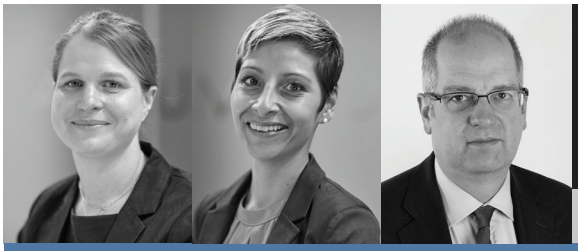

# Non-disclosure agreements under pressure

**BETH HALE, SAMANTHA MANGWANA and IAIN MILLER**

*It has, for many years, been standard practice to include non-disclosure agreements (NDAs) or confidentiality provisions in both employment contracts and settlement agreements. However, the routine inclusion of such clauses and the breadth of their drafting have been thrown into question by recent events.*

The precedent documents used by employment lawyers in most firms will include vanilla confidentiality provisions, which are rarely heavily negotiated, other than in exceptional cases. However, following recent high-profile scandals, including the Harvey Weinstein affair and the President's Club dinner, the use of overly onerous NDAs, particularly in cases involving sexual harassment allegations, has been put under the spotlight. Some commentators have suggested that their use in such cases is entirely inappropriate.

The House of Commons Women and Equalities Select Committee has launched an inquiry into sexual harassment in the workplace, which expressly includes in its remit 'the advantages and disadvantages of using non-disclosure agreements in sexual harassment cases, including how inappropriate use of such agreements might be tackled'.

On 12 March 2018, the Solicitors Regulation Authority (SRA) published a warning notice for solicitors on the use of NDAs. Much of the publicity around the warning notice has focused on its application to misconduct and harassment within the legal profession. However, it applies equally to lawyers who advise clients on NDAs, particularly where the other party to the agreement is an individual (whether represented or not). Of particular relevance to ELA, of course, is the role of employment lawyers in drafting and negotiating such clauses.

On 28 March 2018, a number of employment lawyers gave evidence to the select committee inquiry, largely in light of the NDA provisions that were included in the settlement agreement between Zelda Perkins (a former assistant to Harvey Weinstein) and Miramax; those provisions were described as 'morally lacking' by Ms Perkins and have been widely criticised in the press.

During that evidence session, Philip Davies MP suggested that while solicitors were aware of their obligations to act in the best interests of their clients, they were less clear on other principles of the SRA code of conduct, including acting with integrity and behaving in a way that maintains the trust the public place in them. This is a concern also raised by Professor Richard Moorhead, Professor of Law and Ethics at UCL, who, in his written evidence to the select committee, described 'evidence of a capacity of even elite lawyers to make significant, and sometimes catastrophic, errors of judgment because they fail to stand back and think about their broader professional obligations'. Many of us will baulk at this suggestion, but it does appear that there is at least a perception that some lawyers may have been complicit in 'gagging' individuals and allowing powerful employers to avoid scrutiny.

***Why use an NDA?***

Confidentiality provisions play a crucial role in protecting the confidential information of a business. Without express contractual provisions, generally only information that amounts to a 'trade secret' will be protected from disclosure by an employee both during and after employment (Faccenda Chicken). For this reason, most employment contracts will include some confidentiality wording in order to protect key sensitive documents such as client lists and financial information. This type of NDA will not usually purport to preclude an employee from disclosing incidents of sexual harassment, although this is reportedly what happened at the President's Club. In practice, clauses that do seek to extend that far would likely be unenforceable insofar as they seek to prevent workers from disclosing criminal behaviour or from

***'employees may consider that agreeing to keep details of the situation confidential is a price worth paying to avoid prolonged, uncertain and costly litigation'***

blowing the whistle in accordance with the relevant legislation (see further below).

In settlement agreements, NDAs are used (a) to protect confidential information where the provisions in an employment contract are inadequate or have fallen away due to a breach of contract; and (b) to prevent departing employees (and frequently the employer, its officers and its employees) from disclosing details of the circumstances of the termination and information about the settlement itself. It is this latter category that has proved controversial and such clauses are frequently called 'gagging clauses'. However, it is inaccurate to view such clauses as always being oppressive. The types of clauses seen in the Zelda Perkins NDA (which was provided in evidence to the select committee hearing) are extremely rare. For many employers, the presence of confidentiality provisions is key to the value of the settlement of a claim. Employees may also want to ensure confidentiality themselves and some may consider that agreeing to keep details of the situation confidential is a price worth paying to avoid prolonged, uncertain and costly litigation.

