PIB Insurance Brokers
Solicitors Newsletter

Solicitors Newsletter 3rd Edition

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Welcome to the 3rd edition of our quarterly newsletter bringing you right up to date with the latest insights from across PIB Group.

In this edition we have a fascinating guest article from Lionfish Litigation Finance Ltd on how to "work" a litigation funder – inside information that we are sure will be invaluable to the litigators amongst you.

We also bring you an update on the W&I market and insurers' response to high M&A activity levels and deliver exciting news about our recently launched Private Equity proposition.

For those COLPs and COFAs amongst you, we have advice from specialist law firm consultancy and external provider The Strategic Partner on Anti Money Laundering Compliance.

In our News section we spotlight the Levelling up Law Coalition, a really important initiative intended to boost social mobility and widen opportunities within the legal sector and the proposed introduction of competence checks for lawyers.

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Working a Litigation Funder

In the first of our guest articles, Tets Ishikawa of Lionfish Litigation Finance Ltd explains how you can "work" a litigation funder to get the best funding solutions for your client. Essential reading for all claimant litigators, his 5 tips are as follows:

Tip 1: Be demanding

The amount of investment capital available in the litigation funding industry continues to increase unabated. But with that comes deployment pressure. In fact, most funders are under more pressure to deploy than ever before and finding good investable litigation risks, whether cases, portfolio or otherwise, is tough going for funders. Fail to deploy and they will lose their investors and their fees.

So, leverage the fact that each funder needs you more than you need them. They don't have as many investment opportunities as you have other funders. Demand swift responses. Demand transparency and explanations. Demand some basic courtesy in communication. Set timelines and deadlines. Because if one can't smell the jerky, there are plenty of others that will.

Tip 2: Create competitive tension

No one sells a house by approaching one person only at a time. So why do it with a litigation case or portfolio? In the real world, only the outcome matters and approaching multiple funders creates the competitive tension that empowers you to play one funder off the other.

Most funders will spin a story of why they are above the rest and why you don't need to approach others because of their name and reputation built over many years. This spin is actually a very logical and sensible one for a market that gauges prowess by name, reputations and "recent work". But third party litigation funding, while full of litigators, is not the legal market. It is a financial market and actions, not the spin, will tell the story.

Let free market rules decide. Make funders walk the walk rather than talk the talk. "Competitive tension" is a real thing that people use all the time in every other financial market so create it and use it. And it's always worth remembering a funder who shies away from competition ultimately won't survive… and no one wants to work with a funder who's not going to survive.

Tip 3: Use brokers (they're really like M&A bankers)

Those who see brokers as "lesser" professionals are misguided. Brokers tend to get paid by insurers and funders (and some get paid by the litigant) but either way, the bulk of their commissions come from the premiums and returns that are made when there is a successful outcome. In other words, they do a huge amount of work for a commission they might make as and when, or if, the case is successful.

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They're constantly running a level of contingent risk that would make most law firms collapse. They've taken a huge risk to establish their franchise and all are in it for the long run. So when they arrange insurance or funding, they are necessarily on your (both lawyer and litigant's) side. They will fight your corner and they will do everything possible to get you the best deal and to get it over the line. And if it's not a deal with one funder, they will try to find another solution (whether it's another funder, co-funding with various funders or re-engineering the economics) like brokers have successfully done for years with after the event (ATE) insurance.

The work they do will also save you a vast amount of time and effort that is better spent elsewhere. They can be a good sounding board. They will put themselves in the firing line to remove the kind of transactional angst that can often derail a transaction for non-commercial reasons. And because they're experienced having done this with ATE insurers (which is a far bigger market than TPLF), they know how to create that all-important competitive tension for you.

They really are no different to M&A bankers, just that M&A bankers are called "investment bankers" rather than the not-so-glamorous "brokers".

Tip 4: Don't give away exclusivity, it has a value

Exclusivity is not the practice direction that some funders like to make it seem. It is actually an asset with a value. For a funder, it secures a right of first refusal or, in financial market speak, a call option, both of which have commercial value. The value for funders is that it takes away your negotiating leverage on pricing and urgency and lets them control the situation to serve their own interests.

Put another way, exclusivity is a sure way to remove competitive tension. The only time it makes sense to give exclusivity is if there is no position to weaken; that is, that there is no competitive tension and the funder you are giving exclusivity to is your last hope.

On the basis that exclusivity then has a value, exclusivity should only ever be granted for a consideration of equal value. It could be a monetary amount. It could be (as some funders have done very selectively) for seed funding in return for exclusivity. It could have penalty clauses or a monthly fee for exclusivity.

But also know that some funders will never ask for exclusivity as a general principle. Those funders believe free market rules always apply and that solicitors shouldn't be prevented from being able to act in their client's best interests by getting the best solution for their clients.

