

NOTICE OF FILING

Details of Filing

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File Title:	FORTESCUE LIMITED ACN 002 594 872 & ORS v ELEMENT ZERO PTY LIMITED ACN 664 342 081 & ORS
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A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

Important Information

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

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

**First, Second and Fourth Respondents’ Submissions in response to the Applicants’
Submissions dated 6 August 2024**

- 1 These are the **Element Zero Respondents’** submissions in response to the Applicants’ submissions dated 6 August 2024 in relation to the Cross-Examination Application (**Applicants’ Submissions**).
- 2 The Applicants position is that, because the Respondents seek leave to cross-examine Mr Dewar, Fortescue will seek leave to cross-examine Mr Masterman and Mr Williams “on any topics for which leave is granted for Mr Dewar to be cross-examined” (chapeau of [13]).
- 3 The Applicants’ position is contrary to the principles regarding cross-examination of witnesses during interlocutory hearings: it should not be a “rehearsal of, or dry run at, the issues relevant to the trial” *Selvaratnam v St George – A Division of Westpac Banking Corporation (No 2)* [2021] FCA 486 at [44].
- 4 Mr Williams is not the solicitor on the record for the Applicants, did not prepare the case in support of the Search Orders and was not present at the *ex parte* hearing. His knowledge of material facts not put before the Court is not an issue on the Set Aside Application. There is no legitimate forensic basis for the Applicants to cross-examine Mr Williams on the same topics as Mr Dewar.
- 5 Nor is there a basis for the Applicants to have free rein to cross-examine Mr Masterman, the Fourth Respondent, on any topic arising in these proceedings (which is in effect what they seek given Mr Dewar’s affidavits touch on all aspects – *prima facie* case, risk of destruction and discretion). To do so would be to allow rehearsal of cross-examination that may occur at the final hearing.
- 6 In addition, the Applicants seek to cross-examine the Fourth Respondent on his 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” ([13(a)]). It would be inappropriate for the Court to give leave to cross-examine Mr Masterman on these meetings in circumstances where: (1) Mr Masterman’s evidence as to the fact of

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such correspondence is not challenged by the Applicants (Mr Dewar's sixth affidavit confirms the correspondence occurred but he decided to omit it from what was presented to the duty judge); and (2) as stated above, Mr Masterman is likely to be a key witness in the final hearing and cross-examination of this nature would likely involve a "dry run" of key issues for determination of the Court at a final hearing.

- 7 The Applicants also seek to cross examine Mr Williams on his evidence regarding the volume and scope of material captured by the Search Orders ([13(b)]). The Applicants have not filed any evidence to contradict Mr Williams' evidence regarding the "Listed Things" defined in the Search Order (including from Mr Dewar).
- 8 In the circumstances, the Court should not allow cross-examination of the Element Zero Respondents' deponents at the hearing of the Set Aside Application.

D B Studdy

C D McMeniman

Gilbert + Tobin

7 August 2024