

NOTICE OF FILING

Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 4/06/2024 3:28:00 PM AEST
Date Accepted for Filing: 4/06/2024 3:30:11 PM AEST
File Number: NSD527/2024
File Title: QFM1 & ORS v RAB1 & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "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

No.527 of 2024

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

FORTESCUE LIMITED ACN 002 594 872 (currently described in the proceeding by the pseudonym QFM1) and another
Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081 (currently described in the proceeding by the pseudonym RAB1) and others
Respondents

Affidavit of: **Michael John Williams**
Address: Level 35, International Tower Two, 200 Barangaroo Avenue
Barangaroo NSW 2000
Occupation: Solicitor
Date: 29 May 2024

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Filed on behalf of (name & role of party) The First, Second and Fourth Respondents
 Prepared by (name of person/lawyer) Michael John Williams, Partner
 Law firm (if applicable) Gilbert + Tobin
 Tel (02) 9263 4271 Fax (02) 9263 4111
 Email mwilliams@gtlaw.com.au

Address for service Level 35, International Tower Two
 (include state and postcode) 200 Barangaroo Avenue, Barangaroo NSW 2000

Made

I **Michael John Williams** of Level 35, International Tower Two, 200 Barangaroo Avenue Barangaroo NSW 2000, Solicitor, say on oath:

Introduction

1. I am the solicitor on record for the First, Second and Fourth Respondents. I have sworn one previous affidavit in these proceedings, on 29 May 2024.
2. For the purpose of making this affidavit I have read the affidavit of Adrian Huber sworn 1 May 2024. In this affidavit I provide a response, including on information and belief, to certain statements made in Mr Huber's affidavit. While I respond to certain statements in that affidavit, where I do not do so, I do not intend to agree with those parts of the affidavit or annexures or be taken to agree to them.
3. I have prepared this affidavit and have made enquiries with the First, Second and Fourth Respondents on an urgent basis in the time available.
4. The contents of this affidavit are based on my own knowledge or, where otherwise indicated, on information provided to me by the sources identified, which information I believe to be true.
5. By referring in this affidavit to any information or instructions I received or obtained, I do not waive or intend to waive – nor am I authorised to waive – any privilege attaching to those instructions or any work I performed as a result of those instructions, other than where expressly referred to in this affidavit.

Exhibits

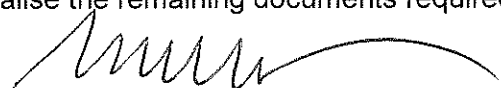
6. Exhibited to me at the time of swearing this affidavit is a paginated bundle of documents marked "**Confidential Exhibit MJW-3**" which I refer to in this affidavit. A reference to a page number of **Confidential Exhibit MJW-3** is a reference to a document which appears on that page of that exhibit.
7. **Confidential Exhibit MJW-3** contains documents and information which I understand to potentially be confidential and commercially sensitive to the Applicants (collectively, **Fortescue**). I respectfully request that access to **Confidential Exhibit MJW-3** and be restricted to the parties' external legal advisors.

Documents the subject of paragraph 19 of the Statement of Claim

8. At paragraph 77 of Mr Huber's affidavit, he summarises the results of a forensic investigation undertaken by Mr Rodney McKemmish of Cyter in April 2024. That report appears at Annexure AH-27 to Mr Huber's affidavit (the **McKemmish Report**).




