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Form 3
Rule 2.13(4)

No. NSD 527 of 2024

Federal Court of Australia

District Registry: New South Wales

Division: General

Fortescue Limited ACN 002 594 872 and others

Applicants

Element Zero Pty Limited ACN 664 342 081 and others

Respondents

Submissions of the third respondent (Dr Winther-Jensen) in answer to the applicants' IA

INTRODUCTION

1. By prayer 1 of the applicants' amended interlocutory application, the applicants (**Fortescue**) seek to leverage minor omissions in Dr Winther-Jensen's discovery in order to get access to the materials they seized from his house.

2. By prayer 3 of the application, Fortescue makes another application for categories of discovery that have already, in substance, been refused twice. They should, Dr Winther-Jensen submits, be refused again, with costs.

3. By prayer 3A of the application, Fortescue asks for eight new categories of discovery (together with multiple sub-categories). They are unnecessary. They would only produce more delay in the proceeding, which might jeopardise the trial.

4. Dr Winther-Jensen resists prayer 3B for the reasons given by the first, second, and fourth respondents (the **EZ respondents**).

Filed on behalf of (name & role of party) Bjorn Winther-Jensen, the third respondent
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5. The appropriate next step, Dr Winther-Jensen submits, is for the parties to just get on with preparing their evidence in anticipation of the trial in May next year.

PRAYER 1: ACCESS TO THE SEIZED MATERIALS

6. For the reasons given by the EZ respondents, Dr Winther-Jensen submits that the first step in Fortescue's application for prayer 1 against him is to establish that his discovery has been inadequate.[1]

7. Fortescue initially raised 41 alleged deficiencies in Dr Winther-Jensen's discovery. Dr Winther-Jensen responded to each of them, by an affidavit of his solicitor Mr Hales of 12 September 2025 (**Hales 4**).[2] In relation to 38 of the alleged deficiencies (the deficiencies Fortescue numbered #457-#463, #465, #466, #471-#474, and #495-#536), Dr Winther-Jensen confirmed, initially by letter and then by an affidavit of his solicitor Mr Hales, that he has nothing more to discover.[3] In response to alleged deficiency #467, Dr Winther-Jensen advised Fortescue that a document had been discovered in error and was not responsive to the categories.[4]

8. In response to alleged deficiency #464, Mr Hales said an email and its attachment were inadvertently omitted from the discovery as a result of human error by MinterEllison. Those documents were given to Fortescue on 6 August 2025 – although Fortescue did already have the email, because it was part of two other email chains that had already been produced.[5]

9. In response to alleged deficiency #468-470 (grouped together by Fortescue), on 6 August 2025, Dr Winther-Jensen gave Fortescue a photograph that was attached to an email, and the email itself. The email had already been discovered, but without the attached photograph. Mr Hales says the original email and its attachment were omitted because the only text in the email was the word "FYI" in the subject line. That meant the email did not respond to the search terms. That is a perfectly understandable reason for an email to be missed. It does not indicate any problem with the discovery process.

[1] This was previously accepted by Fortescue (T26.44-27.4 on 17 September 2025).
[2] Dr Winther-Jensen also relies on affidavits of Mr Hales made on 16 September 2025 (**Hales 5**) and 23 September 2025 (**Hales 6**).
[3] Hales 4 [13]-[14].
[4] Hales 4 [15].
[5] Hales 4 [20]-[22].

10. While Dr Winther-Jensen was trying to locate the original photograph, he searched his computer. He did not know what the missing image might be. He opened his microscope program to see whether it would indicate whether he had used it on the date of the original email. When he did that, he found that nine additional images were stored in his microscope program. The images were microscopic views of iron ore depositions. Dr Winther-Jensen produced them, without admitting they were discoverable, in order to avoid incurring the costs associated with further enquiries.[6]

11. Fortescue's submissions address only one alleged further deficiency in Dr Winther-Jensen's discovery: the alleged failure to discover experimental records to support the examples in the patent specifications (Fortescue's submissions (**FS**) [31]-[32]). Again, Hales 4 addresses this allegation by confirming that there are no more documents to discover.[7] Fortescue's argument is that the specifications indicate experiments were done, and Fortescue has not been able to pinpoint records about those experiments in the discovered documents. But that does not mean more discoverable documents exist.

