

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO: OF 2021 ()

BETWEEN: **ASIA PRIVATE CREDIT FUND LIMITED**
(IN OFFICIAL LIQUIDATION)

AND: **KIANG TIEN SIK DAVID**

WRIT OF SUMMONS



TO: Kiang Tien Sik David, (1) c/o Maples Corporate Services Limited, PO Box 309, Uglund House, Grand Cayman KY1-1104, Cayman Islands and (2) Flat A2, 9F, Evergreen Villa, 43 Stubbs Road, Hong Kong.

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff in respect of the claim set out on the next page.

Within 14 days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, PO Box 495, George Town, Grand Cayman, the accompanying Acknowledgment of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued this 17th day of June 2021

NOTE – This Writ may not be served later than 4 calendar months (*or, if leave is required to effect service out of the jurisdiction, 6 months*) beginning with the date of issue unless renewed by order of the Court.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

GENERAL INDORSEMENT

Background

1. Asia Private Credit Fund Limited (in Official Liquidation) (the "**Plaintiff**") was incorporated in the Cayman Islands on 9 February 2010 as an exempted limited company under the Companies Act (as amended). The Plaintiff was assigned company number 236963 and registered with the Cayman Islands Registrar of Companies on or about 9 February 2010.
2. The Plaintiff carried on business as a mutual fund and is registered as such with the Cayman Islands Monetary Authority with licence number 562026 under the Mutual Funds Act (as revised).
3. On 17 June 2014, the Defendant was appointed as director of the Plaintiff and on 30 April 2019, the Defendant resigned as director of the Plaintiff. At all material times to which this Writ relates (leading up to and following the CPIT Loan and Extensions (each as defined below)) the Defendant was a director of the Plaintiff.

The Private Placement Memorandum

4. The Private Placement Memorandum dated February 2015 ("**PPM**") provides that:
 - (a) the "Investment Objective" of the Plaintiff is "*to achieve superior consistent risk adjusted returns with maximum downside protection through maximizing total investment yield and capital appreciation of short- to medium-term special situation investments in growth companies in the Asia region. The majority of investments are made through credit and/or asset backed structures and/or equity markets. This allows for quarterly distributions to investors from both cash*

generating/yielding investments as well as realized proceeds from exited/retired investments. The principal investment objective of the [Plaintiff] in respect of the Class D Portfolio is to generate absolute return annually by investing in Greater China equities using event driven ideas and long-short strategy"; and

- (b) *the "Investment Restrictions" are "in respect of the Class A, Class B and Class C Shares, the [Plaintiff] will generally target investment horizons of around 18 to 24 months per investment opportunity. However, the [Plaintiff] may, from time to time, have a longer investment horizon per specific investment should such investment, in the opinion of the Manager, offer good risk adjusted returns to investors. No more than 10% of the [Plaintiff's] total Committed Capital or US\$20 million whichever is less, can be invested in any one transaction."*
- (c) *the "Investment Strategy" was "[i]n respect of the portfolio relating to the Class A, Class B and Class C Shares, the Manager will seek investment opportunities in the range from USD 5MM to USD 20MM and target gross return between 10% to 25% with an investment tenor of around 6 months to 24 months on average".*

Management Agreement

5. Pursuant to a written agreement dated 27 February 2013 entered into between the Plaintiff as the fund and Adamas Global Alternative Investment Management Inc. as manager (the "**Manager**") (as amended pursuant to a deed of amendment dated 15 January 2015), the Plaintiff engaged the Manager as manager of the Plaintiff's assets (the "**Management Agreement**").

6. The Manager is an exempted company incorporated with limited liability under the laws of the Cayman Islands on 5 January 2005 with registration number 143604.
7. The Plaintiff understands that Mr Barry Lau Wang Chi and Mr Paul Heffner were the majority beneficial owners of the Manager, until Mr Heffner's death on 1 January 2021.
8. The terms of the Management Agreement include, amongst other things, that:
 - (a) *Clause 3.1 (Duties of the Manager): "subject to the overall control and supervision of the Directors, the Manager will act as manager of the [Plaintiff] and will appoint, and delegate any of its powers under [the Management Agreement] to the Investment Manager, and/or any other person or persons as the Manager considers appropriate, to act as investment manager of the [Plaintiff] in respect of all or any assets comprised in the same and to manage and invest the Portfolio on a discretionary basis in pursuit of the Investment Objective and subject to the Investment Restrictions described in the [PPM] or as otherwise stipulated by the directors from time to time and the Manager shall perform such duties as are customarily performed by a manager of an open-ended investment company or as may be agreed from time to time between the [Plaintiff] and the Manager";*
 - (b) *Clause 3.2 (Duties of the Manager): "the Manager may appoint the Investment Manager, and/or such other person or persons as the Manager considers appropriate to manage and invest the Portfolio on a discretionary basis in pursuit of the Investment Objective and subject to the Investment Restrictions set out in the [PPM] or as otherwise stipulated by the Directors from time to time..."*

