Private mergers and acquisitions in the Isle of Man: overview

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CORPORATE ENTITIES AND ACQUISITION METHODS

1. What are the main corporate entities commonly involved in private acquisitions?

In private acquisitions, both the buyer and seller are most commonly private companies limited by shares incorporated in either the Isle of Man or England and Wales.

2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

Restrictions on share transfer

There are no statutory restrictions on share transfer, unless the target company is a regulated body. If this is the case, the restrictions on change of control set out in the Isle of Man Financial Services Act 2008 will need to be reviewed carefully and changes notified to and/or consent obtained from the Isle of Man Financial Services Authority (IOM FSA).

Whether or not the target company is regulated, the primary documentation to check for potential restrictions are the articles of association and any shareholders’ agreement that may be in place. These documents may contain restrictions on the transfer of shares, including:

- **Pre-emption rights.** These require the shares to be offered to other shareholders first.
- **Drag along rights.** These entitle the selling shareholder to require other shareholders to sell their shares as well.
- **Tag along rights.** These entitle other shareholders of the target company to sell their shares alongside the selling shareholder.

In addition, a prospective buyer will need to check if the target company’s shares have been charged. If so, the chargee’s consent will be required for the sale of any shares.

Foreign ownership restrictions

There are no statutory restrictions on the acquisition of shares in an Isle of Man company by a foreign entity. However, the target’s articles of association and any shareholders’ agreement should be reviewed to ensure that they do not contain restrictions as to who is entitled to hold shares in the company.

In addition, key contracts entered into by the target company should be checked in case they contain change of control provisions that relate to foreign entities. For example, there have been examples of government grant contracts requiring the grantee to be wholly owned by an Isle of Man incorporated company for a set number of years and any change in this would trigger the requirement to repay the grant. This is a rare restriction, but such protectionist clauses can be seen.

3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

The most common way to acquire a private company incorporated in the Isle of Man is to purchase the whole of its issued share capital by way of a share purchase agreement.

Share purchases: advantages/asset purchases: disadvantages

The purchase of the entire issued share capital of a company means that the buyer will automatically acquire all the assets of the target company without requiring additional contracts dealing with the transfer of assets, suppliers or customers. In an asset purchase, each individual contract entered into by the target company will need to be reviewed, third-party consents obtained (where required) and then, if possible, assigned or novated.

Share purchases: disadvantages/asset purchases: advantages

In acquiring the entire issued share capital of a company, the buyer will also inherit all the target company’s liabilities, including those that the buyer may have been able to exclude in an asset purchase. Due diligence is crucial in a share purchase, and full warranties and indemnities would be expected in the share purchase agreement. While due diligence is still crucial in an asset purchase, the buyer has more freedom to pick and choose which assets of the business it wishes to acquire.

4. Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

Sales of Isle of Man companies by auction are not common, unless the company is part of a wider international group or holds assets in another jurisdiction, in which case the auction process will usually be conducted in another jurisdiction. There are no specific statutory requirements or regime that govern sales of companies by auction.

PRELIMINARY AGREEMENTS

5. What preliminary agreements are commonly made between the buyer and the seller before contract?

A letter of intent (or heads of terms) setting out the main contractual terms of the proposed sale is quite common. The letter is generally not legally binding and essentially sets out the basic agreed terms and background for the negotiation of the purchase agreement.
Exclusivity and non-disclosure agreements are also usual, although perhaps less common with an Isle of Man incorporated company. An exclusivity agreement permits the buyer to negotiate exclusively with the seller for a set period of time. A non-disclosure agreement requires the parties to keep their discussions and any agreements made confidential, not just in relation to the general public but also to suppliers and employees.

**ASSET SALES**

6. **Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded from the purchase?**

No assets or liabilities automatically transfer in an asset sale. They must be specified in the asset purchase agreement as a transferred asset or liability.

