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Jay B. Lake

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## JOINT VENTURE: BE CAREFUL, YOU MAY HAVE CREATED ONE

In *April Enterprises v. KTTV and Metromedia, Inc.*,<sup>1</sup> the California Court of Appeal for the Second District breathed new life into the age-old adage that actions speak louder than words. In a lawsuit disputing the production and syndication rights of the "Winchell-Mahoney Time" television show, the court ruled that a joint venture had been created due to the nature of the contract and the conduct of the parties, notwithstanding express language to the contrary.

In 1965, April Enterprises ("April"), a television series producer, entered into a written contract with KTTV and Metromedia, Inc., a television station, for the production and syndication of the "Winchell-Mahoney Time" television show.<sup>2</sup> In 1968, April and KTTV entered into a new contract which implemented the syndication clause of the original 1965 contract by substantially altering the parties' syndication and revenue rights under the 1965 agreement, giving KTTV exclusive rights to syndication.<sup>3</sup> The 1968 contract was to terminate automatically in five years or earlier if the shows were not broadcast for a certain length of time.

April alleged that in 1969 it attempted to purchase the video tapes of the "Winchell-Mahoney Time" show from KTTV in order to negotiate syndication agreements with various third parties.<sup>4</sup> Between November 1969 and March 1970, presumably in response to April's attempt to purchase the video tapes, KTTV sent April two letters offering to purchase the exclusive rights to broadcast and license the show for an additional two years, but subject to different terms from those in the 1968 agreement. In the second of these letters, dated March 31, 1970, KTTV

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1. 147 Cal. App. 3d 805, 195 Cal. Rptr. 421 (1983).

2. The 1965 agreement set forth the rights of the respective parties regarding the production and syndication of the show. Section 4 gave KTTV ownership rights to all the video tapes of the show. Section 17 provided that both April and KTTV had the right to initiate syndication with third parties. Additionally, each party was to receive fifty percent of the net profits gained through syndication. Section 17(c) stated that KTTV could erase the video tape of each show six months after it was first broadcast. *Id.* at 813-14, 195 Cal. Rptr. at 423-24.

3. In the 1968 agreement, KTTV had the exclusive right to initiate syndication while the contract remained in effect; however, KTTV could no longer erase the tapes of the show. April's syndication revenue would now be twenty percent instead of the fifty percent granted under the first contract. Furthermore, because KTTV had exclusive syndication rights, April could no longer initiate syndication. *Id.* at 814, 195 Cal. Rptr. at 424.

4. The court assumed April had no right to negotiate these agreements while the 1968 contract remained in effect. *Id.*

advised April that if April did not accept the new terms, the video tapes would be destroyed. The tapes were in fact erased by KTTV.<sup>5</sup>

April alleged that it first discovered that the video tapes had been erased at an unknown date in 1976. Soon thereafter April filed suit for breach of contract and breach of fiduciary duty based on a joint venture. KTTV demurred on the grounds that April failed to state a cause of action on both breach of fiduciary duty and breach of contract, and that both actions were barred by the statute of limitations. The trial court rejected the demurrer as well as KTTV's first motion for judgment on the pleadings, which was based on the same assertions as the demurrer. After rejecting April's second amended complaint, the court reversed its earlier denial, and granted KTTV's motion on the pleadings, as well as KTTV's motion of nonsuit. April appealed the rulings of the trial court.<sup>6</sup>

The Court of Appeal first addressed April's contention that the erasure of the video tapes was a breach of the covenant of fair dealing under the terms of the 1965 agreement, on the ground that the erasure interfered with April's right to profit from future syndication of the show.<sup>7</sup> KTTV argued that because the 1965 agreement expressly provided that KTTV had the right to erase the tapes,<sup>8</sup> the court should apply the general rule that a covenant cannot be implied where a contract is not ambiguous.<sup>9</sup> However, the court looked to the terms and purpose of the 1965 contract and found the contract to be ambiguous and inherently contradictory.<sup>10</sup> The syndication clause, Section 17, granted April the right to sale and syndication of the show, yet simultaneously allowed KTTV to erase the video tapes. The court concluded that the contradictory terms could be reconciled by limiting the erasure clause by the implied covenant of fair dealing. This meant that KTTV's right to erase the tapes was restricted to situations where future syndication of the "Win-

