

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Demone Monuments and Granite Products Ltd, v. Heritage Memorials Ltd., 2015 NSSC 314

**Date:** 20151105

**Docket:** Bwt. No. 435253

**Registry:** Halifax

**Between:**

Demone Monuments and Granite Products Limited

Plaintiff

v.

Heritage Memorials Limited, a body corporate and G. Steven Nelson, Gwen Nelson and Donald Green

Defendants

<b>Decision</b>
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**Judge:** The Honourable Justice Jamie Campbell

**Heard:** October 20, 2015 in Halifax, Nova Scotia

**Written Decision:** November 5, 2015

**Counsel:** John T. Shanks for the Plaintiff  
Gavin Giles, Q.C. for the Defendants

Campbell, J.

[1] The parties both sell cemetery headstones or monuments. Apparently it is a very competitive business. The Plaintiff in the action, Demone Monuments and Granite Products Limited (“Demone”) has alleged that the Defendants, Heritage Memorials Limited (“Heritage”) and their employees, have made false and misleading statements with respect to the products and services offered by Demone. The motion now before the court is a claim for an injunction to prohibit Heritage from making such statements until the issues are resolved at a trial.

### **Summary**

[2] The form of injunction sought by Demone is to prohibit the named Defendants from making specific statements to the public about Demone. The Notice of Motion filed in January 2015 originally sought an order that would generally prohibit the Defendants from “making false and or misleading statements about the Plaintiff”, and in particular from making statements that the Plaintiff uses inferior or substandard material in its production of granite monuments and that the Plaintiff cannot manufacture its own monuments. Demone has clarified that what is being sought is not that broad.

[3] Demone has shown that there is a reasonable case to be tried and that the damages that it will potentially suffer are not compensable by an award of damages. The balance of convenience favours the order of an injunction that is very specific in its scope. An order that would prevent Heritage from making any statements about Demone that are “false and/or misleading” would be a very

significant and unjustifiable restriction, not to mention being difficult to define and enforce.

[4] Similarly Demone should not be restricted from expressing its opinion that Demone uses products that are “substandard”. Heritage should remain free to express unfavourable opinions about the quality of its competitor’s products, the quality of its work or its capability to perform work. Regulating what one competitor says about another in the day to day course of business to prospective customers would require the presence of a patient full time referee.

[5] What Heritage should be enjoined from doing is making specific assertions of fact that, based on the evidence before the court on the motion, are not factually correct. It cannot say that Demone uses granite from China for its monuments. The uncontested evidence on the motion is that Demone does not use granite from China. The granite is from India. Heritage is not restrained from offering its opinions as to the quality of granite sourced from India and is not enjoined from saying that it believes that granite from its own quarries is superior to that sourced from India.

[6] Heritage cannot say that Demone either does not or does not have the capacity to cut, shape, polish and finish, monuments or headstones. It has that capacity and based on the evidence submitted on the motion Demone does in fact cut, shape, polish and finish monuments and headstones. Heritage is not restrained from expressing an opinion, unfavourable or otherwise, on the quality of the work performed by Demone.

## **Evidence**

[7] In many situations where relief of this kind is sought, companies have made public statements about their competitors through an advertising campaign. There has been no such advertising campaign here. Some of the evidence against Heritage in this matter is the result of what might be characterized as a “sting” operation undertaken by the principal of Demone, Paul Himmelman.

[8] For some years Mr. Himmelman sensed that Heritage had been making disparaging comments about his company’s products. He got that impression from a 2011 newspaper article about the expansion planned by Heritage. One statement attributed to Steve Nelson, one of the named defendants and the president of Heritage, is that the company is the only one that “still manufactures monuments”. The article goes on to say that other companies sell premade monuments and just add the lettering. Heritage filed no affidavit from Mr. Nelson to deny the statement or to suggest a misunderstanding. The defence filed on behalf of Heritage is not evidence in the motion. It does however make reference to there being some confusion surrounding the term “manufacture” as it is used in that industry. It states that the cutting, shaping and finishing of granite of “unknown quality and origin purchased...from a broker” is known as building and not as manufacturing.