The Isle of Man does not apply provisions similar to the UK Transfer of Undertakings (Protection of Employment) Regulations 2006. Therefore, employees will not automatically transfer on an asset purchase. If the buyer chooses to hire certain members of staff following the purchase, an employee is likely to be considered under continuous employment (even if they were made redundant at the point of completion) so that statutory rights acquired based on the number of years in employment will continue to accrue. For more detail, see Question 32 and Question 33.

7. **Do creditors have to be notified or their consent obtained to the transfer in an asset sale?**

If the assets are not charged, creditors do not usually need to be notified or their consent obtained. However, any loan agreements and security documents with any financial institutions should be reviewed in case they contain restrictions or notification requirements of this nature.

If the assets are charged, consent must be obtained from the chargee and the buyer will usually need to request a specific release, releasing the asset in question from the charge.

**SHARE SALES**

8. **What common conditions precedent are typically included in a share sale agreement?**

Conditions precedent depend on the circumstances of each transaction, but generally include the following:

- Seller's board approval.
- Target's board approval (to include director resignations, change in bank mandate signatories, change in registered agent, approval of share transfer, and so on).
- Shareholder approval.
- Regulatory and other third-party approvals (as applicable).

**SELLER’S TITLE AND LIABILITY**

9. **Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?**

There are no terms implied by law as to the seller’s title. Title must be written into the share purchase agreement. The concept of “full title guaranty” in contracts governed by the laws of England and Wales does not apply in the Isle of Man. Instead, an agreement for the sale of shares in an Isle of Man company will often refer to the shares being sold free from encumbrances and the seller will warrant that they hold legal and beneficial title to the shares in question.

10. **Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements or similar matters?**

**Seller**

A seller can be liable for pre-contractual misrepresentation and misleading statements if liability is not expressly excluded under the share purchase agreement (although liability for fraudulent misrepresentation cannot be excluded). However, a share purchase agreement will often limit the seller’s representations and warranties by including qualifying statements such as "in so far as they are aware". This will reduce the risk of a seller giving a misleading or misrepresentative statement in relation to something outside their knowledge.

Additionally, the share purchase agreement will often include an entire agreement clause under which the buyer can only rely on statements that have been made in the share purchase agreement itself and not in ancillary documents or discussions, ensuring that all parties are clear on the statements that are being relied upon.

**Advisers**

Advisers can be liable for misrepresentation if they acted negligently in speaking for the seller. However, advisers often exclude any liabilities to their client in this regard under their engagement letter and require an indemnity from their client for any third-party claims.

**MAIN DOCUMENTS**

11. **What are the main documents in an acquisition and who generally prepares the first draft?**

The main documents in an acquisition depend on the circumstances of each transaction, but generally include:

- The share purchase agreement or asset purchase agreement, as relevant (to be prepared by the seller).
- A disclosure letter qualifying the representations and warranties given in the sale agreement (to be prepared by the seller).
- Board minutes of the target company in a share purchase (to include director resignations, change in bank mandate signatories, change in registered agent (if applicable), approval of share transfer, and so on) (to be prepared by the seller).
- Stock transfer forms and new share certificates (to be prepared by the seller).
- Third-party change of control consents (to be prepared by the seller).
- Release of security (to be prepared by the seller).
- In an asset purchase agreement, new employment contracts/employment termination agreements (to be prepared by the buyer).
- In an asset purchase agreement, separate transfer documents for each asset where required (such as land registry forms) and notices of assignment of contracts (to be prepared by the seller).
ACQUISITION AGREEMENTS

12. What are the main substantive clauses in an acquisition agreement?

The main substantive clauses depend on the circumstances of each transaction, but generally include the following:

- Definitions.
- Conditions precedent.
- Sale and purchase provisions.
- Completion requirements and procedures.
- Seller warranties.
- Limitation on claims.
- Indemnities.
- Confidentiality and announcements.
- Boilerplate clauses, including further assurances, assignment and third party rights.
- Governing law and jurisdiction.
- Schedules relating to:
  - particulars of the target company;
  - conditions to completion and conduct of business between exchange and completion;
  - documents to be delivered at completion;
  - detailed warranties;
  - details of key assets; and
  - adjustments to the purchase price or details of any permitted leakage where the purchase price will not change.

