

“I was only following orders”

Employees can be personally liable for corporate deceit

In the recent case of XY, LLC v. Zhu, the BC Court of Appeal confirmed that employees of a company can be personally liable, and not shielded by the corporation, for their role in the breach of a technology license agreement by their employer and for their active participation in committing the tort of deceit.

The plaintiff, XY, LLC (“XY”), as licensor, entered into a technology license agreement with one of the defendants, JingJing Genetic Inc (“JingJing”), as licensee, and a member of a group of corporations known as the “IND Group”. The technology makes it possible to separate X- and Y-chromosomes in bovine spermatozoa allowing sex-selection in the production of calves. The Agreement required JingJing to pay a royalty based on its revenues from the number of embryos and the amount of sperm it sold in China thanks to its use of the technology.

The trial judge found JingJing breached the contract and committed the tort of deceit by falsifying its records and committed the tort of deceit by falsifying its records and committed the tort of deceit by significantly underpay the royalties it owed to XY. The controlling shareholder of JingJing, Jesse Zhu, and two of its employees, Jin Tang and Selen Zhou, were also found to have committed the tort of deceit and were jointly and severally liable, with JingJing, for the payment of damages in excess of \$8 million.

By the date of trial, JingJing declared bankruptcy. It was, therefore, critically important for the plaintiff to be able to recover its damages awarded at trial from the personal defendants. The defendants, except JingJing, appealed.

Appellate court decision

The BC Court of Appeal upheld the trial judge’s finding that the three personal defendants were personally liable and that they were not shielded by the corporate vehicle for liability for their active participation in deceiving XY. The Court stated: “...It appears to be the law in Canada that as long as tortious conduct on the part of an employee or agent of a corporation (or any other employer) is properly pleaded and proven as an “independent” tort by the employee or agent, the wrongdoer can be held personally liable, notwithstanding that he or she may have been acting in the interests of (and at the behest of) the employer or principal...”

“In any event, it is clear that fraud or fraudulent conduct has historically fallen into an established category in which personal liability has been imposed on agents and employees...”

“In the result, it cannot in my view be said that the

claims of deceit or civil conspiracy were not available to XY against the Personal Defendants as a matter of law merely because they were employees of JingJing and acting in the course of their duties to further the objectives of JingJing.”

The two personal defendants, who were merely employees of JingJing, further argued that in carrying out the conduct complained of, they were “only following orders” and could not be expected to refuse to carry out the scheme apparently devised by their boss, Mr Zhu, the directing mind of JingJing and the IND Group.

The Court of Appeal agreed that an employee who simply carries on doing the job he or she has always done, despite that his or her typing or bookkeeping may assist in the fraud, should not without more be regarded as a fraudster or conspirator himself or herself.

However, in this case, the trial judge found that Zhou and Tang went beyond mere bookkeeping or “typing” lab reports and Mr Zhu’s instructions. Rather, both defendants actively assisted in devising how best to deceive XY. Therefore, their acts were “tortious in themselves” and were not part of their regular duties. As a result, the “following orders” defence asserted on behalf of Tang and Zhou was rejected by the Court of Appeal.

A cautionary tale

This case is a very important decision for both employers and employees. It thoroughly analyzes the relevant principles of law and applies them to the pertinent facts, resulting in personal liability for employees of a company for their role in assisting their employer in carrying out a fraud. In those circumstances, the Court extended liability to the three personal defendants who were not shielded by the corporate vehicle from liability for their active participation in the commission of actionable civil wrongs. It then held the personal defendants liable to personally pay damages assessed in excess of \$8 million.

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