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INCIDENTS INVOLVING THE 1971 FUND

SEA EMPRESS

Note by the Director

Summary:	This document examines whether the 1971 Fund should take recourse action against various third parties to recover the amount paid by the Fund in compensation as a result of the *Sea Empress* incident. In particular a detailed examination is made of whether the 1971 Fund should take recourse action against the Milford Haven Port Authority (MHPA).
Action to be taken:	Decide on whether to take recourse action against the MHPA and any other third parties.

1 Introduction

1.1 As instructed by the Executive Committee at its 60th session (document 71FUND/EXC.60/17, paragraph 3.7.17), the Director has been considering, with the assistance of the 1971 Fund's legal and technical advisers, whether the 1971 Fund should take recourse action against third parties in order to recover the amounts paid by it in compensation.

1.2 The 1971 Fund's policy in respect of recourse actions as laid down by the Assembly and the Executive Committee can be summarised as follows (document 71FUND/EXC.55/19, paragraph 3.3.10):

> The Executive Committee examined the question of possible recourse action, basing its considerations on the Director's analysis as set out in paragraph 6.3 of document 71FUND/EXC.55/4 and on the note presented by the Spanish delegation (document 71FUND/EXC.55/4/1). The Director drew attention to the fact that the Executive

Committee had taken the view that the policy of the 1971 Fund was to take recourse action whenever appropriate and that the Fund should in each case consider whether it would be possible to recover any amounts paid by it to victims from the shipowner or from other parties on the basis of the applicable national law. It was recalled that the Committee had stated that if matters of principle were involved, the question of costs should not be the decisive factor for the Fund when considering whether to take legal action. It was further recalled that the Committee had stated that the 1971 Fund's decision of whether or not to take such action should be made on a case by case basis, in the light of the prospect of success within the legal system in question (document FUND/EXC.42/11, paragraph 3.1.4).

1.3 In his consideration of this issue the Director has taken account of the view expressed by the Executive Committee at its 60th session that a decision whether to take recourse action in the *Sea Empress* case should be taken on legal grounds on the basis of the policy laid down by the Assembly and the Executive Committee as set out in paragraph 1.2 above and that the interests of the contributors should be taken into account when deciding whether to take recourse action (document 71FUND/EXC.60/17, paragraphs 3.7.18 and 3.7.19).

2 Investigations into the cause of the incident

Investigations into the cause of the incident were carried out by the Marine Accident Investigation Branch of the United Kingdom Department of Transport (MAIB) and by the Commissioner of Maritime Affairs of Liberia. Their reports dated 27 March 1997 and 16 July 1997, respectively, can be summarised as set out below as regards the cause of the incident:

MAIB report

The immediate cause of the groundings was pilot error, namely his failure to take appropriate and effective action to keep the vessel in the deepest part of the Channel … The pilot's error was due in part to inadequate training and experience in the pilotage of large tankers … The standards of training and examination of pilots at Milford Haven were unsatisfactory and in need of improvement.

The Pilotage Authorisation Committee should amend the qualifying requirements for authorisations to perform pilotage on vessels in excess of 30 000 dwt. The requirements for each of these authorisations should be based upon a minimum number of trips under instruction from another pilot, of which at least half are undertaken at night and at least half are inward trips from sea.

The Pilotage Authorisation Committee should improve the standards of examination of pilots. There should be an examination prior to the granting of any additional authorisation, not just initial authorisation to perform pilotage on vessels up to 30 000 dwt. Each examination should be in two parts, an oral part conducted ashore followed, if successful, by a practical part conducted on board one or more vessels when the candidate should be required to demonstrate his competency in pilotage to the satisfaction of the examiner.

Consideration should be given to the use of simulators as an additional means for both training and examining pilots.

The port radar surveillance system should be returned to a fully operational state and be provided with a continuous recording facility. It should be continuously monitored by a trained operator, fully instructed as to the type of vessel and circumstances when its navigation is to be monitored. In such a case, the intended track of the vessel must be known by the radar operator.

Pilots should be instructed to ask after boarding to see any pilotage plan prepared by the vessel. A plan to be followed, taking the vessel's own plan into account, should be discussed and agreed with the master and then notified to the port radar operator. The

level of detail of the agreed plan, which should either be in writing or drawn on the chart, should be appropriate for the particular pilotage to be carried out.

The boarding position off Milford Haven for pilots should be such that it allows sufficient time to agree the passage plan with the master of the vessel and sufficient sea room to allow the vessel to be lined up for the agreed approach.