12. In the period before the specification was drafted, the work that would lead to EZ's solution was just a retirement project that Dr Winther-Jensen was doing in his garage. There was no obligation on him to keep any records at all.[8] The records Dr Winther-Jensen did keep are largely rough notes in his notebooks. Some are barely intelligible to anyone other than Dr Winther-Jensen.[9] Fortescue has not established that they do not include records of the experiments in question. Some of the details may also have come from Dr Winther-Jensen's memory. Fortescue suggests that is unlikely (FS [32]), but it is important to remember that Dr Winther-Jensen was doing this work because he was interested in it. Ultimately, Fortescue's submissions that there must be other records of the experiments do not rise above speculation. They certainly are not a sufficient basis, Dr Winther-Jensen submits, for the Court to grant relief so extreme as what is sought in prayer 1.

13. Thus, the only established errors in Dr Winther-Jensen's discovery are the two errors addressed above. Two errors in a discovery of this size do not *"tell against the sufficiency of the discovery process"*.[10] They do not indicate there is a real problem with Dr Winther-Jensen's discovery sufficient to justify going behind the verifying affidavit.

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[6] Hales 4 [23]-[27].
[7] Hales 4 [61], [64]-[65].
[8] Hales 4 [62].
[9] Hales 6 [13]-[14] and Annexure MGH-11.
[10] See Fortescue's submissions (**FS**) [8].

14. And here, crucially, the Court has not just the verifying affidavit, but also Hales 4. By that affidavit, Mr Hales verified that he supervised the process of providing discovery for Dr Winther-Jensen (at [8]). He addressed all of the alleged deficiencies raised by Fortescue, and affirmed that there is nothing more for Dr Winther-Jensen to discover. Fortescue needs to persuade the Court that there is a good reason to go behind Hales 4 as well. Where an affidavit supplementing the affidavit verifying discovery is given, that should ordinarily be treated as conclusive.[11] Fortescue could have applied to cross-examine Mr Hales, but it chose not to. Instead, it asks the Court in submissions to find that Mr Hales is wrong when he says there are no more discoverable documents.

15. Even if the Court were satisfied that Dr Winther-Jensen's discovery has been inadequate, that does not mean Fortescue should have access to the seized materials. Rather, the more usual remedy would be an affidavit explaining any deficiencies – and here, that has already been given, by Hales 4. Another more usual remedy would be particular discovery under FCR r 20.21. That rule provides relief *"where a party is dissatisfied with the extent of discovery made by an opposing party"*.[12] That, too, has already been given, because for the actual deficiencies Fortescue found, Dr Winther-Jensen has already produced the missing documents.

16. Finally, Dr Winther-Jensen respectfully submits that the Court should, in exercising its discretion, give primacy to proportionality. It is apparent from Fortescue's evidence on this application that it examined the respondents' discovery with a fine-toothed comb. The result is two accepted deficiencies in Dr Winther-Jensen's discovery. Those errors have been interrogated by his solicitors, which resulted in the discovery of 13 additional documents. In a discovery of this scale – 532,915 documents searched, 7,557 documents personally reviewed by Dr Winther-Jensen's solicitors, and 2,525 documents produced[13] – two mistakes, resulting in non-disclosure of 13 documents, is a very small rate of error. It does not justify granting Fortescue access to the seized materials.

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[11] See, eg, *Finance Sector Union of Australia v Commonwealth Bank of Australia Ltd* [2000] FCA 1389 at [31].
[12] *Diddams v Commonwealth Bank of Australia* (unreported, FCA, Branson J, BC9801739, quoted in *McIlwain v Ramsey Food Packaging Pty Ltd* (2005) 221 ALR 785 at [31].
[13] Hales 5 [6].

17. Granting that access would be disproportionate and oppressive, for two reasons. First, it would be a very substantial, and unnecessary, intrusion on Dr Winther-Jensen's privacy, and the privacy of his family. The Listed Things that relate to him were seized from his home in an *Anton Pillar* raid. They include, for example, copies of the personal laptop and mobile phone of his wife.[14] The images of Dr Winther-Jensen's own devices include personal material (for example, photographs exchanged between him and his wife, and copies of his niece's visa applications);[15] documents related to his work before he ever took up employment at Fortescue;[16] personal information of third parties (his previous students);[17] and irrelevant documents in which third parties claim confidentiality.[18] The intrusion that Dr Winther-Jensen and his family would suffer if this material were made available to a third party is unjustifiable, in circumstances where the errors in his discovery were so minor, and Fortescue has not established that any other discoverable documents are likely to exist.

18. Secondly, granting access to the seized materials would cause an unjustifiable and disproportionate waste of time and resources. The discovery categories that were granted in February were very broad. It is highly likely that all relevant documents have already been produced. Fortescue has already been given more than 4,000 documents by the respondents in their discovery. On top of examining those, it now wants to embark on a process of interrogating the whole of the seized materials as well. Dr Winther-Jensen's solicitors have already spent approximately 360 hours on the discovery exercise, and 90 hours responding to Fortescue's complaints about the discovery.[19] There would be very substantial further costs involved in the exercise that Fortescue proposes.

