

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

**First, Second and Fourth Respondents' Submissions in Support of 21 June 2024  
Interlocutory Application to Set Aside the Search Orders**

## 1 Introduction

1 These submissions are made in support of the Interlocutory Application by the First, Second and Fourth Respondents (the **Element Zero Respondents**) dated 21 June 2024 to set aside or vary the **Search Orders** made on 14 May 2024.

## 2 Summary

2 The Element Zero Respondents seek to have the Search Orders obtained *ex parte* by the Applicants (**Fortescue**) set aside or varied on five bases: (a) first, that the Applicants' *prima facie* case was overstated and misrepresented to the duty judge who granted the Search Orders, (b) second, that there was no real risk of destruction of documents on the evidence, (c) third, that there was material non-disclosure by the Applicants when seeking the Search Orders, (d) fourth, 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) fifth, that the Applicants undertook excessive and unnecessarily intrusive surveillance of the Respondents, evidence which it deployed during the *ex parte* application.

3 *First*, Fortescue has weak *prima facie* claims for breach of confidence and contraventions of the *Corporations Act 2001 (Cth)* (**Corporations Act**). Those claims were overstated and misrepresented to the Court. They centred around the alleged taking and misuse of two sets of information, the "**Ionic Liquid R&D Information**" and the "**Fortescue Plant CI**". There are fundamental weaknesses in relation to the claims for breach of confidence relating to both types of information, including that the Ionic Liquid R&D Information does not exist (circularly, Fortescue relies on this fact to infer the information has been taken or destroyed and has therefore not been able to be defined with the specificity required by the law). This will be fatal to an ultimate claim for breach of confidence and exemplifies the weakness in the *prima facie* case. Equally problematic is there being no real evidence of threatened or actual misuse of either type of confidential information. The highest the alleged threat of misuse appears to rise is that the Second Respondent accessed documents on his laptop and USB after resigning but still during the course of his employment, which appears uncontroversial and is not sufficient to establish any threat of misuse (particularly when he was instructed to do so, a matter which was not disclosed, see further at paragraph 51 to 52 below). Further evidence relied on by Fortescue, such as the alleged "exfiltration" of documents by the Second Respondent, and the deletion of a specific "TempSD" folder on his laptop during the closing days of his employment, was overstated by Fortescue, with important details hidden in lengthy annexures which were contrary to the

submissions made to the Court about the effect of the evidence. Ultimately, Fortescue's case is weak because it is based on "inexact proofs, indefinite testimony, or indirect inferences": Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 362.

- 4 *Second*, there was no real risk of destruction of documents by the Respondents. Fortescue's case on the risk of destruction is built on unavailable inferences and overstatements or misstatements of the evidence. The matters relied on by Fortescue do not demonstrate the necessary "real risk of destruction, but involve vague, cobbled together allegations, reliant on misstatements and overstatements of the import of the evidence. In particular, Fortescue relies on the conduct of the Second Respondent in accessing material during the final weeks of his employment (there is no evidence that he "took" that material, contrary to Fortescue's submissions), and technical evidence about the deletion of the "TempSD" file (which is heavily relied upon by Fortescue as evidence of nefarious intent, but which again involves submissions that are inconsistent with the evidence). The actual position is that there was no risk of destruction, that would have warranted the making of search orders, and this is particularly the case when the material facts that were not disclosed are considered.
- 5 *Third*, there were egregious non-disclosures of multiple matters which were material to the Court's decision. This included matters relevant to an assessment of core aspects of the Applicants' *prima facie* case, such as instructions given to Dr Kolodziejczyk upon his resignation which are directly relevant to the allegations that he "exfiltrated" documents. Those instructions included that Dr Kolodziejczyk should work at home after he resigned, take whatever files he needed to complete his work, communicate with Fortescue using his personal Gmail and phone because he had been required to return his laptop prior to his final week at Fortescue. A further material non-disclosure relevant to the alleged risk of destruction was the extent of the relationship between Fortescue and Element Zero throughout 2023 and early 2024 which included: (a) Fortescue supplying Element Zero iron ore samples to test using the Element Zero technology; (b) Element Zero providing Fortescue confidential information concerning the Element Zero technology and the differences between it and the Fortescue technology; and (c) Fortescue and Element Zero entering into a Non-Disclosure Agreement (**NDA**) which contemplated that Fortescue could ask for, and Element Zero would provide, further confidential information concerning the development and operation of its technology. None of those facts, which tend strongly against there being any risk of destruction, were disclosed to the Court. Against this background a

risk of destruction could only reasonably arise – given the nature of the relationship between the parties – if Fortescue had made inquiries of Element Zero which were rebuffed or avoided. There is no evidence of that having ever occurred. Finally, there was also non-disclosure by Fortescue relevant to risk of destruction such as the enquiries which were made or ought reasonably have been made by Fortescue for the “missing” Ionic Liquid R&D Information.

- 6 *Fourth*, the excessive scope of the Listed Things in the Search Order is inconsistent with what was reasonably required to preserve potentially relevant evidence and has resulted in the capture of an estimated more than ten million files including many thousands of irrelevant documents which it is not practical to review. That can be seen by [1] of the Listed Things: it allowed the seizure of all electronic devices and electronic information located or accessible at the locations, regardless of their relevance to the issues in the proceedings. Similarly, [3] captured any research undertaken by the Respondents at any time and in relation to any subject matter.
  
- 7 *Fifth*, there was excessive and unnecessary surveillance of the Respondents leading up to and relevant to the exercise of discretion in making the Search Orders. Search orders must be obtained for the sole purpose of preserving evidence. A strong discretionary factor tending against the making of search orders is their likely intrusive effect upon the respondents. Surveillance is only necessary to identify the locations to be searched and, perhaps, whether the respondents are at those locations (but even that is not necessarily required, as occurred here with Dr Kolodziejczyk, a respondent’s home may be searched without them being present). The Element Zero Respondents can identify no decision of this Court in which there has been consideration of an approach such as was taken by an applicant. It is open to the Court to conclude from the excessive scope of the surveillance and the lack of probative evidence as to its purpose(s) (including the resistance in disclosing the instructions given to the surveillance “operatives”) that it was not undertaken solely to assist in obtaining and executing search orders to preserve evidence, and that a collateral purpose was to obtain information about Element Zero beyond what is relevant to these proceedings and to intimidate the Respondents. Such a purposes, beyond the preservation of evidence, amount to unclean hands or bad faith in obtaining the Search Orders.