Tip 5: Take control by being prepared

A broker may help you considerably in this but if you still prefer to go it alone, take control by making sure your application is top notch. M&A bankers will never take a deal to market without having everything (the pitchbook, Investor Memorandum, the forecasts) spot on. The risk of shooting too early is to lose that competitive tension.

Make sure all the issues you can think of are considered and addressed. Be transparent and open. Communicate information in a way that makes it discourteous for them not to reciprocate. Have your documents logically filed and don't miss out any key facts. It's not just the substance of responses to queries raised by funders that is important but the speed with which you respond. The quicker, the better prepared you are, the more it says about you. And the slower they are. Ultimately, being prepared means increasing your chances of being a star attraction to multiple funders allowing you to play one funder off the other to get the most competitive offer more quickly.

Find out more

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The full article can be read here.

Warranty and Indemnity Market responds to high levels of M&A activity

David Walters, Head of Financial Lines at PIB Insurance Brokers, shares his insight into the current state of the market.

The current pandemic has unfortunately caused a great deal of economic dislocation in the UK economy, particularly in the retail and leisure sectors. It has however, also created an environment where the levels of merger and acquisition activity have been running high, particularly in the world of Private Equity, with both buyers and sellers seeking advantageous opportunities.

This climate has also been assisted by a responsive and competitive insurance market that specialises in underwriting Warranty and Indemnity insurance. In its simplest form the insurance seeks to insure those warranties given by the vendors in the share purchase agreement (SPA) that governs the sale of one company to another. The benefits of the insurance placement to either side in a transaction are that deal value can be maintained, the requirements for funds being tied up in escrow are removed, known liabilities may be insured and that deal uncertainty can be managed.

With over twenty underwriters providing such cover there is currently a healthy tension in the insurance market with premium rates stable or falling and, more importantly, coverage positions becoming broader than ever. Examples of this include:

- Coverage availability on an indemnity basis
- The provision of knowledge scrapes
- Materiality scrapes
- Extended survival periods

These innovations can ensure that any resultant policy is broader than the SPA thus truly enhancing deal viability.

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Further innovation can be seen with the provision of insurance coverage for certain known issues which, as these are traditionally disclosed or form the basis of an indemnity, can create pinch points to deal closure. At PIB we have successfully negotiated insurance coverage for certain known matters on a transaction which removed buyer nervousness on that particular point and thus allowed the deal to close.

Furthermore, the rapidly expanding tax liability market is also taking proactive coverage positions and again, can facilitate deals being completed. A good example of this is where clients are now seeking insurance solutions as an alternative to tax clearances/rulings from the relevant authorities. The pandemic has meant that any tax authority response to requests for clearances or rulings are now very slow and the availability of insurance solutions has again enabled the M&A deal flow to remain strong.

At PIB Insurance Brokers we have worked with both lawyers, their clients and insurers on a tripartite basis to secure the best possible outcomes for transactions where insurance is not only desirable but sometimes a necessity.

Our team is happy to work to the rhythm of the transaction and often works through the night to ensure that coverage is placed in appropriate form as a deal closes.

Find out more

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PIB Launches Private Equity Initiative

At PIB Insurance Brokers, we are proud of our extensive connections in the world of private equity. We have recently launched a guide outlining our capabilities and what we are able to offer to private equity firms and to their investment portfolios.

As a highly active member of the Private Equity community completing over fifteen acquisitions a year, we fully understand the dynamics of deal flow and the need for timely support around each transaction. Our knowledge, awareness and understanding of private equity enable us to broker even distressed business into a market that is increasingly difficult.

Our range of expertise allows us to engage professionally with investment businesses and, on a wider scale, their portfolio companies.

Our strategic services can be broken down into three tactical compartments:

Protecting the Private Equity Hub

The combined experience of our team ensures that your private equity clients will be represented in the insurance market both professionally and forcefully.

The pillars of a successful financial lines placement fall into those policies that are essential such as D&O and Professional Liability and can then expand to includes others such as Crime and Cyber for example.

Furthermore, we have designed manuscript wordings which reflect the structures used and risks contemplated by regulated Private Equity entities.

Auxiliary Services

The initiative includes the provision of any Due Diligence required when an asset is being analysed so that it can be mapped into any placement requirements and/or provision of risk management services designed to present the business in a good light.

Protecting the Portfolio Assets

Given the wide nature of any portfolio of investments the potential insurance requirements will need to be managed by a wide spectrum of expertise.

We are acutely aware of the pressures that the current Covid-19 situation is placing on certain sectors of the economy such as retail. Moreover, we appreciate the additional disruption likely to occur as the 'invisible hand' of government assistance falls away as the pandemic eases. There are grave predictions of the consequences of this.

