

NOTICE OF FILING

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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.

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Form 59
Rule 29.02(1)

Affidavit

Federal Court of Australia

No. NSD 527 of 2024

District Registry: New South Wales

Division: General

FORTESCUE LIMITED ACN 002 594 872 and others named in the schedule

Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081 and others named in the schedule

Respondents

Affidavit of: **Bjorn Winther-Jensen**

Address: Unit 4, 213 Gildercliffe Street, Scarborough, Western Australia, 6019

Occupation: Engineer and Scientist

Date: 8 July 2024

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Filed on behalf of (name & role of party)

Third Respondent, Bjorn Winther-Jensen

Prepared by (name of person/lawyer)

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[Version 3 form approved 02/05/2019]

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I, Bjorn Winther-Jensen, Unit 4, 213 Gildercliffe Street, Scarborough, Western Australia, 6019, Engineer and Scientist, sincerely declare and affirm that:

1. I am the Third Respondent in these proceedings.
2. I affirm this affidavit from my own knowledge, except where otherwise indicated. Where I depose to matters based on information and belief, I believe these matters to be true and I set out the source of that information or belief.
3. On 14 May 2024, the Applicants obtained search orders against the First to Fourth Respondents (**Search Orders**).
4. I affirm this affidavit in support of the First, Second and Fourth Respondents' interlocutory application dated 21 June 2024, which seeks to set aside or vary the Search Orders (**Set Aside Application**).
5. In preparing this affidavit, I have reviewed affidavits filed by the First, Second and Fourth Respondents in support of the Set Aside Application and the affidavits relied upon by the Applicants in obtaining the Search Orders. In particular, I have reviewed:
 - (a) the affidavit of Dr Bartłomiej Piotr Kolodziejczyk sworn 19 June 2024, in support of the Set Aside Application;
 - (b) the affidavit of Dr Anand Indravadan Bhatt affirmed 1 May 2024; and
 - (c) the affidavit of Wayne McFaull affirmed 1 May 2024.
6. In this affidavit, I respond to certain statements in those affidavits. However, to the extent that I do not refer to other statements in those affidavits, I do not intend to be taken to agree with them.
7. I do not waive my legal professional privilege or client privilege in respect of any matter in this affidavit.




Background, qualifications and experience

8. I am an engineer and scientist with more than 30 years' experience in innovation, research and development, in both academia and the private sector.
9. Other than my roles at Fortescue and Element Zero (which are discussed in this affidavit), I have held research and/or teaching positions at the following institutions:
 - (a) NKT Research Centre in Brøndbyvester, Denmark, from 1995 to 2001;
 - (b) Technical University of Denmark (Department of Chemical and Biochemical Engineering) in Copenhagen, Denmark, from 2001 to 2004;
 - (c) University of Wollongong (Intelligent Polymer Research Institute) in Wollongong, Australia, from 2005 to 2006;
 - (d) Monash University (Department of Materials Science and Engineering) in Melbourne, Australia, from 2006 to 2015; and
 - (e) Wasada University (Graduate School of Advanced Science and Engineering) in Tokyo, Japan, from September 2015 to 2018.
10. I obtained my PhD in the field of electrochemistry from the Department of Chemical and Biochemical Engineering of the Technical University of Denmark in 2005.
11. Throughout my career, I have worked on various aspects of materials science and engineering. This includes development of new isolation materials for low and high voltage cables, surface modification using plasma techniques including chemistry and equipment for this, conducting polymers and their catalytic and photo catalytic properties, porous "non-bubbling" electrodes for water-splitting and latest novel approaches for electrowinning of metals.
12. I have authored 114 peer reviewed articles and 32 patent applications relating to my research areas described above.
13. My research has led to a number of research grants and fellowships in Japan and Australia, having a combined value of more than AUD\$2 million.



