

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 |
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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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Fortescue and Ors v Element Zero Pty Ltd and Ors – NSD 527/2024

First, Second and Fourth Respondents' Submissions on the Cross-Examination Application dated 6 August 2024

- 1 These are the submissions of the First, Second and Fourth Respondents (the **Element Zero Respondents**) in support of leave to cross-examine Mr Paul Dewar at the hearing of its Interlocutory Application dated 21 June 2024 (**Set Aside Application**) concerning the Anton Piller / search orders dated 14 May 2024 (the **Search Orders**).

Background

- 2 In the Set Aside Application, the Element Zero Respondents seek to set aside the Search Orders on multiple bases: (a) that the Applicants' *prima facie* case was overstated and misrepresented to the duty judge who granted the Search Orders, (b) that there was no real risk of destruction of documents on the evidence, (c) that there was material non-disclosure by the Applicants when seeking the Search Orders,¹ (d) that the form and scope of the Search Orders was inappropriately broad and resulted in an excessive capture of the Element Zero Respondents' information, and (e) that the Applicants undertook excessive and unnecessarily intrusive surveillance of the Respondents, evidence which it deployed during the *ex parte* application: paragraph 21 Fourth affidavit of Michael John Williams sworn 25 June 2024.
- 3 Mr Dewar is the solicitor for the Applicants in these proceedings. He has given six affidavits in these proceedings, including three affidavits in support of the Applicants' *ex parte* application for the Search Orders, and one affidavit in answer to the Set Aside Application. The latter affidavit is one of the principal affidavits relied on by the Applicants in answer to the Set Aside Application filed by the Element Zero Respondents.
- 4 As the solicitor on record, he was responsible for, and directly involved in, making the application for the Search Orders, the evidence relied on by the Applicants, the form of that application and the submissions that were made orally and in writing in support. Any challenge to the Search Orders necessarily involves an investigation of these issues about which he has direct knowledge.

¹ See eg. *Aristocrat Technologies Australia Pty Ltd v Allam* [2016] HCA 3 (per Gagelar [15]).

Filed on behalf of (name & role of party) The First, Second and Fourth Respondents

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- 5 Central to the Element Zero Respondent's allegations of material non-disclosure are the commercial dealings between the Applicants and the Respondents from the period August 2023 to January 2024, which are the subject of evidence of Mr Masterman. It is not in dispute that those dealings were not disclosed by the Applicants in making the application for the Search Orders. Mr Dewar was present at a meeting in December 2023 the subject of evidence from Mr Masterman in support of the Set Aside Application. Mr Dewar's three affidavits filed in support of the application for the Search Orders made no mention of the meeting or its contents.
- 6 In his affidavit sworn 31 July 2024 in answer to the Set Aside Application, Mr Dewar specifically responds to the allegations of material non-disclosure made by the Element Zero Respondents to the effect that he considered the issue and determined that "*Fortescue did not disclose the correspondence relating to the setting up of and the occurrence of the meetings on 19 December 2023 and 24 January 2024, or the correspondence relating to or the execution of the Non-Disclosure Agreement dated 23 January 2024*" because he formed the view that they were not "*material or relevant*" to the application for the Search Orders: paragraphs 21 – 22 sixth affidavit of Paul Alexander Dewar affirmed 31 July 2024.
- 7 The Element Zero Respondents seek the opportunity to test that evidence and can only do so by way of cross-examination of Mr Dewar. The Court will also be assisted in its assessment of the Set Aside Application by permitting this cross-examination.

Principles regarding cross-examination

- 8 The principles concerning cross examination of a witness during an interlocutory application are well established. Cross-examination is permissible where the issues are limited to those on the application and where the Court would be assisted by cross-examination of the deponent to understand which issues will eventually be seen as relevant to a decision: *National Mutual Life Association of Australasia Ltd v Tolfield Pty Ltd* [2011] FCA 1309; *Wu v Avin Operations Pty Ltd (No 3)* [2006] FCA 1321; *Marsden v Amalgamated Television Services Pty Ltd* [2000] NSWSC 66.
- 9 Cross-examination of Mr Dewar falls squarely within these principles.
- 10 The five reasons relied upon to set aside the orders referred to in paragraph 2 above, are based upon not only Mr Dewar's direct involvement in the Court granting the *ex parte* orders as stated in paragraph 4 above, but the explanation he has now given in his sixth affidavit about the allegations of material non-disclosure.

Topics

- 11 The Element Zero Respondents therefore seek leave to cross-examine Mr Dewar on the following topics:
- (a) Mr Dewar's explanation for not disclosing the commercial relationship between Fortescue and Element Zero, including the Non-Disclosure Agreement and the meetings which took place between December 2023 and January 2024, during the application for the Search Orders.
 - (b) The submissions and evidence that were put forward by the Applicants in support of their *prima facie* case.
 - (c) The submissions and evidence that were put forward by the Applicants in support of the argument that there was a risk of destruction of documents by the Respondents.
 - (d) The scope of the Listed Things in the Search Orders proposed to the Court.
 - (e) The purpose(s) for which the surveillance was conducted, the instructions provided to those instructed to perform the surveillance and the information provided to Fortescue from the surveillance.
- 12 These proposed cross-examination topics are clearly confined to issues relevant to determination of the Set Aside Application. Additionally, the cross-examination would not be at large on issues relevant to the final hearing and would at all times be conducted under the close supervision of the Court. It does not raise issues that would tell against the granting of the leave to cross-examine, such as involving a "rehearsal of, or dry run at, the issues relevant to the trial": *Selvaratnam v St George – A Division of Westpac Banking Corporation (No 2)* [2021] FCA 486 at [44].
- 13 In all of the circumstances, this is an appropriate case for the exercise of the discretion to permit cross-examination in this proportionate and targeted manner to expose material which is directly relevant to the Set Aside Application and the Court's consideration of all material facts. It is in the interests of justice having regard to the serious allegations which are the subject of the Set Aside Application, and the Court's assessment of them in all of the circumstances.

D B Studdy

C D McMeniman

6 August 2024

Gilbert + Tobin