9. At subparagraph 77(a), Mr Huber observes that the McKemish Report found that at least 2 USB devices were connected to Dr Kolodziejczyk's Fortescue laptop between September 2021 and November 2021.
10. I am informed by Dr Kolodziejczyk, and believe, that he used USBs to access documents he was working on at Fortescue in the ordinary course of his employment. That is recognised in paragraph 52(c) of Mr Huber's affidavit, being that Fortescue employees were permitted to use USB ports on Fortescue issued laptops in order to share documents for work purposes.
11. At subparagraphs 77(b), (d), (e), (f) and (g) of Mr Huber's affidavit, he observes that Dr Kolodziejczyk's laptop was used to access certain files while a USB device was connected to the laptop, including documents accessed on 26 October and 1 November 2024 (after Dr Kolodziejczyk resigned, see subparagraph (e)), and documents accessed on 22 October 2024 (the day Dr Kolodziejczyk resigned, see subparagraphs (d), (f) and (g)).
12. I am informed by Dr Kolodziejczyk, and believe:
- (a) Dr Kolodziejczyk resigned on 22 October 2021 and gave 3 months' notice.
 - (b) On or around 22 October 2021 or 25 October 2021 (shortly after Dr Kolodziejczyk's resignation) Dr Kolodziejczyk attended a meeting in the board room at Fortescue with Jim Herring (Head of Green Energy for the Third Applicant (FFI)), Emily Ward (Chief Legal Counsel for FFI), Kara Vague (HR Manager for Fortescue), and Mathew Roper (IP Manager for Fortescue).
 - (c) During the meeting referred to in subparagraph (b) above, Ms Ward or Ms Vague told Dr Kolodziejczyk that:
 - i. because of his position, he would not be permitted to serve the full notice period, and he needed to finish up at the end of the week (by 29 October 2024); and
 - ii. he would need to work outside the office for the remainder of his employment and not contact colleagues.
 - (d) At some time after the meeting, Ms Ward or Ms Vague conveyed an offer to Dr Kolodziejczyk from Mr Andrew Forrest (Executive Chairman of Fortescue) that Dr Kolodziejczyk could work in office space at Swan Brewery, the location of the Tattarang Group and the Minderoo Foundation offices. Dr Kolodziejczyk did not take up this offer, and worked from home.
 - (e) During the meeting referred to in subparagraph (b) above, Mr Roper told Dr Kolodziejczyk that he would need to finalise the remaining documents required



for the IP protection of the technologies that he was working on at Fortescue and that it was up to Dr Kolodziejczyk to determine what documents he would need to work on.

- (f) At some point during the week of 25 October 2021 (prior to 29 October 2021), Dr Kolodziejczyk realised that he would not be in a position to complete all of his work prior to 29 October 2021.
- (g) On or before 29 October 2021 Dr Kolodziejczyk had a telephone call with Mr Roper (and possibly Ms Vague) during which he was told by Mr Roper:
 - i. to continue working for another week, but that he would need to return his Fortescue laptop on 29 October 2021;
 - ii. Dr Kolodziejczyk could make copies and use the documents he needed in order to finish the rest of his work, and it was up to Dr Kolodziejczyk to decide what documents he needed to use to finish up his work; and
 - iii. Dr Kolodziejczyk should delete everything saved locally on his Fortescue laptop before returning it to Fortescue, because Fortescue had copies of the documents in its SharePoint.
- (h) On 29 October 2021, Dr Kolodziejczyk returned his Fortescue laptop to Fortescue.
- (i) From 29 October 2021 up until 5 November 2021, Dr Kolodziejczyk continued his work for Fortescue. That work included preparing and advancing documents relevant to applications for patents for technologies Dr Kolodziejczyk had worked on at Fortescue, such as a beneficiation process to be contained in a patent.
- (j) From 29 October 2021 to 5 November 2021 (when Dr Kolodziejczyk did not have access to his Fortescue email account), Dr Kolodziejczyk had text message and email exchanges with Mr Roper about the work he was undertaking, including as follows:
 - i. On 29 October 2021, a text message exchange with Mr Roper, which appears at page 1 of **Confidential Exhibit MJW-3**.
 - ii. On 29 October 2021, an email from Dr Kolodziejczyk from his personal email address to Mr Roper containing a "further descriptor" for a forecasting algorithm titled "Forecasting of Power Generation". A copy of that email and its attachments appear at pages 2 to 7 of **Confidential Exhibit MJW-3**.
 - iii. On 3 November 2021, Mr Roper sent Dr Kolodziejczyk and Dr Winther-Jensen (the Third Respondent) a draft patent specification for the "method of beneficiation of iron ore" invention prepared by Justin Negler of the law firm



Davies Collison Cave. Both Dr Kolodziejczyk and Dr Winther-Jensen respond to the draft with comments. Copies of those emails and its attachment appear at pages 8 to 33 of **Confidential Exhibit MJW-3**.

