SUPREME COURT OF QUEENSLAND

CITATION:	*Council of the City of Gold Coast v Council of the City of Logan* [2007] QSC 357
PARTIES:	**COUNCIL OF THE CITY OF GOLD COAST** (applicant) v **COUNCIL OF THE CITY OF LOGAN** (respondent)
FILE NO/S:	BS 3363 of 2007
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	10 August 2007
JUDGE:	Daubney J
ORDER:	**1. Application be dismissed.**
CATCHWORDS:	PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – DECLARATIONS – OTHER MATTERS – where water supply agreement entered into for a fixed term of four years and six months – where applicant seeks determination of its and the respondent's rights - whether agreement terminated by frustration, agreement or estoppel *ABC v XIV Commonwealth Games Ltd* [1988] NSWLR 540, cited *Brisbane City Council v Group Projects Pty Ltd* [1979] 145 CLR 143, cited *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, applied *Davis Contractors Ltd v Fareham Urban District Council* (1956) AC 696, cited *Ermogenous v Greek Orthodox Community of SA Ltd* (2002) 209 CLR 95, cited *Thompson v Palmer* (1933) 49 CLR 507, cited *Water Act 2000* (Qld), Ch 2 Pt 2 Div 2A *Water Amendment Regulation (No 6) 2006* (Qld) *Water Regulation 2002* (Qld), Pt 8, Sch 10A, Sch 10C, Sch 10D

COUNSEL: D Cooper SC with J Webb for the applicant.
P O'Shea SC with T Bradley for the respondent.

SOLICITORS: Minter Ellison for the applicant.
Corrs Chambers Westgarth for the respondent.

[1] **DAUBNEY J**: This proceeding concerns a water supply agreement ('the Agreement') between the respondent, Logan City Council ('LCC') and the applicant, Gold Coast City Council ('GCCC'). The Commencement Date specified under the Agreement was 1 January 2003, and it had a fixed term of four years and six months.

[2] Under another agreement between the LCC and the Brisbane City Council ('BCC'), the BCC delivered to the LCC specified quantities of water treated to a particular quality standard. This is referred to in the Agreement as 'Treated Water'. It is uncontentious that this Treated Water is sourced from the Wivenhoe Dam.

[3] The GCCC contends that the Agreement was terminated by:

(a) frustration; or

(b) discharge by agreement; or

(c) discharge by estoppel,

and seeks declaratory orders to that effect, and a consequential declaration that it is not indebted to the LCC from the time of termination.

The Agreement

[4] The Agreement relevantly recited, under the heading 'Background', that:

(a) at the request of the GCCC, the LCC, in determining the quantity of and demand for Treated Water required from the BCC, took into account the requirements notified by the GCCC; and

(b) the LCC had agreed to acquire and transport through its area the Treated Water required by the GCCC 'on the terms and conditions set out in this document'.

[5] The core obligations for the supply of Treated Water under the Agreement are contained in the following provisions (in which the GCCC was describe as 'the Customer Council'):

> 2.2 **Supply of Treated Water**
>
> Logan shall transport the Treated Water received from Brisbane through the Water Conveyance System to the Delivery Point where the Treated Water shall be received by the Customer Council.
>
> 2.3 **Quality and quantity of Treated Water**
>
> Subject to this document:

(a) Logan shall deliver the Treated Water at the Delivery Point:

(i) at the same quality standard as provided by the Brisbane Agreement; and

(ii) at the quantity in any Day up to the greater of:

(A) the Deemed Maximum Demand; or

(B) the Agreed Maximum Demand.

(b) The Customer Council shall draw a minimum volume of 2 megalitres of Treated Water per week from the Delivery Point.

[6] In relation to the various defined terms used in these provisions:

(a) the 'Delivery Point' was a specified bulk supply point on the north bank of the Logan River at Loganholme (Clause 1.4);

(b) the 'Water Conveyance System' was 'all mains, pipes, pumps, reservoirs and ancillary equipment used by [the LCC] to transport treated water received from [the BCC] to the deliver point' (Clause 1.4);

(c) 'Day' was defined in clause 1.4 to mean:

(i) for the purpose of calculating the Deemed Maximum Demand, a period of 24 hours from one midday to the following midday; and

(ii) for all other purposes, a period of 24 hours from one midnight to the following midnight;

(d) 'Deemed Maximum Demand' was defined in clause 1.4 as 'the maximum volume of Treated Water calculated under clause 2.4 (Deemed Maximum Demand) that [the LCC] will make available for delivery at the Delivery Point in a Day'. Clause 2.4 then provided, in effect, for a mechanism whereby:

(i) the 'Deemed Maximum Demand' figure was calculated for each financial year;

(ii) the starting point for determining the 'Deemed Maximum Demand' figure in each financial year was the 'Initial Deemed Maximum Demand'. By reference to the definition of that term in clause 1.4 and schedule 2, the 'Initial Deemed Maximum Demand' figure for the first financial year of the Agreement was 35 megalitres per day; and

(iii) Clause 2.4 contained provisions for increasing the 'Deemed Maximum Demand' figure in the course of a financial year, and also from year to year, but it is not necessary for present purposes to descend into the detail of that.

(e) 'Agreed Maximum Demand' was, by reference to clauses 1.4 and 2.5, the maximum volume of Treated Water which the GCCC and the LCC may agree that the LCC 'will make available for delivery at the Delivery Point in a Day'.

For convenience, I will use these defined terms in the course of these reasons.

