Article

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Contracts and Equality: The Dangers of Non-disclosure Agreements in English Law

https://doi.org/10.1515/ercl-2022-2041

Abstract: This paper is concerned with the interaction between the principle of equal treatment and non-disclosure agreements in English law. The common use of non-disclosure agreements (also referred to as 'confidentiality clauses' or 'gagging clauses') as a term in contracts settling possible claims in which harassment or discrimination were alleged came to public prominence in England following the #MeToo movement. There has, though, been little consideration of the enforceability of these non-disclosure agreements as a matter of contract law and the impact of non-disclosure agreements upon equality. This paper examines the legal enforceability of these agreements as a matter of English contract law. It is argued that non-disclosure agreements, designed to obtain silence, work to impede the equality of women. English contract law provides few protections from the potential abuse that can arise from non-disclosure agreements.

Keywords: contract law, equality law, non-disclosure agreements, #MeToo

Résumé: Cet article porte sur les relations entre le principe d'égalité de traitement et les accords de confidentialité en droit anglais. L'utilisation courante d'accords de non-divulgation (également appelés "clauses de confidentialité" ou "clauses bâillon") dans les contrats ayant pour objet le règlement de plaintes dans lesquelles des faits de harcèlement ou de discrimination étaient allégués a été révélée au grand public en Angleterre à la suite du mouvement #MeToo. Cependant, la question du caractère contraignant de ces accords de non-divulgation au regard du droit des contrats comme leur impact sur l'égalité de traitement ont été peu traités. Cet article examine le caractère juridiquement contraignant de ces accords au regard du droit anglais des contrats. Il fait valoir que les accords de non-divulgation, conçus pour obtenir le silence, entravent l'égalité des femmes. Le

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droit anglais des contrats offre peu de protections contre les abus potentiels qui peuvent découler des accords de non-divulgation.

Zusammenfassung: Dieser Beitrag befasst sich mit der Wechselwirkung zwischen dem Gleichbehandlungsgrundsatz und Vertraulichkeitsvereinbarungen im englischen Recht. Die häufige Verwendung von Vertraulichkeitsvereinbarungen (auch als "Vertraulichkeitsklauseln" oder "Knebelklauseln" bezeichnet) als Klausel in Verträgen zur Beilegung möglicher Ansprüche, in denen Belästigung oder Diskriminierung behauptet wird, wurde in England im Anschluss an die MeToo-Bewegung öffentlich bekannt. Die Durchsetzbarkeit dieser Vertraulichkeitsvereinbarungen im Rahmen des Vertragsrechts und die Auswirkungen von Vertraulichkeitsvereinbarungen auf die Gleichstellung wurden jedoch bisher kaum berücksichtigt. In diesem Beitrag wird die rechtliche Durchsetzbarkeit dieser Vereinbarungen im Rahmen des englischen Vertragsrechts untersucht. Es wird argumentiert, dass Vertraulichkeitsvereinbarungen, die darauf abzielen, Stillschweigen zu bewahren, die Gleichstellung von Frauen behindern. Das englische Vertragsrecht bietet nur wenig Schutz vor dem potenziellen Missbrauch, der sich aus Geheimhaltungsvereinbarungen ergeben kann.

1 Introduction

This article considers the interaction between non-disclosure agreements and the equality of women in English law. The #MeToo movement provided a substantial impetus for several official inquiries into the use of non-disclosure agreements in the United Kingdom in 2019. These inquiries revealed both the wide spread use of such agreements and a legal deficiency in protecting those who felt compelled to enter into them. There has been little sustained consideration of the legal force of these clauses as a matter of contract law. This article begins with an exploration of the equality protection afforded women in the United Kingdom. While there are statutory protections of equality in place, the withdrawal of the United Kingdom from the European Union has the effect of weaking these protections. The article assesses the official inquiries into non-disclosure agreements held in 2019 before outlining the use of both legitimate non-disclosure agreements and also the abuse of non-disclosure agreements used for illegitimate purposes. It concludes by investigating the enforceability of non-disclosure agreements as a matter of contract law.

2 Legal Protections from Discrimination

Equality of treatment of men and women in the United Kingdom as a matter of law arises through a combination of British and European Union legislation. Prior to the United Kingdom's entry in 1972 into the European Economic Community

legislation existed to prevent discrimination in the 'terms and conditions of employment, between men and women'.[1] While this protection was further extended by domestic legislation[2] far greater protections against sex based discrimination came during the period in which the United Kingdom was a member of the European Union.[3] From the outset, member states were responsible for 'the application of the principle that men and women should receive equal pay for equal work'.[4] While this protection was initially given for the economic interests of the member states it formed an important basis for further non-discrimination and equality provisions enacted for human rights reasons. Within the United Kingdom these various and often disparate sets of legislation largely came together within the Equality Act 2010.[5] As an act of parliament, this legislation survives the United Kingdom's departure from the European Union in January 2020 (Brexit). The European Union (Withdrawal Agreement) Act 2018 ends the supremacy of EU law within the United Kingdom although EU discrimination law is retained within the United Kingdom[6] and Article 157 of TFEU remains directly effective.[7] The extent to which this protection will endure following Brexit is uncertain and the current employment law situation within the United Kingdom is marked by uncertainty.[8]

This article is not concerned, however, to assess the impact of Bexit upon non-discrimination and equality law as such, but to examine how private contractual arrangements can work to impede the equality of women by creating a silence around inequality. It must be acknowledged, though, that the protections which were afforded by European Union directives and judgments were of a

1 Equal Pay Act, 1970, c 41.

2 Sex Discrimination Act, 1975 c 65.

3 See, for example, R. Wintemute, 'Goodbye EU Anti-Discrimination Law? Hello Repeal of the Equality Act 2010?' (2016) 27 *King's Law Journal* 387.

4 Article 119, Treaty establishing the European Economic Community; now Consolidated version of the Treaty on the Functioning of the European Union, Article 157. A recent, possibly final, determination of Article 157 within the United Kingdom is Case C-624/19 *K and others* v *Tesco Stores Ltd* 3 June 2021 (CJEU) which held that Article 157 is of direct effect within the United Kingdom.

5 C 15. The history of this process is detailed in B. Hepple, *Equality The Legal Framework* (2nd ed, Oxford: Hart Publishing, 2014) 11–17.

6 European Union (Withdrawal Agreement) Act 2020, c 1, s 14.

7 European Union (Withdrawal) Act 2018, c 16, s 4; Explanatory Notes European Union (Withdrawal) Act 2018, para 94.

8 See, for example, the observations of the Employment Lawyers Association (UK) at https://www.elaweb.org.uk/content/eu-withdrawal-bill-–-employment-lawyers-association-draws-attention-potential-impact#overlay-context; M. Connolly, 'Objective justification, less discriminatory alternatives, and the 'Great Repeal Bill'' (2017) 17 *International Journal of Discrimination and the Law* 195.

constitutional nature; the absence of any such similar fundamental laws makes this situation far more precarious for women and other groups who seek to assert equality rights. The examination in this article is around private contractual agreements which operate to remove information about discrimination against women, based on sex, from the public domain. An important effect – indeed the central reason for such arrangements – is to prevent discrimination from receiving public scrutiny. Quite apart from the impact upon individual women, this effect hampers attempts to combat discrimination against all women.

A large part of the public discrimination in relation to women arises in an employment or employment like context. One of the hazards of a common law system is that the courts can often lack an overarching framework of fundamental principles to draw upon in adjudicating disputes. While the adjudication of a particular issue can be of fundamental importance to others, the court is seemingly constrained by the law applicable to the particular issue. English Labour Law, for example, grew initially from the resolution of particular contractual and tortious disputes, a process in which the rights accorded to workers by courts was unsurprisingly restrictive. Unusually, workers' rights in the United Kingdom arose not by law but from the recognition of trade unions and their right to undertake collective bargaining on the part of their workers. Otto Kahn-Freund both identified the uniqueness of this situation[9] and gave it an enduring description: collective laissez-faire.[10] Collective bargaining allowed a collective determination of the contents of individual contracts of employment and with regard to employment relations social legislation was 'an adjunct to, a gloss on, collective bargaining'.[11] State support for voluntary collective bargaining declined during the period of market flexibility and deregulation brought about by the Conservative governments of the last quarter of the twentieth century. As this collective laissez-faire system was eroded the protection of workers' rights increasingly came from EU legislation which, itself, had a paramount and quasi-constitutional status within the United Kingdom. Britain's withdrawal from the EU leaves British workers without this overarching legislative protection to their employment rights as it is open to the British parliament to remove or amend the retained EU employment law. Again, uniquely, there is little constitutional check upon such a process for the Charter of Fundamental Rights was not retained[12] and the European Convention on Human Rights not only refers mainly to individual rights but is also implemented

9 O. Kahn-Freund, 'Legal Framework', in A. Flanders and H. Clegg (eds), *The System of Industrial Relations in Britain* (Oxford: Basil Blackwell, 1954) 47.

10 O. Kahn-Freund, 'Labour Law', in M. Ginsberg (ed), *Law and Public Opinion in Britain in the Twentieth Century* (London: Stevens, 1959).

11 *Ibid*, 248.

12 S 5(4) European Union (Withdrawal) Act 2018, c 16.

in the United Kingdom by reason of a domestic statute, the Human Rights Act 1998. What this short survey of the development of British Labour Law[13] tells us is that the individual contracts of employees with their employers are of particular and increasing importance in the United Kingdom.

