



Abuses of power

The use of parliamentary privilege to break non-disclosure agreements raises questions about their usage

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This month has had an unfortunate amount of light shone onto the role of non-disclosure agreements and their legality and morality, or lack thereof.

The main focus of this press attention has come from the naming in parliament of controversial businessman and chairman of Arcadia Group, Sir Philip Green, as the UK businessman who had been alleged to have used non-disclosure agreements and substantial payments to conceal the truth about serious and repeated sexual harassment, racist abuse and bullying.

This case is of course extremely troubling in many ways and much has and will be written on the subject. In

terms of governance, we must look to the responsibilities of the board and auditors and also to the government and legal system.

In the case of Sir Philip, the Court of Appeal had granted him and his senior staff a temporary injunction against the *Daily Telegraph*, preventing them from publishing the results of an eight month investigation into allegations of bullying, intimidation and sexual harassment.

The Telegraph has reported that they had interviews with several members of Sir Philip's staff who revealed that 'substantial sums' were paid to reported victims in return for legal commitments not to discuss their alleged experiences.

Non-disclosure agreements

Following days of press and social media

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speculation into the identity of the businessman, former cabinet minister and Leader of the House of Commons, Peter Hain revealed Sir Philip's name in the House of Lords, stating: 'Having been contacted by someone intimately involved in the case of a powerful businessman using non-disclosure agreements and substantial payments to conceal the truth about serious and repeated sexual harassment, racist abuse and bullying which is compulsively continuing I feel it's my duty under parliamentary privilege to name Philip Green as the individual in question given that the media have been subject to an injunction preventing publication of the full details of this story which is clearly in the public interest.'

Sir Philip has refused to comment on court proceedings or anything that was said in parliament but did issue a statement denying any wrongdoing.

'To the extent that it is suggested that I have been guilty of unlawful sexual or racist behaviour, I categorically and wholly deny these allegations. [...] Arcadia and I take accusations and grievances from employees very seriously and in the event that one is raised, it is thoroughly investigated' he said.

'Arcadia employs more than 20,000 people and in common with many large businesses sometimes receives formal complaints from employees. In some cases these are settled with the agreement of all parties and their legal advisers. These settlements are confidential so I cannot comment further on them.'

Privacy law

The decision to use parliamentary privilege in this way has not been without criticism, with the former Attorney General, Dominic Grieve describing Lord Hain's actions to BBC Radio 4's *World at One* 'an entirely arrogant decision that had absolutely no regard for judicial process or the rule of law.'

These concerns have been raised before, in 2011 over the granting of so-called 'superinjunctions' and the naming of Ryan Giggs by the Liberal Democrat MP John Hemming as the footballer who had secured one in order to cover-up allegations of an affair.

The then lord chief justice, Lord Judge, observed: 'It is, of course, wonderful for you if a Member of Parliament stands up in parliament and says something which in effect means an order of the court on anonymity is breached.'

But you do need to think whether it's a

good idea for our lawmakers to be flouting a court order just because they disagree with a court order or they disagree with the privacy law created by parliament.'

The decision to reveal the allegations is complicated further by the fact that two of the five alleged victims, were opposed to the *Daily Telegraph* publishing the story and against Sir Philip's naming.

This raises questions about the motivation behind this reveal and also about the rights of alleged victims if their wishes are contradictory to what is deemed by those in power to be in the public interest.

Responding to these criticisms Lord Hain told BBC's *Newsnight*: 'I considered it extremely seriously before I said it. I'm not disputing judges' responsibilities or timing or anything like that. That's a matter for the judiciary.'

'I'm discharging my function as a parliamentarian - and what concerned me about this case was wealth, and power that comes with it, and abuse.'

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Further questions about Lord Hain's role in the case have been raised following the revelation that he has undisclosed financial ties to the law firm Gordon Dadds, who are the firm representing the *Daily Telegraph*.

Lord Hain is their global and government advisor but has 'categorically' denied that he was aware of their work with the newspaper.

The law firm has stated that Lord Hain received now information from it regarding the case 'including any information which would enable him to identify Philip Green as having any involvement in it.'

A familiar story

The abuse of power and the use of non-disclosure agreements is a sadly familiar story in the era of the #metoo movement.

What is new in this case is that the second highest-ranking court in the United Kingdom, upheld legally binding gagging agreements against the five Arcadia group employees.

Effectively, the court had found that Sir

Philip's confidentiality was more important than the public's right to know.

Of course, it is to be noted that confidentiality arrangements are standard practice when employment disputes are settled outside of court. They serve to prevent either party from disclosing terms of the settlement or making disparaging remarks about the other party.

The theory behind such arrangements is that both parties are equal and the agreement treats each the same. However, it is obviously not always the case, particularly when one party has the weight of wealth and influence behind them.

It is also obvious that despite the legal protections, which were noted by the Court of Appeal in the Green agreements, which protected the claimants' rights of legitimate disclosure, including criminal offences, that signatories of these agreements may feel that their rights to whistle blow or speak to police are hindered for fear of being sued.

Peter Swabey, policy and research director at ICSA: The Governance Institute comments saying: 'This is a difficult setting which pits contract law against public policy and perhaps even more against public sentiment (though sometimes there is a whiff of public prurience).'

To what extent is it defensible to permit someone to buy another's silence about an issue that may well be illegal? Or that someone should be able to take a payment for their silence and then talk to the press? And does it matter what the issue is or who is involved? Whether or not we like Philip Green shouldn't be allowed to affect our answer to those questions.

It seems to me that, to the extent that the law allows the silencing of victims of potentially criminal conduct, the law should be changed. But I can't help thinking that using the absolute defence of Parliamentary privilege to avoid a slander action and to frustrate ongoing legal proceedings and a court decision undermines the rule of law and is questionable in a case where Parliament itself has the ability to change the law.

That is even more so when, as in this case, the court order is an interim injunction intended to give time for these important issues to be properly considered by judges with access to all the facts. In this case Lord Hain seems to have appointed himself prosecutor, judge and jury and his reported but undisclosed links with one of the law firms engaged in the case are unhelpful and cloud the purported propriety of his actions.'