[7] Clause 3.1(a) of the Agreement provided that the GCCC would pay to the LCC each calendar month 'the Water Charge for the quantity of treated water transported by [the LCC] through the water conveyance system to the delivery point'. The term 'Water Charge' was defined in clause 3.1(b) to mean 'the sum of the Fixed Charge and the Volume Fixed Charge'. Dealing then with each of those terms:

(a) The 'Fixed Charge' was defined in clause 3.1(b) to mean 'the sum of the Brisbane Fixed Charge and the Logan Fixed Charge'. Those terms were defined in clause 3.1(b) as follows:

> **Brisbane Fixed Charge** means the proportion of the Brisbane Base Charge payable by the Customer Council calculated in accordance with the following formula:
>
> $$A = \frac{B}{C} \times D$$
>
> where:
>
> A means the proportion of the Brisbane Base Charge payable by the Customer Council in respect of which the calculation is being made; and
>
> B means the Monthly Demand; and
>
> C means the Logan Deemed Maximum Demand; and
>
> D means the Brisbane Base Charge.
>
> **Logan Fixed Charge** means the monthly instalment of the charge for the relevant Financial year made up of the sum of the following components:
>
> (i) the Customer Council's share of the cost allocated for depreciation of the System Components for the relevant Financial year calculated on the basis of System Utilisation (**Depreciation**); and
>
> (ii) the Customer Council's share of the fixed maintenance costs of the System Components for the relevant Financial Year calculated on the basis of System Utilisation (**Fixed Maintenance Costs**); and
>
> (iii) the Customer Council's share of Economic Real Rate of Return of 5.0% of the estimated Written Down Value of the System Components at the end of the relevant Financial Year calculated on the basis of System utilisation (**ROA**); and

(iv) an administration charge being 2.5% of the total amount for the relevant Financial year payable by the Customer Council to Logan for Depreciation, Fixed Maintenance Costs and ROA.

(b) The 'Volume Charge' was defined in clause 3.1(b) to mean 'the Water Usage multiplied by the Combined Rate'. 'Water Usage' was defined in that clause:

> **Water Usage** means the quantity of Treat Water delivered by Logan to the Customer Council in the relevant month measured in megalitres as determined by meter at the Delivery Point multiplied by a factor of 1.01 to allow for 1.0% loss in the Water Conveyance System.

> The 'Combined Rate' was defined as the sum of the Brisbane rate and the Logan rate, and those terms were further defined as particular unit prices per megalitre.

[8] In short, during the term of the Agreement:

(a) The LCC was obliged to deliver Treated Water to the Delivery Point up to a specified maximum volume;

(b) The GCCC was obliged to draw a specified minimum volume of Treated Water;

(c) The GCCC was obliged to pay the Water Charge to the LCC.

Background

[9] The Agreement was not the first agreement which had been entered into between these parties (or their predecessors) for the supply of water. On 1 July 1993, the LCC and the Albert Shire Council had entered into an agreement requiring the LCC to 'transport water in bulk to Albert for a period of 15 years' from 1 July 1993. The maximum required to be supplied by the LCC under that agreement was 25.2 megalitres per day, but did not impose any minimum draw obligation on the Albert Shire Council.

[10] In 1995, the Albert Shire Council was amalgamated with the GCCC, and in 1999 the LCC and the GCCC entered into a 'Water Supply Deed' which had a term of three years commencing on 1 July 1999. The obligation on the LCC was to deliver Treated Water at the Delivery Point at a quantity up to 15 megalitres per day. This deed did, however, impose a specific obligation on the GCCC to 'draw a minimum volume of 2 megalitres per week from the Delivery Point' throughout the term of the deed.

[11] That deed expired by effluxion of time on 30 June 2002 and, as already noted, the Agreement commenced on 1 January 2003.

[12] In August 2004, a report known as the South-East Queensland Regional Water Supply Strategy Stage 1 Report was produced. Mr Cox, director of the GCCC's water department, Gold Coast Water ('GCW'), states that this report was the

outcome of work undertaken by the State Government together with the Council of Mayors of South-East Queensland, representing 18 local authorities (including both the GCCC and the LCC), and the Department of Natural Resources and Mines. Mr Cox says that 'at the time of the drafting of this report it was the general policy of the [GCCC] and the various Government bodies involved in the distribution of water in South-East Queensland ('SEQ') that because the requirement of water for the GCCC would exceed the Hinze Dam yield that the excess was to come from the Wivenhoe Dam. Over time it was expected that the GCCC would take significant amounts of water on a daily basis from Wivenhoe Dam via supply arrangements with [the LCC] which had been in place for many years, going back until at least 1993.'

[13] Mr Cox further says that:

(a) At the time of entering into the Agreement, the present drought conditions were not foreseen, nor was the present depletion of Wivenhoe Dam;

(b) The take of water by the GCCC under the Agreement from 1 January 2003 until 2 August 2006 generally varied between about 400 megalitres per month to 1,000 megalitres per month, and at no time was the take of water anywhere close to as low as 8 megalitres per month;

(c) By November 2005, it had become apparent that, because of drought conditions in and around South-East Queensland, particularly affecting the Wivenhoe catchment area, it would be necessary to adopt strategies which would conserve the water remaining in Wivenhoe Dam. By that time, the water level of Wivenhoe Dam was down to 35 per cent and Level 2 water restrictions were in place across South-East Queensland. Consequently, the South-East Queensland Regional Water Supply Strategy Interim Report – Stage 2 was prepared. Part of the strategy proposed was development of 'inter-catchment water distribution plan', with the intention that water users with adequate alternative supplies would discontinue taking water from Wivenhoe Dam where possible. He says that the GCCC was in this situation because, at that point in time (late 2005), Hinze Dam levels were at close to capacity, and it had been determined that the proposed desalination plant project would be accelerated for implementation some time in 2008;

(d) GCW decided that, given the existing drought and the strategies just referred to, it would be appropriate to commence steps to reduce its take of water from Wivenhoe Dam by reducing the water purchased under the Agreement.

