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Sia Lagos

Registrar

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

Applicants' Submissions

A. INTRODUCTION

A1. Background

1. The Applicants (**Fortescue**) are involved in developing green iron technology, i.e., for processing iron ore into metallic iron, without burning fossil fuels. An aspect of that technology involves electrochemical reduction of the iron oxides found in iron ore to produce metallic iron. Fortescue's process involves, among other things, suspending solid iron ore particles in the electrolyte (**Fortescue Particle Process**).¹
2. Fortescue alleges that the Respondents have engaged in misuse of confidential information, breaches of the Corporations Act, copyright infringement, breach of contract and misleading conduct. The case pleaded against the Respondents in Fortescue's Statement of Claim dated 30 April 2024 (**SoC**) – i.e. the form of the pleading when the Court made the search orders on 14 May 2024 (**Search Orders**) – is summarised in [3]-[9] below.² (The amendments made in the Amended Statement of Claim dated 14 June 2024 (**ASOC**) did not materially change the case.)
3. While employed by Fortescue as Chief Scientist and Technology Development Lead respectively, the Second Respondent (**Dr Kolodziejczyk**) and Third Respondent (**Dr Winther-Jensen**) undertook confidential research and development work into a particular direct electrochemical reduction process utilising, among other things, an ionic liquid electrolyte (**Ionic Liquid R&D**). During this work, they created the **Fortescue Process CI** (also referred to as “Ionic Liquid R&D Information”).
4. Before their employment with Fortescue ended in November 2021 and without Fortescue's knowledge or permission, Drs Kolodziejczyk and Winther-Jensen took the Fortescue Process CI. They also took steps to ensure that the Fortescue Process CI was not available to Fortescue – and Fortescue has not located much of it.
5. In addition, before leaving Fortescue and without its knowledge or permission, they took documents containing confidential information useful in the design, engineering, construction, operation and/or feasibility of a green iron pilot plant (**Fortescue Plant CI**). (Dr Winther-Jensen has admitted emailing himself, and Dr Kolodziejczyk has in effect admitted taking, Fortescue documents: see [79], [118]-[119] below.)
6. The Fortescue Process and Plant CI is confidential information belonging to Fortescue.
7. The First Respondent (**Element Zero**) was incorporated in December 2022. Its founding directors – who each own (directly or indirectly) a third of Element Zero's ordinary shares – are: Dr Kolodziejczyk, who is also its CTO; Dr Winther-Jensen, whose directorship concluded in January 2024); and the Fourth Respondent

¹ E.g., First affidavit of Anand Bhatt affirmed 1 May 2024 (**Bhatt 1**) [22]-[53].

² SoC at e.g., [5]-[9], [12]-[14], [19], [20], [25], [26], [29]-[33], [75(c)], [78(c)]; and corresponding paragraphs in the ASOC.

(**Mr Masterman**), who is also its CEO. Dr Winther-Jensen reported to Mr Masterman at Fortescue for part of 2021. Mr Masterman was a Fortescue director for part of 2022.

8. The Respondents have: commercialised and used an electrochemical reduction process which includes utilising an ionic liquid electrolyte (**EZ Process**);³ and designed, engineered, constructed, and operated a green iron pilot plant (**EZ Plant**), which implements the EZ Process.
9. The Respondents misused the: (1) Fortescue Process CI in commercialising and using the EZ Process; (2) Fortescue Process CI and Plant CI in designing, engineering, constructing, operating and determining the feasibility of the EZ Plant; and (3) Fortescue Process and Plant CI in inventing, preparing and filing **Patent Applications** filed in Element Zero’s name.
10. On 9 May 2024, Fortescue appeared before Perry J seeking ex parte search orders against Element Zero, Dr Kolodziejczyk and Dr Winther-Jensen (**Search Order Application**). It provided the Court with written submissions dated 8 May 2024 (**FS1**), which her Honour said she had reviewed “very carefully” (T38.15-20, T47.43-45). Fortescue made several hours of oral submissions. Her Honour’s conclusion that search orders were appropriate was “encapsulated”⁴ at T37.35-38.8:

“I do agree that there is a strong prima facie case that’s really established by a very substantial body of evidence. And there’s also, one would have thought in light of the matters that have been covered in the written submissions, a real risk that if information were provided in advance and it was an inter partes application, there is a real risk that information might be destroyed or hidden, squirrelled away. And obviously, the prejudice – you’ve clearly established prejudice of a very substantial nature to the applicants in the event that the orders are not made... That is my view, having gone to the material, gone through the evidence.”
11. The matter was listed on 14 May 2024 to deal with various subsidiary matters including the identity of the independent lawyers (see e.g., T35.43-37.30). Those matters having been addressed, the Search Orders were made on that date. The searches were then executed. Hard copy material was seized and devices were imaged. This is in the possession of the Court, and the Independent Computer Experts.⁵ Copies have been provided to the Respondents’ lawyers.⁶
12. On 30 May 2024, the parties appeared before Logan J, as duty judge. His Honour delivered *ex tempore* reasons (*Fortescue Ltd v Element Zero Pty Ltd* [2024] FCA 590)

³ It is not in dispute that the EZ Process, which involves ionic liquids, is different from the Fortescue Process, which involves suspending solid iron ore particles in the electrolyte. Fortescue’s pleadings do not allege any similarities between them.

⁴ See T15.12-19 on 14 May 2024. Note that her Honour indicated that the original transcript had incorrectly recorded “and it was an inter partes application” as “it weren’t inter partes application”. This has been corrected in the above extract.

⁵ Pursuant to order 5 of Logan J’s orders made 30 May 2024.

⁶ E.g., Second Affidavit of Stephen Klotz affirmed 29 May 2024.

and made orders varying orders 19, 20, 22, 23 and 26 of the Search Orders. The parties also agreed orders should be made for the Respondents to file a defence and for Fortescue then to file and serve an application for discovery (T18.22-28, 20.13-39, 39.31-39), and orders to that effect were made: orders 11 and 13 made 30 May 2024. At the Respondents' request, however, the time for compliance with these orders has been extended until further order: orders 4 and 8 made 26 June 2024 (and see T2.28-40). The time for compliance with order 23 of the Search Orders – a standard order under the Search Orders Practice Note (GPN-SRCH), requiring the search order recipients to serve an affidavit detailing various information about the “Listed Things” – has also been extended until further order: order 3 made 26 June 2024.

A2. Summary of the IA

13. By their interlocutory application dated 21 June 2024 (**IA**), Element Zero, Dr Kolodziejczyk and Mr Masterman (**EZ Respondents**) seek to set aside the Search Orders *ab initio* or alternatively *in futuro*.
14. As the EZ Respondents accept at [12] of their submissions dated 7 August 2024 (**EZS**), as they made no application to set the Search Orders aside when served, they can only be set aside *ab initio* if there was bad faith *or* material non-disclosure: e.g., *Braggs Electric Ltd v Gregory* [2010] NSWSC 1205 at [17], [26], [36]. The authorities also indicate that attempts to discharge search orders on the basis that the grounds for making them were not established are of “little utility” (see [22] below) and an application to discharge search orders is not in the nature of an appeal (e.g., *Austress Freyssinet Pty Ltd v Joseph* [2006] NSWSC 77 at [26]).
15. Notwithstanding the principles at [14] above, by the first two of the five grounds relied upon – “weak prima facie case” and “no real risk of destruction” (EZS [3]-[4]) – the EZ Respondents seek to discharge the Search Orders largely on the basis that different weight should have been given to aspects of Fortescue’s evidence on the Search Order Application. The attempt to gainsay Perry J’s conclusions as to a “strong prima facie case” and the “real risk” of destruction lacks any foundation and should be rejected.
16. In support of the first two grounds, EZS [2]-[3] makes the serious allegations – seemingly as an afterthought, no details having been notified in the fourth affidavit of Michael Williams sworn 25 June 2024 (**Williams 4**), which summarised the EZ Respondents’ grounds for the IA – that, in the face of their duty of candour, Fortescue “misrepresented” and “overstated” matters to Perry J. This is plainly incorrect.
17. As to the third ground – by which the EZ Respondents assert various material non-disclosures (EZS [5]) – all but one were not “non-disclosures” at all, let alone material. While Fortescue did not disclose the meetings between Fortescue and Element Zero on 19 December 2023 and 24 January 2024, and their entry into a Non-Disclosure Agreement on 23 January 2024 (**NDA**), it was not necessary for Fortescue to do so;

these matters were not material. If, contrary to the above, the Court concludes there was material non-disclosure, then, in the exercise of its discretion, the Search Orders should not be set aside. (Curiously, EZS does not even mention the existence, let alone address the exercise, of the discretion: see further [36(a)] below).

18. As to the fourth and fifth grounds – “excessive scope of the Listed Things” (EZS [6]) and “excessive and unnecessary surveillance” (EZS [7]) – EZS does not make clear how these can bear on the determination of the IA. They cannot. In any event, the scope of the Listed Things was appropriate and the extent of the surveillance is the kind of collateral issue which the authorities caution against parties raising on applications to discharge search orders. The allegation – not appearing in Williams 4 – that the surveillance involved bad faith should not be entertained; even if it is, there is no evidence to support it.
19. Ultimately, the nature and number of the allegations made by the EZ Respondents is indicative of a scattergun approach to the IA; an approach admonished by the authorities: see e.g., [14] above and [22], [23], [26] and [38] below. There is no basis to set aside the Search Orders.
20. Finally, it should be noted that Dr Winther-Jensen sought to be heard in the IA (see e.g., T12.6-13.4 (26 June 2024)) and to that end filed affidavit evidence which is referred to at [119] below. However, he has elected not to file written submissions.⁷

B. PRINCIPLES AS TO DISCHARGING SEARCH ORDERS

21. **Onus.** The onus falls on the EZ Respondents – i.e., the parties seeking to set aside the Search Orders – to *prove* why this should occur: e.g., *Braggs* at [10], [17].
22. **Basis for setting aside.** The limited bases on which search orders may be set aside *ab initio* are set out at [14] above. As to seeking to set aside a search order on the basis that the grounds for a search order were not established, as the EZ Respondents seek to do in the IA – in *Geneva Laboratories Ltd v Nguyen* (2014) 110 IPR 295 at [49]-[50], Gleeson J quoted with approval the following passages (emphasis added):
 - (a) *Braggs* at [17]: “where an application is made to set aside or discharge the order on the basis that the grounds for making such an order were not established, that will be of **little utility if made after the order has been executed.**”
 - (b) *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721 at 727 (also quoted with approval in *Braggs* at [13]):

“In the instant case the Anton Piller order is spent in the sense that it has been executed. However, the defendants seek to go back to the beginning of the action saying that... the judge had insufficient material to justify his action at the *ex parte* stage. They therefore invite us to set the *ex parte* order aside and to order the return

⁷ In those circumstances, Fortescue will oppose any attempt by him to make oral submissions at the hearing.

of the ...seized material ... I regard this as **wholly absurd**. The courts are concerned with the administration of justice, not with playing a game of snakes and ladders.”

