Reasoning in krell v henry

To what extent would you describe the reasoning inKrell v Henry[1903] 2KB 740 andHerne Bay Steam Boat Company v Hutton[1903] 2 KB 683 as either compatible or incompatible?

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On the 9th August 1902, the coronation of King Edward VII and Queen Alexandria took place. However, the festivities were originally planned for the 26th June of that year, having been postponed due to the King falling ill with an abdominal abscess. This delay gave rise to a number of cases brought by parties who had contracted into arrangements whereby they could watch and participate in the (as originally scheduled) royal celebrations.

Of these so-called ‘ coronation cases’, *Krell v Henry[1]*

and *Herne Bay Steamboat Co v Hutton[2]*

are the two that arguably led to the greatest refinement of the English law doctrine of frustration of contract. Both relied on the authority of *Taylor v Caldwell[3]*

which clarified the position on contractual impossibility, a flavour of frustration which asserts that both parties to a contractual obligation may be freed from it if, by no fault of their own, performance of the contract was made impossible. Particularly, if the impossibility pertains to something which ‘ strikes to the root’ of the contract, then both parties would be restored to their original position, as far as was possible.

The assumed approach to frustration of contract involving contractual impossibilities was to examine whether or not the absence was implicitly central to the contract. Both of the aforementioned cases took this test – and the *Taylor* case as a whole – as a starting point, though the differing judgements present a *prima facie* incompatibility. However, it could be argued that the reasoning in both cases is largely compatible and logically consistent. Moreover, it could be argued that both cases read together have led to a greater clarification of the doctrine of frustration which is evident from subsequent case law.

Krell and *Herne Bay* are distinguishable in terms of both the material facts and the decision reached. *Krell* concerned a defendant who rented a flat from which he intended to watch the coronation procession. The contract was held to be frustrated, even though he could still rent and occupy the flat, as the viewing of the procession (now impossible due to its rescheduling) was deemed to be the foundation of the contract. Even though the coronation was not explicitly mentioned during the pre-contractual negotiations, the court concluded that this intent was both implicit and integral.

In *Herne Bay Steamboat Co v Hutton* the defendant contracted to hire a steamship to watch the royal naval review and to take a “ day’s cruise around the fleet”. This contract was not held to be frustrated; even though the naval review was no longer possible, the defendant could still take part in the cruise regardless.

We see, therefore, a fundamental irreconcilability in the application of the ‘ implied term’ test established in *Taylor* ; in both cases the parties entered into their respective contracts with the royal festivities being the implicit reason for the contract. That there is another element – that of a general cruise around the fleet – in *Herne Bay* should be irrelevant; ostensibly the court had taken a less absolute view of the hiring parties’ intent in making their judgement. Criticism has particularly focused on *Krell* – Roberts (2003, para. 30.) paints the ruling in Mr Henry’s favour as being fundamentally at odds with the common law principle of sanctity of contract.

In *Herne Bay* , Stirling J accepted the logic of *Taylor* , but said the fact that the parties could still visit the fleet denied the possibility of frustration. He opined that the royal naval review was descriptive as to the nature of the trip, but not fully indicative of what was contracted for. In essence, the contract was limited, but not utterly diminished; that is, the cruise itself could still, and would still, go ahead as planned, merely without the coronation element.

Therefore, the cases demonstrate judicial analysis of *Taylor* yet a reluctance to adhere to its core tenets; in *Herne Bay* there was held to be no frustration even in the case of a unique subject matter, lost due to impossibility, which stood as an overt reason for forming the contract. The treatment in this case becomes more similar to non-frustratory contract cases where a pursuer sues over a ‘ loss of enjoyment’, such as in *Jarvis v Swan Tours* [4].

I would argue, however, that instead of an incompatibility – the extent to which either case followed the *Taylor* reasoning – these decisions instead

indicate a move to the more elegant test discussed in the later case of *Davis Contractors v Fareham Urban District Council* [5]. In this case, Lord Radcliffe reasoned that frustration would be possible when "…such a change [has occurred] in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

This test asserts that if the supervening act radically changes the subject matter of the contract then it will be frustration. If *Krell* and *Herne Bay* indeed contain an early iteration of the test in *Davis* , then they are compatible within this framework. To elaborate, in *Herne Bay* the royal presence may have formed part of the pre-contractual consensus; however, the contract would not be *radically* different after the change of circumstances as Mr Hutton could still make a profit from taking passengers on a pleasant tour around the fleet regardless of the timing of the coronation. Mr Henry's use of the flat, conversely, would be radically different as he would be obliged to make payment for a flat he has no use for, watching the coronation being the sole purpose of the rental agreement. *Krell* , therefore, is not merely distinguishable and of limited scope of application as opined by Koffman and Macdonald (2010. p. 511), but just as thematically consistent with the ' radical difference' test as *Herne Bay* .