[14] To that end, at the Council meeting of the GCCC on 5 September 2005, a number of resolutions directed to water sustainability and usage reduction were passed, including:

> That Council initiates negotiations for variations to the contract with Logan and Brisbane City Councils and endorses the temporary reduction of 10 ML to 25 ML per day from the Wivenhoe Dam along the Logan pipeline as soon as the Level 2 restrictions are mandated on 3 October 2005 (or when the Wivenhoe Dam complex reaches an average level of 35 per cent).

[15] A comprehensive report setting out various options to further reduce the GCCC's intake of water from the Wivenhoe system as part of the regional drought response

was presented to the GCCC's Council meeting on 13 March 2006. Resolutions passed by the Council at that meeting after receiving the report included:

> 2. That Council resolves to decrease the amount of water drawn from the Wivenhoe system to 15 ML/day effective when the Coomera pump station is modified to ensure the level of redundancy to the north of the City is not compromised as a result of this reduction in supply.
>
> …
>
> 5. That Council resolves to discontinue the Gold Coast's supply from the Wivenhoe system when it reaches a storage capacity of 25 per cent, which is the trigger for introducing Level 4 restrictions under the South-East Queensland Regional Drought Contingency Plan.
>
> 6. That the Director, Gold Coast Water be directed to commence the works necessary to ensure water supply to the north of the City can be maintained from the Hinze Dam at existing levels of reliability, should supply to the Gold Coast from the Wivenhoe system be ceased altogether (noting that such work will take some four months to complete).
>
> 7. That the costs of these works to enable the ceasing of supply from Wivenhoe (being approximately $50,000) be funded from a deferral of capital works in the Gold Coast Water budget and be incorporated in the March 2006 budget review.
>
> 8. That savings that flow from a reduction in supply of water from the Wivenhoe system be used to fund the increase in operating costs to supply water to the north of the City from the Hinze Dam, along with shortfalls in revenue attributable to the ongoing restrictions.

[16] The regional drought strategy was also discussed at the GCCC meeting on 26 May 2006, including the noting of potential scenarios for the availability of water depending on the level of water restrictions and the amount of supply drawn from Wivenhoe Dam.

[17] Drought strategy matters were again discussed at the GCCC's meeting on 9 June 2006, at which, inter alia, the following resolution was passed:

> That Gold Coast City Council immediately commences negotiations relating to the temporary cessation of water being supplied from Wivenhoe Dam pursuant to the contract with Logan City Council.

[18] Water supply to the GCCC was again discussed at the Council meeting on 23 June 2006. A number of motions were passed at that meeting, including the following:

> 2(a) That the Chief Executive Officer be delegated authority to take the appropriate action to discontinue the drawing of water for consumption from the Wivenhoe Dam system and report to Council on the long term resource arrangements that can be negotiated to allow reconnection to Wivenhoe network at a later time.

(b) That the Chief Executive Officer be authorised to implement the necessary decisions to ensure the appropriate operation of the pipeline can continue during this time should it be required.

[19] Mr Cox says that, to implement this resolution, he issued a direction to Mr Dick Went, a senior engineer with GCW, to commission a report to satisfy the GCCC that 'all things had been satisfactorily dealt with from a technical and operational perspective to safely allow the water to be cut off'. Mr Went provided the necessary report on 28 June 2006. Mr Cox says that he then requested Mr Went to proceed with that disconnection 'which was carried out on 2 August 2006 by closing the GCCC valve at the Delivery Point on the Coomera River'.

[20] The task of closing off the valve was delegated to Mr Phillip Mogg of the GCCC, who in turn instructed Mr Cameron Fraser, an hydraulic field officer employed by the GCCC. Mr Fraser was the person who turned off the valve on the GCCC side of the Delivery Point on 2 August 2006.

[21] Mr Lester Bridgham, the mechanical and electrical supervisor for Logan Water (a division of the LCC), says that he recalls receiving a telephone call from Mr Mogg on 2 August 2006 during which Mr Mogg said that the GCCC would not be drawing any water from that day forward. Mr Bridgham says that he did not enquire as to the reasoning behind that decision and does not recall if anything else was said during that conversation. He sent an email to Mr Palith Siriwardana, the executive operations engineer of Logan Water, advising him of the conversation with Mr Mogg. Mr Bridgham also says that he has never been directed to turn the valve on the Logan side of the Delivery Point to the 'closed' position. It is not in issue between the parties that, since 2 August 2006, the valve on the GCCC side of the Delivery Point has been closed and the valve on the LCC side has been open.

[22] Some weeks later, there was a telephone discussion between Mr Mogg and Mr Siriwardana. Mr Mogg recalls this happening about six to eight weeks after the valve was closed, while Mr Siriwardana says it occurred on or around 1 September 2006. On Mr Mogg's version, it was a phone call to him from Mr Siriwardana in which Mr Siriwardana requested 'whether it would be possible for [the LCC] to secure a minimum flow of 2 ML per week of water through the system as [the LCC] was experiencing water quality issues in their system'. He said that there was some discussion, but Mr Mogg was not supportive of the idea of securing such a minimum flow 'in that it would put degraded quality water into Gold Coast City Council's infrastructure'. Mr Siriwardana, for his part, says that he does not recall whether the specific amount of 2 megalitres per week was discussed with Mr Mogg, because he recalls that they were discussing the 'very low flow at that time being taken by the applicant each week (minimal flow) and whether [the GCCC] would consider taking more water than this minimal flow'.