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5. *Id.*

6. *Id.* at 815, 195 Cal. Rptr. at 424. In review, the Court of Appeals accepted to be true all facts on the face of the pleading and in the opening statement. In review of the judgment on the pleading, the court looked only to the 1965 agreement because it was the only contract alleged to have been breached in April's first amended complaint. However, with regard to the judgment of nonsuit, the court considered both the 1965 and the 1968 agreements because both were alluded to in April's opening statement. *Id.* at 815, 195 Cal. Rptr. at 425.

7. *Id.* at 816-17, 195 Cal. Rptr. at 426. Under the 1965 contract, both April and KTTV held the right to initiate syndication.

8. *Id.* Section 17(c) of the 1965 agreement gave KTTV the right to erase the tapes of each show six months after first being aired.

9. *Id.* at 816, 195 Cal. Rptr. at 425. KTTV relied on *Witt v. Union Oil Co.*, 99 Cal. App. 3d 435, 441, 160 Cal. Rptr. 285, 289 (1979) (an implied covenant cannot override an express covenant in a contract). See also 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW 497 (8th ed. 1973).

10. *April*, 147 Cal. App. 3d at 816, 195 Cal. Rptr. at 425.

chell-Mahoney Time" show was not feasible. Similarly, applying the implied covenant of fair dealing insured that April would not be deprived of the future rights to syndication which it bargained for under the 1965 agreement.<sup>11</sup>

The pivotal question confronting the court was whether April had set forth a cause of action for breach of a fiduciary duty by a joint venturer. The court in making its determination looked first to the judgment on the pleadings, and then to the judgment of nonsuit.<sup>12</sup>

In finding the presence of a joint venture, the court first looked at the allegations in April's complaint and found facts necessary to satisfy the assertion that a joint venture had been formed in the 1965 contract.<sup>13</sup> The court decided that the common business requirement was met by April's assertion that the parties intended to co-produce the shows in preparation for seeking syndication and that each party provided its own resources toward this goal.<sup>14</sup>

The requisite joint control was found based on the fact that each party had equal rights to initiate syndication of the show.<sup>15</sup> Finally, the court stated that the necessary element that there be a sharing of losses and profits was inferred from the 1965 contract provision that both April and KTTV would receive fifty percent of the profits derived from any syndication of the show.<sup>16</sup> Despite the absence of a clause specifically providing for losses in the 1965 contract, the court was still persuaded by April's allegation that the parties intended to share losses in the same

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11. *Id.* at 817, 195 Cal. Rptr. at 426. The court applied *Milstein v. Security Pacific Nat'l Bank*, 27 Cal. App. 3d 482, 103 Cal. Rptr. 16 (1972) (where the provisions of a trust deed were ambiguous and contradictory, the court applied a covenant of fair dealing to meet the parties' intentions). Furthermore, the court determined that under the 1968 contract KTTV's exclusive right to syndication lasted only while the contract was in effect. Upon termination of the contract, the syndication rights reverted to April. Thus, the erasing of the tapes deprived April of its future syndication rights under the 1965 contract. *Id.* at 818, 195 Cal. Rptr. at 426-27.

12. *Id.* at 818-21, 195 Cal. Rptr. at 427-29. In dictum, the court concluded that April was alleging that both the 1965 and 1968 agreements implemented an oral joint venture.

13. A joint venture is entered into in order to execute a business transaction for profit. See *Nelson v. Abraham*, 29 Cal. 2d 745, 177 P.2d 931 (1947). See also *Brelsford, Apparent Authority and the Joint Venture: Narrowing the Scope of Agency Between Business Associates*, 13 U.C.D.L. REV. 831, 835 (1980). See generally, 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Partnership § 16, p. 4267 (8th ed. 1974). The essential elements of a joint venture are: (1) joint interest in a common business; (2) a sharing of profits and losses; and (3) right to joint control. *County of Riverside v. Loma Linda Univ.*, 118 Cal. App. 3d 300, 173 Cal. Rptr. 371 (1981).