Reforms should be introduced in the management of the pilots. In particular they should consider abolishing their wholly owned subsidiary, Milford Haven Pilotage Limited, so that the pilots become direct employees of the Port Authority and managed by them on a day-to-day basis.

A comprehensive tidal stream survey should be conducted along the West Channel from the entrance buoys to a position on the line joining West Blockhouse Point and East Blockhouse Point, including the waters in the immediate vicinity of the Channel. The information obtained should be provided to all who require it.

The initial grounding resulted in approximately 2 500 tonnes of crude oil escaping and about a further 69 300 tonnes was lost to the sea during the period of the salvage operation.

Liberian report

The pilot had 1 hour and 50 minutes at the time of boarding in order to reach the berth at the Texaco jetty n°1 before low water. The normal passage time is one hour from boarding area. Therefore on this occasion arrival off the berth would have been 50 minutes before low water. The minimum depth at the jetty is 19 metres.

Since he became a Class 2 Pilot in May 1995 the Pilot had piloted 'from sea' only three vessels of over 90 000 tonnes deadweight. *Sea Empress* was the largest ship he had solely piloted. It is apparent that the navigation he used for entering the West Channel and the practice of judging the 'gap' between two sets of leading lights had been done regularly with smaller vessels which may be easier to manoeuvre, and may have quicker responses should a correction in course be required due to changes in tide and wind. Without experience of piloting larger vessels he may have assumed that all vessels could be navigated in this way, not fully taking into account the prevailing conditions of wind and tide.

The course made good since entering the channel was more likely nearer 040° than 025° or 030° as steered and led the vessel over the 15 metre contour. The helmsman's comment about the vessel not steering could be attributed to the water cushion against the rock wall of the channel edge prior to grounding.

It is concluded that the grounding occurred because:

(a) The pilot made insufficient allowance for the tidal cross current on entering the channel believing that at that time there would be no cross current.
(b) The pilot did not use the leading lights from his boarding position to ascertain on the run to the channel entrance if there was any cross current.
(c) There were insufficient control procedures by the harbour/pilot authorities to:

    (1) monitor the approach of deep draft vessels when entering or leaving the port, and advise the pilot of the vessel if he was off the leading line, and by how much; and
    (2) monitor closely the annual advancement of junior pilots until they have suitable experience for the tonnage the licence permits and until they become fully qualified Class 1 pilots.

3 Criminal proceedings against the Milford Haven Port Authority

3.1 Criminal proceedings were brought by the United Kingdom Environment Agency against two defendants, namely the Milford Haven Port Authority (MHPA) and the Harbour Master in Milford Haven at the time of the incident. Both defendants faced a charge that they caused polluting matter, namely crude oil and bunkers, to enter controlled waters, contrary to Section 85(1) of the Water Resources Act 1991, and that the discharge of crude oil and bunkers amounted to public nuisance. More particularly, the prosecution alleged that MHPA failed in its duties under the Milford Haven Conservancy Act 1983 properly to regulate navigation in the Haven and properly to prevent or reduce the risk of discharge of oil, by inadequately regulating or managing the navigation and/or pilotage of large deep-draughted oil tankers. It was also alleged that, under the Pilotage Act 1987, MHPA failed to provide proper pilotage services for the Haven in that it caused an insufficiently trained and qualified pilot to perform an act of pilotage, alone, on the *Sea Empress*, thereby endangering the marine and coastal environment and posing a danger to public safety. The Harbour Master was accused of failing in his duty safely to control and regulate shipping at the entrance to and within the port.

3.2 As the Director reported to the Executive Committee at its 60th session (document 71FUND/EXC.60/8), he and the 1971 Fund's legal advisers had intended to monitor closely the trial in the criminal prosecution commenced by the United Kingdom Environment Agency against the MHPA and the Harbour Master, which was due to begin on 12 January 1999 and to last several weeks. It had been hoped that evidence would emerge during the course of the trial, which could assist the 1971 Fund in deciding whether to take recourse action against the MHPA.

3.3 At the opening of the criminal trial on 12 January 1999, the Harbour Master pleaded not guilty, and the plea was accepted by the Environment Agency. The Milford Haven Port Authority pleaded guilty to the charge under the Water Resources Act 1991 of causing or permitting polluting matter, namely oil and bunkers, to enter controlled waters, the penalty for which is imprisonment for a term not exceeding two years, or a fine, or both. The Port Authority pleaded not guilty to all other charges. The pleas were accepted by the Environment Agency. As a result, the full trial did not take place. On 15 January 1999, sentence was passed: the Milford Haven Port Authority was ordered to pay a fine of £4 million and to pay £825 000 towards the prosecution costs. The Port Authority has appealed against this sentence.