[23] In the meantime, a new Pt 8 of the *Water Regulation 2002* (Qld) ('the Regulations') had commenced operation on 8 August 2006. I will discuss the legislation in more detail below, but it is appropriate here to note that the preamble to the *Water Amendment Regulation (No 6) 2006* (Qld), by which the new Pt 8 was introduced, included the following:

Reasons for the making of this regulation, and the context of its operation –

1. The current drought in South-East Queensland is the worst on record. To respond to the drought, powers under the *Water Act* 2000 are being used to implement a strategy to secure the essential water supply needs of the region.

2. This strategy includes the following –

   …

   - establishing a water grid that enables water to be moved between storage facilities throughout South-East Queensland;

   …

[24] The footnote to the last-mentioned dot point states:

> It is recognised that some local governments have planned more effectively than others to meet the needs of their communities. This, combined with variable rainfall patterns throughout catchments in the region, means that some parts of the region have substantial water resources while others are facing severe shortages. The water grid will create the ability to move surplus water from water rich parts of South-East Queensland to areas of South-East Queensland where supplies are stretched. Operating principles to be established for the grid will ensure, however, that the overall water resource is managed in a way that does not lead to the imposition of restrictions on residents of areas whose local governments have responsibly planned supplies to meet local demand. Only water that is excess to the requirements of those local government areas will be eligible for transfer to elsewhere in South-East Queensland.

[25] The preamble further provided:

> 5. To implement the water strategy for South-East Queensland and to meet the water requirements of the region, there needs to be a co-ordinated set of actions undertaken by all local governments and their water supply businesses, and the State. This Regulation requires local governments and other service providers to undertake a number of measures, to ensure that all elements of the strategy are implemented in a timely and co-ordinated way. Timelines for completion of the actions, as well as State funding contributions for some actions, are outlined in this Regulation.

[26] Mr Dickson, the GCCC's chief executive officer, says that there 'has been no water supplied by' the LCC to the GCCC since early August 2006, but the LCC continued to issue monthly invoices to the GCCC for the payments which the LCC contended were required under clause 3.1 of the Agreement. Copies of the invoices are exhibited to the material before me. The invoices purport to show that there was a small amount of water supplied notwithstanding the GCCC valve having been closed, but Mr Dickson says that readings of electronic equipment which purport to show such a small flow are incorrect, and there has in fact been no supply.

[27] On 12 December 2006, Mr Dickson wrote to his counterpart at the LCC, Mr Rose, in the following terms:

> I refer to the contract between Gold Coast City Council and Logan City Council which commenced on 1 January 2003.

> The *Water Amendment Regulation (No. 6) 2006* came into effect on 8 August 2006. Outcome 5 of the Regulation required Logan to reduce the supply of water from Wivenhoe Dam to Gold Coast by 10ML/day. Logan has satisfied Outcome 5 and Gold Coast is no longer taking any water from Logan under the contract.
>
> My Council has previously resolved to seek an agreement with your Council which would result in a reduction in charges under the contract, given Gold Coast's reduction in water taken under the contract over time due to the drought in South East Queensland.
>
> In our opinion, the introduction of the Regulation and the requirement on Logan to comply with Outcome 5 renders the contract ineffective. Consequently, Gold Coast's obligations under the contract are discharged, and it would be inappropriate and irresponsible for Gold Coast to continue to make payments to Logan without considering whether it is still legally required to make those payments.
>
> My Council is, of course, willing to comply with its payment obligations under the contract, if these obligations remain current.
>
> If you have a different opinion in relation to the effectiveness of the contract, I would support a joint application for a Court declaration to determine the payment obligations of my Council under the contract.
>
> It is my intention to work collaboratively with you to resolve this issue in an appropriate manner, and to this end, I would appreciate your response to the matters raised at your earliest convenience.

[28] On 9 February 2007, Mr Rose responded with the following letter:

> Thank you for your letter dated 12 December 2006. Council advises that we have sought legal advice from Council's Solicitors. Their advice confirms Council's belief that the Water Regulation Outcome 5 does not make the Water Supply Agreement between Logan City Council and Gold Coast City Council ineffective, and it is Council's stand that your obligation under the agreement remains current.
>
> Council understands Gold Coast City Council's position. As such, Council may re-consider its position if Brisbane City Council is prepared to reduce its charges to Logan City Council for the 35 megalitre per day capacity that Council is charged that relates to Gold Coast's capacity.
>
> To this end, it is proposed that a meeting be held between Logan City Council, Gold Coast City Council and Brisbane City Council to discuss this issue.

[29] The GCCC's acting chief executive officer replied to Mr Rose's response on 9 March 2007 in the following terms:

> Thank you for your letter dated 9 February 2007.
>
> Gold Coast City Council's (GCCC) position remains as stated in its initial letter to you dated the 12 December 2006. GCCC accordingly:

1. Declines to attend the meeting you propose calling with Brisbane City Council and

2. Reiterates it would support a joint application for a declaration from the Court to determine what Obligations (if any) GCCC has under the terms of the Contract.

Please provide GCCC with a copy of the legal advice you refer to in your letter dated 9 February, 2007.

The legislation

[30] Part 8 of the Regulations, to which I have already referred, was promulgated pursuant to Ch 2 Pt 2 Div 2A of the *Water Act 2000* (Qld) ('the Act').