13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

Share purchase agreements often provide for a foreign governing law, particularly English law.

Regardless of which foreign law governs the contract, the Isle of Man courts will not recognise the competence of a foreign court to make determinations as to title to shares in an Isle of Man company, or enforce any purported judgment for specific performance of an agreement to transfer shares, without a re-examination of the merits of the case in separate Isle of Man legal proceedings. Accordingly, it is usually recommended that the share purchase agreement be made subject to the non-exclusive jurisdiction of the foreign court. It is becoming common to include a further sub-clause which provides that in the event of a necessity to rectify the register of members, the Isle of Man High Court will have jurisdiction.

The mode of enforcement of foreign judgments by Isle of Man courts depends on the country of the judgment. The Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968 provides for the enforcement of money judgments of certain courts by way of reciprocal enforcement arrangements. These include courts of the UK, Italy, The Netherlands, The Netherlands Antilles, Israel, Suriname, Jersey and Guernsey. Foreign money judgments that do not fall under this reciprocal enforcement arrangement require a fresh legal action in the Isle of Man courts on the relevant judgment.

WARRANTIES AND INDEMNITIES

14. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

Seller warranties/indemnities are a crucial aspect of an acquisition agreement, although they may be pared down significantly if the transaction is not at arm’s length. The usual warranties and indemnities relate to:

- The capacity of the seller to enter into the agreement.
- The structure of the target group and share capital of the target company.
- Financial accounts.
- The assets held by the target company, including conditions and details of any charges.
- Intellectual property rights.
- Computer systems.
- Pensions and employees.
- Insurance.
- Supplier and customer contracts.
- Past and ongoing disputes.
- Solvency status.
- Compliance with laws, including data protection, anti-money laundering and anti-bribery legislation.

15. What are the main limitations on warranties?

Limitations on warranties

Limitations on warranties usually include:

- A minimum claim level (referred to as a de minimis) together with a cap on liability (usually a percentage of the consideration).
- A limited time period in which a claim can be made.
- A standard requirement to mitigate any losses.
- Confirmation that anything revealed in the disclosure letter will qualify the warranty.
- Procedures for handling disputes, for example, a clause requiring arbitration.

Qualifying warranties by disclosure

A share purchase agreement is often accompanied by a disclosure letter that qualifies any warranties given in the agreement. The disclosure letter will include both:

- General disclosures, such as making any warranty subject to any information that may be publicly available from the Companies Registry.
- Disclosures relating to specific warranties made in the share purchase agreement, thereby putting the purchaser on notice of a particular fact.

The level of disclosure required varies from contract to contract. The most common position is that a seller must disclose anything of which it is reasonably aware and must make reasonable enquiries to do so. The seller cannot simply turn a blind eye to matters of fact that it should be aware of to avoid having to disclose them to the buyer. Additionally, any disclosure made must provide enough

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information for the buyer to come to a reasoned decision on how to proceed.

16. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

Remedies
The starting point is to look at the reduction in value of the shares/assets as a result of the breach of warranty, which will be the basis of the claim. It may also be possible to make a claim on an indemnity basis, depending on the terms of the purchase agreement, in which case the buyer will look at the cost of remedying the breach regardless of any reduction in value of the shares/assets.

Time limits for claims under warranties
This will depend on what has been agreed in the share purchase agreement. Usual warranties generally allow the buyer to make a claim for up to three years following the date of completion. The maximum statutory time limit for bringing a claim, if not limited in the purchase agreement, is set out in the Limitation Act 1984. The usual limitation period for a contractual claim is six years from the date on which the cause of action accrued. When a purchase agreement is executed as a deed, the limitation period is 21 years.

