

NOTICE OF FILING

Details of Filing

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Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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

**Applicants' Outline of Submissions as to
Leave to Cross-Examine the Respondents' Witnesses**

Summary

1. This note concerns the Applicants' (**Fortescue's**) position as to Fortescue seeking leave to cross-examine the Respondents' witnesses in respect of the interlocutory application dated 21 June 2024 (**Discharge Application**).
2. Based on the evidence filed on the Discharge Application, Fortescue's position is that there should not be any cross-examination on the Discharge Application. (Fortescue will address the reasons why there should not be any cross-examination on the Discharge Application in its submissions in answer to be filed on 7 August 2024 if the Respondents seek leave to cross-examine).
3. Fortescue does not know whether the Respondents seek leave to cross-examine any of the three Fortescue witnesses who have given affidavits as part of Fortescue's evidence in answer to the Discharge Application: see further [5] below. However, if the Respondents seek leave to cross-examine:
 - (a) Dr Bhatt, Fortescue will seek leave to cross-examine Dr Kolodziejczyk and Dr Winther-Jensen;
 - (b) Mr Roper, Fortescue will seek leave to cross-examine Dr Kolodziejczyk;
 - (c) Mr Dewar, Fortescue will seek leave to cross-examine Mr Masterman and Mr Williams.
4. If the Respondents are granted leave to cross-examine, it is appropriate for Fortescue also to be granted leave to cross-examine the corresponding witnesses set out above. It would be an incongruous outcome – and not in the interests of justice – for one party to be permitted to cross-examine but not the other, especially where the witnesses cover the same or overlapping subject matter.
5. Fortescue wrote to the Respondents on 1 August 2024 notifying its position and requesting that the Respondents indicate by 5 August 2024 which, if any, Fortescue witnesses they will seek leave to cross-examine. Regrettably, by their response of that date, the Respondents refused to do so. That correspondence and Fortescue's subsequent response is annexed to these submissions.

6. As a result of the uncertainty regarding the Respondents' position, below, Fortescue addresses the topics on which it seeks leave to cross-examine each of Dr Kolodziejczyk, Dr Winther-Jensen, Mr Masterman and Mr Williams.

Dr Kolodziejczyk

7. The affidavits of Fortescue's employees Dr Bhatt (affirmed 1 August 2024) and Mr Roper (affirmed 31 July 2024) answer aspects of the affidavit of Dr Kolodziejczyk sworn 19 June 2024 (**Kolodziejczyk**).
8. If the Respondents are granted leave to cross-examine Dr Bhatt, then Fortescue should be granted leave to cross-examine Dr Kolodziejczyk on any topics for which leave is granted for Dr Bhatt to be cross-examined and, to the extent not covered by the foregoing, Dr Kolodziejczyk's evidence as to:
 - (a) Dr Kolodziejczyk's dealings with Mr Roper – including Mr Roper's asserted "instruction" for Dr Kolodziejczyk to email Fortescue documents to his personal email and to delete Fortescue documents – which Dr Kolodziejczyk relies on as a justification for part of the impugned conduct: cf Kolodziejczyk [41], [49]-[54]. These dealings are relied upon by the Respondents both as a material non-disclosure (see the affidavit of the First, Second and Fourth Respondents' solicitor, Mr Williams, sworn 25 June 2024 (**Williams**) [28], [29], [31]) and seemingly as part of the Respondents' challenge to the existence of a prima facie case;
 - (b) to the extent not covered by (a), Dr Kolodziejczyk's purported explanations for other aspects of the impugned conduct: cf Kolodziejczyk [35]-[40] and [57]-[59]. These explanations appear to be relied upon by the Respondents in challenging the existence of a prima facie case;
 - (c) his discussions with Fortescue regarding inaccuracies in Dr Kolodziejczyk's *curriculum vitae*: cf Kolodziejczyk [24]-[31]. These paragraphs are relied upon by the Respondents as a form of material non-disclosure: Williams [30].

Dr Winther-Jensen

9. Dr Bhatt's affidavit affirmed 1 August 2024 answers aspects of the affidavit of Dr Winther-Jensen affirmed 8 July 2024 (**Winther-Jensen**).

10. If the Respondents are granted leave to cross-examine Dr Bhatt, then Fortescue should be granted leave to cross-examine Dr Winther-Jensen on any topics for which leave is granted for Dr Bhatt to be cross-examined and, to the extent not covered by the foregoing:
 - (a) Dr Winther-Jensen’s purported justification for having emailed documents to himself at Winther-Jensen [22]-[30];
 - (b) Dr Winther-Jensen’s explanations for other aspects of the impugned conduct: Winther-Jensen [32], [34], [37], [43], [46], [47].
11. The above evidence appears to be relied upon by the Respondents in challenging the existence of a prima facie case.

Mr Masterman and Mr Williams

12. The affidavit of Fortescue’s external solicitor Mr Dewar affirmed 31 July 2024 answers aspects of the affidavit of Mr Masterman sworn 20 June 2024 (**Masterman**) and Williams.
13. If the Respondents are granted leave to cross-examine Mr Dewar, then Fortescue should be granted leave to cross-examine Mr Masterman and Mr Williams on any topics for which leave is granted for Mr Dewar to be cross-examined and, to the extent not covered by the foregoing:
 - (a) Mr Masterman’s evidence concerning the “discussions” between Mr Masterman and Fortescue’s representatives from November 2023 to January 2024 set out at Masterman [72]-[107], including Mr Masterman’s characterisation and understanding of the purpose of the 24 January 2024 meeting between him and representatives of Fortescue: see Masterman [93]-[96], [102] and [106]. The Respondents assert that there was a material non-disclosure of the “discussions”: Williams [24]-[25].
 - (b) Mr Williams’ evidence – said to be based on his experience – asserting that the “Listed Things” identified in the search orders are “contrary to the usual form of orders” and that this has resulted in “an unduly extensive volume and scope of material”: see Williams [41]-[49].