[31] The term 'water supply emergency' is defined in s 25A of the Act as follows:

25A Meaning of *water supply emergency*

(1) A water supply emergency is a situation in which there is a demonstrably serious risk the State's, or a part of the State's, essential water supply needs will not be met.

(2) The following are examples of circumstances from which a situation mentioned in subsection (1) may arise –

(a) failure of a large part of water supply, treatment or distribution infrastructure or wastewater infrastructure;

(b) extended severe drought conditions;

(c) contamination of a water storage used for essential water supply needs causing the water to be unfit for supply.

(3) In this section –

demonstrably, in relation to a serious risk, means the serious risk can be demonstrated by reliable data about water supply.

essential water supply needs means water supply for –

(a) domestic purposes; or

(b) essential services, including the generation or distribution of electricity; or

(c) processing or refining minerals or petroleum in the Calliope of Gladstone local government areas.

[32] Chapter 2 Pt 2 Div 2A subdivision 2 of the Act contains provisions relating to water supply emergency declarations and regulations. By s 25B, the relevant Minister was empowered to prepare a water supply emergency declaration if the Minister was satisfied that there was a water supply emergency or a water supply emergency

was developing. By s 25B(3), such a water supply emergency declaration has effect when it is approved by the Governor in Council and published in the Gazette, and remains in force until the commencement of a regulation dealing with the matters mentioned in the declaration, or the end of 15 business days after the declaration is published, whichever is earlier.

[33] Regulations about water supply emergencies are dealt with in s 25F, which provides:

25F Regulation about water supply emergency

(1) This section applies if –

(a) there is a water supply emergency; or

(b) a water supply emergency is developing.

(2) A regulation (a ***water supply emergency regulation***) may state –

(a) the water supply emergency to which the regulation applies; and

(b) the part of the State to which the regulation applies; and

(c) the service providers to which the regulation applies; and

(d) for dealing with the water supply emergency –

(i) the measures each service provider is directed to carry out and the day by which the measures are to be carried out; and

(ii) if the measures a service provider is directed to carry out include making non-Act water available to, or operating infrastructure to allow non-Act water to be supplied to, a customer or type of customer – whether section 25K applies to the direction; and

(iii) if the measures a service provider is directed to carry out include imposing the restrictions mentioned in section 25D – that the service provider is directed to give the Minister for approval, within the time state, a water supply emergency response stating the way the service provider intends to ensure the restrictions are complied with; and

(iv) the outcomes each service provider is directed to achieve and the day by which the outcomes are to be achieved; and

(v) that a service provider directed to achieve outcomes is directed to give the Minister for approval, within the time stated, a water supply emergency response stating –

(A) the actions the service provider intends to take to achieve the outcomes; and

(B) if the actions include imposing the restrictions mentioned in section 25D – the way the service provider intends to ensure the restrictions are complied with; and

(vi) any works that are to be carried out by the coordinator-general.

(3) For the matters mentioned in subsection (2)(d), the regulation must state the matters mentioned in section 25C(2).

(4) The regulation may, to the extent stated in the regulation, continue the effect of a water supply emergency declaration.

(5) A water supply emergency regulation may authorise persons to exercise powers, including powers of decision and direction and delegated powers, to facilitate the implementation of the directions under the regulation.

(6) The regulation, for the part of the State to which it applies, must not be inconsistent with a wild river declaration or the objectives of a water resource plan for the part.

(7) However –

(a) the regulation may, to the extent stated in the regulation, be inconsistent with –

(i) the resource operations plan that implements the water resource plan; or

(ii) a resource operations licence for the water to which the plan applies; or

(iii) to the extent of the inconsistency, the regulation prevails.

[34] I interpolate here that there was some debate before me as to whether a water supply emergency declaration relevant to this case had been made. Reference was made to statements made in State Parliament, as recorded in Hansard, concerning the water supply emergency constituted by the drought enveloping South-East Queensland. This argument arose because the relief claimed by the GCCC was founded, in part at least, on the existence of such a declaration. It is not necessary, however, for me to determine this point. It seems to me that, properly construed, the making of such

a declaration is not a necessary precondition to the promulgation of a water supply emergency regulation. Section 25F requires only that:

(a) there is a water supply emergency; or

(b) a water supply emergency is developing.

Whilst one can readily perceive that the scheme of the legislation is to provide for the making of a water supply emergency declaration as the basis for an interim regulatory regime (by providing for the measures which may be directed under s 25D pending the drafting and promulgation of water supply emergency regulations under s 25F), I do not see that the making of such a declaration is a necessary precondition to water supply emergency regulation being passed.

[35] Part 8 of the Regulations commences with s 82, which relevantly provides:

> (1) This Part is a water supply emergency regulation under the Act.
>
> (2) The purpose of this Part is to be outline a range of measures to be carried out, and outcomes to be achieved, by service providers, and work to be carried out by the Co-ordinator General, to ensure the security of essential water supplies for the SEQ region.

[36] That the necessary preconditions mentioned in s 25F of the Act were in existence is apparent from the terms of s 84 of the Regulations, which provides:

> **84 Water supply emergency to which pt 8 applies**
>
> (1) This part applies to a water supply emergency that is developing.
>
> (2) The water supply emergency involves the essential water supply for the SEQ region for –
>
> (a) domestic purposes; and
>
> (b) essential services.
>
> (3) The water supply emergency arises from extended severe drought conditions.
>
> (4) Also, a potential shortfall in supply will exist if there are limited rainfall events within the next 3 years and the requirements of this part are not implemented.

[37] Section 85 of the Regulations provides that Pt 8 applies to the SEQ region, and s 86 provides that the Part applies to the service providers mentioned in Schedule 10A to the Regulations. Each of the matters mentioned in s 84, s 85 and s 86 of the Regulations are those referred to in s 25F(2)(a), (b) and (c) of the Act.

