COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hansen v. Harder,*
2010 BCCA 482

Date: 20101101
Docket: CA037029

Between:

Joey Hansen

Respondent
(Plaintiff)

And

Derrick Harder and Peak Publications Society
(C.O.B. "The Peak")

Appellants
(Defendants)

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia, March 17, 2009
(*Hansen v. Tilley,* 2009 BCSC 360, Vancouver Docket No. S064241)

Counsel for the Appellants: D. Sutherland
D. Kripp

Counsel for the Respondent: R.A. McConchie

Place and Date of Hearing: Vancouver, British Columbia
May 12, 2010

Place and Date of Judgment: Vancouver, British Columbia
November 1, 2010

Written Reasons by:
The Honourable Madam Justice Neilson

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Lowry

Reasons for Judgment of the Honourable Madam Justice Neilson:

[1] The appellants bring this appeal from an order of a Supreme Court judge pronounced March 17, 2009, granting the respondent, Joey Hansen, damages of $30,000 for defamation arising from three articles published in “The Peak”, the Simon Fraser University student newspaper, and on The Peak website.

BACKGROUND

[2] The facts are not substantially in dispute. The following summary is taken largely from the reasons for judgment of the trial judge.

[3] The appellant Peak Publications Society publishes The Peak. The appellant Derrick Harder was The Peak’s copy editor and edited and approved the three articles. Kevin Tilley, The Peak’s news editor, wrote the articles. Mr. Tilley was named as a defendant in the action but Mr. Hansen did not proceed against him.

[4] Mr. Hansen has a long history of involvement in student government associations, both provincially and with the Canadian Federation of Students. During the relevant events he was the financial and services coordinator of the Douglas Students Union (the “DSU”), a student organization at Douglas College. In the spring of 2006, the DSU was in general turmoil. Two factions of its members were disputing the results of the annual election for members of the DSU’s governing board, the DSU representative committee. As well, there was controversy between these two groups over Mr. Hansen’s stewardship of the DSU’s financial affairs. In early 2006 Douglas College, which collects membership fees for the DSU from its students, refused to remit those fees to the DSU until it received a report from the DSU’s accountants that verified the DSU’s finances conformed to statutory audit requirements.

[5] As a result, in March 2006 the DSU treasurer, Jessica Gojevic, contacted Mr. Ron Parks, a well-known forensic accountant, and retained him to conduct a

forensic audit of the DSU's finances. Soon after he was retained Mr. Parks learned the DSU did not have sufficient funds to pay for a full forensic audit. As a result, he instead performed a forensic review, a process that is significantly less rigorous and extensive than an audit.

[6] Mr. Parks had difficulty gathering the DSU's financial information as many documents appeared to be unavailable. He obtained information from a variety of sources including Ms. Gojevic, DSU staff, Mr. Hansen, and the DSU's accountants, who were performing an audit of the DSU's finances at the same time.

[7] The accountants advised Mr. Parks that the DSU had issued 100 personal cheques to Mr. Hansen in addition to payroll cheques. They also told Mr. Parks that on December 6, 2004 the DSU had issued a cheque to Christa Peters, Mr. Hansen's domestic partner, to be used as a down payment on a house.

[8] Mr. Parks completed his report on April 18, 2006. It was titled "Report on Forensic Review" and marked "Private and Confidential". It was very critical of Mr. Hansen's skills and performance as the financial manager of the DSU, and recommended a number of changes to improve internal controls and accountability. Under the heading "Specific Accountability Concerns" Mr. Parks made these comments about Mr. Hansen:

> We note that over one hundred cheques, in addition to payroll cheques, were issued payable to Joey Hansen in the year ended August 31, 2005. We understand the auditors have requested from him documentation adequate to support these expenditures, but he has not yet provided same. We have not quantified the amounts involved, as your auditors are working on this, but regardless of the amounts, we regard this as a serious breach of internal control and accountability, and if Mr. Hansen is unable to produce adequate documentation, a misappropriation of funds.
>
> We found a cheque payable to Christa Peters in the amount of $20,000 dated December 6, 2004. The amount was repaid to DSU on December 22, 2004. We understand Christa Peters is the partner of Mr. Hansen, who confirmed that to us and stated that it was intended to be a temporary loan for the purpose of making a down-payment on a house. The cheque was signed by Mr. Hansen and Jeremy Gervan, who Mr. Hansen said "approved" the loan. In our view, Mr. Hansen and Mr. Gervan exceeded their authority, and the loan should have been approved, if at all, by the Representative Committee.

> Notwithstanding the repayment, this is an example of blatant misuse of DSU member funds.

[9] On April 19, 2006 Mr. Parks presented his report to a meeting of the representative committee. There were about 12 people at the meeting. Mr. Harder, Mr. Tilley, and Mr. Hansen were not there. Ms. Gojevic handed out copies of Mr. Parks' report to those present. No one cautioned them to keep the contents confidential or asked them to return the reports when the meeting concluded. After Mr. Parks presented a summary of his findings, the committee members voted to terminate Mr. Hansen's employment.

[10] Subsequently, the committee determined there was no proper quorum at the meeting, and the vote to terminate Mr. Hansen was invalid. He was placed on a paid leave until the DSU formally terminated his employment in November 2006.

[11] Around May 1, 2006 Mr. Tilley received a copy of the Parks report, most likely from Jan Gunn, a Douglas College student and Mr. Harder's domestic partner. Ms. Gunn was a member of the student faction opposed to Mr. Hansen and had been at the April 19 meeting. Mr. Tilley interviewed several representatives of the DSU, including Ms. Gunn, and these inquiries led to publication of the three articles.

