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Professional Ethics and NDAs: Contracts as Lies and Abuse?

Professional Ethics and NDAs

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Catharine MacMillan's chapter in this volume takes us comprehensively and critically though contractual doctrine relevant to non-disclosure agreements (NDAs).[1] She points to the potential for serious abuse; the weakness in relying on the 'emancipating effect' of outside advice; and especially the potential for challenge because of duress or illegality.[2] Her analysis presents a challenge from within contract law to judges and lawyers who see these agreements primarily in terms of freedom of contract.[3] I wish to present a challenge more external to contract law: a challenge posed by professional ethics. The paucity of challenge to NDAs from within contract is partly a function of the complexity of the law, but more likely the result of structural inequalities presented by rich, well-resourced individuals deploying canny drafters and vigorous 'reputation management' teams. Professional regulation poses challenges that lawyers, but also judges, as interpreters of contracts, need to take more seriously. As MacMillan also reminds us, NDAs enable cloaks of secrecy to be thrown over sometimes serious wrongdoing in areas of public interest as wide-ranging as health, education, policing and the Church.[4] It is in the silencing of women harassed and attacked by men that they have gained their most telling notoriety. The movie producer Harvey Weinstein and the retailer Philip Green are now synonymous with NDAs and the #metoo movement. At a charitable President's Dinner event, employed

* I have benefited significantly from the thoughts of Prince Saprai, Philippa Collins, Paul Davies and Lucinda Miller in developing this chapter. All errors are my own.

[1] C MacMillan, 'Private Law and Public Concerns: Non-disclosure Agreements in English Contract Law', ch 15 in this volume.

[2] ibid [9-10 of the draft??]

[3] J Cohen, 'Non-Disclosure Agreements: The Truth behind the Headlines' *Counsel Magazine* (London, February 2019) available at www.counselmagazine.co.uk/articles/non-disclosure-agreements-the-truth-behind-the-headlines.

[4] MacMillan, 'Private Law and Public Concerns' (n 1) [4-5 in CM's draft]

hostesses were, 'groped, sexually harassed and propositioned'.[5] In apparent anticipation, they were asked to sign NDAs, which they did not have time to read and were not allowed to keep.[6]

I shall focus, in particular, on the Green and Weinstein cases, showing with regard to the former that whilst balancing key rights, privacy and the rights of the press in the public interest, upholding contracts has so far trumped in law but may not in professional ethics.[7] I shall explain how the judges in that case failed to consider a key and, I would argue, inappropriate clause in giving Philip Green's NDA a clean bill of health. In outline, the arguments are that the contract asserted rights that did not exist, asked for warranties that could not be enforced and sought indemnities that should not be paid (as penalties). Its terms were, in professionally punishable ways, likely to be lies and abuse. I use it as an example of how, when negotiating contracts that misstate the law or take unfair advantage of their client's opponents, lawyers are in professionally punishable ways cheating on their clients' behalf.

I highlight some of the professional ethics dimensions of NDAs and how those agreements might, on the facts as known, instantiate criminal offences. I am conscious that such arguments are challenging ones. Some will recoil with an emotional intensity. It is unseemly in the extreme to suggest that reputable lawyers might be liars, cheats, even criminals. But those arguments stand up on the facts as known. Equally, because the facts are not *all* known, I do not assert that criminal offences have been committed here. That would require a rounded consideration of all the facts by a jury. And such facts are not available to us. There is, however, a colourable claim that offences have been committed on the face of those agreements.

My interest in this illegality is not to seek prosecution, or to shame individuals, but to show how far into serious professional misconduct the drafting of bad contracts may take us. I consider along the way some of the other potential professional misconduct problems highlighted by the two case studies: those of Zelda Perkins and Philip Green.

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[5] M Marriage, 'Men Only: Inside the Charity Fundraiser Where Hostesses Are Put on Show' *Financial Times* (23 January 2018) available at https://www.ft.com/content/075d679e-0033-11e8-9650-9c0ad2d7c5b5.

[6] ibid.

[7] *Arcadia Group Limited and others v Telegraph Media Group Ltd* [2019] EWHC 223 (QB) [40].

I. Zelda Perkins

Zelda Perkins left her job with Miramax in 1998, following allegations that Harvey Weinstein had attempted to rape a colleague of hers and repeatedly sexually harassed her. Weinstein denies allegations of non-consensual sex or acts of retaliation against any women for refusing his advances.[8] Having spoken out publicly,[9] Perkins gave written and oral evidence to the House of Commons Women and Equalities Committee (WESC) as part of their investigation into sexual harassment in the workplace.[10]

Simons Muirhead and Burton (SMB) represented Perkins. A recently qualified solicitor conducted the negotiations with Miramax and Weinstein. Those negotiations were hosted and conducted by Allen and Overy, with a lawyer from Miramax also present.

Advised against seeking Weinstein's prosecution, Perkins and her colleague understood that they 'had no option' other than settlement, with stringent NDAs.[11] At Perkins' insistence, SMB requested £250,000 in compensation (her salary was about £20,000 at the time and her colleague's was £16,000, so well in excess of one year's income).[12] Although SMB thought this unrealistic, the request was accepted subject to negotiation of terms. Those negotiations apparently concentrated on the Weinstein team pushing Perkins to name each person she had spoken to about her claims, and Perkins seeking undertakings that Weinstein would attend psychological therapy and that Miramax would institute policies to protect future complaints within the firm.

Perkins describes the assistant solicitor who conducted the negotiations – albeit sometimes with a more experienced barrister on hand for advice – as, 'utterly out of their depth',[13] and the

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[8] M Garrahan, 'Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims' *Financial Times* (23 October 2017) available at https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589.

[9] ibid.

[10] Z Perkins, 'Written submission from Zelda Perkins (SHW0052)' (March 2018) available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/written/80725.html; Z Perkins, 'Oral evidence: Sexual Harassment in the Workplace' (HC 725, 28 March 2018).

[11] Perkins, 'Written submission' (2018) (n 10).

[12] Perkins, 'Oral evidence' (n 10).

[13] ibid.

negotiating sessions as gruelling, intimidating and frightening. One session ran 'from 5pm until 5am'. A week after the negotiation, Perkins and her colleague were brought back to a meeting at which Weinstein was present, to sign the agreement. She said:

> He had a long conversation with us, trying to bring us back to the company and apologising for his behaviour. In fact, it was almost a full admission, which my lawyer noted. He was then not allowed to leave the room with that piece of paper unless it was destroyed.[14]

She was not allowed to keep a copy of the agreement.

