



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Frost v Keough [2015] NSWCATCD 79
Hearing dates:	11 May 2015
Decision date:	23 July 2015
Jurisdiction:	Consumer and Commercial Division
Before:	M Harrowell, Principal Member
Decision:	The orders made are set out in paragraph 88 these reasons and in the schedule marked Specification for the Fence
Catchwords:	Dividing fence – give and take fence.
Legislation Cited:	Dividing Fences Act, 1991 Civil and Administrative Tribunal Act No. 2, 2013
Cases Cited:	Landale v Menzies & Anor 9 CLR 89 Erratt v Local Land Board Armidale [2008] NSWSC 959
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Carol Anne Frost (applicant) Robert Arthur Keough (respondent)
Representation:	Mr D Clifton, Clifton Legal (applicant) Ms S Burnheim, APJ Law (respondent)
File Number(s):	COM 14/50597
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REASONS FOR DECISION

- 1 The applicant, Carol Frost is the owner of a property called Robindale being lot 132 in Deposited Plan 753260. The property is located at Swanvale in New South Wales.
- 2 Her neighbour is the respondent, Robert Keough who owns lot 154 in Deposited Plan 753260. This property is known as Tryagain.
- 3 The boundary between the two properties is the centreline of Little Oaky Creek.
- 4 The applicant seeks an order from the Tribunal under the Dividing Fences Act, 1991.

- 5 The applicant originally commenced proceedings in the Local Court of New South Wales at Armidale, the Local Court also having jurisdiction to determine applications under the Dividing Fences Act. On 9 October 2014 the Local Court made an order, by consent, transferring the proceedings to the Tribunal.
- 6 There is no dispute in these proceedings that the Tribunal has jurisdiction to hear and determine this application. In this regard there is no dispute that:
- (a) that there is no sufficient dividing fence; and
 - (b) notice has been given by the applicant to the respondent to contribute towards carrying out necessary fencing work.
- 7 It is also common ground that the fence cannot be erected on the boundary which is Little Oaky Creek, and in these circumstances that it is appropriate for the Tribunal to make an order for the provision of what is known as a “give and take” fence.
- 8 Such a fence becomes necessary where it is not possible to place the fence of the boundary line due to the physical features of the land or where it might be considered unduly expensive because it is unnecessarily long.
- 9 The parties agree that the expression “give and take fence” has the meaning described by Barton J in *Landale v Menzies & Anor (1909) 9 CLR 89*, where his Honour said at page 105:
- “The very name imports the thing that happens, namely, an adjustment of the direction of the fence by way of compromise. Each holder gives some country and some water, and takes—that is receives—some of each from his neighbour. Thus a less tortuous line is achieved, to the great benefit of both parties in the saving of first cost and upkeep... but it is the part of each to see to it that the “give and take” process amounts to what is called a fair deal- and that in respect not only to the land but of the water and the chances of water... where there is water, the obtaining a fair share of it is of course a more important consideration than the gain of the occupation of a few acres for each of which the yearly rent is but a few pence.”
- 10 The application of this concept to the Dividing Fences Act, 1991 in making orders where the boundary is defined as being the middle line of a creek was confirmed by the Supreme Court in *Erratt v Local Land Board Armidale [2008] NSWSC 959* at paragraph [14].
- 11 Each party asserted there was an agreement reached between the parties at an earlier point in time as to the location of the fence.
- 12 The applicant says that the fence should be constructed along the line or close to the line of a previously existing fence which the applicant said constituted the “historic boundary” being the line shown in black on Annexure A to the applicant’s submissions dated 13 May 2015. In the alternative, the boundary fence should be located along the line shown in red on Annexure B to those submissions.
- 13 On the other hand, the respondent says that the fence should be constructed along the top of the bank of Little Oaky Creek in the position of the black line marked on Annexure A to the respondent’s submissions dated 13 May 2015. In this regard the respondent says he has already fenced that section of the fence line shown on his Annexure A being the eastern end of the creek and that the applicant should fence the western section on her side of the creek.