Women are protected under the Equality Act 2010 from direct and indirect discrimination by their employer in relation to their employment, vocational training and promotion and working conditions.[14] The employer is vicariously liable in the event that another employee discriminates against or harasses an employee unless the employer has taken reasonable steps to prevent this. The Equality Act 2010 also provides 'equality of terms', or equal pay, must be made.[15] It must also be noted that the protection against direct and indirect discrimination on the basis of sex extends beyond employment to include the use of public services or education; the use of businesses and other organisations that provide goods and services; clubs and associations and public bodies (such as local councils and government departments).

The protection of equality occurs in two ways. The Equality and Human Rights Commission (EHRC) has a number of statutory duties. These include a general duty to encourage and support the development of a society in which there is respect for human rights, dignity, equal opportunities and mutual respect between different groups of people.[16] The Equality Act 2006 also places a duty upon the EHRC to enforce the Equality Act 2010. Under the Equality Act 2006, the EHRC has the power to investigate an organisation or an individual it believes to be in breach of equality law and to enter into a legally binding agreement with an organisation or individual to implement an agreed action plan to prevent future discrimination. The EHRC also has litigation powers to provide legal assistance to individuals making a claim under the Equality Act 2010 and to either take or get involved in cases that will strengthen equality and human rights laws.[17] It is important to note that the powers of the EHRC have been diminished since its establishment and so, too, has its funding and personnel.[18] This places a much greater burden on the second way in which the rights accorded by the Equality Act 2010 can be enforced: the enforcement of their rights by private individuals. In the case of discrimination

13 Excellent accounts of this development can be found in S. Deakin, C. Barnard *et al.*, *Deakin and Morris' Labour Law* (6th ed, Oxford: Hart Publishing, 2021) ch 1 and H. Collins, K. Ewing and A. McColgan, *Labour Law* (2nd ed, Cambridge: Cambridge University Press, 2019) ch 1.

14 Equality Act 2010, s 11. The 2010 Act implements the Equal Treatment Directive, Dir 06/54.

15 Equality Act 2010, s 64–80.

16 Equality Act 2006, s 3.

17 Equality Act 2006, s 28, s 30.

18 Hepple, n 5 above, 188–191.

related to employment, claimants must go to an employment tribunal;[19] in cases relating to services and public functions, premises, education and associations individuals must go to the county court in England and Wales.[20]

A considerable weakness of the current system is that a substantial amount of the enforcement of the provisions of the Equality Act 2010 fall upon those individuals who have suffered discrimination. The near removal of all legal aid and the high cost of legal advice creates, in itself, an enormous power imbalance to the detriment of the individual who alleges discrimination. It is in this particular context that the use of non-disclosure agreements is considered in this article.

3 Non-disclosure Agreements and Discrimination

The terminology used to describe agreements used to purchase silence varies. Traditionally, the English term was 'confidentiality clauses' or 'confidentiality agreements'. Americans employed the term 'non-disclosure agreement'; 'gagging clauses' are another common form of reference. This article refers to these agreements as non-disclosure agreements. Confidentiality clauses implies a certain legitimacy to the information or action to be hidden; non-disclosure agreements more carefully captures that there is information or action both legitimate and illegitimate to be hidden. The particular form of non-disclosure agreement can be either a contract in its own right – solely concerned to prevent disclosure – or as a clause or series of clauses within a larger contract, such as a settlement agreement. It is also important to recognise that the non-disclosure agreement can be combined with other contractual clauses which, taken together, strengthen enormously the obligations imposed by the non-disclosure agreement.

3.1 Use

Non-disclosure agreements have long been a common feature in various types of contracts in the United Kingdom. They are particularly suited to commercial circumstances. The use of non-disclosure agreements can serve many important commercial functions in those instances where one party wishes or needs to divulge information to another party or parties but does not wish to share it with a

19 N. Busby and M. McDermont, 'Fighting with the Wind: Claimant's Experiences and Perceptions of the Employment Tribunal' (2020) 49 *Industrial Law Journal* 159 considers the numerous vulnerabilities workers have in advancing their claims and to enforce remedies before employment tribunals.

20 Equality Act 2010, s 114.

wider group. They work to protect information of commercial value: technical information, client databases, intellectual property, know-how and expertise. They are employed not only between firms but also between a firm and its employees, contractors and sub-contractors. Non-disclosure agreements have an important function in facilitating the disclosure of sensitive information necessary to undertake mergers and acquisitions and to explore whether or not such a merger should occur. They facilitate other forms of transactions such as joint ventures, financings, private placements and supply chains. They can be used as a part of the due diligence vital to ensure that professional advisers such as the lawyers, accountants and management consultants involved in commercial arrangements do not disclose the information they have acquired in the particular arrangement. In employment contracts these agreements provide in express terms what would otherwise be implied in many instances and they provide clarity and transparency to the employment relationship.[21] Within an employment context non-disclosure agreements have long had a close connection with restraint of trade clauses and English common law has long had a developed means by which to regulate these clauses.[22] Non-disclosure agreements can also be used by companies who wish to undertake internal investigations into corporate affairs and behaviours without fear that the information undertaken will become public. An important use over the years has also been to keep in confidence the terms by which a dispute has been settled and, at times, the very existence of the dispute and/or its settlement. This is not necessarily a negative matter; it can, for example, work to prevent further vexatious litigation in a particular area.[23] While some criticism exists that the use of a non-disclosure agreement in some of these instances operates to impede the flow of information and distorts economic efficiency,[24] it is generally accepted that all of these various uses of non-disclosure agreements are acceptable in an egalitarian democracy. They work to perform necessary business functions and, as such, have legitimate purposes.

21 T. Aplin *et al.*, *Gurry on Breach of Confidence: The protection of confidential information* (2nd ed, Oxford: Oxford University Press, 2012) ch 11.

22 Courts are able to balance the restraint of the employee against the value of the business interests sought to be protected. Restraint of trade cases are concerned less with the control these clauses place upon an employee or ex-employee at a personal level and more with the effect such a restraint has upon the economy and the competitive forces within it.

23 G. Stevens and L. Subar, 'Confidentiality is a Virtual Necessity' (2012) *GPSolo* 28.

24 C.P. Ehrlich and L. Garbarino, 'Do Secrets Stop Progress? Optimizing the Law of Non-Disclosure Agreements to Promote Innovation' (2020) 16 *New York University Journal of Law & Business* 279.

3.2 Abuse

At some point, or more likely over a period of time, it became apparent that non-disclosure clauses were useful in cases where the concealment of information lacked a legitimate purpose. Non-disclosure clauses could be used to conceal misdeeds and to keep bad behaviour hidden. In relation to an individual, these could be placed in a contract of employment; more commonly they were placed in agreements to settle disputes. Unsurprisingly for a legal device which is intended to procure silence, there have been few detailed studies of non-disclosure agreements and their operation.[25] It appears that non-disclosure agreements are now ever-present in a multitude of contracts.[26] One solicitor from a leading London firm, who had represented Miramax in settling a dispute involving the behaviour of Harvey Weinstein, informed the Women and Equalities Committee in 2018 that: 'I have been practising employment law for over 30 years, and non-disclosure agreements or confidentiality provisions are commonly included in every settlement'.[27] With such an expansive practice of including non-disclosure agreements in settlements, many instances will be perfectly legitimate but where non-disclosure agreements are used to conceal misdeeds, immoralities and even crimes, their use serves an illegitimate purpose.

25 See, though, V. Pagan, 'The murder of knowledge and the ghosts that remain: non-disclosure agreements and their effects' (2021) 27 *Culture and Organization* 302 and R. Moorhead, 'Professional Ethics and NDAs: Contracts as Lies and Abuse?', in P.S. Davies and M. Raczynska (eds), *Commercial Contracts: Terms Affecting Freedoms* (Oxford: Hart Publishing, 2020). On American law, see L.-D. Askew, 'Confidentiality Agreements: The Florida Sunshine in Litigation Act, the #Metoo Movement, and Signing Away the Right to Speak' (2019) 10 *University of Miami Race & Society Justice Law Review* 61; J.S. Gordon, 'Silence for Sale' (2020) 71 *Alabama Law Review* 1109; D. A. Hoffman and E. Lampmann, 'Hushing Contracts' (2019) 97 *Washington University Law Review* 165; E. Otte, 'Toxic Secrecy: Non-Disclosure Agreements and #MeToo' (2021) 69 *University of Kansas Law Review* 545; D.A. Rondeau, 'Opening Doors: How the Current Law Surrounding Nondisclosure Agree'; R.S. Spooner, 'the Goldilocks Approach: Finding the "Just Right" Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases' (2020) 37 *Hofstra Labour & Employment Law Journal* 331; V. Prasad, 'If Anyone is Listening, #MeToo: Breaking the Culture of Silence around Sexual Abuse through Regulating Non-disclosure Agreements and Secret Settlements' (2018) 59 *Boston College Law Review* 2507; and J. Zhai, 'Breaking the Silent Treatment: The Contractual Enforceability of Non-Disclosure Agreements for Workplace Sexual Harassment Settlements' (2020) 2020 *Columbia Business Law Review* 396.

26 See, for example, P. Caruana Galizia, 'Addicted to secrecy', *Tortoise*, Saturday 11 May 2019 at https://www.tortoisemedia.com/2019/05/11/ndas-part-2/?sig=047LZlXFDatYI2_nw0KdA4_LbWU6lUoP6CCPForNTy8&utm_source=Twitter&utm_medium=Social&utm_campaign=11May2019&utm_content=NDAs.

