

**CITATION:** Rubner et al v. Rubner, 2025 ONSC 3500  
**COURT FILE NO.:** CV-25-00738626-00CL  
**DATE:** 20250612

**SUPERIOR COURT OF JUSTICE – ONTARIO  
(COMMERCIAL LIST)**

**RE:** Marvin Rubner and Y.A.D. Investments Limited, Applicants

**AND:**

Joseph Rubner, Respondent

**BEFORE:** Justice J. Dietrich

**COUNSEL:** *Lars Brusven*, for the Applicants

*Sean Grayson*, for the Respondent

**HEARD:** June 9, 2025

**REASONS FOR DECISION**

**Introduction**

- [1] Marvin Rubner and his corporation Y.A.D. Investments Limited (“**YAD**”) seek a determination of rights under a settlement agreement pursuant to Rule 14.05(3)(d) of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194 (the “**Rules**”).
- [2] The settlement agreement (the “**Kalber Settlement Agreement**”) dated July 17, 2023, was entered into between Marvin and YAD on one hand and Brenda Bistricher, Michelle Levinson, and Jacob Pollak in his capacity as Trustee of the Bistricher/Rubner Family Trust on the other.
- [3] Brenda and Marvin are siblings. They, along with their brother, Joseph Rubner (the respondent), have been engaged in litigation for over 10 years. That litigation relates both to Kalber Developments Incorporated (“**Kalber**”), a family related corporation, and the estate of their mother, Eda Rubner.
- [4] The settlement of July 17, 2023, was a comprehensive settlement as between Brenda and Marvin and included the Kalber Settlement Agreement as well as the Will Settlement Agreement (as defined below).
- [5] Litigation still remains between Marvin and Joseph.

- [6] Joseph takes the position that as a result of the terms of the Kalber Settlement Agreement terms, the special shares of Kalber held in Eda's estate should be divided equally between Joseph and Marvin as the remaining beneficiaries of Eda's estate. This is because, he says, under the Kalber Settlement Agreement, Brenda disclaimed and/or renounced any interest she may have had in any special shares of Kalber including as a beneficiary under the estate of Eda. Accordingly, when Brenda, as beneficiary, renounced or disclaimed her interest in the special shares, that property should be equally divided between the remaining beneficiaries of the residue of the estate (being Marvin and Joseph).
- [7] Marvin disagrees and says under a proper interpretation of the Kalber Settlement Agreement and the Will Settlement Agreement, Brenda's interest in the special shares are to be assigned solely to Marvin.
- [8] Accordingly, Marvin seeks a declaration that there has been no disclaimer of the special shares of Kalber and therefore they form part of the residue of Eda's estate and should be distributed in accordance with Eda's will (being equally to Marvin, Brenda, and Joseph).
- [9] The notice of application also contained a request for sealing order for certain documents, however, that relief is no longer being sought by Marvin.
- [10] Given that many of the individuals involved have the same last name, I have referred to those individuals by their first name in these reasons, consistent with the material before me.
- [11] For the reasons set out below, the application by Marvin is granted.

## **Background**

### The Parties

- [12] Marvin, Joseph, and Brenda are siblings.
- [13] Marvin is 68 years old and has operated Kalber since 1981.
- [14] Kalber is a successful real estate investment and management company.
- [15] Joseph is 64 years old and is a practicing endodontist. Joseph has not been involved in the management or operation of Kalber.

### The Litigation

- [16] In 2013, Joseph and Brenda sued Marvin for control over Kalber (the "**Kalber Action**"). Joseph and Brenda sought, among other things, a declaration that they were each 33.3% owners of Kalber and \$20 million in damages based on oppression remedy claims. Joseph continues to claim that Kalber was established by the siblings' parents, Karl and Eda and no sibling was to be treated different than any other in terms of shareholders. Joseph

claims that Marvin (and later YAD) was the property manager for co-tenancies held by Kalber, and Marvin has been paid by the co-tenancies for his services.