Evidence and submissions

- 14 Each of the parties filed a bundle of documents.
- 15 In the case of the applicant's bundle, this included five statements from the applicant, Mr McKinlay, Mr Wood, Mr Little and Mr Willis. The statements from Mr McKinlay and Mr Little, were not relied upon at the hearing. In the case of Mr Willis, his statement was admitted in evidence and he was not required for cross examination.
- 16 The respondent's bundle included a statement from him with various annexures. Included as an annexure was a statement from N.D. Wright (Attachment A).
- 17 Each of the applicant and her witnesses Mr Wood and Mr Keough were cross examined. The oral evidence related to whether there was an existing boundary fence and where was it located, whether there was an agreement in relation to the proposed new boundary fence and where it should be located. In this regard the parties gave evidence about particular features of the land, including the creek bed and the location of water holes. The parties also gave evidence concerning flooding which had occurred and the damage caused by those floods to existing fences.
- 18 The respondent also gave evidence about the fencing work which he had in fact carried out on the bank of the Little Oaky Creek at the eastern end.
- 19 At the conclusion of the hearing the parties were directed to provide written submissions to the Tribunal. The applicant's submissions can be summarised as follows:
- (a) there was originally a boundary fence in the location generally marked in a black line on Annexure A to the submissions.
 - (b) the evidence from Mr Willis together with the photographic evidence should satisfy the Tribunal that there was, in the location depicted, a netting fence which constituted a give and take fence dividing the properties.
 - (c) to the extent the respondent asserted the fence was only an "internal fence", this suggestion should be rejected because the fence clearly crossed Little Oaky Creek at various locations and, in the absence of any other dividing fence, the Tribunal should conclude it was the original boundary fence.
 - (d) locating the fence upon the old fence line, the location of which is established by the evidence, would provide to the respondent access to a water hole which the applicant says the respondent described as "one of the last to dry during the recent drought." This is the water hole marked as "YY" on the respondent's Annexure M. It would also provide her with access to "a water hole located on the bend of the creek that provided good water for her stock (marked as "ZZ" at Annexure M of the respondent's statement)". In this regard the applicant relied on the respondent's submission that the water hole she preferred access to was "an inferior water hole that only filled during a flood event and may need to be filled".
 - (e) locating the fence on the "historic boundary" would also be appropriate to mitigate the impact of flood waters and was sufficient to avoid the effects of high flow rates of water during floods due to the force of any flooding

being dissipated.

- 20 In the alternative, the applicant contends for a location closer to the creek on the north side (slightly south of the location of the “historic line” of the old fence). However the applicant says such location is not preferred due to the greater force of flood waters. The applicant concedes that the proposed choice of fencing construction (namely five strands consisting of three top barb wires and plain wire on the two lower runs rather than netting) would minimise flow resistance and debris retention in the fence in this alternative location.
- 21 In relation to the process for construction and who should pay, the applicant says that a survey should be ordered prior to construction of the fence because “it is essential that each party be absolutely clear as to the location of the fence and that such fence is referable to fixed survey points available to the parties and the Tribunal in the event of dispute”. The applicant submits the survey should be ratified by the Tribunal prior to construction of the fence.
- 22 In relation to the fence type the applicant is broadly in agreement with the respondent’s proposed construction type save that the applicant proposes the bottom two wires be plain wires to minimise retention of flood born debris.
- 23 In relation to the costs of construction the appellant submits that the Tribunal should make an order under section 8 of the Dividing Fences Act against the respondent to the effect that the respondent pay for the costs of the fence in that location marked “section 1” on Annexure A of the applicant’s submissions. This is because the applicant says the respondent deliberately damaged or destroyed the existing fence which needs to be restored
- 24 The applicant also made submissions about what, if any, compensation should be ordered in favour of the respondent by reason of the proposed fencing out of the respondent’s property creek flat areas on the north side of Little Oaky Creek. In this regard the applicant relied on paragraphs [9]-[11] of her statement and submitted that there was an agreement in place as to the construction and location of a replacement boundary fence. The applicant submits there was consideration for this agreement by reason of the adjustment to land and creek access which was agreed.
- 25 The applicant submitted that by reason of the “historic boundary” location and notwithstanding the respondent had utilised land south of the boundary line towards the creek, that the Tribunal should conclude there was no legal right to obtain compensation for any loss of amenity and that no compensation should, in these circumstances, be ordered.
- 26 Finally, the applicant says that an order for costs should be made under section 60 of the Civil and Administrative Tribunal Act because special circumstances exist when regard is had to the relative strength of each party’s case.