14. *April*, 147 Cal. App. 3d at 819, 195 Cal. Rptr. at 427.

15. *Id.*

16. *Id.*

proportion as profits.<sup>17</sup>

KTTV unsuccessfully contended that the 1965 contract characterization of April as an independent contractor negated any inference of joint venture. The court rejected this argument on the premise that a joint venture may be created by the conduct of the parties regardless of express declarations to the contrary.<sup>18</sup> In determining whether a joint venture and the requisite fiduciary relationship are formed, the courts will look to the agreement entered into by the parties to see whether the elements for a fiduciary classification have been met, not whether the parties intended the legal consequences of such a relationship.<sup>19</sup>

KTTV next argued that assuming the 1965 contract did create a joint venture between the parties, the succeeding 1968 contract negated it. The basis for this assertion centered on the provision in the 1968 contract that gave KTTV the exclusive right to license and syndicate the show; therefore, KTTV contended, there could be no finding that a joint right of control continued to exist.<sup>20</sup> The court rejected this argument on two grounds. First, the court placed significance on the fact that KTTV's exclusive right to initiate syndication was only in effect until the 1968 contract expired; that indicated that April and KTTV intended to take turns initiating syndication, with April's turn commencing after termination of the 1968 contract. Secondly, the purposes for which the joint venture was formed had not yet been accomplished, and there was no evidence showing that the joint venture was expressly extinguished.<sup>21</sup>

As a last effort, KTTV alleged that April's causes of action were barred by the statute of limitations. The court decided that the causes of action were not barred under three separate rules.<sup>22</sup>

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17. *Id.*

18. *Id.* at 820, 195 Cal. Rptr. at 428. See also *Universal Sales Corp. v. California Press Mfg. Co.*, 20 Cal. 2d 751, 128 P.2d 655 (1942). The court noted that whether a joint venture actually exists is a question of fact to be decided by the jury. See also *San Francisco Iron & Metal Co. v. American Milling & Indus. Co.*, 115 Cal. App. 238, 1 P.2d 1008 (1931); *Nelson v. Abraham*, 29 Cal. 2d 745, 750, 177 P.2d 931, 933 (1947). For purposes of this case, the court held April had alleged sufficient facts to support the assertion of breach of fiduciary duty of a joint venture.

19. Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 821 (1983).

20. *April*, 147 Cal. App. 3d at 819, 195 Cal. Rptr. at 427. KTTV also argued that there was no intention on the part of the parties to share losses. This is illustrated by the fact that April was to be paid on the basis of gross receipts instead of on the basis of net receipts. The court, however, did not reach this issue. The court only considered the allegations relating to the order granting KTTV's motion for nonsuit. *Id.* at 820, 195 Cal. Rptr. at 428.

21. *Id.* at 820-21, 195 Cal. Rptr. at 428. A joint venture terminates once the purpose for its creation has been fulfilled, or it has been expressly ended. *Id.* at 821, 195 Cal. Rptr. at 428. See *Elias v. Erwin*, 129 Cal. App. 2d 313, 317, 276 P.2d 848, 851 (1954).

22. *April*, 147 Cal. App. 3d at 821, 195 Cal. Rptr. at 429.

