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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 and others
Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081 and others
Respondents

Affidavit of: **Michael John Williams**
Address: Level 35, International Tower Two, 200 Barangaroo Avenue
Barangaroo NSW 2000
Occupation: Solicitor
Date: 25 June 2024

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Filed on behalf of (name & role of party) The First, Second and Fourth Respondents
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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 for the First, Second and Fourth Respondents (the **Element Zero Respondents**).
2. This is my fourth affidavit in these proceedings. In my second affidavit sworn 29 May 2024 (**My Second Affidavit**) I identified serious concerns that I and the Element Zero Respondents had about the search orders made on 15 May 2024, and foreshadowed the filing of an application by them to set aside or vary the search orders.
3. I make this affidavit in support of Element Zero Respondents':
 - (a) Interlocutory Application dated 18 June 2024 (**Application to Set Aside**) and
 - (b) proposed short minutes of order to have the Application to Set Aside heard as soon as possible.
4. In addition to the experience set out in paragraph 4 my third affidavit sworn 25 June 2024, I have executed or been involved in the execution of (including as applicant's solicitor and Independent Lawyer), numerous *Anton Piller* / search orders over the last 25 years in cases of suspected breaches of confidence and infringement of intellectual property rights in Australia. I am familiar with the Federal Court of Australia's Search Orders Practice Note (**GPN-SRCH**) in relation to the guidelines that apply to *Anton Piller* orders, which came into operation and changed some aspects of the practice of executing search orders (role of the independent solicitor) but otherwise restated the *Anton Piller* / search orders processes already known in the Court.
5. Where I refer to my experience in this affidavit concerning search orders, I intend to refer to my experience in relation to cases such as this one as described above.
6. The contents of this affidavit are based on my own knowledge or, where otherwise indicated, on information from the sources identified, which I believe to be true.
7. Sources of information include Mr Masterman (the Fourth Respondent and CEO of the First Respondent) and Dr Kołodziejczyk (the Second Respondent and CTO of the First Respondent), and Mr Nigel Carson principal of Digital Trace Australia (forensic expert).
8. For the purposes of making this affidavit I have read a number of affidavits and documents that were relied on by Fortescue when obtaining the search orders made by Justice Perry on 14 May 2024 against the First Second and Third Respondents (**Search Orders**), together with the submissions and transcripts of the oral hearing when the orders were sought. Where relevant they are referred to below.




9. For the purposes of addressing the position of the Element Zero Respondents, I have also read the affidavits relied on by them on the Application to Set Aside.
10. 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.

Background

11. On 14 May 2024, Justice Perry made Search Orders against the First, Second and Third Respondents.
12. Since receiving instructions to act for the Element Zero Respondents Gilbert + Tobin has worked on an urgent basis to understand the scope of the material that was seized during the execution of the Search Orders and obtain copies of it, where possible.
13. Between 21 May 2024 and 28 May 2024, Gilbert + Tobin made emails requests of the Independent Lawyer (Hall & Willcox) to access to copies of things removed from the Premises during execution of the Search Orders. For brevity they are not reproduced.
14. On 22 May 2024, the Hall & Willcox provided copies of 8 hard copy documents removed from the Premises and confirmed that electronic images of computers and other devices imaged at the 19 and 30 Oxleigh Drive premises (**Forensic Images**) would be delivered to Gilbert + Tobin via courier once received from the Independent Computer Expert.
15. On 28 May 2024 at 5:22pm, the Independent Lawyer confirmed by email that a hard drive with the Forensic Images could be collected from Hall & Wilcox's office in Perth.
16. On 29 May 2024, a graduate lawyer from Gilbert + Tobin's Perth office collected a hard drive containing the Forensic images from Hall & Willcox. Gilbert + Tobin arranged for the hard drive to be urgently couriered to its offices in Sydney. The hard drive did not arrive at Gilbert + Tobin's Sydney office until the following day, the day of the return date of the matter before Justice Logan.
17. Between 28 May 2024 and 24 June 2024, Gilbert + Tobin has also made requests for documents relied on by Fortescue. For brevity they are not reproduced.
18. On 28 May 2024, Gilbert + Tobin sent a letter to Davies Collison Cave, lawyers for Fortescue (**DCC**) requesting a copy of the documents referred to in paragraph 19 of the Statement of Claim. Later that day Gilbert + Tobin sent a proposed confidentiality undertaking to DCC, in relation to Fortescue's confidential exhibits relied on for the purposes of the application for Search Orders.



