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INSIDE



7 Research into dying reefs



8 National museum: slavery

- 2 Detriment constitutional status
- 3 UP Status, lose or gain?
- 4 Harley Davidson turns 100
- 5 Profit tax return
- 5 Financial planning
- 6 Jean Claude "le coiffeur"

CULTURE & LEISURE

- 9 Dimitri's Internet Column
- 10 Puzzle, bridge, science
- 11 Church news bits
- 11 Household Hints, Tips for pets
- 12 Week in review

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Twenty million TelEm claim on ECC all but evaporates in Court

A claim of well over Naf. 20 million local telephone company TelEm says to have on East Caribbean Cellular (ECC) was virtually declared null and void by the Joint Court of the Netherlands Antilles and Aruba, ruling in appeal on Tuesday this week. In the unlikely event that TelEm can come up with "concrete" evidence that parties agreed to a rather unusual obligation by ECC to pay fixed fees (vastrecht) to TelEm when they concluded their first contract in December of 1990, part of the claim may stand. "Unlikely," as TelEm failed to deliver such proof both in proceedings before the Court of First Instance, as well as subsequently before the Appeals Court. Chances are that TelEm will be left with a heavy lawyers' bill, repayment of Naf. 5 million plus a substantial amount in interest and court charges.

The essence of the contested claim reflects the pioneer environment of the introduction of cellular telephone on the island. In April 1990 ECC was granted a licence by federal decree to start and operate a "cellular" radio telephone system on St. Maarten, as well to offer its services to Saba and Statia, and to vessels on the seas of the Windward Islands. The licence stipulated that ECC should link its operation to TelEm's phone operation and provide TelEm monthly with data of users, as well as with the total air time cellular to land and air time cellular to cellular.

The federal decree could only be implemented after an official contract was concluded in writing containing agreement on tariffs to be paid by ECC to TelEm for local calls and LandsRadio for international



calls. It was, moreover, stipulated that ECC would have to pay a monthly 9% surcharge on all air time charges it billed its customers.

Such a contract was drawn up and signed on December 16, 1990. ECC agreed to pay the regular telephone rates for using the telephone communication infrastructure and the above mentioned 9% of the total collected air time charges.

In 1998 this arrangement was replaced by a new "inter-connection agreement" with a different tariff structure. This arrangement, formalized by federal decree, was implemented retroactive to January 1, 1996.

The Naf. 20 million claim concerns the period 1990 to 1996.

On June 11, 1999, TelEm presented ECC with a bill of Naf. 20,835,000 for failure to pay fixed charges on the 10,000 lines made available to the cellular company during those initial 5 years.

The bill came as a most unpleasant surprise, in particular as TelEm had never in all the preceding years forwarded a bill concerning those charges to ECC.

The cellular company, denying that payment of such charges had ever been a condition agreed upon, refused to pay up and was next taken to court by TelEm.

In the first round of court proceedings TelEm came out on top, but for considerably less than 20 million. The Court of First Instance took as its point of departure that the fixed charges (vastrecht) should be considered as included in the "regular telephone rates" ECC had agreed to pay. But the Court rejected the calculation of TelEm. As ECC had never used the full 10,000 lines, the Court downgraded the claim to Naf. 5 million. ECC was ordered to pay the amount, nevermind whether it would appeal.

ECC disagreed on the principal ar-

gument and filed for appeal. Lawyers for ECC (Zwanikken & Snow) argued that the fixed fees charged by TelEm to customers related to special services rendered, such as the installation of a line, equipping customers with a telephone, a number and regular billing, mention in the telephone guide and access to its information service. None of these services is provided ECC cellular subscribers by TelEm. None of such customers use the TelEm infrastructure more than any other caller from outside, the lawyers argued.

The Appeals Court concurred and noted that there is no reason to interpret the conditions of the original agreement to include the payment of fixed fees as charged customers by TelEm. It noted that the agreed upon payment of "regular telephone rates" applied to cost of calls. Those costs were billed by TelEm and paid by ECC. The fixed fees charged customers of TelEm do

Continued on page 2

EQUAL PAY FOR MEN AND WOMEN

The Central Bureau for Statistics (CBS) of the Netherlands Antilles has a new web site www.cbs.an. In a press release of August, 28, CBS states that users are offered a wealth of information, which will be regularly updated. Looking at the information about St. Maarten and the other Windward Islands, the site will have to be updated soon. The News Page gives the most recent statistics, but mostly in Dutch. The public is encouraged to forward comments and suggestions to info@cbs.an (and cc: se@thedailyherald.com).

An example

As far as we can see from this printed table, the Gross Monthly Income on St. Maarten showed a decrease in the period of 1995 to 1997. The fact that women earn less than men has not changed in those years. We don't know in which year the CBS labour survey was held, and we presume CBS are talking about a monthly salary of Dutch Antillean guilders.

	1995			1997		
	Male	Female	Total	Male	Female	Total
500 or less	329	607	936	505	878	1383
501 - 1000	1481	2197	3678	1031	1862	2893
1001 - 2000	4372	3583	7955	3756	2603	6359
2001 - 3000	2052	1150	3202	2113	1246	3359
More than 3000	2442	1194	3636	2139	821	2960
Unknown	119	95	214	1285	657	1942
Total	10795	8826	19621	10829	8067	18896

Source: CBS Labour Force Sample Survey



Lawyer for ECC, Roeland Zwanikken of the Zwanikken & Snow Law Office

not concern ECC. Including the fixed fees in the “regular telephone rates” would, moreover, be in stark variance with international custom.

The Court consequently sided

with ECC, but nevertheless kept the door slightly ajar for TelEm by providing the company the opportunity to present conclusive evidence that payment of the fixed fees was expressly agreed upon in

1990. The Court made crystal clear that only hard “concrete” evidence will suffice and postponed ruling until its scheduled session of September 26, 2003.

Taking into account that three of the main players involved in the 1990 contract negotiations have declared in a written disposition that no such agreement on payment of fixed fees was made, chances that TelEm will be able to provide the Court with conclusive evidence of the contrary must be deemed highly unlikely. The dispositions referred to were made by R. Bernadina, at the time Director of LandsRadio and TelEm; J.L. Buncamper, at the time Head of LandsRadio Windward Islands; and M.L. Bardfield, then director of ECC. All three said they are more than willing to confirm their statements under oath.

East Caribbean Cellular is owned by Innovative Communication Corporation, a diversified telecommunications and media company with major holdings in the US Virgin Islands, throughout the Caribbean and in France.