### 3 Evidence

8 In support of the application, the Element Zero Respondents rely on:

- (a) an affidavit sworn by Michael **Masterman**, the Fourth Respondent, on 20 June 2024 which is accompanied by Confidential Exhibits MGM-1, MGM-2, MGM-3 and MGM-4;
- (b) an affidavit sworn by Bartłomiej **Kolodziejczyk**, the Second Respondent, sworn 19 June 2024 which is accompanied by Exhibit BPK-1 and Confidential Exhibit BPK-2;
- (c) an affidavit of Melissa Gravina sworn 19 June 2024 which is accompanied by Confidential Exhibit MG-1; and
- (d) the fourth affidavit of Michael **Williams** sworn 25 June 2024.

9 Proposed orders to suppress the publication or disclosure of Confidential Exhibits MGM-1, MGM-2, MGM-3, MGM-4, BPK-2 and MG-1 will be provided by the Court prior to the hearing of the application.

### 4 Principles

#### 4.1 Requirements for making an Anton Piller order

10 In *Anton Piller KG v Manufacturing Processes Ltd and others* [1976] 1 All ER 779, Ormrod LJ defined the “three essential preconditions” for making a search order as:

“First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the plaintiff. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.”

11 Described as a “nuclear weapon in the Courts armoury”,<sup>1</sup> it is accepted that *Anton Piller* search orders should only be used in extreme circumstances, where there is no other way to preserve evidence: *Columbia Pictures Industries Inc v Robinson* [1987] 1 Ch 38 at 71. In that regard, Courts have been “careful to avoid the extraordinary jurisdiction of the Court to make an Anton Piller order from being subverted to a mere investigatory tool for applicants or indeed, from being used for any purpose other than

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<sup>1</sup> *Bank Mellat v Nikpour* [1985] FSR 87 cited in *Interest Research Bureau Pty Ltd v Interest Recount Pty Ltd* (1997) 38 IPR 468.

the preservation of vital evidence pending the hearing and determination of a proceeding”.<sup>2</sup> A party applying to the Court for an *Anton Piller* search order will need to satisfy the Court that there is “a high risk that, if forewarned, the defendant, would destroy, or hide, the evidence, or cause it to be removed from the jurisdiction of the court”: *Long v Specifier Publications Pty Ltd & Ors* (1998) 44 NSWLR 545 cited with approval in *Microsoft Corp*.

#### 4.2 Setting aside an Anton Piller order

- 12 Where an *Anton Piller* search order is made *ex parte* (as it ordinarily will be), it may be set aside *ab initio* on the basis that the grounds for such an order were not satisfied or there has been bad faith (such as material non-disclosure), and on any other ground the discharge will operate *in futuro* only: *Brags Electrics Ltd v Gregory* [2010] NSWSC 1205 (Brereton J) at [17].
- 13 The concepts of bad faith and material non-disclosure are related, with the latter being a subset of the former: in *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639, [2005] VSCA 213 (Gillard AJA Ormiston and Buchanan JJA agreeing) at [24]. However, the obligation of good faith goes further than just disclosure of material facts; it includes the obligation to fully and frankly address the court on matters relevant to the exercise of its discretion and to approach the Court with clean hands. As such, the principles are addressed separately below.

#### 4.3 The obligation to make full and frank disclosure of material facts

- 14 In *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679, Isaacs J at 681-2 described the duty of a party seeking *ex parte* orders as follows:

*“... it is the duty of a party asking for an injunction ex parte to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse for him to say that he was not aware of the importance. Uberrima fides is required, and the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all of the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the Court acts*

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<sup>2</sup> *Microsoft Corp v Goodview Electronics Pty Ltd* (1999) 46 IPR 159 cited in *Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* (2004) 205 ALR 319.

*informing its judgment is unfulfilled and the order so obtained must almost invariably fall.”*

- 15 That statement of principle has been more recently affirmed: see *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [133] (Hayne, Crennan and Kiefel JJ) and *Aristocrat Technologies Australia Pty Ltd v Allam* [2016] HCA 3; 90 ALJR 370 (Gageler J), see [15].
- 16 That is, if there is material non-disclosure, the order is almost invariably set aside so that the party in whose favour it was made is deprived of a benefit wrongfully, even if innocently, obtained: as identified in *Victoria Teachers Credit Union v KPMG* [2000] 1 VR 654; [2000] VSCA 23 at 665 (Callaway JA). It is not sufficient to save an order to establish that on a fresh application with full and frank disclosure an order in the same or similar terms would be made: *Garrard (t/as Arthur Anderson & Co) v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 at 676-678 per Mahoney AP (Clarke JA concurring).
- 17 In *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540 at 543 the Full Court observed:

“A party who seeks the granting of an injunction on an ex parte basis has a duty to place before the court all relevant matters including such matters which would have been raised by the respondent in his defence if he had been present.”
- 18 Where *Anton Piller* search orders are sought, “the consequences of the order may be unpredictable and irremediable and very possibly most serious for the proposed defendant: there the very fullest disclosure must be made so as to ensure as far as possible that no injustice is done to the defendant”: *Jay Bola* [1992] QB 907; [1992] 2 Lloyd’s Rep 62 at 67 (Hobhouse J).
- 19 The Search Orders Practice Note (GPN-SRCH) at [2.20] states: “An applicant for a search order made without notice is under a duty to the Court to make full and frank disclosure of all material facts to the Court. This includes disclosure of possible defences known to the applicant”.

20 Further, the duty to make full and frank disclosure is not restricted merely to facts actually known: it extends to facts which the applicant would have known if he had made proper enquiries.<sup>3</sup>

21 As explained by Allsop J (as his Honour then was) in *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Pty Ltd* [2005] FCA 955 at [38], the obligation of disclosure:

“does not mean stating matters obliquely, including documents in voluminous exhibits, and merely not mis-stating the position. It means squarely putting the other side’s case, if there is one, by coherently expressing the known facts in a way such that the Court can understand, in the urgent context in which the application is brought forward, what might be said against the making of the orders. It is not for the Court to search out, organise and bring together what can be said on the respondents’ behalf. That is the responsibility of the applicant, through its representatives.”

22 The question of what constitutes a material fact was considered by the Victorian Court of Appeal in *Savcor* [35]-[36] (Gillard AJA, Ormiston and Buchanan JJA agreeing) (citation omitted, emphasis underlined):

“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.

In *Brink’s Mat Ltd v Elcombe*, Ralph Gibson LJ conveniently summarised the principles. His Lordship noted that ‘the material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.’ His Lordship observed that the applicant must make proper enquiries before making an application.”