- (c) *Clause 5.1 (Representations and Warranties of the Manager): "the Manager represents and warrants to the [Plaintiff] that: ... (C) it has complied with and will continue to comply with all laws, rules and regulations or court and governmental orders by which it is bound or to which it is subject in connection with the execution and performance of [the Management Agreement]";*
- (d) *Clause 8.1 (Fees and Expenses): "the [Plaintiff] shall pay the Manager for its services hereunder a Management Fee equal to 2% per annum of the Net Asset Value...";*
- (e) *Clause 8.2 (Fees and Expenses): "the Manager shall be entitled to receive from the [Plaintiff] an annual performance fee calculated and payable in accordance with the Schedule hereto...";*
- (f) *Clause 11 (Permitted Transactions): "Each [of the Manager and its directors, officers, employees or Associates] will, at all times, have regard in such event to its obligations to the [Plaintiff] and will endeavour to ensure that such conflicts are resolved fairly.";*
- (g) *Schedule (Performance Fee Calculation): "the Performance Fee in respect of each Share will be equal to 20 per cent of the appreciation in the Net Asset Value per Share of that Class during that Calculation Period above the Base Net Asset Value of that Class".*

Investment Management Agreement

9. Pursuant to a written agreement dated 27 February 2013 entered into between the Manager and Adamas Asset Management (HK) Limited (the "**Investment Manager**"), the Manager engaged the Investment Manager to manage and invest the assets of the Plaintiff (the "**Investment Management Agreement**").

The Investment Manager is a company incorporated under the laws of Hong Kong.

10. The Plaintiff understands that Mr Barry Lau Wang Chi and Mr Paul Heffner were the majority beneficial owners of the Investment Manager, prior to Mr Heffner's death in January 2021.
11. The Investment Management Agreement sets out, amongst other things, that:
 - (a) *Clause 4.1 (Duties of the Investment Manager): the Investment Manager's obligation is to "manage and invest the [assets and investments of the Plaintiff]... in pursuit of the Investment Objective and subject to the Investment Restrictions";*
 - (b) *Clause 4.1 (Duties of the Investment Manager): "subject to the Investment Objective and the Investment Restrictions, the Investment Manager will have discretion in respect of the [assets and investments of the Plaintiff] and as agent of the [Plaintiff] ... to buy, sell (including without limitation short sales), retain, convert, execute, exchange or otherwise deal in Investments, borrow securities, make deposits, subscribe to issues and offers for sale of, and accept placings, underwritings and sub-underwritings, of any Investments, effect transactions whether or not frequently traded on any such market or exchange (including, without limitation, derivatives transactions, repurchase and reverse repurchase transactions, and securities lending transactions), negotiate, settle and sign on behalf of the [Plaintiff] account opening and any other documentation required to be so negotiated, settled or signed in connection with the execution of transactions in relation to the [assets and investments of the Plaintiff] by the Investment Manager and otherwise act as the Investment Manager judges appropriate in relation to the management and investment of the [assets and investments of the Plaintiff]";*

- (c) *Clause 4.5 (Duties of the Investment Manager): "The Investment Manager shall... also provide the following services... (D) keeping or causing to be kept such books, records and statements as shall be necessary to give a complete record of all transactions with the Investment Manager carries out for the account of the Manager and the [Plaintiff], which the Manager or the [Plaintiff], and the persons authorised in writing by the Manager and/or the [Plaintiff] as applicable, shall be entitled to inspect at all reasonable times";*
- (d) *Clause 12.1 (Fees and Expenses): "the Manager shall pay to the Investment Manager... by way of remuneration for its services under this [Investment Management Agreement] an investment management fee of such amount and with such frequency as may be agreed between the Manager and the Investment Manager from time to time...";*
- (e) *Clause 15.1 (Conflicts of Interest): "The Investment Manager [and its directors, officers, employees or Associates] will, at all times, have regard in such event to its obligations to the Manager and the [Plaintiff] and will endeavour to ensure that such conflicts are resolved fairly."*