19. On 3 June 2024, after receipt of the signed Confidentiality Undertakings, DCC provided the confidential exhibits relied on for the purposes of the application for Search Orders.
20. On 7 June 2024, DCC provided a copy of “documents that the Applicants believe are the same as or at least similar to the documents” referred to in paragraph 19 of the Statement of Claim, which were claimed to be confidential.
21. On 24 June 2024, Gilbert + Tobin sent an email requesting the documents referred to in particulars (ii), (iii) and (v) to paragraph 19 of the Amended Statement of Claim dated 14 June 2024 (**ASOC**). As at the time of swearing this affidavit, Gilbert + Tobin has not received a response, or the requested documents.

Summary of position

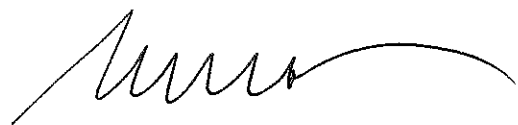
22. The Element Zero Respondents seek to have the Search Orders set aside or varied for reasons a number of reasons including a weak prima facie case, material non-disclosure during the *ex parte* application for the Search Orders, materially inaccurate and misleading information put before the Court on the *ex parte* application, invasion of the privacy of the Respondents, defects in the form of Search Order sought (not being compliant with GPN-SRCH) and the resulting excessive capture of documents from the Element Zero Respondents which it is not practical to have to review. Some of the material relied on is referred to below.

Material non-disclosure

23. Based on review of the material that was put before the Court by Fortescue, the Element Zero Respondents have serious concerns information that was material to consideration as to whether it was appropriate to be making an *ex parte* application and whether, if it was, it was appropriate for the Search Orders to be made was omitted from Fortescue’s disclosure to the Court. This included ongoing dealings between Fortescue and the Element Zero Respondents in the months prior to the Search Orders, and relevant information regarding the Second Respondent’s employment with Fortescue. A summary of those matters is set out below, which I note has been addressed in the affidavits of Dr Kolodziejczyk and Mr Masterman.

Fortescue’s relationship with Element Zero

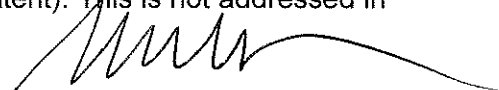
24. Mr Masterman’s affidavit refers to commercial discussions taking place between Fortescue and Element Zero between April 2023 to January 2024. These dealings were not disclosed by Fortescue in its evidence in support of the Search Orders. Mr Masterman’s affidavit refers to and exhibits communications with employees of Fortescue concerning the testing of iron ore and other metal ore samples. Mr Masterman

- attended meetings with Fortescue employees on 26 June 2023, 19 December 2023 and 24 January 2024, none of which are disclosed in Fortescue's evidence.
25. Additionally, as described at paragraphs 87 to 97 of Mr Masterman's affidavit, Fortescue and Element Zero entered into a Non-Disclosure Agreement on 23 January 2024 (**NDA**) which allowed the parties to share information confidentially and was intended to facilitate information sharing about Element Zero's technology. The existence of the NDA and the discussions under the NDA were not disclosed in Fortescue's evidence.
 26. Based on my review of publicly available information in conjunction with Mr Masterman's affidavit, I am aware that there are individuals employed with Fortescue who did not give evidence in support of the Search Orders but who have knowledge that is directly relevant to the commercial relationship between Fortescue and Element Zero during 2023 and 2024. For example, Phil McKeiver, Andrew Hamilton, Michael Dolan and Gerard LaRosa all attended relevant meetings with Mr Masterman in 2024. Key Fortescue executives including Mr Dino Otranto (CEO of Fortescue Metals), Mr John Hartman (CEO of Tararrang and Minderoo) and Mr Andrew Forrest (Chairman of Fortescue) were also aware of the commercial relationship between the parties.
 27. Mr Paul Dewar, solicitor for the Applicants in these proceedings and Mr Huber have both given evidence in these proceedings but each omit references to certain matters. Mr Dewar did not give evidence of the meeting which took place between he, Mr Masterman and Mr McKeiver on 19 December 2023 (see paragraph 77 of Mr Masterman's affidavit). Neither Mr Dewar nor Mr Huber gave evidence about the NDA between Fortescue and Element Zero, despite the fact that they were involved in drafting the NDA with Element Zero's lawyer (see paragraphs 89 to 97 of Mr Masterman's affidavit).