Respondent’s submissions

- 27 The respondent submits that there has never been a boundary fence between the

- properties and that the fence depicted by a black line in Exhibit A was an internal fence.
- 28 The respondent says that he did not seek any financial assistance in relation to the maintenance of the fence, a matter not disputed by the applicant. He says that an “old worn out depleted fence” originally “ran along the Northern side of Little Oaky Creek from the most eastern point to the access road and crossed over to the southern side” at the point marked “X” on Exhibit A. This the respondent described as the “historic boundary fence”.
- 29 The respondent noted that there was no current dividing fence between the properties apart from the “blue line” marked on Exhibit A being the one identified in paragraph 35 of his statement.
- 30 The respondent submitted that the location of any fence ordered by the Tribunal should be as proposed in Annexure A to his submissions. This is the approximate location which the respondent says was the subject of an agreement with the applicant: see paragraph 26 of his statement and Annexure “G” of the respondent’s statement (page 19).
- 31 At this point it should be noted that this location is different to the location which is depicted in Annexure J of the respondent’s statement (page 25) and that in paragraph 42 of the respondent’s statement he said the line “depicted in green was the original agreement that I had with Ms Frost for the erection of her side of the fence”.
- 32 The respondent also submits there was an oral agreement between the parties as to the proposed location of a new boundary fence. The proposed location of the fence which he says was agreed is different to that the applicant says was agreed.
- 33 The respondent says he undertook fencing on the north side of Little Oaky Creek in accordance with the agreement. While he accepts he was going to get a quote for the fencing work pursuant to the proposed agreement, he says the quote was for his half of the proposed fence work and that he decided not to get the quote because he was going to undertake the fencing work himself.
- 34 The respondent submits that locating the fence in the position he proposes will provide access to appropriate water holes. On the other hand the respondent says that the applicant’s proposal “provides the respondent with minimal creek frontage”.
- 35 In relation to access to the creek flat area will generally in the area marked on Exhibit A as “4000m²”, the respondent says he has been using this land to sow oats and has grazed stock on that land in 2014 and before then. He submits that the creek flat area is the “only farming land available to the respondent” on his farm consisting of about 1614 acres and that a reduction in his farming land will cause a large financial burden.
- 36 In relation to flooding, the respondent says the applicant has never seen a significant flood event or any damage which has been caused to fencing by reason of flooding. However, the respondent submits that the evidence of Mr Wood confirms the fence which the respondent describes as “the internal fence” has laid down when subjected to flooding. (This fence is the one the applicant contends was the old boundary fence

which the respondent demolished.) Therefore the respondent submits that it is appropriate to locate any fence on the high banks on each side of Little Oaky Creek in the manor depicted in Annexure J to his statement or, alternatively in Annexure A to his submissions.