The CPIT Loan

12. On 18 June 2015, the Plaintiff entered into a loan agreement with CPIT Investments Limited ("**CPIT**") (a company incorporated under the laws of the British Virgin Islands) (the "**BVI**") whereby the Plaintiff agreed to lend, and CPIT agreed to borrow, HKD45, 500,000 (approximately USD5, 870,000) (the "**CPIT Loan**").
13. The CPIT Loan was drawn down in full on 19 June 2015 and had a one year term from the drawdown date with an interest rate of LIBOR plus 2% per annum, and a default interest rate of LIBOR plus 6% per annum.

14. On 15 September 2016, the Plaintiff signed an agreement with CPIT to extend the term of the CPIT Loan by a further 12 months to 18 June 2017 ("2016 Extension Agreement"), and it appears that a further 6 month extension was sought on 25 June 2017 to 18 December 2017 (the "**Extensions**").
15. There was a typographical error in the 2016 Extension Agreement such that the interest rate was stated to be LIBOR plus 6% per annum. This error was confirmed, on 5 June 2017, by email to the Plaintiff's auditors and the interest rate continued to accrue at LIBOR plus 2% per annum.
16. It is not clear what, if any, commercial purpose was served by the CPIT Loan (or the Extensions) and, in fact, the Plaintiff has suffered loss as a result of the CPIT Loan in the amount of unpaid principal and interest in excess of USD 8 million as at the date of this Writ.

Breach of the PPM

17. The CPIT Loan breached the Investment Strategy of the Plaintiff as the PPM stipulated that the target gross return for the Plaintiff was between 10% and 25%, and the gross return on the CPIT Loan was 2.77% (see paragraph 4(c) above).
18. Further, as CPIT is a BVI company, it is possible that the CPIT Loan breached the geographic restrictions of the Investment Objective of the Plaintiff as described in the PPM (see paragraph 4(a) above).

AND THE PLAINTIFF claims:

- (a) loss and damages for breach of fiduciary duty and/or breach of duty by the Defendant in his capacity as director of the Plaintiff. Such breaches include, but are not limited to:

- (i) the Defendant failed to act *bona fides* in the best interests of the Plaintiff in causing the Plaintiff to enter into the CPIT Loan (and the Extensions) which:
 - (1) had no commercial purpose; and
 - (2) afforded no benefit to the Plaintiff.
 - (ii) the Defendant failed to exercise due care, skill and diligence in supervising the delegation of management and investment management obligations to the Manager and, in turn, the Investment Manager, and in particular, the Defendant failed to ensure that the Manager and the Investment Manager complied with the Investment Objectives and Investment Strategy as set out in the PPM, the Management Agreement and the Investment Management Agreement (as applicable).
- (b) the Defendant failed to ensure that the Plaintiff's business and operations were carried out in accordance with good practice and other corporate governance principles, in particular:
- (i) the Defendant (together with the other directors of the Plaintiff) failed to seek shareholder approval for the CPIT Loan (and the Extensions) from the shareholders of the Plaintiff;
 - (ii) the Defendant (together with the other directors of the Plaintiff) failed to comply with his statutory duty to ensure that proper books and records of the Plaintiff were maintained, namely, the Defendant failed to record and maintain a record of the minutes detailing the terms of and the basis on which the directors considered it appropriate and in the best interests of the Plaintiff to enter into the CPIT Loan (and the Extensions);

- (c) loss and damages arising in tort for inducing the breach of the Management Agreement by the Manager;
- (d) loss and damages arising in tort for inducing the breach of the Investment Management Agreement by the Investment Manager;
- (e) interest pursuant to Section 34 of the Judicature Act (2021 Revision) on such damages as may be awarded to it at such rate and for such period as this Honourable Court thinks fit;
- (f) such further or other relief as this Honourable Court thinks fit; and
- (g) costs.