23. As they are usually the “only hope” of discharging ex parte orders, material non-disclosure arguments are a ‘plank in a shipwreck’ often (and increasingly) run on “slender grounds”: P **Biscoe**, *Freezing and Search Orders: Mareva and Anton Piller Orders*, 3rd edn, LexisNexis Butterworths, Australia, 2023 at [2.133]. As stated in *Berg Engineering Pty Ltd v Tivity Solutions Pty Ltd* [2019] QSC 68 at [108]:
- “...a number of cases discourage an application to discharge a search order because of the collateral disputes the application requires the court to decide without being able to finally resolve all disputed questions of fact... [T]he court should be astute to avoid permitting the parties to engage in disproportionate disputes in collateral ancillary proceedings.”
24. **Material non-disclosure**. In *Geneva* at [45], Gleeson J quoted with approval *Savcor Pty Ltd v Cathodic Protection International Aps* (2005) 12 VR 639 at [22] per Gillard AJA (Ormiston and Buchanan JJA agreeing):
- “the court’s function is to determine on the material that was placed before the judicial officer at first instance, whether a party has failed to discharge the obligation which rests upon any party seeking an order ex parte, namely, making a full and fair disclosure of all matters within its knowledge and which are material, to the court.”
25. “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”: *Savcor* at [35].⁸ A “matter of substance” means “the matter must be material in the sense of being capable of having affected the court’s decision, and not that it would have affected the decision”: *Naidenov, in the matter of 30 Denham Pty Ltd (in liq)* [2023] FCA 134 at [11].
26. As stated in *Tugushev v Orlev* [2019] EWHC 2031 at [7(vii)]:
- “A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits.”⁹
27. While *Tugushev* concerned freezing orders, statements of principle in that context also apply in the context of search orders as both involve extraordinary relief granted ex parte: see *Mellat v Nikpour* [1985] FSR 87 at 92 (“the law’s two nuclear weapons”).
28. As to what constitutes a material fact, in *Liberty Financial Pty Ltd v Scott* [2002] FCA 345 at [47], Weinberg J quoted the following passage (itself cited with approval in *Cth Bank of Australia v Oswal* (2011) 82 ACSR 626 at [11], emphasis added):

⁸ In *Savcor* at [38] Gillard AJA went on to pose the question, “Would it [the alleged non-disclosure] have made any difference to the outcome?”

⁹ As to avoiding “mini-trials” in the context of interlocutory applications generally, see *Selvaratnam v St George — A Division of Westpac Banking Corporation (No 2)* [2021] FCA 486 at [45].

“Particularly in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care... [in] ex parte applications, **I do not think the application of the principle should be taken to extreme lengths.”**

29. Similarly, as stated in *Tugushev* at [7(vi)] (emphasis added):

“Where facts are material in the broad sense, there will be degrees of relevance and a **due sense of proportion** must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. **The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question** is whether in all the circumstances its effect was **such as to mislead the court in any material respect.”**

30. See also *Darnitsa v Metabay* [2021] EWHC 1441 at [16] (regarding freezing orders):

“in the ordinary case a judge on... a discharge application must really have [their] timbers shivered by something serious that has gone wrong, rather than a litany of matters that could have been put differently or could have been expanded”.

31. The submission at EZS [13] that material non-disclosure is a subset of bad faith – which suggests all material non-disclosure involves bad faith – is wrong.¹⁰ The case cited (*Savcor* at [24]) does not support that proposition. The authorities generally refer to them as alternatives: bad faith “or” material non-disclosure: see e.g., [14] above.

32. ***Duty of candour in presenting the evidence.*** The duty of candour requires “squarely putting the other side’s case, if there is one”: see EZS [21]. However, this standard “cannot be applied in a vacuum and careful consideration has to be given to the relevant surrounding circumstances”: *Sutherland v Pascoe* (2013) 297 ALR 44 at [51].

33. The standard does not require: (1) “a counsel of perfection” which overlooks the practicalities of the case: *Brag*s at [34]; (2) identifying “all possible submissions that the respondents, if present” might have made, or “submissions about the weight of the available evidence”: *Geneva* at [73], [93]; (3) for circumstantial evidence, pointing out the possibility of there being an “innocent explanation” (unless such innocent explanation is *known*): *Brag*s at [34].

34. ***Discretion.*** Whether to set aside an order for material non-disclosure “is a matter of discretion”: *Savcor* at [27]. “Each case will depend upon its own circumstances. Justice is the determinant”: *Savcor* at [29]. As stated in *Savcor* at [31], [33]:

“Whether a court will set aside an order will depend upon many factors. The court should not overlook the practical effect of such a step. What would be achieved by setting aside the order? Absent deliberate and intentional non-disclosure or misleading information (which usually leads to a discharge), the court must weigh

¹⁰ Bad faith involves a claimant not genuinely believing it had a case or not genuinely pursuing it for the remedy sought: *Brag*s at [31]. Moreover, and more generally, a failure to establish that one acted in good faith is not of itself indicative of bad faith. As Jagot J said in *Bayer Pharma Aktiengesellschaft v Generic Health Pty Ltd* (2017) 124 IPR 23 at [45], “bad faith is not necessarily the obverse of good faith”.

all relevant material... Setting aside does not follow as a matter of course. Relevant to the discretion is whether the material non-disclosure was serious or otherwise the importance or weight that should be attached to the omitted fact in the decision making process and also any hardship if the order was set aside. The approach is different if the plaintiff has acted culpably in the sense that the omission to disclose relevant matters was done deliberately to mislead the court.”

35. Other important factors to take into account are: (1) the “merits of the case”: *Tyche Asset Management Pty Ltd v Flyland Development Group Pty Ltd* [2021] NSWSC 1283 at [40]-[41]; and (2) whether the non-disclosure was innocent, such as a “failure to understand its relevance”: *Savcor* at [36].
36. The following propositions in EZS are not good law:
- (a) EZS [16], “if there is a material non-disclosure an order is almost invariably set aside”, citing Callaway JA’s dissenting judgment in *Victoria Teachers Credit Union v KPMG* [2000] 1 VR 654 at 665. To the contrary, see e.g, [34]-[35] above and *Savcor* at [29], “it is not an inflexible rule that a non-disclosure of a material fact in an ex parte application invariably leads to the order being set aside.”
- (b) EZS [16]: “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”. Rather, as stated in *Savcor* at [31], “An important matter is that the setting aside of the order will not necessarily preclude another application being made... The practical effect would be a waste of time and costs.”¹¹

C. RESPONDENTS’ CHALLENGE TO “STRONG PRIMA FACIE CASE”

37. Rule 7.43(a) of the *Federal Court Rules (FCR)* requires a “strong prima facie case”: cf EZS [10] re “extremely strong”, which is not the test: *Braggs* at [18]; *Biscoe* at [6.49], [6.52]. The EZ Respondents challenge Perry J’s conclusion that Fortescue established a “strong prima facie case”, notwithstanding the principles at [14] and [22] above.
38. The IA is not to be approached on the bases that Fortescue needs “to prove again the case in favour of making” the Search Orders or that Fortescue had not proved the matters in evidence before Perry J: *Austress* at [25]-[26].
39. Before turning to address the arguments in EZS, it is convenient first to summarise the matters supporting Perry J’s conclusion as to a “strong prima facie case”: see Part C1 below. These matters were also set out (in greater detail) in FS1 Parts A and C.

C1. Strong prima facie case

40. **Fortescue Process CI.** In 2020, Dr Kolodziejczyk was investigating opportunities for Fortescue involving the development of an electrochemical reduction process with an

¹¹ Note that this principle was set out after Gillard JA had earlier (at [26]) referred to – and thus taken into account – the statement in *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681-682, quoted at EZS [16].

ionic liquid electrolyte.¹² By December 2020, Dr Kolodziejczyk reported to Fortescue management an invention and project concerning “low-temperature electrochemical ores reduction in ionic liquid electrolytes”.¹³ There are numerous documents in evidence in which Dr Kolodziejczyk stated that significant Ionic R&D work had already been completed by late 2020/early 2021, and further R&D for commercialising and ‘scaling’ the process was well underway. These include the following:

- (a) emails with external collaborators on 21 October 2020 referring to “preliminary work that we have done in ionic liquids and low temperature iron ore reduction”;¹⁴
- (b) various statements in December 2020 to Fortescue’s Chairman, Dr Andrew Forrest, including that: (1) Dr Kolodziejczyk was working on setting up a testing facility to undertake “processing from ionic liquids”,¹⁵ and (2) work for a ‘mini’ plant and later a commercial scale plant would “proceed shortly”;¹⁶
- (c) a patent assessment form emailed on 22 December 2020 for a process using ionic solvents, that had been “tested in a laboratory setting and [was] intended to be scaled up to a commercial system in 2021”, said to involve “proven” technology;¹⁷
- (d) statements on 23 December 2020 to the Second Applicant’s then CEO, Ms Julie Shuttleworth, regarding “development of...low-temperature electrochemical ore reduction in ionic liquids,” for which Dr Kolodziejczyk stated he was preparing “R&D roadmaps and write ups”;¹⁸
- (e) a draft board paper prepared 22 January 2021 in which Dr Kolodziejczyk wrote that his team “has done an initial evaluation of various suitable electrolytes”;¹⁹
- (f) a statement to Dr Winther-Jensen on 27 January 2021 (“I have looked at...ionic liquids”).²⁰

(At least (b), (c), (d) and (e) are types of “significant internal documents” the EZ Respondents wrongly assert are absent: EZS [30].)

41. Also in December 2020, Dr Kolodziejczyk was approved to recruit Dr Winther-Jensen, his former PhD supervisor, in relation to the “one step process” involving “low temperature processing from ionic liquids” he had discussed with Dr Forrest, Ms Shuttleworth and Mr Masterman, among others.²¹

¹² Bhatt 1 [54]-[64].

¹³ Bhatt 1, AIB-12 p 93.

¹⁴ Bhatt 1, AIB-7 p 71.

¹⁵ Bhatt 1, AIB-9 p 81.

¹⁶ Bhatt 1, AIB-10 p 85.

¹⁷ Bhatt 1, AIB-13 p 96-97.

