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

Applicants' Outline of Submissions Opposing Respondents Being Granted Leave to Cross-Examine

1. The Court should refuse to grant leave for the First, Second and Fourth Respondents (**EZ Respondents**) to cross-examine the Applicants' (**Fortescue's**) external lawyer, Mr Paul Alexander Dewar, on any of the five (imprecisely defined) topics set out at [11] of the EZ Respondents' submissions dated 6 August 2024 (**EZS**).

Principles as to cross-examination on applications to discharge search orders

2. While ultimately a matter for the Court's discretion, it is "common practice" not to permit cross-examination in interlocutory matters: *Markisic v Cth of Australia* [2010] NSWCA 273 at [31]-[32]; ***Selvaratnam*** *v St George* (*No 2)* [2021] FCA 486 at [43]. Reasons why cross-examination may be refused include: **(1)** that the Court would not be assisted by the cross-examination; **(2)** avoiding a preliminary/mini trial; **(3)** the application to cross-examine not being *bona fide*; and **(4)** that cross-examination would be a waste of time or lead to delay. See *Selvaratnam* at [45] and *National Mutual Life Association of Australasia Ltd v Tolfield Pty Ltd (No 2)* [2011] FCA 1309 at [10]-[12].

3. In the context of applications to set aside search orders, it is "seldom if ever necessary to hear cross-examination" and it may be an error to do so: ***Booker*** *McConnell plc v Plascow* [1985] RPC 425 at 443. If cross-examination is permitted, it will usually be "confined": ***Brags*** *Electrics Ltd v Gregory* [2010] NSWSC 1205 at [28].

4. The Court must be cautious to avoid any cross-examination which involves: **(1)** raising collateral disputes and ancillary issues, which can cause such applications to "snowball": cf e.g., *Booker* at 433-434, 439, 443; *Berg Engineering Pty Ltd v Tivity Solutions Pty Ltd & Ors* [2019] QSC 68 at [2], [108]; **(2)** probing matters the subject of legal professional privilege: *Booker* at 443; **(3)** matters that may be in issue at trial: *Selvaratnam* at [44].

Background

5. By interlocutory application dated 21 June 2024 (**Discharge Application**), the EZ Respondents seek to set aside the search orders made 14 May 2024 on the specific grounds identified in the affidavit of the EZ Respondents' solicitor, Mr Michael John Williams, sworn 25 June 2024 (**Williams 4**) at [22], i.e.: "weak prima facie case", "material non-disclosure"/provision of "inaccurate and misleading information" on the ex parte application, "invasion of the privacy of the Respondents" and "defects in the form of Search Order sought". Details of these grounds are at Williams 4 [23]-[58].

6. Where no application to set aside a search order is made when the search order was served, a search order will generally only be set aside *ab initio* if there is bad faith or material non-disclosure: *Brags* at [26], [36]. It will be observed that most of the specific grounds set out at [5] above go well beyond this.

7. Contrary to EZS [2(a)] and [2(b)], the EZ Respondents' grounds on the Discharge Application do not include that "Fortescue's prima facie case was overstated and misrepresented to the duty judge" or that "there was no real risk of destruction of documents on the evidence". These matters are not raised in Williams 4.

EZ Respondents' proposed topics

8. Cross-examination should be refused for each of proposed topics at EZS [11], including for the reasons set out below.

9. ***(a) "Mr Dewar's explanation" for non-disclosure.*** A "central" allegation made by the EZ Respondents is that Fortescue did not disclose: various meetings between Fortescue representatives and Mr Michael Masterman from November 2023 to January 2024; and that Fortescue and Element Zero had entered into a Non-Disclosure Agreement on 23 January 2024: Williams 4 [24]-[25]; cf EZS [5].

10. Fortescue accepts that it did not disclose the matters set out at [9] above. By his sixth affidavit affirmed 31 July 2024 (**Dewar 6**), as an officer of the Court, Mr Dewar explains to the Court why they were not disclosed – i.e. because they were not considered material or relevant – and confirms that this did not involve any attempt to "mislead" the Court: see Dewar 6 [10]-[23]; cf EZS [6].

11. As a result, the sole issue to be determined as to the matters set out at [9] above is whether their non-disclosure was material. Fortescue's position is that they were not.

12. The materiality of a non-disclosure is a matter for the Court, to be determined **objectively**. As stated in ***Savcor*** *Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639 per Gillard AJA (Ormiston and Buchanan JJA agreeing, emphasis added) at [35]: "The obligation is to disclose all material facts. What is a material fact is a matter which is **relevant to the court's determination**. To be material, it would have to be a matter of substance in the decision making process." A "matter of substance" means "the matter must be material in the sense of being capable of having affected **the court's decision**, and not that it would have affected the decision": *Naidenov, in the matter of 30 Denham Pty Ltd* [2023] FCA 134 at [11] (emphasis added).

13. In the circumstances, leave to cross-examine on the topic should be refused. Mr Dewar's evidence – and indeed his views as to materiality – cannot assist the Court in determining, objectively, whether the non-disclosure of the matters set out at [9] above was material. That issue is to be determined by the Court "on the material that was placed before [Perry J] at first instance" (*Savcor* at [22]), i.e. the pleadings, submissions and evidence relied upon by Fortescue on the search order application.

