

NOTICE OF FILING

Details of Filing

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File Title: FORTESCUE LIMITED ACN 002 594 872 & ORS v ELEMENT ZERO PTY LIMITED ACN 664 342 081 & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Further Amended Statement of Claim

(Amended *by leave* pursuant to *order 1 made on 23 October 2024*)

No. NSD 527 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

Fortescue Ltd (ACN 002 594 872) and others

Applicants

Element Zero Pty Ltd (ACN 664 342 081) and others

Respondents

A. Parties

A.1 Applicants

1. The first applicant, **Fortescue Ltd** (ACN 002 594 872):
 - (a) is a publicly listed company incorporated under the laws of Australia;
 - (b) is able to sue; and
 - (c) was formerly named "Fortescue Metals Group Ltd"; and
 - (d) is the ultimate holding company of the second and third applicants.
2. The second applicant, Fortescue Future Industries (ACN 625 711 373) (**FFI**):
 - (a) is a company incorporated under the laws of Australia;
 - (b) is able to sue; and
 - (c) was formerly named "Fortescue H2 Pty Ltd".
3. The third applicant, FMG Personnel Services Pty Ltd (ACN 159 057 646) (**FMGPS**):
 - (a) is a company incorporated under the laws of Australia;
 - (b) is able to sue;

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- (c) is the employing entity of employees working for companies within the group of companies controlled by Fortescue Ltd (**Fortescue Group**); and
 - (d) is the former employer of the second, third and fourth respondents.
4. Fortescue Ltd, FFI and FMGPS are together referred to as "**Fortescue**" unless otherwise specified.

A.2 Respondents

5. The first respondent, Element Zero Pty Ltd (ACN 664 342 081) (**Element Zero**), is:
- (a) a company incorporated under the laws of Australia, registered since 7 December 2022, with its registered office at Suite 3 Level 2, 66 Clarence Street, Sydney, NSW;
 - (b) liable to be sued;
 - (c) the named applicant for Australian provisional patent applications:
 - (i) no. 2022903090 entitled "Method of Ore Processing" (**090 Application**);
 - (ii) no. 2023902103 entitled "Ore Processing Method for Metal Recovery" (**103 Application**); and
 - (iii) no. 2023903979 entitled "Electrowinning from Molten Salt" (**979 Application**); and
 - (d) the named applicant for PCT application no. PCT/AU2023/051041, published as publication no. WO/2024/082020 (**PCT Application**) on and from about 25 April 2024.
6. The patent applications in subparagraphs 5(c) and 5(d) are together referred to as the **Patent Applications**.
7. The Second Respondent, Dr Bartłomiej Piotr **Kolodziejczyk**:
- (a) is a natural person resident in Victoria;
 - (b) is able to be sued;
 - (c) was employed by FMGPS from about 25 March 2019 to about 5 November 2021;
 - (d) during his employment with FMGPS, held the following roles in FFI:
 - (i) from about 1 July 2020 to about 21 June 2021 — FFI's Chief Scientist – Energy; and

- (ii) from about 22 June 2021 to about 5 November 2021 — FFI's Chief Scientist;
- (e) since 7 December 2022, has been a director and the Chief Technology Officer (**CTO**) of Element Zero; and

Particulars

- (i) *Dr Kolodziejczyk is identified as Element Zero's Chief Technology Officer on its website at URL: <https://elementzero.green/about-us/>.*
 - (f) since about December 2022, has owned 1000 ordinary shares in Element Zero, which is one-third of the ordinary shares issued by Element Zero.
8. The Third Respondent, Dr Bjorn **Winther-Jensen**:
- (a) is a natural person resident in Western Australia;
 - (b) is able to be sued;
 - (c) was employed by FMGPS or alternatively FFI, from about 15 February 2021 to about 12 November 2021;
 - (d) during his employment with FMGPS or alternatively FFI, held the role of FFI's Technology Development Lead;
 - (e) in that role, reported to the following people:
 - (i) from about February 2021 to about 23 June 2021 — to the fourth respondent (Mr Masterman); and
 - (ii) from about 24 June 2021 to about 5 November 2021 (the end of Dr Kolodziejczyk's employment with FMGPS) — to Dr Kolodziejczyk.
 - (f) was, in the period from 7 December 2022 to 11 January 2024, a director of Element Zero; and
 - (g) since about December 2022, has owned 1000 ordinary shares in Element Zero, which is one-third of the ordinary shares issued by Element Zero.
9. The fourth respondent, Michael George **Masterman**:
- (a) is a natural person resident in Australia;
 - (b) is able to be sued;

- (c) was employed by FMGPS from about 15 October 2020 to about 31 July 2022;
- (d) during his employment with FMGPS in paragraph 8(g)(c), held the role of FFI's Chief Financial Officer (**CFO**);
- (e) was a director of FFI from about 3 February 2022 to about 4 July 2022;
- (f) since 7 December 2022, has been a director and the Chief Executive Officer (**CEO**) of Element Zero;

Particulars

- (i) *Mr Masterman is identified as Element Zero's Chief Executive Officer on its website at URL: <https://elementzero.green/about-us/>.*
- (g) since about December 2022, has (through **Symmall** Pty. Limited ACN 080 538 530) has owned 1000 ordinary shares in Element Zero, which is one-third of the ordinary shares issued by Element Zero; and
- (h) since about August 2023, has (through Symmall) owned about 25% of the non-cumulative redeemable preference shares issued by Element Zero.