My role at Fortescue

14. Between 15 February 2021 and 12 November 2021, I was employed by the Third Applicant (**FMGPS**) in the role of Technology Development Lead.
15. I was responsible for suggesting research directions, establishing a laboratory facility, selecting (employing) relevant researchers to join the research effort, and leading daily research and development tasks conducted by a team of three researchers. I was also responsible for reporting research findings to Fortescue Future Industries Pty Ltd's (**FFI**) engineering team under the 'Green Iron' project.
16. During my employment by FMGPS, I undertook research and development in relation to an electrochemical flow-cell system to convert iron ore to metallic iron. The chemistry and conditions (such as temperature) involved in the conversion of iron ore to metallic iron are well-established in this field, especially informed by the **SIDERWIN** project (development of new methodologies for industrial CO₂-free steel production by electrowinning), which was conducted by a European Union-supported consortium between 2017 and 2022.
17. I have considered Dr Kolodziejczyk's description of the research he conducted at Fortescue. I was involved in a part of the research he describes at paragraph 38, in particular the development of a flow-cell system for the purpose of reducing solid iron ore particles suspended in an electrolyte slurry. I agree with Dr Kolodziejczyk that such technology is very different to Element Zero's technology.
18. While employed by FMGPS and conducting the research described above, I worked from the following locations:
 - (a) Thailand from 15 February 2021 to about 12 April 2021. During this time I did not have access to a company laptop and so used my personal laptop to conduct my work;
 - (b) a COVID-19 quarantine hotel in Perth, Western Australia from about 12 April 2021 to about 26 April 2021. During this time I continued to use my personal laptop to conduct my work;




- (c) FFI's office in East Perth, Western Australia from about 26 April 2021 to about late May 2021. During this time, I was provided with a Fortescue laptop, an access card and a company credit card; and
- (d) a laboratory and office rented by FFI at the University of Western Australia in Crawley, Western Australia from about late May 2021 to 12 November 2021. During this time I continued to use my Fortescue-issued laptop to conduct my work.

My resignation from Fortescue

19. On 3 November 2021, I resigned from FMGPS by sending an email with an attached letter to Michaela Johnstone, Human Resources, and Rachelle Doyle, who had taken over responsibility for the 'Green Iron' project after Dr Kolodziejczyk resigned.
20. I resigned because I was experiencing significant stress and anxiety:
 - (a) Professionally, I felt that the volume of work and the deadlines that I was required to meet were incredibly difficult and in some cases impossible to achieve. As a result, I felt a lot of anxiety about my work.
 - (b) Personally, I was processing the fact that my sister in Denmark was battling cancer metastases in her brain. I was also geographically separated from my wife and niece (who has lived with us and been our dependant since 2015), who both remained in Thailand due to Covid-19 restrictions after I travelled to Perth. This made me feel isolated and depressed, and made focusing on work even more challenging.
21. When I resigned from FMGPS, my intention was to retire. I considered that I was financially stable and had adequate funds in my superannuation account and so I did not need to continue working, especially under such stressful circumstances. I intended to focus on enjoying retirement with my wife and helping to raise my niece. I thought that any further research or study I did in my field would be purely for my own intellectual curiosity and enjoyment.
22. Shortly after I resigned, Ms Johnstone got in touch with me. I do not remember if it was by email or text or some other means. To the best of my recollection, she said words to the following effect: "You will not be able to continue working throughout your notice




period. You will need to complete and hand over ongoing work by 12 November 2021. After that time you will be on 'gardening leave' subject to a separation deed."