A. The Weinstein-Perkins Agreement

An extract from the NDA has been published.[15] Beyond that, most of what we have heard about the agreement comes from Zelda Perkins. Mark Mansell, the partner from Allen & Overy (A&O) responsible for drafting it, declined to comment on the agreement specifically because of client confidentiality. He did provide comments that tell us quite a bit about the agreement, though, because he commented generically on agreements 'like it' whilst also indicating the agreement was unusual, in some ways exceptionally so.[16] Thus, we learn that refusing a copy for one of the parties 'would be extremely rare – very, very rare'. He could think of no other case where non-disclosure required a medical practitioner to sign an NDA before treating the woman. And a condition that a signatory cannot get further legal advice without having another NDA with that lawyer 'would not be normal'. Long overnight negotiations, whilst sometimes justified, he indicated, would not be at all usual. Similarly, opponents would never be present in the same room in a negotiation, only in a mediation. That background given, let us turn first to looking at some of the actual clauses.

Of crucial significance is clause 6(a). It requires Perkins to keep any information she has confidential unless she has, ' the prior written consent of Harvey Weinstein or Bob Weinstein'. And any

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[14] ibid.

[15] Excerpt NDA Agreement, Z Perkins, 'Supplementary Written Evidence from Zelda Perkins (SWH0058)' available at www.parliament.uk/documents/commons-committees/women-and-equalities/Correspondence/Zelda-Perkins-SHW0058.pdf.

[16] M Mansell, 'Oral evidence: Sexual Harassment in the Workplace' (HC 725, 28 March 2018).

legal advice on the agreement she receives must be given under an NDA approved by Miramax. Even then, disclosure is expressly prohibited

> except to any entity if required by legal process … but you will first, in the case of any civil legal process and where reasonably practicable in the case of any criminal legal process, give not less than forty eight (48) hours prior written notice to the Company through Mark Mansell at Allen & Overy before making any such disclosure and if any disclosure is made you will use all reasonable endeavours to limit the scope of the disclosure as far as possible. You agree to provide reasonable assistance to the Company and its legal advisers if it elects to contest such legal process. In the event that the Company does not contest such legal process or the challenge is not successful, you may make disclosure to your legal advisors (who must first agree in writing to execute a confidentiality agreement in a form satisfactory to the Company in the form of paragraph 6) but you will use all reasonable endeavours to limit the scope of the disclosure to your legal advisors as far as possible.

So, written consent is needed to make *any* disclosures voluntarily. Disclosure must only be given in legal proceedings if Perkins is *required* to do so. And any attempt to compel Perkins through legal process has to be *notified* to Miramax. Any disclosure has to be *as limited in scope as possible* (presumably in discussion with Miramax and/or Weinstein, or Perkins would be required to guess for herself what is necessary), but prior to that, she must *provide any assistance asked for in Miramax's contesting* her being so compelled. Notably, the clause envisages notification and contestation taking place prior to her seeking legal advice.

The clause thus prevents Perkins from making a criminal complaint. If Perkins wished unilaterally to disclose information to the police, under the agreement she would need the Weinsteins' permission in writing. Similarly, Perkins cannot instigate civil legal process or respond voluntarily to others who do so.

It might be argued that she could ask for consent and the Weinsteins would have to grant it because to do otherwise might pervert the course of justice. To know this was possible, she would

presumably need legal advice.[17] This would be rendered difficult because she was refused a full copy of the agreement. Perkin's new solicitor might also object to advising under an NDA on the basis that it would compromise their independence and ability to represent the client's best interests.

Even when cooperating with lawful process, the clause permits disclosure by Perkins only if she is *required* to cooperate. Ordinarily, a witness is not required to give evidence to the police. Preventing Perkins from giving evidence voluntarily thus rules out the dominant means by which the police would investigate such matters. If a witness refuses to cooperate having been approached, there is a strong likelihood the police would not proceed to investigate the lead – they cannot compel a witness to give evidence, short of arresting them for the offence under investigation and seeking to interview them (and then the arrestee can remain silent).[18]

Similarly, in civil matters, such as a claim by a fellow employee that Weinstein had harassed them, civil litigants could issue a witness summons to require Perkins to give evidence but would not know what her evidence would be, and might have to contend with the potential for well-resourced objections from Miramax.

To take the matter further, how would a potential litigant or prosecutor know to compel Perkins as a witness? They would want to know, in broad terms, what Perkins would be likely to say before considering compelling her to give evidence at trial. If they summoned her to give evidence, that would raise a suspicion that Perkins had already breached the NDA. In this way, Perkins would likely feel at risk of breaching the NDA if she had even intimated willingness to talk if compelled.

Even if these hurdles are overcome, the requirements to limit disclosure suggest significant opportunities to inhibit and shape Perkins' giving of evidence. There is potential, for instance, for a requirement not to disclose more than is necessary to have a significant chilling effect on any evidence given.

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[17] Her evidence does not suggest that any doubt about the enforceability of the clauses was conveyed through advice at the time.

[18] It is possible for potential witnesses to be compelled to give evidence by a magistrates' court, under the Crime and Disorder Act 1998, sch 3, para 4, but this power is granted on application to a magistrate after a defendant has been charged and is to be sent for trial. A prosecutor would have to have sufficient evidence to charge before making this application.

In this way, the dominant, likely impact of the clause is to effectively preclude Perkins from cooperating with either civil or criminal process. Even in the unlikely event that cooperation were to be compelled, that cooperation is inhibited and the agreement buys time, and opportunities for intervention, for Miramax/Weinstein in the process.

Mark Mansell only hints at an explanation for the onerous agreement, saying agreements may be more extensive where high-profile public figures have particular sensitivities around reputation. Mark Mansell also concedes, 'it would not be either reasonable or lawful to prevent somebody from participating in a criminal process'. As we have seen, the agreement seems plainly intended to influence whether, when and how any such participation takes place. In particular, he suggests that a clause could legitimately be used to prevent certain kinds of confidential information being given to the police: 'information being disclosed that is not necessary for that process, [such that] the individual who is seeking to protect those interests has an opportunity to be involved'.[19]

In seeking an opportunity for a suspect to be involved in guarding the evidence of a witness, the opportunities to apply pressure to Perkins are clear. Unfortunately, it is not implausible that leading lawyers would engage in such pressure. Indeed, other partners in Mansell's firm in a different case have been so implicated.[20] Any time or information gained during this opportunity might enable Weinstein's teamto spread their efforts to understand who the other complainants against Weinstein might be – apparently a key element of the original settlement negotiations.[21] This might suggest a wider attempt to control evidence as well as adverse publicity. They may, although this is speculation, also have NDAs against some of the other witnesses to whom the prosecution have spoken, which they may similarly seek to enforce.

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[19] ibid.

[20] A serious bribery trial was adjourned at significant cost because of allegations that A&O lawyers had pressured prosecution witnesses in the week leading up to a trial. C Binham, 'Two Allen & Overy Lawyers at Risk of Probe over Dahdaleh Case' *Financial Times* (26 March 2014) available at www.ft.com/content/b0e47460-b4dd-11e3-af92-00144feabdc0.

[21] Perkins, 'Oral evidence' (n 10).