- [17] Joseph and Brenda's claim in the Kalber Action pleads that voting control of Kalber resides in 400 special shares (the “**Special Shares**”) originally held by the siblings' parents Karl and Eda – and held solely by Eda following Karl's death in 2005.
- [18] In his defense in the Kalber Action, Marvin originally disputed the existence of the Special Shares. However, Marvin now accepts that the Special Shares exist.
- [19] Eda passed away in 2020 and the Special Shares now form part of the residue of Eda's estate. All parties agree (subject to the dispute about the Special Shares), the residue of Eda's estate is to be distributed equally to Marvin, Joseph, and Brenda.
- [20] Marvin defended the Kalber Action on the basis that Joseph and Brenda hold no ownership interest in Kalber because the 50 common shares originally issued in their names exist solely due to a mistake by Karl and Eda in failing to cancel those shares. Marvin claims that the 50 common shares were issued to Joseph and Brenda as part of an attempted estate freeze by Karl and Eda, which was never ultimately implemented. After abandoning the attempted estate freeze, the family agreed that Marvin would use Kalber—which was a shell company without assets at that stage—to operate and grow his personal real estate investment business. Marvin also raises a *quantum meruit* claim in defense claiming that if common shares are held by Joseph and Brenda, Marvin should be compensated for the investment of his time, effort, and personal funds.
- [21] Although initiated in 2013, the Kalber Action, discoveries took place in July of 2023 and the litigation remains outstanding.
- [22] The siblings were also involved in a dispute regarding Eda's will (the “**Will Challenge Litigation**”). On November 24, 2020, the Court ordered the appointment of an estate trustee during litigation (the “**ETDL**”) pending final resolution or settlement of the Will Challenge Litigation. The order appointing the ETDL clarified that all property of Eda's Estate shall vest in the ETDL.
- [23] All outstanding disputes between Marvin, Joseph, and Brenda in the Will Challenge Litigation have now been resolved, and the ETDL has agreed to distribute Eda's estate, with the exception of the Special Shares that would go to Brenda and are subject to the dispute raised in this application.

### **The Settlement Agreements**

- [24] In July of 2023, Marvin and Brenda entered into a comprehensive settlement that resolved all outstanding litigation between them. Marvin and Brenda executed several agreements as part of that settlement.

[25] With respect to the Kalber Action, Marvin and Brenda entered into the Kalber Settlement Agreement dated July 17, 2023. The Kalber Settlement Agreement (which is also entered into by Brenda's daughter Michelle) provided:

Each of Brenda, Michelle, and the Trustee:  
hereby agree and acknowledge that they do not now and never had any direct or indirect beneficial right, title or interest in Kalber or any of the shares of Kalber; and that all shares of Kalber which may have been reflected in the minute book or any other documents as having been owned by the Trust were so reflected in error and such shares have at all times been beneficially owned by Marvin.

[26] At the same time, they entered into the Kalber Settlement Agreement, Marvin and Brenda also entered into an agreement to settle the Will Challenge Litigation (the “**Will Settlement Agreement**”). Under the Will Settlement Agreement, Brenda agreed to assign to Marvin any Special Shares she subsequently receives through Eda’s Estate. Because Brenda does not yet hold any specific interest in the Special Shares contained in the residue of Eda’s undistributed estate, the Will Settlement Agreement provided as follows:

Brenda will assign any rights/interest she has or receives under the probated Wills in respect of Kalber Developments Incorporated and/or the shares of Kalber Developments Incorporated, including, without limitation, voting rights, to Marvin and to the extent she is legally able to do so, instruct the ETDL to assign such rights/interest to Marvin, and if applicable, to exercise the voting rights as directed by Marvin, upon receipt of a written request therefor from Marvin. In the event that Brenda is or becomes entitled to receive any special shares of Kalber Developments Incorporated, Brenda agrees to transfer such special shares to Marvin for no consideration.