27 M. Mansell, from Allen & Overy, Q91 Oral Evidence: Sexual Harassment in the Workplace, HC 725 28 March 2018.

The facilitation of these illegitimate purposes constitutes an abuse of non-disclosure agreements and the effect varies according to the context of the particular situation. The consequences for most individuals are extremely unpleasant for they feel powerless, compelled to agree to hide a truth they wish to express. The words of an anonymous woman, an alleged victim of the British businessman, Sir Phillip Green, provide a distressing insight into this impact:

> I would like nothing more than to speak freely about what Philip Green did to me, but I can't tell you what happened. I was paid for my silence and I have kept it, not just because of the NDA that I was forced to sign, but because of the fear … Green is like a general hiding behind an entire army. His armour is made of wealth, power, and influence. It's how men like him get away with behaviour which is unacceptable in normal society. . . . Their sphere of influence extends far and wide. Those who have stood up to these people can be left feeling utterly victimised and helpless. . . . Some like Green have the power and influence to stop you working ever again if they choose.'[28]

This angst does not diminish over time as signatories come to realise a new fear, of breaching the non-disclosure agreement and attracting adverse consequences. Zelda Perkins, who entered into a non-disclosure agreement with Miramax, stated that she feared that if she broke the terms of the non-disclosure agreement, she would go to jail for breaking the law.[29] The terms of many, perhaps most, non-disclosure agreements are such that the victim of harassment and abuse will struggle to seek professional or other assistance in coming to terms with this abuse, a situation which compels them to live with ongoing psychological and emotional burdens. Some non-disclosure agreements require the individual to name all of the family and friends to whom they have had any discussions about the particular matter. Again, as Zelda Perkins observed:

> We also increasingly see the use of disclosure clauses in NDA's where a list of individuals in whom the weaker party has confided their abuse must be disclosed. This is very often used as a collateral threat to cause, close family members, close friends, life partners to also be threatened by the more powerful party. Threats of libel and breach of confidence are routinely made against this penumbra group of individuals.[30]

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28 'The terror of being pursued is still enough to confine me to silence', *The Daily Telegraph*, 9 February 2019, p 1.

29 Z. Perkins, Q89 Oral Evidence: Sexual Harassment in the Workplace, HC 725 28 March 2018.

30 Written submitted by Zelda Perkins on 19th April 2019 to the Women and Equalities Committee Inquiry on the use of Non-Disclosure Agreements in discrimination cases at http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/The%20use%20of%20nondisclosure%20agreements%20in%20discrimination%20cases/written/100919.html.

A non-disclosure agreement also prevents one victim of harassment from providing emotional support to another victim. This has legal ramifications as it suppresses the extent of the evidence that could be offered in later civil litigation or criminal trials. The effect of this abuse of a non-disclosure agreement extends beyond the complainant and their circle. It also encompasses the individual abuser. There are indications that the concealment of misdeeds, and possibly crimes, not only allows an abuser to continue with this pattern of behaviour but that there is also an increase in the severity of the abuse they perpetrate upon others.[31] The lack of consequences for their misbehaviour emboldens the abuser. In turn the concealment of abuse works to remove the ability of other women to make an informed decision as to whether or not to come into contact with the particular abuser. As one academic has observed, the non-disclosure agreement with one individual removes the free agency of other individuals.[32] The presence of a powerful individual who abuses and harasses employees and co-workers also causes emotional distress to others in this working environment. There are some indications that where the abuse of one individual is tolerated within an organisation, others will also engage in offensive and discriminatory behaviour.

There are indications that the availability of non-disclosure agreements can act to produce negative management styles.[33] In relation to whistleblowing cases, the failure to acknowledge and address serious problems can impair the functioning of the institution as a whole. In the case of discriminatory and abusive behaviour, a continued pattern of this behaviour creates a negative working environment. Research has established that sexual harassment is an 'organizational stressor' that creates significant negative outcomes for an institution's targets.[34] Organisations which function with such stresses are economically inefficient and wasteful. There are not only the costs of settling these actions but also the cost of a lower worker productivity: 'as individuals are made subject to unwelcome, unwanted advances or to generally hostile workplaces, they probably focus less on day-to-day tasks and devote increasing energy to avoidance, minimizing exposure and ensuring one's own safety'.[35]

There is a further cost beyond these individuals and organisations and that is a public cost. Abusive non-disclosure clauses, those without legitimate purposes, facilitate the diminution of our public lives and harm our societies as a whole. This occurs in a number of different ways. In the United States scholars have considered

31 Hoffman and Lampmann, n 25 above, 174.

32 Gordon, n 25 above, 1152–1155.

33 C. MacMillan, 'Private Law and Public Concerns: Non-Disclosure Agreements in English Contract Law', in *Contents of Commercial Contracts,* n 25 above, 331.

34 Hoffman and Lampmann, n 25 above, 177.

35 *Ibid* 178.

the negative impact of non-disclosure agreements on free speech and related rights.[36] A great deal of this scholarship examines this in relation to the American constitution, most notably the First Amendment, although an attempt has been made to link the right to free speech to more fundamental and free standing public policy rights.[37] The silencing of free speech has been linked to an illegitimacy in the election of the United States president in 2016 for voters, deprived of information by Stormy Daniels about Donald Trump, were unable to exercise their own agency and autonomy in casting their votes.[38]

A second way in which non-disclosure agreements work against the public good is in the eradication of discrimination and the establishment of an equal society. When non-disclosure agreements operate to suppress public knowledge of instances of sexual harassment and discrimination they prevent individual citizens from realising the extent to which legal principles of equality are not met. Ignorant citizens do not seek or demand measures to combat discrimination which they are unaware of. In short, private non-disclosure agreements prevent the realisation of equality and work to retain traditional inequalities.

Non-disclosure agreements also pose a particular problem to common law jurisdictions such as England and Wales. The common law is largely judge made law rather than legislative made law. Judges are either bound or persuaded by earlier decisions made in similar cases. When potential litigants are prevented, even by their own choice, from legal action a potential precedent is not created. Further a reduction in litigants coming before the courts all claiming redress for a particular wrong hampers the judiciary from realising the extent of the wrong. Those cases which do come before courts look unusual rather than litigation over a very usual form of agreement.

Finally, the effect of non-disclosure agreements is to erode one of the most fundamental conditions necessary for democracy: the rule of law. When a powerful individual silences their weaker victim with a non-disclosure agreement they begin to change the way in which law is applied to citizens. A private contract between two individuals has worked to create a situation where one is now above the law.

In the United Kingdom some of the dangers posed by non-disclosure agreements, particularly in relation to the harassment and discrimination, have been considered by a number of public bodies who held public consultations in 2019.

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36 See, for example, Garfield, 'Promises of Silence: Contract Law and Freedom of Speech' (1997–1998) 83 *Cornell Law Review* 261 and Gordon, n 25 above.

37 Gordon, *ibid* 1117.

38 *Ibid*.

3.3 2019 Inquiries, Consultations and Recommendations in the United Kingdom

Discrimination against women can occur in many ways. Within England, most of the focus has been within the employment environment. Here there are concerns with several forms of discrimination directed against women: unequal pay; unequal working conditions or requirements; maternity provisions; and harassment. In the last few years, spurred by the #MeToo movement, two public bodies, the House of Commons' Women and Equalities Committee[39] and the Equality and Human Rights Committee,[40] considered the problem of sexual harassment in the workplace. Most people who had been sexually harassed were women. Both bodies concluded that it was apparent that the sexual harassment of women was a major problem, one compounded by 'corrosive cultures which silence individuals and normalise harassment',[41] and of which there was, correspondingly a lack of awareness of the extent of sexual harassment in the workplace. A principal reason identified in both reports for this lack of awareness was the use of non-disclosure agreements which operated to silence discussion of both the harassment and the employer's response, or lack thereof, to it.[42]

The significance of non-disclosure agreements in stifling knowledge of sexual harassment was so great that both the Women and Equalities Committee and Equality and Human Rights Committee then went on to report on their use.[43] In addition, the Department for Business, Energy and Industrial Strategy, also prompted by 'high-profile cases', launched a consultation on Confidentiality

39 HC 725, Sexual harassment in the workplace, Fifth Report of Session 2017–19, 18 July 2018.

40 Equality and Human Rights Commission, Turning the tables: Ending sexual harassment at work, 27 March 2018, https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf. The Government Equalities Office also consulted on the issue of sexual harassment in the workplace in 2019 but has yet to release the results of its consultation at https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace.

41 Turning the tables, *ibid* 2.

42 Sexual harassment in the workplace, n 40 above, 46; Turning the tables, n 40 above, 16. That this situation existed is startling given the employers' liability under the Equality Act 2010 for the acts of sexual harassment of one employee by another unless they had taken all reasonable steps to prevent it.

43 EHRC, The use of confidentiality agreements in discrimination cases, October 2019 at https://www.equalityhumanrights.com/en/publication-download/use-confidentiality-agreements-discrimination-cases; HC 1720, The use of non-disclosure agreements in discrimination cases, Ninth Report of Session 2017–19, 5 June 2019 at https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1720/1720.pdf.

Clauses and subsequently issued a response to this consultation.[44] This response also considered the recommendations made by the Women and Equalities Committee report on the use of non-disclosure agreements. The Government's response largely rejected the wide-ranging recommendations made by the Women and Equalities Committee, deferred decisions on other recommendations and committed itself to only a small number of legislative amendments. No date for legislation has been specified.