II. Might the Use of This Kind of Clause Amount to Perverting the Course of Justice?

The offence of perverting the course of justice (PTCoJ) is committed where someone (i) acts or embarks upon a course of conduct, (ii) which has a tendency to and (iii) is intended to pervert (iv) the course of public justice.[22] Does the Zelda Perkins clause, given evidence on the context, give rise to a concern that the offence may be made out?

An NDA clearly constitutes a positive act. A tendency to pervert the course of justice requires, 'a possibility that what the accused has done "without more" might lead to injustice'.[23] There is an obvious risk that an NDA in the above terms 'without more' leads to an injustice. Perkins is likely prevented from reporting and inhibited from cooperating with police enquiries. Indeed, if my construction of the clause is accepted, it operates to preclude disclosure of evidence to the police pre-charge. And it is likely to shape the nature of any disclosure. A potential suspect is empowered to limit or shape criminal proceedings. Plainly, PTCoJ covers concealing or destroying evidence with intent to influence criminal investigations and preventing a witness giving evidence. Agreeing to conceal a crime prior to an investigation is also capable of being PTCoJ. In many ways, the NDA's practical impact is similar.

As for intention, it is not necessary to show dishonesty. What has to be shown is that the act complained of has a tendency to pervert the course of justice and that the defendant intended it to do so. It is not necessary to show the wrongdoer believed they were acting through unlawful means but that they had engaged in 'the intentional doing of an act having a tendency, when objectively considered, to pervert the course of justice'.[24]

The test would be, then, whether the inhibiting of Zelda Perkin's disclosures to the police was intended to affect the course of

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[22] *R v Vreones* [1891] 1 QB 360.

[23] *R v Murray (GE)* [1982] 1 WLR 475 (CA), (1982) 75 Cr App R 58; and see *R v Firetto* [1991] Crim LR 208 (CA).

[24] Archbold, citing A-G's Application; *Attorney-General v Butterworth* [1963] 1 QB 696 (CA) 726 (Donovan LJ); *Connolly v Dale* [1996] QB 120, [1996] 1 Cr App R 200 (DC) 205 (Balcombe LJ); *R v Meissener* (1995) 130 ALR 547 (High Court of Australia) (cited in *Lalani* [1999]1 Cr App R 481, 491–92); and I. Cram (Ed.) Borrie and Lowe's *The Law of Contempt*, 3rd edn (LexisNexis 2010) 64 ff, 410 ff.

justice. There are a number of reasons for thinking that it was. The agreement was intended to reduce substantially the likelihood of information from Zelda Perkins, or from any of the other people she has spoken to, coming to the attention of the police or third parties. Whilst this intention might be sufficiently evidenced by the agreement itself, the broader attempts to identify who Perkins has spoken to, and the wider history of Weinstein's conduct being 'widely known', would likely be relevant.[25]

The more the lawyers involved can distance themselves from such knowledge, and the more plausibly they can mount the case that the NDA was solely aimed at protecting reputation rather than inhibiting the flow of information to the police, the less likely the intention is made out. We should not dismiss out of hand the possibility that controlling information that goes to the police might be legitimate. After all, the police sometimes use information inappropriately during investigations.[26] However, it is not enough to claim that protection of reputation was one of the aims. If a substantial aim was also to inhibit or shape a police investigation, this is enough, potentially, for an offence to be made out.

Similarly, whilst it would be argued that the NDA was part of a normal and legitimate strategy for managing sexual harassment allegations, it may not be enough that the strategy was potentially legitimate. Even if the agreement is lawful, this is not in and of itself a protection against a criminal charge. By way of example, in contempt cases, a solicitor's employing lawful threats improperly has been found to amount to contempt.[27] A lawful threat, or exercise of a legal right, can constitute an act intended to pervert the course of justice, 'if the end in view is improper'.[28] What matters is the intent behind the NDA, not the lawfulness of the agreement (and in any event the lawfulness of this agreement is in doubt). Influencing justice through a respectable solicitor is not a prophylactic against prosecution.

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[25] Perkins gave this evidence and it was supported by the evidence of R McGowan, 'Submission to the Women and Equalities Committee on Sexual Harrassment and the Abuse of Non-Disclosure Agreements (NDAS)' (19 April 2018) [*sic*] available at http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/Sexual%20harassment%20in%20the%20workplace/written/81746.html.

[26] The disclosure of confidential information from the police investigation of the former minister Damian Green and the televised investigation of Cliff Richard come to mind.

[27] *Re Martin (P)*, *The Times* (DC, 23 April 1986).

[28] *R v Toney; R v Ali* [1993] 1 WLR 364, (1993) 97 Cr App R 176 (CA).

Wrongful interference with a witness can include 'improper pressure'.[29] It is even possible for an intention to pervert to be found when improperly pressuring a dishonest witness to tell the truth.[30]

It is not certain, but there is sufficient evidence to suggest that what was done here was not just dubious, it was criminal. Under Crown Prosecution Service guidance, prosecutors bringing such case also have to satisfy themselves that there are serious aggravating features.[31] And any defence might seek to argue that applying PTCoJ in such circumstances is an extension of the offence into new territory, which should only be done cautiously, step by step.[32] The latter argument is weak: the analogy between what was done here and the simple concealing of evidence is strong, but a judge faced with any prosecution of reputable solicitors might be persuaded.[33] Only a trial, with fuller evidence, would be likely to decide. But my principal interest in making this argument is not prosecution but showing how far from professional principles the use of NDAs can lead solicitors to stray.

III. Professional Ethics Perspectives

What, then, of professional rules applicable to this situation? The Solicitors' Code of Conduct requires solicitors to uphold the rule of law and the proper administration of justice. They are also required to: act with integrity; not allow their independence to be compromised; act in the best interests of each client; provide a proper standard of service to their clients; and behave in a way that maintains the trust the public places in them and in the provision of

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[29] *R v Kellett* [1976] QB 372, (1975) 61 Cr App R 240 (CA).
[30] ibid.
[31] *R v Sookoo* [2002] EWCA Crim 800.
[32] *R v Clark (Mark)* [2003] EWCA Crim 991, [2003] 2 Cr App R 23 (CA).
[33] As Proops' and others' submissions to the WESC made plain, other offences might also be considered, including that under s 4(1) of the Criminal Law Act 1967 (knowing or believing another to be guilty of a 'relevant' (arrestable) offence, to act with intent to do any act with intend to impede his apprehension or prosecution without lawful authority or reasonable excuse): A Proops et al, 'Written Submission from Anya Proops QC, Aileen McColgan, Natalie Connor and Jennifer Robinson (SHW0059)' (18 April 2018) available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/written/80878.html.

legal services.[34] The 10 principles are mandatory and 'all-pervasive'.[35] And where[36] 'two or more Principles come into conflict the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice'.

An agreement found to have strayed into PTCoJ territory (as set out in section II) would clearly be a breach of professional conduct rules: at the very least, the integrity, administration of justice and trust obligations would be breached.

There are other ways of thinking about the problem, though. What if the agreement's errant clauses were merely unenforceable rather than criminal? MacMillan's chapter[37] reminds us that identifying unenforceability may not be straightforward, but for now I want to ask the question whether putting a *plainly* unenforceable clause into a contract is a professional breach.

