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CAN YOU SUE OVER A BAD REVIEW?

Catherine Ramnarine & Mukta Balroop

Navigating customer feedback in the social media age can be a minefield. A single tweet from reality television star Kylie Jenner declaring that she was no longer using the social media app Snapchat caused its stock price to plummet, wiping out USD1.3 billion of its market value in just one day. Entire documentaries, like last year's Yelp focussed Billion Dollar Bully, have been dedicated to dissecting the impact that negative customer reviews can have on businesses. And even locally we have seen negative reviews, like the one left on Facebook by a customer dissatisfied with a cake that she ordered, go massively viral. Some businesses are able to successfully navigate the social media storm, while others are not so fortunate. Where a negative customer review amounts to defamation, then the business may have legal options. In this Article we will look at the legal remedies available to businesses, and in particular recent developments in the law governing the availability of injunctions against social media posts.

Defamation occurs when someone publishes a statement about someone else that (among other things) tends to discredit them in their trade or profession. It is not every negative review that can result in a successful defamation claim. The words used in the statement must be defamatory. For example, a customer simply stating that they didn't like a product or service would not be enough. The person who made the statement can also defend a defamation claim on the basis that the statement was true, amounted to fair comment on a matter of public interest or was privileged.

A business has several options when faced with a potentially defamatory review or post. The first is to simply ignore it – though from a marketing perspective this might be a bad idea. A second option could be to report the post to the social media platform with the hope that they take it down. However, this runs the risk that the post could simply be reposted, with the added stinger that the business is trying to repress negative reviews. A third option is to respond to the post professionally and attempt to resolve it off-line. In some cases, repeated, negative posts unfairly made about a sole trader may constitute harassment under the Offences Against the Person (Amendment) (Harassment) Act and a report could be lodged with the cybercrime unit of the TTPS.

Another option, depending on the seriousness of the defamatory content, could be to file a lawsuit. This option is not without commercial and reputational risk as it could amount to "burning the house to roast the pig" and generate more negative attention than the post itself would otherwise have done. Legal action can also be time consuming and expensive, as it may take months or even years for the matter to go to Trial and for a Court to make a final ruling on whether a post was defamatory or not.

If a business decides that legal recourse is its best option, one interim step that it can take is to apply for an interlocutory injunction against the publisher of the post. This would require them to take the post down and refrain from reposting it until the Court is able to make a final ruling at Trial. This situation recently arose in a local lawsuit involving a hospital.

In that case, a patient underwent a CT scan at the hospital's premises. She fell unwell shortly afterward and suspected that her symptoms were caused by the CT scan. She subsequently published a series of posts on Facebook, in which she alleged that she had suffered radiation poisoning at the hospital and insinuated that the chairman of the hospital was responsible. She also repeated these allegations on placards that she publicly displayed outside the hospital.

Both the hospital and its chairman sued for defamation and applied to the Court for an interlocutory injunction. The Court refused to grant the injunction based on a rule from an old English case, **Bonnard v Perryman [1891] 2 Ch 269**. The rule in Bonnard Perryman's case was that injunctions in defamation claims would be refused unless the allegations were clearly untrue or there was no face value basis or support for publishing them. This was party because of the great importance attached to freedom of expression, and the fear that injunctions could be abused to stifle public criticism.

The Claimants appealed to the Court of Appeal. The Court of Appeal found that while freedom of expression was still of paramount

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HUSH YUH MOUTH! A PRIMER ON NON-DISCLOSURE AGREEMENTS (NDAS)

David Hamel-Smith

An NDA (also known as a confidentiality agreement) is a contract whereby a party gaining access to sensitive information agrees not to share it with others.

NDAs have received negative coverage in the news lately as a result of the allegations against Harvey Weinstein, Philip Green and others. Clearly NDAs have been used (or abused) in workplace harassment/assault settlement agreements. Such agreements often require one party to keep quiet about particular allegations, usually in exchange for a monetary settlement. The practice of using an NDA to cover up allegations of harassment in the work place has attracted considerable (and understandable) criticism and a committee appointed by the House of Commons in the UK recommended that the Government should take steps to "*ensure that NDAs cannot prevent legitimate discussion of allegation of unlawful discrimination or harassment*".