Dr Kolodziejczyk's employment with Fortescue

28. A core allegation made by Fortescue in support of the application for search orders was that during his employment with Fortescue, Dr Kolodziejczyk took four confidential documents without the licence or authority of Fortescue. Fortescue relies on a forensic report prepared by Mr McKemish in support of this allegation.
29. As set out in paragraph 80 Dr Kolodziejczyk's affidavit sworn 19 June 2024, Dr Kolodziejczyk was instructed by Mr Matthew Roper, Fortescue IP Manager, to take any documents that he needed to finalise his remaining work at Fortescue and then delete any documents off his local drives prior to returning his laptop to Fortescue. Dr Kolodziejczyk has given evidence of the work which was sent to Mr Roper during his final week of employment from his personal Gmail address (patent specifications and invention disclosures, as named inventor of a patent). This is not addressed in

Fortescue's evidence. Based on publicly available information, I am aware that Mr Roper is still employed by Fortescue. He did not give evidence in support of the Search Orders.

30. Additionally, Fortescue alleged that there is a real risk of destruction of documents by Dr Kolodziejczyk, including because an internal investigation conducted by Fortescue found that he "had materially misrepresented his qualifications and experience when applying for his position at Fortescue" (paragraph 69(f) of the Applicant's written submissions). In paragraphs 24 to 31 of Dr Kolodziejczyk's affidavit, during his interview for the role at Fortescue he explained his qualifications listed on his resume. John Paul Olivier, who was present during this interview process, did not give evidence of the conversation.

Evidence regarding research and development work at Fortescue

31. Dr Anand Bhatt has given evidence that he conducted a review of Dr Kolodziejczyk's Fortescue emails. Dr Bhatt did not work with Dr Kolodziejczyk work at Fortescue, and was not an employee of the company at the time. Individuals employed by Fortescue at the time of Fortescue's application for the Search Orders who are likely to have knowledge of Dr Kolodziejczyk's work, including Mathew Roper (who Dr Kolodziejczyk worked with on patent specifications and invention disclosures) and Sienna Mohammadzademoghadam (who worked with Dr Kolodziejczyk in the laboratory), both of whom are employees of Fortescue, and did not give evidence in the *ex parte* application.

Concerns about form of the Search Order

32. I am informed by Mr Masterman (the Fourth Respondent and Chief Executive Officer of the First Respondent) and Dr Kolodziejczyk that the Search Orders were executed on 15 May 2024 at the following premises (**the Premises**):
- (a) Unit 2, 30 Oxleigh Drive, Malaga, Western Australia, 6090;
 - (b) Unit 1, 19 Oxleigh Drive, Malaga, Western Australia, 6090; and
 - (c) 5A Volga Street, Hadfield, Victoria 3046 (**Dr Kolodziejczyk's residence**).

Material obtained from the Premises during the Search Order

33. I am aware from my review of the report prepared by Mr Rodney McKemmish, the Independent Computer Expert (which appears in Annexure SK-2 to the affidavit of Stephen Klotz affirmed 29 June 2024), that the following Forensic Images were made:
- (a) Forensic image of Dr Kolodziejczyk's laptop;
 - (b) Forensic image of Dr Kolodziejczyk's Samsung phone;
 - (c) Browser extract for Dr Kolodziejczyk's Whatsapp account;

