily be affected by the oil spill.

3.8 The Appeal Court (the Inner House of the Court of Session), unanimously rejected all these arguments. The Court took the view that the 'but for' argument, if accepted, would open up a limitless chain of even more remote claims. The Court held that the Merchant Shipping Acts did not cover secondary or relational claims. One of the three judges stated that accepting the 'but for' argument would cause a dramatic change in the law both in the United Kingdom and in many other Contracting States. The Court did not consider it proper to treat the criteria and decisions of the Fund as an aid to interpreting United Kingdom

legislation. Finally the Court rejected Landcatch's argument that there was a close relationship between Landcatch and the Shetland economy which would entitle Landcatch to recover relational economic loss.

3.9 Copies of the decision of the Inner House are available to delegates on request.

3.10 Although Landcatch was entitled to appeal to the House of Lords, Landcatch decided not to do so.

#### 4 Personal injury claim

4.1 At its 61st session the Executive Committee was informed that the shipowner, the Skuld Club and the 1971 Fund had appealed against a Court of Session decision in respect of the admissibility of a claim for compensation for psychological damage as a result of property damage. The appeal was to be heard on 10 and 11 June 1999.

4.2 In May 1999 the claimant informed the 1971 Fund that he no longer wished to proceed with his claim. The appeal hearing, therefore, did not take place, and the legal action has been withdrawn.

#### 5 Loss of income claim

5.1 This claim related to the alleged loss of income as a result of a cancelled contract to supply lambs to the Faeroe Islands for four years.

5.2 The claimant ( a butcher) had already received compensation for his loss of income during 1993, and he had at that time signed a receipt and release in full and final settlement and discharge of his claim for loss of profit on the sale of slaughtered lambs to the Faeroese company due to oil pollution damage arising out of the *Braer* incident.

5.3 A hearing took place on 13 May 1999 in the Court of Session at which the shipowner, the Skuld Club and the 1971 Fund argued that compensation had been paid in full.

5.4 In a decision issued shortly after the hearing, the Court rejected the claim on the ground that a full and final receipt and release had been signed. The claimant has not appealed against this decision.

#### 6 Shetland Fish Processors Association claim

6.1 A claim for £229 489 was made by the Shetland Fish Processors Association on behalf of a number of its members relating to fees paid to their advisers, and interest on amounts previously admitted by the Fund.

6.2 In respect of some fish processors' claims a full and final settlement was reached and a receipt and release was signed by the claimant in exchange for a letter from the 1971 Fund stating that the question of interest and fees was still outstanding.

6.3 This claim was due to have been the subject of a hearing in the Court of Session on 25 May 1999. In advance of this date the claimants decided to accept an offer of settlement, in the amount of £64 000, that had been made by the 1971 Fund, with the approval of the Skuld Club, in September 1997.

#### 7 Tourism and property damage claim

This claim had been made for £150 000 for loss of income and property damage relating to two hotels on the mainland of Shetland. The claimant had been unable to substantiate certain elements of the claim. Following the Court of Appeal decision in respect of Landcatch Ltd this claim was withdrawn.

#### 8 Property damage claims

8.1 Claims were submitted for alleged pollution damage to asbestos cement tiles and corrugated asbestos cement sheets that were used as roof coverings for homes and agricultural buildings.

8.2 During a four-week hearing in June 1999 evidence was heard in the Court of Session in respect of five property damage claims which had been selected to provide a wide geographical spread and variety of types of roof materials.

8.3 The claimants described various problems associated with their roofs, including the curling of their slates and curling, cracking and softening of the corrugated sheet roofs which had not been observed prior to the incident. Their expert indicated that this might have been caused by the dispersant chemical, which was sprayed on the oil slicks, being blown onto the land and then onto the claimants' roofs. It was accepted by the 1971 Fund that of the 110 tonnes of dispersant sprayed, a very small quantity could have been blown onto the land but only over a restricted geographical area. Expert witnesses engaged by the shipowner, the Skuld Club and the 1971 Fund stated that only minute quantities of dispersant reached the land and that in any event there was no scientific basis that dispersants used to seek to break up the oil spill could cause damage to asbestos cement roofs.