There was little consideration in the reports of either the Women and Equalities Committee or the Department of Business, Enterprise and Industrial Strategy of the contractual limits which exist concerning non-disclosure agreements. An underlying difference in approach between the two reports, broadly, is that while the Women and Equalities Commission was more concerned with the impact upon the individuals bound by the non-disclosure agreements while the Department for Business, Enterprise and Industrial Strategy was concerned with the utility of the clauses to businesses. The Women and Equalities Committee provided a focus largely upon the circumstances in which such agreements were sought and what these agreements attempted to cover. The Women and Equalities Committee found that non-disclosure clauses were commonplace in settling any employment dispute.[45] While there were advantages to the individual employee in such circumstances (the willingness of an employer to settle a dispute,[46] a higher payment than might otherwise be reached through settlement or tribunal action,[47] the removal of the need to undertake tribunal hearings,[48] and that the employee themselves might not want matters to be made publicly known) there were considerable disadvantages. Some of these disadvantages were particular to the individual employee, most notably that they experienced problems both in having to agree to a non-disclosure agreement and also in moving forward with their lives as they lived in fear of repercussions if the agreement was breached and the barriers constraining them in discussing matters with future employers or providing information to receive professional support of any kind.[49]

44 Department for Business, Energy and Industrial Strategy, Confidentiality Clauses Response to the Government consultation on proposals to prevent misuse in situations of workplace harassment or discrimination, July 2019 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818324/confidentiality-clause-consultation-govt-response.pdf.

45 HC 1720, n 43 above, [11].

46 *Ibid* [12]–[13].

47 *Ibid* [12].

48 *Ibid*.

49 *Ibid* [14].

The disadvantages of non-disclosure clauses were not confined to the individual, however, but extended more broadly. Within an organisation, 'the use of NDAs effectively covers up unlawful discrimination and harassment, allowing management behaviour and organisational culture to go unchallenged and unchanged'.[50] Perpetrators could continue to harass or discriminate against others and with victims unable to know about or support other complaints. In some instances it appeared that employers allowed a culture of harassment and discrimination, knowing the culture could be covered up with an NDA;[51] it was also clear that some employers used NDAs to avoid conducting any investigation into discrimination or harassment allegations.[52] In addition the unethical and sometimes unlawful use of non-disclosure agreements did deter whistleblowers from speaking out in the public interest[53] and, similarly, prevent or hamper signatories from assisting the police or other public bodies with their inquiries or investigations.[54]

The Women and Equalities Committee expressed grave concern that most employees entered into non-disclosure agreements because a severe imbalance of power existed between the employer and employee throughout the entire complaint and resolution process. This imbalance was brought about in different ways, both within an employer's control and also in general existence. Employers set and controlled the grievance process, often employing law firms to conduct these and then refused to provide even an individual complainant with the investigative report and outcome on the basis that it was covered by legal privilege.[55] Employees also feared that their future employment prospects would be impaired if they were not given a reference.[56] Employees attempting to enforce their rights faced barriers of a general nature which existed independently of an employer's actions. These included: the expense of obtaining legal advice;[57] the short time limit in which to bring an action in the employment tribunal;[58] the difficulty of claimants representing themselves before employment tribunals in discrimination cases which 'tended to be both complex and sensitive';[59] the online publication of tribunal judgments made both the details of the treatment they suffered and the complaint they brought publicly available

50 *Ibid*.
51 *Ibid* [15].
52 *Ibid* [19].
53 *Ibid* [79]–[86].
54 *Ibid* [89].
55 *Ibid* [22].
56 *Ibid* [24].
57 *Ibid* [43]–[44].
58 *Ibid* [38]–[39].
59 *Ibid* [52].

to all;[60] and that awards by the tribunal were low, particularly in relation to the costs incurred in bringing a case.[61]

As a result of their inquiry, the Women and Equalities Committee made a series of recommendations for the Government to implement.[62] While many of these recommendations were addressed at the circumstances surrounding the settlement or adjudication of a discrimination or harassment claim and the corporate governance of companies concerned to use non-disclosure agreements, others were addressed at the particular wording and use of non-disclosure agreements. There was a call for legislation to prohibit their use to prevent legitimate discussions of unlawful discrimination or harassment and where disclosure was required for a legitimate public interest (such as discussing potential claims with other alleged victims).[63] It was also recommended that the Government should make it a criminal offence for an employer or their professional adviser to propose a confidentiality clause which sought to prevent or limit the making of a protected disclosure or the disclosure of a criminal offence.[64] They called upon the Government to legislate to ensure that non-disclosure agreements should not prevent signatories from sharing information with other potential victims and to ensure that non-disclosure agreements are not used to stop the cover-up of unlawful discrimination.[65] An important set of recommendations concerned the need for legislation to ensure that non-disclosure clauses contained certain mandatory content pertaining to: (i) what information could not be shared with others; (ii) agreement about acceptable forms of wording to be employed by the signatory in answering queries from others, notably in job interviews; (iii) the explanation in clear English as to the effect of clauses and their limits;[66] and (iv) a requirement of standard clauses to be included which covered the wording of confidentiality, non-derogatory and similar clauses, along with standard clauses on the damages which could be received for a breach of these terms.[67]

The Government's response to these recommendations came in two related documents. The first was the response of the Department of Business, Enterprise

60 *Ibid* [33]–[34].

61 *Ibid* [53]–[58]; [63]–[64]. Even more worrying was the fact that in an action before the County Court or High Court, complaints faced the possibility that if they did not settle an action (possibly with an agreement containing an NDA) that costs would be sought against them if their action was unsuccessful: *ibid* [59].

62 *Ibid* [49]–[58].

63 *Ibid* [52].

64 *Ibid* [53].

65 *Ibid*.

66 *Ibid* [54].

67 *Ibid* [55].

and Industrial Strategy to its own consultation[68] and the second was a formal response to the Women and Equalities Committee report.[69] The government preferred to use the term 'confidentiality clauses' rather than 'non-disclosure agreements'; a choice which emphasises a less critical approach to these contractual clauses, an approach which favours an employer and the operation of businesses. While promises to legislate on some matters were given, most other recommendations were not adopted, particularly those which would have worked to change the general circumstances which created the power imbalance between a victim and their former employer. The government promised to legislate to regulate non-disclosure agreements in a limited number of ways. First, non-disclosure agreements would not be able to prevent an individual disclosing information to the police,[70] regulated health and care professionals or legal professionals.[71] Second, the legislation would provide that the limitations of a non-disclosure agreement were clear to those who entered them, although such clarity might extend only to ensuring an understanding that disclosures to the police were permitted.[72] Third, the need for independent legal advice would be required when individuals entered into a settlement agreement.[73] Fourth, new enforcement

68 Department of Business, Enterprise and Industrial Strategy, Confidentiality Clauses Response to the Government consultation on proposals to prevent misuse in situations of workplace harassment or discrimination, July 2019 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818324/confidentiality-clause-consultation-govt-response.pdf.

69 HC 215, Women and Equalities Committee, The use of non-disclosure agreements in discrimination cases: Government response to the committee's Ninth Report of Session 2017–19, 29 October 2019 at https://publications.parliament.uk/pa/cm201919/cmselect/cmwomeq/215/21502.htm.

70 Confidentiality Clauses Response, n 44 above, 8–9; the proposed legislation is 'that no provision in any employment contract or settlement agreement can prevent someone from making any kind of disclosure to the police'. Should this new legislative requirement not be met the clause will be void although the entire settlement agreement will not be void: *ibid*, 15. The government's response in HC 215, *ibid*, 15.

71 *Ibid*, 8. The disclosure to legal and health and care professionals would only be covered where the particular individual was a 'regulated professional' and as such was 'covered by duties of confidentiality . [with] … established practices for when confidential information is disclosed'. The government's response in HC 215, *ibid*, 3, 12. In other words the secret would never reach the general public. The government expressly rejected the suggestion that disclosure could be made by the victim to friends, family or other victims as they would not be subject to professional confidentiality requirements: the government's response in HC 215, *ibid*, 12. Again, if the clause attempted to prevent such a disclosure, the clause would be void.

72 *Ibid* 10. The government's response in HC 215, *ibid* 3.

73 *Ibid* 13. This proposal is not as generous as it might first appear to be. The government proposes only to extend s 203(3) of the Employment Rights Act 1996 which requires a worker to receive independent advice in order to make a settlement agreement valid to provide that this must be

mechanisms would be introduced for settlement agreements which did not comply with the legal requirements.[74] Finally, guidance would be produced, by 'relevant stakeholders' working with the government on drafting requirements for non-disclosure agreements.[75]

There is no indication of when these limited legislation provisions will be put forward. At the time of writing, there is no provision for government legislation in the current parliamentary session, although a private member's bill has been put forward by Maria Miller, the former chair of the Women and Equalities Select Committee.[76] More surprisingly, these provisions have not received sustained or critical consideration by others. It is not the purpose of this paper to critically scrutinise the Government's proposals but it must be noted that they fall far short of what the Women and Equalities Committee recommended. Their limited and conservative nature mean that it is unlikely that they will resolve the wide ranging and serious issues identified by the Women and Equalities Committee. It must also be observed that the Government's proposals are largely procedural rather than substantive in nature. The requirement for independent legal advice is, for example, unlikely to alter much by way of outcome. The evidence before the Women and Equalities Committee indicated that many of these women had received legal advice, although not of the quality and experience of their employer; in other cases, they were already largely aware of the effect of the non-disclosure agreement. Their anguish came about not through ignorance but powerlessness.

