



## **Element Zero appeals against raid decision**

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### **Body**

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A "green metal" start-up is appealing against a judge's decision that allowed mining giant **Fortescue** to seize millions of files from the homes and offices of its staff as part of a battle over intellectual property.

Element Zero, founded by ex-**Fortescue** executives Michael Masterman, Bart Kolodziejczyk and Bjorn Winther-Jensen, is accused of stealing the Andrew Forrest's clean energy trade secrets before the three launched their own business.

**Fortescue** secured search orders from a Federal Court judge in May. The orders allowed it to carry out surprise raids on the houses of Dr Kolodziejczyk and Dr Winther-Jensen to seize millions of files for their case following what the Element Zero personnel described as "unprecedented" surveillance.

Mr Masterman and Dr Kolodziejczyk challenged the initial decision to grant **Fortescue** the search orders, but Federal Court judge Brigitte Markovic dismissed their application.

A **Fortescue** spokesman reiterated a previous statement about the case: "**Fortescue** will vigorously defend Element Zero's attempt to have the decision of the court overturned," he said.

"Two Federal Court judges have found a strong prima facie case that the Element Zero parties misused **Fortescue**'s confidential information and breached its rights.

"**Fortescue** remains committed to protecting its intellectual property and investment in green technologies, and looks forward to progressing the matter to a final trial." The Element Zero team has lodged an appeal against Justice Markovic's decision to allow the search orders.

She had found **Fortescue** failed to inform the primary judge about a series of meetings that took place involving the two companies and a subsequent nondisclosure agreement that was signed by Mr Masterman.

"The primary judge erred in failing to set aside the search orders made by the duty judge on 14 May, 2024 after finding there was a material nondisclosure by **Fortescue** when making their ex parte application," the appeal application says.

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"The primary judge ought to have set aside the search orders, in whole or in part." Justice Markovic found that it was not "**Fortescue**'s intention to mislead the court" and there was no misuse of the search orders as alleged.

But Element Zero disagrees, and its application also says the judge erred because **Fortescue** did not disclose that Dr Kolodziejczyk had been instructed to work from home after he gave his notice to quit.

The application said that as a result, Dr Kolodziejczyk worked on his personal devices and communicated with **Fortescue** colleagues - including sending them documents containing the work he was doing.

"The primary judge erred in exercising a discretion not to set aside the search orders," the application states. Element Zero said it was not right to form the view that **Fortescue** had a strong prima facie case and the material non-disclosure would not have changed the court's decision.

Justice Markovic made those observations in her judgment, when she chose to not set aside the search orders.

Justice Markovic also said in her judgment that Element Zero failed to explain why the **Fortescue** case was unwarranted.

Element Zero said Justice Markovic erred in her reasons not to dispel the orders when she found there was a lack of utility in doing so, and when **Fortescue** could apply for the search orders to be made again and independent experts had already filed their reports.

Mr Masterman and Dr Kolodziejczyk have asked the court to allow their appeal and an order that the search orders be -dismissed.

An Element Zero spokesman declined to comment on Wednesday, but previously said the original search orders were carried out "after unprecedented surveillance of Element Zero employees and strangers by private investigators". "(This) represented massive overreach by **Fortescue**," he said.

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