***What are the limitations on NDAs?***

There are five key legal restrictions on the enforcement of NDAs; in summary:

- an NDA will not prevent an individual from initiating a claim for harassment or discrimination under the Equality Act (or another statutory claim such as unfair dismissal), unless it is included in an agreement which satisfies the statutory requirements governing settlement agreements;
- in order to benefit from protection, information must have the 'necessary quality of confidence' (*Coco*). There is no absolute test as to what types of information will have such a quality, but it has been interpreted fairly broadly. There is no specific case law in relation to whether allegations of sexual harassment would qualify for protection, but it is assumed by many practitioners that they would;
- any agreement that purports to prevent an individual from making a protected disclosure under the whistleblowing legislation is void (s.43J ERA 1996). This means that a disclosure of information that satisfies the requirements of the whistleblowing legislation will not be in breach of any express or implied contractual duties (whether they are contained in an employment contract, a separate NDA or a settlement agreement);
- even if the statutory requirements for a protected disclosure are not made out, there are circumstances in which public interest overrides the contractual duty of confidentiality. This is often summarised by saying that there is a presumption that there is no confidence as to the disclosure of iniquity (*Gartside*), but in fact the principle extends further than this. This principle will apply where an NDA seeks to prevent the disclosure of a crime – which may be relevant in employment cases where sexual harassment is so serious as to constitute, for example, sexual assault, indecent exposure, stalking or offensive communications – but also where there is a genuine public interest in disclosing other information; for example, where there is misconduct of such a serious nature that it ought to be disclosed to others (*Putterill*), including recipients who fall outside the ambit of the Public Interest Disclosure Act 1998. There is a key, but rather opaque, difference here between what is in the public interest and what is simply a matter of public curiosity. This exception is not well defined in law, which makes it extremely difficult to advise upon with any certainty; and
- finally, an employer will generally not be able to enforce an NDA where an individual has disclosed information because he or she is required by law to do so; for example, where someone is required to give evidence in court.

***The SRA warning notice and regulatory obligations***

The warning notice published by the SRA is intended as a reminder of the existing position rather than a change in the rules on the use of NDAs. The notice provides that NDAs should not be used:

- as a means of preventing, or seeking to impede or deter, a person from:
  - reporting misconduct to a regulator;
  - making a protected disclosure under the whistleblowing legislation;
  - reporting an offence to a law enforcement agency (such as the police); or
  - co-operating with a criminal investigation or prosecution;

  or
- as a means of improperly threatening litigation against, or otherwise seeking improperly to influence, an individual in order to prevent or deter or influence a proper disclosure.

***'it is possible that abusive use of NDAs could constitute an attempt to pervert the course of justice'***

The notice also indicates that unenforceable NDAs should not be included in settlement agreements simply for their deterrent effect – individuals must not be given the impression that they cannot make disclosures which they are lawfully permitted to make. Finally, the notice states that 'it may be appropriate for the NDA itself to be clear about what disclosures are not prohibited by the NDA'.

This area is likely to be one of enhanced risk for those drafting NDAs in future. While there is an obligation to act in a client's best interest, this duty is not without its boundaries. It can, in some circumstances, be outweighed by the duty to maintain public confidence in the provision of legal services.

In light of the SRA's warning notice, extreme care should be taken in ensuring that an agreement is not being used for the ulterior purpose of moderating the behaviour of the other party by containing provisions that are unlikely to be enforceable. Where a client insists on such provisions, then the SRA will not consider that acting on the client's instructions, or in its best interests, or as part of a negotiation between legally represented parties, amounts to a reasonable explanation. As such, where a solicitor finds him or herself with a client who wants to insert arguably unenforceable provisions, then consideration will need to be given as to whether it is proper to continue to act.

It is clear from the warning notice that inappropriate use of NDAs may put solicitors and their firms in breach of the SRA principles, which could lead to disciplinary action being taken against them. In addition, it is possible that abusive use of NDAs could constitute an attempt to pervert the course of justice; for example, by seeking to prevent disclosure of a crime to the police, which could give rise to extremely serious consequences for those drafting them.

### *What is the future for NDAs?*

It is unlikely that NDAs will disappear altogether from employment and settlement agreements. They still serve a valid purpose in many situations – and in many cases they are there to protect victims as well as perpetrators, and indeed also protect those who are wrongly accused of harassment. A total ban on the use of NDAs in sexual harassment cases would interfere with parties' contractual freedom and risks discouraging employers from reaching settlement with employees, driving more cases to the employment tribunal and all the costs, time and stress involved on both sides of such litigation.