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independent legal advice. It is worth noting that the government rejected the proposal of the WESC that the employer fund this legal advice. And, of course, there would be no such independent legal advice requirements for those instances not within s 203 of the Employment Rights Act 1996.

74 These enforcement mechanisms are more limited than the WESC recommended (which was to make it an offence for an employer or professional adviser to propose a confidentiality clause designed or intended to prevent or limit the making of a protected disclosure). As noted in the footnotes above, if a non-disclosure clause in a settlement failed to meet the new legislative requirements (that is to say, it attempted to prevent disclosure to the police or certain professionals) the clause would be void: HC 215, n 69 above, 15; Confidentiality Clauses Response, n 44 above, 15. Where a worker received a written statement of employment details which did not provide the limits of the non-disclosure clause, they would be eligible for additional compensation before an employment tribunal should they be successful in any subsequent claim: Confidentiality Clauses Report, n 44 above, 15–16; HC 215, n 69 above, 15.

75 *Ibid* 11–12. The relevant stakeholders were the Solicitors Regulation Authority (SRA), the Equality and Human Rights Commission (EHRC) and the Advisory, Conciliation and Arbitration Service (ACAS). All have thus far produced guidance, none of which is sufficiently far-reaching to provide the protections the WESC sought to provide.

76 Maria Miller, the former chair of the Women and Equalities committee introduced a private member's bill on non-disclosure agreements (Hansard vol 700, col 834, 21 September 2021) scheduled for second reading on 18 March 2022. Parliament was prorogued in May 2022 before the Bill could become law.

The absence of legislation, and the limited nature of the legislation, means that the enforceability of non-disclosure agreements under the common law of contract becomes very important. There has, to date, been virtually no such consideration in England and Wales.

4 The Common Law of Contract and the Treatment of Non-disclosure Agreements

4.1 Legislative Regulation of Specific Contractual Terms

There are a small number of legislative safeguards which work to provide protection to an employee who has suffered discrimination. As will become apparent, these safeguards are somewhat piecemeal and neither prohibit the use of a non-disclosure agreement nor do they offer an entirely adequate protection. While it is not possible limit or exclude the operation of the Employment Rights Act, 1996 by contract it is possible to agree not to bring proceedings under the Act before an employment tribunal.[77] In order, though, for the agreement not to bring such proceedings to be valid, the employee must have received advice from an independent adviser as to the terms and effect of the proposed agreement and its effect on her ability to pursue her rights before an employment tribunal.[78] While there are certain restrictions as to who this adviser can be[79] they do not need necessarily need to be a qualified lawyer but can be one who is certified and authorised by a trade union to give advice on behalf of the trade union or one who works at an advice centre (as an employee or volunteer).[80] Where such advice is given, the agreement to forgo proceedings before the employment tribunal is valid and enforceable, although subject to normal contractual doctrines which might operate to vitiate a contract, such as misrepresentation.[81] It is also possible for an employee to enter into a binding agreement to refrain from legal proceedings if a conciliation officer has conciliated the matter.[82] The validity of such an agreement, even if it has met

77 Employment Rights Act 1996, c 18, s 203(1).

78 *Ibid* s 203(3).

79 *Ibid*: they must, for example, be covered by a contract of insurance or a form of indemnity covering the risk of claim by the employee. They cannot be employed by the employer: s 203(3B).

80 S 203(3A).

81 *Industrious Ltd v Horizon Recruitment Ltd* (*In Liquidation*) [2010] ICR 491.

82 Employment Rights Act, 1996 s 203(2) (f); s 18(1) Employment Tribunals Act, 1996.

the relevant procedural requirements, is also subject to general contractual doctrines such as misrepresentation and estoppel.[83]

A second form of legislative protection arises by reason of the Equality Act 2010 which provides that an employment term is unenforceable where it purports to prevent or restrict an individual from disclosing or seeking to disclose information about their pay where this is made for the purpose of discovering whether or not in relation to the work in question there is a connection between pay and having (or not having) a protected characteristic under the Act.[84] Similarly, a clause which purports to prevent or restrict an individual from seeking a pay disclosure from a colleague, including a former colleague, is also unenforceable.[85] To the extent which a non-disclosure agreement covered such prohibitions regarding such access to pay information, it would be unenforceable.

Finally, in some circumstances a non-disclosure agreement may purport to include matters which are protected disclosures under the Public Interest Disclosure Act 1998.[86] This Act is designed to protect whistleblowers. While there are serious criticisms as to the nature and extent of the protection the Act affords whistleblowers,[87] it works to prevent whistleblowing disclosures from being concealed with a non-disclosure agreement. Any provision in any agreement is void 'in so far as it purports to preclude' a worker[88] from making a protected disclosure.[89] There are a number of weaknesses in this provision. First, it only applies to one who is a worker.[90] Second, the legislative protection has not

83 *Cole* v *Elders' Voice* [2021] ICR 601.

84 Equality Act 2010, s 77.

85 *Ibid*.

86 Public Interest Disclosure Act 1998, c 23. The Act amends part IV of the Employment Rights Act 1996 and allows a worker to make a 'qualifying disclosure', that is information for which the worker has a reasonable belief tends to show that one of the following has been committed, is being committed or likely to be committed with regard to: a criminal offence; any legal obligation to which an individual is subject; a miscarriage of justice, damage to the environment; or that one of the previous matters is being concealed (s 43B Employment Rights Act 1996). The limits upon the persons to whom a worker can make disclosure are set out in s 43C to 43H of the 1996 Act. The worker must establish that they have a reasonable belief not only that the disclosure tended to show one or more of the matters contained within the statutory categories but also that they had a reasonable belief that disclosure was made in the public interest: *Chesterton Global Ltd* v *Nurmohamed* [2017] EWCA Civ 979.

87 J. Ashton, '15 Years of Whistleblowing Protection under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger?' (2015) 44 *Industrial Law Journal* 29.

88 The whistleblowing detriment claim must arise in respect of detriments suffered in the employment field: *Tiplady* v *City of Bradford MDC* [2019] EWCA Civ 2180.

89 S 43J Employment Rights Act 1996.

90 The limitations upon this category can be seen in *Gilham* v *Ministry of Justice (Protect Intervening)* [2019] UKSC 44, a case in which the Supreme Court was only able to include a District Judge

prevented employers from including non-disclosure clauses which seek to preclude protected disclosures in contracts.[91] Third, a contract with a non-disclosure clause purporting to prevent protected disclosures may also include a further term whereby the worker warrants that they are unaware of any matters which are protected disclosures. The result is to circumvent the protections seemingly afforded by the Act because if the worker later releases the information, they are in breach of contract. This circumvention of the Act is made complete by coupling this warranty to a further term that in the event that the warranty is breached by the worker that they are liable to pay the other party damages.[92]

4.2 General Contract Principles

The limited legislative scope to invalidate or regulate the use of non-disclosure agreements acts to place a greater emphasis upon general contract principles to regulate the efficacy of these non-disclosure agreements. English law, however, struggles in this role. Three powerful currents pull courts away from recognising the harm that non-disclosure agreements can work and intervening to prevent this harm. The first is freedom of contract, a recognition of the importance of the value of the abilities to parties to reach their own agreement, unimpeded by courts. Closely allied to this is sanctity of court, that contracts freely entered into should be upheld by courts. Thirdly, a premium is put on certainty. All factors have worked to shape a conservative, non-interventionist set of contractual doctrines. To combat these factors English courts have few overriding laws or principles to allow them to judges cases concerned with non-disclosure agreements as belonging to a different form of contractual order. The essence of the litigation is a contest between two parties, a contest in which few modern judges will view it either as their role or within their capabilities in adjudicating the dispute to examine the externalities and external consequences attendant upon a non-disclosure agreement.

4.2.1 Formation

The general principles of contractual formation in English law afford little means of regulating the use of non-disclosure agreements. While English contract law

within the status of worker through the application of the Articles 10 and 14 of the European Convention on Human Rights.

91 J. Bowers *et al.*, *Whistleblowing: Law and Practice* (3rd ed, Oxford: Oxford University Press, 2017) 233.

92 The situation is examined in Moorhead, n 25 above, 355–356.

requires the consent of the parties as a general basis for the enforcement of contracts there is little concern with the substantive reality of the consent as a matter of formation.[93] In most, if not all, cases the non-disclosure agreement will be drafted by the party seeking to prevent disclosures. If the other party signs this document, even if presented with little or no opportunity to scrutinise its contents, without any real understanding of the terms and, indeed, even if they have not read the terms, their signature binds them to the contract.[94] Judicial regret over the harshness of this rule has not prevented its consistent application.[95] English law has yet to recognise a general duty of good faith in contract formation,[96] although this lack has been the subject of debate and may well change in the future. There is a cruel irony that an individual who signs a non-disclosure agreement is not protected by a duty of good faith which would exist if they were to purchase consumer goods.[97]

Consideration, something given in exchange for the promise, is necessary for the formation of a binding contract. Consideration cannot usually be provided after a contract has been entered into.[98] In some instances it may be that where the parties already have a binding contract for, say, the provision of services one party may subsequently seek to bind the other to a non-disclosure agreement. If there is no subsequent consideration given in exchange, the consideration is said to be past and the subsequent non-disclosure agreement is not enforceable because it lacks consideration. The requirement of consideration is, however, easy to circumvent as almost anything of economic value can constitute consideration and, in any event, an agreement formed by deed requires no consideration.