- 37 In relation to why any replacement fence should not be located on the so called "internal fence" line the respondent says that he provided evidence concerning flooding, erosion and the location of "high banks".
- 38 In relation to the provision of a survey, the respondent resists any order for a further survey and says that the Tribunal should make final orders without the need for a further hearing.
- 39 In relation to the type of fence, the respondent agrees the top three wires should be barbed wire but disagrees that the two bottom wires should be plain wire. The respondent says that these wires should also be barb wires and that the difference in wire will have little or no effect on the catching of debris. On the other hand, the respondent contends that the barbed wire "may prevent young live stock from going through the fence."
- 40 In relation to the costs of construction and the submissions concerning section 8 of the Dividing Fences Act, the respondent says the Tribunal should reject this claim because the fence in question was an internal fence which was, in any event, in a state of disrepair and was not sound, serviceable or stock proof. Further, the respondent says that the evidence establishes that the fence had been demolished prior to the time the dispute arose. Therefore there was no justification for an order to be made against the respondent under section 8.
- 41 In relation to the issue of compensation, the respondent says he has farmed the land up until August 2014 and has baled hay, up to 70 bales. The respondent contends that the loss of land would be approximately 2.36 acres and that the map provided by land partners detailing the area in question should not be accepted because it is not sufficiently detailed.
- 42 Finally, the respondent says that costs should be determined at a later date depending upon the outcome of the proceedings. In this regard the respondent says he was entitled to pursue the agreement between the parties and that there were competing arguments in relation to the terms of this agreement which needed to be resolved. Because he has "tried to negotiate a boundary line" and tried to resolve this issue since he purchased this property with the various owners, no order for costs should be made in the circumstances.
- 43 In summary, the respondent submits that his proposed fence location adequately takes account the topography of the land, the flow of flood waters, erosion, drought events. On the other hand, in his experience as a fencer and a farmer he says an order in the terms proposed by the applicant would have a detrimental effect on the respondent's land and the value of his property. Accordingly, the applicant's proposal "is not in the spirit of a give and take boundary fence."

Consideration

44 The issues raised by the parties are the following:

- (a) was there an agreement between the parties in relation to the construction of a boundary fence and its location;
- (b) was there originally a boundary fence, should any new fence be constructed in the same location and should the location of the fence be surveyed;
- (c) what type of fence should be constructed;
- (d) who should pay the costs of the fence and should an order be made under section 8 by reason of the respondent demolishing an existing fence; and
- (e) should an order for costs be made in the proceedings.

45 Each of these issues will be dealt with in turn.

Was there an agreement between the parties in relation to the construction of a boundary fence and its location

46 Each of the parties provided evidence concerning an oral agreement in relation to the construction of a replacement boundary fence.

47 The terms of the agreement for which the applicant contends are set out in paragraphs 9 and following of their statement dated 27 January 2015. The respondent gave a different version of events which are recorded at paragraphs 24 and following of his statement.

48 The parties recollections of what was agreed are quite different both as to the location of the fence (a matter evident from the drawings to which they have referred in their evidence), and as to obtaining quotations for the work and the purpose of those quotations.

49 Further, there is conflicting evidence as to whether:

- (a) the respondent commenced constructing a new fence on the south side of Little Oak Creek in the eastern section, which the applicant contended the respondent took down; or
- (b) the respondent commenced constructing a fence on the northern side of Little Oak Creek at the eastern boundary in accordance with the agreement which he said had been reached with the applicant.

50 The parties were cross examined about this aspect of the case and about that part of the agreement which required the respondent to obtain quotations which were to be assessed by the applicant prior to any fencing work being undertaken.

51 The only common features of the evidence are that:

- (a) both parties agree they had a conversation in about 2011 concerning the boundary fence; and
- (b) it was agreed between them that the respondent would obtain a quotation.

52 In this regard the respondent gave evidence that the quotation was limited to his half of

the fence but he says he decided to do the fencing work himself and did not get a quotation. The applicant says it was agreed that each party would obtain quotes for the work which would be compared.