[12] The first article was published on May 8, 2006. It described the "controversial" financial crisis in the DSU, the fact Mr. Hansen had been terminated and then reinstated as there had not been a proper quorum, and that he was now on a paid leave. It gave a history of the financial difficulties leading to those actions, and cited comments from two members of the representative committee who supported the decisions regarding Mr. Hansen. Mr. Hansen established the following statements in the article were defamatory:

> … the results of a forensic audit showed serious discrepancies in the way money was handled within the organization …
>
> The forensic audit revealed over 100 unapproved cheques payable to Mr. Hansen, which have yet to be documented or accounted for. Additionally, the auditor found a cheque to Christa Peters, Hansen's partner, for $20,000 allegedly for a down-payment on a house. The amount was repaid to the DSU two weeks later.

[13] The second article was published on May 23, 2006. Its primary focus was the controversy between the two factions of the DSU arising from the recent elections. It described the financial problems arising from the refusal of Douglas College to hand over student dues to the DSU, and set out this statement, which Mr. Hansen established was defamatory:

> The College Board of Douglas College has been withholding the DSU's funds since last fall following a scathing financial audit which showed significant discrepancies in internal controls as well as possible fraud and misappropriation of funds by the DSU's Financial Coordinator.

[14] The third article was published on June 26, 2006 and focused on a reported police investigation into the DSU finances. It reiterated some of the financial and political difficulties in the DSU, summarized Mr. Hansen's background with student organizations, and said he remained on leave as investigations continued. Mr. Hansen established several aspects of this edition of The Peak were defamatory. Its cover had a drawing of two police officers, one holding a magnifying glass and the other a notebook, with a caption reading "Busted! Police launch investigation on Douglas (College) Students' Union News, page 6." Page 6 set out this headline:

> Police investigate DSU
>
> Police probe launched after financial mishandlings at Douglas Students' Union

The article that followed included these statements:

> The New Westminster Police have launched an investigation at the Douglas Students' Union into crimes relating to the organization's finances, the DSU has recently confirmed.
>
> The investigation was initiated after an anonymous Douglas College student contacted the police following a forensic auditor's report showing potential fraud and misappropriation of funds.
>
> …
>
> The DSU wouldn't say whether any specific individuals are under investigation, but Joey Hansen, the finance and services coordinator responsible for the union's finances remains on leave since the auditor's report.
>
> Hansen was unavailable for comment.

> The report notes a number of specific issues that drew attention to Hansen. In particular a $20,000 cheque signed by Hansen was made out to Hansen's partner for the purpose of making a down payment on a house. The money, although paid back to the DSU several weeks later, was never approved by the organization.
>
> …
>
> This would not be the first time a high-ranking CFS official has been in the police spotlight.

The article also stated Mr. Hansen claimed "he was entitled to the money as a result of outstanding overtime and other payroll issues."

[15] On June 28, 2006 Mr. Hansen's counsel wrote to Mr. Parks advising him his forensic review contained errors with respect to both the number of cheques written to Mr. Hansen and the $20,000 cheque payable to Ms. Peters. Mr. Parks responded in a letter dated July 13, 2006, which stated:

> Further to our report of April 18, 2006, we wish to amend certain of our findings as follows.
>
> On page 8 of our report, ... we referred in the first paragraph to "over one hundred cheques, in addition to payroll cheques, were issued payable to Joey Hansen in the year ended August 31, 2005." This was information we received from your auditors, which they subsequently have amended. They have confirmed that the number of cheques in question was twenty-one, and that to date, despite their requests, they have received no supporting documentation for these cheques. This amendment does not change our conclusion regarding the issues of internal control and accountability.
>
> In the second paragraph … we stated that we "found" a cheque payable to Christa Peters in the amount of $20,000. The word "found" was an unfortunate choice, as we should have stated we were "informed" of the details of the cheque. We recently received a copy of the cheque and note that Joey Hansen did not sign the cheque. We are unable to clearly determine the first signatory, but the second appears to be Jeremy Gervan.

[16] Mr. Hansen commenced his action against the appellants on June 30, 2006. He grieved his dismissal through his union, and reached a settlement with the DSU in which it acknowledged there was no evidence he was guilty of fraud or misappropriation.

THE FINDINGS OF THE TRIAL JUDGE

[17] The trial judge considered whether the statements were defamatory, and found an ordinary person would reasonably have understood the May 8 article to import:

> (a) that over 100 cheques had been issued to Mr. Hansen without the approval of his employer and that in spite of the efforts of a professional forensic auditor the cheques could not be documented or accounted for; and
>
> (b) that the auditor had "found" an unapproved $20,000 cheque payable to Mr. Hansen's partner, Christa Peters, allegedly for a down-payment on a house and that upon the cheque being discovered by the auditor, the $20,000 was repaid to the DSU some two weeks later.

[18] He found the statements in the May 23 article inferred that Mr. Hansen was guilty of fraud and misappropriation of monies from the DSU or, at the least, there were reasonable grounds to reach that conclusion.

[19] The trial judge concluded the June 26 cover and article in The Peak would reasonably be understood to mean:

> (a) that the two officers depicted on the cover are involved in a police investigation in which they had "busted" or charged someone as a result of the investigation of the DSU;
>
> (b) that a complaint from an anonymous Douglas College student initiated the police investigation after the forensic review showed potential fraud and misappropriation of monies from the DSU;
>
> (c) that the DSU would not say who was being investigated, but the article then added that Mr. Hansen, the finance and service coordinator responsible for the DSU's finances, had been on leave since the auditor's report inferring that Mr. Hansen was the individual under investigation;
>
> (d) that the article further linked the police investigation directly to Mr. Hansen when it drew attention to Mr. Hansen in stating that a $20,000 cheque signed by Mr. Hansen and payable to his partner, Ms. Peters, although repaid, was never approved by the DSU, inferring that Mr. Hansen was guilty of fraud and misappropriation.