3.4 The Director has considered the transcript of the trial in the criminal proceedings. Although the full trial did not proceed, as a result of pleas by the defendants being accepted by the prosecutor, a number of interesting comments were made by the trial judge when passing sentence. Mr Justice David Steel, a well-respected judge with extensive maritime and commercial experience, was highly critical of the MHPA and the way in which it had operated the port.

3.5 Mr Justice Steel made clear that, in the context of a scheme of compulsory pilotage, where shipowners and masters have to take the training, experience and expertise of the pilot provided at face value, the highest possible standards on the part of the port authority were called for. The judge also made the point that "it was not simply a question of furnishing a pilot who then commits an act of negligent navigation dislocated from the system of training and classification of pilots and from port control of navigation."

3.6 The judge emphasised in particular the "sketchy" experience of the pilot prior to the casualty in navigating large deeply laden tankers and the absence of any experience of doing so late on the tide; the degree of confusion within the MHPA between the need for categorisation of ships for the purpose of pilotage and categorisation of ships for mode of entry; the need for a coherent policy on entry by large vessels; and the desirability of placing restrictions on entry times for large vessels.

3.7 The judge described the improved procedures for pilot progression which had been introduced by the MHPA since the incident as "an indication of best practice with regard to ensuring familiarity with the class of vessels to which a pilot has achieved authorisation, hands-on experience under supervision of the next category, followed up by formal assessment".

3.8 Mr Justice Steel referred to an element of "muddled thinking" within the MHPA, which led to the focus on pilotage requirements for VLCC's tending to obscure the navigational requirements of such

vessels. He pointed out that the *Sea Empress* had not entered the Haven according to the model for entry which was set out in the West Coasts of England and Wales Pilot 1993[<1>]. The judge also expressed the view that there could be no doubt that an "appropriate additional restriction" for the MHPA to impose on vessels such as the *Sea Empress* would have been "to ensure that entry was only attempted sufficiently before low water to provide a North Westerly current in the roads". He noted that the validity of the advice in the West Coasts of England and Wales Pilot was reinforced after the casualty when the MHPA introduced new entry restrictions for large vessels.

3.9 Mr Justice Steel stated that it was "worth quoting" from the agreed document which formed the basis of the MHPA's plea:

> "(The Port Authority) created and then operated a system which resulted in *Sea Empress* attempting to enter the Haven … at a time as late as or later, in terms of proximity to low water, than any comparable vessel had attempted previously. It therefore put (the pilot) in a position where, as a direct consequence of the management system operated by the (Port Authority), he could make an error of navigation".

3.10 The judge also made the point that "best practice" called for a review of classification of vessels in the light of the introduction of segregated ballast tanks, which had not been undertaken by the MHPA until after the casualty.

3.11 The Director considers that these comments are relevant, whether or not the high level of the fine imposed upon the MHPA is reduced on appeal.

4 Possible recourse actions by the 1971 Fund

4.1 The Director has considered whether it would be appropriate to take recourse action against various persons involved in the incident, namely, the pilot, his employer, the Marine Pollution Control Unit (MPCU) of the United Kingdom Department of Transport, the Coastguard Agency, the salvors and the MHPA.

4.2 The Director has obtained detailed views from technical experts, including experts in pilotage and in radar and vessel traffic systems. In addition, the Director has obtained advice from the 1971 Fund's solicitors and a maritime legal expert, Mr Geoffrey Brice QC.

5 Recourse action against the salvors, the pilot, his employer, MPCU and the Coastguard Agency

5.1 Under Article III.4 of the 1969 Civil Liability Convention no action for compensation may be brought, under the Convention or otherwise, against the servants or agents of the shipowner. However, the legislation which implements the Convention into United Kingdom law (Merchant Shipping Act 1995) contains in Section 156 channelling provisions which go further than those of the Convention in that they also preclude action for compensation against salvors. Section 156 reads:

> 156. Where, as a result of any occurrence taking place while a ship is carrying a cargo of persistent oil in bulk, any persistent oil carried by the ship is discharged or escapes then, whether or not the owner incurs a liability under section 153 -
> (a) he shall not be liable otherwise than under that section for any such damage or cost as is mentioned therein; and
> (b) no servant or agent of the owner nor any person performing salvage operations with the agreement of the owner shall be liable for any such damage or cost.