However, it is clear that consideration must be given to how NDAs are drafted, and recent events should certainly give pause for thought before the knee jerk inclusion of blanket confidentiality clauses or very minimalist carve-outs.

Other than in relation to some settlement agreements in specific sectors, there is currently no requirement for limitations of NDAs to be expressly set out in an agreement, although it is common practice to include carve-outs for whistleblowing, seeking legal advice and other disclosures required by law.

In view of the warning notice, there is a strong argument that these express carve-outs should be extended beyond the usual set to include:

- a clear explanation in lay terms of what falls within the whistleblowing regime rather than an opaque reference to s.43A ERA 1996;
- any voluntary (rather than only mandatory) disclosures to police and regulators;
- any disclosure to legal or medical advisers; and
- potentially, a broader exemption for disclosures of serious misconduct made in the public interest in certain circumstances but which are not otherwise strictly compliant with the particular requirements of the whistleblowing regime.

*Clawback clauses*

The SRA also states that solicitors should not improperly influence a party by reference to adverse consequences of making a disclosure. This shines light directly onto the use of clawback clauses (often included in settlement agreements) that require repayment of monies in case of a breach of the settlement agreement. Although some recent case law (*Cavendish* and *Imam-Sadeque*) means that carefully drafted clauses may be less likely to fall foul of the penalty doctrine, there will still frequently be a question as to their enforceability. It is not uncommon for advisers to employers to advise their clients of the risk that a clawback clause may not be enforceable, but that it can be included for deterrent effect nevertheless.

While the SRA warning notice does not represent a ban on clawback clauses, it certainly means that lawyers should carefully consider how such clauses are drafted and whether they are certain of their potential enforceability. Even if they are enforceable, lawyers should ensure that they do not have the effect of stifling the disclosure of serious wrongdoing.

***'the onus continues to fall on us as legal advisers, on both sides of disputes, to ensure that NDAs are not used in an abusive manner'***

*Non-derogatory statements clauses*

Other commonly used clauses, such as prohibitions on making derogatory comments and limitations on an individual's ability to assist with future litigation, will also need to be reconsidered (and limited) following the warning notice.

*Access to copies of NDAs, settlement agreements and employment agreements*

A prohibition on an individual retaining a copy of an NDA which he or she has signed, a feature in both the Zelda Perkins NDA and the document reportedly used at the Presidents Club, will never be appropriate – but is, in any event, rare.

### *Revisiting ethical obligations*

In view of the above issues, it would be sensible for all employment lawyers to consider the extent to which ethical rules may have an impact on their future approach to NDAs; a minimalist approach may have been acceptable in the past, but it is not likely to withstand scrutiny going forward.

The question each lawyer advising on NDAs should ask is whether they would feel comfortable with the drafting if, at some time in the future, it was scrutinised by the SRA, particularly as heightened awareness following the warning notice may, in practice, result in increased reporting to the SRA where solicitors appear to fall short of their ethical obligations. Solicitors should be prepared to take personal responsibility for the drafting of provisions rather than relying on precedents or delegating drafting responsibility to juniors or others not directly involved in the negotiation of terms.

### *Conclusion*

There is significant push for change in this area. In addition to the publication of the warning notice and the ongoing select committee inquiry, the Employment and Human Rights Commission has published a report, 'Turning the tables: Ending sexual harassment at work' which includes recommendations on the use of NDAs and the Law Society is considering guidance on their appropriate use.

Further guidance would be welcome, particularly in areas where the law is not as clear as it might be. In the meantime, the onus continues to fall on us as legal advisers, on both sides of disputes, to ensure that NDAs are not used in an abusive manner.

*This article was written by Beth Hale and Samantha Mangwana of CM Murray LLP, and Iain Miller of Kingsley Napley LLP*

***KEY:***

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| *Faccenda Chicken* | *Faccenda Chicken Ltd v Fowler* [1984] ICR 589 |
| ERA 1996 | Employment Rights Act 1996 |
| *Coco* | *Coco v A N Clark* [1969] RPC 41 |
| *Gartside* | *Gartside v Outram* [1857] 26 LJ Ch (NS) 113 |
| *Putterill* | *Initial Services Ltd v Putterill* [1967] 3 All ER 145 |
| *Cavendish* | *Cavendish v Makdessi* [2015] UKSC 67 |
| *Imam-Sadeque* | *Imam-Sadeque v BlueBay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB) |