Lawyers thinking about their obligations to the administration of justice tend to concentrate on not attempting 'to deceive or knowingly or recklessly mislead the court' (O(5.1) in the Code). This includes not being complicit in another person's deceiving or misleading the court (O(5.2)). The Code's indicative behaviours (IBs, ie examples of when the Code is probably breached) suggest that one example is 'constructing facts supporting your client's case or drafting any documents relating to any proceedings containing: (a) any contention which you do not consider to be properly arguable' (IB(5.7)).

If a settlement agreement relates to any proceedings it might fall within this example, although a court is unlikely ever to see it and be misled by it. If we continue to assume that the agreement is unenforceable and that a lawyer could not stand up and properly argue that the inhibitions on Ms Perkins' cooperation with the police were enforceable, can they include that term in the contract if it does not risk misleading the court? What might the professional rules say about that situation?

The Bar's Code of Conduct is clearer: it recognises an obligation not to knowingly or recklessly mislead or attempt to mislead *anyone* (rc9.1). The new Solicitors' Code of Conduct now

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[34] Solicitors Regulation Authority, *SRA Handbook* (Version 21, 2018).
[35] ibid.
[36] ibid.
[37] See MacMillan, 'Private law and Public Concerns' (n 1).

contains similar obligations.[38] Even sbefore that, solicitors could not knowingly or recklessly mislead people more generally because of their duty to act with integrity. As the Court of Appeal recently opined:

> [A] solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.[39]

Putting an onerous, but unenforceable, clause into an agreement risks misleading opposing parties, either during the negotiation or afterwards. It might be implied that the lawyer is contending that the enforceability of such a clause is properly arguable by the fact of its inclusion. If they know it is not then they are seeking to create a belief in another and something which is deliberately misleading. Scrupulousness would demand that it is not included. It might even be said that they are lying if they know the clause not to be enforceable.

The need to consider one's duty to act with integrity is strengthened by O(11.1), which prohibits taking 'unfair advantage of third parties in either your professional or personal capacity'. This is supplemented by examples: IB(11.7), taking unfair advantage of an opposing party's lack of legal knowledge where they have not instructed a lawyer; and IB(11.8), demanding anything that is not legally recoverable. The argument here would be that demanding unenforceable elements in an NDA is akin to claiming something that is not legally recoverable and so taking unfair advantage.

It could be argued that IB(11.7) indicates that unfair advantage problems are confined to unrepresented parties. This is probably a misreading. Indicative behaviours are just examples, they do not limit the rules. The Code does not confine the obligation to acting against unrepresented parties, and the SRA's *Walk the Line* guidance talks of being 'careful not to take unfair advantage of the opponent or other third parties … Special care is needed where the opponent is unrepresented.'[40] Similarly, the SRA's Warning Notice on

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[38] Solicitors Regulation Authority, *SRA Standards and Regulations* (2019) para 1.4, available at

[39] *Wingate & Evans v The Solicitors Regulation Authority* [2018] EWCA Civ 366, [2018] 1 WLR 3969.

[40] Solicitors Regulation Authority, *Walking the Line: The Balancing of Duties in Litigation* (2015).

NDAs implies that unfair advantage can be taken of represented parties, by suggesting that 'Where the employee is not represented, your obligations will be *heightened*, to ensure that there is no abuse of position, or unfair advantage taken.'[41]

If we assume for a moment that Weinstein's lawyers managed to exploit a lack of knowledge or understanding in Perkins' lawyer (again, this is speculation not fact), they are not necessarily protected simply by the fact that Perkins was represented. As the SRA notes, 'solicitors involved in litigation [need not generally] … ensure that their opponents do not fall into traps of their own making'.[42] But any misinformation around the clauses in the NDA might well be sufficient to lead to a 'taking advantage' finding.

It would be difficult, if not impossible, for the SRA to legislate in advance for all the possible meanings of unfair advantage. Equally, practitioners struggle with their ethical obligations when acting against an unrepresented party, worrying about an inherent unfairness to their client if they are seen to be helping their opponent. They are likely to find doubly problematic the risk of being seen to be 'soft-pedalling' with a represented opponent.

The A&O–SMB negotiation is a case in point. Was it for A&O or SMB to ensure the agreement was not unfair to Zelda Perkins? How far should a judgment on this reflect concerns about SMB's decision, as alleged, to send in a two-year qualified solicitorto negotiate with a sizeable team from A&O and Miramax? If the evidence is correct, agreeing to turn over some of one's attendance notes, the way in which the client, not the lawyer, seemed to be leading the negotiation, agreeing to Perkins' not having a copy of the agreement, and the (apparent) failure to challenge terms which are manifestly excessive, all give rise to concerns about the quality of Zelda Perkins's representation during the negotiation.

Mark Mansell suggested when giving evidence that his professional ethics were not impugned because

> any situation like that, where you have an individual who is legally advised, there is a negotiation, seeking to reconcile the interests of the two parties. I think, in doing that, I am compliant with my obligations.

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[41] ibid (emphasis added).

[42] ibid.

I do not agree. Proving unfair advantage may be harder but not impossible in such circumstances; he is not relieved of responsibility by dint of a represented opponent. After all, one does not escape responsibility for throwing a punch by arguing one's opponent should have moved their head. The key question is whether a punch was thrown, not whether the opponent should have moved. Asking for an unenforceable clause to be included is highly likely to be unfair if one accepts that it is misleading, or that it seeks to make a legal claim which has no substance.

Additionally, it imposes a significant practical detriment in that it forces the opponent to adhere to or challenge enforcement of such clauses. Those opponents are typically without the resources to mount such challenges. What is more, representation of the more vulnerable party is not continuous; the unfairness of the clauses continues after the agreement is executed. Furthermore, the NDA has a life beyond its creation. It can be designed to take advantage of the counter-party after they are represented. Most ex-employees are not going to retain lawyers to help them interpret their obligations under an NDA. Unfair advantage must be a particular concern given that Perkins was required to give warnings and assistance when compelled to give evidence, *before* she could seek legal advice.

The SRA document sensibly concludes with this reminder:

> There will always be complex situations where maintaining the correct balance between duties is not simple and all matters must of course be decided on the facts. It is important for solicitors to recognise their wider duties and not to rationalise misconduct on the mistaken basis that their only duty is to their client.[43]

These arguments become especially important when thinking about one string to Mr Mansell's defence of himself before the WESC, which leads us towards situations where the tactics employed in a case, or clauses employed in a contract, are arguably legal. For Mr Mansell that was the argument that it might be proper to limit the disclosure of some material to the police.

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[43] ibid.