¹⁸ Bhatt 1, AIB-14 p 102.

¹⁹ Affidavit of Susanne Hantos affirmed 1 May 2024 (**Hantos**), SMH-3 p 82.

²⁰ Bhatt 1, AIB-19 p 120.

²¹ See, for example, Bhatt 1 [74]; AIB-9.

42. By early 2021, Dr Kolodziejczyk was working with Dr Winther-Jensen to develop a research plan involving the dissolution of iron ore with an ionic liquid, which Dr Winther-Jensen recommended pursuing “in parallel” with other R&D activities.²²
43. The Green Iron team to which Dr Kolodziejczyk and Dr Winther-Jensen belonged were expected to store work output in a folder on SharePoint (a Microsoft software application).²³ Other than the emails summarised above, there are no records on Dr Kolodziejczyk’s Outlook or the SharePoint concerning ionic process work between 25 March 2019 (Dr Kolodziejczyk’s first day of work) and 5 November 2021 (his final day of work).²⁴ There is also a lack of records in his emails or SharePoint of Dr Winther-Jensen’s work product while at Fortescue.²⁵
44. On 1 October 2021, Mr Nicolas Marrast joined the Fortescue team working on electrochemical reduction, answering directly to Dr Kolodziejczyk. However, despite Mr Marrast repeatedly asking Dr Kolodziejczyk about the objectives of the electrochemical reduction work and deliverables promised to management, Dr Kolodziejczyk refused to tell him this information. Dr Winther-Jensen, too, refused to share information with Mr Marrast.²⁶
45. Drs Kolodziejczyk and Winther-Jensen both resigned from Fortescue in close proximity, on 22 October and 4 November 2021 respectively, with Dr Kolodziejczyk leaving on 5 November and Dr Winther-Jensen on 12 November 2021.²⁷ Before their departures, both of them took various Fortescue documents: see [49] below.
46. In December 2022, both Dr Kolodziejczyk and Winther-Jensen became founding directors of Element Zero.²⁸ The EZ Process uses an ionic liquid that bears strong resemblance to the work undertaken by at least Dr Kolodziejczyk in 2020,²⁹ as well as the research and development described by Dr Winther-Jensen in 2021.³⁰
47. In the circumstances, the strong inference, is one of misuse: i.e. that Drs Kolodziejczyk and Winther-Jensen surreptitiously took the Ionic Liquid R&D with them when they left Fortescue and, together with the other Respondents, used it in developing the EZ Process and (together with the Fortescue Plant CI) the EZ Plant.³¹

²² Bhatt 1 [79]-[82].

²³ Affidavit of Adrian Huber sworn 1 May 2024 (**Huber**) [52]; Bhatt 1 [112]; Affidavit of Nicolas Marrast affirmed 8 May 2024 (**Marrast**) [23]; Hantos [67].

²⁴ Bhatt 1 [54], [84], [86]-[88]; Hantos [50]-[65].

²⁵ Bhatt 1 [156]-[158].

²⁶ Marrast [36]-[43]; [49]-[53]; T32.28-39 (9 May 2024). Marrast is not referred to in FS1 because it was only affirmed after FS1 was finalised.

²⁷ Huber [39], [57], [62].

²⁸ Huber [23]-[24], AH-3 p 35.

²⁹ Bhatt 1 [107]-[110], T29.20-25 (9 May 2024).

³⁰ Bhatt 1, AIB-20.

³¹ T16.26-T17.2 (9 May 2024).

48. **Fortescue Plant CI.** The Fortescue Plant CI comprises engineering and commercial documents relevant to building a green iron pilot plant. It is contained in: emails between Fortescue employees and Dr Winther-Jensen;³² folders stored on Dr Kolodziejczyk's work laptop, including a 'Temp-SD' folder', and inferentially a USB;³³ a SharePoint folder;³⁴ and certain 'procedure and specification' documents³⁵ to which Dr Kolodziejczyk and Dr Winther-Jensen had access during their employment.
49. As Fortescue uncovered in April 2024:³⁶
- (a) on and after the date he resigned (22 October 2021), Dr Kolodziejczyk accessed the following documents on his laptop from or while a USB was connected: **Green Iron Update** dated 3 August 2021;³⁷ the **Basis of Design** for the Chameleon Pilot Plant dated 13 September 2021;³⁸ Fortescue's Green Iron **Provisional Application** filed 24 May 2021.³⁹ Further, he accessed the **Bumblebee P&ID** document at least twice on 26 October 2021 (i.e. after his resignation).⁴⁰ It should be inferred Dr Kolodziejczyk copied these four documents and misused information in them as discussed below.⁴¹ (These four documents are pleaded at SoC [19]/ASOC [19(i)].)
- (b) Dr Kolodziejczyk then began a process of deleting files off his work laptop, including a "Temp_SD" folder in which folders such as "Fortescue IP" (which included, *inter alia*, the Provisional Application) and "Green Steel" had been saved. Given the similar folder structure of certain files on the USB, the inference

³² Bhatt 1 [119]-[155].

³³ Huber [77], AH-27.

³⁴ Bhatt 1 [111]-[118], AIB-29.

³⁵ Affidavit of Wayne McFaul affirmed 1 May 2024 (**McFaul**) [103].

³⁶ Huber 1 [71]-[77].

³⁷ This is located in the second affidavit of Anand Bhatt affirmed 1 August 2024 (**Bhatt 2**) at Conf AIB-40 pp 38-50. It is a slide deck prepared for an internal Fortescue meeting, describing Fortescue's strategy for developing green iron in the Pilbara and discussing potential projects and partnerships: Bhatt 2 e.g. [51](a); Conf AIB-38 [1]-[5]. Dr Kolodziejczyk accessed the Green Iron Update from the USB, connected to his work laptop on the day of his resignation: Huber 1 [57], [77(f)]; AH-27 (internal p 22).

³⁸ This is located at Bhatt 2 Conf AIB-41 pp 52-81. It is a draft used as the basis for the detailed engineering of Fortescue's pilot plant for its electrochemical iron ore reduction technology and describes the scope of the plant and the limits for each section of the plant: Bhatt 2 e.g. [51(c)]; Conf AIB-38 [9]-[11]. Dr Kolodziejczyk accessed it from the USB connected to his work laptop on the day of his resignation: Huber 1 [57], [77(d)]; AH-27 AB p 328 (internal p 22), file name "FFI0302-10000-00-EG-BOD-0001_A (002) (BK).docx". It was also accessed after his resignation (25 Oct 2021): AH-27 attachment, "Master Chronology", row 69505.

³⁹ This is located in Bhatt 1 Conf AIB-34. It describes the invention of a method to produce iron from iron ore using only electricity: Bhatt 2 e.g. [51](b); Conf AIB-38 [6]-[7]. Dr Kolodziejczyk accessed it in the "TempSD" folder on the day of his resignation: Huber 1 [77(g)]; AH-27 attachment, "TempSD", rows 5017.

⁴⁰ This is located in Bhatt 2 Conf AIB-41 pp 83-97. It is a bundle of draft piping and instrumentation diagrams for Fortescue's pilot plant. It depicts the locations of piping, instruments and other equipment: Bhatt 2 [51(d)]; Conf AIB-38 [12]. It was accessed at least twice on 26 October 2021, a day on which a USB was connected: Huber 1 [77(e)]; AH-27 attachment, "Master Chronology", rows 69566, 70012-70035, 70805-70816.

⁴¹ Huber 1 AH-27, [34], [40]-[45], Finding 8.

is that at least some of the “Temp_SD” documents from Dr Kolodziejczyk’s work laptop were transferred across to a USB.⁴²

50. Further, between his resignation and his final day at Fortescue (4-12 November), Dr Winther-Jensen sent the following Fortescue Plant CI documents to his personal email (i.e. those in SoC [20]/ASOC [20(i)]): a leaching report, specific leaching data, two ‘Technical Evaluation’ documents and a ‘Green Iron Update’. Their valuable and detailed technical content is explained in Fortescue’s evidence, which sets out how they could be used in the development etc of a green iron plant.⁴³
51. In January 2024, Dr Kolodziejczyk and Mr Masterman announced in an article in the *Australian Financial Review* (**AFR**) that Element Zero had built a pilot plant (**EZ Plant**) that implemented the EZ Process.⁴⁴ This was a mere 26 months after Drs Kolodziejczyk and Winther-Jensen had left Fortescue and only 13 months after Element Zero was incorporated: see [45] and [46] above.
52. In April 2024, Mr Wayne McFaul (Manager of Energy Technology Scale-up at Fortescue) undertook a detailed analysis of the typical phases required from inception to delivery of a pilot plant, by reference to Fortescue’s pilot plant. He then compared the timeline and resources used to develop Fortescue’s plant with public statements about the achievements of the EZ Plant (which he considered to be similar to, if not slightly more complex than, Fortescue’s plant), and concluded: **(1)** Element Zero had a substantial resource deficit in the first 20 months of the EZ Plant’s development; **(2)** the development of the EZ Plant in spite of the resources deficit could be explained by Element Zero having access to the Fortescue Plant CI.⁴⁵
53. Further, Dr Anand Bhatt (Manager of Minerals, Research & Development at Fortescue) analysed an Element Zero patent application that became open to public inspection on 25 April 2024, and identified that it contained a temperature window falling within the temperatures tested in one of the documents (‘Leaching Report’) taken by Dr Winther-Jensen.⁴⁶
54. In the circumstances, the strong inference is one of misuse of the Fortescue Plant CI, both in the steps taken to set up the EZ Plant and in respect of the Patent Applications.

C2. The EZ Respondents’ arguments

55. In challenging the “serious prima facie” conclusion, the EZ Respondents rely on an array of largely disparate matters. Each is addressed in turn below.

⁴² Huber 1 AH-27, [40]-[45], Finding 8.

⁴³ Bhatt 1 [119]-[155].

⁴⁴ Bhatt 1 AIB-23.

⁴⁵ McFaul [88]-[116], [121]-[122].

⁴⁶ Bhatt 1 [134].