[38] Further, s 87 (Measures to be carried out), s 88 (Outcomes to be achieved), s 89 (Directions for giving water supply emergency supply response), and s 90 (Works to be carried out by Co-ordinator General) of the Regulations also clearly fall within the matters mentioned in s 25F(2)(d) of the Act.

[39] The LCC is a ‘service provider’ mentioned in Schedule 10A to the Regulations, and Pt 8 therefore applies to it.

[40] Section 88 of the Regulations provides:

> **88 Outcomes to be achieved**
>
> (1) A service provider mentioned in schedule 10C –
>
> (a) is directed to achieve each outcome listed for the service provider in the schedule, before the day mentioned in the schedule; and
>
> (b) must give the Minister and the commission a written report on the service provider’s progress in achieving the outcome within 5 business days after the end of –
>
> (i) each month; or
>
> (ii) any longer period the Minister directs.
>
> (2) Without limiting subsection (1), any actions taken in achieving an outcome must be directed at attaining water saving or water availability, as the case may be, to the extent of any target mentioned in the schedule for the outcome.
>
> (3) In achieving an outcome, a service provider must comply with any directions or requirements given or made by the Minister in relation to the outcome.
>
> (4) For each outcome in schedule 10C, item 3 or 4, that a service provider is directed to achieve, the service provider must, in achieving the outcome, consult with the Water Infrastructure Project board about matters under the State Development Regulation and keep the commission informed of its progress.

[41] Relevant for present purposes is the outcome directed to be achieved in paragraph 5 of Schedule 10C (which, for convenience, I shall refer to simply as 'Outcome 5'):

description of outcome	**service provider**	**Target (ML/day)**	**date**
Alternate supply			
5 Reduction in the supply by Logan City Council to Gold Coast City Council of water from Wivenhoe Dam, other than the volume of water that is necessary for fire fighting purposes and other services This reduction is in addition to a reduction of approximately 25ML/day that has already been made. The State will contribute a subsidy of up to 40% of the capital costs in accordance with the Water and Sewerage Program.	Logan City Council	10	31 October 2007

[42] As the LCC was a service provider directed under Pt 8 to achieve an outcome, by s 89 of the Regulations it was 'also directed to give the Minister for approval a water supply emergency response, stating the actions the service provider intends to take to achieve the outcome, and complying with the requirements mentioned in Schedule 10D, before the day stated for the service provider in the Schedule'.[1] Schedule 10D relevantly required that response to include GCCC's assessment of how the outcome would be achieved, and was required to be given to the Minister by 30 September 2006.

[43] By a letter dated 28 September 2006, the LCC submitted its water supply emergency response to the executive director Water Task Force within the Department. Mr John Betts, who was then the LCC's executive water administrator, states that he was responsible for drafting this response, and that he sought an assessment from the GCCC of how outcome 5 would be achieved', but no response was received. The LCC's water supply emergency response relevantly stated:

1 The statutory basis for this Regulation is found in s 25F(2)(d)(v) of the Act.

5	**Alternative Supply** Reduction of 10ML/day in the supply by Logan City Council of water from Wivenhoe Dam, other than the volume of water that is necessary for fire fighting purposes and other services This reduction is in addition to a reduction of approximately 25 ML/day that has already been made.	➢ Gold Coast City Council ceased drawing water from Logan on 2 August 2006 ➢ Testing of water quality in the delivery pipe indicates an unacceptable deterioration in water quality ➢ To maintain water quality, the delivery pipe would require regular flushing or a minimum flow to Gold Coast would be required. Flushing would cause water to be run to waste and should be avoided ➢ The current Bulk Water Agreement between Logan City Council and Gold Coast City Council requires a minimum draw by Gold Coast of 2ML per week to maintain water quality ➢ It is understood that there would be a political desire to have no flow from Logan to Gold Coast, however, to maintain water quality Logan requests that a weekly flow of 2 ML be allowed under the Water Amendment Regulation

[44] On 13 December 2006, the then Deputy Premier, who was the relevant Minister, wrote to the LCC. In reply to the submission of that response specifically in relation to Outcome 5, the Minister said:

> Schedule 10C: Outcome 5 – Reduce Supply from Logan City to Gold Coast (omitting underlining)
>
> I acknowledge receipt of Logan City Council's water supply emergency response in relation to outcome 5 in Schedule 10C of the Regulation. I confirm that submission of this response satisfied Council's obligation to submit a water supply emergency response as required under s.89 of the Regulation.
>
> I accept Council's proposal that a minimum flow of 2ML per week be permitted from Logan to the Gold Coast in order to maintain water quality, until this flow is no longer required.
>
> Pursuant to s.251 of the Water Act 2000, I hereby approve the water supply emergency response (including the minimum flow of 2ML/week) submitted by Council. Council is obliged to comply with this approved response.

[45] Finally, it is to be noted that s 25H of the Act relevantly provides:

> **25H Requirement to comply with water supply emergency regulation**
>
> (1) A service provider to whom a direction is given under a water supply emergency regulation must comply with the direction.
>
> Maximum penalty –
>
> (a) for a direction mentioned in section 25F(2)(d)(i) – 1665 penalty units;
>
> (b) for a direction mentioned in section 25F(2)(d)(iii) or (v) – 1000 penalty units.
>
> (2) Subsection (1) applies even if complying with the direction would be inconsistent with the service provider's current supply and infrastructure contractual arrangements and the current arrangements are ineffective –
>
> (a) to the extent of the inconsistency; and
>
> (b) for the period stated in the regulation.

