

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 04/09/08

DEPT. 24

HONORABLE Robert L. Hess

JUDGE

G. Charles

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

Deputy Sheriff

None

Reporter

1:30 pm

BC323747

Plaintiff

Counsel

RIKOU KOTSU CO LTD

No Appearances

VS

Defendant

Counsel

RIKUO CORPORATION ET AL

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

The Court now issues its Tentative Decision After Bench Trial, a copy of which is sent to counsel via U.S. mail addressed as follows:

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Rikuo Kotsu Co. v. Rikuo Corporation—BC323747

APR 09 2008

Tentative Decision After Bench Trial

JOHN A. CLARKE, CLERK
Geoffrey Charles
BY GEOFFREY CHARLES, DEPUTY

This action came on regularly before the Court, the Honorable Robert L. Hess, Judge, presiding, between October 2, 2007 and November 5, 2007, for trial without a jury. Plaintiff Rikuo Kotsu Co. ("RK") appeared by T. Larry Watts, Esq., of Seyfarth Shaw, and by Thomas M. Roth, Esq., of Steinmeyer Roth ; defendants Rikuo Corp. ("RC"),¹ Pacific Kingland Corp. ("PK"), Whoe Joon Han ("Mr. Han"), Nung Ja Hwang (Ms. Hwang"), and Kwan Koo (Peter) Lee ("Mr. Lee") appeared by Albert H. Ebright, Esq., and Allan J. Graf, Esq., of Carlsmith Ball. Having considered the documentary and testimonial evidence, the credibility of the witnesses who testified, the pertinent legal authorities, the arguments of counsel, and being fully advised, the Court rules as follows.

The discussion which follows is a summary of the Court's salient findings based on what it considers to be a preponderance of the credible evidence.²

1. Mr. Han was born in Korea, but moved to Japan after World War II. He was the founder and controlling person of RK, a closely held Japanese company which had initially been in the taxi business. As the largest shareholder and a

¹ RC is a California corporation, whose corporate status has been suspended by the Secretary of State.

² At the close of the case, RK dismissed the Fifth, Sixth, Seventh, Twelfth and Thirteenth Causes of Action of the Fifth Amended Complaint. With respect to the related case involving the jet aircraft, RK also dismissed the First, Third, Sixth, Eighth, Ninth and Tenth Causes of Action.

Representative Director of RK, for almost four decades he dominated both the management and the Board of Directors of RK, to the extent that his directions were accepted without question and without documentary or corporate formalities. Mr. Han was a Representative Director of RK until 2002, and thus stood in a fiduciary relationship to RK and its other stockholders.

2. Throughout the pertinent period, Mr. Han was continuously married to Sungja Han aka Katsuko Jo ("Mrs. Han"), who has been living in Japan.³ Mr. Han has five children, of whom the most important for these purposes is his daughter Toshiko Nishihara ("Ms. Nishihara"), who is now the owner of RK. Ms. Hwang initially began to work for Mr. Han as a babysitter/tutor to Mr. Han's daughter Helen. However, for many years she has been Mr. Han's mistress, and latterly his concubine in the living-together-out-of-wedlock sense, especially during Mr. Han's residence in California. Mr. Lee is Ms. Hwang's son, although Mr. Han is not his father. Masunori Tatsukawa ("Mr. Tatsukawa") is Mrs. Han's brother (Mr. Han's brother-in-law) and was for most of this period a co-Representative Director of RK along with Mr. Han.

3. In about the early 1980s, Mr. Han decided as a matter of business strategy to diversify RK's business into California real estate. In late 1981, he created RC as the vehicle by which investments would be made. He eventually moved to California, and made that his primary residence for many years. As an officer and director of RC, Mr. Han had fiduciary duties to it and to the other shareholders.

³ The Court has been asked to take judicial notice of the fact that Mrs. Han filed for legal separation from Mr. Han in Los Angeles Superior Court on November 5, 2004. That fact changes nothing in the Court's analysis of this case.