23 Importantly, actual dishonest knowledge is not required for there to be bad faith. In *Barton v Official Receiver* (1984) 4 FCR 380 at 388–9; 58 ALR 328, Fisher J observed that “a failure to make inquiries a person might have been expected to make may be cogent evidence of such knowledge or suspicion as would deny good faith; but in such

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<sup>3</sup> *Brink’s-Mat Ltd v Elcombe* [1988] 1 WLR 1350; [1988] 3 All ER 188 at 1356 (Ralph Gibson LJ), cited with approval in a number of Australian cases: see, for example, *Liberty Financial Pty Ltd v Scott* [2002] FCA 345; *French v Chapple* [2000] NSWSC 1240; *Victoria Teachers Credit Union v KPMG* [2000] 1 VR 654; *Bell Group NV (In liq) v Aspinnall* (1998) 19 WAR 561.



a case, the court's finding will not be one of an imputed dishonesty, but rather of a dishonesty inferred as a fact from the circumstances”.

#### 4.4 The obligation to make an *ex parte* application in good faith

24 As the Victorian Court of Appeal in *Savcor* identified at [24], an applicant for an *ex parte* order has an obligation to the court of the utmost good faith. This includes an obligation to disclose to the court facts which are relevant to the exercise of the court's discretion to make an invasive search order.<sup>4</sup> The concept of good faith is also rooted in the equitable maxim that the applicant must come into a Court of equity with clean hands: see summary of principle in *Kation Pty Ltd v Lamru Pty Ltd* [2009] NSWCA 145; 257 ALR 336, (Allsop P) at [2].

25 In *Deeson Heavy Haulage Pty Ltd v Cox & ors* (2009) 82 IPR 521, 565-568, McMeekin J at [275] rejected a submission that conduct occurring in the conduct of the litigation could not found a defence of unclean hands, relying on *Ocular Sciences Ltd & anor v Aspect Vision Care Ltd & ors* [1997] RPC 289; [1996] EWHC Patents 1 and accepting the requirement of an immediate and necessary relationship to the equity sued for at [276]. Meekin J relevantly said at [277]:

“Here, if I had been persuaded that the giving out of this information had been part of a plan to destroy a trade rival, and that the bringing of the suit itself formed part of that plan, then I would have held that it would have been appropriate to deny any form of equitable relief.”

26 The reference to *Ocular* is to the seminal judgement of Laddie J in a case where the plaintiff claimed injunctions against the use of or publication of alleged confidential information. Laddie J found that most of the allegations of breach of confidence were not made out, leaving “items of confidential information on which the plaintiffs have succeeded...[that were] from a technical point of view, insubstantial...[so that] the trivial nature of its claims became apparent”<sup>5</sup>. It was held that the reckless way in which the claims to confidential information were advanced inevitably increased the size of the proceedings and vastly increased the amount of the evidence, so that the way that the proceedings were conducted was oppressive. In the result, his Honour declined an injunction as to use of the confidential information found but granted an injunction as to its disclosure by the defendants.

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<sup>4</sup> See *Vitkovice Horni a Hutni Tezirstvo v Rorner* [1951] AC 869, 882 (cited with approval in *Yzerman v Schofield* [2011] WASC 200 at [58] (Em Heenan J)).

<sup>5</sup> [1997] RPC 289, 404-405.

## 5 Weak *prima facie* case

- 27 The Applicants plead six causes of action in their Statement of Claim dated 30 April 2024 (**SOC**), but relied on only two of them in seeking the Search Orders: (1) breach of equitable obligations of confidence, and (2) contraventions of s 183 of the Corporations Act. They submitted they had a strong *prima facie* case in relation to both causes of action: [49] and [63] **Search Order Submissions** dated 8 May 2024. The alleged breaches of confidence and the Corporations Act relate to two types of confidential information, defined as Ionic Liquid R&D Information, and Fortescue Plant CI.
- 28 The strength of the *prima facie* case for both causes of action was overstated and incorrectly presented to the duty judge. It was also subject to serious material non-disclosures, as to which see further section 7 below. Notably and critically absent from the case on breach of confidence, were two key elements, being (1) the specific identification of confidential information, and (2) the need for there to have been an actual or threatened misuse of the information without the Applicants' consent.<sup>6</sup>
- 29 Central to Fortescue's claim on the *ex parte* application was that:
- (a) The Second Respondent, Dr Kolodziejczyk, undertook and led R&D work at Fortescue on electrochemical reduction of iron oxide to iron using ionic liquid electrolytes ("Ionic Liquid R&D"): [3] Search Order Submissions citing SOC [12].
  - (b) Fortescue cannot locate documents recording the Ionic Liquid R&D Information, but "these documents *must have existed* because Dr Kolodziejczyk referred to the Ionic Liquid R&D in multiple internal and external communications, in the period at least from Sep 2020 to Jan 2021": [51(b)] Search Order Submissions.
  - (c) Because Fortescue cannot locate documents recording the Ionic Liquid R&D Information, it "may be inferred" that Dr Kolodziejczyk "took the documents": [56(c)] Search Order Submissions.
- 30 As can be seen from the above, and from the SOC, the case in relation to Ionic Liquid R&D Information is circular and weak. It is said (based on drawing together of comments in a small number of emails across 7 months from August 2020 to February 2021) that the Second Respondent undertook and led an entire body of work in relation to Ionic Liquid R&D. There is no evidence of the type that would be expected in relation

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<sup>6</sup> *Coco v AN Clark (Engineers) Ltd* [No 2] [1969] RPC 41 (at 47) and *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 (at 51); *Objectivision Pty Ltd v Visionsearch Pty Ltd* [2014] FCA 1087; (2014) 108 IPR 244 at [93], quoting *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [30] per Gleeson CJ.

to such an allegedly important project for a major organisation like Fortescue. Not a single employee of the Applicants gives evidence in relation to the nature and scope of this alleged work. Nor are there any significant internal documents of the type that would be expected, including board papers or reports (and according to Fortescue's evidence such documents from 2020 were not even looked for; the review for these was limited solely to the Second Respondent's emails). The claim is patched together via a retrospective analysis of a minute number of the Second Respondent's emails by Dr Anand Bhatt, who was not employed by the Applicants until January 2022 (three months after the Second Respondent left Fortescue) and who is not an independent observer (or expert).