Frustration

[46] The GCCC submits that the promulgation of Pt 8 of the Regulations on 8 August 2006 frustrated the Agreement, with the consequential effect that its obligation to make ongoing payments to the LCC under the Agreement were discharged from that date. It was submitted that:

(a) the effect of the Regulations was to prohibit performance of the Agreement according to its terms throughout the duration of the Regulations' operation, which was intended to continue until at least 31 October 2007;

(b) the GCCC's voluntary conduct in closing the valve and ceasing to draw water under the Agreement did not preclude it from thereafter resuming to draw its full contractual entitlement under the Agreement if it chose to do, but the introduction of the Regulations had that consequence; and

(c) the Regulations constituted a legislative change which rendered unlawful the express mode of performance underlying the Agreement, thereby depriving the GCCC of the rights conferred by the Agreement, resulting in frustration of the Agreement because performance in the new situation was 'fundamentally different from performance in the situation contemplated by the contract.'[2]

[47] The law of frustration is, it might be said, somewhat easier to state than it is to apply. In *Davis Contractors Ltd v Fareham Urban District Council*,[3] Lord Radcliffe described the concept of frustration as follows:[4]

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2 Adopting *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 362.

3 (1956) AC 696.

> Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable to being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

[48] This description was adopted and applied by the High Court in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*.[5]

[49] The difficulties associated with application of the doctrine are usefully summarised in the following passage from Carter & Harland's '*Contract Law in Australia*' (4th ed, 2002) (omitting citations):[6]

> **[2002] Frustrating events.** Since frustration necessarily depends on the terms of the contract and the circumstances of the particular case, it is not possible to define, except in general terms, what constitutes a frustrating event. However, it is clear that the event must have severe consequences.
>
> Under Lord Radcliffe's formulation the event must not merely alter the circumstances in which performance is called for; there must be a 'radical' change. Other formulations of the concept also emphasise the strictness of the requirement, by referring:
>
> - to an event which would make further performance 'a thing different in substance' from that contracted for;
> - to an event which creates a 'fundamentally' different situation; or
> - to an event which deprives a party with further obligations to perform of 'substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain' from performing those obligations.

[50] It is useful, too, to recall the cautionary comments of Stephen J in *Brisbane City Council v Group Projects Pty Ltd*:[7]

> It is no doubt true, as critics complain, that the various expositions of the true basis of the doctrine of frustration leave imprecise its actual operation when applied to the facts of particular cases. How dramatic must be the impact of an allegedly frustrating event? To what degree or extent must such an event overturn expectations, or affect the foundation upon which the parties have contracted, or, again, how unjust and unreasonable a result must flow or how radically different from that originally undertaken must a contract become (to use the language of some of the various expositions), before it is to be regarded as frustrated? The cases provide little more than single instances of solutions to these questions. These difficulties of application of the doctrine of frustration were keenly appreciated both by Latham C.J. and by Williams J. in their consideration of the doctrine in Scanlan's *New Neon Ltd. v. Tooheys Ltd.* (58). They are, perhaps, inevitable in questions of degree arising when a broad principle must be applied to infinitely variable factual situations.

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4 Ibid, 729.
5 (1982) 149 CLR 337, 380.
6 At [2002].
7 [1979] 145 CLR 143, 162-163.

[51] It seems to me that, for the resolution of this dispute, the questions for determination are whether the promulgation of Pt 8 of the Regulations:

(a) rendered performance of the parties' obligations under the Agreement impossible or 'impracticable in a commercial sense';[8] or

(b) effected a radical alteration of the circumstances of performance of their contractual obligations.

[52] I would answer both of those questions in the negative for the following reasons.

[53] Under the terms of the Agreement, the LCC's obligation was to supply Treated Water (up to specified maximum volumes) to the Delivery Point, and the GCCC's obligation was to draw a minimum volume of Treated Water. Those obligations enured until the expiration of the Agreement on 30 June 2007. Nothing in Pt 8 of the Regulations generally, or Outcome 5 particularly, impacted on those obligations at any time during the currency of the Agreement – the LCC was not prohibited from supplying, nor was the GCCC prohibited from drawing.

[54] Outcome 5 recognised, as was the fact, that the GCCC had, by August 2006, voluntarily reduced its draw by approximately 25 megalitres per day. The Regulations did not, however, require that this voluntary reduction had to be maintained for the balance of the Agreement. Rather, s 88 of the Regulations and Outcome 5 imposed on the LCC a statutory obligation to achieve the stated outcome by 31 October 2007. The stated outcome to be achieved by that date was a reduction in the supply by the LCC to the GCCC of water from the Wivenhoe Dam of a total of approximately 35 megalitres per day (being the 25 megalitres per day (approx) which had been voluntarily reduced at the date of the Regulation plus the specified 10 megalitres per day). It is to state the obvious to say that the LCC could have achieved this outcome simply by letting the Agreement expire by effluxion of time on 30 June 2007.

[55] There is nothing before me to suggest that the LCC did not, in fact, continue to perform its contractual obligation of supplying Treated Water to the Delivery Point. The decision to cease taking water from the Delivery Point was made by the GCCC as early as its meeting on 23 June 2006, and was implemented by its action in closing its valve on 2 August 2006. Self-evidently, this unilateral action by the GCCC had nothing to do with Pt 8 of the Regulations and, as submitted by the LCC, put the GCCC in the position of being in breach of its own obligation under clause 2.3(b) of the Agreement.