KTTV asserted that April's causes of action were barred by the statute of limitations under the date of breach and injury rule in that the harm suffered by April was the deprivation of syndication rights which occurred no later than March 31, 1970. The court disagreed, stating that review of the factual events leading up to the causes of action and the plain language of the contracts clearly debunked KTTV's argument. The 1968 contract between the parties placed exclusive syndication rights in KTTV until February 1973. Thus, April had no syndication rights to the show during the period from 1968 to February 1973. Those rights had been suspended by the 1968 contract and April had no actionable claim in March 1970.<sup>23</sup>

The court further disagreed on the basis that KTTV had completely mischaracterized the nature of the harm suffered by April. April was not suing because KTTV failed to cooperate with efforts to syndicate the show in 1969 or 1970, or because April had been dispossessed of the right to a single syndication deal. April's harm and the basis of its suit was the deprivation of rights to ever syndicate the show under any circumstances.<sup>24</sup> April was totally deprived of the future right to syndicate, which would exclusively revert to April upon termination of the 1968 contract. Therefore, the first time April could maintain an action was when KTTV erased the tapes and forever precluded April from syndicating and receiving benefits under the 1968 contract.<sup>25</sup>

Contrary to KTTV's allegations, the court next decided that April's cause of action for breach of the implied covenant was not barred by the time of injury rule because the tapes were erased in 1970 or 1972. The court ruled that April's pleading of the discovery of the erasure of the tapes without giving a specific time was not necessarily barred by the statute of limitations, because only KTTV knew when the tapes had ac-

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23. *Id.* at 822, 195 Cal. Rptr. at 429. The court outlined the relationship between the parties on March 31, 1970 as follows:

The 1965 contract governed all rights and liabilities of the parties with respect to all aspects of the "Winchell-Mahoney Time" show except those rights and liabilities relating to syndication and, by implication, respondents' former rights of erasure. The rights to initiate future syndication, vested in appellant by the 1965 contract, had been temporarily suspended by the subsequent contract, formed in 1968. That agreement gave respondents exclusive rights to syndicate the show until February 11, 1973.

*Id.* The court quoted the general rule that a cause of action accrues at the moment the party who owns it is entitled to bring and prosecute an action thereon. The court found that had April filed suit in 1970, KTTV could have pleaded the 1968 contract as a complete defense because April's rights to syndication were temporarily suspended, barring April from bringing an action at that time. *Id.* at 822-23, 195 Cal. Rptr. at 430.

24. *Id.* at 823-24, 195 Cal. Rptr. at 430-31.

25. *Id.* at 824, 195 Cal. Rptr. at 431.

tually been erased and April had no knowledge to allege when that event had occurred.<sup>26</sup>

The court next considered whether April in its joint venture action should be bound by the harsh rule that the statute of limitations began to run when the tapes were erased — the last essential element necessary to the cause of action — despite its blameless ignorance of the fact, or by the growing and more sympathetic rule which tolled the statute until April, exercising due diligence, discovered or should have discovered the erasure.<sup>27</sup>

The court noted that it is well settled in California that the date of discovery rule applies to causes of action for breach of a fiduciary relationship.<sup>28</sup> The application of the rule was found to be particularly appropriate in the instant case because KTTV had custody and control of April's property. The court held that due to the fact that April and KTTV were joint venturers in a fiduciary relationship, it would be grossly unfair to April to require the assertion of a cause of action before it could reasonably discover its existence.<sup>29</sup>

Finally, the court analyzed whether the date of discovery rule was applicable to a cause of action for breach of contract. The court first noted that in determining whether a statute of limitations is applicable, the right sued on is the factor considered, not the form of action. The

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26. *Id.* at 825, 195 Cal. Rptr. at 432. The general rule in contract cases is that the statute of limitations begins to run upon the occurrence of the last essential element necessary to the cause of action. Here the erasure of the tapes was found to be the last essential element. See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 187, 491 P.2d 421, 428, 98 Cal. Rptr. 837, 844 (1971). The court reasoned that only KTTV knew when the tapes had actually been erased. Thus, April's pleading of the discovery of the erasure just before the filing of the action was not necessarily subject to a time bar for the cause of action. *April*, 147 Cal. App. 3d at 825-26, 832, 195 Cal. Rptr. at 432, 436.

27. *Id.* at 826, 195 Cal. Rptr. at 432.

