[DISCLOSURE]

A real privilege?

The presence or absence of terms such as 'without prejudice' on correspondence does not necessarily determine whether it will be protected. **Alan Ma** explains

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When a dispute arises, all communications between the parties are normally admissible in court. However, correspondence will not be disclosed if it is protected by the principle of "privileged information". This includes correspondence between client and solicitor and legal opinions on the matter in dispute.

"Without prejudice" communications are also privileged. This term applies to correspondence between parties in negotiation of a settlement, while "without prejudice save as to costs" means the documents may be revealed if the matter is being decided by a judge or arbitrator and there is an issue of costs assessment. For example, one party may have to pay the other party's costs if it is discovered that it refused to accept a reasonable offer of settlement prior to court proceedings.

However, case law has established that not all documents purporting to be privileged information are protected. When deciding whether a document is privileged the courts will look at substance, not form. Take the example of a buyer who claims that he and the seller agreed a delivery date of 1 July but he did not receive the goods until 5 July. The seller denies this but he possesses a delivery note with "without prejudice" written on it, which shows that the goods were dispatched on 5 July. This delivery note will help the court determine liability and will not be privileged information. But if the seller sends an e-mail to the buyer stating that he would like to settle for £2,000 because the delivery note is strong evidence against him, this would be privileged and would not be used in court, even if the words "without prejudice" are not used.

Using the disclaimer "without prejudice" in the right circumstances might help to ensure the correspondence is not used in court, should it go that far. But using the label inappropriately is unnecessary and can create ill feelings between the parties.

To add to the confusion, you may also see terms like "commercial in confidence" or "commercial in confidence/restricted" written on documents. These relate to confidentiality, which is a different issue to whether the document will be disclosed in court.

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Information about tenders and contractual terms is classified as "commercial in confidence" until the signing of a contract, which means there will be restrictions around disclosure. Once the contract has been signed, restriction on certain information (for example the identity of the parties and the duration of the contract) will no longer be applicable and it can be made public. To ensure negotiations prior to the signing of the contract are kept confidential, parties can sign a confidentiality agreement. This would be legally binding under the law of contract and would prevent either party from disclosing the contents of the proposed tender.

By contrast, the use of privileged information is primarily governed by case law and statutes. To be on the safe side, even if a contract is awarded it would be prudent to seek consent from all parties concerned before making any sensitive information public, as disclosure may breach the contract, depending on its terms.