



## *Element Zero up for a fight in spy case*

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### **Body**

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**Fortescue's** would-be green steel competitor Element Zero is challenging a Federal Court's decision to side with the mining giant after it gained legal permission to raid the homes and offices of former employees.

**Fortescue** got the green light in May to execute search orders on properties and offices linked with ex-**Fortescue** executives Bart Kolodziejczyk and Bjorn Winther-Jensen over allegations they stole trade secrets to start their own business.

The executives, and Michael Masterman, were spied on by private investigators employed by **Fortescue** in the lead up to the raids. Element Zero had claimed the surveillance was excessive, but Federal Court judge Brigitte Markovic accepted it was necessary in response to an application to have the search orders thrown out. Justice Markovic ultimately decided **Fortescue** was legally -entitled to carry out the search -orders and seize millions of documents ahead of more court -action, but she acknowledged Andrew Forrest's company made a "material non-disclosure" when it failed to alert the court about a commercial relationship between it and Mr Masterman.

"I am not satisfied that the EZ respondents have established that **Fortescue** had a weak prima facie case," she said.

"The question is whether evidence of **Fortescue's** relationship with Element Zero, through Mr Masterman, and the discussions it had about the different concerns it held in December to January 2024 was capable of having affected the court's decision, in particular in relation to the consideration of the risk of -destruction. In my view, on balance, it was." On Wednesday, during a brief case management hearing, legal counsel for Element Zero told Justice Markovic they had filed a "narrow" application for leave to appeal part of her decision.

"On Friday there was an application filed on a narrow point around â€ material non-disclosure," the court heard.

"It's an application that's made without seeking order to stay anything taking place in proceeding before you.

"The application is directed solely to the question of leave." The application will not disrupt the ongoing court matter, and it will be heard by a single judge in due course, the court heard.

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It means Element Zero is still trying to have the search orders thrown out and discharged, and is seeking orders from the court that it may not have to pay costs if it succeeds.

A spokesman for **Fortescue** told The Australian it would vigorously defend Element Zero's -attempt to have the decision of the court overturned.

"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," he said. "**Fortescue** remains committed to protecting its intellectual property and investment in green technologies, and looks forward to progressing the matter to a final trial." Element Zero had asked the court to set aside the search -orders because it claimed surveillance conducted in the lead up to obtaining them was excessive.

It emerged that **Fortescue** employed former SAS soldier Robert Lancaster to spy on Element Zero staff and their families for up to 17 hours a day. The surveillance included following family members to Kmart, rummaging through mail and taking pictures of their children leaving school.

Justice Markovic declined to set aside the search orders based on those claims, however.

"The private investigator's reports are lengthy and detailed. However, on their face they do not disclose any collateral purpose. Rather, they attempt to provide information necessary for an application for search orders and as required by the court's search orders practice note," she said. "One way of obtaining that information is to instruct qualified persons to attend at and observe premises. In this case, **Fortescue** chose to do so by instructing a private investigator firm."

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