- iv. On 5 November 2021, an email from Dr Kolodziejczyk to Mr Roper sending information on the "iron flow battery" in which he says: "I have done an extensive search and have described the prior art. I have also emphasised the novelty or point of difference of the current invention.". Mr Roper responds. A copy of that email and attachment appears at pages 34 to 38 of **Confidential Exhibit MJW-3**.

13. In relation to the documents referred to at subparagraphs 77(d), (e), (f), and (g) of Mr Huber's affidavit, I am informed by Dr Kolodziejczyk and believe:

- (a) Dr Kolodziejczyk has not seen the documents to be able to verify what they are. In the absence of having access to the documents, his recollection of these documents is unclear.
- (b) Based on the titles of the documents, his best understanding at this stage is that:
 - i. the document referred to at subparagraph 77(d) ("FFI0302-10000-00-EG-BOD-0001_A(002)(BK).docx" may have related to the beneficiation patent;
 - ii. the document referred to at subparagraph (f) ("Green Iron Update (02.08.2021).pdf") may have contained an update of his work related to the beneficiation patent and he thinks was a presentation given to Mr Forrest by Dr Kolodziejczyk;
 - iii. the documents referred to at subparagraph(g) ("35557986AU-Drawings as filed (35557986).pdf" and "35557986AU-Specification as filed (35557986).pdf") are likely to be specifications for previous patents on which Dr Kolodziejczyk was an inventor which were relevant to the beneficiation patent; and
 - iv. the title of the document referred to at subparagraph (e) ("Bumblebee PID markups 26_10_21.pdf") suggests to Dr Kolodziejczyk that it relates to the Fortescue pilot plant project because "Bumblebee" was the project code.
- (c) Based on the titles of the documents and the timing of access, Dr Kolodziejczyk considers it likely that they related to the work he was undertaking in the final two weeks of his employment (as set out at paragraph 12(i) above).
- (d) Dr Kolodziejczyk did not use those documents after his employment at Fortescue.




- (e) Those documents do not relate to any work undertaken by Dr Kolodziejczyk at Element Zero or any of the Element Zero technology.
14. At subparagraph 77(c) of his affidavit, Mr Huber suggests that the McKemmish Report identifies that a folder called "TempSD" was deleted on 22 October 2021. I have reviewed the McKemmish Report and note that it concludes that Mr McKemmish "is unable to determine when the "TempSD" folder and contents were deleted" but based on the last modified date, he assumes it took place after 22 October 2021 at 9.05am (see page 27 of the McKemmish Report at Annexure AH-27).
15. I am informed by Dr Kolodziejczyk, and believe, that he recalls that the "TempSD" folder contained personal files, which he accessed when travelling with the Fortescue laptop. He deleted files from his Fortescue laptop prior to returning it, as instructed.

Relationship between Fortescue and Element Zero in 2023-2024

16. Section F of Mr Huber's affidavit is entitled "Contact with Respondents and Further Investigation in 2023-2024". I am informed by Michael Masterman (the Fourth Respondent and the CEO of the First Respondent), and believe, that the account given in Mr Huber's affidavit about the interactions between Fortescue representatives and Element Zero in 2023 and 2024 is incomplete. I have set out below, on information and belief, further details of the commercial discussions between Fortescue and Element Zero from August 2023 to January 2024, which were not included in Mr Huber's account.
17. At paragraph 70 of Mr Huber's affidavit, he states that he is informed by Mr Hamilton that on or about 5 September 2023, Mr Masterman contacted Mr Hamilton to request further iron ore samples, but that Fortescue did not ultimately provide any further ore samples. I am informed by Mr Masterman, and believe:
- (a) Element Zero and Fortescue had entered into an arrangement in May 2023 under which Fortescue provided Element Zero with iron ore samples for testing by Element Zero. A copy of emails from 19 May 2023 to 19 September 2023 between Mr Masterman, Mr Hamilton and Gerald LaRosa (Manager of Process Engineering for Fortescue) in relation to the arrangement appears at pages 39 to 44 of **Confidential Exhibit MJW-3**.
- (b) The arrangement was mutually beneficial as it enabled Element Zero to test its technology on commercially available iron ore, and it provided Fortescue with information about the the results from using Element Zero's process on the iron and allow a technical discussion.
- (c) From around 19 May 2023, Element Zero had tested a small amount of Fortescue magnetite iron ore under this arrangement, and Element Zero and Fortescue were

Alleade

Masterman

continuing discussions about the provision of further iron ore for testing and the potential for future commercial collaboration.