5.2 It is clear from the MAIB report and the Liberian report that the incident was caused by pilot error. However, it is likely that an action against the pilot would fail on the ground that the pilot would under

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<1> The Pilot Book contains Admiralty Sailing Directions, navigational advice and information on weather, tidal streams, currents etc, which is needed for safe navigation, but is not available from Admiralty charts alone. It is compiled by the Hydrographic Office of the United Kingdom Ministry of Defence.

English law (Pilotage Act 1987, Section 16) be treated as a servant of the shipowner and would therefore be able to rely on protection under Section 156 of the Merchant Shipping Act 1995. Alternatively, if such an action were to succeed, the pilot would be entitled to limit his liability to a very low amount. Section 22(1) of the Pilotage Act 1987 reads:

> The liability of an authorized pilot for any loss or damage caused by any act or omission whilst acting as a pilot shall not exceed £1 000 and the amount of the pilotage charges in respect of the voyage during which the liability arose.

5.3 In the unlikely event that the pilot were not considered a servant of the shipowner, it might be possible to establish vicarious liability for the actions of the pilot on the part of his employer, Milford Haven Pilotage Limited. However, even if such a claim could be pursued successfully, it is doubtful whether proceedings against Milford Haven Pilotage Limited would be worthwhile in view of the limited assets available for the purposes of enforcement. In any event, the company could probably limit its liability to a very low amount.

5.4 As a matter of English law, a pilot is not regarded as a servant or agent of the Government. For this reason there is no basis upon which the Government could be held liable for the pilot's negligence.

5.5 In view of the provisions of the Merchant Shipping Act 1995, the Director considers that no action for recovery can be taken against the salvors, even if it could be proved that negligence by them caused or contributed to part of the pollution damage resulting from the incident.

5.6 As regards MPCU and the Coastguard Agency, the 1971 Fund's legal advisers consider that there is no evidence of negligence on their part which would justify recourse action against them. The Director shares this view.

5.7 In the light of these considerations, the Director takes the view that there would be no point in taking recourse action against the pilot, his employer, the salvors, MPCU or the Coastguard Agency.

6 Recourse action against MHPA

6.1 The legal advice given to the Director indicates that the basis of a recourse action against the MHPA would be that, as a harbour authority and a pilotage authority, MHPA was in breach of both common law and statutory duties (under the Milford Haven Conservancy Act 1983 and the Pilotage Act 1987). The statutory provisions impose upon the MHPA, *inter alia*, a duty to keep under consideration what pilotage services need to be provided to secure the safety of ships navigating in or in the approaches to the Haven, to provide such services and to authorise such persons to act as pilots as it considers are suitably qualified to do so. The MHPA also has a duty to take 'such steps as it may consider necessary or expedient … to maintain, improve, protect and regulate the navigation in the Haven, and prevent or reduce the discharge of oil, or the risk of discharge of oil, into the water from vessels in the Haven…'. At common law, in the view of the 1971 Fund's legal advisers, the MHPA as a harbour authority has a duty to take reasonable care that those who lawfully use the harbour may do so in safety. As a pilotage authority, the MHPA is under a duty at common law to take reasonable care to ensure the proper selection, supply, supervision and remuneration of pilots.

6.2 Having reviewed the MAIB and Liberian reports on the cause of the incident and the preliminary views of several technical experts, the 1971 Fund's legal advisers consider that the standards of training and authorisation of pilots at Milford Haven, as well as the system for classification of vessels for the purpose of allocation of pilots, were inadequate, and that it is likely that this particular pilot's limited experience in piloting tankers of this size led to his error, which in turn caused the grounding. Further, there appears in their opinion to be a realistic prospect of successfully arguing that the initial grounding would not have occurred if the radar system at Milford Haven - which had broken down some time before the grounding – had been fully operational, and if a reasonable vessel traffic system had been in operation. The Director agrees with the views expressed by the legal advisers.

6.3 It is recognised that there are a number of complex legal issues and difficulties associated with a recourse action of this type. The MHPA would no doubt argue that it was not negligent, that its training and pilot authorisation standards were adequate and that, in any event, other intervening factors (such as the salvage operation) contributed to the pollution.