28. *Id.* at 827, 195 Cal. Rptr. at 433. See, e.g., *Neel*, 6 Cal. 3d at 190, 491 P.2d at 429, 98 Cal. Rptr. at 843 (breach of attorney's duty to client); *Jefferson v. J.E. French Co.*, 54 Cal. 2d 717, 720, 355 P.2d 643, 645, 7 Cal. Rptr. 899, 901 (1960) (breach of agent's duty to principal); *San Leandro Canning Co. v. Perillo*, 211 Cal. 482, 486-87, 295 P. 1026, 1027-28 (1931) (breach of corporate director's duty).

29. *April*, 147 Cal. App. 3d at 828, 195 Cal. Rptr. at 434. The court's rationale was that plaintiffs ought not be forced to suffer where circumstances prevent knowledge of the injury. Under the circumstances, KTTV, by failing to inform April of the erasure, assumed the risk that the statute of limitations would not commence to run until some future time when April discovered the injury. The court found that *April* shared common threads found in all actions that successfully applied the discovery rule. These commonalities were that the injury and/or the causing act are difficult for the plaintiff to discover; the defendant's position to understand the act and injury was superior to the plaintiff's; and the defendant could reasonably believe that plaintiff was ignorant of the fact that he was injured. *Id.* at 831-32, 195 Cal. Rptr. at 436-37. See generally O'Neil, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 CALIF. L. REV. 106 (1980).

court then ruled that here the breach of the fiduciary duty also constituted a breach of contract; therefore, the cause of action for both breaches occurred upon discovery of the actual erasure of the tapes.<sup>30</sup>

The court further found that other grounds existed in this case for applying the discovery rule to the breach of contract claim. Even though California courts continue to follow the date of injury rule, the discovery rule has displaced that rule in a growing number of cases. None, however, showed application of the rule to a breach of contract action except where fraud and misrepresentation were involved.<sup>31</sup> Although the court did not reject the California date of injury general rule, it ruled that because of its unusual facts this case merits an exception to the general rule. The court held that the date of discovery rule may be applied where a breach of contract is done in secret and the resulting injury could not reasonably be known by the plaintiff until a later date.<sup>32</sup>

The court in *April* did not rule that there was a breach of the covenant of fair dealing; nor did it determine that KTTV breached the fiduciary duty of a joint venture. What the court did determine was that based on April's complaint, causes of action for those breaches did exist.<sup>33</sup> The importance of the court's ruling is the potential for imposing a fiduciary duty on contracting parties where both parties share control over the principal object of the contract.

In the entertainment industry, due to the specialization of labor and need for capital, it is often advantageous to enter into agreements similar to the April-KTTV contract. Parties should be aware that in circumstances where the agreement is for a limited purpose, and where both parties retain joint control and share in the profits, the California courts may interpret such agreements as joint ventures with fiduciary duties regardless of the declared intent of the parties. This case illustrates that the courts have begun to analogize new relations similar to existing, established fiduciary relationships, and accordingly are applying the rules

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30. *April*, 147 Cal. App. 3d at 828, 195 Cal. Rptr. at 434.

31. See *supra* n.24.

32. *Id.* at 830-32, 195 Cal. Rptr. at 435-37. See also *Seelenfreund v. Terminix of N. Cal., Inc.*, 84 Cal. App. 3d 133, 148 Cal. Rptr. 307 (1978) (statute of limitations on property owner's claim for negligent breach of an oral contract did not commence until the owner discovered or should have discovered material facts at issue); *Watts v. Crocker-Citizens Nat'l Bank*, 132 Cal. App 3d 516, 183 Cal. Rptr. 304 (1982) (statute of limitations on bank's misrepresentations in contract did not begin to run until the property owner discovered bank's breach); *Balfour, Guthrie & Co. v. Hansen*, 227 Cal. App. 2d 173, 38 Cal. Rptr. 525 (1964) (statute of limitations was not applicable to bar action on breach of contract in view of fraudulent concealment of defects).

33. See *April Enterprises v. KTTV & Metromedia, Inc.*, 6 WHITTIER L. REV. 400 (1984).



of law applicable to the existing fiduciary relationships to the new ones.<sup>34</sup>

*Jay B. Lake*

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34. See Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 805 (1983).