

forming part of the contract; and I am unable to see how one of the parties, without the consent of the other, can have it added now. To do so would, in fact, be adding a new term to the contract. . . .

Proceeding, then, to the main question involved in this appeal: the language of the contract is perfectly plain. . . . It is not to be lost sight of that the word "penalty" was struck out and the words "as and for liquidated damages and not as a penalty" were inserted, after an explanation by the plaintiffs' solicitor (which was not contradicted) that as altered the damages would be merely a matter of calculation by the parties, whilst if the sum were to be described and treated as a penalty, it would involve ascertainment by the Courts. Whilst the alteration did not, I think, change the legal effect of the clause as originally drawn, still the discussion and re-wording of the clause and the adoption of the re-wording, in order to make clear the views of both parties prior to the contract, is significant as to their intentions. . . .

[Reference to and quotations from *Rye v. British Automobile Commercial Syndicate*, [1906] 1 K.B. 429; *Wallis v. Smith*, 21 Ch.D. 266; *Astley v. Weldon*, 2 B. & P. 346; *Law v. Redditch*, [1892] 1 Q.B. 127; *Elphinstone v. Monkland Iron and Coal Co.*, 11 App. Cas. 332; *Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos*, [1905] A.C. 15; *Commissioners of Works v. Hills*, 22 Times L.R. 589; *Crux v. Aldred*, 14 W.R. 657; *Fletcher v. Dryche*, 2 T.R. 32; *Bonsall v. Bryne*, I.R. 1 C.L. 575.]

In the present case the defendants agreed to do one particular thing, namely to deliver the boiler not later than the 1st March, failing which they agreed to pay \$25 (not an extravagant sum) for each and every working day after that date, as liquidated damages. The sum contracted to be paid has reference to a single obligation, and is graduated according to the length of time the obligation shall remain unfulfilled, and brings the case within the rule laid down in the cases referred to, that, in such circumstances, it is a pre-assessment by the parties of the damage flowing from the breach.

For these reasons, I am, with very great respect, unable to concur in the view of the learned trial Judge, and think this appeal (the plaintiffs') should be allowed, and that judgment should be entered for the plaintiffs for the amount of their claim and interest, with costs of the trial and of these appeals.

The defendants' appeal dismissed with costs.

TEETZEL and SUTHERLAND, JJ., concurred; the latter giving reasons in writing.