IV. The Balancing Exercise

How to interpret a clause shaping disclosure to the police evidence in professional ethics terms? Shaping disclosures to the police plainly can constitute perverting the course of justice. Mr Mansell may not have thought about that at the time; or he might have taken the view that the potential risks of that amounting to a perversion were not sufficiently strong or clearly spelled out in the law and that is sufficient for the clause to be permissible. So, for example, because there is not a case of a solicitor's drafting a similar NDA and being successfully prosecuted for it, he might feel that the law is sufficiently uncertain for him to disregard potential restrictions in favour of his client. Or he might take the view that because one can articulate the view that a clause is *potentially* justifiable, because the law does not *prohibit* parties from exerting any influence on potential witnesses, it is in fact justified in the instant case.

Such an approach is consistent with the idea of professional minimalism I have set out elsewhere.[44] Under professional minimalism, only unarguably illegal acts are restrained and the client gets all the benefit of uncertainty; a mere risk of perverting the course of justice is sanctified as legitimate by dint of private bargaining and representation. Professional minimalism legitimates decisions about, and therefore distances responsibility for, unsavoury tactics. Those decisions are often shielded by client confidentiality and legal professional privilege. The client can say 'I was acting on advice'; and the lawyer can say 'I was only following instructions.'

There are a number of reasons for giving clients the benefit of uncertainty. First, and importantly, it prevents lawyers from having to apply legal uncertainty against their own clients, bolstering loyalty. It is also usually in their commercial interests to align as fully as they can with clients. If they neglect their clients' interests, there is the risk of being sued; whereas if they neglect the public interest in the administration of justice, the risk is lower. Indeed, it is rare for this neglect to be revealed, because lawyer and client interests are usually aligned, confidentiality protects the lawyer and the client from scrutiny, and enforcement is rare. Similarly, ethical and tactical dilemmas, and the psychological burdens of practising law, are simplified considerably when it is only if there is a clear breach of law

[44] R Moorhead and V Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' (2015) 42 *Journal of Law and Society* 387.

or professional ethics that lawyers must restrain the imperative to act in their clients' interests.

Lawyers also see themselves as bound to accept their clients' instructions on how to handle a case. This is wrong. Under their professional principles, they have an obligation to act with independence, and to consider their broader obligations to protect the rule of law and the administration of justice. They must take account of clients' best interests when thinking about these issues, and the factors in the previous paragraph will generally encourage them to do so, but they are not to see themselves as absolved of responsibility for their decisions on the basis that they were just following the clients' instructions. Responsibility and judgement are axiomatic to professionalism, and that judgement requires a rounded consideration of all the relevant professional rules and principles, not just the clients' best interests. So lawyers have to decide for themselves whether deploying a tactic in settlement discussion is misleading or taking unfair advantage or not. As Lord Chief Justice Judge remarked:

> Something of a myth about the meaning of the client's 'instructions' has developed. As we have said, the client does not conduct the case. The advocate is not the client's mouthpiece, obliged to conduct the case in accordance with whatever the client, or when the advocate is a barrister, the solicitor 'instructs' him. ... That is the foundation for the right to appear as an advocate, with the privileges and responsibilities of advocates and as an advocate, burdened with twin responsibilities, both to the client and to the court.[45]

This case was about criminal advocacy, but the words apply doubly in civil contexts, especially in cases resolved away from the courts, where judges cannot exercise supervisory restraint. As a result, the balancing of ethical principles requires a more nuanced approach than saying 'something is theoretically permissible, therefore I can do it'. The lawyer may be bound, if we come back to the PTCoJ frame, to think about what the likely and intended effects of the agreement were, not just what legitimate purposes the agreement could be put to.

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[45] *R v Farooqi* [2013] EWCA Crim 1649, [2014] 1 Cr App R 9 [108].

V. Common Law and the Freedom of Contract

The preceding analysis shows how professional ethics considerations turn partly on the enforceability of clauses, but also on concepts such as unfair advantage and protecting the rule of law and administration of justice. It also suggests the need for balance and judgement. An alternative view is that NDAs promote the rule of law through their facilitation of settlement agreements. Freedom of contract and the enforceability of contracts are important public interest concerns in their own right.

Freedom of contract is, of course fundamental to English commercial law.[46] In essence, this means parties are free to make agreements, and the courts should enforce the terms of those agreements unperturbed by, even showing an ugly reverence for, sharp practice: 'fairness has nothing to do with commercial contracts' since '[c]ommercial parties can be most unfair and entirely unreasonable, if they can get away with it'.[47] This view ignores the professional obligation not to take unfair advantage, and could be used to support a professionally minimalistic judgement about NDAs.

As MacMillan's chapter[48] shows us, contract law has a number of ways of suggesting that 'getting away with it' is subject to proper restraint (duress, illegality and so on). Non-disclosure agreements may be contracting out of the Equality Act 2010, even though section 144 renders any such term unenforceable unless it is a 'qualifying settlement agreement' (section 147). Section 43J of the Employment Rights Act 1996 renders void any provision in an agreement that 'purports to preclude the worker from making a protected disclosure' (in very broad terms protecting whistle-blowers upon disclosure of crimes or other wrongs in the public interest to prescribed organisations).

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[46] PS Davies, 'Bad Bargains'Current Legal Problems, Volume 72, Issue 1, 2019, Pages 253–286 . I am indebted to this piece for the cursory summary of the law that follows.

[47] Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts', (Harris Society Annual Lecture, Oxford, 8 May 2017) available at www.supremecourt.uk/docs/speech-170508.pdf.

[48] See MacMillan, 'Private Law and Public Concerns' (n 1).

Freedom of contract depends on what the courts talk of as 'real choice'[49] and the criticality of the assumption that 'consent to the terms of the contract has been obtained fairly'.[50] MacMillan's plea for more critical focus on NDAs,[51] and a broader recognition that the law on illegality is complex and voluminous,[52] suggests courts may not take these restraints as seriously as they might. Only in the most unusual of cases will the resource constraints on employees be overcome. Persuading a court to believe that consent has been vitiated is difficult: being under pressure, or having a weak negotiating position, is not enough on its own.[53] And, as we shall see in section VI, the courts seem willing to regard independent representation as enough to suggest that a real choice was properly exercised.

VI. The Court Consideration of the Green Cases

Freedom of contract was at the forefront of the decisions in the Philip Green/Arcadia/Topshop/Topman's (the Group) injuncting of the Daily *Telegraph*.[54] The newspaper sought to expose the Group's use of NDAs to deal with alleged impropriety by Green. As the Court of Appeal noted in its *ABC* decision,[55] five Group employees made allegations of 'discreditable conduct' against Green. All five cases were settled, with substantial payments made to the complainants. Confidentiality provisions were included in the agreements. All the complainants were reportedly independently advised. And the Court

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[49] G Leggatt, 'Making sense of contracts: the rational choice theory' (2015) 131 *LQR* 454, 474. In the commercial context, a major exception arises regarding exclusion clauses given the Unfair Contract Terms Act 1977, although even here a court is unlikely to interfere where a contract was made between well-advised parties of similar bargaining power: *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696; Unfair Contract Terms Act 1977, sch 2(a).
[50] *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637 [104].
[51] MacMillan, 'Private Law and Public Concerns' (n 1).
[52] E McKendrick, *Contract Law: Cases Text and Materials*, 8th edn (OUP 2018) ch 20B.
[53] *Wood v Sureterm Direct Ltd* [2015] EWCA Civ 839.
[54] See *Arcadia Group Ltd v Telegraph Media Group Ltd* [2019] EWHC 96 (QB), [2019] 1 WLUK 173.
[55] *ABC & Others v Telegraph Media Group Ltd* [2018] EWCA Civ 2329, [2019] 2 All ER 684.

of Appeal felt that '[t]he Agreements safeguarded the complainants' rights to make legitimate disclosures (including reporting any criminal offences) if they chose'.[56] That is, the Court of Appeal thought the agreements did not fall foul of whistle-blowing legislation.