4. RC was capitalized by funds transferred to it by RK at Mr. Han's direction, with the initial amount being \$200,000 transferred in 1982. However, issuance of the shares was delayed, with no certificates being issued until at least 1983. In respect to the failure to issue and to deliver RC stock certificates to RK, Mr. Han breached his fiduciary duties to RK. By the end of 1983, RK had made at least \$1.2 million in capital contributions to RC. RK provided the only capital infusions ever made into RC; neither Mr. Han nor any other person ever purchased any shares or RC or made any capital contributions into RC. To the extent Mr. Han purportedly put money into RC, it was actually RK's money sent through Mr. Han for the purpose of investing in RC. Although shares were purportedly issued, transferred and/or canceled at various times, except as specifically noted below, there was a complete absence of any credible evidence concerning the circumstances.⁴

5. The Court finds that, by virtue of its initial capital contribution, and the 1986 issuance of shares in its name, RK was a shareholder of RC. The Court further finds that by virtue of his fiduciary relationships to both RC and RK, Mr. Han was not permitted to act for his own benefit with respect to RC without formal, informed, approval by the boards of each. As a matter of California law, that duty is codified in Corporations Code § 310(a). Finally, the Court finds that there was never a valid sale or transfer of RK's shares in RC, and that RK has continuously been and remains a shareholder of RC. Defendants have failed to carry their burden of showing the validity

⁴ With the possible exception of the first meeting of directors, there was little credible evidence that corporate formalities were observed during most of RC's existence.

of this transaction under Corporations Code § 310(a)(3). This conclusion compels the further finding that acts purporting to be by unanimous consent of stockholders of RC which do not include RK--including election of directors--were not valid.

6. The evidence persuades the Court that Ms. Hwang and Mr. Lee were purportedly issued shares in RC in order that they might appear to qualify for visas for admission into the United States. Ms. Hwang and Mr. Lee actually contributed neither capital nor services prior to supposedly being issued the shares; rather, the shares were issued (but never delivered) purportedly as consideration for future services. Under Corporations Code § 409(a), that does not constitute valid consideration. The Court further finds that Ms. Hwang's failure to list those shares as an asset during her personal bankruptcy precludes her from now claiming she was a stockholder of RC under the doctrine of judicial estoppel. See 11 U.S.C. §§ 554(c) and (d). Mr. Lee's purported issuance of RC shares to himself after he supposedly became its sole director was invalid, and the Court finds that act to be not just and reasonable under Corporations Code § 310(a)(3). All supposed issuances and transfers of RC shares to Ms. Hwang and Mr. Lee were invalid.

7. The evidence persuades the Court that the purported transfer of RK shares to Mr. Han in about 1989 or 1990 was a sham for the purpose of facilitating issuance of a liquor license for the Gardena property. No consideration was paid to RK for the purported transfer. The Court finds the purported transfer to have been ineffective to deprive RK of its rights as a shareholder.

8. Commencing in 1982 through at least 1994, RK loaned substantial amounts of money to RC. These loans were made at the express direction of Mr. Han,

based on his control over both RK and RC. RC's responses to requests for admissions admit to loans from RC totaling \$26,435,000 from 1982 through 1990 (Ex. 77). The evidence persuades the Court that all the transfers from RK to RC or to Mr. Han--other than \$1.2 million in capital contributions--were loans to RC, and were not gifts, compensation to Mr. Han, or anything else.⁵ At least in part, these transfers were funded by a May 1989 loan from the Japanese Long Term Credit Bank to RK, which loan was personally guaranteed by Mr. Han.

9. The Court further finds that RK owns PK, the Hawaii corporation which was formed in late 1990 to hold real estate in Hawaii. The initial share certificate for that entity names RK, and all the money for its capitalization came from RK. The later typed addition of "a California corporation" to that stock certificate does not alter the fact that it was initially issued to RK (Ex. 31). Ms. Hwang was made the President of PK.

