

Bermuda Court confirms personal right of action of company directors to end wrongful exclusion

Briefing Summary: In two notable recent judgments, the Bermuda Supreme Court ruled that a director of a Bermuda company was entitled to an interim injunction prohibiting the company and its other directors from improperly excluding him from involvement in important company decision-making. Carey Olsen Bermuda Limited acted for the successful applicant director in both *In the Matter of ASA Gold And Precious Metals Limited*, [2025] SC (Bda) 47 civ and [2025] SC (Bda) 54 civ.

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Three key takeaways from the judgments of the Bermuda Supreme Court

1. The Bermuda Supreme Court (**Court**) adopted the legal principles set out in *Pulbrook v Richmond Consolidated Mining Co*, (1878) 9 Ch D 610 (Ch). Those principles stand for the proposition that, if improperly excluded from the board of directors (**Board**), a director can bring a claim in his own name against the other directors and the company because the exclusion constitutes an individual injury to the applicant as a director. The applicant's legal claim is for declarations of right supported by a permanent injunction prohibiting the exclusionary conduct as a violation of his rights.
2. The Court confirmed that individual directors do not have an equitable duty to provide shareholders with their own personal views on the business proposed at general meetings when those views are not supported by the full Board. In doing so, the Court adopted the reasoning in *Sharp v Blank*, [2017] BCC 187 (Ch). The Court made this finding in response to the argument that the interim injunction prevented the respondent directors from soliciting the company's shareholders in compliance with their general duty, and the lack of information provided to shareholders would invalidate the outcome of a hotly contested special general meeting (**SGM**). The Court found that no such general duty exists.

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3. The Court took a firm line on the requirements imposed on applicants by the duty of full and frank disclosure when seeking an *ex parte* on notice injunction. The Court rejected the respondent directors' long list of purported breaches of the applicant director's duty at the *ex parte* injunction hearing. That rejection was coloured by the fact that, while the respondent directors did not formally appear on the record at the *ex parte* hearing, their legal counsel still attended the *ex parte* hearing and filed what amounted to written arguments and supporting legal authorities in advance with the Court.

Background

ASA Gold and Precious Metals Limited (**Company**) is a Bermuda exempted company which is publicly traded on the New York Stock Exchange and regulated by the US Securities and Exchange Commission. In December 2023, the Company's largest shareholder, Saba Capital Management, L.P. through various affiliates (**Saba**), submitted a statutory requisition which proposed a slate of director candidates for election to the Company's Board at its 2024 annual general meeting (**AGM**).

In response, the Company's then-Board instituted a limited-duration shareholder rights plan (**Poison Pill**) intended to prevent Saba from acquiring more shares in the Company. The then-Board also implemented mechanisms designed to entrench the Poison Pill by delegating certain fundamental powers of the Board to two new Board committees (**Litigation and Rights Plan Committees**). Additionally, the size of the Board was reduced from five to four directors which, depending on how the shareholders voted at the 2024 AGM, would create a two-to-two voting deadlock on the newly elected Board.

At the 2024 AGM, the Company's shareholders elected two director candidates from Saba's slate (**New Directors**) and re-elected two directors from the then-Board's slate (**Legacy Directors**). Carey Olsen acts for the New Directors.

Following the 2024 AGM, the Legacy Directors used the Litigation and Rights Plan Committees to exclude the New Directors from involvement in various key Company decisions. The full Board remained deadlocked and could not agree on other key matters such as convening the 2025 AGM.

In April 2025, Saba submitted a new statutory requisition which sought to convene a SGM that would allow shareholders to expand the Board from four to five seats and then elect a new director candidate to break the ongoing Board deadlock. The Legacy Directors voted against the Board convening the SGM and, after Saba convened the SGM itself in accordance with its statutory right, the Legacy Directors used the litigation committee to solicit the Company's shareholders to vote against the SGM's proposed resolutions.

On 8 May 2025, the Court granted one of the New Directors an *ex parte* on notice interim injunction which prohibited the Company and the Legacy Directors from, among other things, using the litigation committee to improperly solicit shareholders or otherwise interfere with the SGM. On 2 June 2025, following an *inter partes* contested hearing, the Court extended the interim injunction until the final determination of the New Director's claim that he was being improperly excluded from the Board by the Legacy Directors.

On 13 June 2025, the Company's shareholders overwhelmingly voted at the SGM to approve both proposed resolutions. A new director was thereby elected to the Board which broke the ongoing voting deadlock.

A link to the Court's *ex parte* judgment can be found [here](#) and the *inter partes* judgment can be found [here](#).

FAQs

1. What did the Bermuda Supreme Court confirm regarding directors' rights?

The court confirmed that a director who is improperly excluded from board decision-making can bring a personal claim in their own name against the company and the other directors. This stems from the principle in *Pulbrook v Richmond Consolidated Mining Co (1878)*, where improper exclusion constitutes an individual injury, entitling the director to seek declarations of right and injunctions preventing further exclusion.

2. Does a director have a duty to share their personal views with shareholders?

No. The court confirmed that directors do not have an equitable duty to provide shareholders with their personal views on business proposed at general meetings if those views are not supported by the full board. This follows the reasoning in *Sharp v Blank [2017]*, and it rejected arguments that an interim injunction limiting communications to shareholders not authorised by the full board would invalidate a shareholder meeting.

3. What were the circumstances leading to the dispute?

The case involved ASA Gold and Precious Metals Limited, where activist shareholder Saba Capital Management submitted director candidates for election by the shareholders at an AGM. After the contested AGM resulted in a 2-2 board split, the two incumbent legacy directors used board committees (including a litigation committee and shareholder rights plan committee) to exclude the two newly elected directors from key management decision of the company.

4. How did the court approach the issue of full and frank disclosure in injunction applications?

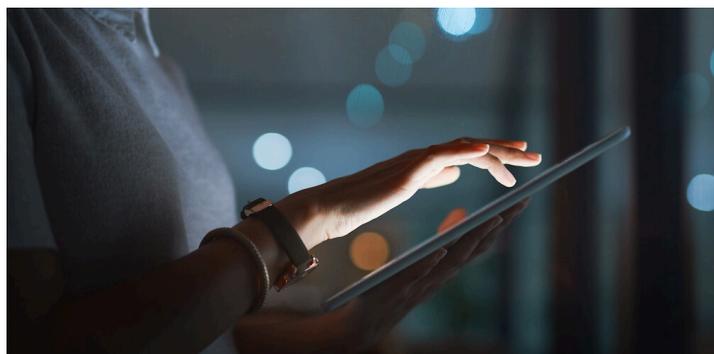
The court took a strict approach to the applicant's requirements, rejecting the respondent directors' arguments that the applicant had breached his duty of full and frank disclosure during the ex parte hearing. The court was influenced by the fact that, while respondents did not formally appear at the ex parte hearing, their counsel attended and submitted materials – effectively participating despite the procedural posture.

5. What was the outcome of the injunction proceedings?

On 8 May 2025, the court granted an ex parte interim injunction prohibiting further exclusion of the excluded directors and preventing improper shareholder solicitation by the legacy directors. On 2 June 2025, after a contested hearing, the interim injunction was extended until final determination of the applicant's underlying director exclusion claim. A SGM held on 13 June 2025 resulted in the shareholders approving resolutions to expand the board and elect an additional director, ending the 2-2 board deadlock.

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