[56] Accordingly I do not accept the proposition advanced by the GCCC that Pt 8 of the Regulation prohibited performance of the Agreement according to its terms. Nor, in my view, did it preclude the GCCC from drawing its full contractual entitlement during the balance of the term of the Agreement had it sought to do so. Nothing in Outcome 5 made performance of the Agreement during its term impossible or impracticable in a commercial sense. I therefore find that the Agreement was not frustrated by the promulgation of Pt 8 of the Regulations.

[57] Finally, I should mention that considerable argument was addressed by the parties to clause 2.3(b) of the Agreement. It was submitted by the GCCC that the reason

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8 *Horlock v Beal* [1916] 1 AC 486 at 492.

for the inclusion of this clause was 'curious', its relevance was not apparent on the face of the Agreement, and that 'its role is obviously intended to be of a subsidiary or secondary nature to the primary obligation, but its meaning is not sufficiently certain'. No evidence was put before me from which I could glean, other than from the face of the Agreement, the intention of the parties at the time of contracting in relation to this clause. I accept the submission of counsel for the GCCC that I should not have regard to statements in the LCC's water supply emergency response and the Minister's reply which referred to this minimum draw being required 'to maintain water quality' (notwithstanding that this seems to be a commonsense explanation, albeit perhaps one of several). However, I do not accept the characterisation of this obligation on the GCCC as being merely subsidiary. Clause 2.2 of the Agreement made it clear that the obligations on the parties were co-relative – the LCC was required to transport treated water to the delivery point 'where the treated water shall be received by [the GCCC]' (underlining added). Clause 2.3 operated to quantify the extent of those respective co-relative obligations. Precisely how it performed its obligation of drawing the minimum volume per week was a matter for the GCCC.

Discharge by agreement

[58] The GCCC's second argument is that the parties impliedly agreed to discharge the Agreement. This calls for an objective consideration of all of the relevant circumstances to ascertain whether the conduct of the parties evinced the necessary intent to contractually terminate their relationship.[9]

[59] The GCCC points to the following conduct by the LCC as probative of the conclusion that there was an implied agreement to discharge the Agreement:

(a) the conduct of the LCC towards the Queensland Water Commission and the Government in adopting the action of the GCCC as the performance of what the GCCC described as the 'statutory obligations' under the Regulation;

(b) a failure to complain that the GCCC was guilty of any breach of contract; and

(c) a failure to commence proceedings to enforce performance of the Agreement.

[60] As to the first of these matters, it is to be recalled that s 89 of the Regulations required the LCC to give the Minister a 'water supply emergency response, stating the actions the service provider intends to take to achieve the outcome'. The LCC's response stated, as was the fact, that the GCCC 'ceased drawing water from Logan on 2 August 2006'. This statement in the LCC's response was not made in a vacuum – Mr Betts had sought an assessment from the GCCC as to how Outcome 5 would be achieved, but no response was received from the GCCC. But more fundamentally, it is difficult to see how the content of communications between the LCC and the Minister, to which the GCCC was not a party, could give rise to an implied agreement between the LCC and the GCCC to discharge the Agreement; moreover, it is difficult to see how the statement of the fact that the GCCC had ceased drawing water could constitute an admission by the LCC that it and the GCCC had contractually discharged the Agreement.[10]

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9 *Ermogenous v Greek Orthodox Community of SA Ltd* (2002) 209 CLR 95, [25].

10 See *ABC v XIV Commonwealth Games Ltd* (1988) 18 NSWLR 540, 550 (Gleeson CJ).

[61] True it is that the material before me discloses no complaint by the LCC that the GCCC was in breach of contract, and it is also clear that no proceedings were commenced by the LCC to enforce performance of the Agreement. It is hardly surprising that no such proceedings were commenced – the LCC was fulfilling its obligations under the Agreement by making the required Treated Water available at the Delivery Point, but for so long as the GCCC refused to draw from the Delivery Point the LCC was in a position of being able to effectively achieve early compliance with Outcome 5 without any further action on its part. And in any event, a conclusion that the LCC continued to consider that the Agreement was on foot between the parties is to be inferred from:

(a) the fact that the LCC did not at any time close its valve at the Delivery Point; and

(b) the delivery of monthly invoices from the LCC to the GCCC calculated in accordance with the terms of the Agreement.

[62] Accordingly, I conclude that there was no implied agreement between the parties for discharge of the Agreement.

Discharge by estoppel

[63] The third argument advanced by the GCCC is that the conduct of the LCC in submitting the water supply emergency response to the Department 'on the basis that the action of [the GCCC] in turning off its tap constituted performance by [the LCC] of its statutory obligations was a representation to, inter alia, [the GCCC] that [the LCC] regarded the parties as no longer bound to perform the [Agreement] from that time', and that the LCC is now estopped from resiling from that position.

[64] It seems to me, with respect, that no such estoppel arises in the present case:

(a) To the extent that it is contended that the estoppel is founded in an assumption as to a state of affairs adopted by the GCCC,[11] there is no evidence in this case that the LCC's water supply emergency response was provided to the GCCC, let alone that the GCCC made any assumption based on that response. Indeed, Mr Cox says in his affidavit that he first became aware of the Minister's approval and the LCC's water emergency response when he was shown the affidavit material filed by the LCC in this application.

(b) In any event there is no evidence of the GCCC having in any way acted, or refrained from acting, to its detriment in reliance on any such alleged assumption.

Conclusion

[65] It follows that I conclude that the GCCC has not established any basis for any of the declaratory relief it seeks in this application. Accordingly, I order that the application be dismissed.

[66] I will hear the parties as to costs.

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11 In the sense described in *Thompson v Palmer* (1933) 49 CLR 507.