4.2.2 Vitiating Elements

Non-disclosure agreements are usually entered into in situations of structural inequality, in which the party who provides silence is in an unequal position with

93 There is a greater concern with the substance of consent in the consideration of vitiating elements, considered below.

94 *L'Estrange* v *Graucob* [1934] 2 KB 394.

95 *Ibid*, 405, per Maugham LJ. If the proferee suffers from a disability which prevents them from reading the contract terms and this is known to the proferror, further steps to acquaint them with the terms of the written contract must be taken: *Richardson, Spence & Co Ltd* v *Rowntree* [1894] AC 217.

96 *Times Travel (UK) Ltd* v *Pakistan International Airlines Corpn* [2021] UKSC 40 at [3].

97 The Consumer Rights Act, 2015, s 62. This duty of good faith arises in English law as a result of the implementation of the Unfair Terms in Consumer Contracts Directive, Council Directive 93/13 (*OJEC* L 95/29).

98 *Roscorla* v *Thomas* (1842) 3 QB 234.

regard to legal and other resources. English law recognises no doctrine of inequality of bargaining power, leaving it to the legislature to regulate such situations.[99] Nevertheless, the circumstances surrounding the formation of some non-disclosure agreements may result in either a contract void *ab initio* or a contract voidable at the option of the injured party because there has been a defect in the consent necessary to form a contract. The principal grounds for vitiating the consent necessary to contract are found in both law and equity: misrepresentation, mistake, unconscionability, undue influence and duress. While the circumstances attending the formation of a non-disclosure agreement might operate to avoid the contract none of these doctrines operates to nullify all non-disclosure agreements of dubious morality.

Where a profferor misrepresents the contract's terms or their effect the full extent of the contract cannot be relied upon[100] and the profferee may also be able to rescind the contract and claim damages. While misrepresentation is a very effective means of avoiding contracts in English law, mistake is difficult to establish and results in a contract which is void *ab initio*. If the circumstances were such that a profferee was mistaken as to the profferor's terms, and the profferor, although not acting fraudulently or negligently, was aware of this mistake the contract may be void.[101] It is unlikely that a unilateral mistake as to the commercial or legal effect of the terms will render the contract void.[102]

Duress, undue influence and unconscionability present much stronger possible grounds to avoid a non-disclosure agreement. Each doctrine, however, presents certain challenges which limit their effectiveness as a means of avoiding a non-disclosure agreement. Unconscionability will render a contract voidable where one party is at a serious disadvantage to the other such that circumstances existed of which unfair advantage could be taken, that another party exploited the weakness of this party in a morally culpable manner and that the resulting transaction is 'not merely hard or improvident, but overreaching and oppressive'.[103] While there has been some indication in later cases that the weakness of the one party may simply be a failure to appreciate the nature of the transaction, coupled with inexperience and a lack of legal advice,[104] it is generally

99 *Times Travel v Pakistan International Airline*, n 96 above, at [26].

100 *Curtis* v *Chemical Cleaning and Dyeing Co* [1951] 1 KB 805.

101 *Smith* v *Hughes* (1870–71) LR 6 QB 597.

102 *Clarion Ltd* v *National Provident Institution* [2000] 1 WLR 1888; *Brennan* v *Bolt Burdon* [2004] EWCA Civ 1017.

103 *Alec Lobb Garages Ltd* v *Total Oil (GB) Ltd* [1985] 1 WLR 87, 95 per Millett QC, approved in *Times Travel* v *Pakistan International Airline*, n 96 above, at [24].

104 H. Beale, 'Undue Influence and Unconscionability', in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds), *Defences in Contract* (Oxford: Hart Publishing, 2017) 104–105, relying upon *Cresswell* v *Potter* [1978] 1 WLR 255 and *Credit Lyonnais Bank Nederland NV* v *Burch* [1997] 1 All ER 144.

acknowledge that modern English courts have been so concerned with certainty in commercial transactions that the development of the doctrine has been stunted.[105] While courts in other Commonwealth common law jurisdictions are more generous in granting relief on the grounds of unconscionability,[106] the Supreme Court has recently affirmed that 'unconscionability is not an overarching criterion to be applied across the board without regard to context'.[107]

Undue influence takes two forms, presumed undue influence and actual indue influence. Presumed undue influence arises where, absent actual undue influence, the transaction calls for an explanation. The doctrine is concerned with situations where, in an existing relationship of trust and confidence between the parties, the stronger party has procured the consent of the weaker party by unacceptable means. The concern is 'upon the unfair exploitation by one party of a relationship which gives him ascendancy or influence over another'.[108] Two difficulties are present in any attempt to set aside a non-disclosure agreement on the basis of undue influence. The first is that the complainant needs to repose trust and confidence in the other party in the management of their financial affairs.[109] This is unlikely to so arise in the context of a non-disclosure agreement. The second is that the presumption of undue influence is almost invariably rebutted once the complainant has received independent legal advice.[110] This is a procedural matter, easily arranged and frequently present.

The equitable doctrine of actual undue influence now overlaps with common law duress. Actual undue influence, like presumed undue influence, is an unlikely ground for avoiding a non-disclosure agreement because it requires some relationship of trust and confidence between the parties. While such a relationship is not impossible,[111] it is unlikely in the context of a non-disclosure agreement. The accounts of many who enter into non-disclosure agreements indicate that they do so under pressure. Is this pressure sufficient to constitute duress? Duress need only be a reason for contracting and will avoid a contract even if the party had other

105 N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (3rd ed, London: Sweet & Maxwell, 2018) 1-001; N. Enonchong, 'The Modern English Doctrine of Unconscionability' (2018) 34 *Journal of Contract Law* 211.

106 D. Capper, 'The unconscionable bargain in the common law world' (2010) 126 *Law Quarterly Review* 403, 416.

107 *Times Travel* v *Pakistan International Airline*, n 96 above, at [23] per Lord Hodge DPSC.

108 *R* v *A-G for England and Wales* [2003] UKPC 22 at [22] per Lord Hoffmann.

109 *Royal Bank of Scotland* v *Etridge (no 2)* [2001] UKHL 44 at [14].

110 Lord Nicholls has observed, *ibid* at [20] that the effect of the legal advice is a question of fact but, in the case before him focussed almost entirely upon the duties of the solicitor in giving the legal advice: *ibid* [69]–[74].

111 *B* v *D* [2014] EWHC 1442 (QB) at [204].

reasons for contracting.[112] If a reason a party entered into a non-disclosure agreement is because of a threat to their physical well-being by the other party, the contract is voidable.[113] While most who sign non-disclosure agreements do so because they believe that they are forced to, the compulsion is rarely physical. Economic duress is 'a coercion of will, which vitiates consent. It must be shown that … the contract entered into was not a voluntary act'.[114] Where a party relies on their rights to drive a hard bargain, this will not normally amount to duress.[115] The claimant must prove two requirements to establish economic duress: first, pressure amounting to compulsion of the will of the victim; and, second, that the pressure was illegitimate.[116]

The first of these requirements is established if the complainant has little choice but to submit; the pressure applied must be sufficient to remove practical alternative courses of action from the complainant.[117] Whether or not the complainant protested at the time, or shortly thereafter, is relevant to the determination of the pressure applied.[118] With regard to non-disclosure agreements, litigation will almost always be a practical alternative but one which few will wish to pursue because of fear of the cost of litigation and the concern, within an employment context, that they will not receive a reference.[119]

With regard to the second requirement, any threat of unlawful action is generally regarded as illegitimate.[120] The Supreme Court has recently held that, in very limited circumstances, a threat of lawful action may be regarded as illegitimate.[121] While courts would rarely find that lawful act duress would arise in the context of commercial negotiations,[122] where the defendant's conduct in procuring the contract was morally reprehensible the contract was voidable for duress.[123] While the Court left open the forms of morally reprehensible behaviour,[124] the

112 *DSND Subsea* v *Petroleum Geo-Services* [2000] BLR 530; *Barton* v *Armstrong* [1976] AC 104.
113 *Ibid*.
114 *Pao On* v *Lau Yiu Long* [1980] AC 614, 636 per Lord Scarman.
115 *Alec Lobb Ltd* v *Total Oil GB Ltd* [1983] 1 WLR 87 (varied on other points, [1985] 1 WLR 173).
116 *R* v *A-G for England and Wales* [2003] UKPC 22 at [15] per Lord Hoffmann (based upon *Universe Tankships Inc of Monrovia* v *International Transport Workers Federation* [1982] 2 All ER 67, 88).
117 *Huyton SA* v *Peter Cremer GmbH & Co Inc* [1998] 1 Lloyd's Rep 620, 638.
118 *DSND* v *Petroleum Geo-Services*, n 112 above.
119 Moorhead, n 25 above, 358–360.
120 *R* v *Her Majesty's Attorney-General for England and Wales* [2003] UKPC 22 at [16]. For forms of unlawful action, see *Chitty on Contracts*, vol I (34th ed, London: Sweet & Maxwell, 2021) 10-13-10-17.
121 *Times Travel* v *PIA*, n 96 above.
122 *Ibid* [30].
123 *Ibid* [2].
124 *Ibid* [3].

examples given were ones in which courts had found in equity that an unconscionable transaction had arisen. In particular, these were the possible threats by the defendant to bring criminal prosecutions or where they had manoeuvred the claimant into a position of vulnerability, generally in the context of an existing legal claim.[125] It is possible that some non-disclosure agreements might well be procured by reason of this second manner. The Court stated that a situation where the claimant had a legal claim against the defendant and the defendant manoeuvred this claimant by reprehensible means into a vulnerable position such that they had no choice but to agree to waive their pre-existing rights would qualify as a form of lawful act duress. A threat not to enter into the contract unless the threatener's terms are met will not normally be an improper pressure.[126]

In short, while it may be possible in certain circumstances to find that the particular circumstances surrounding the entry into a non-disclosure agreement do give rise to grounds to set aside the contract on the basis of duress, it is unlikely that this will be a common vitiating element. Not only are the grounds for such avoidance limited it is also the case that courts are concerned to limit cases of economic duress.