14. There is an additional reason to refuse leave to cross-examine on topic (a). As the Respondents have not filed a defence, the metes and bounds of the issues for trial are not defined. It is unclear whether the asserted "commercial relationship" between Fortescue and Element Zero will be relied upon in the Respondents' defence. As a result, there is a real concern that the proposed cross-examination will involve a rehearsal of, or dry run at, the issues relevant to the trial: *Selvaratnam* at [44].

15. ***(b)-(c) "The submissions and evidence… put forward by [Fortescue] in support of their prima facie case [and the] risk of destruction of documents by the Respondents".*** First, and most fundamentally, to the extent relevant to the Discharge Application at all, the assessment of the submissions and evidence relied upon by Fortescue in seeking search orders is a matter for the Court. The Court would not be assisted by cross-examination of Mr Dewar on these topics.

16. Secondly, it is inappropriate for a party's solicitor to be cross-examined about the party's submissions and evidence. Here, such matters necessarily concern issues relevant to the trial (*Selvaratnam* at [45]) and Fortescue's forensic approach in the proceeding: cf [4]

above in relation to probing for privileged material. Cross-examination on the Discharge Application ought not be taken as a general "opportunity to interrogate": cf *Booker* at 443.

17. Thirdly, the proposed cross-examination appears directed to traversing matters that are not the subject of the Respondents' grounds on the Discharge Application: cf [7] above.

18. Fourthly, other than quoting or cross-referencing particular evidence in the context of his explanation regarding the non-disclosure allegations, Dewar 6 (i.e. Mr Dewar's only affidavit in respect of the Discharge Application) does not address this topic.

19. Fifthly, contrary to the requirement in order 3(b) made 2 August 2024, the topic is not "confined". Fortescue's "submissions and evidence" conceivably cover every legal and factual issue including issues that are likely to be raised at trial. Also see [2] above.

20. ***(d) "The scope of the Listed Things".*** To the extent relevant to the Discharge Application, the scope of the "Listed Things" is a matter for the Court. There is no factual controversy; the "Listed Things" are defined in the search orders. The Court would not be assisted by cross-examination of Mr Dewar on this topic. In addition, Dewar 6 does not address it. [15] above applies *mutatis mutandis*.

21. ***(e) "The purpose(s) for which the surveillance was conducted, the instructions provided… and the information provided to Fortescue from the surveillance".*** First, the topic travels beyond the grounds on the Discharge Application, which is limited to the alleged "invasion of the privacy of the Respondents": Williams 4 [22], [52]. This can be pursued by reference to the private investigation reports in evidence. The Court would not be assisted by cross-examination.

22. Secondly, the topic appears to involve an attempt to "interrogate", including for privileged material, in order to raise collateral disputes and ancillary issues: cf [4]. The topic is far removed from any basis on which search orders are ordinarily discharged: see [6] above. In the circumstances, there is a real concern whether the application on topic (e) is made *bona fide*, or whether it is for a collateral purpose, including to attract media attention.

Other matters

23. In the event that leave is granted to cross-examine Mr Dewar: **(1)** on topic (a), Fortescue seeks leave to cross-examine Mr Masterman (see Fortescue's submissions dated 6 August 2024 (**FS**) at [4], [13(a)]); **(2)** on topic (d), Fortescue seeks leave to cross-examine Mr Williams: see FS [4], [13(b)]; **(3)** on topic (e), Fortescue seeks leave to cross-examine Mr Masterman and Mr Williams, including in respect of the matters raised in [22] above: FS [4], [13]; **(4)** Fortescue seeks leave for Mr Dewar to appear by video-link from Perth, for the reasons set out in Fortescue's correspondence to the Respondents dated 6 August 2024, which is annexed to these submissions.

24. Fortescue does not press any application to cross-examine Dr Kolodziejczyk or Dr Winther-Jensen: cf FS [3(a)-(b)], [7]-[11].

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6 August 2024

Mr Michael Williams / Ms Rebecca Dunn
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Dear Colleagues

Fortescue Limited & Ors v Element Zero Pty Limited & Ors,
Federal Court Proceeding No. NSD527/2024

We refer to your clients' application to cross-examine Mr Dewar on 19 August 2024.

Please be advised that if the Court grants leave to your clients to cross-examine Mr Dewar, our clients will apply for leave for Mr Dewar to be cross-examined by video link for the reasons set out below.

(a) Mr Dewar is undergoing 1 MTP joint fusion surgery in Perth on 13 August 2024.
(b) Mr Dewar has been advised that he will be prescribed tapentadol for pain relief following the surgery, which he understands is a moderately strong opioid. Mr Dewar further understands that he may require tapentadol for pain management for around one week after his operation; this period of time may vary however, depending on the success of the surgery.
(c) Mr Dewar has a one week follow-up appointment with his orthopaedic surgeon on 20 August 2024. Mr Dewar's understanding is that his foot will be examined during that appointment and, provided the fusion is healing correctly, he will then be cleared to fly back to Sydney.

Please let us know by **1 pm on 7 August 2024** whether, subject to the Court's approval, your clients oppose Mr Dewar being cross-examined by video link in the event that the Court grants leave for him to be cross-examined.

Yours faithfully

Paul Dewar
Principal
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