In July 2018, a *Daily Telegraph* journalist contacted the claimants for comments on the allegation and the NDAs. This suggested to the Group that

> the information in question had been disclosed to the newspaper by one or more of the complainants or by other employees who were aware of the information and of the NDAs, and they immediately commenced the present proceedings.[57]

And:

> At an early stage in the proceedings Nicklin J directed that attempts be made to ascertain the attitudes of the five complainants to whether information about their complaints should be published, even if they were not named. One complainant said that they were happy for their complaint, and the settlement, to be disclosed, provided they were not named. Two said that they supported the Claimants' application for an injunction. One said they did not support the application.[58]

We do not know how that information was forthcoming. Presumably, it was garnered by the lawyers for the Group, as only they would know the identities of the complainants. The court does not express any doubt about the depth and reliability of any of the complainants' reported views on this matter.

The interim injunction application was unsuccessful at first instance, but successful in the Court of Appeal. There the Court weighed Article 10(1) of the European Convention on Human Rights (ECHR) ('Freedom of expression') and 'the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence (Article 10(2) ECHR); respect for

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[56] ibid [4].
[57] ibid [5].
[58] ibid [6].

private and family life (Article 8(1) ECHR); and whether the court would be sufficiently likely to prohibit publication at a full trial.

'Sufficiently likely' does not mean 'more likely than not' if the adverse consequences of disclosure seem sufficiently grave to the judge. One such adverse consequence was the impact on Green's reputation. Various elements of public interest were in play too: the principle that there is no confidence in an iniquity; whether it was vital in the public interest to publish confidential information; and 'a public interest that confidences should be preserved and protected by the law'. I note in passing that protection of reputation appears three times in the justifications offered by the Court: in Article 10(2) ECHR; in the softening of the likelihood test; and in the protection of confidences.

Balancing the competing interests required a test of proportionality,

> having regard to the nature of the information and all the relevant circumstances, [whether] it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public.[59]

What seemed to weigh heavily in the balancing was that duties in such cases arose out of contract, especially

> where the obligation in question is contained in an agreement to compromise, or avoid the need for, litigation, whether actual or threatened. Provided that the agreement is freely entered into, without improper pressure or any other vitiating factor, and with the benefit (where appropriate) of independent legal advice, and (again, where appropriate) with due allowance for disclosure of any wrongdoing to the police or appropriate regulatory or statutory body, the public policy reasons in favour of upholding the obligation are likely to tell with particular force, and may well outweigh the article 10 rights of the party who wishes to publish the confidential information.[60]

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[59] ibid [21], citing *HRH the Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2008] Ch 57 [68].

[60] *ABC & Ors* (n 55) [22], here citing *HRH the Prince of Wales v Associated Newspapers Ltd* (n 59) [69] approvingly.

In this way, the Court of Appeal suggests that the public interest can be compromised by the creation of private rights at the end of a dispute. Putting aside the question of whether this is right in principle, central to the argument is that whistleblowing provisions were protected by the agreement. I disagree. And at the very least, even at the interim stage, this merits a more searching inquiry into the propriety of the agreement than the Court itself attempted in its published judgment. What did the Court pay attention to in reaching its decision?

The judges said they paid close attention to 'reasonably credible' evidence of wrongdoing (the harassment presumably), but there were 'factors going the other way that need to be weighed in the balance at this, interlocutory, stage', including 'that the most serious allegations made by the complainants had been denied and that the settlement of the ET [Employment Tribunal]claims meant that the opportunity to have their truth determined by an independent tribunal had been lost'.[61] They negate 'reasonably credible' evidence on the basis of a denial and a settlement that supports no factual finding either.

The first instance judge was criticised because he had 'left entirely out of account the important and legitimate role played by [NDAs] in the consensual settlement of disputes, both generally but in particular in the employment field'.[62]

> There is no evidence that any of the Settlement Agreements were procured by bullying, harassment or undue pressure by the Claimants. Each Settlement Agreement records that the employee was independently advised by a named legal adviser. Each Settlement Agreement contained provisions authorising disclosure to third parties in a range of cases, including to regulatory and statutory bodies. They did not in the present case, therefore, on the face of the evidence at this interlocutory stage, have any of the unethical vices criticised by the WESC Report.[63]

Here the Court of Appeal appears to be relying on the agreement itself and the existence of independent advice as evidence of fairness

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[61] *ABC & Ors* (n 55)[33].
[62] ibid [41].
[63] ibid [43].

and propriety. To rebut the presumption that the agreements were freely entered into, the defendant newspaper would have had to have evidence of the negotiations, which, presumably, would very likely reveal the confidentiality breaches of the employees themselves (or likely others subject to general duties of confidentiality as former or existing employees or advisers of the claimants). The agreement itself closes off this risk that such evidence would come to light: it shapes the course of justice in a way not recognised by the Court.

Second, and more fundamentally, it seems plausible that the Court of Appeal did not pay close enough attention to the terms of the NDA itself, because the agreements certainly did in my view create the very mischief with which the WESC was concerned. We can see this by looking at a now published NDA relating to one of the ex-employees of Arcadia given the pseudonym 'Alex'. It was set out in an appendix to the last Arcadia judgment, given when the original injunction was discharged.[64]

The agreement indicates three types of compensation to be paid to Alex: a lump sum 'for injury to feelings and aggravated damages' in settling a tribunal claim (clause 4.1.1); a further lump sum in respect of compensation for the termination of Alex's employment and any other claims against their employer and Sir Philip (or associates) (clause 4.1.2); and a third set of monthly compensation sums (paid until November 2018) for similar reasons (clause 4.1.3).

As part of the bargain, Alex is prohibited from disclosing information about the grievance, the termination of their employment and their claim (including the settlement of it), 'save to immediate family/professional advisers,' or 'where required by any governmental, regulatory or other competent authority or by a Court of law or Her Majesty's Revenue and Customs'.

Under clause 13 there are some further exceptions to the agreement: making a 'protected disclosure' (under whistleblowing legislation) is allowed for instance; as is 'reporting a criminal offence to any law enforcement agency; and/or co-operating with any law enforcement agency regarding a criminal investigation or prosecution'. It follows that the agreement does appear to allow cooperation with, and reporting to, at least some law enforcement agencies. This explains the Court's view that

[64] *Arcadia Group Limited* (n 54).