8.4 At the conclusion of the hearing the Court indicated that it wished to receive written submissions from the lawyers for the claimants, the Fund, the shipowner and the Skuld Club on the issues raised in the evidence and that following receipt of the submissions there would be an oral hearing during the week commencing 14 December 1999.

## 9 Salmon price damage claims

9.1 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 associated losses. 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 up 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.

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

9.3 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 Ltd, 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 by 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.

9.4 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.

9.5 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 a number of claimants as set out in paragraph 9.1 above.

9.6 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.

9.7 The salmon farmers have appealed against this decision. The appeal is scheduled to be heard in February 2000.

## 10 Claim by P & O Scottish Ferries Ltd

10.1 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 (cf document FUND/EXC.44/5).

10.2 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).

10.3 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.

10.4 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.

10.5 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.

10.6 The company has appealed against the Court of Session's decision. The appeal will be heard in February 2000.

## 11 Fish processors' claims

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

11.2 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.

11.3 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.

11.4 A hearing was scheduled in the Court of Session during May 1999 for a legal debate on the admissibility of these claims. At the request of the claimants, however, the hearing was postponed pending the outcome of Landcatch's decision whether or not to appeal to the House of Lords. The appeal will be heard in June 2000.

## 12 Schedule of court hearings

The following court hearings have been scheduled:

Shetland Sea Farms Ltd - proof before answer	16 November - 3 December 1999
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P & O, salmon price damage - appeal	8 - 12 February 2000
Clive Burgess - personal injury proof	7 - 10 March 2000
Fish processors claims - debates	6 - 9 June 2000

### 13 Suspension of payments

13.1 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). Since the suspension of payments was imposed, 212 claims for a total amount of £5.7 million have been approved but not paid.

13.2 The total amount of compensation available under the 1969 Civil Liability Convention and the 1971 Fund Convention is 60 million SDR, which converted at the rate applicable on 25 September 1997 (the date on which the shipowner's limitation fund was established) corresponds to £50 609 280.

13.3 So far, the total amount paid in compensation is £44 959 834 out of which the 1971 Fund has paid £40 640 278 and the Skuld Club has paid £4 319 556. There is, therefore, £5.6 million available for payments in respect of the remaining claims. As mentioned above claims totalling £5.7 million have been approved but not paid.

13.4 The claims pending in court total £34 million as set out in the Annex.

### 14 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****Summary of claims in court**

	Actions against the shipowner/Skuld/Fund <1>		Claims in the limitation proceedings <2>	Claims not included in the limitation proceedings
	1 January 1996 £	1 October 1999 £	8 October 1999 £	8 October 1999 £
United Kingdom Government (Dept of Transport and Scottish Office)	3 571 181	3 571 181	3 587 049	
Shetland Islands Council	1 508 317	1 413 987		1 413 987
P & O Scottish Ferries Ltd	902 561	682 715	682 715	
Personal injury	500 000	370 000	400 000	
Fishermen's agent	103 217	0		
Fish processors	10 505 245	7 745 026	6 039 100	
Shetland Fish Processors Association	229 489	0	229 489	
Shetland Fish Producers Organisation	36 108	0		
Tourism - Shetland Hotel	149 000	0		
Tourism & property damage	400 000	0	150 000	
Property damage	8 031 650	2 763 990	2 917 190	
Loss of income	650 000	0	650 000	
Shipowner's LOF 90 claim	1 678 126	1 678 126	1 708 126	
Salmon farming industry	21 863 523	13 353 048	8 679 071	
Fishing industry	30 212 908	2 343 005	960 413	1 721 625
<b>Total</b>	<b>80 341 325</b>	<b>33 921 078</b>	<b>26 003 153</b>	<b>3 135 612</b>

&lt;1&gt; Actions commenced prior to the third anniversary of the incident

<2> Actions transferred to the limitation proceedings

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