[20] The trial judge accepted Mr. Parks' corrections to his report gave the true version of events. He found there was no evidence that Mr. Hansen was guilty of fraud or misappropriation of funds from the DSU. He also found that in December

2004 Mr. Hansen obtained the approval of two members of the DSU executive to receive the $20,000 advance to allow Ms. Peters to purchase their home, and those two members signed the cheque. The funds were secured against outstanding overtime payable to Mr. Hansen, and were repaid two weeks after they were borrowed.

[21] The trial judge also found there was no evidence the police investigated the DSU's finances. There were only rumours of an investigation from a DSU board member who was an opponent of Mr. Hansen, and an unsubstantiated statement from a student who told Mr. Tilley she had complained to the police.

[22] The trial judge concluded the inferences flowing from the three articles were false and defamed Mr. Hansen. He noted the appellants declined to prove the truth of the allegations, and instead advanced the defence of statutory qualified privilege under s. 4(1) of the *Libel and Slander Act*, R.S.B.C. 1996, c. 263, and the emerging defence of responsible journalism. The trial judge considered and rejected both defences, and awarded Mr. Hansen damages of $30,000.

GROUNDS OF APPEAL

[23] The appellants raise two grounds of appeal:

1) the trial judge erred in rejecting the defence of statutory qualified privilege under s. 4(1) of the *Libel and Slander Act*; and

2) developments in the law since the trial demonstrate the defence of responsible communication on matters of public interest is available to the appellants.

ANALYSIS

1. Did the trial judge err in rejecting the defence of statutory qualified privilege?

[24] The defence of statutory qualified privilege is set out in s. 4(1) of the *Libel and Slander Act*, the relevant parts of which state:

> A fair and accurate report published in a public newspaper or other periodical publication ... of the proceedings of a public meeting ... is privileged, unless it is proved that the report or publication was published or made maliciously.

[25] Section 1 of the *Act* defines “public meeting”:

> "public meeting" means a meeting genuinely and lawfully held for a public purpose, and for the furtherance or discussion of a matter of public concern, whether the admission to it is general or restricted;

[26] The appellants thus had to establish the meeting of the DSU representative committee on April 19, 2006 was a public meeting, and the three articles were fair and accurate reports of the proceedings at that meeting.

[27] The trial judge found the appellants failed to prove any of those constituent elements of the defence. He found none of the articles reported the proceedings at the April 19 meeting. As well, because the meeting lacked the necessary quorum he concluded there was no meeting, public or otherwise. He observed the by-laws of the DSU restricted attendance at meetings of the representative committee to DSU employees and Douglas College students, and found the April 19 meeting thus did not fall within the statutory definition of a “public meeting”. Finally, he found the articles did not fairly and accurately report the events.

[28] The appellants attack each of those findings. As they are findings of fact, this Court will not interfere unless the trial judge made an overriding and palpable error in reaching his conclusions: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[29] The appellants first maintain that in finding the April 19 meeting was not a public meeting the trial judge ignored or failed to properly weigh relevant evidence. They say the financial concerns of the DSU were matters of public interest. The

meeting was not conducted *in camera.* There was no evidence the public or press were screened or barred from attending meetings of the representative committee. For example, Mr. Tilley attended a later meeting of the representative committee in May. While Mr. Parks' report was marked "Private and Confidential", no caution was given to that effect at the meeting. Copies were handed out freely and were not retrieved at the conclusion of the meeting. The appellants maintain that if the trial judge had properly weighed these facts, he would have found it was a public meeting.

[30] In *McCartan Turkington Breen (a firm) v. Times Newspapers Ltd.,* [2000] 4 All. E.R. 913, [2001] 2 A.C. 277 (H.L.), the House of Lords considered whether the British equivalent of s. 4(1) afforded a defence where the publication reported on a press conference called by a private individual. They had no difficulty finding the general invitation issued to journalists to attend the press conference demonstrated a clear intent to widely disseminate information about what the organizers viewed as a matter of public concern, and the press conference was a public meeting. In doing so, Lord Bingham described the objective of the statutory privilege defence at 922-23:

> ... This grant (as in 1881, 1888 and 1952) must have been intended to enable citizens to participate in the public life of their society, even if only indirectly, in an informed and intelligent way. Since very few people could personally witness any proceedings or attend any meeting in question, it was intended to put others, by reading newspaper reports, in a comparable position. The privilege was not extended to newspaper reports of the proceedings of private bodies and private meetings, because those are proceedings which by definition the public do not witness and to which the public do not have access: the object was not to put the newspaper reader in a better position than one who was able to attend the proceedings or meeting in person.

[31] Lord Bingham and Lord Steyn each concluded the public or private nature of a meeting is determined by reference to the intention or objective of its organizers. At 923, Lord Bingham stated:

> ... Thus 'public', a familiar term, must be given its ordinary meaning. A meeting is public if those who organise it or arrange it open it to the public or, by issuing a general invitation to the press, manifest an intention or desire that the proceedings of the meeting should be communicated to a wider public. Press representatives may be regarded either as members of the

> public (as made clear by the language of para 10 of the Schedule) or as the eyes and ears of the public to whom they report. A meeting is private if it is not open to members of the pubic and if it is not intended that the proceedings of a meeting should be communicated to the public, unless perhaps by the body which holds the meeting.

[32] This is a very different situation from that in *McCartan.* Under the DSU bylaws attendance at meetings of the representative committee is restricted to "members of the Union", who are Douglas College students. All present on April 19, with the exception of Mr. Parks, were members. No press were invited to the meeting. The fact attendees were not screened carries little weight since, as Mr. Parks testified, they all knew each other well. Nor is the evidence about who did or did not attend subsequent meetings helpful. The issue is whether the representative committee intended the April 19 meeting to be public. That meeting was convened to receive a private and confidential report on serious internal financial matters, and to determine what steps needed to be taken by the DSU to address them.