- (d) Capture of the Google account for Kolodziejczyk.bartlomiej@gmail.com;
 - (e) Capture of the Google account for bart@kolodziejczyk.com;
 - (f) Capture of Google account for bart@elementzero.green;
 - (g) Capture of Element Zero Office 365 Share Point and OneDrive;
 - (h) Capture of Element Zero Google Workspace (which includes user data, including emails, files etc); and
 - (i) Capture of Element Zero's Google Drive and Gmail audit logs.
34. The Element Zero Respondents have instructed Nigel Carson of Digital Trace Australia, experienced computer forensic expert, to process the Forensic Images. Gilbert + Tobin has provided Mr Carson with the hard drive containing the Forensic Images.
35. In the time available since receiving the Forensic Images, Mr Carson has undertaken preliminary work on processing the Forensic Images to prepare them for review and has performed an initial analysis of the Forensic images. I am informed by Mr Carson and believe that he has observed the following about the Forensic Images to date.
36. Taken together, the Forensic Images contain approximately 2.5 terabytes (TB) in size, which I am aware from my experience of other matters involving forensic images is a large amount of data. The Forensic Images are in a compressed form, with multiple layers of compression. Mr Carson estimates that to decompress the Forensic Images so they can be processed and reviewed will take several (2-3) weeks of work by his team.
37. Mr Carson anticipates that when uncompressed the Forensic Images would be significantly larger in size and could be in excess of 4-5 TB. Based on the initial review, Mr Carson anticipates the Forensic Images contain more than 10 million files.
38. Mr Carson has conducted a preliminary and high-level review of the Forensic Images only as they relate to the computer devices captured, by parsing various email containers and analysing the file types contained within the Forensic Images. Based on this review, Mr Carson estimates that the Forensic Images include:
- (a) at least 50,000 possible user-created business documents (based on his own estimation of the file types that might constitute business documents),
 - (b) at least 200,000 emails; and
 - (c) at least 200,000 image files (not including icons and small graphic files).

These estimates are preliminary only, do not take into account the material on Dr Kolodziejczyk's phone, and would increase if a full extraction process is conducted.




39. I am informed by Mr Carson that reviewing the Forensic Images will require significant time and resource commitments, because:

- (a) the Forensic Images contain data from multiple sources, including different types of various computers and mobile phones, full copies of multiple Google accounts (referred to as Google Takeouts), Office 365 downloads and images and other downloads from mobile devices such as WhatsApp and other message threads;
- (b) each Forensic Image requires significant further processing, including to inspect the unallocated clusters of about 1.5 TB using file carving, mounting and expanding the multiple layers of ZIP files, and processing to allow review of forensic artefacts;
- (c) the Forensic images contain many files such as images (which Mr Carson estimates to be at least 200,000), videos and possibly schematic and other non-searchable files. These files will need to be processed further as it will not be possible to run search terms over these files in their current format. The processing of non-searchable files is a time-consuming exercise. I am also informed by Mr Carson that even once processed, these non-searchable files will need to be manually reviewed.
- (d) in addition to the complex and time-consuming task of processing and reviewing the many millions of files captured by the Forensic Images, there is substantial forensic analysis work that would need to be completed to understand how and when files have been accessed, deleted etc. This is largely manual work that, due to the number of devices imaged and will involve significant time (weeks).

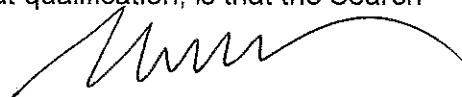
40. Based on my experience in equivalent review processes, and the information with which I have been provided by Mr Carson, I estimate it could take a team of multiple reviewers several months to review the Forensic Images (even if the review was confined to a review for confidentiality and privilege under order 22(b) of the Search Orders). This review process would be considerably reduced if the volume of data was reduced, such as if certain images were excluded and categories of irrelevant material excised.

The Search Orders

41. Based on my experience, I am concerned that issues with the drafting of the Search Order have caused the Search Order to cover an unduly extensive volume and scope of material (which volume and scope is discussed in more detail in the section below).

Category 1

42. Category 1 of the Listed Things includes all electronic storage devices and cloud-based storage accounts at or accessible from the Premises as themselves "Listed Things" rather than as the devices to be searched for Listed Things. The effect of the inclusion of all devices and accounts as Listed Things, without qualification, is that the Search

Orders capture every single file or document held on every device or stored on every cloud-based account at or accessible from the Premises without any limitation for file name, subject matter, keyword hits, date range or any other standard limitations.