B. Background facts

B.1 Green Iron R&D at Fortescue

10. Since about November 2019, Fortescue (through FFI) has undertaken substantial research and development of new technologies for reducing iron ore to metallic iron using renewable energy sources. Iron produced using such technologies is commonly referred to in the minerals industry as "**Green Iron**".
11. One type of Green Iron technology in which Fortescue (through FFI) has undertaken substantial research and development involves the direct electrochemical reduction of iron oxide in iron ore to create metallic iron (**Direct Electrochemical Reduction**).
12. In a period not precisely known to Fortescue, but during their roles in FFI, each of Dr Kolodziejczyk and Dr Winther-Jensen undertook, and caused other employees of FMGPS to undertake, confidential research and development work into one or more Direct Electrochemical Reduction processes, having at least the following features:
 - (a) an electrochemical reduction process;
 - (b) utilises electrowinning;
 - (c) membrane free;

- (d) operates at low temperature;
- (e) utilises an ionic liquid electrolyte; and
- (f) is capable of operating using renewable electricity sources

(Ionic Liquid R&D).

Particulars

- (i) *Inferences available from the emails and attachments referred to in the affidavit of Dr Anand Indravadan Bhatt, including:*
 - (ii) *A patent assessment form describing an invention titled “Low-temperature Electrochemical Ore Reduction” completed and signed by Dr Kolodziejczyk dated 22 December 2020 (**Patent Assessment Form**) and sent via email to his manager Robert Grant on that day.*
 - (iii) *The documents referred to in paragraphs 56 to 66, 73 to 82 of the affidavit of Dr Anand Indravadan Bhatt affirmed on 1 May 2024 and the annexures thereto, and inferences arising therefrom.*
 - (iv) *The documents referred to in paragraph 55 of the affidavit of Susanne Monica Hantos affirmed on 1 May 2024 and the annexure thereto, and inferences arising therefrom.*
 - (v) *It can reasonably be inferred from one or more of particulars (i)-(iv) that Dr Kolodziejczyk and/or Dr Winther Jensen undertook, and caused other employees of FMGPS to undertake, confidential research and development work relating to Ionic Liquid R&D, including as recorded in documents in addition to those referred to in (i)-(iv) above.*
 - (vi) *Further particulars may be provided, including after discovery.*
13. Information created by Dr Kolodziejczyk, Dr Winther-Jensen and/or other employees of FMGPS in undertaking Ionic Liquid R&D (**Ionic Liquid R&D Information**) was at all material times confidential information belonging to Fortescue.

Particulars

(i) [Particulars as to the information constituting the Ionic Liquid R&D Information:](#)

1. [The Patent Assessment Form.](#)

2. The information referred to in the 'Summary of Invention' and 'Specific Inventive Element' sections of the Patent Assessment Form.

3. The Applicants are presently unable to provide further particulars by reason of the matters in paragraph 14 below.

(ii) Particulars as to the confidentiality of the Ionic Liquid R&D Information:

1. *The nature of the Ionic Liquid R&D information, being information generated through commercial research and development work.*
2. *Admission by Dr Kolodziejczyk in the Patent Assessment Form, page 3: "No, invention has not been publicly disclosed. All information related to this invention is kept internally within [FFI]."*
3. *The email sent by Dr Kolodziejczyk to Ashlee Crabbe, senior media and corporate affairs specialist, and others at Fortescue dated 22 January 2021 at 11:41am: "The selection of electrolyte, electrode material, and other materials used in the process is proprietary, and at this point, Fortescue's trade secret".*
4. *Fortescue's IT systems used by Dr Kolodziejczyk, Dr Winther-Jensen and others within FFI are protected by access controls, including passwords.*
5. *The information was not publicly available, and the circulation of that information was limited to Fortescue staff.*
6. *Confidentiality obligations imposed on Fortescue staff in employment agreements and confidential agreements.*

(ii)(iii) Further particulars may be provided, including after discovery.

14. Fortescue cannot locate many of the documents recording the Ionic Liquid R&D Information referred to in paragraphs 12 and 13 above, from which it can be inferred that

Dr Kolodziejczyk and/or Dr Winther-Jensen took or otherwise caused those documents to be unavailable to Fortescue before he or they ceased employment with FMGPS.

Particulars

- (i) *Searches of Fortescue's records for Ionic Liquid R&D described in the affidavit of Ms Susanne Monica Hantos.*
- (ii) *Inferences available from the affidavit of Dr Anand Indravadan Bhatt.*
- (iii) *Further particulars may be provided, including after discovery.*

B.2 Dr Kolodziejczyk and Dr Winther-Jensen resign (Oct-Nov 2021)

- 15. On about 22 October 2021, Dr Kolodziejczyk gave notice of his intention to cease employment with FMGPS and cease acting in his role with FFI.
- 16. On about 3 November 2021, Dr Winther-Jensen gave notice of his intention to cease employment with FMGPS (or alternatively FFI) and cease acting in his role with FFI.
- 17. Dr Kolodziejczyk ceased employment with FMGPS and ceased acting in his role with FFI on about 5 November 2021.
- 18. Dr Winther-Jensen ceased employment with FMGPS (or alternatively FFI) and ceased acting in his role with FFI on about 12 November 2021.

