The use (and abuse) of NDAs – risks for clients and professionals

Non-disclosure agreements ("**NDAs**") have long been a feature of the legal landscape, but have come under increasing public scrutiny in recent years due to concerns over their use to prevent whistleblowing, conceal wrongdoing and impede the media's reporting on matters of public interest. For most people, their exposure to NDAs will be limited or non-existent, but NDAs are commonly used in business to facilitate the exchange of sensitive commercial information.

Many in business, including in-house legal professionals, are used to assuming that NDAs and non-disclosure provisions are a simple solution to the problem of exchanging confidential information with suppliers or customers, settling a dispute with a commercial counterparty, or dealing with employees who resign or are dismissed in difficult circumstances.

It is important to understand, however, that there are limits to how NDAs can and should be used and that their use beyond specific restrictions in the employment context. The Horizon scandal has brought this into sharper focus, with NDAs allegedly having been used to prevent sub-postmasters from sharing and publicising their experience with the Horizon IT system – information which could have undermined the Post Office's prosecution strategy (and the jobs of those who depended on it) as well as the reputation of the Post Office.

In a warning notice to the profession on the use of NDAs and non-disclosure clauses in broader agreements last revised in 2020 (SRA | Use of non-disclosure agreements (NDAs) | Solicitors Regulation Authority), the Solicitors Regulation Authority ("**SRA**") cautioned against the use of NDAs by law firms, in-house lawyers and managers to prevent reporting to the SRA, the making of disclosures protected by law, or to take unfair advantage of the

other party.

The SRA made clear that solicitors should "*not attempt to prevent anyone from providing information to* ***any … body exercising regulatory, supervisory, investigatory or prosecutory functions in the public interest***" and that they are under a positive duty to "***report promptly to*** *the SRA, or another* ***approved regulator … any facts or matters that you reasonably believe are capable of amounting to a serious breach of their regulatory arrangements by any person regulated by them*** *… of which you are aware*". NDAs should not give the impression that such disclosures are prohibited, and solicitors are required to use "*plain English*" and to be "*clear … what disclosures can and cannot be made and to whom*".

Further, the SRA makes clear that a solicitor's duty not to take "unfair advantage" of an opposing party applies even if that party is represented by a lawyer or professional advisor, and extends to the use of "*undue pressure or … inappropriate aggressive or oppressive tactics*".

The abuse of NDAs remains a live issue, with the Legal Services Board ("**LSB**") having completed a "call for evidence" in mid-2023 and issued a summary of its findings in February 2024 (Legal Services Board – The misuse of non-disclosure agreements: call for evidence themes and summary of evidence). These suggested widespread ignorance of the SRA's warning notice and concern that the principes within it are honoured mostly in the breach, something that the LSB considers "*has the potential to undermine the rule of law and proper administration of justice*". The LSB's "next steps" for 2024-2025 include requiring legal regulators to assess and report on the effectiveness of their own regulation and consider what additional regulatory steps may be necessary.

In the context of a July election and public response to the Horizon enquiry, it seems plausible that any incoming government will look to support regulatory action and regulatory changes by the SRA and LSB, especially if this can be done without the need for Parliamentary time and additional primary legislation.

With the LSB promising further action in 2024 and 2025, businesses should therefore tread carefully when using NDAs or non-disclosure clauses to resolve current or potential disputes, especially where there is a disparity of negotiating power, or where the NDA's purpose or to implicitly or explicitly restrain another person from disclosing information on wrongful or illegal conduct to any person who exercises regulatory, supervisory, investigatory or prosecutory functions in the public interest.

External and in-house lawyers should be particularly careful that their approach to drafting and negotiating such provisions is in line with the SRA's warning notice, given the potential for conduct investigations should there be a later dispute with the counterparty regarding a breach of the NDA.

In turn, businesses should be aware (and be made aware by their professionals) that pressure to take unreasonable positions, include unenforceable "in terrorem" provisions, or apply excessive leverage to the counterparty for commercial advantage may not only place their professionals in an impossible position, but as the Horizon enquiry has shown, could undermine the effectiveness of the NDA and result in substantial damage to the business's reputation, potentially disproportionate to the benefit obtained.

How we can help

At Cripps, we ensure that we craft effective and appropriate solutions to protect our clients' confidential information. Please get in touch with one of the team members to see how we can help you.

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