56. ***Elements of breach of confidence (EZS [28], [33])***. The contention that there was no strong prima facie case because of a failure to specifically identify confidential information, or misuse of it, should be rejected.
57. The need to satisfy these elements in order *to establish* a breach of confidence was set out at FS1 [46]. The Fortescue Plant CI is specifically identified at SoC [19]-[20]. The Fortescue Process CI is identified as specific subject matter – i.e. “Ionic Liquid R&D” – at SoC [12]-[14]. Fortescue cannot presently identify specific documents within that subject matter as they are not in its possession, inferentially because of Dr Kolodziejczyk’s and Dr Winther-Jensen’s misconduct. No further specificity was required for the purposes of being granted Search Orders: cf e.g., *Macquarie Holdings (NSW) Pty Ltd v Maharaj* [2019] NSWSC 811 at [40]-[45]. Fortescue will be able to provide further specificity after discovery: cf *Millwell Holdings Ltd v Johnson* (1988) 12 IPR 378 at 387 (in the context of a refusal to discharge an interlocutory injunction).
58. The allegations as to misuse of the Fortescue Process CI and Fortescue Plant CI is at SoC [31], [33], [34]. There is no difficulty with those allegations relying in part upon inference; confidential information cases are often *established* based on inference: e.g., *Thales Australia Limited v Madritsch KG* [2022] QCA 205 at [41], [42], [44], [216].
59. ***Asserted lack of evidence as to ionic process (EZS [30])***. As to the criticism that no Fortescue employee gave evidence “in relation to the nature and scope” of Dr Kolodziejczyk’s work on the ionic process, the evidence shows that, until Dr Winther-Jensen joined Fortescue, Dr Kolodziejczyk worked on this alone.⁴⁷ The assertion that there are no “significant internal documents” is wrong: see [40] above.
60. ***“Proper analysis” of documents (EZS [31])***. The bare assertion that a “proper analysis” of the documents reveals Dr Kolodziejczyk (and later, Dr Winther-Jensen) were merely “considering” and undertaking “preliminary investigation” into ionic liquid research that was ultimately “not pursued” is contrary to the contemporaneous documents: see [40] above.⁴⁸ Significant work had been completed; Dr Kolodziejczyk considered his ionic liquid work to be advanced to a point where he “intended [it] to be scaled up to a commercial system in 2021”: see 40(c) above.

⁴⁷ E.g., Bhatt 1, AIB-13 p 96 (“**I** have developed this method and tested it in a small scale laboratory setting before ...”), p 97 (“Inventor’s Name ... KOLODZIEJCZYK”). As to [41] of the affidavit of Bartłomiej Kolodziejczyk sworn 19 June 2024 (**Kolodziejczyk**) [41], Mr Matthew Roper and Dr Sienna Mohammadzadehmoghadam had not joined Fortescue at the time the documents referring to an ionic process were created (late 2020-early 2021): affidavit of Matthew Roper affirmed 31 July 2024 (**Roper**) [9]; Bhatt 2 [105(a)]. In any event, Dr Kolodziejczyk’s interactions with these employees was limited: Roper [43], [48], [49]; Bhatt 2 [104]-[105].

⁴⁸ The assertion of “preliminary investigations” in EZS [31] is inconsistent with Dr Kolodziejczyk’s evidence set out at [61]: he flatly denies working on an Ionic Process at all, not that he did work but it was preliminary.

61. *Assertion that Dr Kolodziejczyk did not work on ionic process at Fortescue (EZS [32]).* At EZS [32], the EZ Respondents rely on Dr Kolodziejczyk’s evidence: “I did not work on an “Ionic Process” while I was at Fortescue.”⁴⁹
62. As a threshold matter, the EZ Respondents cannot rely upon evidence they have filed on the IA in support of any contention as to the absence of a “strong prima facie” on the material before Perry J: see [38] above and [116] below.
63. In any event, Dr Kolodziejczyk’s one-sentence, bald denial is inexplicable; it stands in stark contrast to the many documents showing that Dr Kolodziejczyk *did* work on an “Ionic Process” while at Fortescue (see [40] above). These documents were summarised in Dr Bhatt’s first affidavit; Dr Kolodziejczyk read that affidavit⁵⁰ but elected not to address the contents of any of the emails. Fortescue’s strong prima case has become even stronger: given Dr Kolodziejczyk’s failure to explain the emails, inferences otherwise available based on them “can be drawn more strongly”: e.g., *Austress* at [99]; see also *Brag* at [27], [29].⁵¹
64. *Alleged misrepresentations as to copying/taking of documents (EZS [34]-[37]).* Fortescue did not “incorrectly represent” its evidence to Perry J. As to EZS [35] and [37(a)], FS1 [56(a)] incorrectly stated that the “Temp SD” laptop folder was deleted *on* 22 October 2021 (Dr Kolodziejczyk’s resignation date), whereas Mr McKemmish concluded it was deleted *on or after* 22 October 2021.⁵² The effect, however, is the same: Dr Kolodziejczyk deleted material around the time of his resignation. The duty of candour is not contravened by the fact a point could have been made “more precisely”, or there having been an immaterial mistake made, in submissions: see e.g., *Geneva* at [38], [77]-[81], [88]. See the principles at [32]-[33] above.
65. As to EZS [37(b)], Fortescue submitted the two “Temp SD” folder structures were *similar*, not the same, which *suggests* files from the “Temp SD” laptop folder were copied to the “Temp SD” USB folder: FS1 [56(a)], third sentence. Mr McKemmish’s report says the same (emphasis added): “Such a similarity [in folder structures] provides a strong indicator that the Kingston external USB storage device is **likely to contain a copy**, either full or in part, **of the files located in the ‘TempSD’ folder.**”⁵³ The contention that Fortescue’s submissions failed to acknowledge that “employees were permitted to use USB ports on Fortescue issued laptops... to share documents for work purposes” misquotes Huber [52(c)] (“*internal* work purposes”) and is in any

⁴⁹ Kolodziejczyk [36].

⁵⁰ Kolodziejczyk [32].

⁵¹ As to the drawing of *Jones v Dunkel* inferences based on unexplained documents, see e.g., *Gilead Sciences Pty Ltd v Idenix Pharmaceuticals Ltd* (2016) 117 IPR 252 at [515].

⁵² Huber AH-27 [41].

⁵³ Huber 1 AH-27 p 28 [45].

event ineffectual; there is no evidence – from Dr Kolodziejczyk or otherwise – to suggest that this is what Dr Kolodziejczyk was doing.

66. As to EZS [37(c)], there was no misrepresentation of the evidence as to Dr Kolodziejczyk’s taking of the four documents in SoC [19]. At T21.2-37 (9 May 2024), Fortescue cross-referenced those documents to [77(d)]-[77(g)] of Mr Huber’s affidavit, which refer to Mr McKemmish’s conclusions that they were accessed from, or while Dr Kolodziejczyk’s laptop was connected to, a USB; and/or deleted. The submission that Dr Kolodziejczyk “took these documents before he left Fortescue” was an inference strongly supported by the evidence. Fortescue did not need to volunteer the unlikely possibility that the conduct was part of Dr Kolodziejczyk’s “responsibilities as Fortescue’s Chief Scientist”: see the principles at [32]-[33] above.
67. Insofar as Fortescue’s internal investigation report acknowledged the possibility that Dr Kolodziejczyk had retained these documents in order to assist Fortescue in his role (cf EZS [37(c)], last two sentences),⁵⁴ this was based on an earlier Deloitte report, which made limited findings,⁵⁵ without the benefit of Mr McKemmish’s conclusions⁵⁶ as to Dr Kolodziejczyk’s document access and the “Temp SD” folder activity. In any event, EZS [37(c)] last sentence omits the qualification in the next sentence of the internal investigation report (“It is notable that this appears to have been done discreetly, with no approval of a manager”),⁵⁷ which tells against an innocent explanation.
68. *Mr Marrast’s affidavit (EZS [38]-[39])*. The contention that the *emails* attached to Mr Marrast’s affidavit do not “establish let alone give support [to] there being any lack of cooperation or secrecy” ignores the evidence in the body of the affidavit (see [44] above), which the Court – after reading it – described as “very serious allegations of a lack of cooperation”: T30.7-31.19, particularly T31.14-15 (9 May 2024).
69. The suggestion that the email chain at NM-7 to Mr Marrast’s affidavit “reinforced that there was no Ionic R&D [which] Fortescue failed to identify... to the Court” is wrong. The fact *one* October 2021 email chain between Drs Kolodziejczyk and Winther-Jensen did not explicitly mention the ionic process is of no moment given the evidence referred to at [40] above. The complaint that Fortescue failed to identify that the final email in the chain was in response to a request from Dr Winther-Jensen is misconceived; the nature of the email chain was fairly characterised in the body of

⁵⁴ Huber 1, AH-21 p 158.

⁵⁵ Huber 1, AH-22 pp 169-170. The report was referred to at FS1 [30]-[31].

⁵⁶ Huber 1, AH-27 [24]-[45].

⁵⁷ Huber 1, AH-21 p 158.

Mr Marrast’s affidavit,⁵⁸ which the Court read during the hearing (T31.5-10). In any event, given the principles at [32]-[33] and [64] above, the complaint goes nowhere.

70. **ASOC amendments (EZS [40]).** The submission at EZS [40] makes no sense. The amendments at ASOC [19] involved *broadening* the allegation and particulars thereto. Following the amendment, the copied documents referred to at particular (i) are but one kind of the Fortescue information alleged to have been surreptitiously obtained by Dr Kolodziejczyk. Fortescue has not “withdrawn” its allegation that he copied the documents at particular (i). While this is plain from ASOC [19], it is also confirmed by the retention of the copyright infringement allegations at ASOC [65]-[74].

D. CHALLENGE TO RISK OF DESTRUCTION

71. Rule 7.43(c)(ii) of the FCR requires a “real possibility” that the respondent “might” destroy or cause to be unavailable important evidentiary material. As stated in *In the matter of Bakers Extra Pty Ltd* [2017] NSWSC 1257 at [48] as to the equivalent rule in the *Uniform Civil Procedure Rules 2005* (NSW), “it is important to recognise that ‘real possibility’ does not amount to a probability, or to it being more likely than not. The rule is concerned only with possibilities, albeit real ones”.
72. Despite the matter not having been raised in Williams 4 – and despite the principles at [13] and [22] above – EZS faintly challenges Perry J’s conclusion as to there being a “real risk that information might be destroyed or hidden, squirrelled away”.
73. The matters in FS1 Part E – which Perry J concluded gave rise to the “real risk” (see [10] above) – were: **(1)** Dr Kolodziejczyk taking Fortescue material via USB: see [49(a)]; **(2)** Dr Kolodziejczyk deleting the “TempSD” folder on his Fortescue laptop, which it could be inferred was done to conceal his copying of Fortescue material: see [49(b)] above; **(3)** Dr Winther-Jensen having emailed Fortescue documents to himself: see [50] above; **(4)** Fortescue’s inability to locate the Fortescue Process CI, from which it may be inferred that Drs Kolodziejczyk and Winther-Jensen took it from, and caused it to be unavailable to, Fortescue: see [43] above; **(5)** Dr Kolodziejczyk’s statement in the AFR that the EZ Process did not dawn on him until after his time in Fortescue,⁵⁹ which conflicts with the documents he wrote about Ionic Liquid R&D while at Fortescue, as set out at [40] above; **(6)** a Fortescue investigation into Dr Kolodziejczyk having found that he had misrepresented his qualifications and experience when applying for his position at Fortescue.⁶⁰
74. There is seldom “cogent actual evidence of a threat to destroy materials or documents”: *Indicii Salus Ltd v Chandrasekaran* [2007] EWHC 406 at [15]. Rather, the possibility of destruction is typically inferred where, as here: there has been nefarious activity

⁵⁸ Marrast [56]-[57].