- 31 Contrary to the submissions made by Fortescue, a proper analysis of the documents relied on by Fortescue indicates that Dr Kolodziejczyk (and later Dr Winther-Jensen when he commenced work at Fortescue in late-February 2021) were considering various avenues for further research, one of which involved ionic liquid, but that avenue was not pursued given the urgency of the project. The documents relied on by Dr Bhatt rise no higher than showing preliminary investigation and funding approval for research into ionic liquid reduction, in the context of Dr Forrest setting a "stretch target" that he wanted the testing and processing of green iron technology up and running by 30 June 2021. It is not evidence of what was done.
- 32 The Second Respondent has given evidence that he did not work on an "Ionic Process" at Fortescue and that several current employees of Fortescue would have been aware of the work he was undertaking in 2020 and 2021: [36] and [41] Kolodziejczyk. None of those employees were called as witnesses. The Applicants rely on the absence of any documents regarding Ionic Liquid R&D to substantiate the claim that such documents not only existed, but were taken by the Second Respondent upon his departure. Such a construction of the available facts is speculative at best. It certainly does not rise to the level of a strong case, let alone one justifying search orders.
- 33 In terms of the actual components of the cause of action, no documents have been identified by Fortescue as being confidential (within the amorphous, broad, abstract category of "Ionic Liquid R&D Information"). In order to establish a claim, information must be identified with specificity and precision.<sup>7</sup> This is not merely a procedural point but is a substantive requirement. The lack of any specificity or precision in identifying the documents in the Ionic Liquid R&D category highlights the unreality of this part of

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<sup>7</sup> See *O'Brien v Komesaroff* (1982) 150 CLR 310, 327, *Pioneer Concrete Services Ltd v Galli* (1985) VR 675, 711 and *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 443.

Fortescue's claim. The information therefore cannot be shown to meet the threshold justifying protection in equity, let alone in support of a search order. There is also no evidence of real or threatened misuse. The highest the submission rises is that because Fortescue cannot locate the documents it *may be inferred* that they existed and the Second and Third Respondents took the documents: [56(c)] Search Order Submissions.

- 34 In relation to the Fortescue Plant CI, Fortescue relies on conduct pleaded at [19] and [20] the SOC (which pleadings have now been materially amended by way of an Amended Statement of Claim dated 14 June 2024). In [19], Fortescue alleged that the Second Respondent obtained a "copy" of four Fortescue documents from September to October 2021 (noting he resigned on 22 October 2021). In its submissions, Fortescue alleged that the Second and Third Respondents "took" the material identified in [19] and [20] of the SOC in their final days at Fortescue: see [52] Search Order Submissions.
- 35 The Search Order Submissions suggest there is "strong evidence of misuse", including because "*Dr Kolodziejczyk accessed the documents in SOC 19 on his Fortescue laptop while connected to a USB device. This occurred on or after 22 Oct 2021, the day he resigned. Both devices had a folder named "TempSD" with a similar folder structure, which suggests the files in the laptop folder were copied to the USB device's folder. One subfolder in "TempSD" on both devices is in the path "To save" > "Fortescue IP", from which it may be inferred that Dr Kolodziejczyk intended to copy Fortescue's intellectual property. The "TempSD" laptop folder was deleted on 22 Oct 2021, the day he resigned.*"<sup>8</sup>
- 36 Similarly, during the *ex parte* hearing, the Applicants referred the Court to a summary of Mr McKemmish's forensic analysis at [77] of the affidavit of Adrian Huber in support of the submission that "*we have evidence that the second respondent took these documents before he left Fortescue.*"<sup>9</sup> The Court was taken to Mr Huber's summary, rather than the report of the actual forensic analysis conducted by Mr McKemmish (the **McKemmish Report** appears at Annexure AH-27 to Mr **Huber's** affidavit), which expressed findings in a much more qualified form.

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<sup>8</sup> [56] Search Order Submissions, emphasis added.

<sup>9</sup> T21.23-37, emphasis added.

37 The submissions advanced by the Applicants regarding the “exfiltration” of documents by the Second Respondent incorrectly represent the Applicants’ evidence:

- (a) The McKemish Report states that Mr McKemish “was unable to determine when the “TempSD” folder and its contents were deleted”, although he notes that it was last modified on 22 October 2021 so it likely was deleted at some point after this time (Annexure AH-27, [41] McKemish Report). Mr McKemish’s analysis is consistent with the analysis conducted by Deloitte who concluded “insufficient information was available to confirm if accessed date was the actual date and time the folder was deleted” (Annexure AH-22, [4.3.5] Deloitte Report). Fortescue’s submissions were inconsistent with that evidence, which was contained in the voluminous evidence it filed in support of the application for the Search Orders.
- (b) The submission that it can be inferred from the similar file structure that “Dr Kolodziejczyk intended to copy Fortescue’s intellectual property” is unavailable and misconceived. The McKemish Report identifies the “base file structure” of the TempSD folder, and notes that “that there is a similarity in folder structure” between the TempSD folder and the USB. It is not the same. The McKemish Report does not identify when any particular files were copied to a USB. The Applicants’ submission fails to acknowledge Fortescue’s evidence that “Fortescue employees were permitted to use USB ports on Fortescue issued laptops in order to share documents for work purposes”: [52(c)] Huber.
- (c) Contrary to the submission made by Fortescue, Mr McKemish does not say that the Second Respondent “took” the four documents in [19] of the SOC. The highest his evidence rises is that those documents were accessed either on the Second Respondent’s laptop or via a USB during the last months of his employment. Fortescue did not explain this to the Court and overstated the effect of Mr McKemish’s evidence: the duty judge was not taken to the McKemish Report, but to a summary of it in Mr Huber’s affidavit about which sweeping and generalised submissions were made which were unsubstantiated by the findings in the McKemish report). Further, Dr Kolodziejczyk’s alleged conduct in accessing the four documents in [19] of the SOC took place during Dr Kolodziejczyk’s employment with Fortescue. Far from suggesting “strong evidence of misuse”, there is nothing sinister or improper about Dr Kolodziejczyk accessing documents on his work issued laptop during his employment which were necessary in order to complete his responsibilities as Fortescue’s Chief

Scientist. In an internal report prepared by Fortescue's Internal Governance and Compliance Team in February 2020 (following receipt of the Deloitte Report), Fortescue acknowledged the possibility Dr Kolodziejczyk retained these documents in order to assist Fortescue in his role, stating "It is unclear if the intention of taking these files on a USB was to remove information without permission for his own private use, or to simply keep copies of paperwork relating to items where his ongoing assistance was needed" (page 158 of Annexure AH-22 to Huber).