4.2.3 Illegality and Public Policy

While these various vitiating elements may allow a non-disclosure agreement to be avoided a claim of illegality presents a stronger challenge to the validity of a non-disclosure agreement. Illegality renders a contract, or a contractual term, unenforceable. The application of the doctrine involves both private and public law, a situation which renders the clear formulation of rules difficult.[127] The doctrine encompasses those situations where a particular act is illegal, a narrower ground, and those where it is contrary to broader public policy grounds. This narrower ground of illegality involving an unlawful act will be considered before turning to the broader grounds of public policy. As will be seen, it is the broader grounds of being contrary to public policy which provides the greatest possible challenge in English law to the enforcement of non-disclosure agreements.

Where a court finds a contract to be tainted by illegality it seeks to protect the integrity of the legal system. In assessing whether or not the public interest would be so harmed courts consider a number of factors: a consideration of the underlying purpose of the prohibition which has been transgressed and whether that purpose is enhanced by a denial of the claim; a consideration of other relevant

125 *Ibid* [4], [5]–[18], and [59].

126 *Chitty on Contracts*, n 120 above, 10-063G.

127 A. Burrows, 'Illegality after *Patel* v *Mirza*' (2017) 70 *Current Legal Problems* 55, 56.

public policy elements; and to consider whether denying the claim is a proportionate response to the illegality given that punishment is for criminal courts.[128]

The Supreme Court has now provided multi-factorial guidance as to how to consider claims of illegality. In the words of Lord Toulson in *Patel* v *Mirza*:

> one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy.[129]

While it is acknowledged that the application of this approach is less likely to be applied to the enforcement (the attempt to undo an illegal contract) than other remedial responses (such as the recovery of sums)[130] illegality could render a non-disclosure agreement unenforceable in certain circumstances. Two will be considered here. First, where the non-disclosure agreement is illegal as formed or intends an illegal performance it will be unenforceable. This could occur in a number of ways. The agreement might involve the common law offence of perverting the course of justice.[131] This offence requires a positive act; it is committed when one acts or embarks on a course of conduct that tends, and is intended, to pervert the course of justice.[132] Where a non-disclosure agreement attempted, for example, to prevent an individual from speaking to the police or giving evidence at trial, it would probably pervert or otherwise obstruct the course of justice. The agreement would be illegal, the 'paradigm case … [of] … a criminal offence':[133] the contract is void and provides no enforceable rights.[134] In addition, the same result occurs even if only one party intended to perform the contract in a way which perverted the course of justice.[135]

128 *Patel* v *Mirza* [2016] UKSC 42; [2016] 3 WLR 399 at [120].

129 *Patel* v *Mirza*, *ibid* at [101], per Lord Toulson.

130 *Ibid* at [48]. See, also J. O'Sullivan, 'Illegality and Contractual Enforcement after *Patel* v *Mirza*', in S. Green and A. Bogg (eds), *Illegality after Patel* v *Mirza* (Oxford: Hart Publishing, 2018) 172.

131 A detailed consideration is found in Moorhead, n 25 above, 344–346.

132 *R* v *Vreones* [1891] 1 QB 360. It does not matter that the conduct was performed before the matter was investigated or discovered: *R* v *Rafique* [1993] QB 843.

133 *Les Laboratoires Servier* v *Apotex Inc* [2014] UKSC 55; [2015] AC 430, [23] per Lord Sumption.

134 *Ibid*. As Lord Sumption explained 'the *ex turpi causa* principle precludes the judge from performing his ordinary adjudicative function in a case where that would lend the authority of the state to the enforcement of an illegal transaction or to the determination of the consequences of an illegal act': *ibid*. See, also *Bilta (UK) Ltd* v *Nazir (No 2)* [2015] UKSC 23; [2016] AC 1.

135 *ParkingEye Ltd* v *Somerfield Stores Ltd* [2012] EWCA 1338; [2013] QB 840, [33].

Second, it is an indictable offence under s 5 of the Criminal Law Act, 1967 for one who knows or believes a relevant offence has been committed, and who has information which might be of assistance in securing the prosecution or conviction of an offender for it, to accept consideration for not disclosing this information.[136] The agreement itself is unenforceable as a civil contract. There are a number of uncertainties with regard to this statutory section. On its wording it appears to allow a victim to settle their civil claim for compensation.[137] It is probably not the case that the statute allows the stifling of a prosecution in exchange for such compensation.[138] While s 5 probably does not remove the bar on contractual enforceability,[139] the question remains as to which compromises effected for compensation are enforceable and which are not. It has been argued, in light of the historical development of the criminal law, that such a contract should be enforceable unless there is some ground of public interest for avoiding them.[140] Factors which might tell against the enforceability of the agreement are matters such as an offence which is of a 'public character' rather than a 'private character'[141] or that the agreement has been procured by improper pressure.[142]

English law has traditionally been sceptical of refusing to enforce contracts on grounds of public policy.[143] The argument will be advanced here that some non-disclosure agreements fit within grounds already recognised in English law as contrary to public policy while many others would be unenforceable if public policy grounds were suitably expanded following the decision in *Patel* v *Mirza*.

Contracts prejudicial to the administration of justice are not enforceable.[144] In particular, courts will not prevent the publication of material in which there is a public interest in disclosure for confidence does not prevent the disclosure of iniquity.[145] It can thus be argued that non-disclosure agreements which seek to conceal matters which fall short of a crime but are morally repugnant seek to cloak

136 Criminal Law Act, 1967 c 58, s 5.

137 *Chitty on Contracts*, n 120 above, 18–081; R.A. Buckley, *Illegality and Public Policy* (5th ed, London: Sweet & Maxwell, 2020) 8–10.

138 Buckley, *ibid* 8–11.

139 *Ibid*.

140 A.H. Hudson, 'Contractual Compromises of Criminal Liability' (1980) 43 *Modern Law Review* 532, 542. See, also, E. Peel, *Treitel The Law of Contract* (14th ed, London: Sweet & Maxwell, 2015) 557 and *Chitty on Contracts*, n 120 above, 16–065.

141 Hudson, *ibid* 540.

142 *Ibid* 541.

143 It is recognised that there is a counter-vailing public policy consideration in freedom of contract: *Printing and Numerical Registering Co* v *Sampson* (1875) LR 19 Eq 462, 465.

144 *Chitty on Contracts*, n 120 above, 18–083.

145 *Lion Laboratories* v *Evans* [1985] QB 526, 550; *Fraser* v *Evans* [1968] 1 QB 349, 362; *Gartside* v *Outram* (1856) 26 LJ Ch 113, 114.

with confidence an iniquity and that there are thus good public reasons to disclose the information.[146] Contracts seeking to prevent a party from giving information to third parties to secure convictions for, or to prevent the commission of, fraud have been held as unenforceable because 'the promise of secrecy is void as being against public policy'.[147] In these instances the multi-factorial approach of Lord Toulson in *Patel* v *Mirza* establishes that the disclosure acts to further the public interest in the information. Lord Toulson's criteria require a balancing as to whether there are other public policies rendered less effective or ineffective. It may, thus, be that the defendant's rights under the Human Rights Act, 1998 may establish a countervailing public policy such that the particular non-disclosure agreement is enforceable.

Non-disclosure agreements have the potential to erode fundamental human rights, including equality. As non-disclosure agreements proliferate in the modern world the time has come to expand public policy grounds of non-enforceability to include those instances where there is a contravention of fundamental human rights.[148] This argument is made in the face of a considerable body of cases in which public policy arguments are viewed with scepticism.[149] It is the case, though, that 'public policy is a variable notion, depending on changing manners, morals and economic conditions'[150] and that these now include human rights. Because human rights form essential norms within our society contractual terms which erode these rights are contrary to public policy. The extension of human rights law from public into private law has already occurred as courts create a right of privacy through breach of confidence actions decided by reference to the European Convention on Human Rights.[151]

Lord Toulson's approach in *Patel* v *Mirza* provides a balanced way in which fundamental human rights can form the basis of public policy grounds rendering some non-disclosure agreements unenforceable as a matter of private law. The first of his criteria, the underlying prohibition which has been transgressed, is made up

146 *Hubbard* v *Vosper* [1972] 2 QB 84; *Lion Laboratories Ltd* v *Evans ibid*; *Attorney-General* v *Guardian Newspapers Ltd* [1992] 1 WLR 874.

147 *Howard* v *Odhams Press, Limited* [1938] 1 KB 1 at 42 per Greene LJ. The case was a reason behind Professor Furmston's view that courts would strike down agreement to silence in situations where something ought to be said: M.P. Furmston, 'The Analysis of Illegal Contracts' (1965) 16 *University of Toronto Law Journal* 267, 293–297.