⁵⁹ Bhatt 1 AIB-23 pp 146, 149.

⁶⁰ Huber [61(a)], Confidential AH-21 items 2.1 and 2.3 - 2.7. See also the following footnote.

rendering it likely the person is untrustworthy (see FS1 [68]) *or* there is “prima facie cogent evidence of dishonesty”: *TSG Corporation Pty Ltd v Islami* [2011] FCA 1545 at [4]; *Jemella Australia Pty Ltd v Internet Marketing Pty Ltd* (2008) 75 IPR 59 at [13].

75. Each of the matters in [73] above supports both characterisations; all the more so when the matters are considered in combination. The assertion at EZS [43] that the matters “go nowhere near establishing the type of risk” does not engage with those matters. As to EZS [45], see e.g., [66] above. As to EZS [46], see [73(5)] above and FS1 [69(e)].

E. ALLEGED MATERIAL NON-DISCLOSURES

76. Williams 4 [23]-[31] sets out the EZ Respondents’ alleged material non-disclosures. The IA is necessarily limited to these allegations: see also the principle at [26] above.

77. As the allegations at Williams 4 [30]-[31] are not addressed in EZS, Fortescue takes them to have been abandoned.⁶¹

E1. Dr Kolodziejczyk’s taking of documents

78. The EZ Respondents assert Fortescue failed to disclose that: “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.”⁶² See also EZS [51].

79. Dr Kolodziejczyk’s evidence is that he was instructed to do this over the telephone by Mr Roper, whose reason for indicating that Dr Kolodziejczyk could delete documents was “Fortescue had copies of everything they needed” on SharePoint. He asserts the documents were relevant to his finalising intellectual property related documents for Fortescue, which he seeks to substantiate by using emails to Mr Roper in which he provided certain invention details (**Forecasting Algorithm; Iron Flow Battery**) and comments on a draft patent specification [REDACTED] **Draft**).⁶³

80. Dr Kolodziejczyk’s version of events is in conflict with the evidence of Mr Roper and Dr Bhatt filed by Fortescue in answer to the IA.

81. Mr Roper does not recall giving any of the asserted instructions. He considers it unlikely he did so, including because: (1) as Intellectual Property Manager, he was not responsible for Dr Kolodziejczyk’s “work”, nor did his responsibilities include dealing with the logistics of employee exits and equipment return; (2) he did not have the authority to allow Dr Kolodziejczyk to “take” documents; (3) he did not even know

⁶¹ In any event: Williams 4 [30] (based on Kolodziejczyk [24]-[31]) does not engage with the misrepresentations regarding Dr Kolodziejczyk’s prior work experience as uncovered in the formal investigation overseen by FFI Governance and Compliance in 2021: Huber 1, AH-21, Confidential Attachments 1, 2, 4, 6 and 7; as to Williams 4 [31], see Roper [43], [48] and [49] and Bhatt 2 [103]-[105].

⁶² Williams 4 [28]-[29].

⁶³ Kolodziejczyk [50], [58], [59]; Conf Ex BPK-2 [1]-[8]; pp 4-9 (Forecasting Algorithm); pp 10-35 [REDACTED] Draft); pp 36-40 (Iron Flow Battery).

whether Dr Kolodziejczyk needed any documents to finish the final intellectual property related tasks he needed to complete; **(4)** allowing Dr Kolodziejczyk to delete data would have compromised an investigation being undertaken into Dr Kolodziejczyk and Fortescue’s concern to “receive all his documentation and data”.⁶⁴

82. Dr Kolodziejczyk’s version of events is further undermined by the fact that, for the detailed reasons Dr Bhatt explains, three of the documents Dr Kolodziejczyk copied – the Green Iron Update, the Basis of Design and the Bumblebee P&ID document – have no relevance to preparing or considering the Forecasting Algorithm, Iron Flow Battery or commenting on the [REDACTED] Draft.⁶⁵
83. Dr Kolodziejczyk’s other purported explanation is that the copied documents are relevant to finalising documents for patents for green cement or green hydrogen technologies.⁶⁶ However, as Dr Bhatt explains, the Green Iron Update, the Basis of Design, the Bumblebee P&ID and the Provisional Application (the other copied document) are not relevant to green cement or green hydrogen, nor do they provide information relevant to patents for those technologies.⁶⁷
84. Fortescue and the EZ Respondents agree that the Court cannot resolve these conflicts in the evidence before trial. As stated at EZS [54], “The contest ... [in the] evidence will not be resolved by the court at this point in time, and could only be resolved at a final hearing.” The upshot of the conflicts in the evidence is that the EZ Respondents cannot have discharged their onus of establishing the alleged non-disclosure set out at [78] above. Applying *Tugushev* at [7(viii)], albeit in the context of search orders:
- “In general terms it is inappropriate to seek to set aside a [search] order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the [search] order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself.”
85. In the circumstances, it appears to be unnecessary for the Court to consider the likelihood of the conflicting version of events: cf the principles at [116] below. If, however, it does so, it should find that Dr Kolodziejczyk’s version is implausible, including because: **(1)** Fortescue’s evidence tells strongly against it: see e.g., [81]-[83] above; **(2)** it is not corroborated by any documents; and **(3)** the idea that a Fortescue IP manager would (without authority) instruct a departing employee (who was under investigation) to email himself and delete documents is inherently improbable.

⁶⁴ Roper [18], [43], [46]-[53].

⁶⁵ Bhatt 2 [51(a)], [51(c)], [51(d)], [53(a)], [53(c)], [53(d)], [56(a)], [56(b)], [56(c)], [57].

⁶⁶ Kolodziejczyk [58].

⁶⁷ Bhatt 2 [68]-[69].

86. Fortescue now turns to address various points in EZS. As to EZS [53], the contention that it is “too late” for Fortescue to rely on Mr Roper and Dr Bhatt’s evidence summarised at [81]-[83] above – as it was not before the Court when the Search Orders were sought – is misconceived. Fortescue relies on the evidence to *rebut the facts* alleged to constitute the asserted non-disclosure, not to supplement the evidence it relied upon in obtaining the Search Orders. There was no reason for the evidence to have been before the Court when Fortescue sought the Search Orders; it is not necessary to adduce evidence prospectively to rebut something that did not occur.
87. The suggestion in EZS [54] that Mr Roper’s evidence is “speculative, because it concerns conversations he does not recall (such as in [50]-[53])” should be rejected. Properly characterised, Mr Roper’s evidence is that he does not recall saying various matters attributed to him *and*, for various cogent reasons, it is unlikely he said them: see [81] above. The fact that Mr Roper does not purport to recite the precise detail of a conversation occurring nearly three years ago – or speak in absolutes – reflects well on the veracity of his evidence. In contrast, Dr Kolodziejczyk’s apparently complete recollection of the specifics of the same conversation is improbable. The famous passage in *Watson v Foxman* (1995) 49 NSWLR 315 at 318-319, quoted with approval in e.g., *Julstar Pty Ltd v Hart Trading Pty Ltd* [2014] FCAFC 151 at [73], is apposite:
- “... human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest...”
88. As to EZS [54] penultimate sentence, that Dr Bhatt has not “met” Dr Kolodziejczyk is immaterial; Dr Bhatt’s evidence is based on his review of the relevant documents, utilising his substantial scientific knowledge of their subject matter.
89. As to EZS [55], the fact that the “TempSD” folder contained “a number” of folders and subfolders with personal/non-Fortescue matters is inconsequential, given it also contained (e.g.) “Fortescue IP” and “Green Steel” sub-folders: see [49(b)] above. As to EZS [56], Fortescue did not allege that the patent applications listed in the “Fortescue IP” are missing from Fortescue’s systems. The probative value of the “Fortescue IP” sub-folder lies in the inference that Dr Kolodziejczyk intended to copy Fortescue intellectual property: see e.g., [49(b)] above and FS1 [56(a)]. The contention at EZS [57] that Fortescue should have raised with the Court other possible speculative reasons for Dr Kolodziejczyk’s conduct is contrary to principle: see [32]-[33] above.
- E2. “Commercial dealings”**
90. The EZ Respondents assert that Fortescue did not disclose “commercial dealings between the parties”, as set out in Mr Masterman’s affidavit: EZS [58].

91. Insofar as the allegation concerns “non-disclosure” regarding Mr Masterman having obtained iron ore samples from Fortescue (e.g., EZS [60(a)]; Williams 4 [24]), this can be put to one side. Fortescue’s Search Order Application evidence included that: (1) it had provided samples to Mr Masterman in ~ May 2023; (2) Mr Masterman requested more samples in July/August 2023; (3) in mid-August 2023, Fortescue re-assessed the provision of such samples, and did not provide any further samples to Mr Masterman.⁶⁸
92. As noted at [17] above, Fortescue accepts that it did not disclose the meetings between Fortescue and Element Zero on 19 December 2023 and 24 January 2024 and their entry into an NDA. However, for the reasons explained below, these matters were not material. Before turning to materiality, it is important to set out the salient facts.
93. **Facts.** In early November 2023, the First Applicant’s Chief General Counsel, Mr Phil McKeiver, indicated to Mr Masterman that Fortescue had concerns that Element Zero was infringing Fortescue’s intellectual property, and wanted to meet to discuss them.⁶⁹
94. On 19 December 2023, Fortescue representatives and Mr Masterman met for ~45 minutes, the final ~10-15 minutes of which were spent discussing Element Zero technology. Mr Masterman indicated that “the Element Zero technology [the EZ Process] is very different from Fortescue’s [Fortescue Particle Process]”.⁷⁰
95. On 17 January 2024, the day the AFR article was published, Mr McKeiver and Mr Masterman exchanged correspondence marked without prejudice. On 18 January 2024, Fortescue representatives and Mr Masterman agreed to meet on 24 January 2024, subject to an NDA “being in place”. Mr Masterman said he understood the meeting’s purpose was to “quickly provide comfort and technical understanding” (i.e. *not* a commercial purpose). The NDA was executed on 23 January 2024.⁷¹
96. The meeting, lasting only ~60 minutes, occurred on 24 January 2024. A large part involved discussing the Element Zero technology. Mr Masterman explained the “differences between the Fortescue and Element Zero technologies”. Following the meeting, Fortescue did not ask Mr Masterman to share any further information.⁷²
97. Although it may be that nothing turns on them, the following two characterisations of the facts in EZS are erroneous:
- (a) As to EZS [60], the interactions between Fortescue and Mr Masterman from November 2023 to January 2024 were not “extensive”. The interactions involved

⁶⁸ Huber 1 [67], [69(b)], [70].

