



## Should confidentiality clauses be banned? Be careful what you wish for

By **Paul Quain** - 30 November 2018

In the UK, non-disclosure agreements (or NDAs as they have now become known) is a term used to describe two distinct types of agreement.

The most common purpose was to provide a form of agreement for people who were having talks with each in relation to their businesses, usually thinking about merging or working together in some way. A non-disclosure agreement was a way of both sides saying that that they would not use any information gained from preliminary talks for commercial gain. These are uncontroversial, and nobody is talking about getting rid of these.

More recently NDAs have also been used to describe agreements (or clauses within agreements, often called “confidentiality clauses”) which prevent people talking about the content of a legal claim they have against an individual or company. This is because both parties will have agreed to settle their dispute, which has usually been reached through the payment of money to the individual who has been prevented from speaking. It is this latter type of NDA which has become notorious and there many voices calling for such clauses to be prohibited.

Not a week has gone by in recent months that NDAs have not made the press. First there was the #MeToo movement, followed by the ongoing cases against Harvey Weinstein in the US, the stories about Philip Green here, the press speculation about the allegations against Cristiano Ronaldo and the Financial Times expose about behaviour at the President’s Club. All these events, and more, have highlighted abuses of power and suggested that it is inherently wrong for people to not be able to disclose heinous behaviour.

In fact, settlement agreements (which used to be called compromise agreements) have been used for decades in the employment world to settle disputes between employers and employees. Sometimes employees bring meritorious claims and complain about appalling treatment they have suffered, and sometimes claims can be a vehicle to negotiate a more significant sum of money on departure. Often (as in very many disputes) the fault is not all on one side. If an employer suspects an employee of causing mischief,

it is very unlikely to offer any money to that employee if it feels that the employee has an axe to grind and will go to the press. A clause in a settlement agreement prohibiting this was often a useful way to encourage an employer to settle with an employee. NDAs can act as both a shield and sword, depending on who is wielding the power.

In the vast majority of cases employees are quite happy never to have to talk about the circumstances of the case again. In fact, three of the parties in the Philip Green case who signed settlement agreement wanted the agreements to remain confidential. Whilst it must be right that people should not be prevented about talking about serious crimes (although in this author's view it is very unlikely that such a clause would probably not be enforceable in any event), we may be in danger of throwing the baby out with the bathwater. If we prevent NDAs from finding their way into settlement agreements, the perverse effect may be that employers are discouraged from settling at all, or at least on far less generous terms.

Although we have, right now, a very particular zeitgeist in relation to NDAs and settlement agreements, there needs to be greater appreciation for their wider purpose. However, such middle ground voices tend to be lost in the heat of the argument as those striving for social change see that their opportunity to enact long term change has a narrow window which they must exploit. A glance at the press would indicate that the public mood is firmly against NDAs, but clearly this anger is targeted towards NDAs used in the specific context of sexual harassment and abuse of power.

We are already experiencing all kinds of unintended consequences as a result of decisions in the light of Brexit. We perhaps need to be alert to other significant unintended consequences if confidentiality clauses are outlawed.