Their misuse aside, NDAs also exist for legitimate commercial purposes and are frequently used to protect genuine trade-secrets and intellectual property. One could easily imagine the benefits of an NDA to a party presenting a prototype of a new invention to a potential investor, or to an employer seeking to part ways with an employee who would have had access to sensitive proprietary information, such as the secret ingredients to a recipe.

So how does one go about putting together a useful NDA?

Firstly, you need to consider who are the parties to the agreement and what is it trying to achieve. Having a clear 'Parties' clause is important for ensuring that the information does not slip out through a related party that may have been overlooked. Furthermore, in considering who the parties are you should consider the type of NDA – as it may be unilateral (for example in the employer-employee context where an employment contract imposes an obligation of confidentiality) or bilateral/multilateral (for example where two or more companies agree to exchange sensitive information for the purposes of evaluating whether or not to deepen their relationships) and therefore, the agreement could potentially stipulate that the information could be shared with each company's external accountants but that they must also keep it confidential.

Once you understand who needs to keep quiet, you should include a clear definition of the information or type of information which they must keep quiet about. Defining which information should be kept confidential can be a tricky because you may be tempted to use broad language so as to minimize the risk that you leave any cracks open for information to slip through but, on the other hand, if you aren't specific enough then your agreement may be difficult to enforce. In some circumstances it may be useful to include a stipulation that the information being provided can only be used for that specific permitted purpose. For example, that information provided from one company to another detailing the manufacturing costs of specific goods can only be used for the specific purpose of valuing the company for the purposes of an amalgamation.

Finally, you should consider expressly stipulating the consequences for a breach of the NDA. While the non-breaching party would generally be entitled to damages stemming from a breach of contract, it may also make sense to expressly include other specific repercussions which would flow from a breach – for example, you might include that a breach of confidentiality could form a basis for termination of employment or an express acknowledgement that the other party may obtain injunctive relief.

It goes without saying that a well-drafted NDA can go a long way to ensure that confidential information remains protected.

What does it mean for you if you're on the receiving end of an NDA?

Generally, in the employment context, even without an NDA, you are expected to remain fairly tight-lipped about your employer's sensitive information while you remain employed. But, if your employment is terminated, then you will generally be free to use the skills and general knowledge which you developed during your employment. However, if you are subject to an NDA it may specifically stipulate that 'trade secrets' will continue to be protected even once your employment has ended.

Of course, 'what constitutes a trade secret' is a legal grey area with no clear answer. The courts have generally held that a 'trade secret' is information which, if disclosed to a competitor, would be liable to cause significant damage to the employer's business. For example, they may include: secret manufacturing processes, special methods of construction or customer lists. In determining whether information constitutes a trade secret, the court will have regard to the nature of the employment, the nature of the information, whether the employer placed any emphasis on the confidentiality of the information, and whether the relevant information could be extricated from other information which the ex-employee would be free to use or disclose.

If you do expose confidential information in breach an NDA then, depending on the terms of the specific NDA, you may be liable for damages stemming from a breach of contract, misappropriation of trade secrets, copyright infringement, breach of fiduciary duty, conversion, trespass or patent infringement.

In summary, as we have seen in a number of recent public cases, Non-Disclosure Agreements have been misused to stifle allegations of harassment and discrimination. However, in most circumstances, NDAs serve a legitimate purpose and their importance, particularly in the context of commercial and employment law, should not be over-looked.

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importance, it had to be balanced against (among other things) the potential negative consequences that defamatory statements could have on a business' goodwill, reputation and finances. Unlike the days of Bonnard Perryman, when publishers were likely to be magazines or newspapers, in today's society defamatory comments could be published and widely disseminated by anyone with access to a smart phone, tablet or computer, and these persons would not necessarily have the ability to pay the monetary damages that might be awarded against them, leaving the business with an empty judgment. Interestingly, the Court also found that individuals posting on social media could, depending on the circumstances, avail themselves of defences that traditionally applied to journalists. On the facts of the case, the Court refused to grant the injunction to the hospital but did grant it to the chairman.

While it is certainly not easy for a business to obtain an injunction against negative social media posts, and there are practical drawbacks to taking a litigious response to negative reviews, it is one option that is available to businesses in serious cases. That said, both businesses and customers would do well to heed this insightful observation (slightly paraphrased) from the Court of Appeal - freedom of expression is not freedom to post recklessly.

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