Continuing to suppose that *Krell* and *Herne Bay* share an early adoption of the " radical difference" test, we may examine two cases which share the echoes of their logical reasoning; *Nickoll and Knight v Ashton Eldridge & Co[6]*

and *Tsakrioglou & Co Ltd v Noblee Thorl GmbH[7].*

Nickoll concerned a stranded ship which was unable to deliver its cargo. As in *Krell* , the impossibility of performance is clearly radically different to what both parties intended. In *Tsakrioglou* , another merchant shipping case, the ship in question was unable to deliver its cargo through the Suez canal – as originally agreed by both parties – due to political reasons. The court held that taking the alternative Cape of Africa route was not frustratory. This case, as in *Herne Bay* , may have fallen on a bare interpretation of *Taylor* , but the court maintained that even limited performance should be upheld. It also suggests a high bar for situations in which courts will agree that frustration has taken place.

This high bar further supports the idea that *Krell* and *Herne Bay* share compatible reasoning; the courts have been keen to prevent frustration from being an easy escape from a contract for fickle parties. Treitel (2004, para 7. 14) points out that the continuation of *any* part of the contract apart from something trivial makes frustration unlikely. In *Blackburn Bobbin Co v Allen* [8]the outbreak of war was held not to be frustratory, even given concerns by the merchant shipping company that the goods would be destroyed due to the predations of the Imperial German navy. This high threshold – which exists to prevent buyers evading a minor disappointment, or vendors a more difficult method of supply – is evident in *Krell* and *Herne Bay* (with regards the former, Morgan (2013, p120) suggests the high threshold has been reached as Mr Henry lacked an obligation to reschedule given that the King may not have survived his appendix surgery).

As well as both cases being decided “ correctly” against the high threshold for successful frustration, both demonstrate a common judicial reluctance to

infer too much of the mental thought processes of the parties. Brownsword (1993, p246-247) puts forward a key distinction; Mr Krell was treated as a consumer – he had a very specific intent in mind, an assumption the court had little difficulty in basing their judgement upon. In *Herne Bay* , however, the Court of Appeal was unwilling to infer such a clear purpose. Mr Hutton intended to hire the steamship so that he could in turn hire the use of it to paying guests. Stirling J asserted that the " risk fell on the defendant whose venture the taking of passengers was". This suggests a shared reasoning – the judges are more likely to be able to establish the root of a contract where it concerns a disappointed consumer rather than assess the nebulous interests of remote third parties in the more commercial situation seen in *Herne Bay.*

Alternatively, it can be said that compatibility simply is not relevant. As indicated above, it can be argued that the evolution from *Taylor* to the test in *Davis* is a move towards a fairer system. However, Lord Wilberforce in *National Carriers v Panalpina* [9]was reluctant to assert the supremacy of either test. He suggested they overlapped considerably and that the one used is the one " most appropriate to the particular contract under consideration", that is, the tests should be used on a case by case basis depending on the specifics of that particular situation. Furmiston et al (2012, p. 722) draws an analogy to the standard of the reasonable man, suggesting the organic approach taken in these cases was correct.

To conclude, the reasoning in both the cases examined is compatible. The judges Vaughan Williams J, Stirling J and Romer J sat on both cases, and it cannot reasonably be inferred that they intended to create clarification on

the precedent laid down in *Taylor* without ensuring the cases can be read in concert with one another. Indeed, the words of the judges suggest that they had precedential consistency very much aforethought; Vaughan Williams J stated that all cases of this type must be decided on their own merits, indicating a preference for the more organic approach later seen in *Davis* . He even went on to evoke a strong analogy akin to the facts of *Herne Bay* when making his judgement in *Krell* ; that of someone who has hired a taxi to take him to the Epsom Derby. Even in the event of the cancellation of the Derby, the contract to convey the hirer to Epsom still exists.

As previously stated, both cases stand under the weight of the later approach taken towards frustration in cases such as *Davis* , that of looking at whether or not the contract is so radically different as to make freeing the parties from it the only fair and reasonable course of action. Additionally, the cases clearly delineate situations in which a court will be willing to apply the doctrine of frustration – the court plainly saw the contract was robbed of its commercial value in *Krell* yet recognised the situation in *Herne Bay* was still commercially viable; as Lord Roskill in *Pioneer Shipping v BTP Tioxide[10]*

remarked, the doctrine of frustration was “ not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains”. The cases clearly demonstrate how this doctrine may be correctly applied.

As the cases fit so comfortably within the radical difference test and the reasoning applied to each of them can be seen in following case law, we can conclude that they are compatible.

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