23. Between my resignation and 12 November 2021 (the **Handover Date**), I:
- (a) briefed Ms Doyle regarding my work relating to the 'Green Iron' project. **Annexure BWJ-1** is an email I received from Ms Doyle on 11 November 2021, indicating that I had helped her "come up to speed" and thanking me for my efforts "to set [my] team up for success post departure";
 - (b) briefed Dr Robert Kerr, who was to take over the practical and technical development in FFI's lab, on technical aspects, suppliers and plans regarding the flow-cell system; and
 - (c) assisted with finalising a leaching report by Dr Aabhash Shrestha.
24. On 11 November 2021, I sent an email to Ms Johnstone stating, "Guess that I must hand back some items tomorrow; are you the receiver or can you nominate one/some?". By that, I meant that I needed to hand back my Fortescue-issued laptop, credit card and access card. A copy of that email is set out at **Annexure BWJ-2**. I did not receive a response to that email.
25. On or around 17 November 2021, I attended FFI's office at Level 1/6 Bennett St, Perth, Western Australia 6004. I handed my Fortescue-issued laptop, credit card and access card to an employee at the reception desk.
26. On 11 November 2021, I also sent an email to Julie Shuttleworth, who was then Chief Executive Officer of FFI, thanking her for her support. My email and Ms Shuttleworth's email response on 12 November 2021 are set out at **Annexure BWJ-3**.

Access to Fortescue materials

27. Before the Handover Date, and sometime shortly after he himself departed FFI, David Arnall called me and told words to the effect: "I have spoken to Bart [Dr Kolodziejcyk]. We have both lost access to Fortescue's IT network and so cannot finish handing over our work'. Dr Kolodziejcyk describes losing access to his Fortescue email account at paragraph 45 of his affidavit.

28. I was concerned that I might similarly lose access to Fortescue's IT network and my email account before my Handover Date and would be unable to properly hand over my work, including that I would not be able to comment or reply to other employees. For this reason only, between about 5 and 11 November 2021, I used my Fortescue email address "bjorn.winterjensen@fmgl.com.au" to send copies of the following documents (listed at Particular (i) of paragraph 20 of the Amended Statement of Claim) to my personal email address "bjornwj@gmail.com":

- (a) document named "211029_Iron ore leaching_Report_ASH.R1.docx";
- (b) document named "211014_FFI Green Steel_ Ore Leach_ASH_XRF results.csv"
- (c) document named "211014_FFI Green Steel_ Ore Leach_ASH_ICP results.csv";
- (d) 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";
- (e) document named "Technical Evaluation.xlsx";
- (f) email from David White sent on 4 November 2024 with Subject 'Technical Evaluation of Green Iron process'; and
- (g) document named "Green Iron Update (01.11 .2021).pdf"

(the **Identified Documents**).

29. Ultimately, I did not lose access to Fortescue's IT network and my email account before my Handover Date and so I did not need to refer to the Identified Documents.
30. I did not send the Identified Documents to my personal email account to refer to or use them after I ceased work for FFI. I have not opened or otherwise used the documents mentioned above since 11 November 2021.
31. Fortescue has not identified, and therefore I do not know, what parts of the Identified Documents are said to be confidential.




32. At paragraphs 112 to 118 of his affidavit, Dr Bhatt describes his review of documents contained in the 'Green Iron Project Share Point Folder'. I recall that this Share Point folder was only set up and started to be used approximately five to seven weeks before I ceased work for Fortescue. Therefore, the contents of that Share Point folder did not accurately reflect all of the work that was undertaken prior to it being set up. I cannot recall whether I downloaded to my Fortescue laptop any of the documents identified by Dr Bhatt.
33. I do not know what documents in the Share Point folder Fortescue consider to be confidential. Based on my recollection, the Share Point folder contains substantial amounts of information that could not be said to be confidential; for example, a number of published scientific papers and reports.
34. At paragraph 118 of his affidavit, Dr Bhatt claims that he assessed whether documents identified 'would be of particular value in progressing a competing research and development project in relation to the purification of iron ore utilising electrochemical reduction'. In my view, the documents identified by Dr Bhatt have no relevance for equipment later developed by Element Zero because of the substantial differences between each company's technology.
35. At paragraph 103 of his affidavit, Mr McFaul lists internal Fortescue procedures and specifications. I was not aware that I had access to those documents and, to the best of my recollection, have never seen or read any of them. I do not know the contents of these materials or what is said to be confidential in those materials.
36. I have read paragraphs 102 to 106 and 111 to 122 of Mr McFaul's affidavit. I do not understand what inferences are available based on those paragraphs (as indicated at Particular (vi) of paragraph 20 of the Amended Statement of Claim). Nor do I understand Particular (vii) of paragraph 20 of the Amended Statement of Claim. Other than as described at paragraphs 28 to 35 above, I do not understand what specific documents are covered by paragraph 20 of the Amended Statement of Claim, or what is said to be confidential in those materials. As I understand it, paragraph 20 would capture a substantial number of documents that I reviewed or worked on during my employment by Fortescue.
37. As I have mentioned, the technology pursued by Fortescue and by Element Zero are different, such that I do not consider the experience and knowledge obtained from