B.3 Dr Kolodziejczyk and Dr Winther-Jensen exfiltrate Fortescue material (Oct-Nov 2021)

- 19. In an unknown period before the date pleaded in paragraph 17 above, but from at least about September 2021 to October 2021, Dr Kolodziejczyk obtained Fortescue information relating to the design, engineering, construction, operation and/or feasibility of a Green Iron pilot plant.

Particulars

- (i) *Report on the forensic image of Dr Kolodziejczyk's Fortescue laptop referred to in the affidavit of Mr Adrian Huber, identifying the following documents:*
 - 1. *File named "Green Iron Update (02.08.2021).pdf";*
 - 2. *Copies of the specifications and drawings, as filed on 24 May 2021, of Australian provisional patent application no. 2021901547 entitled 'Apparatus and process for producing iron' in the name of*

Fortescue Future Industries Pty Ltd, including documents with the file names "35557986AU- Specification as filed (35557986).pdf" and "35557986AU - Drawings as filed (35557986).pdf";

3. *Document titled "Basis of Design – Chameleon Pilot Plant" having document number or file name FFI0302-10000-00-EG-BOD-0001; and*
 4. *File named "Bumblebee PID markups 26_10_21.pdf"*
- (ii) *The SharePoint documents identified in paragraphs 112 to 118 of the affidavit of Dr Anand Indravadan Bhatt affirmed on 1 May 2024 and Annexure AIB-29 thereto.*
 - (iii) *The internal Fortescue procedures and specifications listed in paragraph 103 of the affidavit of Mr Wayne McFaull affirmed on 1 May 2024.*
 - (iv) *The facts, matters and circumstances in paragraphs 102 to 106, 111 to 122 of the affidavit of Mr Wayne McFaull affirmed on 1 May 2024, and available inferences arising therefrom.*
 - (v) *It can reasonably be inferred from one or more of particulars (i)-(iv) that Dr Kolodziejczyk took documents and information in addition to that in (i)-(iv) above from Fortescue relating to the design, engineering, construction, operation and/or feasibility of a Green Iron pilot plant.*
 - (vi) *Further particulars may be provided, including after discovery.*
20. In an unknown period before the date referred to in paragraph 18 above, but from at least about 5 to 11 November 2021, Dr Winther-Jensen obtained Fortescue documents relating to the design, engineering, construction, operation and/or feasibility of a Green Iron pilot plant.

Particulars

- (i) *Dr Winther-Jensen used the email address "bjorn.wintherjensen@fmgl.com.au" to send at least the following Fortescue documents to his personal email address "bjornwj@gmail.com":*
 1. *Document named "211029_Iron ore leaching_Report_ASH.R1.docx"*

2. Document named "211014_FFI Green Steel_Ore Leach_ASH_XRF results.csv";
 3. Document named "211014_FFI Green Steel_Ore Leach_ASH_ICP results.csv";
 4. Copies of the specifications and drawings, as filed on 24 May 2021, of Australian provisional patent application no. 2021901547 entitled 'Apparatus and process for producing iron' in the name of Fortescue Future Industries Pty Ltd, including documents with the file names "35557986AU- Specification as filed (35557986).pdf" and "35557986AU - Drawings as filed (35557986).pdf";
 5. Document named "Technical Evaluation.xlsx";
 6. Email from David White sent on 4 November 2024 with Subject "Technical Evaluation of Green Iron process"; and
 7. Document named "Green Iron Update (01.11.2021).pdf".
- (ii) The documents referred to in particulars 20(i)1 to 20(i)6 above described in the affidavit of Dr Anand Indravadan Bhatt.
 - (iii) The document referred to in particular 20(i)(7) above described in the affidavit of Mr John Paul William Testaferrata Olivier.
 - (iv) The SharePoint documents identified in paragraphs 112 to 118 of the affidavit of Dr Anand Indravadan Bhatt affirmed on 1 May 2024 and Annexure AIB-29 thereto.
 - (v) The internal Fortescue procedures and specifications listed in paragraph 103 of the affidavit of Mr Wayne McFaull affirmed on 1 May 2024.
 - (vi) The facts, matters and circumstances in paragraphs 102 to 106, 111 to 122 of the affidavit of Mr Wayne McFaull affirmed on 1 May 2024, and available inferences arising therefrom.
 - (vii) It can reasonably be inferred from one or more of particulars (i)-(vi) that Dr Winther-Jensen took documents and information in addition to that in (i)-(vi) above from Fortescue relating to the design, engineering, construction, operation and/or feasibility of a Green Iron pilot plant.

(viii) *Further particulars may be provided.*

21. Dr Kolodziejczyk engaged in the conduct pleaded in paragraph 19 above without Fortescue's authority.
22. Dr Winther-Jensen engaged in the conduct pleaded in paragraph 20 above without Fortescue's authority.
23. Information referred to in paragraphs 19 and 20 above was at all material times confidential information belonging to Fortescue.

Particulars

- (i) *The nature of the information, being information generated through commercial research and development work or in the commercialisation of that research and development.*
 - (ii) *Fortescue's IT systems used by Dr Kolodziejczyk, Dr Winther-Jensen and others within FFI are protected by access controls, including passwords.*
 - (iii) *The information was not publicly available, and the circulation of that information was limited to Fortescue staff.*
 - (iv) *Confidentiality obligations imposed on Fortescue staff in employment agreements and confidential agreements.*
 - (v) *Further particulars may be provided, including after discovery.*
24. Information in the FFI Green Iron Provisional Application was, until 8 December 2022, confidential information belonging to Fortescue.

