

COURT OF APPEAL FOR ONTARIO

CITATION: 2689686 Ontario Inc. v. Lloyd's Underwriters, 2025 ONCA 801

DATE: 20251124

DOCKET: COA-25-CV-0173

Copeland, Wilson and Pomerance JJ.A.

BETWEEN

2689686 Ontario Inc.

Plaintiff  
(Appellant)

and

Lloyd's Underwriters\*, Aime Mil Rivard, and 1687979 Ontario. Inc also known as  
Rivard Engineering

Defendant  
(Respondent\*)

John H. Reiterowski and Vyshnavay Paramalingam, for the appellant

Gerry Gill, for the respondent

Heard: November 7, 2025

On appeal from the judgment of Justice Grant R. Dow of the Superior Court of Justice, dated October 3, 2024, with reasons reported at 2024 ONSC 3980.

REASONS FOR DECISION

[1] The respondent, Lloyd's Underwriters, brought a motion for summary judgment and dismissal of an action by the appellant, 2689686 Ontario Inc., regarding insurance coverage under the Builder's Risk Policy it issued to the

appellants. The respondent sought a determination of whether the Builder's Risk Policy afforded coverage for the loss sustained on approximately April 1, 2020 at its property located on Duncan Avenue South in Kirkland Lake. The motion was brought after pleadings closed and examinations for discovery were complete. The motion judge granted summary judgment, finding that the loss suffered was due to frost followed by heaving that caused the roof to fail, which was one of the perils excluded under the policy. The appellant appeals from the motion judge's decision, arguing that the motion judge erred in three ways: in finding this was an appropriate case for summary judgment; in finding the "frost or freezing" exclusion was applicable; and in failing to apply the doctrine of nullification.

[2] We do not agree that the motion judge made these errors and dismiss the appeal for the reasons that follow.

### **Summary Judgment**

[3] The case involved the application of an exclusion clause contained in an insurance policy. We agree with the motion judge that such a case is amenable to determination by way of a summary judgment motion. The motion judge determined that the material enabled him to make the necessary findings, and he found there was no genuine issue requiring a trial. We see no error in his analysis. We do not accept the submission of the appellant that where the expert reports arrive at different conclusions, the court ought not to grant summary judgment. Rule 20.04 (2.1) of the *Rules of Civil Procedure, R.R.O. 1990, Reg. 194*, enables

a judge to weigh the evidence, make credibility findings and draw any reasonable inference. The motion judge considered the evidence filed on the motion and determined that he could assess the evidence properly in order to arrive at a just result. His decision is entitled to deference.

### **Different Expert Opinions**

[4] In order to determine the cause of the roof collapse, the motion judge had the expert reports of the structural engineers retained by the parties. The report of the expert retained by the appellant was equivocal; he said simply that he “did not notice any noticeable frost up heave damage” and that he had been informed that the roof collapsed due to historically high snow fall loading. The appellant’s expert did not put his evidence before the court in the form of a sworn affidavit.

[5] The engineer retained by the respondent prepared two reports and swore an affidavit dated September 1, 2023. Her opinion was that the roof collapsed as a result of frost heaving in the basement area. She addressed the possibility that the collapse of the roof was due to causes other than frost heaving.

[6] The motion judge properly considered the evidence of the two experts and noted that the appellant’s expert had not offered an opinion on the conclusion of the respondent’s expert nor had the appellant’s expert been cross-examined. The appellant’s expert also offered no alternative explanation for the damage. As noted by the motion judge, this was a summary judgment motion, and the parties had the

obligation to put their best foot forward. He found that the opinion of the respondent's expert was "uncontested". She explained how she arrived at her conclusion of the cause of the roof collapse, and she also set out why she did not accept that it was caused by heavy snowfall. The motion judge found on the evidence that the collapse of the roof was due to heaving caused by frost. Since under subparagraph 6B(e) of the policy "frost or freezing" is excluded from coverage, the motion judge concluded that the policy did not afford coverage to the appellant for the loss suffered on or around April 1, 2020. That finding was available to him on the evidence and we agree with it.

[7] The motion judge gave cogent reasons for his acceptance of the opinion of the respondent's expert. He made no error in his analysis. The appellant invites this court to undertake its own assessment of the evidence, which is not the function of this court.

### **Doctrine of Nullification**

[8] We do not accept the submission of the appellant that this exclusion clause ought not to be enforced because to do so would be inconsistent with the reason the policy was purchased.

[9] The doctrine of nullification was clearly described by this court in *Weston Ornamental Iron Works Ltd. v. Continental Insurance Co.*, 1981 CarswellOnt 1324 (Ont. C.A.), at para. 16, referred to by the motion judge:

The exclusion clause should not be interpreted in a way which is repugnant to or inconsistent with the main purpose of the insurance coverage but so as to give effect to it. Thus, even if the exemption clause were found to be clear and unambiguous it should not be enforced by the courts when the result would be to defeat the main object of the contract or virtually nullify the coverage sought for protection from anticipated risks.

[10] This was a Builder's Risk Policy that covered direct physical loss or damage, subject to certain specified risks set out in the policy. Enforcing the exclusion for frost and freezing does not negate the coverage under the policy. Damage arising from fire, vandalism, wind and other perils was covered under this policy; damage arising from "frost or freezing" was not. This was not a case of illusory coverage to which the doctrine of nullification would apply. The motion judge was correct to find that it was not applicable.

### **Disposition**

[11] The appeal is dismissed. Costs to the respondent in the agreed upon amount of \$12,900 all inclusive.

"J. Copeland J.A."

"D.A. Wilson J.A."

"R. Pomerance J.A."