

FEDERAL COURT OF AUSTRALIA ISSUES FULL COURT DECISION FOR FORTESCUE, ET AL. V/S
ELEMENT ZERO, ET AL. CASE**FEDERAL COURT OF AUSTRALIA ISSUES FULL COURT DECISION FOR
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Body

Australia, Oct. 15 -- The Federal Court of Australia issued the following judgement on Oct. 4:

1 On 30 April 2024 the applicants, **Fortescue** Limited, **Fortescue** Future Industries Pty Ltd (FFI) and FMG Personnel Services Pty Ltd (together, **Fortescue**), commenced this proceeding against Element Zero Pty Limited, Bartłomiej Piotr Kolodziejczyk, Bjorn Winther-Jensen and Michael George Masterman as respondents. At the time, **Fortescue** filed an originating application and statement of claim (SoC).

2 Element Zero was registered on 7 December 2022. Element Zero is a start-up that has technology to convert metal ores such as iron and nickel into pure metal using intermittent renewable energy. Mr Masterman is a director and shareholder of Element Zero and its chief executive officer (CEO), Dr Kolodziejczyk is the chief technology officer and a shareholder and director of Element Zero, and Dr Winther-Jensen is a shareholder of Element Zero and was its research and development manager and from 7 December 2022 to 11 January 2024 a director. Dr Winther-Jensen ended his employment with Element Zero in December 2023.

FORTESCUE'S EX PARTE APPLICATION

3 The proceeding first came before Perry J in her Honour's capacity as general duty judge on 9 May 2024 on an ex parte application made by **Fortescue** for search orders. The transcript of the hearing on 9 May 2024 discloses that her Honour was provided with affidavits and submissions dated 8 May 2024 prior to the hearing, and that some additional affidavits were provided at the hearing. The hearing lasted for approximately 2 hours and 20 minutes. Towards its conclusion, her Honour said:

The last thing - this is the - to my mind at the moment, I can indicate that 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 weren't 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, so that I do consider it's appropriate to make the orders, but subject to that concern.

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And after reviewing Fortescue's proposed orders added:

I mean, as I said, I've been very carefully through the written submissions. And then having those, having the benefit of being taken through the evidence in a closely and in the structured way that you have, has led me to the view that it is appropriate, subject to addressing the particular issues I've raised, to make orders in the nature that are sought.

4 On 9 May 2024 the Court made interim suppression orders pursuant to s 37AI of the Federal Court of Australia Act 1976 (Cth) and otherwise adjourned the proceeding to 14 May 2024 to allow Fortescue to deal with a number of matters raised by her Honour principally in relation to practical issues that might arise on execution of the proposed orders.

5 On 14 May 2024, when the proceeding was next listed before Perry J, the search orders were made. Those orders are directed to Element Zero, Dr Kolodziejczyk, Dr Winther-Jensen and the occupants of three identified premises. Relevantly, the search orders permit searches to be undertaken in accordance with their terms at the premises and require the recipients or targets of the search orders, referred to as "You", among other things:

(1) to permit members of the "Search Party", as defined, to enter the premises so that they can carry out the search and other activities referred to in the search orders;

(2) having permitted members of the Search Party to enter the premises, to:

(a) permit them to search for and inspect the "Listed Things" as defined in Sch A to the search orders, and to make or obtain a copy, photograph, film, sample, test or other record of the Listed Things;

(b) disclose to them the whereabouts of all the Listed Things in their possession, custody or power, whether at the premises or otherwise;

(c) disclose the whereabouts of all computers (including smartphones, tablets and other mobile devices), computer disks, drives or memory (including portable drives and USB drives), electronic information storage devices or systems, and online accounts (including all cloud and email accounts) at or accessible from the premises in which any documents among the Listed Things are or may be stored, located or recorded and cause and permit those documents to be copied or printed out;

(d) do all things necessary to enable the Search Party to access the Listed Things including by opening or providing keys to physical or digital locks and enabling them to access and operate computers and online accounts and providing them with all necessary passwords, access credentials and other means of access;

(e) permit any "Independent Lawyer", as defined, to remove certain specified things into their custody; and

(f) permit any "Independent Computer Expert", as defined, to search any computer (including any smartphone, tablet and other mobile device), computer disk, drive or memory (including any portable drive and USB drive), any electronic information storage device or system, and online accounts (including all cloud and email accounts) at or accessible from the premises, and make a copy or digital copy of any of the foregoing and permit any Independent Computer Expert to remove any of the foregoing from the premises in accordance with the terms of the search orders.

*Rest of the document and Footnotes can be viewed at: (<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca1157>) For any query with respect to this article or any other content requirement, please contact Editor at contentservices@htdigital.in

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