Kingsley Napley

Non-Disclosure Agreements: One year on

This paper is based on a roundtable discussion held at Kingsley Napley LLP in May 2019. The discussion was held under Chatham House rules and was attended by guests who are senior within their organisations. Most specialised in law firm risk management or employment law and/or hold specific expertise in legal ethics.

Introduction

Whilst the discussion raised a number of interesting points which we deal with below, it also demonstrated that the central issue remained the fact that there is currently a lack of a clear understanding as to what is and is not permitted in relation to NDAs.

A peculiar feature of NDAs is that responsibility for the issues they raise is spread across a wide range of bodies. They include regulators, courts, representative bodies, government and other interested groups. No one organisation has ownership. That has led to a lack of clarity. That uncertainly is best addressed by authoritative guidance and agreed standard form documents that could be relied upon by those practising in this area. The court has in the past adopted this approach in relation to, for example injunctions. However, the Court has not traditionally supervised what are essentially private contractual agreements which certainly include NDAs.

Background

In April 2018, Kingsley Napley sponsored an event hosted by UCL's Centre for Ethics and Law on Non-Disclosure Agreements ("NDAs"). An invited audience of employment practitioners, regulators, and regulatory experts discussed what was then a new issue around the use of NDAs, or more accurately the use of confidentiality clauses in employment settlement agreements. By that stage, the NDAs relating to Zelda Perkins and the President's Club had been the subject of much public debate. The Solicitors Regulatory Authority ("SRA") had

issued its Warning Notice whilst the event was being planned. That event led to a Think Tank Report by the Centre of Ethics and Law.

Since then, there have been a number of further developments. These include:

- The Women and Equalities Select Committee took evidence from lawyers and complainants as well as the SRA, as part of its enquiry in relation to Sexual Misconduct in the Workplace.
- The Telegraph became involved in litigation with Sir Philip Green and Arcadia, in relation to stories it wished to run which at that time were protected by NDAs. Those proceedings led to a judgment in the Court of Appeal and a campaign by the Telegraph around the use of NDAs.
- The Women and Equalities Select Committee undertook a further enquiry into the use of NDAs. This report was published after the roundtable took place and again emphasised the need for the legal profession to do more in relation to NDAs.
- The Government has also issued a consultation paper on the use of NDAs.
- The Law Society issued a Practice Note on the use of NDAs.

Against this background, Kingsley Napley thought these issues should be re-visited with an invited group of specialists whose experience and knowledge cover the areas included. Hence the roundtable which was held under Chatham House Rules.

Outlined on the following pages are some of the points and suggested areas for enhanced clarity which emerged.

1 There remains a level of uncertainty about the precise boundaries of acceptable terms in the drafting and negotiation of NDAs

This is for two reasons. First, the fast and continuing pace of development has led solicitors to become concerned that agreements reached today may be reviewed critically in the future as the approach to NDAs evolves. There clearly has been a shift in public attitudes. What is less clear is whether that shift will continue and include matters that have so far not attracted criticism. The uncertainty in this area is compounded by the approach taken by the SRA that their Warning Notice contains nothing new. They would presumably take a similar approach to any future shifts and therefore solicitors could face criticism in relation to cases they are dealing with now where they have considered their position on currently available information. Second, the issue goes beyond the use of particular clauses and extends to the facts of each case or indeed how negotiations were conducted.

The only existing guidance for solicitors is the SRA Warning Notice and the Law Society's Practice Note 2

The former was subject to some criticism for not dealing with all the issues although others thought it was very clear. The Law Society's Practice Note did attract some criticism for being equivocal in relation to the advice given. A further matter that was discussed was the extent to which law firms are under an obligation to audit previous NDAs, particularly in light of the SRA's position that the Warning Notice did not raise new issues and because the Warning Notice specifically refers to the obligation to report. The general feeling was that this would not be proportionate. Nonetheless, if concerns were raised about particular circumstances, these should be investigated.

3 It would be helpful for there to be a default form of wording that was authoritative and agreed, with any departure from the wording being possible, but subject to the need for it to be justified on a case by case basis

This would be similar to the way in which standard form court orders such as freezing injunctions are used. It would be extremely helpful in enabling solicitors to have confidence that they are acting appropriately.

