

NOTICE 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

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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: **Michael Geoffrey Hales**

Address: C/- MinterEllison, Level 9, One the Esplanade, Perth WA 6000

Occupation: Solicitor

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)

Mike Hales

Law firm (if applicable) MinterEllison

Tel (08) 6189 7800

Fax

Email perthbusinessservices@minterellison.com; Mike.Hales@minterellison.com;

Daniella.Lambert@minterellison.com; Lachlan.McLean@minterellison.com

Address for service

MinterEllison, Level 9, One the Esplanade, PERTH WA 6000

(include state and postcode)

[Version 3 form approved 02/05/2019]

I, Michael Geoffrey Hales, c/- MinterEllison, Level 9, One the Esplanade, Perth WA 6000, Solicitor, sincerely declare and affirm that:

1. I am the solicitor for the Third Respondent in these proceedings. I am the partner at MinterEllison with care and conduct of this proceeding on behalf of the Third Respondent. I am instructed to affirm this affidavit on behalf of the Third Respondent.
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 to set aside the Search Orders dated 21 June 2024 (**Application**).
5. In preparing this affidavit, I have reviewed the affidavits filed by the First, Second and Fourth Respondents in support of the Application and the affidavits relied upon by the Applicants in obtaining the Search Orders. In particular, I have reviewed copies of the:
 - (a) Affidavit of Dr Anand Bhatt affirmed on 1 May 2024;
 - (b) Affidavit of Wayne McFaulx affirmed 1 May 2024;
 - (c) Affidavit of Stephen Klotz dated 29 May 2024; and
 - (d) Fourth Affidavit of Michael John Williams dated 25 June 2024 (**Fourth Williams Affidavit**).
6. I also affirm this affidavit in support of the First, Second and Fourth Respondents' interlocutory application dated 25 June 2024 to strike out the Applicants' Amended Statement of Claim dated 14 June 2024 (**ASOC**) (**Strike Out Application**).
7. In preparing this affidavit, I have reviewed the Affidavit of Michael John Williams dated 25 June 2024 in support of the Strike Out Application (**Strike Out Affidavit**).
8. I have not commented on every aspect of the affidavits referred to above. Nothing should be inferred from this.
9. I do not waive and am not authorised to waive the Third Respondent's legal professional privilege or client privilege in respect of any matter in this affidavit, other than where expressly referred to in this affidavit.

Experience

10. I was admitted as a solicitor in England and Wales in 1988 and subsequently as a solicitor-advocate. Since then, I have been admitted as a solicitor-advocate in the British Virgin Islands and as a solicitor in Western Australia, New South Wales and the High Court of Australia. I was a partner in a London law firm for 16 years. I have been a partner of MinterEllison since 2012. I have practiced commercial dispute resolution my entire career. I have experience in proceedings such as the current one involving a search order.

Materials taken pursuant to the Search Orders

11. I am informed by Mr Winther-Jensen, the Third Respondent, that the Search Orders were executed on 15 May 2024 at his home, Unit 4, 213 Gildercliffe Street, Scarborough, Western Australia, 6019 (**Premises**).
12. I have reviewed the report of Ms Penelope Ford, the Independent Solicitor who attended the Premises (which is Annexure SK-1 to the affidavit of Stephen Klotz affirmed 29 May 2024) and its attachments and the report of Mr Phillip Russo, the Independent Computer Expert (being PHF-3 to annexure SK-1 to Mr Klotz's affidavit).
13. From Ms Ford and Mr Russo's reports, I believe that:
- (a) the following devices were searched by Mr Phillip Russo, the Independent Computer Expert, at the Premises. He took images of them and left the devices at the Premises at the end of the search:
- (i) 3 Samsung mobile phones;
 - (ii) 1 Lenovo tablet;
 - (iii) 1 Comsol 8GB USB thumb drive; and
 - (iv) 1 Sandisk 64GB USB thumb drive;
- (b) the following hardcopy records were taken from the Premises by Ms Ford:
- (i) 3 spiral bound notebooks;
 - (ii) 2 plastic sleeves of loose documents; and
 - (iii) a small bundle of loose papers, and

(c) Mr Russo took the following items from the Premises:

- (i) 1 HP laptop;
- (ii) 1 Toshiba laptop;
- (iii) a 1TB Toshiba hard drive;
- (iv) 1 blue Sony USB thumb drive;
- (v) 3 USB thumb drives; and
- (vi) a 1TB External Western Digital My Book.

14. I have reviewed Mr Russo's report and believe that forensic images were taken of:

- (a) the items listed in paragraph 13(a);
 - (b) the uplifted items listed in paragraph 13(c); and
 - (c) the Third Respondent's Gmail email account,
- (together, **Forensic Images**).

Volume of material taken

15. Since receiving the Forensic Images, MinterEllison has instructed its internal Legal Technology Consulting (**LTC**) Team to process and undertake preliminary reviews of the Forensic Images. Jack Carter, Legal Technology Lead, has had carriage of the processing and preliminary review of the Forensic Images.