[9] Though there was no evidence provided on the motion by Heritage it will argue at trial that what Mr. Nelson said to the newspaper was true and accurate. Heritage will say that it is the only company in Atlantic Canada that uses granite from its own quarries. There is no evidence of that on the motion however.

[10] The following year an article appeared in allnovascotia.com, an online news service. That article was published in February 2012 and once again talked about

Heritage's expansion. The article attributes a quote to Mr. Steve Nelson in which he says that Heritage was one of the last manufacturers left. "If you want a monument that's made in Canada or made in the Maritimes, we're really your only choice around here. Everything else comes from China, all premade."

[11] Once again there is no evidence from Mr. Nelson to suggest that he was misquoted or misunderstood. The defence, which once again is not evidence, says that Mr. Nelson denies making the statements attributed to him. The article in any event would be subject to interpretation.

[12] On 4 May 2012 a lawyer on behalf of Demone sent a letter to Mr. Nelson complaining about the publication of comments that Demone said were false. The letter demanded that Heritage stop making public representations that it was the only one with manufacturing capabilities in the Atlantic Provinces. It also demanded that sales staff at Heritage stop commenting on the quality, condition or features of products offered by Demone. Mr. Nelson responded by saying that if the exact statements could be provided Heritage would be happy to correct any activities that were not within the law.

[13] To this point in the narrative, the evidence in support of the claim consists of the brief comments attributed to Mr. Nelson in the media reports.

[14] While this was going on in 2012, Tim McDonald started working for Demone in its Bedford office. He provided an affidavit. In that affidavit he says that he noticed a pattern of contact with potential customers. They would make a series of inquiries and then say that they had gone or were going to Heritage to compare. In more than 10 cases, he says that they began posing a series of very specific questions about the quality of the product that Demone used to make its

monuments. He said that on several occasions he was asked directly by customers who had previously gone to the Bedford sales office of Heritage whether Demone used inferior Chinese granite. Mr. McDonald cites the example of an unnamed customer who came into the office in summer 2012 to compare prices and who said that he had been told by someone in the Heritage sales staff that Demone used inferior Chinese granite. The customer provided the information on condition that Demone did not involve him in any dispute with Heritage. Mr. McDonald says that the pattern of customers returning to Demone after visiting Heritage with specific questions about the source and quality of the granite has continued. He says that he noticed situations of that kind continuing as late as October 2014.

[15] Mr. McDonald's affidavit is of almost no value as evidence. The assertions made are untestable. He says that unnamed and unknown people have said things to him reporting what they say other unnamed people have said to them. It provides no information to assess what was actually said in the first instance and how it might have been subject to interpretation by the person who heard it. It sets out Mr. MacDonald's impressions.

[16] Mr. Himmelman had the two media reports and comments from his employee Tim McDonald. Mr. Himmelman apparently recognized that something more might be required.

[17] In February 2014 he went to the Heritage sales office in New Minas, without disclosing his real identity. He says that there he was told by Gwen Nelson that Heritage was the only manufacturer of granite monuments in Nova Scotia. She told him that other local suppliers of monuments such as Demone, which she

referenced by name, used Chinese prefinished granite monuments that were prone to crack or fade over time.

[18] On 28 May 2014 Mr. Himmelman went back to the New Minas office accompanied by Jeannine LeBlanc an investigator employed by CKR Global Investigations. Mr. Himmelman and Ms. LeBlanc of course were not customers but played the part of a couple looking for a monument. Ms. LeBlanc secretly recorded the exchange.

[19] The Heritage sales person was, once again, Gwen Nelson. In that exchange Ms. Nelson said that there was a problem with Chinese granite, “which is what other competitors are selling.” She explained that Chinese granite contains an additive that covers the grain of the stone. It fades in the sun. Ms. Nelson did not make the comparison with any other company’s product. Mr. Himmelman invited her to do that.

Mr. Himmelman: So how do we know, if we buy from Demones, what we’re getting? Like because I’d have no idea. I mean, are you positive that’s what they’re selling? Like I don’t know I have no idea?

[20] Ms. Nelson does not make the comparison initially.