[33] I am not persuaded the trial judge erred in finding the April 19 meeting was not a public meeting. In my view, there is a sufficient factual basis to support a finding that the representative committee did not intend the proceedings of that meeting to be communicated to a wider public.

[34] While that is sufficient to dispense with this ground of appeal, I also see no error in the trial judge's conclusion that the three articles failed to fairly and accurately report the events. In my view, he correctly identified a number of inaccuracies in the articles. I will deal only with what I view as the three most significant.

[35] First, the trial judge properly criticized the appellants for inaccurately describing the Parks report as a forensic audit when it was a forensic review. The difference is significant, and I agree that by describing the report as an audit, the appellants imported a high and unjustified level of reliability to Mr. Parks' findings, and falsely implied the information in their articles had been objectively verified. In

fact, the Parks report contained significant errors with respect to the allegations against Mr. Hansen.

[36] Second, the second and third articles stated or clearly implied that Mr. Parks' "audit" revealed possible or potential "fraud and misappropriation of funds" by Mr. Hansen. The trial judge properly found this inaccurately represented Mr. Parks' use of those terms in his report. At no time did Mr. Parks accuse Mr. Hansen of fraud or misappropriation of funds. He mentioned those phrases twice in his report. With respect to the 100 cheques issued to Mr. Hansen, he stated "... we regard this as a serious breach of internal control and accountability, and if Mr. Hansen is unable to produce adequate documentation, a misappropriation of funds" (emphasis added). While Mr. Parks was very critical of Mr. Hansen's competence and skills, he only mentioned potential fraud and misappropriation in his recommendations in these terms:

> In addition, instituting a reasonable and cost-effective system of internal controls and accountability will reduce DSU's exposure to potential fraud and misappropriation of funds.
>
> ...
>
> We do, however, recommend that segregation of duties be of foremost importance in order to minimize DSU's exposure to potential fraud, misappropriation of funds, and error.

[37] In my view, the trial judge properly found the appellants' articles did not fairly represent the context in which Mr. Parks' used those terms.

[38] Third, I am of the view the trial judge correctly found the third article did not reflect appropriate standards of fairness and accuracy. He stated:

> [52] ... The cover page leaves the viewer with the impression that there had been a police investigation resulting in somebody being "busted", or found out, or arrested with criminal charges to follow the investigation, with the reader directed to p. 6 of the paper for further information. The article at p. 6 advises the reader that Mr. Hansen is on leave from the DSU following delivery of Mr. Parks' report and adds that Mr. Hansen was unavailable for comment, leaving the inference that Mr. Hansen did not want to respond to questions about the alleged police investigation. The information is inaccurate. Mr. Tilley was unable to confirm with the police that they were conducting an investigation. As for Mr. Hansen's availability, I have earlier

> noted that Mr. Harder and Mr. Hansen were both present at a DSU meeting in June 2006.

[39] In my view, that is an appropriate description of the inaccuracies in the third article.

[40] That is sufficient to dispense with this ground of appeal. It do not find it necessary to consider the remaining findings of the trial judge on the statutory defence.

2. Is the defence of responsible communication on matters of public interest available to the appellants?

[41] This defence developed from the defence of responsible journalism established by the House of Lords in *Reynolds v. Times Newspapers Ltd. and Others,* [1999] UKHL 45, [1999] 4 All E.R. 609, and *Jameel and Another v. Wall Street Journal Europe SPRL,* [2006] UKHL 44, [2006] 4 All E.R. 1279. When the trial of this matter took place the defence was just emerging in Canada. The Ontario Court of Appeal had recognized it in *Cusson v. Quan,* 2007 ONCA 771, 286 D.L.R. (4th) 196, and *Grant v. Torstar Corp.,* 2008 ONCA 796, 92 O.R. (3d) 561, and appeals from those decisions were making their way to the Supreme Court of Canada.

[42] The trial judge thus based his analysis of the defence on the framework adopted by the Ontario Court of Appeal in *Cusson*. Mr. Justice Sharpe, writing for the Court, described the defence in these terms at para. 143:

> We should not, as the House of Lords cautioned, adopt the *Reynolds-Jameel* defence in a slavish or literal fashion, but rather accept it in a manner that best reflects Canada's legal values and culture. The defence rests upon the broad principle that where a media defendant can show that it acted in accordance with the standards of responsible journalism in publishing a story that the public was entitled to hear, it has a defence even if it got some of its facts wrong. That standard of responsible journalism is objective and legal, to be determined by the court with reference to the broader public interest. The non-exhaustive list of ten factors from *Reynolds,* applied in the manner directed in *Jameel,* provides a useful guide. The defence is plainly intended to shift the law of defamation away from its rigidly reputation-protection stance to freer and more open discussion on matters of public interest and should be interpreted accordingly.

[43] Sharpe J. went on to state that to avail itself of the defence a defendant must show it took reasonable steps to ensure its story was fair, and the contents true and accurate. He adopted the ten factors from *Reynolds* as guidelines in deciding whether a defendant had met the standard of responsible journalism, but noted these were not a series of hurdles to be negotiated, but were *indicia* of whether the defendant had been truly acting in the public interest.