- 53 At the time these discussions were taking place, the applicant had not served any notice under the Dividing Fences Act. She had recently purchased the property (in May 2011) and, no doubt both parties were, at that time, seeking to reach an agreement about what works needed to be done.
- 54 The question which arises is whether or not the parties had reached an agreement concerning the fencing work. As with all agreements, this would require the Tribunal to conclude that the requirements for the formation of a contract are met, namely that there was an offer, acceptance and consideration or, alternatively, a contract should be inferred by reason of an arrangement between the parties and action of the parties in performance of what was agreed.
- 55 In the present circumstances, the Tribunal is not satisfied that, objectively assessed, the parties had reached an agreement for the construction of a give and take dividing fence.
- 56 This is because the precise location of the fence, on either party's view, had not been determined. Further, the type of fence, the costs of the fence and who was going to construct the fence had not been agreed.
- 57 A common feature of the evidence provided by the parties was that a quotation or multiple quotations were to be obtained for the purpose of determining the cost of the fence. It is common ground on the evidence provided to the Tribunal that the respondent was to obtain a quotation and did not do so.
- 58 In the absence of an agreement as to the location of the fence, who would construct it, the materials to be used and the price to be paid by each party, the necessary legal requirements for the formation of an agreement have not been satisfied and the Tribunal has no basis to otherwise conclude that a binding agreement was entered into between the parties.

Was there originally a boundary fence, should any new fence be constructed in the same location and should the location of the fence be surveyed

- 59 As is evident from the submissions made by the parties there is a significant dispute concerning whether or not the fence generally in the location marked section 1 on Annexure A to the applicant's submissions constituted a boundary fence. Also, there is a dispute about whether or not there was an alternative fence, for which the respondent contends, in a different location closer to the creek.
- 60 The Tribunal has been provided with various photographic evidence including a picture of the section of the fence at about section 1 and some photographs of the fence taken in about 2010. The first is an aerial photograph taken on 20 June 2010 and the second is a coloured photograph taken from the south side of Little Oak Creek showing the creek crossing and the access road back to Spring Mountain Road on about 20 August

2010.

61 The fence which the respondent describes as “an internal fence” is a netting type fence with barb wire and wooden posts. The aerial photograph taken in 2010 shows that to the northern side of that fence there was various cultivation activities and to the southern side of the fence there were no cultivation activities, at least to the east of the access road to the appellant’s property.

62 There are no other clearly discernible features on the aerial photograph taken in 2010 which would indicate the existence of another fence dividing the two properties.

63 In circumstances where there is competing evidence and the only objective evidence is the photographic material taken in about 2010, on the balance of probabilities the Tribunal is satisfied that the aerial photograph and the coloured photographs taken at this time support the applicant’s evidence that the fence shown on the aerial photograph and generally marked in the black line on Annexure A of the appellant’s submissions was in fact a boundary fence originally dividing the two properties.

64 Further, the Tribunal is satisfied from viewing the photographic evidence showing the fence during a flood event that this fence had fallen into a state of disrepair and would in any event require demolition and reconstruction.

65 Notwithstanding this conclusion, in the opinion of the Tribunal the fence in its present location as proposed by the applicant in her primary submission is not an appropriate location for a new dividing fence having regard to the following reasons:

- (1) the amount of land which the respondent would be required to give to the applicant is greater than the amount of land the respondent would receive,
- (2) the creek frontage access would be less than a reasonable allocation; and
- (3) a fence in this location may deprive the respondent of some usable farming land

66 On the other hand, a fence generally constructed in the location shown on the red line of Annexure B to the applicant’s submissions would correct this imbalance, provide a reasonable give and take adjustment as shown in the areas of the bends to Little Oak Creek marked “Abt 2500m²” and “Abt 4000m²”. In addition, it would provide to the respondent the water hole which he asserts is a more secure water hole shown at YY on Annexure M to his statement and also access to the waterhole at the eastern end marked with a circle on Annexure M. It would provide to the applicant the water hole which she prefers shown at location XX in Annexure M. Of course, at the time of hearing the evidence was that the creek was running so each party will have general access to water unless there is a drought.

67 As to the respondent proposal, the Tribunal is not satisfied it will provide reasonable access to the various water holes and a construction line following the creek bank will result in a fence of greater length and cost.