43. In my experience, the inclusion of category 1 of the Listed Things is contrary to the usual form of orders and appears to me to be inconsistent with other parts of the Search Orders. The orders themselves (see order 20(d1)) contemplate excluding certain devices on the basis that they do not contain material falling into categories 2 to 9 of the Listed Things. If the Listed Things included the devices themselves, there would be no basis to exclude devices which did not contain Listed Things. Categories 2 to 8A of the Listed Things would also appear to me to be unnecessary (except for hardcopy documents) in light of category 1, which captures all documents on all devices and accounts already falling within category 1. All documents falling within categories 2 to 8A because of file name, subject matter, key word hits, date range or any other characteristics would already be caught by category 1.
44. Categories 2 to 8A of the Listed Things are also very broad and are likely to capture material which is privileged and highly confidential as well as material which does not relate to Fortescue, Element Zero or any issues in dispute in these proceedings. I have set out a non-exhaustive list of examples below.

Category 3

45. Category 3 of the Listed Things refers to all documents recording or recording or evidencing research and development work by or on behalf of Element Zero, Dr Kolodziejczyk or Dr Winther- Jensen, including laboratory notebooks and experimental data. The effect of this category is to extend to documents recording confidential research and development work prepared by Element Zero employees, including research which is subject to non-disclosure agreements (referred to in paragraphs 116 of the affidavit of Mr Masterman). This category would also capture all research and development conducted by Dr Kolodziejczyk which does not relate to Fortescue, Element Zero or the issues in dispute in these proceedings, including research undertaken as part of Dr Kolodziejczyk's roles (see paragraphs 15 to 21 of his affidavit).

Category 6

46. Category 6 of the Listed Things refers to all documents evidencing communications to which any two or more of Dr Kolodziejczyk, Dr Winther- Jensen or Mr Masterman are parties. This category is not limited by subject matter or date range.
47. I am aware from the affidavit of Dr Kolodziejczyk sworn 19 June 2024, that Dr Kolodziejczyk and Dr Winther-Jensen have known each other for 14 years, and that Dr Winther Jensen was Dr Kolodziejczyk's research supervisor at Monash University.

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48. I am concerned that the effect of this category is that all communications between Dr Kolodziejczyk and Dr Winther-Jensen would be captured, including communications which do not relate to Fortescue, Element Zero or any issues in these proceedings (which would in any event be captured by category 1).

Categories 7 and 8

49. Categories 7 and 8 of the Listed Things refer to all emails in Dr Kolodziejczyk and Dr Winther-Jensen's email accounts from the commencement of their employment with Fortescue (25 March 2019 and 19 January 2021 respectively) to January 2024. Categories 7 and 8 are not limited by subject matter, and could capture a large volume of irrelevant material, including for example personal emails or emails which relate to Dr Kolodziejczyk's advisory roles described at paragraphs 15 of his affidavit.

Surveillance of the Respondents prior to execution of the Search Order

50. I have read exhibits PAD-2, PAD-6, PAD-8 and PAD-9 to Mr Dewar's affidavits, which comprise 601 pages of reports on the surveillance conducted on the Respondents (**Surveillance Reports**).
51. The Surveillance Reports were sent to Mr Darren Perry of Seyfarth Shaw, copying Fortescue's in-house legal counsel Mr Huber and Mr McKeiver. Mr McKeiver has not given evidence in these proceedings.
52. Surveillance was conducted on Dr Kolodziejczyk, Dr Winther-Jensen, Mr Masterman, as well as at Element Zero's office and laboratory at 30 and 19 Oxleigh Drive, Malaga WA. In my experience and for the reasons set out below the level of surveillance conducted on the Respondents was highly invasive and not necessary to confirm the location of the Respondents prior to execution of the Search Orders.
53. The Surveillance Reports indicate that at least 685 hours surveillance was conducted on the Respondents between 21 April 2024 and 12 May 2024. By way of example, on 9 May 2024, surveillance was conducted at:
- (a) Dr Kolodziejczyk's residence between 6am – 8pm;
 - (b) Element Zero's office and laboratory between 6am – 6pm,
 - (c) Dr Winther-Jensen's residence between 6am – 8pm;
 - (d) Mr Masterman's residence in Cottesloe between 6:30pm – 8pm;
 - (e) Mr Masterman's residence in Coogee between 5:30am – 8pm; and
 - (f) Port Hedland to attempt to ascertain the location of Mr Masterman and Dr Kolodziejczyk between 12:30 - 8pm.