[44] The trial judge examined each of the ten factors in the context of the circumstances before him. What follows is the list of those factors as set out by Sharpe J., followed by the trial judge's conclusions on each, which I have italicized to set them apart:

> 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
>
> *1. The Peak's allegations against Mr. Hansen involve criminal actions founded in fraud and misappropriation of funds and are of a most serious nature.*
>
> 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
>
> *2. The information about DSU's financial difficulties and the allegations against Mr. Hansen with respect to the DSU's financial affairs have, I conclude, little interest to the public at large, but are of significant interest to college and university students, particularly the students at Douglas College whose fees funded the DSU.*
>
> 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
>
> *3. The information utilized by the defendants came initially from Mr. Parks' flawed forensic review - flawed in the sense that it contained inaccuracies about Mr. Hansen. Unfortunately, that review formed the basis for the first article from which followed the May 23 and June 26 articles. The defendants obtained other material from various sources, but I conclude that most of that information came from individuals belonging to the faction opposed to Mr. Hansen, including Jan Gunn who, in addition to being the partner of the defendant Mr. Harder, was opposed to Mr. Hansen. She was a primary information source for Mr. Tilley and claimed to have provided him with a copy of Mr. Parks' report.*
>
> 4. The steps taken to verify the information.
>
> *4. Mr. Tilley acknowledged that in writing the three articles he relied on Mr. Parks' report and made no attempt to verify the*

information it contained. He made no attempt to interview Mr. Parks and failed to explore the difference between Mr. Parks' forensic review and a forensic audit, the latter being the term Mr. Tilley used to describe the forensic review. Mr. Tilley did not verify the circumstances surrounding the $20,000 cheque payable to Ms. Peters and the cheques paid to Mr. Hansen. Mr. Tilley contacted the police but was unable to confirm the existence of an investigation into DSU's finances, relying instead on second hand information that such an investigation was underway.

5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.

5. As for the status of the information, Mr. Parks performed a cursory forensic review with respect to matters involving Mr. Hansen, but Mr. Tilley appears to have accepted the information revealed in the review as if it were the product of a much more intensive forensic audit. While the defendants might have been able to rely on a forensic audit, the status of the information produced in a forensic review did not provide the same level of reliability, notwithstanding Mr. Parks' reputation.

6. The urgency of the matter. News is often a perishable commodity.

6. Mr. Parks delivered his April 18, 2006 report to the DSU on April 19, 2006 and as I understand Ms. Gunn's evidence, she obtained a copy of the report on the latter date, made copies of it, and delivered a copy to Mr. Tilley, although he could not remember receiving it from Ms. Gunn, saying it was delivered to him in a brown, blank envelope. He could not remember when he received the envelope, but believed it was on or about May 1, 2006. Mr. Tilley therefore had at least a week to write the first article in which to investigate the allegations against Mr. Hansen and had ample time to confirm the contents of the following two articles prior to their publication. I do not view Mr. Tilley as being subject to an urgent deadline in preparing the articles for which Mr. Hansen seeks judgment.

7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

7. Mr. Tilley testified that he sought comment from Mr. Hansen, leaving both email and telephone messages at his office. He did not keep copies of his email messages or a record of the times he left messages. He did not leave messages or try to locate and attend at Mr. Hansen's home. Mr. Hansen said he did not receive any email or voice mail messages from the defendants although throughout the period he regularly checked his emails and voice mail for messages. Mr. Hansen said his home telephone number was listed in the name of his partner, Christa Peters. Mr. Tilley acknowledged that he was aware that Ms. Peters was Mr. Hansen's partner, but did not attempt to find her telephone number or her home address.

When considering Mr. Tilley's efforts to contact Mr. Hansen, it is of interest that a reporting crew from a lower mainland television station later in 2006 was able to find Mr. Hansen outside his home early one morning and obtained a brief comment that he was not prepared to provide the crew with an interview.

Mr. Tilley wrote in the June 26, 2006 edition of The Peak that Mr. Hansen was unavailable for comment. He testified that he had exhausted his efforts to contact Mr. Hansen. He did not testify as to the attempts, if any, that he had made to contact Mr. Hansen with respect to suggestions that police were investigating DSU's financial affairs. Although, Mr. Harder and Mr. Hansen both attended a meeting in June 2006 prior to the June 26 edition of The Peak, Mr. Harder made no attempt to discuss DSU's financial situation or a police investigation with Mr. Hansen.

I conclude that the defendants' efforts to contact Mr. Hansen lacked the diligence expected of a journalist. Although the leading Australian case on responsible journalism, Lange v. Australian Broadcasting Corp., [1997] HCA 25, 189 C.L.R. 520 held that the defendant's conduct would not be reasonable unless the defendant sought a response from the person defamed and published the response, unless this was not practicable or was unnecessary, I do not think that it is absolutely crucial for the defendants to have contacted and obtained a comment from Mr. Hansen. However, at the very least I conclude that the defendants had an obligation in the circumstances of this case, considering the serious allegations which they were about to publish, to make diligent efforts to contact Mr. Hansen. I do not find the diligence required of the defendants manifests itself in the evidence.

8. Whether the article contained the gist of the plaintiff's side of the story.

8. The articles provide some hints of Mr. Hansen's side of the story, but they are only hints. I find the articles overall lack the balance required to describe to some extent the plaintiff's perspective of the situation.

9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

9. The tone found in all three articles is that Mr. Hansen had committed fraud and had misappropriated monies, thereby conducting himself in a criminal manner, leading to his being "busted" as reflected in the June 26, 2006 article. The defendants' articles adopted inaccurate allegations as statements of fact, rather than adopting a neutral stance and providing a balanced report and perhaps raising queries or calling for further investigation

10. The circumstances of the publication, including the timing.

10. The circumstances of the publication, including the timing, are unfortunate, particularly for Mr. Hansen, but they do not hold any particular significance as a factor in determining whether the defendants have acted as responsible journalists.

[45] Based on those findings, the trial judge concluded the appellants had not demonstrated the level of journalistic responsibility required to avail themselves of the defence of responsible journalism.

[46] Since his decision, the Supreme Court has delivered judgment in *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, and *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640. These decisions accept responsible communication on matters of public interest as a new defence to defamation in Canada. While this defence closely mirrors that of responsible journalism, the Court chose the broader label to acknowledge the increasing role of online communication, as well as traditional journalism, in publishing material of public interest. It defines two elements in the test for responsible communication. First, the publication must be on a matter of public interest. Second, the defendant must show the publication was responsible, in the sense that he or she was diligent in trying to verify the allegations having regard to all the relevant circumstances. MacLachlin C.J., writing for the Court, summarized those circumstances at para.126 of *Grant*:

> (a) the seriousness of the allegation;
>
> (b) the public importance of the matter;
>
> (c) the urgency of the matter;
>
> (d) the status and reliability of the source;
>
> (e) whether the plaintiff's side of the story was sought and accurately reported;
>
> (f) whether the inclusion of the defamatory statement was justifiable;
>
> (g) whether the defamatory statement’s public interest lay in the fact that it was made rather than its truth (“reportage”); and
>
> (h) any other relevant circumstances.