⁶⁹ Huber [68] (noting the date correction in the Sixth Affidavit of Paul Dewar affirmed 31 July 2024 (**Dewar 6**) [9]; affidavit of Michael Masterman sworn 20 June 2024 (**Masterman**) [72], Conf Ex MGM-1 p 45.

⁷⁰ Masterman [79].

⁷¹ Masterman [92], [95] (and Conf Ex MGM-1 p 58-62), [97].

⁷² Masterman [103], [104], [107].

two meetings lasting a cumulative total of ~1.75 hours and communications regarding facilitating those meetings, including by the entry into the NDA.

- (b) As to EZS [60(e)], Mr Masterman’s subjective perception of the meetings as involving “commercial discussions”⁷³ and a possible “commercial relationship” does not accord with the matters set out at [93]-[96] above or the contemporaneous documents exhibited to his affidavit. Rather, characterised objectively, the dominant purpose of the NDA and meetings was to explore Fortescue’s concern that the EZ Process was the same as the Fortescue Particle Process.
98. **Materiality.** As a threshold matter, the materiality of Fortescue’s non-disclosure falls to be assessed in the context that this is a “heavy commercial case”: see [26]-[29] above.
99. The thrust of the meetings was Mr Masterman’s statements that the Fortescue Particle and EZ Process are different. The differences between the processes were drawn to the Court’s attention in the Search Order Application.⁷⁴ The pleadings do not allege any similarities. Fortescue’s case is not that the Fortescue Particle Process is the same or similar to the EZ Process but rather that the Respondents misused the Fortescue Process CI (i.e. the Ionic Liquid R&D which is fundamentally different from the Fortescue Particle Process) and the Fortescue Plant CI.
100. The contention at EZS [5] and [65] that the meetings and NDA “tend strongly against the risk of destruction” – because “Fortescue could have asked” Element Zero for “the information in relation to the Element Zero technology” – is misplaced.
101. *First*, it is unclear what “the information” means in this context. The information Mr Masterman provided Fortescue as to the “Element Zero technology” in November 2023 to January 2024 concerned *its differences* compared with the Fortescue Particle Process. It did not concern a justification for the clandestine activity of Drs Kolodziejczyk and Winther-Jensen during their time at Fortescue, which Fortescue only uncovered in April 2024 – *months after* the meetings and execution of the NDA – or the strong inference of misuse in the EZ Process, EZ Plant and Patent Applications.
102. Indeed, Fortescue “asking about” the misconduct would have been imprudent; it would have exacerbated the risk of destruction of important evidence. Asking general questions about similarities in technologies is poles apart from confronting Element Zero about – or commencing proceedings in respect of – unrelated misconduct.
103. *Secondly* and in any event, the evidence as to the real risk of destruction was strong: see [73] above. Bearing in mind the principles at [71] and [74] above, the meetings

⁷³ Masterman [65] (see heading above paragraph), [102], [106].

⁷⁴ In the Search Order Application, Fortescue relied on detailed technical evidence as to the differences: Bhatt 1 [33]-[45], [89]-[98]. These were also addressed in FS1 [20]-[21]. In oral submissions on 9 May 2024, Fortescue indicated it is currently using an “electr[o] chemical reduction approach using solid iron ore particles” (T13.27-31 and 14.1-11) that is different from the EZ Process. See also T13.9-19.

and the NDA could not logically have affected the existence or complexion of any of the six matters set out at [73] above. The fact that Element Zero had met and communicated with Fortescue some 4 months before Fortescue discovered the misconduct cannot somehow neutralise the evidence of nefarious activity/dishonesty on which the inference of a real possibility of destruction was based.

104. As to EZS [59]: **(1)** the matters not disclosed were not contrary to Fortescue’s submission as to prejudice at FS1 [70]. The potential for serious loss or damage was framed by reference to the consequences of the destruction of evidence. The non-disclosure cannot bear upon that matter; **(2)** FS1 [73] did not state or represent that the last communication between Fortescue and Element Zero occurred in August 2023.

E3. Ionic Liquid R&D

105. EZS section 7.3 alleges Fortescue failed to make various “proper inquiries”, or disclose various information with respect to, the Ionic Liquid R&D. As these allegations did not appear in Williams [22] – such that Fortescue had no notice of them when preparing its evidence in answer – they should not be entertained. However, against the possibility that the Court considers them, Fortescue briefly addresses them below.
106. As to EZS [67], it was not necessary for Fortescue to lead evidence as to other work that may have been “occupying Dr Kolodziejczyk’s time in 2020 and 2021” given that Fortescue led evidence showing that Dr Kolodziejczyk had been working on the Ionic Liquid R&D. There is nothing unusual in a person working across multiple areas and on different tasks across a two-year period.
107. As to EZS [68]-[71], the submission that Fortescue “failed to make proper inquiries or did not disclose the results of searches” lacks any proper evidentiary foundation.
108. Insofar as the duty of full and frank disclosure extends to facts the applicant “**would have known** if he had made [proper] inquiries” (*Brink’s-Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1356(3) and cf EZS [20]), two points may be made. *First*, it only extends to what “would have” been known based on the proper inquiries; a respondent cannot establish that this standard is contravened by speculating that an applicant *might have* found particular facts had it undertaken particular inquiries. *Secondly*, what constitutes “proper inquiries” depends on the circumstances: *Brink’s-Mat* at 1357(4).
109. Having regard to the matters in [108], as to: **(1)** EZS [68]-[70], the suggestion that Fortescue failed to “make proper inquiries” is belied by the investigations it undertook: a search of ~ 47,000 files from Dr Kolodziejczyk’s Outlook account (including emails, calendar invites, drafts, “purged” and other miscellaneous documents); 1,000 files from Dr Winther-Jensen’s Outlook account; a review of the Green Iron SharePoint Folder and other raw data files on Fortescue’s systems; and a forensic review of Dr

Kolodziejczyk’s and the shared UWA laboratory laptops.⁷⁵ In any event, the EZ Respondents – bearing the onus – have not adduced evidence as to what other “inquiries” would have shown; (2) EZS [71], the speculation as to the whereabouts of “any Ionic R&D Information created in 2020” is not supported by any evidence from Dr Kolodziejczyk or otherwise. Fortescue *did* search for documents from 2020.⁷⁶

E4. Exercise of Discretion

110. If, contrary to the above, there was a material non-disclosure, it is in the interests of justice for the Court to exercise its discretion not to set aside the Search Orders.
111. *First*, disclosure would not have changed the Court’s decision to make the Search Orders. There was a “very substantial body of evidence” establishing a “strong prima facie case”, a “real risk of information” being destroyed and “prejudice of a very substantial nature” was “clearly established” absent the Search Orders: see [10] above.
112. *Secondly*, if the Court concludes that there was any material non-disclosure: (1) Fortescue has not “acted culpably in the sense that the omission to disclose relevant matters was done deliberately to mislead the court”⁷⁷: cf [34] and [35(2)] above; (2) any such material non-disclosure was on the less “serious” end of the spectrum.
113. *Thirdly*, the hardship from setting aside the Search Order is plain, i.e a “real risk of information” being destroyed and the ensuing prejudice to Fortescue, as well as the Respondents potentially claiming on the undertaking as to damages: see EZS [83].
114. *Fourthly*, this may be contrasted with the lack of any utility in setting aside the Search Orders. In particular: (1) the searches have already been executed and the Independent Lawyers and Computer Experts have filed their reports, as required by the Search Orders; (2) in any event, Fortescue could apply for the Search Orders to be made again; and (3) any asserted reputational impact on the Respondents from the Search Orders would not make their setting aside utile: e.g., *Brilliant Digital Entertainment Pty Ltd v Universal Music Australia Pty Ltd* (2004) 63 IPR 373 at [12]; *Geneva* at [119].
115. *Fifthly*, the merits of the case favour the exercise of the discretion. In particular, Fortescue has a strong prima facie case and there is a real risk of destruction of important evidentiary material: see e.g., [10], [40]-[54], [59]-[61] and [73]-[74] above.
116. Unlike when the Search Order Application was made, the merits fall to be assessed in light of the Respondents’ evidence. Insofar as there is a conflict in Fortescue’s and the Respondents’ evidence, the principles applied for interlocutory injunctions and contested freezing order applications are apposite. They include: (1) where there is conflict of evidence, the use which may be made of the Respondents’ evidence is “a

⁷⁵ Hantos [51]-[53], [66]-[67]; Bhatt 1 [120], [156]-[157]; Huber AH-26, AH-27.

⁷⁶ Bhatt 1 [54]; Hantos [51].

⁷⁷ *Savcor* at [33]; see also Dewar 6 [24].

limited one”, unless for example it “explains away” Fortescue’s strong prima facie case or shows it has no case: e.g., *Warner-Lambert Company LLC v Apotex Pty Ltd* (2014) 311 ALR 632 at [72]; *Fine China Capital Investment Limited v Qi (No 2)* [2023] FCA 1059 at [23(b)-(d)]; *Parbery v QNI Metals Pty Ltd* (2018) 358 ALR 88 at [73]-[74]; and (2) statements in affidavits are to be assessed based on their plausibility, including whether they are lacking in precision or are inherently improbable. The Court need not accept their truth, despite the absence of cross-examination: e.g., *Fine China* at [23(e)]; *Parbery* at [75]. See also, in the search order context, *Braggs* at [28].

