



Be vigilant

Savvy investors do detailed due diligence as early as possible, and it's simple but effective in the BVI, says *Valerie Georges-Thomas*

There has been greater emphasis placed on effective due diligence on investments and acquisition targets in the aftermath of 2008's financial crisis. Important lessons should have been learnt from all the high-profile hedge fund frauds and failures occurring at the height of the fallout. Many investors could have avoided substantial losses if relatively straightforward due diligence had been carried out prior to investing.

Detailed due diligence must take place before an investment and on an ongoing basis. It is a relatively simple and cost-effective exercise to undertake early in a transaction and it can highlight potential issues that could prove costly if not discovered until later.

While it is common to engage offshore counsel towards the end of a transaction to provide the customary legal opinion, involving them at an early stage often makes for a more cost effective and smoother process.

BVI funds

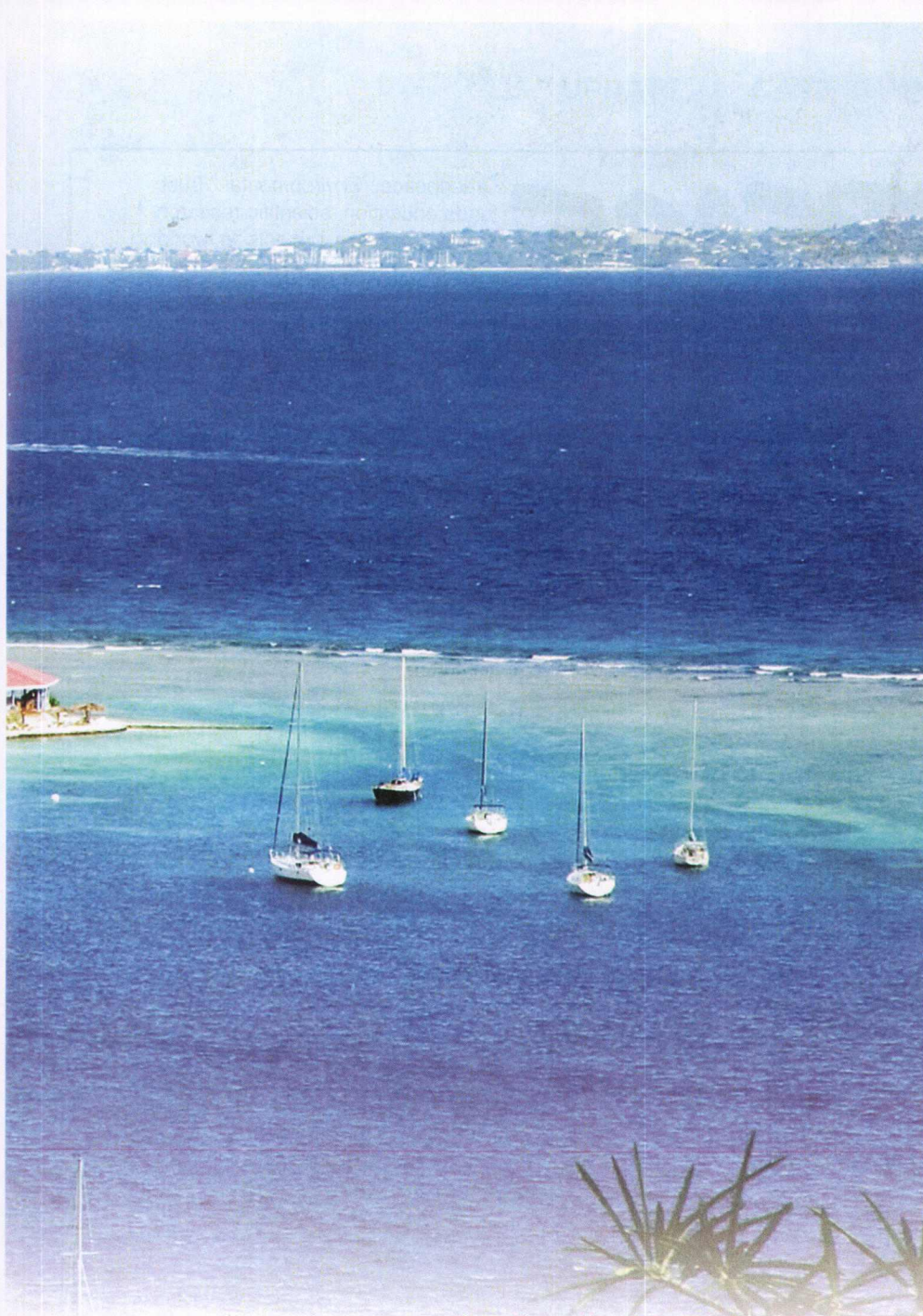
For BVI funds, proper checks should be carried out to ensure that the target fund is duly incorporated, properly constituted and in good standing. This will necessitate a search of the public records at the Companies Registry and a review of the fund's constituting documents for compliance with BVI law.