[47] While that list is similar to the one established in *Reynolds* and employed by the trial judge, it is not identical. I agree with the appellants that this Court should consider the trial judge’s findings in the framework established by the Supreme Court in *Grant*.

[48] The first part of the test is met as the parties agree the three articles published by the appellants were on a matter of public interest.

[49] The appellants maintain the trial judge made a number of errors in his assessment of the factors relevant to whether publication was responsible. Their complaints raise questions of fact and, as stated previously, this Court will not interfere with the trial judge's factual findings unless the appellants establish a palpable and over-riding error.

[50] First, the appellants argue the trial judge erred in over-stating and misapprehending the seriousness of the allegations in the articles in two respects. Their first point is based on what they say is a significant difference between the approach to the defence established by the Supreme Court in *Grant* and that espoused in *Reynolds* and adopted by the trial judge. They say the *Reynolds* approach required the fact-finder to consider the meaning of the defamatory words when determining the seriousness of the allegation, at the outset of the analysis. By contrast, the Supreme Court at para. 124 of *Grant* puts this factor at the end of the list as one of the "other relevant circumstances" and, if the words are capable of having more than one meaning, requires the fact-finder to consider the range of meanings in deciding whether the defence has been made out.

[51] The appellants say since the trial judge did not have the benefit of *Grant* he inadvertently erred by considering the meaning of the defamatory comments too early in his analysis, and by selecting the most severe interpretation of the defamatory comments from a range of possible meanings. The appellants argue these errors coloured his analysis of the remaining factors, leading him to assess them too harshly and wrongly reject the defence of responsible communication.

[52] The appellants rely on *Lewis v. Daily Telegraph Ltd.*, [1963] 2 All E.R. 151 (H.L.) to demonstrate their point. There, the alleged defamation arose from a statement the London Fraud Squad were "inquiring into the affairs of [the plaintiff]". The plaintiff pleaded an innuendo that the statement meant he had been guilty of fraud, or was suspected by the police of being guilty of fraud. The House of Lords

found the trial judge erred in leaving both meanings for consideration by the jury as the ordinary man would not infer guilt merely because an inquiry was underway. They observed there is a significant difference between saying someone has behaved in a suspicious manner and someone is guilty of an offence. The appellants say that similarly here they intended only to convey that Mr. Hansen was suspected of fraud or misappropriation. The trial judge instead found the articles conveyed he was guilty of those crimes.

[53] I am not persuaded there is substance to these complaints. First, nothing in *Grant* requires the fact-finder to consider the relevant factors in their listed order. Even if that were the case, the "seriousness of the allegation" tops the list in both *Grant* and *Reynolds*, and necessarily imports consideration of the meaning of the comments. Moreover, at para. 111 of *Grant* the Court made it clear that the "logic of proportionality" requires that the seriousness of the allegation inform the degree of diligence required in verifying it. Thus, regardless of when the fact-finder considers the meaning of the comments, this aspect of the analysis must be examined in connection with other factors on the list.

[54] In determining whether the trial judge properly considered the range of reasonable meanings of the comments, it is important to note the focus of this analysis is the defendants' intended meaning. In *Bonnick v. Morris and others*, [2002] UKPC 31, [2003] 1 A.C. 300, the Privy Council decided the "single meaning" rule, used to determine whether a statement is defamatory, should not be applied in considering whether the defence of responsible journalism has been established, and made these observations as to ambiguity that may lead to a range of meanings:

> [24] Their Lordships consider it would be to introduce unnecessary and undesirable legalism and rigidity if this objective standard, of responsible journalism, had to be applied in all cases exclusively by reference to the "single meaning" of the words. Rather, a journalist should not be penalised for making a wrong decision on a question of meaning on which different people might reasonably take different views. … If the words are ambiguous to such an extent that they may readily convey a different meaning to an ordinary reasonable reader, a court may properly take this other meaning into account when considering whether *Reynolds* privilege is available as a defence. In doing so the court will attribute to this feature of the case whatever weight it considers appropriate in all the circumstances.

> [25] This should not be pressed too far. Where questions of defamation may arise ambiguity is best avoided as much as possible. It should not be a screen behind which a journalist is "willing to wound, and yet afraid to strike". In the normal course a responsible journalist can be expected to perceive the meaning an ordinary, reasonable reader is likely to give to his article. Moreover, even if the words are highly susceptible of another meaning, a responsible journalist will not disregard a defamatory meaning which is obviously one possible meaning of the article in question. Questions of degree arise here. The more obvious the defamatory meaning, and the more serious the defamation, the less weight will a court attach to other possible meanings when considering the conduct to be expected of a responsible journalist in the circumstances.
>
> [Emphasis added.]

[55] In *Grant* the Supreme Court adopted this aspect of *Bonnick*, stating at para. 124:

> If the defamatory statement is capable of conveying more than one meaning, the jury should take into account the defendant's intended meaning, if reasonable, in determining whether the defence of responsible communication has been established. This follows from the focus of the inquiry on the conduct of the defendant. The weight to be placed on the defendant's intended meaning is a matter of degree[.]

[56] Here, the appellants encounter some difficulty in that neither Mr. Harder nor Mr. Tilley was asked about the meaning they intended to convey by the defamatory comments. Each simply agreed with the proposition that the allegations in the articles directed at Mr. Hansen were "serious", a view shared by the trial judge.