It should be clear what the confidentiality agreement does not prevent 4

This could be in the form of a short standard form of words on the front of every settlement agreement which will state in plain English what was not/could not be prevented by the agreement, such as reporting to the police, regulators, medical practitioners etc.

5 There was still a level of uncertainty as to what criminal offences might be committed either by entering into an NDA or as a result of the terms of the agreement

The following primary criminal offences are engaged: 1) Perverting the Course of Justice; and 2) Concealing contrary to section 5(1) of the Criminal Law Act 1967. Appendix A includes a short note, which sets out the relevant offences.

Therefore, while an NDA which included a financial settlement would be lawful, any increase in the consideration to secure a confidentiality clause (in relation to the police) would run the risk of the parties committing a criminal offence. Similarly, securing the resignation of a "suspect" in exchange for not reporting a criminal offence to the police is capable of amounting to Concealing.

It should be presumed that NDAs arising from incidents of sexual misconduct may well become evidence in a police investigation or during the course of proceedings. As such, the terms, together with the settlement figure, ought

carefully to be scrutinised to ensure the agreement does not contravene the criminal law.

6 The use of NDAs should be the subject of greater controls within law firms

Law firms may wish to consider whether the use of NDAs in employment cases should be subject to a higher level of scrutiny. This is because on account of recent developments, they now present a higher level of risk than before. For example, they might require approval at a certain (higher) level. Another suggestion was that clients could only be allowed to enter into NDAs in employment cases with Board approval. An additional level of oversight could be introduced in this way.

7 There may need to be a higher level of regulation around NDAs in employment cases

This could include more specific requirements in relation to the financial contribution made by the employer for the employee to obtain (independent) legal advice and a requirement that the NDA needs to be signed off by a qualified lawyer or other qualified adviser specifically authorised to advise on such matters.

Where to next?

The last 18 months have seen a constant stream of events which have drawn focus back to the legal profession on how it deals with NDAs. There is every reason to expect this will continue until the various issues, including those highlighted in this paper, are resolved. In short, this issue is not going away.

Kingsley Napley would like to thank all those involved in the roundtable for their contributions. Our specialist practice areas engage with many of the different aspects of NDAs as it covers employment law, legal services regulation, criminal law and reputation management.

Kinsley Napley retains its long term interest in the issues around NDAs. We are currently considering projects that might address the concerns raised above, and we intend to return to the issue again.

Key contacts

Iain Miller
(view profile)
Partner
Regulatory

imiller@kingsleynapley.co.uk
+44 (0)20 7566 5273

Julie Norris
(view profile)
Partner
Regulatory

jnorris@kingsleynapley.co.uk
+44 (0)20 7814 1290

Richard Fox
(view profile)
Partner
Employment

rfox@kingsleynapley.co.uk
+44 (0)20 7814 1285

Sandra Paul
(view profile)
Partner
Criminal Litigation

spaul@kingsleynapley.co.uk
+44 (0)20 7814 1259

Gerard Cukier
(view profile)
Partner
Reputation & Media

gcukier@kingsleynapley.co.uk
+44 (0)20 7814 1212

Helen Morris
(view profile)
Legal Counsel
Reputation & Media

hmorris@kingsleynapley.co.uk
+44 (0)20 7566 2938

Appendix A

Criminal offences

The offence of Perverting the Course of Justice is made out where an individual does an act tending and intending to pervert the course of public justice. Acts tending and intended to obstruct, divert or disrupt criminal proceedings or investigations generally may suffice[1]. This includes acts performed after the alleged crime has been committed but before investigations into it have begun[2]. A clause preventing or which has the effect of discouraging someone from making a report to the police or giving evidence at court, would be caught by this common law offence.

The offence of Concealing is made out where: a) a person knowing or believing that another person has committed a relevant offence; b) has information which might be of material assistance in securing the prosecution or conviction of an offender for it; and c) accepts or agrees to accept for not disclosing that information, any consideration other than the making good of loss or injury caused by the offence or the making of reasonable compensation for that loss or injury. A "relevant offence" is an offence for which the sentence is fixed by law or an offence for which a person aged 18 years or over may be sentenced or imprisoned for a term of five years.

[1] *USA v Dempsey* [2018] EWHC 1724 (Admin)
[2] *R v Rafique* [1993] Q.B. 843