Particulars

- (i) *The information in the FFI Green Iron Provisional Application was not publicly available until 8 December 2022. The complete patent application associated with the FFI Green Iron Provisional Application, Australian application no. 2021215184, became open for public inspection on 8 December 2022.*
- (ii) *Particulars 23(i), (ii) and (iv) are repeated.*
- (iii) *Further particulars may be provided.*

C. Breach of confidence

C.1 Fortescue's confidential information

25. Ionic Liquid R&D Information is hereafter referred to as "**Fortescue Process CI**".
26. The information referred to in paragraphs 19 and 20 above is hereafter collectively referred to as "**Fortescue Plant CI**".
27. Fortescue Process CI and Fortescue Plant CI are hereafter collectively referred to as "**Fortescue CI**".

C.2 Respondents' equitable obligations of confidence

28. By reason of:
- (a) the nature of the Fortescue CI;
 - (b) their respective roles within FFI; and
 - (c) the circumstances in which that information came into existence and was obtained by them,

each of Dr Kolodziejczyk and Dr Winther-Jensen was under an equitable obligation to Fortescue to treat the Fortescue CI confidentially, and not to use it for any purpose other than in the course of their employment with FMGPS and for the benefit of Fortescue.

Particulars

- (i) *The roles pleaded in paragraphs 7(d) and 8(d) above.*
- (ii) *The circumstances particularised in paragraphs 13, 19 and 20 above.*
- (iii) *Further particulars may be provided, including after discovery.*

C.3 Element Zero's process and plant

29. Since date/s not known to Fortescue, but after November 2021, Dr Kolodziejczyk, Dr Winther-Jensen and/or Element Zero have commercialised and used a process of electrochemical reduction of iron oxide in iron ore to create metallic iron, having at least the following features:
- (a) an electrochemical reduction process;
 - (b) utilises electrowinning;
 - (c) membrane free;

- (d) operates at low temperature;
- (e) utilises an ionic liquid electrolyte; and
- (f) is capable of operating using renewable electricity sources

(EZ Process).

Particulars

- (i) *The facts, matters and circumstances in the affidavit of Dr Anand Indravadan Bhatt.*
- (ii) *Further particulars may be provided, including after discovery.*

30. Since date/s not known to Fortescue, but since about January 2024 at the latest, Dr Kolodziejczyk, Dr Winther-Jensen and/or Element Zero has or has caused to be designed, engineered, constructed and operated a pilot plant that has the following features:

- (a) performs the EZ Process;
- (b) performs a leaching step before the EZ Process; and
- (c) is capable of processing up to about 100kg of iron ore feedstock per day,

(EZ Plant).

Particulars

- (i) *The public statements made by Element Zero about the EZ Plant and inferences arising therefrom, referred to in the affidavit of Mr Wayne McFaull.*
- (ii) *The facts, matters and circumstances in the affidavit of Dr Anand Indravadan Bhatt.*
- (iii) *Further particulars may be provided, including after discovery.*

C.4 Misuse of Fortescue CI

31. Each of Dr Kolodziejczyk and Dr Winther-Jensen has:

- (a) disclosed Fortescue CI to each of Element Zero and Mr Masterman; and
- (b) used Fortescue CI as follows:

- (i) used Fortescue Process CI in commercialising (including in capital raising) and using the EZ Process;
- (ii) used Fortescue Process CI and Fortescue Plant CI in designing, engineering, constructing, operating and/or determining the feasibility of the EZ Plant or causing those things to be done;
- (iii) to the extent either is an inventor of any invention described or claimed in each Patent Application— used Fortescue Process CI and/or Fortescue Plant CI in inventing the invention so described or claimed; and/or
- (iv) used Fortescue Process CI and/or Fortescue Plant CI in preparing and filing each Patent Application.

Particulars

- (i) *Inferences available from the commonality of the features of the Ionic Liquid R&D pleaded in subparagraphs 12(a) to 12(f) above and the features of the EZ Process pleaded in subparagraphs 29(a) to 29(f) above.*
- (ii) *Inferences available from Dr Kolodziejczyk's and/or Dr Winther-Jensen's exfiltration of the information referred to in paragraphs 19 and 20 above.*
- (iii) *The facts, matters and circumstances in the affidavit of Dr Anand Indravadan Bhatt.*
- (iv) *The facts, matters and circumstances in the affidavit of Mr Wayne McFaull.*
- (v) *The facts, matters and circumstances in the affidavit of Ms Susanne Monica Hantos.*
- (vi) *Further particulars may be provided, including after discovery.*

32. Each of Element Zero and Mr Masterman was under an equitable obligation to Fortescue to treat the Fortescue CI confidentially, and not to use it without Fortescue's authorisation.