16. LTC specialises in the preservation, collection and review of electronic data as part of a large portfolio of matters. The team's experience includes the handling and processing of forensic image data from sources such as mobile phones, computers and other similar devices, including the use of a range of IT tools to accelerate the review process.

17. I am informed by Mr Carter, and believe, that he has observed the following in relation to the Forensic Images to date:

- (a) There are 17 folders containing forensic image data, being:
 - (i) 3 mobile phones;

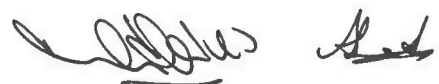


- (ii) 1 tablet;
 - (iii) 8 USBs or other external storage devices;
 - (iv) 3 computer based devices; and
 - (v) 1 Gmail email account.
- (b) The total dataset received is over 1TB in size. However, some of the data has been compressed. The compression makes it difficult to predict the final size of the dataset, but Mr Carter expects the overall size to grow to between 1.5 to 2TB once it has been processed.
- (c) There are 1,981,121 raw files within the Forensic Images, excluding the images of the mobile phones. This number is likely to grow significantly once the data is processed. In Mr Carter's experience, there is typically a 20-30% increase in file count following the extraction and processing of the data set.
- (d) There are likely to be more than 1,000,000 files in the Forensic Images taken of the mobile phones, in addition to the files mentioned above.
- (e) The processing, searching, configuration and management of the review will take a significant amount of LTC time, which will incur a considerable amount of costs. For example, even the initial processing and extraction of the files from the Forensic Images is likely to take between 1 to 2 weeks.
- (f) There will also be very substantial costs incurred by having a legal team of reviewers reviewing the actual materials once they are processed. Even with the use of technology, I estimate that it would take months for a team of multiple reviewers to conduct the actual review of this volume of documents.

18. I am informed by Mr Carter that he agrees with the challenges described by Mr Carson at paragraph 39 of the Fourth Williams Affidavit.

Scope of Search Orders

19. I have reviewed paragraphs 41 to 49 of the Fourth Williams Affidavit in relation to the scope of the Search Orders. I agree with Mr Williams that the drafting of the Search Orders has caused the Search Order to cover an unduly extensive volume and scope of material, in particular by the inclusion of category 1 of the Listed Things.



20. To the extent they are relevant to the Third Respondent, I expand on these concerns below.

Categories 1, 6 and 8

21. I am informed by the Third Respondent and believe that the Forensic Images contain confidential and privileged material that is irrelevant to the Proceedings.
22. Further, I am informed that the Forensic Images also include the Third Respondent's sensitive personal information, documents and emails, including, for example, passwords for various accounts controlled by the Third Respondent, as well as the Third Respondent's personal emails, photos, bank details, and other personal information.
23. The Search Orders as currently drafted capture every single file or document held on each of the Forensic Images, without any of the standard limitations such as file name, subject matter, or date range.
24. The Search Order also captures:
- (a) all communications between the Second, Third and Fourth Respondents; and
 - (b) all emails in the Third Respondent's email accounts between 18 January 2021 and January 2024,
- with no limitation as to subject matter.
25. The effect of this is that the Third Respondent will be required to review each of the documents, files, and emails on the Forensic Images, which currently totals nearly 2 million raw files, in addition to the files from the mobile phones for privilege and confidentiality. For the reasons set out above, this is oppressive to the Third Respondent.
26. Further, the broad nature of the Search Orders means that it captures documents that are irrelevant to the Proceedings. This is because, as set out at paragraphs 23 and 24, the Search Orders have not been limited in any way by subject matter.
27. Accordingly, as currently drafted, the Search Order captures all files, documents and emails in categories 1, 6 and 8, notwithstanding the fact that they do not relate to any matter in dispute between the parties and are irrelevant.



Conclusions

28. For the reasons set out above, the Search Orders are oppressive and unnecessarily broad. For those reasons, the Search Orders should be set aside pursuant to the Application.

Strike Out Application

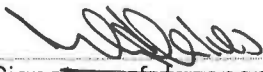
29. I have read the Strike Out Affidavit and share the concerns enunciated by Mr Williams about the ASOC.
30. In particular, I do not understand what documents the Third Respondent is said to have taken in paragraph 20 of the ASOC. There are no facts pleaded to support an allegation that the Third Respondent obtained the documents referred to in particulars (ii) to (v) of paragraph 20.
31. In relation to particular (vi), I do not understand what inferences are alleged to be available from the identified paragraphs of the McFaul Affidavit.
32. In relation to particular (vii), I do not understand how the pleaded inference arises from particulars (i) to (vi), nor do I understand what documents and information the Third Respondent is said to have taken. The words "design, engineering, construction, operation and/or feasibility of a Green Iron pilot plant" do not provide sufficient detail to identify the documents to which the particular refers.
33. Further, I do not understand what information in the documents that are particularised is said to be confidential.



34. For these reasons, the Third Respondent cannot properly understand and consider the allegations made against him in the ASOC.

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

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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

ApplicantsSecond 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