DATED this 17th day of June 2021



WALKERS
Attorneys At Law for the Plaintiff

This **WRIT OF SUMMONS** is filed by Walkers, Attorneys at Law, 190 Elgin Avenue, George Town, Grand Cayman, Cayman Islands for the Plaintiff whose address for service is care of said Attorneys at Law.

If the claim against the Defendant is for a debt or liquidated demand, AND he does not intend to contest the proceedings, state if the Defendant intends to apply for a stay of execution against any judgment entered by the Plaintiff (*tick box*)

yes

no

Service of the Writ is acknowledged accordingly

(Signed) _____

[Attorney] for

[Defendant in person]

Address for service:

Please complete overleaf

Notes on address for Service

Attorney: where the Defendant is represented by an attorney, state the attorney's place of business in the Cayman Islands. A Defendant may not act by a foreign attorney.

Defendant in person: where the Defendant is acting in person, he must give his post office box number and the physical address of his residence or, if he does not reside in the Cayman Islands, he must give an address in Grand Cayman where communications for him should be sent. In the case of a limited company, "residence" means its registered or principal office.

Indorsement by plaintiff's Attorney (or by plaintiff if suing in person) of his name, address and reference, if any, in the box below.

Walkers
Attorneys at Law
KY1-9001
190 Elgin Avenue
George Town, Grand Cayman

FAO : Chris Keefe

Indorsement by defendant's Attorney (or by defendant if suing in person) of his name, address and reference, if any, in the box below.

DIRECTIONS FOR ACKNOWLEDGMENT OF SERVICE OF WRIT OF SUMMONS

The accompanying form of *Acknowledgment of Service* should be completed by an Attorney acting on behalf of the Defendant or by the Defendant if acting in person.

After completion it must be delivered or sent by post to the Courts Office, PO Box 495GT, George Town, Grand Cayman.

A Defendant who states in his Acknowledgment of Service that he intends to contest the proceedings *must also serve a defence* on the Attorney for the Plaintiff (or on the Plaintiff if acting in person).

If a Statement of Claim is indorsed on the Writ (i.e. the words "Statement of Claim" appear on the top of page 2), the Defence must be served within 14 days after the time for acknowledging service of the Writ, unless in the meantime a summons for judgment is served on the Defendant.

If the Statement of Claim is not indorsed on the Writ, the Defence need not be served until 14 days after a Statement of Claim has been served on the Defendant.

If the Defendant fails to serve his defence within the appropriate time, the Plaintiff may enter judgment against him without further notice.

A *Stay of Execution* against the Defendant's goods may be applied for where the Defendant is unable to pay the money for which any judgment is entered. If a Defendant to an action for a debt or liquidated demand (i.e. a fixed sum) who does not intend to contest the proceedings states, in answer to Question 3 in the Acknowledgment of Service, that he intends to apply for a stay,

execution will be stayed for 14 days after his Acknowledgment, but he must, within that time, *issue a Summons* for a stay of execution, supported by an affidavit of his means. The affidavit should state any offer which the Defendant desires to make for payment of the money by instalments or otherwise.

See over for notes for guidance

Please complete overleaf

Notes for Guidance

Each Defendant (if there are more than one) is required to complete an Acknowledgment of Service and return it to the Court's office.

For the purpose of calculating the period of 14 days for acknowledging service, a writ served on the Defendant personally is treated as having been served on the day it was delivered to him.

Where the Defendant is sued in a name different from his own, the form must be completed by him with the addition in paragraph 1 of the words "sued as (*the name stated on the Writ of Summons*)".

Where the Defendant is a FIRM and an attorney is not instructed, the form must be completed by a PARTNER by name, with the addition in paragraph 1 of the description "Partner in the firm of (.....)" after his name.

Where the Defendant is sued as an individual TRADING IN A NAME OTHER THAN HIS OWN, the form must be completed by him with the addition in paragraph 1 of the description "trading as (.....)" after his name.

Where the Defendant is a LIMITED COMPANY the form must be completed by an Attorney or by someone authorised to act on behalf of the Company, but the Company can take no further step in the proceedings without an Attorney acting on its behalf.

Where the Defendant is a MINOR or a MENTAL PATIENT, the form must be completed by an Attorney acting for a guardian *ad litem*.

A Defendant acting in person may obtain help in completing the form at the Court's office.