68 The result will be that the give and take dividing fence will cross the creek at close to the current creek crossing shown in Exhibit B. However, the location of the fence, consistent with Annexure B to the applicant’s submissions, should be marked by a

surveyor. To the extent necessary the line should be adjusted to accommodate any minor topographical issues or amendments to the location required because of existing trees. A survey plan should also be prepared to record the final location. In this regard the fence should cross the access road and cross the creek on the east/ north east side of the access road into the applicant's property. This will allow a gate to be placed across the road, away from the creek bed, at approximately the northern bank of Little Oaky Creek.

What type of fence should be constructed

- 69 Neither party contended for the construction of a netting fence, the reason being that both parties say that the fence is in a location where Little Oaky Creek might flood and that a five strand fence, rather than a netting or ringlock type fence, would be more appropriate to avoid the fence being damaged by collecting debris from any flood event.
- 70 The difference between the parties is whether or not the two bottom strands of a five strand fence should be plain wire (as contended by the appellant) or barb wire (as contended by the respondent) and whether the wooden posts should be that 10 m centres or 12 m centres.
- 71 The purpose of the fence is, in part, to keep stock separated between the two properties. The respondent said that the two barb wires on the bottom of the fence would assist in stopping young stock passing between the properties. The applicant did not disagree with this fact however submitted that the use of barb wire on the bottom two runs would likely catch more debris in the event of a flood. Also the respondent suggested timber split posts at 12 m centres, not 10 m centres.
- 72 While it may be the case that a flood event could result in debris being caught in the barb wire, in the opinion of the Tribunal the fence needs to be constructed in a manner likely to retain stock on the correct property. Having regard to the evidence provided by the respondent, it is more probable that this will be achieved by the use of barb wire on the bottom two runs. While there is a possibility of damage to the fence on occasion by a flood event, the type of construction should not make overly difficult any repairs that might be required. It was not suggested that flooding is a regular event in this location and, even if they were, any repairs will be part of the usual maintenance process required for fences in flood prone areas.
- 73 Further, having the timber posts at 10 metre centre will make the fence sturdier.
- 74 In relation to installation of a cattle grid, absent agreement and in circumstances where the dividing fence will be located close to the creek, a gate is appropriate rather than a cattle grid. This is because a cattle grid may fill up with debris from a flood event. Lastly, stock may cross any grid whereas a fence will be more secure.
- 75 Accordingly, the specifications for the fence will be as follows:
- (1) Timber split posts to be located at 10 metre centres with two steel posts equidistant between;

- (2) The fence is to comprise five barb wire runs;
- (3) The strainers and stays are to be timber;
- (4) Creek crossing to be constructed of flood rails or otherwise as agreed;
- (5) A gate is to be installed at the point where the fence crosses the access road on the north side of Little Oaky Creek (as described in the reasons above), unless otherwise agreed by the parties. and having regard to the final location of the fence determined by the surveyor;

Who should pay the cost of the fence and should an order be made under section 8 against the respondent

- 76 In the opinion of the Tribunal no order should be made under section 8 of the Dividing Fences Act, 1991 so as to require the respondent to pay the whole of the costs for that part of the fence constructed in the general area of section 1 shown in Annexure B to the applicant's submissions.
- 77 Rather, the costs of erecting the new fence should be shared equally. The reasons for this conclusion are as follows:
- (1) while the Tribunal has accepted that the so called "internal fence" was in fact an original boundary fence, the fence was in a state of disrepair and needed to be replaced prior to the applicant serving any notice under the Dividing Fences Act.
 - (2) the new fence is to be located in a different position, south of the original fence. Therefore demolition of the original fence would have been required in any event.
 - (3) lastly, the fence construction proposed by both parties is different to the original type of fence and no reason otherwise exists as to why the parties should not share equally in the costs of undertaking the work.