10. Security agreements and deeds of trust executed in 1994 and 1995, and signed by Mr. Han, refer to obligations owed by RC to RK for which the property is security. For example, Ex. 9 is a Security Agreement dated January 3, 1995, which was filed with the Federal Aviation Administration on August 8, 1996, in favor of RK on a Lear Jet owned by RC, and was signed by Mr. Han on behalf of both RC and RK. It includes as an attachment a list of 47 promissory notes issued by RC to RK from January 1982 through May 1994, all bearing interest at the rate of 10% and with 15-year

⁵ The Court is aware that Mr. Nagano's testimony indicates that the total capital was \$1.4 million rather than \$1.2 million. The Court has accepted the lower figure as more conservative.

maturity periods, whose principal balance totals \$37,717,883.35. The maturity dates run from January 13, 1997, through May 19, 2009. Similarly, Ex. 1 is a trust deed filed January 24, 1995, with the Los Angeles County Recorder's Office in favor of RK. It is secured by real property owned by RC and purports to cover an indebtedness to RK in the amount of \$37,717,883.35. While RK was unable to produce the originals of the promissory notes, certain copies in the possession of RC were marked as Exhibit 133, and the Court is persuaded both that such notes were created and executed by RC, and that the \$37.7 million figure is correct.⁶

11. In 1996, Sumitomo Bank filed collections actions against RC for sums past due, apparently on properties purchased by RC. Those actions were dismissed in February 1997.

12. In early 1998, RK began to have trouble repaying loans made to it by Shinsei Bank and Tokyo Shogin Credit Union. The evidence persuades the Court that the massive transfers of funds to RC were an important reason for RK's lack of cash.

13. In about May 2000, Ms. Nishihara was elected as a director of RK. The Representative Directors at this time were Mr. Han and Mr. Tatsukawa. Negotiations with Shinsei Bank to work out the loans began in May 2000 and ran through September 2001. One aspect of RK's internal discussions at this time centered

⁶ The Court does not regard RK's inability to locate the original notes as significant, because it finds no evidence to suggest that they were canceled, no evidence to suggest that they were destroyed to prevent their production, and it affirmatively finds adequate secondary evidence to set forth their terms, maturities and authenticity.

The Court is aware that RK claims an additional \$9.3 million was provided by RK to RC after the 47 listed promissory notes. These obligation to repay these sums was not memorialized in a promissory note or similar writing.

around Mr. Han's need to accept responsibility for RK's situation. Another aspect related to cash flow: the need to clarify what assets the U.S. companies had, the need for those entities to provide funds to repay RK's loans, and the need to stop further advances of funds to the U.S. companies. However, the attempt to work out the loans was frustrated because Mr. Han refused to disclose the status and ownership of U.S. assets. This was a breach of the fiduciary duty owed by Mr. Han to RK.

14. In early February 2002, RK began negotiations with the Resolution and Collection Corporation ("RCC"), a Japanese government agency handling assets of insolvent financial institutions, with respect to RK's debt to Tokyo Shogin Credit Union. Again, negotiations were impeded because Mr. Han would not disclose information about assets in the U.S.

15. In March 2002, Mr. Han finally agreed to resign as Representative Director of RK, and at an RK board meeting in April 2002, Mr. Han and Mr. Tatsukawa both resigned as Representative Directors, and Ms. Nishihara was appointed to succeed them. After this time, Mr. Han had no authority to act on behalf of RK. At about the same time, Mr. Han's stock in RK was transferred to Ms. Nishihara, as was that of both Mr. Tatsukawa and Mrs. Han. This completed the transition to new management required by RK's creditors.⁷

16. Commencing in about February 2002, Mr. Lee directed that certain moneys owed by Bombardier Aerospace as refunds to RC be sent to his personal

⁷ In about 2005, Mr. Han initiated actions in the Japanese courts to--in effect--have his relinquishment of control over and ownership in RK set aside. His efforts were completely unsuccessful. See Exs. 14, 15 and 16. The facts recited in the Japanese court's opinions essentially track those proved in this case.

account(s).⁸ The Court has considered Mr. Lee's explanations for why these refunds were not deposited into RC's regular accounts, and finds them not credible. The Court is persuaded that these deposits into Mr. Lee's accounts constituted an unauthorized diversion of RC's money for Mr. Lee's own benefit. It appears that RC was over-billed and that it over-paid for services so that the refunds could be misappropriated by Mr. Lee. The total amount of this misappropriation through the end of November 2003 was \$68,456.73.