Particulars

- (i) *Element Zero knew the Fortescue CI was confidential to Fortescue because its directors (Dr Kolodziejczyk and Dr Winther-Jensen) had that knowledge.*
- (ii) *Mr Masterman knew the Fortescue CI was confidential to Fortescue because:*
 - (A) *of his knowledge of the Ionic Liquid R&D from his roles as FFI's CFO and director;*
 - (B) *of his knowledge of FFI's research and development work in Electrochemical Reduction and Fortescue's development of a pilot plant for Electrochemical Reduction from his roles as FFI's CFO and director; and*
 - (C) *the fact that some of the documents containing the Fortescue CI were marked "Fortescue" or "FFI".*
- (iii) *Further particulars may be provided, including after discovery.*

33. Each of Element Zero and Mr Masterman has:

- (a) used Fortescue Process CI in Element Zero's commercialising (including in capital raising) and using the EZ Process; and/or
- (b) used Fortescue Process CI and Fortescue Plant CI in designing, engineering, constructing, operating and/or determining the feasibility of the EZ Plant or causing those things to be done.

Particulars

- (i) *Particulars to paragraph 31 above are repeated.*
- (ii) *Further particulars may be provided.*

34. Each Respondent disclosed Fortescue CI by causing the PCT Application to be published on and from 25 April 2024.

35. Each Respondent's uses of Fortescue CI pleaded in paragraphs 31, 33 and 34 above was done without Fortescue's authorisation.

36. Each Respondent's uses of Fortescue CI pleaded in paragraph 19, 20, 31, 33 and 34 above was in breach of his or its equitable obligation pleaded in paragraph 28 or 32 above.

D. Breach of duties under the general law and the *Corporations Act*

D.1 General law

37. Subparagraphs 7(c) and 7(d) (Dr Kolodziejczyk) above are repeated.

38. Subparagraphs 8(c) to 8(e) (Dr Winther-Jensen) are repeated.

39. Subparagraphs 9(c) to 9(e) (Mr Masterman) are repeated.

40. By reason of the matters pleaded in paragraphs 37 to 39 above, each of Dr Kolodziejczyk, Dr Winther-Jensen and Mr Masterman owes fiduciary duties to Fortescue under the general law:

- (a) not to use Fortescue CI for his or Element Zero's benefit; and
- (b) not to profit from Fortescue CI.

41. Paragraphs 19, 20, 31, 33 and 34 above are repeated.

42. By reason of the matters pleaded in paragraph 41 above, each of Dr Kolodziejczyk, Dr Winther-Jensen and Mr Masterman has breached the fiduciary duties pleaded in paragraph 40.

43. Each of:

- (a) Element Zero; and
- (b) in the alternative to his breach pleaded in paragraph 42—Mr Masterman,

received Fortescue CI with the knowledge that it was disclosed in breach of the fiduciary duties pleaded in paragraph 40.

Particulars

- (i) *Paragraph 31(a) above is repeated.*
- (ii) *Particulars to paragraph 32 above are repeated.*
- (iii) *Further particulars may be provided.*

44. By reason of the matters pleaded in paragraph 43, each of:
- (a) Element Zero; and
 - (b) in the alternative to his breach pleaded in paragraph 42—Mr Masterman, is liable for Dr Kolodziejczyk's and Dr Winther-Jensen's breaches of the fiduciary duties pleaded in paragraph 42 above.
45. By reason of the matters pleaded in paragraphs 42 and 44 above, each Respondent:
- (a) holds (to the extent he or it has any interest) the inventions the subject of the Patent Applications, and any extant or inchoate patent rights relating to the inventions the subject of those applications, on constructive trust for Fortescue; and
 - (b) is liable to account to Fortescue for any other benefit or profit he or it received in connection with Dr Kolodziejczyk's, Dr Winther-Jensen's and Mr Masterman's breaches of the fiduciary duties pleaded in paragraph 42 above.

D.2 s 183 of the Corporations Act

46. Each of Dr Kolodziejczyk and Dr Winther-Jensen received Fortescue CI because he was:
- (a) an officer of FFI; or
 - (b) an employee of FMGPS.
47. In the premises, each of Dr Kolodziejczyk and Dr Winther-Jensen owes a statutory duty under s 183(1) of the **Corporations Act 2001** (Cth) to not improperly use Fortescue CI to gain an advantage for himself, Element Zero or Mr Masterman.
48. Paragraphs 19, 20, 31, 33 and 34 above are repeated.
49. By reason of the matters pleaded in paragraphs 46 to 48 above, each of Dr Kolodziejczyk and Dr Winther-Jensen has contravened the statutory duty under s 183(1) of the **Corporations Act**.
50. Each of Element Zero and Mr Masterman was involved in the contraventions pleaded in paragraph 49 above (within the meaning of s 79 of the *Corporations Act*) and has therefore contravened the statutory duty under s 183(2) of the *Corporations Act*.

Particulars

- (i) *Particulars 32(i) and 32(ii) are repeated.*

- (ii) *The Applicants rely on available inferences arising from:*
 - (A) *the nature of the Fortescue CI;*
 - (B) *the roles Dr Kolodziejczyk, Dr Winther-Jensen and Mr Masterman held in FFI, and the fact that Dr Winther-Jensen reported to Mr Masterman in that role;*
 - (C) *the roles Dr Kolodziejczyk, Dr Winther-Jensen and Mr Masterman hold or held in Element Zero; and*
 - (D) *the uses to which the Fortescue CI was put.*
- (iii) *Further particulars may be provided, including after discovery.*

E. Breach of contract

E.1 Respondents' employment agreements

51. On about 22 January 2019, FMGPS and Dr Kolodziejczyk entered into an employment agreement on the terms recorded in the following documents:
- (a) Letter of offer and special terms and conditions of employment dated 17 January 2019 (**Kolodziejczyk Offer**); and
 - (b) General terms and conditions of employment (**Kolodziejczyk General Terms**),
- together referred to as the **Kolodziejczyk Employment Contract**.