- 38 Seemingly, in further support of the suggested misuse, the duty judge was taken to the affidavit of Nicholas Marrast at T30.7ff and it was submitted that it was "further evidence about how secretive the second and third respondents were before they left employment at Fortescue" (T30.10) and submissions to the effect that there were "very serious allegations of a lack of cooperation" (T31.1-29). The emails annexed to Mr Marrast's affidavit do not establish let alone give support there being any lack of co-operation or secrecy. For instance, Fortescue pointed to the email chain at NM-7 as showing "there was secrecy between them [the Second and Third Respondents] generally". To the contrary, it shows that the Third Respondent was concerned that they were only investigating and developing a "Plan A" (being solid state reduction) and they had no "Plan B" (such as ionic or molten reduction). That reinforced that there was no Ionic R&D. Fortescue failed to identify that to the Court. Instead, Fortescue quoted from the final email in the chain as suggesting them being secretive, but failed to identify that was in response to the Third Respondent saying "Should we try to set up a meeting with Julie to explain expansion [in research into leeching] as a way to mitigate risks (in light of no plan B)?" to which the Second Respondent replied: "Let's just explore it as part of our R&D. She is aware of this being a big moonshot and I think Andrew [Forrest] is finally understanding it too, although he is excited about the progress."
- 39 Having put this material forward, Fortescue was required to bring this to the Courts' attention. As noted by Allsop J in *Walter Rau* at [38] when an ex parte application is brought forward, "*[i]t is not for the Court to search out, organise and bring together what can be said on the respondents' behalf. That is the responsibility of the applicant, through its representatives*". Fortescue has abjectly failed in this responsibility here.
- 40 The weakness of the claim to the extent it relies on Dr Kolodziejczyk's conduct as pleaded in [19] of the SOC is exemplified by the amendments to that paragraph in the Amended Statement of Claim. Despite that paragraph being central to the application

for the Search Orders, Fortescue no longer pleads that Dr Kolodziejczyk obtained “a copy” of the specific documents, but instead pleads that he obtained “information”. This is an entirely different allegation, resting on a distinction between taking documents and information, which is material to whether there was conduct from which a risk of destruction could be inferred. This amendment also confirms that the original pleading and associated submissions relied on in the application for the Search Orders, simply could not be sustained. In effect, and only after executing the Search Orders, Fortescue has withdrawn one of the fundamental planks on which it obtained the orders. No explanation has been preferred by Fortescue for that amendment, despite its criticality to the issues.

- 41 For the same reasons as outlined in relation to the breach of confidence claim, the claim for breach of the Corporations Act, which relies on the same allegations is, at best, weak and takes the assessment of the strength of the case no further.

## **6 No real risk of destruction**

- 42 As identified by the Applicants at [68] of their Search Order Submissions, the risk of destruction will be inferred “*where it is clearly established...that the defendant has engaged in nefarious activity which ends it likely he is an untrustworthy person.*”

- 43 The matters relied on by the Applicants in support of the submission that there was a real possibility of destruction if the Search Orders were not made do go nowhere near establishing the type of risk the authorities indicate is required. It needs to be recalled that the risk of destruction is the touchstone of an application for search orders and without which they would not be made. The evidence of risk of destruction relied on by the Applicants is vague, and in many instances involved overstatement of the evidence.

- 44 The key matters relied upon by the Applicants are the Second Respondent’s deletion of the TempSD folder, the fact that the Applicants cannot locate the Ionic Liquid R&D Information and the fact that the Second and Third Respondents “took” Fortescue material electronically (via USB and email).

- 45 For the reasons outlined in section 5 above, there is no evidence that the Second Respondent “took” Fortescue material electronically, The evidence was he simply accessed it during the closing weeks of his employment (see 37(c) above), the evidence about the deletion of the TempSD file is that it was deleted at some point after 22 October 2021 (not on 22 October 2021) (see 37(a) above), and there is no

evidence that the alleged “Ionic Liquid R&D Information” was taken or deleted, as there is no direct evidence it ever existed in the first place (see 30 above).

46 Another factor relied upon in support of the risk of destruction is that the Second Respondent was quoted in the AFR as saying that the Element Zero technology was developed after he left Fortescue. It is unclear how this could possibly ground a risk of actual destruction required by the authorities; if anything, as a matter of common sense, the openness of the Respondents in agreeing to a public interview tells strongly against a risk of destruction, which is usually associated with businesses which eschew publicity. It was never explained in the Applicants’ submissions how this could have contributed to a genuine risk of destruction which would warrant the grant of search orders.

47 In all of the circumstances, a fair characterisation of the evidence is that there was no risk of destruction of information, let alone any real risk of the type necessary to ground such a special order. Moreover, the commercial dealings between the parties referred to below, which were not disclosed to the Court on the application, are inconsistent with any suggestion that the Respondents activities were clandestine in nature.

## **7 Material Non-Disclosure**

48 As identified above, the authorities emphasise the importance of a party making any *ex parte* application, particularly for search orders, putting before the Court all material facts for consideration. In its application, Fortescue’s failure to disclose to the Court material matters which would have impacted the Court’s determination in granting the Search Orders was egregious. Had those matters been disclosed, the Court would not have made the Search Orders.

### **7.1 Material Non-Disclosure – alleged inappropriate use of information**

49 A central plank of the Applicants’ *prima facie* case (and risk of destruction) as against Dr Kolodziejczyk hinges on the submissions made at [56(a)] and [69(a)] that:

- (a) it may be inferred that Dr Kolodziejczyk “intended to copy Fortescue’s intellectual property” because he deleted a folder named “TempSD” with a subdirectory named “To Save / Fortescue IP” on his laptop and opened the same files from the subdirectory “To Save/ Fortescue” on a USB device before Dr Kolodziejczyk’s Fortescue laptop was handed back to Fortescue; and



- (b) there is a risk of destruction because the “TempSD” laptop folder was deleted on 22 October 2021, the day Dr Kolodziejczyk resigned, such that “it can be inferred that he did so to hide the fact that he had copied Fortescue material in his final days at Fortescue”.
- 50 No other material facts concerning those events were put forward to the Court. There were two key material non-disclosures.
- 51 *First*, the Applicants failed to disclose that Fortescue instructed Dr Kolodziejczyk to work at home after he resigned, taking whatever files he needed to do so, and was to communicate with Fortescue using his personal Gmail and phone because he had been required to return his work computer prior to his last week at Fortescue (there is nothing in the Search Order Submissions and nothing said to her Honour about it; instead It was simply submitted at T21.37 “we have evidence that the second respondent took these documents before he left Fortescue”).
- 52 Dr Kolodziejczyk sets out the events following his resignation on 22 October 2021 at [43]-[56] of his affidavit. He identifies the correspondence he had with employees of Fortescue from his resignation up to 5 November, none of whom gave evidence. Nor were the communications put before the Court. As that correspondence identifies:
- (a) Ms Ward or Ms Vague told Dr Kolodziejczyk he would need to finalise any outstanding IP work and any other documents from home.
- (b) Between 25 and 29 October 2021, Dr Kolodziejczyk worked from home in Perth to finalise his remaining work for Fortescue.
- (c) On or around 29 October 2021, Dr Kolodziejczyk had a telephone conversation with Mr Roper about outstanding work, during which Mr Roper informed Dr Kolodziejczyk that he could continue to work for another week from home, would need to return his laptop by 29 October 2021, should take the documents he needed to finish off his work for Fortescue and then email the finished work to him directly, and to delete any documents saved on the local drives of his Fortescue laptop before he returned it because Fortescue had copies of what it needed on SharePoint (being the online file storage platform used by Fortescue).
- (d) On 29 October 2021, Dr Kolodziejczyk returned his Fortescue laptop, and his recollection is that he deleted the files on the local drives before doing so, some of which were personal files, as Mr Roper had instructed him to do.