17. Moreover, in about November 2003, Mr. Lee misappropriated an additional \$53,484.00, which was a refund from the State of California Water Resources Control Board to RC relating to property in Gardena. Again, the Court finds Mr. Lee's explanation for this diversion of funds not credible.⁹

18. After giving up his posts with RK in April 2002, Mr. Han returned to California from Japan. At about this time, he began having significant health issues and memory problems, and became less active in RC's business, likely brought about by his financial worries. The Court is persuaded, by what it finds to be reasonable inferences from the evidence, that after Mr. Han returned from Japan, Ms. Hwang used her influence over Mr. Han to attempt to secure her position and that of Mr. Lee with respect to RC. Mr. Lee was an active participant in these efforts.

⁸ Although the account(s) was/were in the name of Rikuo Corporation, they were set up by Mr. Lee personally, for only his signature, and were used by Mr. Lee to pay personal expenses.

⁹ Exhibit 162 suggests that hundreds of thousands of dollars went through Mr. Lee's personal "Rikuo Corporation" account, rather than the less than \$70,000 asserted in Mr. Lee's declaration. The Court does not find that declaration credible.

19. After RK's financial issues were known, various financial transactions were initiated by RC with respect to the properties it owned. These include refinancing of the Gardena property in January 2002, the execution of grant deeds to several of RC's properties, and a further refinancing of the Gardena property in October 2002. In connection with the transactions after April 2002, Mr. Han executed reconveyances or releases of RK's security interests, although he had no legal authority to do so, and no consideration for such releases was paid to RK. Mr. Lee notarized many of the documents involved. The proceeds of these transactions--for example, the sale of 698 Vermont--were not recorded in RC's books.¹⁰ Nevertheless, in December 2002, \$1,680,000 was remitted by RC to RK in partial payment of the outstanding loans.

20. During 2003, further refinancings and sales of RC's remaining properties occurred, and RK's security interests were again released without authority or consideration. These included the payment to Hamni Bank of \$2,100,000 out of the proceeds of an eminent domain sale of the Gardena property, when RK had a superior security interest. It appears the effect of these various transactions was first to encumber, and then to dispose of substantially all of RK's real property, with the proceeds vanishing. The Court is persuaded that the proceeds were used for the personal benefit of Mr. Han, Ms. Hwang, and Mr. Lee.

21. In about March 10, 2004, RK assigned its claims against RC in writing to the RCC (Ex. 34). That said, however, it appears that neither RK nor the RCC

¹⁰ The Court does not believe Mr. Lee's statements to the effect that there were no net profits from the 698 Vermont sale (which was apparently for \$5,500,000); rather, the Court is persuaded that sales proceeds were diverted out of RC.

regarded that assignment as complete, and that the RCC permitted RK's attorneys to proceed with this suit. Pursuant to a July 26, 2007, Modification Agreement (Ex. 35), the RCC formally released these claims back to RK.¹¹

22. In October 2004, Mr. Han and Ms. Hwang left the United States for the last time. The Court was advised that Mr. Han was living in Japan at the time of trial, and that some time before he had been found to be mentally incompetent. He did not appear to testify at trial.¹²

23. In late 2004 or early 2005, Mr. Han executed a power of attorney and other documents. The Court infers, from the totality of the evidence, that this was a pursuant to a scheme by Ms. Hwang and Mr. Lee to obtain control over the California and Hawaii assets, for the purpose of liquidating those assets for their own benefit.

24. Pursuant to those documents, and the corporate resolutions which they then promulgated, Mr. Lee and Ms. Hwang proceeded to liquidate various assets of RC and PK. These acts included purported releases of RC mortgages on various Hawaii properties (Exs. 37, 38, 38 and 43), and purported transfers of assets from the corporations to themselves, including the transfers of the Kalaniana'ole Highway and Hanapepe properties from PK to Mr. Lee (Exs. 42 and 43). In addition, Mr. Lee sold the

¹¹ Prior to July 2007, a factual question existed as to whether an actual transfer of these claims had been completed, or whether additional negotiations were needed. However, the Modification Agreement removed any doubt in the Court's mind as to RK's standing.