Particulars

- (i) *The Kolodziejczyk General Terms were enclosed with the Kolodziejczyk Offer provided to Dr Kolodziejczyk.*
52. On about 16 December 2020, FMGPS and Mr Masterman entered into an employment agreement on the terms recorded in the following documents:
- (a) Letter of offer and special terms and conditions of employment dated 16 December 2020 (**Masterman Offer**);
 - (b) General terms and conditions of employment (**Masterman General Terms**),
- together referred to as the **Masterman Employment Contract**.

Particulars

- (i) *The Masterman General Terms were enclosed with the Masterman Offer provided to Mr Masterman.*

53. On about 18 January 2021, FMGPS and Dr Winther-Jensen entered into an employment agreement on the terms recorded in the following documents:

- (a) Letter of offer and special terms and conditions of employment dated 18 January 2021 (**Winther-Jensen Offer**);
- (b) General terms and conditions of employment (**Winther-Jensen General Terms**), together referred to as the **Winther-Jensen Employment Contract**.

Particulars

- (i) *The Winther-Jensen General Terms were enclosed with the Winther-Jensen Offer provided to Dr Winther-Jensen.*

54. (**Confidentiality Term**) It was a term of each of the Kolodziejczyk Employment Contract, the Masterman Employment Contract and the Winther-Jensen Employment Contract that Dr Kolodziejczyk, Mr Masterman and Dr Winther-Jensen respectively must not, during or after his employment, use or disclose Fortescue Group's confidential information, except:

- (a) in the proper performance of the responsibilities and duties of his employment;
- (b) if he was compelled by law to do so and he had used every lawful means available to prevent disclosure; or
- (c) if he had been authorised in writing by Fortescue to do so.

Particulars

- (i) *Kolodziejczyk General Terms and Winther-Jensen General Terms, page 5, 'Confidentiality'.*
- (ii) *Masterman General Terms, page 5, 'Confidentiality'.*

55. (**1st IP Ownership Term**) It was a term of each of the Kolodziejczyk Employment Contract and the Winther-Jensen Employment Contract that any intellectual property (including inventions, discoveries, original work, processes, designs and other material) produced by Dr Kolodziejczyk and Dr Winther-Jensen respectively:

- (a) in the course and scope of his employment; or
- (b) using the Fortescue Group's equipment, data or other resources,

is and will be the sole and exclusive property of the Fortescue Group.

Particulars

- (i) *Kolodziejczyk General Terms and Winther-Jensen General Terms, page 6, 'Ownership of Products and Copyright'.*

56. **(No Collateral Use Term)** It was a term of each of the Kolodziejczyk Employment Contract and the Winther-Jensen Employment Contract that any intellectual property (including inventions, discoveries, original work, processes, designs and other material) produced by Dr Kolodziejczyk and Dr Winther-Jensen respectively:

- (a) in the course and scope of his employment; or
- (b) using the Fortescue Group's equipment, data or other resources,

must not be used other than for the purpose of Fortescue Group's business.

Particulars

- (i) *Kolodziejczyk General Terms and Winther-Jensen General Terms, page 6, 'Ownership of Products and Copyright'.*

57. **(IP Assignment Term)** It was a term of each of the Kolodziejczyk Employment Contract and the Winther-Jensen Employment Contract that Dr Kolodziejczyk and Dr Winther-Jensen respectively will assign to the Fortescue Group all intellectual property (including inventions, discoveries, original work, processes, designs and other material) produced by him:

- (a) In the course and scope of his employment; or
- (b) using the Fortescue Group's equipment data or other resources.

Particulars

- (i) *Kolodziejczyk General Terms and Winther-Jensen General Terms, page 6, 'Ownership of Products and Copyright'.*

58. **(Delivery Up Term)** It was a term of each of the Kolodziejczyk Employment Contract, the Masterman Employment Contract and the Winther-Jensen Employment Contract that, on the conclusion of his employment, Dr Kolodziejczyk, Mr Masterman and

Dr Winther-Jensen respectively will return to FMGPS the following property (including anything on which information is recorded and including documents) that he has or can reasonably obtain:

- (a) all property belonging to the Fortescue Group; and
- (b) all property containing Fortescue Group's confidential information.

Particulars

- (i) *Kolodziejczyk General Terms and Winther-Jensen General Terms, page 5, 'Company Property'*

E.2 Dr Kolodziejczyk's separation deed

59. On about 8 February 2022, FMGPS, FFI and Dr Kolodziejczyk entered into a deed recorded in a Separation Deed dated 8 February 2022 (**Kolodziejczyk Separation Deed**).
60. (**2nd IP Ownership Term**) It was a term of the Kolodziejczyk Separation Deed that Dr Kolodziejczyk will continue to promptly take all necessary steps to ensure that any Intellectual Property Rights (including inventions, trade secrets, the right to have confidential information kept confidential, patents and potential patents) created by him during his employment with FMGPS are exclusively owned by FFI.