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54. The surveillance operatives have not been identified in the Surveillance Reports (although in some cases individuals are described using initials). However, it appears that several operatives were employed to conduct surveillance on the Respondents, including several operatives at a single location.
55. Surveillance of Element Zero's office and laboratory included multiple operatives who were deployed to follow staff, employees and visitors. Element Zero staff were followed by private investigators to their personal residences (see for example, page 157- 158, 188-189, 194-196 of Exhibit PAD-2) and shops (see for example, pages 189-190 of Exhibit PAD-2 and page 11 of Exhibit PAD-6) after leaving Element Zero's office. Element Zero's cleaners were also followed by Fortescue's surveillance operatives (page 238 of Exhibit PAD-2). Title searches were obtained of individuals who visited Element Zero's office and profiles of Element Zero employees were created by the private investigators.
56. The Surveillance Reports indicate that surveillance was conducted on Mr Masterman's residential premises in Sydney and Perth, as well as surveillance on Mr Masterman personally between 29 April 2024 and 30 April 2024. I am not aware of any reason why it was necessary to conduct surveillance on Mr Masterman, given that Mr Masterman was not a recipient of the Search Order. I note the Surveillance Report indicates that the private investigator searched Mr Masterman's garbage bin and mail box (page 24 - 26 of Exhibit PAD-6) and followed an elderly lady who parked on Mr Masterman's front lawn to Officeworks (page 149 of Exhibit PAD-8). No explanation has been given in the Surveillance Reports for this level of invasion of privacy.
57. Dr Kolodziejczyk and Dr Winther-Jenson's residences were under heavy surveillance between 21 April 2024 and 12 May 2024, typically for around 14 hours per day, but in some cases up to 17 hours a day. Surveillance operatives followed Dr Kolodziejczyk closely including to his son's daycare (see for example, page 43 of Exhibit PAD-6), and Dr Winther-Jensen to parks, shopping centres and to a Cancer awareness charity event (see for example pages 208-210 of Exhibit PAD-2).
58. Based on my review of the Surveillance Reports, it also appears that the exhibits to Mr Dewar's affidavits do not include all correspondence with the private investigators or all surveillance reports. No instructions are exhibited to Mr Dewar's affidavits. There is no background investigation file for Mr Masterman exhibited to Mr Dewar's affidavits despite the fact he is referred to in the Surveillance Reports as "POI 1". Based on my review of the Surveillance Reports, I believe additional surveillance may have been conducted on Mr Masterman that has not been disclosed by Fortescue. For example, at page 24 of Exhibit PAD-6 the surveillance operative notes no change to the rubbish in Mr



Masterman's bin, however there are no previous surveillance reports of Mr Masterman's residence in Mr Dewar's affidavits.

Amended Statement of Claim

59. I give evidence about the deficiencies in Fortescue's Amended Statement Claim (ASOC) in my third affidavit sworn 25 June 2024. In addition to the issues raised in my third affidavit, I am very concerned that Fortescue is now trying to establish a materially different case to the case it relied on in obtaining the Search Orders.
60. One of the main amendments to the Applicant's pleaded case appear to me to be in paragraphs 19 and 20 of the ASOC, which relate to the allegations that Dr Kolodziejczyk and Dr Winther-Jensen copied a number of Fortescue documents during the course of their employment. Paragraph 19 of the ASOC is as follows:

19 In an unknown period before the date pleaded in paragraph 17 above, but from at least about September 2021 to October 2021, Dr Kolodziejczyk obtained Fortescue information relating to the design, engineering, construction, operation and/or feasibility of a Green Iron pilot plant ~~a copy of at least the following Fortescue documents from his Fortescue issued laptop:~~

Particulars

(i) 4-Report on the forensic image of Dr Kolodziejczyk's Fortescue laptop referred to in the affidavit of Mr Adrian Huber, identifying the following documents:

1. File named "Green Iron Update (02.08.2021).pdf";
2. 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";
3. Document titled "Basis of Design – Chameleon Pilot Plant" having document number or file name FFI0302-10000-00-EG-BOD-0001; and
4. File named "Bumblebee PID markups 26_10_21.pdf"

(ii) The SharePoint documents identified in paragraphs 112 to 118 of the affidavit of Dr Anand Indravadan Bhatt affirmed on 1 May 2024 and Annexure AIB-29 thereto.