[57] The trial judge considered the meaning of the comments at several junctures. He initially examined this in deciding whether the comments were defamatory. As discussed in *Bonnick,* at that point in the analysis it is appropriate for the fact-finder to determine a single meaning of the words. The trial judge's findings at that stage are set out at paragraphs 17 to 19 of these reasons. I am satisfied the comments reasonably bear the meaning he ascribed to them, with one exception. With respect to the comment set out at (b) in paragraph 17, I agree with the appellants that there was ambiguity in the first article as to when the $20,000 was repaid, and the less serious interpretation, that the funds were repaid two weeks after they were borrowed, should have been adopted by the trial judge. I am not convinced, however, that this played a significant role in his analysis.

[58] The trial judge again considered the meaning of the comments when he examined the seriousness of the allegation and the tone of the articles, items 1 and 9 in his *Reynolds* analysis. He found they contained allegations “of a most serious nature”, and their tone was that Mr. Hansen had committed criminal actions founded in fraud and misappropriation leading to his being “busted”, as reflected in the third article. The appellants say the trial judge erred in taking the most serious view of the defamatory statements, and failing to acknowledge they could also be interpreted as suggesting Mr. Hansen was merely under investigation.

[59] That argument has some merit, at least insofar as the first two articles are concerned. I am not satisfied, however, that consideration of that alternative meaning substantially reduces the standard of responsible communication required to establish the defence. Mr. Hansen had spent his entire career in financial management of post-secondary educational institutions. Statements that police are investigating him for suspected fraud and misappropriation of funds are properly characterized as serious allegations. The appellants conceded this was so, and recognized they had a duty to responsibly investigate and confirm those statements before publication. Further, I agree with the trial judge that the use of the word “busted” in the headline of the third article could properly be interpreted as indicating the police had moved beyond the investigatory stage and had charged or arrested Mr. Hansen. In short, I would not accede to this argument.

[60] The appellants’ second complaint about the trial judge’s assessment of the seriousness of the allegation is that he gave too much weight to “minor” flaws in the Parks report that were repeated in the publications, notably the number of unauthorized cheques, the context in which the $20,000 cheque was issued, and the statement Mr. Hansen had signed that cheque. The appellants point out that when Mr. Parks rectified those errors in his letter of July 13, 2006, he stated the corrections did not change his conclusion that there were significant problems with internal control and accountability at the DSU under Mr. Hansen’s stewardship.

[61] In my view, this argument fails to appreciate the difference between the context in which Mr. Parks made his erroneous comments about Mr. Hansen and the context in which they were published. Mr. Parks provided a forensic review that reported on financial irregularities and mismanagement with a view to extricating the DSU from its financial disarray. While he clearly had concerns about Mr. Hansen's skills and competence, he made no allegations of criminal activity. The appellants, on the other hand, used Mr. Parks' erroneous comments as the basis for allegations of potential fraud and misappropriation by Mr. Hansen, and gave them heightened reliability by wrongly describing them as the product of a forensic audit. In that context, I see no error in the trial judge's assessment of the seriousness of the flaws in Mr. Parks' report.

[62] The appellants next criticize the trial judge's treatment of the reliability and status of their primary sources, Mr. Parks and Ms. Gunn, items 3, 4 and 5 in his *Reynolds* analysis. At para. 114 of *Grant*, the Court described the inversely proportional relationship between the trustworthiness of a source and the responsibility of a media defendant to look for verification from other sources. The appellants argue the trial judge erred in finding they made insufficient attempts to confirm the information they received from Mr. Parks and Ms. Gunn.

[63] Dealing first with Mr. Parks, the trial judge found the appellants' information came from his "flawed forensic review", and was critical of Mr. Tilley for failing to interview Mr. Parks, make any attempt to verify the information in the Parks report, and explore the difference between a forensic review and a forensic audit.

[64] The appellants argue they were entitled to rely on Mr. Parks without making such inquiries. They knew him to be a highly regarded forensic auditor, and had no reason to question the reliability of his report. They maintain it is speculative to say Mr. Parks would have spoken to Mr. Tilley at all, let alone given him any different information than that in the report. They point out Mr. Parks was not yet aware of the errors in his report when the articles were published.

[65] I agree it is not possible to say what would have transpired had Mr. Tilley tried to contact Mr. Parks, but I am not persuaded the trial judge erred in finding he should have done so, given the prominent role his report played in the publications. As well, I see no error in the trial judge's view that the standard of responsible journalism required the appellants to discern the import and reliability of a forensic review in contrast to a forensic audit before describing the Parks report as an audit in their publications. I agree with the trial judge that characterizing the report as an audit gave it an undeserved reliability. As well, the trial judge legitimately intimated there were other sources at the DSU whom Mr. Tilley could and should have contacted to verify the circumstances surrounding the cheques that were the focus of the allegations against Mr. Hansen.

[66] As to Ms. Gunn, she was the appellants' primary source with respect to the police investigation that formed the focus of the third article. The appellants argue the trial judge erred in dismissing her as a reliable source because she was Mr. Harder's domestic partner and a member of the faction of students opposed to Mr. Hansen, and because the information she provided was second-hand. They say Ms. Gunn had considerable involvement in the financial affairs of the DSU, and had no improper or indirect motive in opposing Mr. Hansen other than concern about the DSU financial situation. Further, it is common and necessary for journalists to rely on second-hand information. Court-established certainty in reporting matters of public interest is not required.