Particulars

- (i) *Kolodziejczyk Separation Deed, clause 2.6.*

E.3 Breach of contract

61. By engaging in the conduct pleaded in paragraph 19, 20, 31, 33 and 34 above, each of Dr Kolodziejczyk and Dr Winther-Jensen has breached:
- (a) the **Confidentiality Term** pleaded in paragraph 54 above; and
 - (b) the **No Collateral Use** Term pleaded in paragraph 56 above.
62. By engaging in the conduct pleaded in paragraph 33 and 34 above, Mr Masterman has breached the **Confidentiality Term** pleaded in paragraph 54 above.
63. By reason of the matters pleaded in paragraphs 5(c), 5(d), 12, 13, 19, 20, 29 and 31 above, each of Dr Kolodziejczyk and Dr Winther-Jensen has breached the following terms:
- (a) the **1st IP Ownership Term** pleaded in paragraph 55 above;

- (b) the **IP Assignment Term** pleaded in paragraph 57 above; and
- (c) in the case of Dr Kolodziejczyk—the **2nd IP Ownership Term** pleaded in paragraph 60 above.

Particulars

- (i) *Dr Kolodziejczyk and Dr Winther-Jensen failed to assign to Fortescue their rights in the Ionic Liquid R&D and the Ionic Liquid R&D Information.*
- (ii) *Dr Kolodziejczyk failed to assign to Fortescue the invention described in the Patent Assessment Form particularised in paragraph 12.*
- (iii) *It may be inferred from the fact that Element Zero is named applicant of each Patent Application that Dr Kolodziejczyk and Dr Winther-Jensen have transferred their rights in any invention described or claimed in those applications to Element Zero.*
- (iv) *Dr Kolodziejczyk and Dr Winther-Jensen failed to assign to Fortescue their rights in any invention described or claimed in each Patent Application, which invention was invented using Fortescue CI.*
- (v) *Further particulars may be provided, including after discovery.*

64. By reason of the matters pleaded in paragraphs 12, 13, 14, 19, 20, 31, 33 and 34 above, each of Dr Kolodziejczyk, Dr Winther-Jensen and Mr Masterman has breached the **Delivery Up Term** pleaded in paragraph 58 above.

F. Copyright infringement

F.1 Copyright works and subsistence

65. Each of the following documents ~~referred to in paragraphs 19 and 20~~ comprises an original literary work (**Work**) within the meaning of s 32 of the **Copyright Act** 1968 (Cth):

(a) each document referred to in paragraph 19, particulars 19(i)1 to 19(i)4;

(b) each document referred to in paragraph 19, particulars 19(ii);

(c) each document referred to in paragraph 19, particulars 19(iii); and

~~(a)~~(d) each document referred to in paragraph 20, particulars 20(i)1 to 20(i)7.

66. Each Work is unpublished within the meaning of s 29 of the *Copyright Act*.

67. Each Work was created by the **Author/s**, being a person or persons identified in the Work, the metadata of that Work, or an employee or employees of one or more of the Applicants.
68. Each Author was a qualified person within the meaning of s 32(4) of the *Copyright Act* at the time each Work was made.
69. By reason of the matters pleaded paragraphs 65 to 68 above, copyright subsists in each Work under s 32(1) of the *Copyright Act*.
70. **FMGPS**, on behalf of the Fortescue Group or alternatively **FFI** is the owner of the copyright in each Work.

F.2 Copyright infringement

71. By-In the course of engaging in the conduct pleaded in paragraph 19 above and further or in the alternative, following that conduct, Dr Kolodziejczyk has reproduced the whole or substantial part of each of the Works in a material form in Australia.

Particulars

- (i) Dr Kolodziejczyk reproduced the whole or a substantial part of each of the Works on information storage devices or systems, the identities of which are not fully known to the Applicants. Such devices and systems include Dr Kolodziejczyk's Fortescue-issued laptop and Toshiba- and Kingston-branded USB devices.
- (ii) Further particulars may be provided, including after discovery.

72. By-In the course of engaging in the conduct pleaded in paragraph 20 above, and further or in the alternative, following that conduct, Dr Winther-Jensen has reproduced the whole or substantial part of each of the Works in a material form in Australia.

Particulars

- (i) Dr Winther-Jensen reproduced the whole or a substantial part of each of the Works on information storage devices or systems, the identities of which are not fully known to the Applicants. Such devices and systems include devices and systems used to send the reproductions to his personal email address "bjornwj@gmail.com" and used to download those reproductions from that email address.
- (+)(ii) Further particulars may be provided, including after discovery.

73. The reproductions pleaded in paragraphs 71 and 72 above were done without the licence of the copyright owner.
74. In the premises, pursuant to s 36(1) of the *Copyright Act*:
- (a) Dr Kolodziejczyk has infringed the copyright in each of the Works; and
 - (b) Dr Winther-Jensen infringed the copyright in each of the Works.

G. Contraventions of the Australian Consumer Law

G.1 *The Representations*

75. In January 2024, each of Dr Kolodziejczyk and Element Zero represented that:
- (a) “Everything we do [at Element Zero] was developed after [Dr Kolodziejczyk left] Fortescue” (**After Fortescue Representation**);
 - (b) “Everything we do [at Element Zero] ... doesn’t bring anything from Fortescue” (**No Fortescue Input Representation**);
 - (c) Dr Kolodziejczyk did not conceive the ideas in the EZ Process until after he left Fortescue (**Later Conception Representation**).