6.4 The MHPA may also try to establish that it is entitled to limit its liability in some way. There are several provisions contained in the Pilotage Act 1987 and the Merchant Shipping Act 1995 which concern the right of a harbour authority to limit its liability and upon which the MHPA might seek to rely. The issue of limitation of liability is by no means straightforward. However, the 1971 Fund's legal advisers consider it unlikely that the MHPA would be entitled to limit its liability in this case.

6.5 The 1971 Fund's legal advisers have indicated that the 1971 Fund would be entitled to bring a claim against the MHPA, on the basis of the 1971 Fund having acquired by subrogation the rights of those victims of oil pollution to whom it has made payments of compensation. The legal advisers consider that, in performing its functions, the MHPA should have had greater regard to the fact that Milford Haven was a major oil port where many laden deep-draught tankers navigated through a narrow rocky entrance and where it was self-evident that, if there was a grounding, the consequences could be extremely serious. The 1971 Fund's legal advisers have expressed the view that, on the basis of the evidence available so far, there is likely to be a strong case against the MHPA that it was negligent in operating the port. On balance, they consider there are good prospects of establishing that the MHPA was in negligent breach of duty in relation to the safe navigation within the Haven and its approaches and that the necessary causative link between the breaches and the incident exists.

6.6 The Director is conscious that there is a risk element inherent in any litigation. A recourse action against the MHPA would give rise to complex legal issues. Also, it is likely that certain evidence concerning the running of the port will not become available until after the proceedings have begun, which adds to the difficulty of predicting the outcome of the case.

6.7 As for the financial position of the MHPA the following observations should be made. The MHPA (formerly Milford Haven Conservancy Board) was established as a public trust port authority set up as an independent statutory body by the Milford Haven Conservancy Act 1958. Its responsibility, in general terms, is to manage the Haven in the interests of the safety of navigation and the preservation of the environment. The broad picture which emerges from the MHPA's audited accounts for the year ended 31 December 1997 is that the fixed assets were £27.3 million, made up almost entirely of tangible assets (that is, the book value of the freehold and leasehold land and buildings). Prior to the incident, the MHPA had begun to extend the roll-on, roll-off terminal at a cost of £11.3 million, part of which was to be covered by a grant. In late 1998, the MHPA acquired the Port of Pembroke for an amount understood to be in the region of £3 million. The MHPA's budget for 1999 contemplated increasing the fixed assets to £33.2 million although this apparently reflects in part the use of a secured bank overdraft.

6.8 It is uncertain to what extent there exists insurance covering the MHPA's liability for pollution damage.

6.9 The Director's understanding is that the shipowner and the Skuld Club as well as the hull insurer are still considering whether to pursue the MHPA by way of recourse action.

6.10 So far, the 1971 Fund has paid some £9.4 million in compensation of which £5.6 million related to property damage, clean-up operations and preventive measures and £3.8 million related to pure economic loss. Further payments for significant amounts in respect of clean-up operations will be made, and there will also be some further payments for pure economic loss. It is estimated that the 1971 Fund's total compensation payments in respect of this incident will be in the region of £25 - 28 million. The amount at stake in a recourse action is therefore substantial. However, the cost of any litigation will also be considerable. In addition, if other parties were also to take recourse action against the MHPA, the 1971 Fund might have to compete with them in the distribution of any amount available if that amount were insufficient to meet all favourable judgements.

6.11 It should be noted that a considerable part of the 1971 Fund's recourse claim would relate to pure economic loss. As the Executive Committee is aware, the courts in the United Kingdom have in general taken a restrictive approach as to the admissibility of such claims. In this context reference should be made to the various judgements in relation to the *Braer* incident (most recently the Scottish

Appeal Court's judgment in respect of the claim by Landcatch Ltd; cf document 71FUND/EXC.62/5). It is possible that the English Courts would take a similar approach in relation to the *Sea Empress* incident and that therefore at least some of the 1971 Fund's subrogated claims for pure economic loss would not be admitted in a recourse action.

6.12 As set out in paragraphs 6.3 - 6.11 above, the 1971 Fund is likely to encounter a number of difficulties in a recourse action against the MHPA. The 1971 Fund's legal advisers consider nevertheless that there is a reasonable prospect of recovering funds by way of recourse action against the MHPA. The Director shares this view. His conclusion is therefore that such an action should be pursued.

7 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 decide whether the 1971 Fund should take recourse action against the Milford Haven Port Authority; and

(c) to decide whether recourse action should be taken against any other third parties, namely:

(i) the pilot;
(ii) the pilot's employer;
(iii) the salvors;
(iv) MPCU; and
(v) the Coast Guard Agency.

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