¹² While his deposition was taken prior to trial, the Court finds that because of his mental problems, his testimony is not fully credible and the Court finds it of essentially no value. The Court is advised that his problems include advanced Alzheimer's Disease.

Lear Jet initially to a corporation he controlled. As officers and/or directors of RC and PK, Mr. Lee and Ms. Hwang had fiduciary duties, which were breached by their actions. These fiduciary duties were owed to RK as a shareholder, and because it appears that RC was insolvent for most or all of the period their tenure in control of RC, they also owed fiduciary duties to the creditors of RC, including RC.¹³

25. The financial records produced (and often, not produced) by Mr. Lee as the purported President of RC strongly suggest that large sums are unaccounted for. The same observation applies to Ms. Hwang and PK. The Court listened with what became total incredulity to Mr. Lee's testimony concerning his lack of knowledge as to the location or value of these assets. Considering that Mr. Lee was at pains to testify as to his importance to the operation of these two organizations (thus justifying his selection to operate them as Mr. Han's successor), his purported lack of knowledge concerning the location and content of the financial records of the entities, and indeed where the money from the sales of properties had gone, was not believable. The Court was left with the firm impression that Mr. Lee did not tell the truth in great swathes of his trial testimony, and that Ms. Hwang was also untruthful.¹⁴

26. A principal argument raised by the defense is that these claims are

¹³ The financial statements of RC (Ex. 8) disclose that RC was essentially insolvent as of at least December 31, 1998, with a massive deficit on the balance sheet and a net operating loss for the year, which exceeded \$5 million if current interest obligations were included.

¹⁴ In particular, the Court did not find credible Ms. Hwang's testimony concerning the nature of the services she purportedly performed for the benefit of RC. The Court is persuaded that any services she performed were for the personal benefit of Mr. Han.

barred by the statute of limitations. This action was filed March 11, 2005. As noted above, the maturity dates on the promissory notes run from January 13, 1997, through May 19, 2009. As a contract claim, the normal statute of limitations under CCP § 337(1) would be four years, so that a claim on any instrument maturing prior to March 11, 2001 would be barred. However, plaintiff claims that CCP § 360.5 applies to extend the statute of limitations by an additional four years. This is based, for example, on the written waiver of the statute of limitations contained in Section 11.21 of the Deed of Trust, Security Agreement, etc. on the Gardena property (Ex. 1), which was dated in June 1994 and filed with the Los Angeles County Recorder's Office on January 24, 1995. This would make timely suit on all notes which matured on or after March 11, 1997. The Court finds the waiver was executed prior to the running of the statute of limitations on any of the promissory notes listed in Exhibit B to that document. The language of the waiver brings it squarely within the holding of California First Bank v. Braden (1989) 216 Cal. App. 3d 672, 675-77. This makes the contract claims timely as to all but the first promissory note in the amount of \$100,000, which matured on January 13, 1997.

27. As to the breach of fiduciary duty claims, the statute of limitations is four years under CCP § 343, and may also be subject to the same delayed discovery rule as fraud claims. See 3 B. Witkin, California Procedure, Actions § 619 (4th ed. 1996 & 2006 Supp.). The Court finds that, because of Mr. Han's control of both RK and RC, and his monopoly on information concerning the affairs of RC, the facts supporting the breach of fiduciary duty claims were not discovered until after Mr. Han resigned as Representative Director of RK in April 2002. Alternatively, Mr. Han's refusal to disclose

information concerning the assets of RC and PK in the United States in late May to late September 2001, when needed to address the demands of RK's creditors, may be taken as the first indication of such breach. In either event, the claim is timely.

28. The common counts are subject to a four-year statute of limitations under CCP § 337(2). Plaintiff suggests that the statute of limitations started to run in December 2002, when the \$1.68 million payment was made by RC to RK, notionally on account. The problem is that the Court is not satisfied that there is any writing from either side constituting a book account as defined in CCP § 337a, an account stated, or on an open, mutual and current account.¹⁵

29. To the extent plaintiff is seeking to recover the additional \$9.3 million supposedly advanced by RK beyond what is reflected in the promissory notes, these are not adequately memorialized by a written agreement, and must be treated as oral contracts for statute of limitations purposes. The limitations period is two years per CCP § 339(1). There is no adequate evidence of the terms of these agreements, and in the absence of evidence the Court is not prepared to assume they were for 15-year terms, as opposed to being demand loans. The Court is therefore not prepared to find that they are within the statute of limitations.¹⁶

30. Plaintiff has clearly shown its entitlement to an accounting. The financial records produced to date leave the Court firmly persuaded that significant

¹⁵ The Court is not satisfied that the Nagano summary in Ex. 141 qualifies under any of the three prongs.