> Each Settlement Agreement contained provisions authorising disclosure to third parties in a range of cases, including to regulatory and statutory bodies. They did not in the present case, therefore, on the face of the evidence at this interlocutory stage, have any of the unethical vices criticised by the WESC Report.[65]

However, a very interesting question arises as to whether that apparently positive protection of whistle-blower rights is likely to be undone by clause 13.3, which states:

> You warrant, however, that you do not know of any circumstances which would lead you to making a disclosure in the form of or in the circumstances referred to in this clause.

On breaching this warranty, Alex would be obliged to pay two out of the three heads of compensation received, recoverable as a debt, 'together with our costs, including legal fees, in doing so'. At least one of the NDAs to which this case relates involvesover £1million in compensation payments, so the repayment penalty might be high.

Leaving to one side whether this was an unenforceable penalty clause, one more fundamental and very interesting question raised by this clause is its likely and intended effect. Let us imagine I have been assaulted, possibly sexually, and yet promise that I do not know of any circumstances in which I would make a report of that conduct to the police. One interpretation is that I am being given rights to disclose, but I am promising never to exercise, or perhaps save in unforeseen circumstances, those rights. If I do, I may risk paying the indemnity and being placed in the compromising situation of having promised something that is contrary to what I know. That might be used in an attempt to discredit me later should I give evidence.

Analysing it under the PTCoJ framework, critical questions are raised about what is intended or likely as a result of the clause. Am I more likely not to disclose wrongdoing to an investigation of my own volition or if approached as a result of this clause? Is that its intended effect? It seems to me that a likely and foreseeable effect of the clause is that the former employee can report to or cooperate with legal investigations in theory, but would do so fearing the risks

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[65] *ABC & Others* (n 55) [43].

of breaching the warranty. This would be particularly true if the employee could have envisaged, prior to signing the agreement, that they might be approached and asked to make a disclosure to a prosecutor, or if they could envisage changing their mind and disclosing to a law enforcement agency of their own volition, in which case any such disclosure might be said to indicate a breach of the warranty.

If that analysis of the clause is correct, it appears to be drafted with the intention of making it significantly less likely that Alex will disclose wrongdoing to, or cooperate with, a law enforcement agency or to an employee thinking of making a claim. It does not preclude the exercise of whistleblowing rights, but it does make their exercise illusory or close to it.

Now, we do not know what the parties say about the reasons for drafting that clause, and so we must remain circumspect, but on its face the clause gives rise to significant concerns. Whether this would fall within the ambit of PTCoJ depends a great deal on the persuasiveness of alternative explanations forthe clause.

One suggestion is that the agreement may be aimed at circumstances where there is an employee who has engaged in poor behaviour but there is no evidence of any criminal act. The employer is engaged in buying the silence of those with legitimate but non-criminal complaints. The clausemight be intended to ensure that the signatory has disclosed all of the issues that may have occurred. Where a settlement is paid on the basis that everything is now dealt with, it gives the company a mechanism for clawing this back where the signatory comes out later with further issues that they had not disclosed.[66] In this way it provides the employer with sufficient certainty they can settle 'difficult' cases.

Given the multiple complaints of harassment and other allegations made in the Green case about the probity of their handling (such as allegedly compromised internal investigations), it is hard to see how the lawyers involved could claim such purity of purpose. But one problem of principle with this interpretation is that rather than protecting the employer in other ways (eg mandating full disclosure of the allegations to the employer, and documenting those as part of the settlement), it seeks to warrant something that is likely to interfere with someone's willingness to report a crime. It allows the private ordering of a public function that should not be interfered

[66] I am grateful to Rob Stevens and Robin Brooks for these points.

with: there is a *public* interest in investigating allegations of iniquity, proportionately protected by allowing the subjects of NDAs to talk to the police unrestrained by cash for silence. The counter-parties to NDAs are not being allowed to trash the employer's reputation, they are being permitted to make a complaint to, or cooperate with, the police. The main risk to the employer is that the police take that evidence seriously. This is not a risk they should be able to button down. It goes to the heart of a process that the offence of PTCoJ seeks to protect.

Use of warranties to 'work round' what would otherwise be seen as clear requirements under the Public Interest Disclosure Act 1998 may not be uncommon. The whistle-blowing charity Protect, for instance, reports that whistle-blowers can be required to warrant that the matter they have raised has been 'satisfactorily concluded', risking, on the face of such agreements, claims for repayment of compensation and costs should they disclose in a way that suggests they were not in fact satisfied.[67] And they risk attacks on their credibility. Warranties can include the former employee's being asked to promise that there are no circumstances of which they are aware that would amount to a breach of the regulatory requirements applicable to the company, even where the complaints they raised might or do in fact raise such concerns. Or that they withdraw all appeals/grievances, data protection requests and any complaints to any ombudsman or similar authority. And similarly agreements that provide for payment of automatic indemnities if the individual exercises or attempts to exercise any of the statutory rights referred to in the agreement for Public Interest Disclosures (a less subtle version of Alex's clause). On their face, and again subject to any proper explanations that can be offered, these seem to be deliberate attempts to frustrate whistle-blower protections.[68]

At least in circumstances where criminal and/or civil proceedings are in train, and probably where such proceedings are in contemplation, there is a significant potential that these agreements are likely to and intended to pervert the course of justice. If drafted

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[67] See Protect, 'Written Submission from Protect (NDA0038)' (January 2019) available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/the-use-of-nondisclosure-agreements-in-discrimination-cases/written/95054.html. Private communication with the author.

[68] Interestingly, the Financial ConductAuthority prohibits settlement agreements that include warranties related to protected disclosures: www.handbook.fca.org.uk/handbook/SYSC/18.pdf.

by a solicitor, on the face of the agreements alone, significant questions about breaches of the professional code are also raised for similar reasons to those discussed previously.

Even if one accepted that such clauses might, in certain circumstances, be legitimate, at the very least a judgment balancing the public interest suggests that the possibility that this clause would lead to interference should be canvassed by the court. It was not. They Court of Appeal judges showed themselves insensitive to the significant public interest challenges posed by the agreements instead protesting the public interest in enforcing them. They relied on a theoretical, decontextualised and inadequate understanding of the contract in the face of highly significant public interest concerns: it was an unbalanced balancing. A fair response in the instant case might be that this was an interim hearing, where the judges would not be expected to engage fully with the merits but seek simply to protect the status quo.[69] I would have more sympathy with this argument had the Court not indicated that the agreement does not appear to give rise to the mischief complained of by the WESC. This incautious statement suggests a premature belief that the agreement was probably sound, when there were problems on its face. There is, though, a third point of concern that was not considered, which relates to arguments about costs.