Is the respondent entitled to compensation

- 78 As is apparent from the Tribunal's reasons concerning the location of the new fence, there was some disparity concerning the land allocation, in a "give and take" sense, in favour of the applicant if the Tribunal were to make an order that the dividing fence be located in the position of the black line shown on Annexure A to the applicant's submissions.
- 79 However, constructing the fence in the location depicted by the red line shown in Annexure B of the applicant's submissions will provide additional creek flats area to the respondent. While the respondent will not have access to the area marked "Abt 4000m²", south of the red line in the bend of Little Oaky Creek (see Annexure B), he will retain existing grazing land shown in the bend of Little Oaky Creek marked "Abt 2500m²" on Annexure B.
- 80 This approach will provide additional farming land on the north side of Little Oaky Creek from where the original fence was located which is of value to the respondent and which he has previously farmed.
- 81 While there is a slight disparity in the give and take areas, the Tribunal is satisfied that no order for compensation should be made. This is because the adjust fence line

provide the respondent with access to most of the identified creek flats for farming and the respondent will have access to the waterhole he identifies is most reliable.

82 This view is also consistent with:

- (1) the evidence of the respondent that the area on the creek bend to be “fenced out” may be subject to flooding and erosion. These facts would limit farming activities which can be carried out in that location in any event; and
- (2) the fact that the creek frontage for each party, based on Annexure B, will be roughly of equal length

Should an order for costs be made in the proceedings

83 The Tribunal has power to award costs under section 23 of the Dividing Fences Act.

84 Each of the parties has had some success in relation to the application.

85 While the applicant has succeeded in obtaining an order for fencing work, the location of the fence is not in the position originally contended for by the applicant and the type of fence is, in part, of the construction proposed by the respondent. Also, the applicant failed in her claim under section 8 of the Dividing Fences Act.

86 On the other hand, the respondent has not succeeded in having the fence constructed in the location he proposed. Also, he did not succeed on the claim for compensation.

87 Taking account of these matters in the opinion of the Tribunal it is appropriate to make an order that each party pay their own costs.

Orders

88 The Tribunal makes the following orders:

- (1) A dividing fence is to be constructed in the location generally shown in Annexure B to the applicant’s submissions dated 13 May 2015 in a manner consistent with these Reasons for Decision and in accordance with the Specification for the Fence set out below;
- (2) A surveyor is to be appointed to mark out the proposed fence line. Unless otherwise agreed, the surveyor is to be the surveyor used by the applicant to prepare the drawing forming part of Annexure B to the applicant’s submission dated 13 May 2015;
- (3) The cost of the fence (including the costs of the surveyor) is to be shared equally;
- (4) In the event the parties cannot agree to carry out half the work each, a single contractor is to be jointly appointed to carry out the whole of the work;
- (5) In the event the parties cannot agree a single contractor, each party is to obtain and provide to the Tribunal a quotation from a qualified contractor. In this event the parties are to jointly write to the Tribunal to list the application to enable appropriate orders to be made;
- (6) The cost of the maintenance of the fence is to be shared equally;
- (7) The fencing work is to be completed on or before 30 September 2015;
- (8) Each party is to pay their own costs of this application;
- (9) The parties have liberty to apply to the Tribunal in respect of any dispute

concerning the implementation of these orders.

Specification for the Fence

The fence is to be constructed of the following materials and dimensions and to the following standards:

- (a) Timber split posts to be located at 10 metre centres with two steel posts equidistant between;
- (b) The fence is to comprise five barb wire runs;
- (c) The strainers and stays are to be timber;
- (d) The flood fence at the creek crossing is to be constructed of flood rails or otherwise as agreed;
- (e) A gate is to be installed at the point where the fence crosses the access road on the north side of Little Oaky Creek (as described in the Reasons for Decision), unless otherwise agreed by the parties, and having regard to the final location of the fence determined by the surveyor;
- (f) All work to be carried out in a competent and workman like manner;
- (g) Materials are to be new unless otherwise agreed.

M Harrowell

Principal Member

Civil and Administrative Tribunal of New South Wales

23 July 2015

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

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Decision last updated: 04 September 2015