[67] The trial judge did not make an express finding about Ms. Gunn's reliability, but dealt with the information she provided at item 4 of his *Reynolds* analysis, finding Mr. Tilley was unable to confirm a police investigation when he contacted the police, and relied instead on second-hand information. As well, at para. 29 h. of his reasons the trial judge made these findings about the foundation for the allegations about the police investigation in the third article:

> … there is no evidence to support the defendants' allegation that police investigated DSU's finances, the police having declined to respond to Mr. Tilley's query. The best that Mr. Tilley could rely on in making this allegation was that there were rumours of an

> investigation, which included a statement to Mr. Tilley from a DSU board member who was a known opponent of Mr. Hansen as well as an unsubstantiated statement from a Douglas College student who advised Mr. Tilley that she had complained to the police based on Mr. Parks' April 18, 2006 report. A complaint does not necessarily result in an investigation.

[68] Ms. Gunn testified she had told Mr. Tilley a police investigation was underway. She advised him a student named Nicole had told her she had gone to the police to launch a formal complaint, and that two other DSU student representatives associated with the faction against Mr. Hansen later told her they were having difficulty assisting with the police investigation because they could not access DSU financial documents.

[69] Mr. Tilley tried to verify the investigation by speaking to the police and Nicole. Neither would confirm it. He then spoke to Ms. Tenove, one of the DSU student representatives from the anti-Hansen faction, who confirmed the RCMP had called her and said an investigation would take place.

[70] I agree with the appellants the trial judge was wrong in saying there was no evidence to support the allegation of a police investigation. The question remains, however, as to the reliability of Mr. Tilley's sources on that point, and whether the steps he took to verify their information were sufficiently diligent. He was unable to obtain direct confirmation of the investigation from the police or the complainant, Nicole. Ms. Gunn testified and was cross-examined at some length about her alliances in the DSU, her views of Mr. Hansen, and her efforts to ensure Mr. Tilley was kept advised of Mr. Hansen's role in the DSU's financial difficulties. In my view, there was a sufficient evidentiary basis on which the trial judge could find Ms. Gunn's views on those matters were not entirely objective, and Mr. Tilley should have sought verification of the police investigation from more neutral sources.

[71] The appellants next argue the trial judge erred in finding their efforts to contact Mr. Hansen and get his side of the story before publication lacked the expected diligence and balance of a responsible journalist.

[72] The trial judge dealt with this at items 7 and 8 of his *Reynolds* analysis. He found Mr. Tilley's efforts to contact Mr. Hansen were limited to leaving email and voicemail messages for him at the DSU office. Mr. Tilley could provide no details of these messages, and Mr. Hansen said he did not receive them. The trial judge noted Mr. Tilley did not attempt to locate Mr. Hansen at his home although he had the means to do so. He also observed the third article stated Mr. Hansen was not available for comment, yet Mr. Harder was at a meeting with him in June before that article was published and had not bothered to speak to him.

[73] The appellants point out Mr. Tilley also asked Mr. Hansen's supporters for his contact information, which they refused to provide. As well, the third article included part of Mr. Hansen's side of the story, stating he said "he was entitled to the money as a result of outstanding overtime and other payroll issues". The appellants say these steps, together with the messages left for Mr. Hansen at his office, were sufficiently diligent to meet the standard of responsible communication.

[74] At para. 116 of *Grant* the Court described efforts to obtain and fairly report the plaintiff's viewpoint as the core *Reynolds* factor, since it speaks to both the thoroughness and the essential fairness the defence is intended to promote. McLachlin C.J. observed that publishing defamatory allegations without giving the target an opportunity to respond is inherently unfair and heightens the risk of inaccuracy.

[75] I am satisfied there was a proper evidentiary basis for the trial judge's finding that the appellants failed to demonstrate the required standard of diligence in their attempts to contact Mr. Hansen and report his side of the story. In addition to the points noted by the trial judge, both Mr. Tilley and Mr. Harder testified they recognized their journalistic obligations required them to make every effort to contact Mr. Hansen and obtain his side of the story, given the serious allegations in the articles. Yet Mr. Tilley's only attempt to do so involved leaving messages for Mr. Hansen at the DSU office, after his position there had been terminated. Moreover, Mr. Tilley could not recall the dates, number or nature of these attempts. He agreed

he may only have tried to call Mr. Hansen once at the DSU before May 8, and was unsure if he tried to email him there before the first article was published. He claimed he had "exhausted all options" to contact Mr. Hansen when the second and third articles were published, yet could not say what further efforts he had made to reach him. Finally and importantly, Mr. Tilley agreed he was aware of Mr. Hansen's explanation for the $20,000 cheque very early on in the events, and heard it again at a DSU meeting on May 18, 2006, yet he did not include it in the first two articles. In my view, the trial judge properly found the appellants' efforts to obtain Mr. Hansen's side of the story were inadequate.

[76] Finally, the appellants argue the statements about Mr. Hansen in the three articles were reportage and thus do not attract liability. The Supreme Court discussed reportage as an exception to the repetition rule in *Grant* at 120:

> [120] However, the repetition rule does not apply to fairly reported statements whose public interest lies in the fact that they were made rather than in their truth or falsity. This exception to the repetition rule is known as reportage. If a dispute is itself a matter of public interest and the allegations are fairly reported, the publisher should incur no liability even if some of the statements made may be defamatory and untrue, provided: (1) the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability; (2) the report indicates, expressly or implicitly, that its truth has not been verified; (3) the report sets out both sides of the dispute fairly; and (4) the report provides the context in which the statements were made. [Citations omitted.]

[77] It appears the trial judge dealt with this argument, or one similar, at item 9 of his analysis and rejected it. He did not address it in the terms set out in *Grant*, but I am not satisfied the Supreme Court's affirmation of the reportage exception assists the appellants. The three articles did not indicate their truth had not been verified. Nor did they fairly set out both sides of the dispute.

[78] In my view, the findings of the trial judge, re-examined in the framework established in *Grant*, properly lead to the conclusion that the defence of responsible communication on matters of public interest is not available to the appellants.

CONCLUSION

[79] I would accordingly dismiss the appeal.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Rowles"

I AGREE:

"The Honourable Mr. Justice Lowry"