- (e) In the morning of 29 October 2021, Dr Kolodziejczyk had communications with Mr Roper during which Mr Roper asked for Fortescue invention disclosures which Dr Kolodziejczyk had been working on (reproduced at p 13 of Exhibit BPK-1).
- (f) Between 29 October 2021 and 5 November 2021, Dr Kolodziejczyk continued outstanding Fortescue work using his personal laptop. He provided documents to Mr Roper from his personal Gmail address. He has set out the details of this work and communications on p2 of Confidential Exhibit BPK-2. They include sending Mr Roper work in respect of a forecasting algorithm, a draft patent specification for the method of beneficiation of iron ore (which is a process undertaken as a precursor to reducing iron ore to iron) and an iron flow battery.
- (g) At the time of swearing his affidavit, Dr Kolodziejczyk had not seen the documents referred to in [77] of Mr Huber's affidavit (which it is alleged he could have used to assist Element Zero), but based on the titles of the documents and the timing of access, he believes it is likely that they related to the work he was undertaking in his final two weeks of employment at Fortescue (which included finalising documents relevant to patents and other processes set out above): [58]-[59] Kolodziejczyk.

53 Since filing Dr Kolodziejczyk's affidavit, Fortescue has served an affidavit from Mr Roper affirmed 31 July 2024 and an affidavit of Dr Bhatt of 1 August 2024. That evidence reinforces the material non-disclosure when the orders were sought. No explanation has been provided by Mr Roper, Dr Bhatt or anyone else at Fortescue as to why the evidence in those affidavits were not provided to the Court when the Search Orders were sought. It is too late for the Applicants to rely on this new evidence. As set out above, it is not sufficient in defence of an application to set aside search orders to establish that on a fresh application a search order would be made: *Garrard* at 676-678 per Mahoney AP (Clarke JA concurring).

54 Even then, Mr Roper's affidavit does not assist. It confirms that Dr Kolodziejczyk was directed to and did work at home after resignation on matters including the forecasting algorithm, draft beneficiation specification and iron flow battery: [18]-[41] Roper. The balance of his evidence is speculative, including because it concerns conversations he does not recall (such as in [50]-[53]). The same can be said of Dr Bhatt's evidence, which makes a number of bold assertions as to what documents Dr Kolodziejczyk would require to complete his work in the final weeks of his employment, in circumstances where he has never even met him (e.g. [50]-[51] Bhatt 2). The contest

reflected in that evidence will not be resolved by the court at this point in time, and could only be resolved at a final hearing.

- 55 *Second*, the “TempSD” folder contained a number of folders and sub-folders which concerned personal matters or non-Fortescue matters. For example, it includes folders with names such as “40Under40” (a type of professional award), “89 The Avenue Spotswood Vic 3015”, “ERC Science Council”, “European Climate Pact Ambassador”, “McKinsey 2021 Executive Leadership Program”, “Millenium Fellowship” and “TAFE Board Director” (the folder structure is set out at Annexure AH-27 p 332; see also [52] Kolodziejczyk). On the face of them, these are likely to be private files and the Applicants haven’t brought forward any evidence to suggest otherwise.
- 56 There was also no evidence put forward by Fortescue as to whether files concerning the patent applications listed in the “Fortescue IP” folder are missing from Fortescue’s system (i.e., that they were not in fact saved there by Dr Kolodziejczyk). It is unremarkable that Dr Kolodziejczyk, being the author and co-author of a number of inventions patented while he was at Fortescue, would have access to such documents.
- 57 As with any employee leaving their employer, there is nothing inappropriate or sinister about deleting from a work laptop personal files and other documents that are not required by their employer and to which access is no longer required by them. But that was not even raised as a possibility by Fortescue with the Court (particularly where he had been directed to finish work on them at home before resigning).

## **7.2 Material Non-Disclosure – ongoing commercial relationship between Element Zero and Fortescue, and alleged risk of destruction based on investigations**

- 58 Fortescue also failed to disclose to the Court commercial dealings between the parties; that they and Element Zero/Mr Masterman were in frequent contact after August 2023, as set out in detail at [34]-[107] of Mr Masterman's affidavit.
- 59 That information is highly material, and directly relevant to the risk of destruction of any documents, and is contrary to submissions made by Fortescue that it would suffer serious prejudice, loss or damage if the search order sought was not made including because of the “inability to find out the true extent of Dr Kolodziejczyk’s and Dr Winther-Jensen’s exfiltration and misuses of Fortescue material”<sup>10</sup> and that information from Element Zero “emerged in Jul-Aug 2023 in a piecemeal fashion” and suggested

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<sup>10</sup> [70] Search Order Submissions.

that the last communication between the Applicants and the Respondents occurred in August 2023.<sup>11</sup>).

60 The commercial and personal interactions between Element Zero and Fortescue were extensive. Highlights include:

- (a) Communications which Mr Masterman had with Fortescue in relation to obtaining iron ore samples from Fortescue to test using Element Zero's technology up until 19 September 2023: [45]-[64] Masterman.
- (b) Correspondence in November 2023 in relation to entering into an NDA: [72]-[75] Masterman.
- (c) A meeting on 19 December 2023 held in-person at Fortescue's offices in Perth that included a discussion about Element Zero's technology. Mr McKeiver and Mr Masterman were physically present, and Mr Dewar from DCC via video link: [76]-[82] Masterman. Mr Dewar did not address this meeting in any of his affidavits prior to the filing of this application.
- (d) Negotiation and entering into an NDA in January 2023: [87]-[97] Masterman.
- (e) A meeting on 24 January 2024 at Fortescue's offices in Perth that was attended by Mr Masterman and three Fortescue employees – Mr Hamilton, Mr Dolan and Mr LaRosa: [99]-[107] Masterman.<sup>12</sup> During the meeting, they had what Mr Masterman considers to be a productive and open discussion about Element Zero technology, the future of Fortescue's technology and the possibility of a future commercial relationship between Fortescue and Element Zero, including the continued testing of Fortescue ore by Element Zero, and the planned Element Zero plant site in Port Hedland: [102]-[103] Masterman. The meeting ended on a congenial basis and left Mr Masterman with the impression that because an NDA was in place the parties would be able to openly communicate and share confidential information with each other about Element Zero's technology and progress testing: [105]-[106] Masterman.

61 Following the 24 January 2024 meeting, Mr Masterman did not receive any requests from Fortescue to share any further information about the Element Zero technology with Fortescue, pursuant to the NDA or otherwise, and he gives evidence that he

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<sup>11</sup> [73] Search Order Submissions.