[27] The Kalber Settlement Agreement and Will Settlement Agreement were disclosed to Joseph on July 17, 2023, the same day they were executed.

#### Kalber Proposed Shareholder Meeting & Joseph's Claim to 50% of the Special Shares

[28] On February 5, 2024, Kalber’s corporate counsel wrote to Joseph and the ETDL to advise that a shareholder meeting would be held later that month to address certain outstanding corporate irregularities, including filling director vacancies. Marvin testified on cross-examination that although Kalber hasn’t previously called a formal shareholder meeting, he wanted to do so at this stage because he and Joseph are currently Kalber’s only formally appointed directors, and Marvin wants to fill Kalber’s two empty director positions to deal with legacy concerns. Marvin and Joseph are both in their sixties, and there is currently no transition plan.

[29] On February 15, 2024, Joseph’s corporate counsel wrote to Kalber’s counsel to demand various information including production of the register of individuals with significant

control (“**ISG Register**”), an agenda of business to be conducted at the shareholder meeting, production of audited financial statements, and the appointment of a new auditor.

- [30] On February 27, 2024, Kalber’s corporate counsel responded and delivered the requested information, including an ISG Register questionnaire. On the same day, Joseph’s corporate counsel returned a completed copy of the ISG Register questionnaire on Joseph’s behalf. Joseph’s ISG Register responses asserted, for the first time, that Joseph holds a beneficial interest in half of Kalber’s 400 Special Shares.
- [31] After some correspondence to understand Joseph’s position, on April 9, 2024, the ETDL’s counsel advised the parties that the ETDL was not comfortable attending a Kalber shareholders’ meeting until the parties’ disagreement over the Kalber Special Shares was resolved.
- [32] On April 29, 2024, Joseph delivered a draft Amended Amended Statement of Claim in the Kalber Action, pleading his new position that he is 50% owner of Kalber’s 100 common shares, and 50% owner of Kalber’s 400 Special Shares by virtue of the settlement reached between Marvin and Brenda. Marvin has consented to Joseph’s latest amendment, following the parties’ attendance at a contested motion before Justice Conway.
- [33] With respect to Kalber’s Special Shares, the ETDL has distributed Marvin’s and Joseph’s Special Shares from Eda’s estate but has advised that he refuses to distribute the one third of Special Shares notionally allocated to Brenda in the estate until there is a court order directing as to how those shares are to be dealt with.

#### Procedural Background Leading to this Application

- [34] On December 3, 2024, Marvin, Joseph, and Brenda attended a judicial mediation with Justice Gilmore in an effort to resolve all outstanding disputes in the Will Challenge Litigation. The parties resolved all outstanding disputes, with the only remaining issue being Joseph’s attack on Marvin’s and Brenda’s settlement. Justice Gilmore directed Marvin to bring the within application in her endorsement, writing:

Given the consequences of a lack of agreement on the Special Share issue I have directed counsel for Marvin Rubner to prepare an Application for the Commercial List to have the interpretation issue dealt with on an expedited basis. Doing otherwise will mean that the issue of the control of Kalber may languish which is not in the best interests of any party or Kalber itself.

#### **Issue:**

- [35] The issue to be decided on this application is the proper interpretation of the Kalber Settlement Agreement and its effect on the Special Shares of Kalber.

#### **Analysis**

- [36] Marvin disagrees with Joseph's position that the effect of the Kalber Settlement Agreement is that Brenda disclaimed or renounced any interest she may have in the Special Shares for three reasons:
- (a) First, Joseph is not a party to the Kalber Settlement Agreement and therefore is not bound or entitled to benefits from it;
  - (b) Second, on a proper interpretation of the Kalber Settlement Agreement, the Special Shares are not captured by the language relied upon by Joseph in section 2 of that agreement to support the alleged disclaimer or renunciation; and
  - (c) Third, at the time the Kalber Settlement Agreement was entered into Brenda had no interest in the Special Shares which could be disclaimed or renounced.
- [37] Joseph also argues that because Marvin and Joseph agree that the settlement agreements should be read together, the matters in this Application should be put over to the Kalber Action to be addressed on a full evidentiary record. I do not agree – Joseph's suggestion in this regard is contrary to Justice Gilmore's earlier endorsement where she directed this application be brought by Marvin and dealt with on an expedited basis so the issue of control of Kalber would not languish.