Additionally, the insurance market has been going through a 'hard' market cycle and has shown itself to be unwilling to be proactive to assist here without very careful management. At PIB we are adept at maintaining insurer risk appetite and breadth of coverage for PE backed companies – this is particularly true of D&O.

For the full guide, please follow the link here

Find out more

To find out more about the Private Equity Initiative please contact:

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Getting Anti Money Laundering Compliance Right!

For all law firms that handle matters which are caught under the Anti Money Laundering (AML) Regulations, the firm must operate in a compliant way. The Solicitors Regulation Authority (SRA) has made it very clear that failure to adhere to the requirements of the AML regulations will be met with disciplinary action and indeed this is proven with a high percentage of successful Solicitors Disciplinary Tribunal prosecutions relating to failings surrounding AML.

There are some fundamentals that a firm must do which are summarised below but to be fully compliant there is more to be undertaken.

Ensure your Money Laundering Compliance Officer (MLCO) is of sufficient authority

The MLCO in your firm must be a member of the board of directors (or equivalent) or a member of the senior management team. The MLCO's role is to ensure the Policies Control and Procedures (PCPs) are in place and the regulations are complied with and there is a requirement to report to the Board annually. Make sure your MLCO is of the appropriate status within the firm.

Update your Policies Control and Procedures (PCPs)

Most firms will have an AML policy and associated policies to manage and control risk and compliance with the regulations. These PCP's must be kept up to date and the staff must be updated on any changes on an ongoing basis. Do not allow your PCP's to become out of date or to not keep pace with the operational processes within your firm.

Arrange an independent audit

Each year the firm has to assess the effectiveness of the PCP's and report to the board. The ideal time to do this is when undertaking the annual Regulation 18 firm-wide risk assessment. Do this at the same time and the requirements will be met. Using an external auditor is favoured by the SRA and The Strategic Partner can work with your firm in this capacity.

Ensure the Money Laundering Reporting Officer (MLRO) guides staff and keeps records

Your MLRO must be accessible to staff and must provide guidance to staff when needed on all Money Laundering and Terrorist Financing issues. Importantly the MLRO must keep registers of high-risk matters and Suspicious Activity and ensure these registers are kept up to date at all times.

Train your staff

The training of staff is essential. Annual training to all staff involved in a department which handles regulated work is expected and this training should update the staff on the regulations, how they are impacted by them and any changes to your firm's PCP's. Ensure your firm has this training in place and make it compulsory to attend.

Compliance with the AML regulation is not simple and there are several elements to consider. We have highlighted some of the more important ones. For further advice and guidance, you can contact **The Strategic Partner.**

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Industry News

In this regular feature we aim to pick some of the stories that have caught our eye recently as being interesting and topical.

This edition looks at pioneering action to boost social mobility and widen opportunities within the legal sector, and competence checks for lawyers

Levelling Up Law Coalition

A group of trailblazing City law firms, including insurance specialists Fenchurch Law Ltd, have published a pioneering action plan to boost social mobility and widen opportunities within the legal sector and launched a Levelling Up Law Coalition to deliver on the recommendations.

Fenchurch Law and fourteen other City of London Law Society (CLLS) member firms have been working with Rt Hon Justine Greening's Social Mobility Pledge on a strategy to open up the sector to a diverse range of backgrounds.

The firms have collaborated with a number of universities across the regions, including Bradford, Staffordshire, Lincoln, York St John and Liverpool John Moores in a bid to create new and wider pathways from higher education into the legal sector.

The action plan sets out recommendations for leading law firms to work together on solutions that benefit the whole legal profession. Research shows that more diverse companies are now more likely than ever to outperform less diverse peers on profitability* and the plan looks at how the profession can tap into talent from a range of backgrounds.

The project has been led by former Government Minister, Member of Parliament and city Solicitor, Seema Kennedy OBE. Fenchurch Law and the other firms now plan to go further and play a leading role in Britain's national recovery from coronavirus, opening up greater access to careers in the legal sector.

David Pryce, Managing Partner, Fenchurch Law "Levelling Up Law is the most effective initiative that I've come across with regard to promoting social mobility within the legal profession. The project's goal of creating true equality of opportunity is vitally important not just in terms of basic fairness, but also because law firms have for too long drawn on an artificially limited pool of talent.

"If the UK is to retain its place as a leading global legal market, it is essential we start to recruiting based on potential, and stop favouring people based on their background and upbringing. Like most firms we have further to go on our journey to creating a truly diverse team, but I have no doubt that we will only be able to unlock our full potential once we do". Further information can be found **here**.