CONSIDERATION AND ACQUISITION FINANCING

17. What forms of consideration are commonly offered in a share sale?

Forms of consideration
The usual consideration is cash. However, consideration is also offered in the form of equity swaps and loan notes.

Factors in choice of consideration
This depends on the seller's tax position, especially if an Isle of Man incorporated company is being sold as part of a larger group of companies where, for example, capital gains tax in England and Wales may be relevant. The choice of consideration also depends on the negotiations between the seller and the buyer, and whether the buyer has alternative forms of consideration available that are appealing to the seller.

18. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares, how is the issue typically structured? What consents and regulatory approvals are likely to be required?

A listed buyer, including an Isle of Man incorporated company, will usually be listed in the UK or other common jurisdiction for listing, as the Isle of Man does not have a separate stock exchange. Therefore, the buyer will need to comply with the consents and regulatory approvals requirements of the jurisdiction in which it is listed.

19. Can a company give financial assistance to a potential buyer of shares in that company?

There is no prohibition on financial assistance as such for a private company incorporated in the Isle of Man. However, the following company law principles continue to apply:
• The transaction must be in the best interests of the company.
• The transaction must not breach the rules on distributions or otherwise consist of an illegal reduction in the capital of the company.
• The transaction must not otherwise represent a fraud on the company's creditors under Isle of Man insolvency laws.

However, there are restrictions on financial assistance for public companies incorporated in the Isle of Man which are determined by the Isle of Man company regime under which the company is incorporated (see Question 2). If the company is incorporated under the Companies Act 1931, it is unlawful for a public company or its subsidiaries to give financial assistance for the acquisition of shares in that public company. Equally, it is unlawful for a public company incorporated under that regime to give financial assistance for the acquisition of shares in its private holding company. However, save for the stated company law principles, there is no prohibition against a private company giving financial assistance for the acquisition of shares in itself or its private holding company.

For a company incorporated under the Companies Act 2006, there is no prohibition on financial assistance as such, regardless as to whether it is a public or private company. However, notwithstanding the absence of formal prohibitions and the absence of statutory whitewash procedures, the listed company law principles continue to apply.

SIGNING AND CLOSING

20. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?

Signing
If there is a gap between exchange and completion, at the signing meeting the directors will typically sign the:
• Share purchase agreement.
• Disclosure letter.
• Board resolutions approving entry into the above.

Closing
The documents commonly produced and executed at a closing meeting differ with each transaction, but usually include the following standard documents:
• Stock transfer forms.
• New share certificates.
• Resignation and appointment letters for officers.
• Bank mandate forms.
• Termination and appointment agreements for the registered agent and nominated officer.
• Board resolutions of the target company.
• Shareholder resolutions of the target company.

21. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

The Isle of Man has two different corporate regimes. Companies involved in the transaction will either be incorporated under the Companies Acts 1931-2004 (1931 Act) or the Companies Act 2006 (2006 Act).
In both types of company, an agreement under hand can be signed by any one director. To execute a deed, a 2006 Act company will simply require one director to sign although it is common practice to require the presence of a witness for evidentiary purposes. A 1931 Act company will require two signatories to execute a deed. These signatories must either be two directors or one director and the company secretary. There is no requirement for a document to be notarised or apostilled under Isle of Man law.

22. What are the formalities for the execution of documents by foreign companies?

This depends on the requirements of the jurisdiction of incorporation of the company in question. There are no additional requirements imposed on foreign companies under Isle of Man law.

23. Are digital signatures binding and enforceable as evidence of execution?

The Electronic Transactions Act 2000 provides for the use of electronic signatures, although this is not yet standard practice and is relatively unusual. The method of signing must be reliable and appropriate and the other party must consent to the method.

24. What formalities are required to transfer title to shares in a private limited company?

The seller must execute a stock transfer form in a form approved by the directors of the target company. There is no requirement for the stock transfer form to be signed by the transferee, unless the shares are only partly paid. There are no stamping requirements.