Ms. Nelson: I can’t ...listen, we’re not sitting in their driveway you know, looking at what they’re doing.

Mr. Himmelman: No. Well, I mean, I don’t...

Ms. Nelson: ...so, I can’t...

Mr. Himmelman: ...I have no idea right...

Ms. Nelson: I can tell you what Heritage Memorials is doing. There’s enough word on the street, there’s enough...you see enough of their monuments. People don’t ... we have

people that...that's what they do they do around and they look...I go to the cemetery and see what the competitors are putting in, that's my job.

Mr. Himmelman: I couldn't remember after I left what it was, because I know you've got Chinese on your list here...

Ms. Nelson: Yes, absolutely.

Mr. Himmelman: ...and I couldn't think if you said that they were selling it...

Ms. Nelson: Yes, they are.

Mr. Himmelman: ...like from Taiwan or...

Ms. Nelson: No, it's China.

Mr. Himmelman: ...Indonesia, wherever.

Ms. Nelson: It's China. It's China.

Ms. LeBlanc: Umm.

Ms. Nelson: We are the only company left that manufactures the monument.

Mr. Himmelman: Oh, that was the other thing.

Ms. Nelson: Everybody else is bringing them in pre-made, and if they are pre-made we know where they are coming from.

[21] Mr. Nelson goes on to say that Demones brings in premade monuments and what they are doing is lettering them. Mr. Himmelman asks, "Not even making them?" She says, "No. We're the last ones to make them."

[22] After some further discussion about the source of the granite Ms. Nelson says that "we're not here to bash other companies, we're just here to tell you how ...this is how we do it." Having said that however she talks about her frustration in selling against a company that "may not be as forthcoming". Ms. Nelson was prompted into making statements that supported what Mr. Himmelman believed had been happening. The statements were made.



[23] Later that day Ms. LeBlanc went to the Heritage sales office in Bedford, where she met with a sales associate, Mr. Donald Green. She said that she was shopping for a headstone. She said that she had looked at what Demone's had.

Mr. Green: Because they're selling Chinese granite.

Ms. LeBlanc: Oh?

Mr. Green: See, we want to...you know, we're the only manufacturer, we bring them in right from the block...

Ms. LeBlanc: Oh, okay.

Mr. Green: ...where we cut it and polish it and we do everything right from scratch.

Ms. LeBlanc: Oh, okay.

Mr. Green: They are buying them already pre-made, pre-sized, pre-cut, pre-polished.

Ms. LeBlanc: Oh?

Mr. Green: So, they really don't have a lot of quality control.

Ms. LeBlanc: Right.

Mr. Green: You know, (inaudible) on their container, they just pull it out and letter it.

Ms. LeBlanc: so, they're not doing it themselves...

Mr. Green: They're not doing it themselves.

Ms. LeBlanc: ...like you guys are doing it in Windsor?

Mr. Green: All they are doing is lettering it. You know, they do up the design and they do, you know the lettering.

Ms. LeBlanc: Oh, okay.

Mr. Green: ...and they just (inaudible)...

Ms. LeBlanc: But they do the same kinds of cuts as you guys do, though...

Mr. Green: No. No.

Ms. LeBlanc: ...or like different all the way around?

Mr. Green: Altogether different. Altogether different. They don't cut any stone at all.

Ms. LeBlanc: Oh, okay.

Mr. Green: All they do is letter it, because it's already pre-cut when they bring it in.

[24] The only evidence on the motion with respect to what Demone actual does is from Paul Himmelman himself. He says that Demone purchases both finished monuments and large slabs of granite polished on the front and back from granite importers. The granite comes from India. The only Chinese granite it uses is for smaller speciality items. Demone offers prefinished polished monuments but also buys 3000 lb slabs of granite from which monuments are cut. The large slabs are cut into smaller monument sized blocks based on customer orders. They are shaped using mechanical means as well as traditional skills involving hammers and chisels.

[25] There is no evidence to suggest that Chinse granite is used for monuments. There is evidence to the contrary. There is no evidence on the motion that Demone uses only premade, presized, precut and prepolished stone and only letters those stones. There is evidence to the contrary. While there may be argument as to what the term "manufacture" means in the monument industry, there is nothing to suggest that Demone simply letters prefinished monuments.