- (d) As part of the discussions about future collaboration, Mr Masterman and Mr Hamilton discussed the execution of a Non-Disclosure Agreement (**NDA**) to enable the sharing of information.

18. I refer to paragraph 68 of Mr Huber's affidavit, in which he describes a call between Phil McKeiver (Chief General Counsel, Fortescue) and Mr Masterman (with Mr Huber on the line). I am informed by Mr Masterman, and believe:

- (a) He did not have a call with Mr Huber in August 2023.
- (b) If Mr Huber was on a call, he did not announce himself and Mr Masterman was not aware of his presence.
- (c) The first record of a call between Mr Masterman and Mr McKeiver on Mr Masterman's phone is on 1 November 2023 (as to which, see subparagraphs 19(a) to 19(d) below).

19. Annexure AH-24 to Mr Huber's affidavit is an email chain between Mr Huber and Dr Kolodziejczyk. The last email in the chain is dated 11 September 2023. That email is the last record in Mr Huber's affidavit of dealings between Fortescue and Element Zero in 2023 and 2024. I am informed by Mr Masterman and believe that:

- (a) Mr Masterman recalls speaking with Mr McKeiver on the telephone on 1 November 2023 when Mr Masterman was in Singapore. The conversation was less than 5 minutes long.
- (b) In that call, Mr McKeiver said that he wanted to catch up with Mr Masterman and they agreed that they would do so when Mr Masterman was back in Australia.
- (c) During that call, Mr McKeiver did not raise concerns regarding potential intellectual property infringement and Element Zero's activities.
- (d) Mr Masterman understood that Mr McKeiver wanted to discuss the continuing work Element Zero was doing with Fortescue (in terms of testing its iron ore, as discussed above).
- (e) Following the call on 1 November 2023, Mr McKeiver sent Mr Masterman an email in relation to a potential meeting. A copy of that email appears on page 45 of **Confidential Exhibit MJW-3**.
- (f) On 23 November 2023, Mr Masterman sent Mr Hamilton a draft NDA.
- (g) Mr Masterman scheduled a meeting with Mr McKeiver on 19 December 2023.



- (h) On 19 December 2023, Mr Masterman attended the meeting at Fortescue's offices. When he arrived at that meeting at Fortescue, he found that the meeting attendees were Mr McKeiver and Mr Masterman (both in person) and Mr Paul Dewar from Davies Collison Cave (via video link).
- (i) Mr Masterman was surprised to see Mr Dewar in the meeting, as he had not been given forewarning that an external lawyer would be attending the meeting, and did not have the opportunity to bring one of his own.
- (j) At the beginning of the meeting, Mr Masterman objected to Mr Dewar's participation in the meeting, but continued the meeting.
- (k) During the meeting:
- i. Mr McKeiver and Mr Dewar raised a matter which had not been foreshadowed, namely whether Mr Masterman had communicated with the Australian Renewable Energy Agency (ARENA) about an application made by Fortescue. Mr Masterman indicated he had never met or had any email correspondence with the relevant person at ARENA, including about any application by Fortescue. This topic took up the majority of the meeting.
 - ii. the attendees also spent about five to ten minutes discussing the Element Zero technology.
 - iii. Mr Masterman advised Mr McKeiver and Mr Dewar that the Element Zero technology is very different from the Fortescue technology, including because the Element Zero does not use a membrane, operates at a different temperature range, and uses a non-aqueous alkaline solution.
 - iv. Mr Masterman advised Mr McKeiver and Mr Dewar that Element Zero has completed extensive Freedom to Operate searches which cleared the technology, and found no overlap with the Fortescue technology.
 - v. Mr Dewar indicated he would be very interested to see the Freedom to Operate searches, and Mr Masterman said he was happy to share the information when the NDA is in place, and that a draft had been sent through in November. Mr Dewar indicated that he had some mark ups to the draft and that they would be sent back tomorrow.
- (l) Mr Masterman did not receive an email from Fortescue or Mr Dewar about the NDA the following day. I have read Mr Dewar's affidavits filed in this proceeding, and he does not refer to or describe the meeting on 19 December 2023.
- (m) On 11 and 12 January 2024, Mr Masterman exchanged emails with Mr McKeiver, Mr Huber and Andrew Hamilton regarding the NDA. An email from Mr Huber to Mr