117. Applying the above principles, the Respondents’ evidence on the IA does not displace Fortescue’s strong prima facie case. To the contrary – given it involves an assortment of admissions, failures to explain parts of the misconduct set out in Fortescue’s evidence and, to the limited extent attempts have been made at doing so, a series of implausible statements – the prima facie case has become even stronger. For example:
118. Dr Kolodziejczyk in terms admits taking and deleting Fortescue documents. His evidence that Mr Roper instructed him to do so is implausible: see [79]-[83] and [87] above. Further, Dr Kolodziejczyk’s perplexing denial of working on the ionic process while at Fortescue fails to explain the contemporaneous documents which indicate that he did work on the ionic process: see [63] above.
119. Dr Winther-Jensen admits sending Fortescue’s documents to his personal email. He claims to have done this because he was “concerned” that he “might” lose access to the Fortescue network and his Fortescue email account before his end-date and would not be able to complete his handover, so he decided – without asking anyone from Fortescue – to email himself Fortescue documents over a number of days.⁷⁸ This explanation is also implausible. There is no evidence to corroborate it. It is also controverted by Dr Bhatt’s explanation as to the lack of relevance to the handover of the documents Dr Winther-Jensen emailed himself.⁷⁹
120. Mr Masterman’s scant evidence (totalling three paragraphs)⁸⁰ about the EZ Plant supports the conclusions reached in Mr McFaull’s careful and detailed analysis about an unexplained resource deficit in the EZ Plant development: see [52] above.
121. First, Mr Masterman ██████████ that the EZ Plant is ██████████ ██████████ Fortescue’s plant and one of the inputs on which Mr McFaull’s analysis was based.⁸¹

⁷⁸ Affidavit of Dr Winther-Jensen affirmed 8 July 2024 (**Winther-Jensen**) [27]-[29].

⁷⁹ Bhatt 2 [85(a)-(g)], [87(a)-(e)], [89(a)-(e)].

⁸⁰ Masterman [26], Conf Ex MGM-4 [1]-[3].

⁸¹ McFaull [8] ██████████. Curiously, Mr Masterman gives opaque evidence that, at February 2024, the EZ Plant was ██████████ Conf Ex MGM-4 [1]. ██████████

Two January 2024 articles in evidence on the Search Order Application (Bhatt 1 AIB-24 pp 152-153; McFaull

122. *Secondly*, Mr Masterman’s evidence that Element Zero has spent [REDACTED] on the EZ Plant suggests the [REDACTED]
123. *Thirdly*, and most critically, no witness for the EZ Respondents comments on, let alone disputes, the existence of a resource deficit or Mr McFaull’s analysis, or explain how the EZ Plant was built despite the resource deficit. The Court should infer that the EZ Respondents feared to address the matter by direct evidence because this would have exposed facts unfavourable to them: see generally *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418E.

F. FORM AND BREADTH OF SEARCH ORDERS

124. EZS [6] and [77]-[82] complains about the breadth of the Search Orders, albeit without stating how this bears on *the determination* of the IA. It is not suggested in EZS – nor could it be – that this is capable of providing a reason for setting aside the Search Orders. Notwithstanding the above, Fortescue addresses the various complaints below.
125. The complaints fall to be assessed in the following context: **(1)** the Court has broad powers to tailor search orders to the circumstances of the case: *AGL Energy Ltd v Hardy* [2017] FCA 420 at [15]. There are many cases in which the “listed things” have included devices/storage accounts;⁸² **(2)** during the 9 May 2024 hearing, the Court was taken to the listed things at T43.19-44.3: cf *Austress* at [106]. Subject to requiring a verification process which excluded devices belonging to family members – a matter which was the subject of order 20(d1)-(d2) of the Search Orders – the Court did not have any concerns as to their scope: see also T16.13-20 (14 May 2024); **(3)** Fortescue has no right to inspect the seized documents and cannot do so without the Court’s leave: e.g., Search Orders Practice Note (GPN-SRCH) [2.18].
126. Contrary to EZS [79]-[81], the scope of the Listed Things was appropriate. In circumstances where Fortescue does not know the precise detail of everything the Respondents took or used, it is impractical to expect Fortescue to have defined such documents and information in a way enabling its ready identification by the Independent Lawyers/Computer Experts in the course of executing a search order. Moreover, a narrow approach to the Listed Things would have run the risk that relevant material that otherwise *could have* been preserved could *later* have been destroyed, thereby compromising the utility of the search order procedure. Search orders should not be framed in a way which makes their utilisation overly complex and

WM-5 pp 45-46) – which quoted Element Zero representatives and one of which included an Element Zero media contact – reported: “The current Element Zero prototype is capable of producing 100 kg of zero-carbon iron per day” and “a 100 kg per day prototype is being tested and optimized”. It may be inferred that these statements emanated from Element Zero [REDACTED]

⁸² e.g., *Direct Flow Pty Ltd v Peterson* [2023] NSWSC 318 at [5]; *Clover Corporation Ltd v Tobias (No 2)* [2020] FCA 1710 at [6]; *Sundarjee Bros (Aust) Pty Ltd v Sanjay Sundarjee* [2024] NSWSC 237 at [2]; *Sun v He* [2020] NSWSC 802 at [213]; *Corry v NHB Enterprises Pty Limited* [2022] NSWCA 280 at [18].

- technical or which undermines the amplitude of the search order procedure: *Aristocrat Technologies Australia Pty Ltd v Global Gaming Pty Ltd* [2006] FCA 862 at [7].
127. The complaint in EZS [82] that the review of the large amount of material seized will be “time consuming and expensive” is misconceived.
 128. *First*, following the filing of a Defence, the “obvious next step” is discovery: **Rauland Australia Pty Ltd v Johnson (No 2)** [2019] FCA 1175 at [56]. This was the sequence in the orders of 30 May 2024: see [12] above. **Schedule 1** contains Fortescue’s draft discovery categories.⁸³ The only material the subject of the Search Orders that will need to be discovered is that caught by any categories ordered by the Court. One would reasonably assume that is a sub-set of the materials seized pursuant to the Search Orders. In addition, logically the scope of the Search Orders can have no effect on the categories of discovery ordered by the Court or the reasonable searches that would need to be undertaken by the Respondents to comply with any such discovery orders. These factors remain the same regardless of the Search Orders. Rather, the Search Orders simply but importantly ensure that the evidence is preserved.
 129. *Secondly*, there is no need for the EZ Respondents to “review the Forensic Images [...] for confidentiality and privilege”: cf Williams 4 [40]. As Fortescue submitted on 30 May 2024 (T11.24-39), any privilege claims can be dealt with in the context of a list of documents pursuant to discovery orders. The same applies to confidentiality claims.
 130. It is only after discovery that it is appropriate to consider any need to interrogate the seized material, e.g., in order to determine whether the Respondents have complied with their discovery obligations: *Rauland* at [56]. And even if Fortescue sought and was granted orders for interrogation, it would be pursuant to a defined protocol; plainly, Fortescue would not seek (or be granted) leave to inspect every document on every device.
 131. *Thirdly*, Fortescue was not to know the number of devices and volume of data that would be imaged. In any event, it is safe to assume that the figures reflect modern digital storage practices and the fact that the same work product tends to be conducted and stored across multiple devices (computers, phones, tablets etc) and communication platforms (different email addresses, phone numbers, etc).

G. “SURVEILLANCE” BEFORE EXECUTION OF SEARCH ORDERS

132. The EZ Respondents contend that there was “excessive and unnecessary surveillance of the Respondents”, which “amount[s] to unclean hands or bad faith in obtaining the Search Orders” (EZS [7]). They also submit that “it is open to conclude the

⁸³ The draft discovery categories are necessarily subject to matters pleaded in the Defence and the Order 23 Affidavits: see also Logan J’s reasons for 30 May 2024 judgment at [36].

surveillance was conducted for purposes other than the preservation of relevant evidence”: EZS [75].

133. *First*, these submissions involve serious allegations which should have been set out in Williams 4 at [22], [52] or elsewhere, so as to give Fortescue notice of them in advance of – and the opportunity to address them in – Fortescue’s evidence in answer. As the allegations do not form part of Williams 4, they should not be entertained.
134. *Secondly*, in any event, there is no evidentiary basis for the findings sought. While the private investigator reports are detailed, they do not indicate any collateral purpose. To the contrary, they reflect the standard bases on which such reports are commissioned in obtaining search orders.⁸⁴ As explained at T10.30-39 (9 May 2024), a further reason for the “surveillance” was to enable simultaneous execution of the Search Orders; this was necessary to ameliorate the risk of a particular respondent becoming aware of the Search Order – and thus having the opportunity to destroy evidence – before the order was executed on that respondent or access to its/his premises obtained.⁸⁵
135. *Thirdly*, the private investigator reports were disclosed to the Court; indeed, they formed part of Fortescue’s Search Order Application evidence.⁸⁶ They were referred to in oral submissions on 9 May (T10.30-37, 34.8-29) and 14 May 2024 (T7.46-8.5).
136. *Fourthly*, the nature/extent of the private investigator reports cannot justify setting aside the Search Orders. The EZ Respondents cite no authority in support of – and it is unclear whether they are even seriously pursuing – any such contention.

H. CONCLUSION

137. The IA should be dismissed with costs.
138. If contrary to the above the Search Orders are set aside *ab initio*, this should be conditional on an order being made for the seized material to be held in the Respondents’ solicitors’ custody: see e.g., *Berg* at [110]-[111].

J S Cooke, D B Larish, W H Wu, S K Yates **Counsel for Fortescue** 14 August 2024

⁸⁴ I.e., (1) confirming the nature of the search premises (business or private), as required by GPN-SRCH [2.8(b)]; (2) confirming the association of a respondent with a particular search premises; (3) ascertaining the time(s) when a respondent is likely to be present at search premises; (4) ascertaining the presence and type of any vulnerable persons at search premises, being information required by GPN-SRCH [2.8(f)], see also [2.15]; and (5) providing information to the Independent Lawyer(s) to assist with execution of the search order.

⁸⁵ As it transpired, despite the “surveillance”, the Search Orders in respect of Dr Kolodziejczyk’s residential premises could only be executed on 16 May 2024, the day after they were executed against Element Zero and Dr Winther-Jensen’s premises, as nobody was at those premises on 15 May 2024.

⁸⁶ See the first, second and third affidavits of Paul Dewar affirmed 1, 9 and 14 May 2024 respectively.