The stock transfer form should be submitted to the target company’s officers together with the original share certificate (or share certificate indemnity, if such certificate is lost) who (assuming there are no restrictions on the transfer of shares at this point) will accept the form, update the register of members and issue a new share certificate.

The register of members and share certificates are prima facie evidence of the company's shareholding. The register of members is often updated at the completion meeting.

The articles of association of the target company may impose additional requirements.

TAX

25. What transfer taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share sale
Stamp duty is not payable on a transfer of shares in an Isle of Man incorporated company. However, stamp duty may become payable in certain circumstances referred to in the Stamp Act 1891. The Stamp Act 1891 is an Act of Parliament and not a Manx Act of Tynwald.

Asset sale
Stamp duty and capital gains tax are not payable on an asset sale in the Isle of Man under Isle of Man law. However, a transfer of real estate incurs Deeds or Land Registry fees that are based on the value of the land. The fee for registration of a transfer is GBP5.70 for every GBP1,000 of value (for example, the transfer of a property worth GBP500,000 will incur registry fees of GBP2,850).

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale
Not applicable (see Question 25).

Asset sale
Not applicable (see Question 25). There are no exemptions or reliefs from Deeds and Land Registry fees, as these are considered fees rather than taxes.

27. What corporate taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share sale
The majority of companies incorporated in the Isle of Man are not subject to corporation tax. Corporation taxes apply to banking business income, land and property income from Isle of Man sources and retail businesses operating in the Isle of Man with profits above GBP500,000. Separate tax advice should be sought regarding applicable rates.

Asset sale
See above, Share sale.

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale
See Question 25. Separate tax advice should be sought in this regard if taxes are applicable.

Asset sale
See Question 25. Separate tax advice should be sought in this regard if taxes are applicable.

29. Are other taxes potentially payable on a share sale and an asset sale?

There are no other local taxes payable on a sale of shares in an Isle of Man incorporated company. Value added tax (VAT) may be payable on an asset sale where the transaction does not qualify as a transfer of a going concern. The standard VAT rate is 20%, although certain reliefs and reduced rates are available under the Value Added Tax Act 1996.

30. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target company before tax?

Separate tax advice should be sought in this regard.
EMPLOYEES

31. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

Asset sale
There are no specific obligations under Isle of Man law to consult with, or obtain approval from, employees.

Share sale
As with an asset sale, there are nospecific obligations under Isle of Man law to consult with, or obtain approval from, employees. However, a seller that does not consult with its employees may face claims of unfair dismissal if employees are made redundant. The parties will minimise the risk of any unfair dismissal claims if the employees are consulted and informed, with as much notice as possible, of the change of employer (and any consequent changes in the terms and conditions of their employment, if applicable).

32. What protection do employees have against dismissal in the context of a share or asset sale? Are employees automatically transferred to the buyer in a business sale?

Asset sale
An employee's contract of employment does not automatically transfer to a new owner on an asset sale. The effect of the transfer of ownership of a business on an employee largely depends on the intentions of the buyer. If the buyer agrees to employ the employee on the same terms as their previous contract of employment, and the employee agrees to this, the employee will be deemed to have continuous employment dating back to when he/she commenced employment with their previous employer (the seller) and will not be entitled to a redundancy payment.

If the buyer decides to employ the employee under different terms and conditions, and the employee accepts the new terms, the employee will be deemed to have continuous employment dating back to when they commenced employment with their previous employer. There will be no entitlement to redundancy pay from the seller. Where the new terms and conditions are different to those previously undertaken, a trial period of four weeks applies. If, during the trial period, the employee terminates the contract of employment (or gives notice) or the new employer terminates the contract (or gives notice) for a reason connected to the change in employment, the employee will be treated to have been dismissed from the date that their employment ended with their previous employer, unless the employee's contract is again renewed. The seller will then be potentially liable for a redundancy payment.