Masterman on 12 January 2024 attached a new NDA. Mr Masterman did not see that email on 12 January 2024 as it went to his junk email (he saw it on or about 18 January 2024, see further email chain extracted at subparagraph 19(p) below).

- (n) On 15 January 2024, Mr Masterman sent an email to Mr Hamilton and Mr Dino Otranto (the Chief Executive Officer for Fortescue Metals) following communication with Dr Forrest. A copy of that email and the response from Mr Otranto's Executive Assistant appears at pages 46 to 47 of **Confidential Exhibit MJW-3**.
- (o) On 17 January 2024, an article about Element Zero's technology was published in the Australian Financial Review. That article is at Annexure AH-25 to Mr Huber's affidavit.
- (p) Between 17 and 18 January 2024, Mr Masterman exchanged emails with Mr McKeiver, Mr Hamilton and Mr Otranto. A copy of that email chain appears at pages 48 to 50 of **Confidential Exhibit MJW-3**.
- (q) On 21 January 2024, Mr Masterman sent Mr Hamilton a revised NDA. A copy of that email chain appears at pages 51 to 53 of **Confidential Exhibit MJW-3**. In that email Mr Masterman said the following words:

"...we have aligned it with purpose that we have discussed – to share our respective iron ore to iron technologies in a constructive way and also enable ongoing testing and feedback on Fortescue iron ore".
- (r) The NDA was signed on 23 January 2024. A copy of the final, signed NDA appears at pages 54 to 65 of **Confidential Exhibit MJW-3**. There is no reference to the NDA in Mr Huber's affidavit.
- (s) On 24 January 2024, Mr Masterman attended a meeting at Fortescue with Mr Hamilton and Michael Dolan (Director of Science and Technology at FFI) and Mr LaRosa. Mr Masterman indicated that the meeting involved an open and constructive discussion. Mr Masterman explained the nature of Element Zero's technology, and Mr Hamilton and Mr Dolan explained the current nature of Fortescue's technology. There was discussion about future sharing of information, testing by Element Zero of further Fortescue iron ore, and future commercial opportunities.

20. Section I of Mr Huber's affidavit refers to the risk of destruction of documents by the Respondents in the event the search orders were not granted. The affidavit does not refer to the commercial discussions and arrangements which took place between Fortescue and Element Zero from May 2023 to January 2024, as outlined in paragraphs 17 to 19 above. I am informed by Mr Masterman and believe:

- (a) Fortescue never raised any concerns with Mr Masterman about the destruction of documents. If any concerns had been raised, he indicates that he would not have deleted any documents. He was actively offering Fortescue documents to explain Element Zero's technology and the differences between it and the Fortescue LTE technology. Mr Masterman has never destroyed any documents relevant to the concerns which have now been raised.
- (b) The commercial arrangements, and in particular the NDA signed by the parties, was designed to and did enable the two-way sharing of information, including about Element Zero technology and Freedom to Operate searches,
- (c) Mr Masterman expected Fortescue to make requests for documents regarding the Element Zero technology and the Freedom to Operate searches we had conducted following the meeting on 24 January 2024, and was ready to provide material to Fortescue upon request. No such requests were made.

Sworn by the deponent
at Barangaroo
in New South Wales
on 29 May 2024
Before me:

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)
)
Signature of deponent

Meade
Signature of witness
Caitlin Aisling Meade
Solicitor
level 35, Tower Two
200 Barangaroo Avenue
BARANGAROO NSW 2000