APPLICANTS' DRAFT DISCOVERY CATEGORIES

Definitions

- a. **“directly relevant”** means a document that falls within any of the criteria in rule 20.14(2) of the Federal Court Rules.
- b. **“document”** has the meaning given to that term in Schedule 1 of the Federal Court Rules 2011 (Cth).
- c. **“First Specified Documents”** means the documents referred to in the particulars of paragraphs 19 and 20 of the ASOC including:

No.	Name	Ref
1	Green Iron Update (02.08.2021).pdf	see ASOC [19(i)(1)]
2	35557986AU- Specification as filed (35557986).pdf	see ASOC [19(i)(2)], see ASOC [20(i)(4)]
3	35557986AU - Drawings as filed (35557986).pdf	see ASOC [19(i)(2)], see ASOC [20(i)(4)]
4	Document titled "Basis of Design – Chameleon Pilot Plant" having document number or file name FFI0302-10000-00-EG-BOD-0001	see ASOC [19(i)(3)]
5	Bumblebee PID markups 26_10_21.pdf	see ASOC [19(i)(4)]
6	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	see ASOC [19(ii)], see ASOC [20(iv)]
7	The internal Fortescue procedures and specifications listed in paragraph 103 of the affidavit of Mr Wayne McFaull affirmed on 1 May 2024	see ASOC [19(iii)], see ASOC [20(v)]
8	211029_Iron ore leaching_Report_ASH.R1.docx	see ASOC [20(i)(1)]
9	211014_FFI Green Steel_Ore Leach_ASH_XRF results.csv	see ASOC [20(i)(2)]
10	211014_FFI Green Steel_Ore Leach_ASH_ICP results.csv	see ASOC [20(i)(3)]
11	Technical Evaluation.xlsx	see ASOC [20(i)(5)]

No.	Name	Ref
12	Email from David White sent on 4 November 2024 with Subject "Technical Evaluation of Green Iron process"	see ASOC [20(i)(5)]
13	Green Iron Update (01.11.2021).pdf	see ASOC [20(i)(6)]

- d. **"Fortescue"** has the meaning given to that term in paragraph 4 of the Amended Statement of Claim filed 17 June 2024 (**ASOC**).
- e. **"Ionic Liquid"** means any salt or mixture of salts that is capable of acting as an electrolyte in electrowinning and/or electroplating of metals and/or ores when in its liquid form (irrespective of the temperature range at which the salt or mixture is in its liquid form) including, without limitation, electrolytes that may be described as ionic liquids, molten salts, eutectics, molten hydroxide-based electrolytes and/or molten carbonate-based electrolytes.
- f. **"Search Orders"** means the orders made by Justice Perry on 14 May 2024 providing for the conduct of a search pursuant to Division 7.5 of the *Federal Court Rules 2011* (Cth).
- g. **"Second Specified Documents"** means any:
- i. modified forms of First Specified Documents, including previous or subsequent drafts;
 - ii. documents created directly or indirectly using the First Specified Documents.

Reasonable Search

For the avoidance of doubt, a "reasonable search" for the purposes of r 20.14 of the *Federal Court Rules 2011* (Cth) includes a search over the copies of materials seized or imaged pursuant to the Search Orders.

Categories

Ionic Liquid documents

1. All documents recording or evidencing work undertaken by the Second Respondent, the Third Respondent and/or Fortescue at any time during the period from 25 March 2019 to 12 November 2021 in relation to an electrochemical reduction process involving Ionic Liquid.
2. To the extent not covered by category 1, all documents recording or evidencing work undertaken by the Second Respondent, the Third Respondent and/or Fortescue at any time during the period from 25 March 2019 to 12 November 2021 in relation to:

- (a) “low temperature oxide (predominantly iron ore) reduction technology” work, being the work referred to in Annexure AIB-5 to the affidavit of Anand Bhatt affirmed 1 May 2024 (**Bhatt**);
- (b) “low-temperature metal oxide reduction from mixed electrolytes” work, being the work referred to in Bhatt AIB-5 p 25, or AIB-6 p 61;
- (c) the “preliminary work that we have done in ionic liquids and low temperature iron ore reduction”, being the work referred to in Bhatt AIB-7;
- (d) work relating to “our internal endeavours, where Fortescue develops a new type of electrolyser”, being the work referred to in Bhatt AIB-8;
- (e) “low-temperature processing from ionic liquids” work, being the work referred to in Bhatt AIB-9 p 81;
- (f) work for “getting our manufacturing and R&D facilities set up”, being the work referred to in Bhatt AIB-10 p 85;
- (g) “low temperature [electrochemical reduction] using ionic liquids as iron ore solvents” work, being the work referred to in Bhatt AIB-10 p 86;
- (h) the “low-temperature electrochemical ores reduction in ionic liquid electrolytes” work, being the work referred to in Bhatt AIB-12 p 93;
- (i) the “work over Christmas to establish our Perth manufacturing in early 2021”, being the work referred to in Bhatt AIB-12 p 94;
- (j) “electrolysers and low-temperature electrochemical iron ore processing plants” work, being the further work referred to in Bhatt AIB-12 p 94;
- (k) “low temperature electrochemical ores reduction” work, being the work referred to in the Patent Assessment Form and email dated 22 December 2020 in Bhatt AIB-13 pp 96 – 100;
- (l) drafts of the “intended patent application” referred to in the email dated 22 December 2020 in Bhatt AIB-13 p 96;
- (m) “the use of ionic solvents and electrochemical devices for the low-temperature reduction of ores and oxides” work, being the work referred to in the Patent Assessment Form in Bhatt AIB-13 p 97;
- (n) the “ionic liquid or mixture of ionic liquids” work, being the work referred to in the Patent Assessment Form in Bhatt AIB-13 p 97;
- (o) the “selection of ionic liquid or mixture of ionic liquids”, “application of ionic liquids in metal oxide reduction”, and “the selection of electrode materials and cell

design” work, being further work referred to in the Patent Assessment Form in Bhatt AIB-13 p 97;

- (p) the “develop[ment]” and “test[ing]” work as referred to Bhatt AIB-13 pp 96, 97;
 - (q) the work intended to be “scaled up”, as referred to Bhatt AIB-13 pp 96, 97;
 - (r) the “low-temperature electrochemical ore reduction in ionic liquids” work, including the “R&D roadmaps”, “write-ups” and proposed “patent applications”, being the work referred to in Bhatt AIB-14 p 104;
 - (s) the “R&D roadmap” and development “using solvents capable of dissolving iron ore at low temperatures <300 deg C and/or using molten carbonate electrolyte” work, being the work referred to in Bhatt AIB-15 p 106;
 - (t) the work concerning “alternative processes that would utilise lower temperatures and direct electrochemical reduction of iron ore into iron and further steel. The electrochemical reduction is done in a liquid phase, hence iron ore has to be dissolved in the electrolyte prior to being electrolysed”, being the work referred to in Bhatt AIB-16;
 - (u) the work concerning “enabling technologies for iron ore processing to produce green commodities”, “apply[ing] this green electricity to electrochemically reduce Fortescue’s iron ore dissolved in a unique electrolyte”, and/or “selection of electrolyte, electrode material and other materials used in the process”, including the proposed “patents covering this development”, being the work referred to in Bhatt AIB-17;
 - (v) the work concerning “water, ionic liquids, and molten carbonate”, being the work referred to in Bhatt AIB-19 p 120;
 - (w) the work concerning “[m]olten salts”, “[m]olten carbonates” and “[i]onic liquids”, being the work referred to in Bhatt AIB-20 pp 132-133; and
 - (x) the work concerning “initial evaluation of various suitable electrolytes”, “laboratory desktop studies”, “R&D roadmap” and “internal electrochemical developments” being work referred to in Annexure SMH-3 to the affidavit of Susanne Monica Hantos affirmed on 1 May 2024, pp 82, 83.
3. All documents recording or evidencing the location and storage of any of the documents referred to in category 1 and 2 above during:
- (a) the period 25 March 2019 to 12 November 2021;
 - (b) after 12 November 2021.

4. All documents recording or evidencing any conduct or attempt by the Second Respondent and/or the Third Respondent to make any of the documents referred to in category 1 and 2 above unavailable to Fortescue.
5. All documents recording or evidencing any of the Respondents' consideration of the confidentiality of any of the documents referred to in category 1 and 2 above.

Specified Documents

6. All documents constituting or referring to the First Specified Documents.
7. All documents constituting or referring to the Second Specified Documents.
8. All documents recording or evidencing any use or disclosure of any one or more of the First and/or Second Specified Documents by any one or more of the Respondents or their agents.
9. All documents directly relevant to any of the matters pleaded or particularised in paragraph 31, 33 and/or 78 of the ASOC.

Element Zero-related documents

10. All documents recording or evidencing consideration by any one or more of the Second, Third and/or Fourth Respondents at any time during the period 25 March 2019 to 31 July 2022 as to their present or future involvement in an enterprise (other than Fortescue) for electrochemical reduction of iron.
11. All versions, including drafts, of the following documents (howsoever described):
 - (a) basis of design documents for the First Respondent's pilot plant;
 - (b) piping and instrumentation documents for the First Respondent's pilot plant;
 - (c) laboratory books (either in hard or soft copy) recording work done with respect to the development of each of beneficiation and leaching of ores and electroplating and/or electrowinning and/or electrolyte development during the period from January 2022 to February 2024
 - (d) any documents provided by or on behalf of the Respondents or any of them to Playground Ventures containing any information in relation to chemical processes, plant design, the green iron/green steel industry and/or industry participants;
 - (e) documents recording or evidencing the "retirement 'project'", the "work[] with nickel [and] iron", and the "work that eventually led to the creation of Element Zero", referred to in paragraph 40 of the affidavit of Bjorn Winther-Jensen affirmed on 8 July 2024.

12. One or more documents recording or evidencing the amount of expenditure on designing, engineering and constructing the First Respondent's pilot plant.

Documents showing use / patent docs

13. Copies of all patents and patent applications (or divisional or related patents and patent applications) filed by any of the Respondents, or in which the Second, Third, and/or Fourth Respondents are named as an inventor concerning any aspect of the Ionic Process, leaching and/or any aspect of a pilot plant for the electrochemical reduction of ore, including drafts thereof, and including but not limited to:
 - (a) no. 2022903090 entitled "Method of ore processing";
 - (b) no. 2023902103 entitled "Ore Processing Method for Metal Recovery";
 - (c) no. 2023903979 entitled "Electrowinning from Molten Salt" (979 Application);
 - (d) no. PCT/AU2023/051041 entitled "Method of ore processing";
 - (e) any patent application for an Ionic Process;
 - (f) any patent application concerning leaching;
 - (g) any patent application that relates to the features of a pilot plant in respect of electrochemical reduction of ore;
 - (h) the patents or patent applications that "cover the overall process and its unique chemistry" as referred to on the Element Zero website as shown at Bhatt AIB-22 p 141;
 - (i) the patents or patent applications that cover "the complete circuit design for mineral processing incorporating a unique electrolyte" as referred to on the Element Zero website, as shown at Bhatt AIB-22 p 141.
14. All documents evidencing or recording the use of any of the documents in categories 1, 2, 6 and/or 7 above for or in preparing or inventing any of the patents or patent applications referred to in category 13 above.