Joseph is not a party to the Kalber Settlement Agreement

- [38] Joseph does not dispute that he is not a party to the Kalber Settlement Agreement or the Will Settlement Agreement.
- [39] The common law doctrine of privity of contract provides that, subject to limited exceptions, no one but the parties to a contract can be bound by it or entitled to it: see *Bertrand v. Academic Medical Organization of Southwestern Ontario*, 2024 ONCA 319 (CanLII) [*Bertrand*] at para 13. The exceptions to the doctrine are set out in the principled approach which require consideration of two factors (i) whether the parties to the Agreement intended to extend the benefit in question to the third party; and 2) whether the activities performed by the third party are the very activities contemplated as coming within the scope of the Agreement in general, or the provision in particular, again as determined by the intention of the parties: see *Bertrand* at para 13 referring to *Fraser River Pile & Dredge Ltd. v. Can-Drive Services Ltd.*, [1999] 1 S.C.R. 108, at para. 31.
- [40] Joseph admits that he does not fall into any of the principled exceptions. However, he claims that the Kalber Settlement Agreement effects the share capital of Kalber and as a shareholder of Kalber he has an interest in ensuring the Kalber Settlement Agreement is respected and interpreted properly. Joseph does not put forward any case law in support of this proposition.
- [41] I do not agree with Joseph's submission on this point. Joseph is not a party to the Kalber Settlement Agreement (or the Will Settlement Agreement) and does not fall into one of the

principled exceptions, accordingly, he cannot seek to obtain a benefit or right pursuant to the terms of the contract.

### Contractual Interpretation

- [42] Even if I am wrong regarding Joseph’s ability to obtain a benefit or right pursuant to the Kalber Settlement Agreement, for the reasons below, I am not persuaded that properly interpreted, the Kalber Settlement Agreement amounts to a disclaimer or renunciation by Brenda of her interest in the Special Shares.
- [43] The actual words chosen are central to the contractual interpretation analysis, but to determine true intent, “decision makers must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract” see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 [*Sattva*], at para 47.
- [44] The surrounding circumstances must not be allowed to overwhelm the words of the agreement, but the goal of examining such evidence is to understand the mutual and objective intention of the parties as expressed in the words of the contract: see *Sattva* at para 57.
- [45] The surrounding circumstances include objective evidence of the background facts at the time of execution of the contract that illustrates what was within the parties’ knowledge at or before the time of their contract’s formation: see *Sattva* at para. 58.
- [46] The relevant language of s. 2 of the Kalber Settlement Agreement provides that Brenda and related parties: “... agree and acknowledge that they do not now and never had any direct or indirect beneficial right, title or interest in Kalber or any of the shares of Kalber; and that all shares of Kalber which may have been reflected in the minute book or any other documents as having been owned by the Trust were so reflected in error and such shares have at all times been beneficially owned by Marvin”.
- [47] The difference in interpretation proposed by Joseph and Marvin is whether the reference to ‘shares’ in the underlined language above includes reference to the Special Shares or is intended to only refer to the common shares of Kalber.
- [48] Joseph submits that in other points in the Kalber Settlement Agreement the term ‘common shares’ rather than ‘shares’ is used. Accordingly, he says the opening language in s. 2 must be intended to refer to both common shares and the Special Shares. Joseph also submits that the both the common shares and Special Shares were at issue in the Kalber Action and therefore are both properly part of the Kalber Settlement Agreement.
- [49] Marvin however submits that the entirety of the sentence at issue should be read in context, including the language after the semi colon. The second half of the sentence in issue refers to shares which may be reflected as owned by the Trust – and those were only the common

shares. The Special Shares were never owned by the Trust (or Brenda) but have remained in Eda's estate. Accordingly, Marvin argues the Special Shares were never intended to be addressed by s. 2 of the Kalber Settlement Agreement – it was a provision solely addressing the common shares.