148 The argument is considered in detail in MacMillan, n 33 above, 328–335.

149 Buckley, n 137 above, 6-01-6-05.

150 Peel, n 140 above, 11–033.

151 P. Giliker, 'A Common Law Tort of Privacy – The Challenges of Developing a Human Rights Tort' (2015) 27 *Singapore Academy of Law Journal* 761 and G. Phillipson, 'Transforming Breach of Confidence? Toward a Common Law Right of Privacy under the Human Rights Act' (2003) 66 *Modern Law Review* 726.

by a body of basic human rights. These include: Article 1 of the Universal Declaration of Human Rights (the equality of individuals); the European Convention on Human Rights Articles 10 (freedom of expression), 14 (prohibition of discrimination), and 17 (prohibition of abuse of rights); and the prevention under the Equality Act, 2010 of direct (s 13) and indirect discrimination (s 19) on the basis of protected characteristics (s 4), including sex. From these one can discern a public policy which accepts that people are equal and hold inalienable rights. These rights include: the right not to be discriminated on the basis of sex; the right of free expression; and that an abuse of these rights is prohibited.

In considering these rights as the basis for a public policy ground relevant to the enforceability of non-disclosure agreements these rights are not absolute. The second of Lord Toulson's criteria requires an evaluative assessment of any relevant public policies which may be rendered ineffective or less effective by denying a claim.[152] In considering this element it is appropriate to examine, *inter alia*, the rights accorded to the profferor of a non-disclosure agreement. Finally, there is the further protection presented in the third criterion, that the law is applied with a due sense of proportionality in the resolution of the case.[153]

It must be acknowledged, though, that where a non-disclosure agreement is found to be unenforceable by reason of illegality or public policy one would expect a restitution of the property which would otherwise have passed under the agreement. In the words of Lord Toulson, 'a person who satisfied the ordinary requirements of a claim in unjust enrichment will not prima facie be debarred from recovering money paid or property transferred by reason of the fact that the consideration which has failed was an unlawful consideration'.[154] This is likely to prevent many individuals subject to non-disclosure agreements seeking their non-enforceability. There is no easy answer to this problem. It may be that the party receiving payment has so altered their position as to provide a defence to an unjust enrichment claim. Or, where the party has provided consideration beyond that within the unenforceable non-disclosure clause a substantial contract remains.[155] Lord Neuberger, in the minority in *Patel* v *Mirza* recognised that restitution would not always follow on the unenforceability of the contract for illegality. In particular this included instances where the party was unaware of the facts giving rise to the

152 A similar evaluative process was undertaken in the decision of whether or not to issue an injunction in relation to a non-disclosure agreement in *ABC* v *Telegraph Media Group Ltd* [2018] EWCA Civ 2329 at [7]–[21].

153 It has been argued that proportionality is not necessary as it has been addressed in the first two considerations: E. Lim, '*Ex Turpi Causa*: Reformation not Revolution' (2017) 80 *Modern Law Review* 927, 937.

154 *Patel* v *Mirza*, n 128 above, [116].

155 *Goodinson* v *Goodinson* [1954] 2 QB 118.

illegality.[156] It is also, likely, relevant that the weaker party was subject to pressure and in a position of structural inequality in entering into the non-disclosure agreement. It must be acknowledged though that the uncertainty surrounding the question of restitution will disinhibit many individuals from challenging a non-disclosure agreement.

4.2.4 The Consequences of Breach

A further question related to monetary consequences is what occurs upon the breach of a non-disclosure agreement, both as a matter of common law and also as a matter of contractual provision in a particular contract. As a matter of common law, the High Court has recently held that where an individual breached his confidentiality clause in revealing to another the settlement amount this did not remove from the other party the obligation to continue to pay the instalments owed under the settlement.[157] Cavanagh J reached this result on the basis that the confidentiality clause was not a condition of the contract (breach of which entitled the other party to repudiate the contract) and that this was not a sufficiently serious breach of an intermediate or innominate term to allow the repudiation of the contract. However the case is concerned with a contract where confidentiality was not at the core of the agreement and, as Cavanagh J himself observed, there might well be cases where the confidentiality clause was of sufficient importance to be a condition.[158] It is also the case that the parties to a contract can themselves stipulate that a clause is a condition, breach of which entitles the other party to repudiate the contract.[159] This is of importance where there are outstanding payments to be made under a non-disclosure agreement.

In order to compel continued silence under a non-disclosure agreement it is common practice to stipulate that breach of the agreement requires the repayment of all the sums paid, often along with certain other costs. Such sums are recoverable if they are liquidated damages but not if they represent a penalty. The determination of whether the clause is a penalty at the time it was made is determined on the following basis:

> The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest

156 *Patel* v *Mirza*, n 128 above, [161]–[162].
157 *Duchy Farm Kennels Ltd* v *Steels* [2020] EWHC 1208 (QB).
158 *Ibid* [55].
159 *Schuler* v *Wickman Machine Tool Sales* [1974] AC 235; *Lombard North Central Finance* v *Butterworth* [1987] QB 527.

> in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance.[160]

In applying this test in the context of a non-disclosure agreement there are a number of factors which could lead to the conclusion that the clause was a penalty. First, a part of this assessment is based on whether the stronger party influenced the other by unconscionable means,[161] including the circumstances in which the contract was made.[162] Second, it could also be argued that as the protection of the clause extends to a matter which offends public policy or is illegal that there can never be a legitimate interest in one who seeks to prevent disclosure. Third, even if there is a legitimate interest in the enforcement of the primary obligation an agreed damages clause must not be extravagant or unconscionable when regard is had to the other party's interest in the performance of the contract.[163] While the meaning of 'unconscionable' is not clear in this context, it appears that it may extend to the situation in which the clause was originally agreed.[164] One could thus argue that it is so unconscionable where the parties are not of equal bargaining power, where one has acted under compulsion and, possibly without legal advice, and where even a small breach might trigger repayment of the entire amount.

All three of these possible factors might lead to the conclusion that a clause requiring repayment was unenforceable as a penalty. Much would depend upon the particular facts of a given case. As a matter of law there is a final problem associated with penalty clauses. The above discussion is premised on the assumption that the relevant clause is a secondary obligation, triggered by a breach of contract. If, however, the clause is drafted as a primary obligation these considerations are irrelevant. The difference between primary and a secondary obligations is critical to the penalty rule although the difference can be hard to draw in particular cases.[165] If a clever draftsperson expresses what might be considered a secondary obligation as a primary one it will evade the scrutiny set out above. While it might be possible to argue that the contract should be interpreted according to the reality of the situation and in light of the fundamental inequality between the parties,[166] this result might not necessarily follow.

160 *Cavendish Square Holdings BV* v *Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67; [2016] AC 1172 at [32] per Lord Neuberger and Lord Sumption.
161 *Ibid* [31].
162 *Ibid* [35].
163 *Ibid* [255], [293]. See, also, R. Halson, *Liquidated Damages and Penalty Clauses* (Oxford: Oxford University Press, 2018) 111–116.
164 *Cavendish* v *Makdessi*, n 160 above; *ZCCM Investments Holdings Plc v Konkola Copper Mines Plc* [2017] EWHC 3288 (Comm).
165 Halson, n 163 above, 60–65.
166 *Autoclenz* v *Belcher* [2011] UKSC 41.

5 Conclusions

A number of conclusions can be drawn from the examination presented here. It is clear from the evidence given before, and the final reports of, the 2019 official inquiries into the use of non-disclosure agreements that such agreements can operate to diminish the equal treatment of women and that the use of non-disclosure agreements is pervasive. The existing statutory framework provides a partial and inadequate protection, at best, from the possible abuse that can be caused by a non-disclosure agreement which serves illegitimate ends. This is important, not only for the equality of the individual women who are compelled to enter into these agreements but also for the equality afforded to all women. The silence obtained by a non-disclosure agreement is a silence which prevents a call to action to combat inequality.

The examination of English contract law presented here reveals both why non-disclosure agreements are so widespread and also why it is so difficult to challenge the enforceability of these agreements. Freedom of contract and sanctity of contract are fundamental values within English contract law. Strong and wealthy parties, with access to good legal advice, are able to effectively buy silence. Although the law is not antipathetic as such to individuals silenced by non-disclosure agreements, the lack of a doctrine such as an inequality of bargaining power or the requirement to bargain in good faith leaves these individuals few means to avoid non-disclosure agreements. The requirements necessary to form a contract although predicated on the consent of the parties are easily satisfied as a matter of procedure. While it might be thought that those doctrines which operate to vitiate consent in certain circumstances could afford a measure of protection, in practice these provide only impartial protections at best. Certain non-disclosure agreements may well be rendered unenforceable by reason of illegality. This argument advanced in this article is that the best method of removing the enforceability of illegitimate non-disclosure agreements is on the basis that they offend public policy. While such a means is well established in English law the public policy grounds must be extended to include fundamental human rights such that non-disclosure agreements which operate to erode these rights are unenforceable.

It is by no means certain that English courts would be so persuaded to adopt such public policy grounds to render non-disclosure agreements unenforceable. A judicial concern about effectively legislating in such circumstances is a further reason why the effective regulation of non-disclosure agreements is best provided by statute. It is to be hoped that Parliament does so enact such protective legislation. Equality is too important a value to allow it to be diminished in the silence bought by non-disclosure agreements.