

**CADWALADER**

## Missing Persons

December 15, 2023



**By Tim Hicks**  
Partner | Fund Finance

When an investor chooses a private equity fund, it is a calculated gamble on that fund's general partner and more specifically its managing principals and the members of the investment team (the "Key Persons"). The Key Persons are the individuals who the investors believe are critical to sourcing, making, managing and exiting from investments to maximize the investor's return. A lender providing a subscription facility to a fund is also concerned with that fund's management. These are the individuals that the lender is partnering with to provide liquidity and the Key Persons provide stability, predictability and, most important to the lender, instill confidence to incentivize an investor to fund its capital commitment to repay obligations under a subscription facility.

Once the investors have made their choice to invest and a fund has compelled a lender to provide a subscription facility, a primary concern of investors and lenders alike is what happens if a Key Person dies, is permanently disabled or otherwise ceases to be involved in managing the fund (a "Key Person Event"). During a fund's investment period, the fund can make investments, dispose of investments, distribute proceeds from asset sales and generally function in the manner that induced the investors to choose to invest at the outset. When a Key Person Event occurs, the investment period is paused and the fund must decide on the next steps, including whether to appoint new key persons or permanently end the investment period. From a lender's standpoint, the occurrence of a Key Person Event often triggers a potential default or an event of default under a subscription facility and forces the remaining principals and the lender to engage in communication about the fund's future plans.

As a general matter, a lender is often willing to live with how the fund decides to define a Key Person Event in its partnership agreement but expects those defined events to continue throughout the life of fund or, at a minimum, through the scheduled investment period (*i.e.*, the three- or five-year period from final closing of new investors as stated in the partnership agreement). A recent trend in partnership agreements seems to frustrate that expectation. We have seen an increasing number of partnership agreements where the occurrence and ramifications of a Key Person Event end after an 18- or 24-month period beginning with the first investor closing. In other words, if a lender ties its trigger event for the occurrence of a potential default or an event of default to how the fund defines a Key Person Event in its partnership agreement, the protection it seeks is lost when the time period lapses. The lender may unknowingly lose the right to pause borrowings upon the occurrence of a Key Person Event because the partnership agreement definition of a Key Person Event disappears with simply the passage of time.

At Cadwalader, determining how a Key Person Event is defined and whether investors must continue to fund to repay debt after the occurrence of a Key Person Event has always been

part of our diligence checklist. But now there is a new cautionary tale to alert lenders to in undertaking the review of a partnership agreement. Does the Key Person Event continue as expected or does the defined event unexpectedly disappear? If the latter, counsel must alert the lender to this fact and take the steps necessary to make sure parties come to the table to discuss the path forward in all instances.

Much like the aforementioned disappearing events, 2023 is coming to an end and is about to pass into the annals of history. It was a year marked by twists and turns, highs and lows and opportunities and resiliency. It did not start how I expected, but it taught us all how to navigate challenges. The fund finance industry came together in ways we never expected, and each of us has a story to tell or a reflection on the events of 2023. We are hoping the best 2023 story you can tell is the joy you experience this Holiday Season.

## PitchBook Publishes NAV Primer

December 15, 2023

While NAV financing has existed for decades, the increased adoption by buyout funds is one of the reasons why NAV has become a trending topic of late, according to Pitchbook in its recent research piece, [NAVigating Considerations and Controversies Around NAV Loans](#). The report is well worth the read as an initial primer and a survey of current NAV discussion topics.

# Congratulations to Our New Partners, Special Counsel and Counsel!

December 15, 2023



We are thrilled to share a remarkable advancement within Cadwalader's esteemed Fund Finance team. Effective January 1, 2024, several accomplished attorneys will be promoted to partner, special counsel and counsel. These attorneys have distinguished themselves through exceptional legal skills, outstanding client service and their consistent embodiment of Cadwalader's values.

The broader announcement encompassing this occasion is slated for Monday; however, we simply couldn't contain our enthusiasm and wished to offer a sneak peek into this momentous development within our Fund Finance practice.

We are excited to congratulate:

**Christopher D. Montgomery**, Partner, Finance (Charlotte) – Chris represents major U.S., regional and foreign bank and non-bank lenders as lead agent or participants in fund finance transactions to private equity and other investment funds. His practice focuses primarily on the due diligence, structuring, negotiation and documentation of both bilateral and syndicated subscription and hybrid credit facilities provided to some of the world's preeminent fund sponsors. Chris earned his B.A. and M.A. from Washington University in St. Louis, and his J.D. from the University of Chicago Law School.

**Joseph P. Zeidner**, Partner, Finance (Charlotte) – Joe's practice focuses on a broad range of fund finance transactions at all levels of the capital structure and every phase of a fund's existence. In particular, Joe has a strong background representing major U.S. and foreign banks and other financial institutions as agents, lead arrangers and lenders in structuring, negotiating and documenting subscription credit and capital call facilities, as well as NAV-based, hybrid and other nontraditional facilities and lending arrangements. Joe earned his B.S. from Duke University, and both his M.B.A. (*summa cum laude*) and J.D. (*magna cum laude*) from Drexel University.

**George Pelling**, Special Counsel, Finance (London) – George represents banks, fund managers and other financial institutions on a variety of cross-border financings, with a particular focus on fund finance (including Capital Call facilities, NAV facilities, hybrid solutions, GP Support facilities and other bespoke financings). He also has experience advising investment funds and financial institutions on the acquisition and sale of syndicated bank loans, debt instruments,

bond claims and other distressed assets. George earned his B.A. (*first class honours*) from Newcastle University and his LPC from the University of Law, Guildford.

**Tom Spinks**, Counsel, Finance (London) – Tom has more than 10 years' experience advising both banks and sponsors on a broad range of financings for private equity, infrastructure and renewable funds. His experience covers a diverse range of fund finance products (including NAV facilities, Capital Call facilities and GP Support Facilities) using a variety of different structures. In particular, Tom has extensive experience advising infrastructure funds on all aspects of their financing needs. He earned his B.A. from the University of Oxford, his GDL from City University and his LPC from BPP University Law School.

## Brickfield Fund Finance Roundup

December 15, 2023

Brickfield Fund Finance Recruitment has released a 2023 roundup discussing new market conditions and new approaches in fund finance.

Read more [here](#).

# Happy Holidays!

December 15, 2023



Fund Finance Friday readers, as the holiday season approaches, we want to take a moment to express our gratitude for your continuous support throughout the year. In celebration of the festivities and to recharge for an exciting new year, we'll be taking a short break and will be back in January. Wishing you all a joyful and safe holiday season filled with warmth and cheer. We eagerly anticipate reconnecting in the new year.