<sup>12</sup> A copy of a recording of the meeting is reproduced electronically on Confidential Exhibit MGM-2.

believes he would have provided information under the NDA if asked by Fortescue: [107] Masterman. There is no challenge to this evidence from the Applicants.

62 In response, Fortescue has served a single affidavit from Mr Dewar affirmed on 31 July 2024. At [9], Mr Dewar gives evidence on information and belief from Mr Huber that he may have incorrectly recalled a telephone call with Mr Masterman in “about August 2023” at [68] of Mr Huber’s affidavit and that the phone call may have occurred in November 2023. No explanation is provided as to why Mr Huber has not given that evidence, nor why Mr Huber has not addressed the balance of the communications he had with Mr Masterman after August 2023.

63 Mr Dewar, from [10], purports to provide an explanation for Fortescue not disclosing the correspondence between Element Zero after August 2023. In doing so, he says at [22] that he specifically considered the duty of candour and obligation to disclose all material facts when deciding not to disclose that correspondence to the Court. The explanation thereafter provided is that Mr Dewar did not consider the correspondence relevant to the pleaded claim that Fortescue information had been created, taken and used by the Respondents. The Element Zero Respondents seek to test that evidence.

64 In any event, Mr Dewar says nothing about the relevance of the correspondence to the risk of destruction – which Fortescue acknowledges is a key element it needed to establish. Moreover, what Mr Dewar considers material is one thing: it is for the Court to determine what ought to have been disclosed at the time of the application.

65 The commercial relationship that existed between Element Zero and Fortescue at the time the Applicants applied for the Search Orders, including the NDA, was such that Fortescue could have asked for the information in relation to the Element Zero technology. However, the Applicants then informed the Court that it was unable to obtain that information, and there was a risk it would be destroyed, without revealing the existence of the NDA. There could be no clearer case of material non-disclosure.

### **7.3 Material Non-Disclosure – alleged creation and destruction of Ionic Liquid R&D**

66 As outlined at paragraph 29 above, the Applicants allege that Dr Kolodziejczyk created Ionic R&D and that while documents regarding that R&D could not be located, they “must have existed”, and it should be inferred that Dr Kolodziejczyk “took the documents”.

67 The Applicants failed to lead any evidence as to the work that was otherwise occupying Dr Kolodziejczyk’s time in 2020 and 2021. Between August 2020 and mid-January

2021, he was travelling extensively as part of the 'Fortescue Travelling Team' as he was responsible for scoping renewable energy projects globally and he did not have time to pursue other projects such as Green Iron: [37] Kolodziejczyk. In 2021 he worked intensively on the development of technology using electrochemical reduction of solid iron ore particles suspended in an electrolyte slurry, as described in Part C.3 of Dr Bhatt's affidavit (which is not Ionic R&D), to meet the 2021 "stretch target" set by Dr Forrest: [38] Kolodziejczyk. Throughout 2020 and 2021 he was also researching and developing a process to produce zero carbon or "green" cement, 'green' hydrogen technologies, hydrogen buses and a hydrogen refuelling station, a flow battery, optimisation tool and electrolyser design: [39]-[40] Kolodziejczyk.

68 As set out in paragraph 19 above, the duty to make full and frank disclosure is not limited merely to facts actually known, it extends to facts which the applicant would have known if he had made proper enquiries. Fortescue was obliged to make proper enquiries regarding the existence and potential destruction of "Ionic Liquid R&D", before submitting to the Court that these documents "must have existed" and it can be inferred that Dr Kolodziejczyk or Dr Winther-Jensen "took the documents or caused them to be unavailable". This has not occurred.

69 Fortescue either failed to make proper inquiries or did not disclose the results of searches of Dr Kolodziejczyk's laptop and Fortescue's computer network for this information in this regard. The evidence as to what it did is as follows:

(a) At [84] of his affidavit, Dr Bhatt says that apart from the emails he identifies he is "informed by Ms Hantos and believe that she and the Fortescue IT team have not been able to locate any other emails or any documents that mention the Ionic Process" and "Accordingly, there is no mention of this process on the Fortescue IT system after 23 February 2021".

(b) At [86]-[87] of his affidavit, Dr Bhatt says that he "would expect to be able to locate" a significant number of documents "on the Fortescue IT system" in relation to the Ionic R&D but "no other documents have been located in relation to the work undertaken by Dr Kolodziejczyk during the period of: (a) at least October 2020 to January 2021 (four months) as is apparent from the emails identified above; and (b) the period of around June 2020 to October 2021, which is the time during which Fortescue is concerned that Dr Kolodziejczyk and Dr Winther-Jensen were in fact working on the Ionic Process or molten carbonate processes."

(c) At [50]-[65] of her affidavit, Ms Hantos sets out a review she conducted of Dr Kolodziejczyk's emails and at [66]-[68] a limited review she undertook of a "SharePoint Folder" used by the Fortescue 'Green Iron' team. As [117] of Dr Bhatt's affidavit identifies, they used keywords to search documents saved in one particular SharePoint folder, limited to documents which were last modified from January to November 2021. No search was taken to identify any documents created and modified prior to 2021.

70 That is, Fortescue failed to identify to the Court that they only undertook a search of Dr Kolodziejczyk's emails to support its submission that "Fortescue cannot locate documents recording the Ionic Liquid R&D Information" which it is alleged Dr Kolodziejczyk created in 2020 before Dr Winther-Jensen commenced at Fortescue and they focused their research on non-ionic green iron technology: see T18.12-28 on 9.5.2024. It was incumbent on Fortescue to make these proper enquiries about the existence of Ionic Liquid R&D. It did not do so.

71 If there was any Ionic R&D Information created in 2020, it would likely have been saved on Dr Kolodziejczyk's laptop or the Applicants' network. If it had been copied, moved or deleted, there would be evidence which could have been identified. The Applicants failed to identify to the Court that they chose, for whatever reason, not to undertake such reasonable enquiries themselves (or with the assistance of Deloitte/Mr McKemmish) or, if they did, they chose not to put any evidence before the Court.

## **8 Bad Faith or Unclean Hands in Conducting Excessive Surveillance**

72 Another disturbing aspect of the application for the Search Orders was the level and extent of surveillance on the Respondents, their wives and young children, as well as employees, contractors and visitors to Element Zero's office. This surveillance was highly invasive and far exceeded what was necessary to identify the premises to be searched (the only legitimate forensic purposes for surveillance material).