### **The Claims**

[26] Demone commenced an action against Heritage, and the individual defendants, Steven Nelson, Gwen Nelson and Donald Green in January 2015. The

Statement of Claim asserts that the statements of the individual defendants constituted the tort of injurious falsehood and that those statements have caused loss and damages to Demone's revenues and reputation. It says that Heritage is directly and vicariously responsible for those statements.

[27] Demone has also claimed that Heritage was in breach of the provisions of the *Competition Act*<sup>1</sup>. Section 52(1) of the *Competition Act* states,

No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[28] In order to establish contravention of that section is it not necessary to prove that any person was actually deceived or that the representation was made in a place to which the public had access. Certain representations are deemed to have been made to the public. Subsection 52 (2) includes a representation made in-store to a person as "ultimate user". Demone argues that the representation made to Mr. Himmelman and Ms. LeBlanc as part of their investigation were made to ultimate users even though they had no intention of buying anything.

[29] Section 36 of the *Competition Act* authorizes a person who has suffered a loss or damage as a result of a breach to commence an action to recover those damages.

[30] The issue of whether the tort of injurious falsehood has been or can be established will be determined at the trial of the matter. That will require a full

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<sup>1</sup> RSC 1985, c. C-34

review of the evidence and the determination of whether the statements that are alleged to have been made and attributed to the Defendants were indeed made by the Defendants to third parties. It will require a finding as to whether there are damages proven to have been caused by any such statements. It will require the consideration of potential defences such as the claim that the any such statements were reasonably accurate, true in substance and made in good faith.

[31] The claim under the *Competition Act* will require consideration of whether damages have been proven as required by s. 36. It will require a determination of whether it has been proven that representations have been made to the public that are false and misleading and that they are false and misleading in a material respect. It will have to be determined whether statements made to a person holding himself out to be member of the general public but who is actually a party to dispute qualify as a misrepresentation to an ultimate user.

[32] The motion is not a preliminary determination of the action.

### **Injunctive Relief and Commercial Free Speech**

[33] The Defendants have argued that when injunctive relief is sought in a defamation case a court should be particularly cautious. They say courts should be reluctant to prejudice defences of justification or fair comment by granting an injunction. The cases brought forward in support of that proposition deal with press freedoms and attempts by litigants to suppress the publication of materials that they claim are defamatory. In those cases, courts will impose a prior restraint only when it is clear that no defence will succeed at trial. Courts guard the freedom of the press and the media in the knowledge that restricting publication of material in a timely way can be tantamount to banning publication entirely.

[34] The kind of commercial free speech at issue here, is qualitatively different. The ability to make full comparisons with a competitor's products is of course important. A court would have to be very cautious about placing any limits on the ability of a business to make those kinds of comparisons. Similarly the right to state opinions about the quality of a competitor's products or services is an important commercial right that should not be summarily curtailed. The right to say to individual customers that a specific competitor gets granite from China, as opposed to India, in the absence of any evidence at all that the granite does indeed come from India, is not a right that need be as assiduously guarded. The ability to say to members of the public that a competitor just uses premade, precut, prefinished and prepolished monuments and only applies lettering to them, in the face of evidence that the competitor does all of those things, is not of the same character as the ability of a media outlet to publish a story that it asserts contains statements that are made in good faith on matters of public interest.

### **Test for Granting an Injunction**

[35] Compelling Heritage to act in a certain way through an injunction in advance of a full determination, involves the application of a well-established three stage test.<sup>2</sup>

[36] The first stage is the determination of whether there is a serious issue to be tried. That part of the test is fairly easily met. It has been met here. The Plaintiff does not have to prove its case at this stage.