A search of the records at the Registry of the High Court of Justice and the Commercial Court Division

should also take place to confirm that there are no pending actions or judgments filed by or against the target fund. The Companies Registry search should also show whether notice of, or resolutions for, appointing a voluntary liquidator have been filed.

Regulated funds have various statutory requirements and ongoing obligations to satisfy. This is particularly the case in relation to notifications required by the BVI Financial Services Commission (FSC) for common corporate actions. Activities such as amending the memorandum and articles of a BVI fund require FSC notification. Therefore, a thorough review is important to ensure compliance.

This comprehensive due diligence



Marina Cay and Virgin Gorda in British Virgin Islands

exercise should include a detailed review of the fund documents, particularly the offering document and the memorandum and articles of association as well as all service provider agreements. This will ensure that the terms are consistent with BVI law and normal commercial terms apply, and spot any 'red flags' or unusual provisions.

Where a transaction involves the disposition and acquisition of shares, additional concerns arise to ensure that the target shares have been properly issued and recorded on the company's books. An early analysis can ensure the seller holds the number of shares they think they do and that they were validly obtained. If there are any questions raised at an early stage of a transaction, remedial

action should be straightforward.

Following any share sale, rectification can be far more problematic. Remembering the doctrine *caveat emptor* (let the buyer beware) a prudent purchaser should always ensure the company books are in order and up to date prior to the transfer, and good due diligence will assist here. A search of the Companies Registry may also identify charges over a target company's assets and/or the shares in the target.

During and after a share purchase, effective due diligence should make sure that the formalities of the share transfer are complied with and that the underlying entity has approved and accurately updated its books and records to reflect the share transfer.

Early action

If the transaction involves distributing or acquiring a BVI company-owned asset, care must be taken to confirm that proper procedures are followed and any statutory requirements are satisfied to formalise and authorise this. Often in substantial asset sales and purchases, minority share rights arise and these need to be dealt with effectively at an early stage.

A transaction with a regulated entity brings certain special considerations into play. Whether the governing statute is the Securities and Investment Business Act 2010, as amended (SIBA) or the Banks and Trust Companies Act, each statute has its own specific requirements and prohibitions that need to be addressed early in any proposed transaction.

Even where the entity is not regulated, it is important to review the business and activities of the target. SIBA contains very broad definitions and encompasses a number of activities that, until its introduction in 2010, were not regulated in the BVI. Confirmation of the regulatory status, or lack thereof, is important as the remedial work involved with respect to an unauthorised entity can be substantial.

Advisory warnings and public statements are issued by the FSC to warn consumers about companies not registered in the BVI or entities not licensed to carry on financial services business in the BVI. For completeness, these warnings and advisories should be monitored.

In our experience, due diligence exercises undertaken on BVI companies early have routinely assisted in identifying issues and concerns that are easily addressed with the luxury of time. They avoid 11th-hour scrambles and enable the parties to focus on the commercial terms of the transaction. ■

**Valerie Georges-Thomas is
a lawyer for Bedell in BVI
(www.bedellgroup.com)**