- [50] Marvin's argument is also consistent with s. 16 of the Will Settlement Agreement which specifically addresses the Special Shares and provides that Brenda is to assign her interest in those Special Shares or voting rights associated therewith to Marvin. I do not agree with Joseph's interpretation that s. 16 of the Will Settlement Agreement is simply belt and suspenders and should not be given weight.
- [51] Both the Will Settlement Agreement and Kalber Settlement Agreement were entered into at the same time as part of the comprehensive settlement between Marvin and Brenda. The interpretation proposed by Marvin gives effect to both agreements. In contrast, the interpretation proposed by Joseph makes s. 16 of the Will Settlement Agreement, which specifically addresses the Special Shares, meaningless.
- [52] Joseph points to no evidence to support his position that Brenda and Marvin intended that Brenda disclaim or renunciate her interest in the Special Shares. Joseph argues that Brenda and Marvin are familiar with the concepts of disclaimer and renunciation as a result of Brenda disclaiming interests in family holdings in the past, including in respect of a family property known as the "Lower Fourth", which was recognized by the Court in *Rubner v. Bistricher*, 2018 ONSC 1934. The fact that Brenda and Marvin are familiar with the effect of disclaimer or renunciation, however, does not go to whether the term 'shares' in s. 2 of the Kalber Settlement Agreement should be interpreted to mean the Special Shares.
- [53] Joseph also argues that Marvin is trying to pervert the effect of Eda's will such that control of Kalber will be given to Marvin if Marvin's interpretation is correct. I do not agree, Joseph admits that there are no restrictions on the Special Shares that would prevent Brenda transferring the Special Shares to Marvin following her receipt of them from the ETDL. As such, I do not see why Brenda agreeing to transfer the Special Shares prior to or upon her receipt of them is therefore offensive.
- [54] For the reasons set out above, I am not persuaded that the interpretation put forward by Joseph is correct.

#### Disclaimer or Renunciation by Brenda

- [55] Given the above, it is not necessary to address Marvin's third argument, that Brenda could not have disclaimed or renunciated her interest in the Special Shares in July of 2023 when the Kalber Settlement Agreement was entered into because she did not have a specific property interest that could be disclaimed or renunciated at that time.

#### **Disposition**

- [56] Accordingly, the application by Marvin is granted. As noted above, the relief requested by Marvin and YAD in the notice of application included a sealing order – however, that relief has not be pursued and therefore is not part of these reasons.
- [57] Both parties provided a bill of costs at the hearing.
- [58] Fixing costs is a discretionary decision under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. In exercising my discretion, I may consider the result in the proceeding, any offer to settle or to contribute made in writing, and the factors listed in Rule 57.01. These factors include but are not limited to: (i) the result in the proceeding; (ii) the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer; (iii) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed; (iv) the amount claimed and the amount recovered in the proceeding; (v) the complexity of the proceeding; (vi) the importance of the issues; and (vii) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding. Rule 57.01(1)(f) provides that the court may also consider “any other matter relevant to the question of costs.”
- [59] In exercising my discretion to fix costs, I must consider what is fair and reasonable for the unsuccessful party to pay in this proceeding and balance the compensation of the successful party with the goal of fostering access to justice: *Boucher v Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.) at paras. 26 and 37.
- [60] For these reasons, I fix the costs of the application in the amount of \$65,000, inclusive of disbursements and Harmonized Sales Tax, and order Joseph to pay that amount to the applicants within 30 days of the date of this order.

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The Honourable Justice J. Dietrich

**Date:** June 12, 2025