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<sup>2</sup> *American Cyanamid Co. v. Ethicon Limited* [1975] A.C. 396, *R.J.R. MacDonald v. Canada (A.G.)* [1994] 1 S.C.R. 311

[37] The claim here is based on evidence which at the motion stage is uncontroverted. If that evidence is believed at a trial a reasonable legal argument can be made to support the claim. The evidence from Tim MacDonald of statements having been made to people other than Mr. Himmelman and Ms. LeBlanc is hearsay and likely to be ruled inadmissible at trial. The evidence from the media reports will be subject to interpretation. There is evidence of the comments having been made to people who were then apparently prospective customers. The defendants will argue that the statements complained of were never published and were made only to Mr. Himmelman and Ms. LeBlanc. Publication to a third party is an essential part of the claim. The Plaintiffs may indeed have some difficulty in establishing that. There is however a serious issue to be tried.

[38] The second part of the test requires that there be irreparable harm. That refers to the nature of the harm not its magnitude. The harm has to be of the kind that cannot be quantified in monetary terms or that cannot be cured. That can refer to the potential destruction of an irreplaceable item. It has also been held to include permanent market loss or irrevocable damage to business reputation. The reason underlying that is that it is all but impossible to actually determine at trial how much the damage to a business reputation has cost a company in terms of its profitability, both past and future.

[39] Part of the plaintiff's claim is based on a tort that requires the proof of damages. It has to establish that actual losses have been incurred as a result of the Defendant's actions. Those losses would be based on the effects on its business reputation. While there has been no admissible evidence provided in the course of the hearing of the motion to establish that damages have been incurred Demone is

not obliged to do that at this stage. It need only show that there is a serious issue to be tried and it has done that.

[40] Yet, it is fair to say that while losses might be established, the quantum of those damages would be difficult to prove. When statements are made to individual members of the public it is difficult to determine in any practical way, how many people might have heard the statements over a period of time and how many of those would have had their opinions formed in part by those statements.

[41] The third part of the test requires a balancing of relative inconvenience. If, as the plaintiffs claim, statements that are wrong in fact about their business practices are being made by the defendants they would potentially suffer damages over the period before the trial of the matter is heard. There would be no way to know how many potential customers had been affected. The Plaintiffs would be required to continue to absorb any losses during that time.

[42] An injunction in the form as proposed would limit the right of Heritage to free commercial expression. It would do so however in the most limited of ways. The statements to be prevented are precisely set out. Heritage should not be able to say that Demone uses granite from China. It doesn't. And Heritage should not be allowed to say to the public that Demone only uses premade, precut, prepolished and prefinished monuments. In the course of the motion the only evidence presented was that if such statements were made they were not true.

[43] Evidence may be entered at the trial of the matter to prove that any such statements claimed to be false were not made at all or, if they were made, were not made to the public or were true or were made in good faith or as a form of fair comment. At this stage however, the only evidence is that the restriction would

limit Heritage from making statements to potential customers of Demone that are both potentially damaging and not correct.

[44] This is not a situation in which comments are made in the course of an advertising campaign requiring that the campaign be pulled back or amended. Neither the potential damages to the plaintiff nor the inconvenience to the defendants are as great as if that had been the case.

[45] The risk to Demone if no relief is granted is that an unknown number of potential customers may hear information that may reasonably affect their impressions about Demone's business practices and that based on the evidence on the motion would be wrong in fact. The risk or inconvenience to Heritage is that it would not be able to make two specific statements to the public. It would not be restrained from making comparisons or from stating favourable or unfavourable opinions generally about the quality of Demone's products or services.

[46] The balance of inconvenience favours the granting of an interim injunction.

### **Form of the Injunction**

[47] Until this matter is resolved, the Defendants will be enjoined, from making public statements, including statements in the course of business to prospective or actual customers, as follows:

1. The Defendants are enjoined from stating that the Plaintiffs use granite from China for the headstones or monuments that they sell.
2. The Defendants are enjoined from stating that the Plaintiffs do not or do not have the capacity to cut, shape, polish, and finish monuments and headstones from larger pieces of granite.



**Costs**

[48] The parties have not made representations on the issue of costs. It should not be necessary for them to incur more costs on a matter of this nature. The motion was heard over one half day. The award of costs is made in favour of the Plaintiff in the amount of \$750.00. That is in keeping with the amount justified under Tariff C.

J.