working on one to be related or transferable to the other. From an equipment perspective, the Element Zero technology has significant similarities to traditional electrowinning equipment used (for example, in the copper and gold industry). It is not comparable to the flow-cell system used by Fortescue. Further, the assumption that Element Zero is using an initial water-based beneficiation/leaching step is incorrect.

My work for Element Zero

38. As stated above, when I resigned I did not intend to work again.
39. After I ceased work for Fortescue, I travelled to Denmark to be with my sister and then to Thailand to reunite with my wife and niece, which was a key factor in my resignation from FMGPS. I returned to Perth in early February 2022.
40. In March 2022 (after returning to Perth in early February) I started setting up electrochemical gear in my garage. This was driven by curiosity and to have a small retirement "project" exploring the footsteps of Humphry Davy's and Michael Faraday's work from 1807 on electrodeposition from molten hydroxides. I worked with nickel initially but then branched into iron in about July 2022. It was this work that eventually led to the creation of Element Zero.
41. I was a director of Element Zero from 7 December 2022 to 11 January 2024. I ended my employment with Element Zero in December 2023.
42. I remain a shareholder of Element Zero.
43. The work I did at FMGPS has no connection to the work that I did on the technology that was developed by Element Zero. The work I did at Element Zero was based on a long and established body of scientific literature that is unrelated to the methods I was working on at FMGPS.

Comparison between Fortescue and Element Zero technology

44. Between January to April 2021, while I was located in Thailand, my work was limited to literature based studies and considerations.
45. At paragraphs 79 to 84 of his affidavit, Dr Bhatt describes that I suggested a 'change in approach' to the work I was involved in. Since the SIDERWIN approach was being considered from the start, I do not agree that the correspondence Dr Bhatt describes in




his affidavit indicates any change of approach. While I mentioned a parallel “long-term” research strand using ion liquids in February 2021, that work was never pursued.

46. At paragraph 84 of his affidavit, Dr Bhatt indicates that Fortescue staff have been unable to locate any other emails or documents mentioning an 'Ionic Process'. This is because, so far as I am aware, no such research was conducted while I was at Fortescue and therefore, no documents were created on this subject.
47. In Dr Bhatt's affidavit Part F, he presents some assumptions regarding Element Zero's process that are inaccurate. Based on Elements Zero's system at the time I worked on it, this included the following:
- (a) A main assumption is that Element Zero's process includes an initial step to purify iron ore (paragraph 89 and 99 of Dr Bhatt's affidavit) and that this step is similar or identical to the water-based chemical leaching process researched by Fortescue. This is incorrect: the Element Zero process relies on dissolving iron ore in a non-aqueous media as the first step and later directly uses this solution for electrowinning of iron.
 - (b) A second assumption is that the Element Zero process uses an ionic liquid. The common and established definition of an ionic liquid includes melting below 100°C. Element Zero uses a molten hydroxide-based electrolyte with a melting point above 170°C, which falls outside the common definition of ionic liquids and indeed the ionic liquid electrolytes that Dr Kolodziejczyk and I considered in early 2021.
 - (c) A third assumption is that Element Zero's process is a continuous flow-cell system. It is not. Rather, it is similar in approach to the batch-based electrowinning processes commonly used in the copper, nickel and gold industries.