If the buyer decides not to take on the employee, the employee will remain employed by the seller. In these circumstances, the employee will usually be surplus to the seller's needs and there is likely to be a redundancy situation. The employee will be entitled (if eligible) to a redundancy payment from the seller. In certain circumstances, eligible employees may also have the right to bring an unfair dismissal claim.

Share sale
An employee's contract of employment does not automatically transfer to a new owner on a share sale. The same principles apply as for an asset sale (see above, Asset sale).

Transfer on a business sale
See above, Asset sale.

PENSIONS

33. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

This depends on the scale of the business and the degree of presence the company has in the Isle of Man. Where there is an existing pension scheme, it is unlikely that the buyer will need to honour it. This is because an employee's contract of employment (which contains the terms of their pension entitlement) will not automatically transfer (see Question 32).

COMPETITION/ANTI-TRUST ISSUES

34. Outline the regulatory competition law framework that can apply to private acquisitions.

The Isle of Man does not operate a competition regime requiring prior clearance of mergers and acquisitions. However, Part 2 of the Isle of Man's Fair Trading Act 1996 gives the Isle of Man Office of Fair Trading (OFT) certain powers in respect of anti-competitive or unfair practices.

The OFT can investigate and report on situations where a person is pursuing a course of conduct that is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the Isle of Man or the supply or securing of services in the Isle of Man. The OFT has further powers to obtain an undertaking from such a person to cease these practices. If an undertaking is not sought or obtained from the person under investigation, the OFT will submit its report to the Council of Ministers, which then decides whether the matter should be referred to a commission to ascertain if the person has engaged in anti-competitive practices and whether the practice operated or might be expected to operate against the public interest. A commission can be any government department or statutory board or such other person(s) as are deemed appropriate. The commission will report back to the Council of Ministers, who can request the OFT to seek an undertaking from the person concerned.

The OFT and any commission can require the attendance of persons to give evidence and produce documents or other information.

In addition, regulatory approval may be required if the target company is regulated by the IOM FSA.

EU competition law does not apply in the Isle of Man, except where a merger or acquisition directly or indirectly breaches Protocol 3 to the Act of Accession which formed part of the UK’s Treaty of Accession 1972. Protocol 3 requires free movement of industrial and agricultural goods between the Isle of Man and the EU. This is subject to change following Brexit.

ENVIRONMENT

35. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

The starting position is that the polluter is liable for the clean-up of contaminated land. This should be considered carefully when undertaking due diligence on a share purchase, as such liability will transfer to the buyer unless specific provision is made in the purchase agreement.

In an asset purchase, due diligence is still crucial as a lease may require the tenant/occupier to be liable for any clean-up costs,
which will become the responsibility of the buyer if they acquire the tenancy to the property.

### ONLINE RESOURCES

**Isle of Man legislation**


**Description.** This official website provides access to original language text of legislation referred to in this article.

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**Recent transactions**

- Acting for several major international banking institutions in respect of the restructuring of their Isle of Man operations, involving transfers of deposits and loan books.
- Advising a private bank on the sale of its Isle of Man investment management business and loan book.
- Representing Avingtrans plc as Isle of Man counsel on its acquisition of Hayward Tyler Group plc through an Isle of Man scheme of arrangement.

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**Recent transactions**

- Acting for a member of the Sports Direct Group in the purchase of a shopping centre in the Isle of Man. This involved assisting with the purchase of a property in the Isle of Man and assisting and advising on lease surrenders, implied tenancies, landlord and tenant rights in the Isle of Man, and enforcement under a lease and short-term licences.
- Acting for Manx Telecom PLC in connection with its recent flotation on the AIM market of the London Stock Exchange, raising GBP156 million.
- Acting as Isle of Man counsel to private equity firm Vitruvian Partners in relation to its agreement to provide funding to support a management-led buyout of Royal London 360°.

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