Particulars

- (i) *News article titled “Ex-Fortescue duo’s green-iron play” by Peter Ker, published in the Australian Financial Review (AFR) on about 17 January 2024.*

76. The After Fortescue Representation, No Fortescue Input Representation and Later Conception Representation are hereafter collectively referred to as “the **Representations**”.

G.2 *Misleading or deceptive conduct*

77. The Representations were made by each of Dr Kolodziejczyk and Element Zero:
- (a) in trade or commerce in Australia; and
 - (b) in connection with the supply, the possible supply or the promotion of the supply of Element Zero’s goods or services.

78. By reason of the matters pleaded in paragraphs 12, 13, 14, 19, 20, 31 and 33 above, each Representation is false, misleading or deceptive, or is likely to mislead or deceive, in that:
- (a) Not everything done by Element Zero was developed after Dr Kolodziejczyk left Fortescue;
 - (b) Fortescue CI was used by the Respondents in the manners pleaded in paragraphs 31 and 33 above; and
 - (c) Dr Kolodziejczyk did conceive the ideas in the EZ Process during his time at Fortescue.
79. By reason of the matters pleaded in paragraphs 75 to 78 above, each of Dr Kolodziejczyk and Element Zero has contravened:
- (a) s 18(1) of the *Australian Consumer Law* (Cth) (**ACL**);
 - (b) s 29(1)(a), s 29(1)(b) or s 29(1)(g) of the ACL.
80. To the extent that either Dr Kolodziejczyk or Element Zero did not contravene s 18(1) or s 29(1) of the ACL, they were a person “involved” within the meaning of s 2(1) of the ACL in the contravention by the other.
81. Mr Masterman was a person “involved” in the contraventions pleaded in paragraph 79 above, within the meaning of section 2(1) of the ACL.

Particulars

- (i) *Mr Masterman was present at the interview with the AFR and made statements that are quoted in the article.*
- (ii) *Mr Masterman knew the Representations were false or misleading because of his previous roles at FFI and his awareness of the Ionic Liquid R&D, FFI’s research and development work in Electrochemical Reduction and Fortescue’s development of a pilot plant for Electrochemical Reduction.*
- (iii) *Mr Masterman did not correct the Representations.*
- (iv) *Further particulars may be provided, including after discovery.*

H. Loss and Damage

82. Fortescue has suffered loss and damage by reason of the Respondents':

- (a) misuses of Fortescue CI pleaded in paragraphs 19, 20, 31, 33, 34 and 36 above;
- (b) breaches of fiduciary duties pleaded in paragraphs 42 and 44 above;
- (c) contraventions of s 183 of the *Corporations Act* pleaded in paragraphs 49 and 50 above;
- (d) breaches of contract pleaded in paragraphs 61 to 64 above;
- (e) infringements of copyright pleaded in paragraph 74 above;
- (f) contraventions of the ACL pleaded in paragraphs 79 to 81 above.

Particulars

- (i) *Loss of profits.*
- (ii) *Loss of opportunity to exploit Green Iron technologies based on the Fortescue CI.*
- (iii) *Diminution in the value of Fortescue's intellectual property and confidential information.*
- (iv) *Further particulars be provided, including after discovery.*

83. The circumstances are such that it would be appropriate for the Court to make an award of additional damages under s 115(4) of the *Copyright Act*.

Particulars

- (i) *Dr Kolodziejczyk and Dr Winther-Jensen engaged in the infringements pleaded infringements of copyright pleaded in paragraph 74 flagrantly.*
- (ii) *The need for general and specific deterrence against Dr Kolodziejczyk and Dr Winther-Jensen, having regard to their status as former FFI officers, FMGPS employees and fiduciaries.*
- (iii) *Dr Kolodziejczyk's and Dr Winther-Jensen's conduct after the infringements, including the matters pleaded in paragraphs 14, 31, 34, 75 and 78 above.*
- (iv) *The benefit accrued to the Respondents by reason of the infringements, including that Element Zero was able to raise US\$10 million in seed*

funding from Playground Global, a venture capital firm, and the value or increase in value of their shareholdings in Element Zero.

(v) *Further particulars may be provided, including after discovery.*

84. Further or alternatively, the Respondents have made profits by reason of their:

- (a) misuses of Fortescue CI pleaded in paragraphs 19, 20, 31, 33, 34 and 36 above;
- (b) breaches of fiduciary duties pleaded in paragraphs 42 and 44 above; and
- (c) infringements of copyright pleaded in paragraph 74 above;

which profits it would be unconscionable for the Respondents to retain.

Particulars

- (i) *Profits from the EZ Process, the EZ Plant, or any commercial-scale plant performing the EZ Process or based on the EZ Plant.*
- (ii) *Any extant or inchoate patent rights relating to the inventions the subject of the Patent Applications.*
- (iii) *Profits from dealings with the Patent Applications.*
- (iv) *Further particulars may be provided after discovery and other interlocutory steps.*

AND the Applicants claim the relief sought in the Originating Application.

Date: 23 October 2024 ~~14 June 2024~~



Signed by Paul Dewar
Lawyer for the Applicants

This pleading was prepared by JS Cooke SC, DB Larish, WH Wu, and SK Yates of counsel.

Certificate of lawyer

I, Paul Dewar, certify to the Court that, in relation to the further amended statement of claim filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 23 October 2024 ~~14 June 2024~~



Signed by Paul Dewar
Lawyer for the Applicants