Surveillance and Execution of Search Orders

48. The Search Orders were executed on 15 May 2024 at my residential premises, Unit 4, 213 Gildercliffe Street, Scarborough, Western Australia, 6019 (**Premises**).
49. At paragraphs 65 to 68 of his affidavit, Dr Kolodziejczyk describes the extensive surveillance that took place leading up to the Search Orders. Like Dr Kolodziejczyk, I

was concerned to learn of the extent of Fortescue's surveillance of me, my wife (who was never employed by Fortescue), and our underage niece. Fortescue was aware that I had, at that time, left Element Zero and retired. At the start of the search process, the independent lawyer said to me words to the following effect: 'They are aware that you have left Element Zero and retired.'

50. My wife and I did not notice the surveillance while it was happening; however, upon learning of it, we were very anxious about whether it might continue without our knowledge or awareness.

Materials obtained during execution of Search Orders

51. During the search, a large number of documents were copied from devices or removed for later copying and later returned. This includes:
- (a) the entire contents of my personal Google account, which is linked to my email address bjornwj@gmail.com. I use this Google account for my personal emails and the storage of my personal documents, and have done so since 2010;
 - (b) my personal Microsoft account and the linked email address bjornwj@hotmail.com, which contains emails and documents going back to 2001;
 - (c) the entire contents of my current and previous personal mobile phones;
 - (d) the entire contents of my personal laptop;
 - (e) the entire contents of my personal external hard drive and a number of USB drives;
 - (f) the entire contents of my wife's personal mobile phone;
 - (g) the entire contents of my wife's personal laptop;
 - (h) the entire contents of my wife's personal external hard drive and a USB drive; and
 - (i) a number of hard copy documents, including three notebooks.
52. My wife's email accounts were also assessed, but I am not aware if these were copied.





53. Two laptops belonging to my niece were also searched, but no copies were made. One USB drive containing documents regarding my niece's previous and current visa applications was copied.
54. At paragraphs 69 to 79 of his affidavit, Dr Kolodziejczyk describes the materials obtained from his premises during the execution of the Search Orders, and his concerns about those materials. I have the same concerns about the materials obtained from my premises.
55. My personal email accounts contain confidential material including:
- (a) historical projects with commercial parties and educational institutions; and
 - (b) personal information from my previous students from my time teaching at Monash University and Waseda University.
56. Those third parties would not be aware of the fact that their documents have been captured in the process of executing the Search Orders and I expect that they would be concerned if that information was accessed by Fortescue or otherwise disclosed.
57. My personal external hard drive also contains unpublished and confidential research from previous collaborations and my own work, including with commercial parties and educational institutions, which is unrelated to the issues in this proceedings.
58. My and my wife's personal mobile phones contain our personal text messages and other communications with friends, personal files, photographs and videos.
59. Each of our personal laptops also contains personal files, photographs and videos.



60. As Dr Kolodziejczyk identifies at paragraph 78 of his affidavit, the Search Orders include a category of documents described as 'All documents (whether in hardcopy or electronic) recording or evidence research and development work by or on behalf of Element Zero, Dr Kolodziejczyk, or Dr Winther-Jensen, including laboratory notebooks and experimental data.' I believe this category would encompass laboratory notebooks and experimental data for any research or development work that I undertook in any role prior to my employment at FMGPS, which is unrelated to the issues in these proceedings.


Affirmed by the deponent
at Perth
in the State of Western Australia
on 8 July 2024

)
) 
) _____
) Signature of deponent

Before me:



Signature of witness


.....
Name of witness

Legal practitioner who has held a practising certificate for at least 2 years and who holds a current practising certificate

.....
Qualification of witness





Schedule

Federal Court of Australia

No. NSD 527 of 2024

District Registry: New South Wales

Division: General

Applicants

Second Applicant: **Fortescue Future Industries Pty Ltd ACN 625 711 373**

Third Applicant: **FMG Personnel Services Pty Ltd ACN 159 057 646**

Respondents

Second Respondent: **Bartlomiej Piotr Kolodziejczyk**

Third Respondent: **Bjorn Winther-Jensen**

Fourth Respondent: **Michael George Masterman**

Date: 8 July 2024