¹⁶ This does not preclude a finding at a later time that these sums are property of RC which must be accounted for.

sums from RC and PK have not been accounted for. A full accounting is necessary to determine the flow of proceeds through RC and PK, including without limitation the amount of funds realized on the sales and refinancings of real and personal property. The Court accepts plaintiff's suggestion that the commencement date of the accounting should be October 29, 2000.

31. The Court is persuaded that plaintiff is entitled to a declaration that it is the sole shareholder of both RC and PK. All shares issued by or to Mr. Lee or Ms. Hwang in either company are void and invalid. All acts by Mr. Han cancel or transfer RK's interests in RC are voided as in breach of his fiduciary duties, as being without consideration, and as being without proper authority. All acts by either Mr. Lee or Ms. Hwang with respect to shares of either RC or PK are void and invalid as in breach of their respective fiduciary duties, as being without consideration, and as being without proper authority.

32. From the date of this tentative decision, Mr. Han, Ms. Hwang, and Mr. Lee, and any persons acting at their direction, are prohibited from transferring, destroying or hypothecating any assets of RC or PK, whether real or personal property, and may not take any actions to terminate, transfer or change the balances in any bank accounts of RC or PK.¹⁷ Those same persons are further ordered to preserve all books and records of RC and PK, and those books and records, any assets of those entities, and any documents which refer or relate to those assets, which are within their

¹⁷ For this purpose, "bank accounts of RC or PK" includes any accounts opened by those entities, or opened by any person where any portion of the name on the account included RC or PK, or which were opened by any person purporting to act by authority of or on behalf of RC or PK regardless what names appear on the accounts.

possession, care, custody or control must be turned over to counsel for RK on demand. This provision is necessary to preserve the assets and records of RC and PK for the purposes of the accounting and further proceedings in this Court.

Disposition and Order

The Court has found in favor of RK as set forth above. However, the damages computation made by plaintiff's counsel at oral argument does not comport with the Court's findings. Counsel for plaintiff therefore ordered, within 20 days from the date of this Tentative Decision, to prepare and submit to the Court:

(1) A calculation of principal and interest on the loans to RC consistent with the Court's Tentative Decision, accompanied by a declaration of counsel (or any expert preparing the calculation) which fully explains the methodology used. This should include, at a minimum, the principal amounts, commencement dates for the calculations, and interest rates used. This is to quantify the damages on the breach of contract claim.

(2) A proposed Order and Interlocutory Judgment which addresses the procedures pursuant to which the accounting is to take place, including--if necessary--provisions for the appointment of a receiver and/or forensic accountants. This is, in part, to assist the Court in quantifying damages from the breach of fiduciary duty claims, as well as to provide a basis for action on the unjust enrichment and constructive trust claims against individuals.

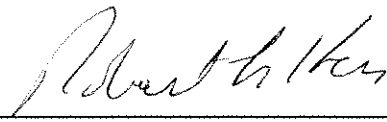
(3) A Permanent Injunction prohibiting anyone but RK from possessing, transferring, disposing of or hypothecating any assets of RC or PK, and requiring

surrender of all books and records of RC or PK.

With the inclusion of a dollar sum for the breach of contract claim, and the execution of the orders relating to an accounting and injunctive relief, this Tentative Decision shall become the Court's Statement of Decision unless within 10 days any party requests a statement of decision in conformity with CCP § 632 and California Rules of Court Rules 3.1590 and 3.1591.

Counsel for all parties are ordered to appear in Dept. 24 at 8:30 a.m. on May 15, 2008, for a status conference to discuss further proceedings in this matter.

Dated: April 9, 2008



Robert L. Hess

Judge of the Superior Court