(iii) The internal Fortescue procedures and specifications listed in paragraph 103 of the affidavit of Mr Wayne McFaul affirmed on 1 May 2024.

(iv) The facts, matters and circumstances in paragraphs 102 to 106, 111 to 122 of the affidavit of Mr Wayne McFaul affirmed on 1 May 2024, and available inferences arising therefrom.

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~~iii)(i) Report on the forensic image of Dr Kolodziejczyk's Fortescue laptop referred to in the affidavit of Mr Adrian Huber.~~

(v) It can reasonably be inferred from one or more of particulars (i)-(iv) that Dr Kolodziejczyk took documents and information in addition to that in (i)-(iv) above from Fortescue relating to the design, engineering, construction, operation and/or feasibility of a Green Iron pilot plant.

~~(iv)(vi) Further particulars may be provided, including after discovery.~~

61. The Applicants relied on the pleaded case in the Statement of Claim during the *ex parte* hearings on 9 May 2024 and 14 May 204. The allegations that the Second and Third Respondents copied and took confidential documents was the core of the case put by the Applicants before Perry J.
62. In written submissions, the Applicants' submitted (emphasis added):
- "without Fortescue's knowledge or permission, when they resigned, Dr Kolodziejczyk and Dr Winther-Jensen copied and took with them certain confidential documents relevant to designing, engineering, constructing and operating an industrial pilot plant for an electrochemical reduction process (listed in the SOC at [19] and [20])"*
63. During the hearing on 9 May 2024, Senior Counsel for the Applicants submitted (emphasis added):
- (a) *"we have evidence that the second respondent took these documents [in paragraph 19 of the SOC] before he left Fortescue" (T21.36-7); and*
- (b) *"the reasonable inference which we would seek to draw is, together with the evidence of them actually taking documents – which we have; together with them – the evidence that they were working on the ionic process; the fact that we can't find the documents; the fact that they've got where they are now, which we say is inconceivable, without the resources – you add that all up, your Honour, and we say we have a strong prima facie case that there has been misuse of my clients' confidential information at an industrial scale (T29.14-24)"*
64. Particulars (ii) and (iii) of paragraph 19 of the ASOC refer to Fortescue documents which are stored on Fortescue's SharePoint folders. Dr Bhatt describes the documents in particular (ii) as documents *"that if taken by Dr Winther-Jensen and Dr Kolodziejczyk, would be of particular value"* (paragraph 118 of Dr Bhatt's affidavit). Mr McFaull describes the documents in particular (iii) as documents which *"could have saved Element Zero considerable time and expense to understand design and regulatory requirements for process infrastructure, particularly with respect to safety, and in the*

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selection and procurement of appropriate equipment to be incorporated into a Pilot Plant.” There is no evidence that the Respondents accessed these documents during their employment at Fortescue or obtained a copy of these documents prior to their departure.

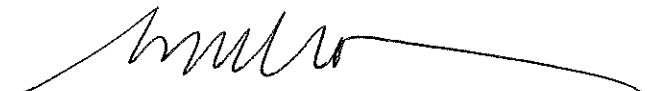
65. My observation is that the Applicants appear now to be trying to establish a materially different case based on Dr Kolodziejczyk and Dr Winther-Jensen’s access to confidential information during their employment with Fortescue, rather than the exfiltration of certain documents as pleaded in the Statement of Claim relied on by the Applicants in obtaining search orders against the Respondents.

Orders sought by the First Second and Fourth Respondents


66. In the circumstances described above, the Element Zero Respondents respectfully seek the orders in the Application to Set Aside.

Sworn by the Deponent
at Barangaroo
in New South Wales
on 25 June 2024
Before me:

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Signature of deponent



Signature of witness

Caitlin Aisling Meade, Solicitor
Level 35, International Tower Two
200 Barangaroo Avenue
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