

The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., LATCHFORD and KELLY, JJ.

M. K. Lennox, for the appellant.

R. H. Holmes, for the defendant, respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—Mr. Lennox did not attack any of the findings of the Official Referee appearing in the report appealed from, but contended that the appellant was entitled to judgment for the amount of the architect's certificate for \$1,400, dated the 3rd June, 1913, which the respondent had refused to pay. He contended that it was conclusive as between the appellant and respondent, no matter whether the respondent had a claim arising out of the non-completion of the work or from its improper performance.

This contention leaves out of sight the meaning of the contract in this case, as well as the effect of the Referee's findings, supplemented as they were by a certificate procured, at the suggestion of the Court, by the parties.

An architect's certificate may be made, by express agreement, final and binding on both the owner and contractor, and in that sense conclusive as between them. But, as pointed out by the judgment of the Court of Appeal in *Smallwood Brothers v. Powell* (1910), 1 O.W.N. 1025, that result by no means follows if the contract itself affords evidence that the certificate is not finally to settle the matters which it deals with, and does not absolve the contractor from responsibility for work badly done or omitted. See also *Watts v. McLeay* (1911), 19 W.L.R. 916, and *Contractors Supply Co. v. Hyde* (1912), 3 O.W.N. 723.

In this case no payment is to be made except on the architect's certificate "that a certain amount of work has been done to their (sic) satisfaction." Payment is to be made "at the rate of 80 per cent. on the value of work executed from time to time, and of the remainder a further 10 per cent. on the certified completion of the work, and the balance of 10 per cent. within six months after the architect has certified that the works are completed to his satisfaction." It is not stated in the architect's certificate here what amount of work has been done; and the finding of the Referee is, that "the amount paid by the defendant on account of the said contract far exceeds the value of the work done and material furnished." This affords a complete answer to the claim; for the appellant is entitled to only 80 per cent. of that value, and he has already received more than 100 per cent. thereof.