VII. The Costs Arguments

The negotiation of NDAs takes place in a system of usually significant structural inequality: a soon-to-be or actually unemployed person presented with a compensation payment and an NDA on a take-it-or-leave-it basis. Where there is doubt about the appropriateness of an NDA in general, or in relation to specific terms, those concerns are likely either ignored or underplayed because:

- there is a widespread practice of accepting NDAs, which means that any negotiations take place against an industry norm that accepts widespread and widely drawn non-disclosure agreements;
- they are, or have been, seen as a useful way of managing reputational and legal risk – so even if not legally enforceable,

[69] I am grateful to Lord Sales for emphasising this point.

widely-drawn clauses help restrain most employees from discussing allegations of wrongdoing;

- employees are often either unrepresented or under-represented (eg on limited retainers, where a lawyer advises on whether they can sign an NDA) and may, at the point of settlement, feel they have little alternative or interest in challenging the breadth of an NDA that they do not really understand; and
- are operating in a system that concentrates on compensation on exit/dismissal as the main ex-post response to sexual harassment and discrimination.

But I want to concentrate on one more specific element that calls into question the idea of a bargain freely chosen: costs.[70] It is relevant to MacMillan's arguments about duress.[71] This relates to another element of the Green/Arcadia/TopShop agreements, which the court mentioned but did not reflect on: the size of the agreed compensation.

Ordinarily, employment cases would be pursued in the employment tribunal, although harassment cases might potentially be pursued through the courts. Sex discrimination claims arising out of employment can only be pursued in the Employment Tribunal.[72] Ordinarily, each party bears its own costs, win or lose, although a tribunal can make an exceptional award for unreasonable conduct. Employers have been known to argue that failure to accept a settlement is unreasonable conduct, including failure to accept an NDA (although such arguments are generally, if perhaps not always, unsuccessful).[73]

As Regan has noted, a respondent wishing to secure an NDA can make 'an enhanced offer to settle if an NDA were executed'.[74] That is, they offer more than the maximum award to which a

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[70] I am indebted to communications with Dominic Regan and , 'Written Submission from Professor Dominic Regan (NDA0073)' (March 2019) available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/the-use-of-nondisclosure-agreements-in-discrimination-cases/written/98704.html.

[71] MacMillan 'Private Law and Public Concerns' (n 1) [See p. 10 of Macmillan's draft].

[72] *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481 (CA).

[73] See, eg, *Anderson v Cheltenham & Gloucester Plc* [2013] UKEAT/0221/13/BA, where a claimant was ordered at first instance to pay a defendant's costs having turned down a Calderbank offer, an offer made without prejudice save as to costs, but this was overturned on appeal.

[74] Regan, 'Written Submissions' (n 70).

claimant is entitled,[75] or is likely to be awarded (possibly including a payment of unrecoverable costs), on condition that an NDA is signed. Let us call these 'over-par offers', being offers that cannot realistically be beaten in any final hearing. Over-par offers put the claimant wishing to resist an NDA in a difficult situation. Financially, the offer may come at a time of great financial vulnerability. Moreover, if they are funded under a no-win-no-fee agreement, the solicitor may decide to withdraw from representing them unless they accept the offer; if they are insured, the insurer may similarly withdraw on the basis that a (more than reasonable) offer of compensation has been made; the same is true for union funding.[76] If the claimant were funding themselves they would be able to proceed, but only if they were willing to risk substantial accumulation of legal costs and a potential application to the tribunal that they had been unreasonable. Such an award of costs might be very unlikely but nonetheless used to put pressure on the claimant.

The situation may be even worse for claims taken to a court, not a tribunal. Given that costs ordinarily follow the event, a claimant declining any reasonable offer can suffer costs penalties, for example by reason of offers without prejudice save as to costs that may wipe out or exceed their compensation. Any over-par offer is likely to be unbeatable, putting the claimant at significant risk. Regan reports phone-hacking litigation as an area where over-par settlements were offered to ensure settlement with NDAs. The size of the settlements reported in the Green case raises a suggestion that such may have been the tactic here. Such costs penalties might well exceed any compensation awarded, even assuming the claims were successful. Regan puts it thus:

> [A] defendant has the capacity to throw money at a claim and seek to buy it off. I have no personal knowledge of recent claims but, if press reports are accurate, it would appear that victims of sexual and racial discrimination have accepted sums which would never be remotely recoverable in a Tribunal or Court case. They cannot be compelled to keep quiet but the

[75] For example, unfair dismissal cases are ordinarily subject to a maximum of £83,682 or 52 weeks' net pay, whichever is the lower.

[76] 'No Help for Doctor Who Refused to be Gagged' *The Times* (30 January 2012) available at www.thetimes.co.uk/article/no-help-for-doctor-who-refused-to-be-gagged-s3g5073phq3.

> financial threat they face is overwhelming and there are law firms which boast of their ability to 'protect reputations'.[77]

VIII. Conclusions

The problems seen in the Green and Weinstein–Perkins agreements are suggestive of an interesting set of tensions. Contract law purports to protect freedom but here instantiates the silencing of women in ways that, I have argued, are professionally problematic. In showing that they may sometimes be potentially criminal, I have concentrated on showing how contractual freedom can be taken to extremes: de facto, through the professional failings of the lawyers involved; and, given decisions in Green, de jure, shielding the powerful from scrutiny without that same contract law's being effectively engaged because the contract 'looks okay on its face' when in my opinion it looks highly questionable.

The importance of professionalism in the drafting of contracts has been bolstered by the Solicitors Regulation Authority's Warning Notice on NDAs. It provides guidanceagainst the abuse of NDAs, covering some, but not all, of the points raised in this chapter.[78] In particular it warns against the

> use of NDAs as a means of improperly threatening litigation or other adverse consequences, or otherwise exerting inappropriate influence over people not to make disclosures which are protected by statute, or reportable to regulators or law enforcement agencies.[79]

Whether contract law pays sufficient attention to the kinds of issues I have raised here is moot. What is striking is how irrelevant duress and other attacks on the NDAs were to a consideration of their interim enforceability. The possibility that the indemnities in the Green case were unenforceable penalties got only the slightest of mentions. Professional enforcement now beckons against Mr

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[77] Regan, 'Written Submissions' (n 70).
[78] SRA, 'Use of Non-Disclosure Agreements (NDAs): Solicitors Regulation Authority' (12 March 2018) available at www.sra.org.uk/solicitors/guidance/warning-notices/use-of-non-disclosure-agreements-ndas--warning-notice/.
[79] Ibid.

Mansell,[80] and a similar fate may await the drafter of Mr Green's NDAs. We shall see. But whilst nice arguments about freedom turn the heads of contract lawyers, the regulators are showing signs of being more concerned with the inappropriate application of professional power.

[80] 'SRA Attempts to Prosecute A&O Lawyer over Controversial Weinstein Gagging Deal' *Legal Business* (3 April 2019) available at www.legalbusiness.co.uk/blogs/sra-attempts-to-prosecute-ao-lawyer-over-controversial-weinstein-gagging-deal/.