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Competence tests for lawyers “every 10 years”

The call by the Legal Services Board for the introduction of competence checks for lawyers seems set to go ahead, although in what form is yet to be determined. In a recent article in Legal Futures we read that the Legal Services Consumer Panel have suggested that such tests should take the form of an online test every 10 years for lawyers to prove that they remain competent in their specialist fields. The Legal Services Board has said that their research, including a poll of the general public, shows that 95% of respondents thought lawyers should have to demonstrate they remain competent throughout their careers and most felt the onus should be on legal services regulators to ensure this is done. However, the SRA are warning against “piling on lots of training and activities” to test the competence of solicitors, suggesting a more targeted approach aimed at high risk areas would be more appropriate. The Legal Services Board is looking to develop its proposals over the coming months and more about these should be known in the autumn.

Find out more

To find out more about any of our news stories, please contact:

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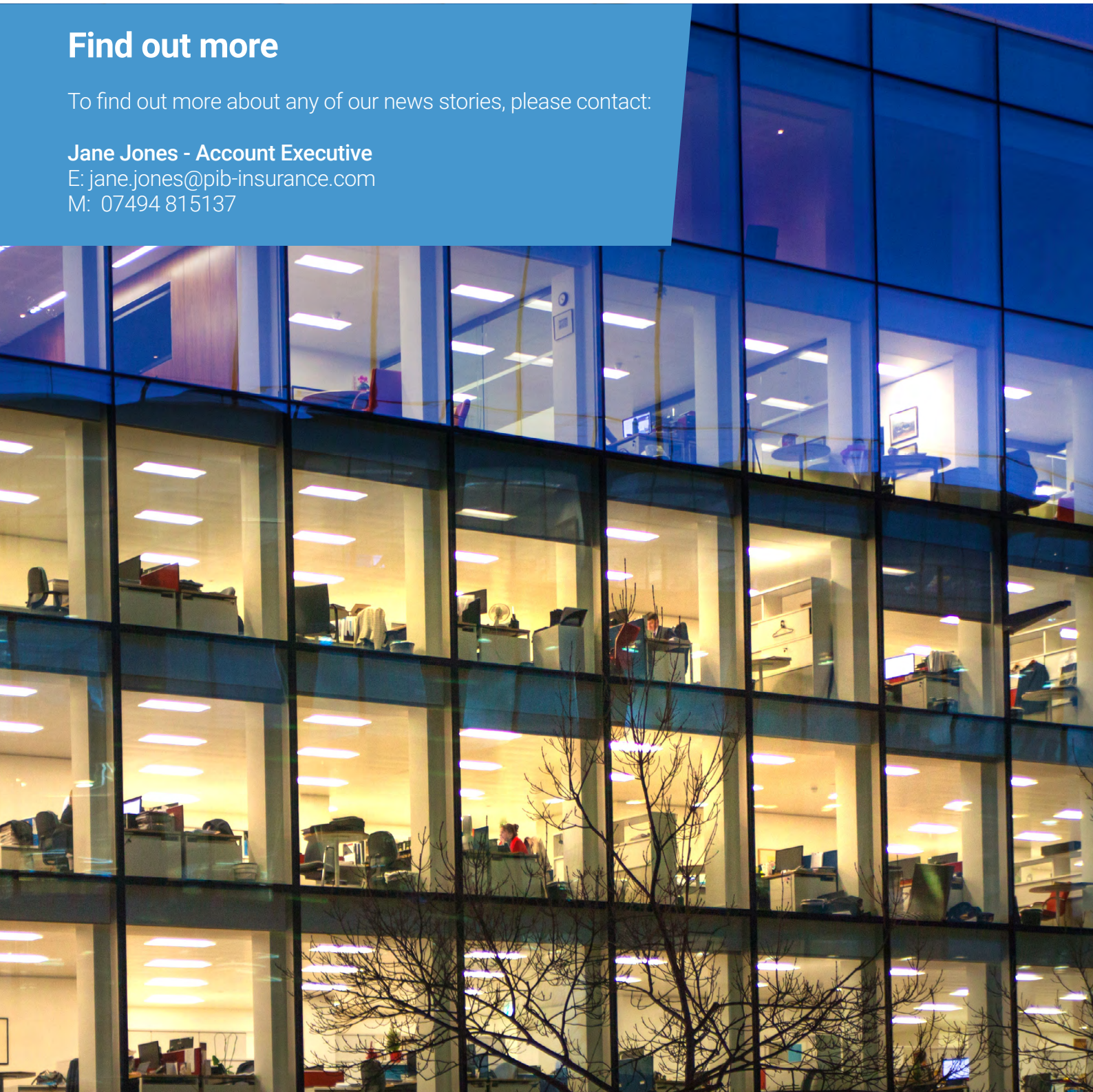

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