73 As summarised in [48] to [55] of Williams, the surveillance reports are 601 pages long and indicate that at least 685 hours surveillance was conducted on all of the Respondents between 21 April and 12 May 2024. Multiple operatives were deployed each day across Australia to conduct surveillance on Element Zero's office and laboratory, and to follow staff, employees and visitors to their homes. Mr Masterman was not a recipient of the Search Order, yet the surveillance reports indicate that surveillance was conducted on Mr Masterman's residential premises and on Mr Masterman personally. The surveillance report indicates that the private investigator

searched Mr Masterman's garbage bin and mail box (p 24 of Annexure PAD-6) and followed a visitor of Mr Masterman's house (p 149 of Annexure PAD-8). Based on the surveillance reports, other surveillance is likely to have been conducted on Mr Masterman that has not been disclosed. No explanation has been given in the surveillance reports for the invasion of privacy of Mr Masterman or third parties, and it cannot seriously be suggested that this was necessary to ascertain the location of the Respondents for the purposes of executing the Search Order on the days on which it was proposed to be executed.

- 74 Surveillance of the Respondents had a real tendency to present a highly misleading picture to the Court; to colour the image of the Respondents as nefarious, fundamentally dishonest individuals operating at the margins of commercial activity. This could not be further from the truth. Mr Masterman is an executive with almost 40 years of experience, who has worked with Fortescue's Chairman Dr Forrest since 1996. Mr Masterman most recently held the role of CFO of FFI: [21] Masterman. Dr Kolodziejczyk is an eminently qualified scientist, with an Order of Australia for his significant services in the field of hydrogen energy, who has advised organisations such as the World Economic Forum, United Nations, World Energy Council, European Commission and NATO: [12]-[23] Kolodziejczyk. Dr Winther-Jensen is a respected engineer and scientist with more than 30 years' experience in innovation, research and development, in both academia and the private sector: [8]-[13] Winther-Jensen. Surveillance on these individuals to this level should never have occurred.
- 75 When the surveillance reports are viewed in the light of the misleading submissions made by Fortescue in obtaining the Search Orders, the material non-disclosures and the scope of the Listed Things, it is open to conclude the surveillance was conducted for purposes other than the preservation of relevant evidence. Collateral purposes, such as seeking to intimidate or damage a potential competitor, are antithetical to the good faith which Fortescue was required to have in pursuing the Search Orders. It is further open to conclude that such collateral purposes existed based on the effect that the surveillance has had on the Element Zero Respondents. Both Dr Kolodziejczyk and Mr Masterman have given evidence about their concerns with the surveillance which was conducted: [66]-[68] Kolodziejczyk; [110]-[112] Masterman.
- 76 It is therefore open for the Court to infer that the surveillance was not undertaken in good faith for the purposes of solely identifying the premises for the execution of the Search Orders. It was also material that had a tendency to prejudice the Respondents and should not have been relied on in support of *ex parte* orders.



## 9 Inappropriate Scope of Search Order

- 77 The Applicants said at [81] of the Search Order Submissions: “It is not the practice of this Court to limit the Listed Things to documents and material directly related to the precise cause of action then known, because that limitation would make the utility of a search order doubtful [*Aristocrat Technologies Australia v Global Gaming* [2006] FCA 862 at [7] (Allsop J); *Metso Minerals (Australia) v Kalra (No 3)* [2008] FCA 1201 at [28](d) (Flick J).]”
- 78 Those cases do not stand for or support the proposition that a search order may be made for the seizure of all computers and devices at a respondents’ premises regardless of whether they may contain information relevant to any cause of action against the respondents or not. In both cases cited by Fortescue, the Listed Things were directed to documents or devices which contained information relevant to the issues raised in the proceedings: the copying of confidential information identified in the pleading. The Applicants failed to identify that to the Court, and instead suggested that those cases supported the scope of the Listed Things being sought. That can be seen by the explanation that follows in [82] of the Search Order Submissions.
- 79 With respect to [1(a)] and [1(b)] of the Listed Things, the Applicants say in [82(a)] that “these are the specific USB devices referred to in Mr McKemmish’s report as having connected to Dr Kolodziejczyk’s Fortescue laptop”. [1] of the Listed Things goes well beyond USB devices referred to in the McKemmish Report. Its overly broad formulation allowed the seizure of all computers, devices and accounts irrespective of there being any basis to believe that they contained any information relevant to the allegations of copying confidential information: [42]-[43] Williams. No attempt was made to tether what could be seized to any matter of relevance and Fortescue failed to signal to the Court at the time the Search Orders were granted that the effect of the Listed Things would be to capture the entirety of Element Zero’s business, including confidential information of Fortescue’s competitors.
- 80 Similarly, [2] of the Listed Things allowed the seizure of “All documents (whether in hardcopy or electronic form) containing the word “Fortescue”, “FFI”, “FMG” or “FMGL””. The only submission made in respect of it is at [82(b)]: “this is intended to capture all documents containing the word “Fortescue” or abbreviations for its relevant subsidiaries”. Fortescue and Element Zero were in an ongoing commercial relationship. Not only had Element Zero been testing Fortescue iron ore samples, but they had also entered into an NDA and were sharing information about their technologies. The scope

of [2] of the Listed Things allowed the seizure of documents containing information that has nothing to do with the case.

- 81 With respect to [3] of the Listed Things, the Applicants said at [82(c)] that “this is intended to capture evidentiary material recording Ionic Liquid R&D Information which in Dr Bhatt’s opinion reasonably must exist. It is also intended to capture evidentiary material that shows subsequent misuse of Ionic Liquid R&D Information.” [3] of the Listed Things goes well beyond that: it captures all research undertaken by the Respondents at any time in the past and in relation to any subject (including research assignments at high school).
- 82 The Search Orders have resulted in seizure of information irrelevant to the proceedings but that is highly confidential to the Element Zero Respondents. That includes the entirety of the Element Zero server, confidential information concerning work being performed with or for third parties (commercial entities and governments), personal employee information (including sensitive health data, home addresses and phone numbers) personal information of Dr Kolodziejczyk (such texts, emails, photos and videos), personal banking and other financial information, personal passwords, and research undertaken throughout their careers: [72]-[79] Kolodziejczyk, [114]-[119] Masterman. Review of this material (including for privilege) will be a time consuming and expensive task ([40] Williams), which is likely to prejudice the Respondents.

## 10 Conclusion

- 83 The Search Orders should be set aside, the costs of and incidental to the Search Orders and this application be borne by Fortescue, and the Independent Solicitor required to return all material and information seized in the execution of the Search Orders to the Respondents: *BWK Elders (Aust) Pty Ltd v Westgate Wool Co Pty Ltd* [2001] FCA 1110 at [5] per Mansfield J. The Element Zero Respondents may seek an enquiry as to, or assessment of, damages caused by the Search Orders: see [120]-[123] Masterman.

D Studdy

Gilbert + Tobin

C McMeniman

7 August 2024