19. By the time this application is heard, it will be October 2025. The trial is seven months away, Fortescue's evidence in chief is due on 28 October 2025. Dr Winther-Jensen respectfully asks the Court to draw a line under discovery in this case and move the proceeding along. Otherwise, there can be no doubt that the trial dates are in jeopardy. Dr Winther-Jensen is a retired academic. He does not have the resources of Fortescue. His interest is in preserving the trial date.

[14] Hales 4 [58](c)(vi)-(vii).
[15] Hales 4 [58](c)(i)-(v); (e); (j)-(k).
[16] Hales 4 [58](g)(i) and (l).
[17] Hales 4 [58](g)(ii).
[18] Hales 4 [58](h) and (i).
[19] Hales 5 [7].

PRAYER 3

20. By prayer 3, Fortescue makes its third application for discovery in substantially the same terms. The categories of documents it seeks would fall within the categories already ordered on 26 February 2025 (particularly category 1, which was very broad, and category 2A, which covered all documents and information taken by Dr Winther-Jensen from Fortescue). Nothing has changed to justify this third application for the category. It would put Dr Winther-Jensen to significant further work and expense, for no reason, because any documents falling in these categories would have already been discovered.[20] Fortescue has not established that there is a reasonable basis to believe undiscovered documents in this category must exist. Indeed, for Dr Winther-Jensen, Fortescue does not say whether it considers that any documents falling within this category have already been discovered (cf FS [35] concerning the EZ respondents).

PRAYER 3A

21. Prayer 3A is unnecessary for the following reasons.

22. Category 15 is documents recording work, research or development during the period from November to December 2021 that would otherwise fall within the earlier categories 11(e) or (f). That ignores Dr Winther-Jensen's affidavit evidence that he did not start his retirement project until 2022. Fortescue attempts to dismiss this by saying that his being overseas does not affect his ability to engage in R&D (FS [39]). But the thrust of Dr Winther-Jensen's evidence is not only that he was in Denmark and Thailand visiting family during this period, but that he did not even start setting up gear in his garage until March 2022.[21] The idea that Dr Winther-Jensen did R&D while visiting family overseas in this period, when he has said he did not even set up the gear until the following month, is fanciful.[22] Fortescue refers to evidence that Dr Winther-Jensen previously worked on R&D while he was overseas. As Fortescue well knows, that was while he was employed, not while he was retired and visiting family.

23. Category 16 is documents in particular sub-folders of a folder on a hard disk. Mr Hales says very plainly that the whole folder has already been discovered, in response to category 2A of the earlier orders.[23] There is no utility in *"test[ing] that assertion"* through another

[20] Hales 4 [48].
[21] Reproduced in Hales 4 [51].
[22] And it is specifically denied in Hales 6 at [15].
[23] Hales 4 [31], [53].

order for discovery seeking exactly the same thing (cf FS [40]).

24. Category 17 is documents recording use of documents in category 16. That would be futile against Dr Winther-Jensen. Mr Hales has deposed that in the discovery process that has already been done, searches were conducted for any documents showing use of any of the documents in category 2A (which includes the documents in category 16). This category would therefore produce a nil result.[24]

25. Categories 18 and 19 would also be futile. Mr Hales has deposed that during the discovery process, searches were conducted that would have captured documents from and communications with NewPro, to the extent they were responsive to the initial discovery categories.[25] It is difficult to conceive of how documents in categories 18 and 19 could be relevant if they do not fall within the categories already ordered in February. Mr Dewar refers to the "Ore composition after drying.xslx" document and says it was used to engage NewPro.[26] However, that is a simple Excel calculator Dr Winther-Jensen made to roughly estimate the composition of a dried iron ore sample based on its composition while wet (or vice versa) – and at any rate, it was not shared with NewPro.[27]

26. Categories 20 to 22 would be futile for the same reason: the earlier searches would have captured documents in these categories insofar as they are relevant to claims in the proceeding.[28] Category 22 is also extraordinarily broad. BWJ Consulting was not, as Mr Dewar speculates, a business name used by Dr Winther-Jensen to refer to Element Zero before its incorporation. Dr Winther-Jensen had already used that name for unrelated consulting work before he even began his employment at Fortescue. A search for that name would produce a substantial number of irrelevant documents. And, at any rate, the searches already done for categories 11(c) to 11(f) (being the categories relevant to the period before Element Zero was incorporated) did not use "Element Zero" or "EZ" as limiting search terms.[29]

[24] Hales 4 [54].
[25] Hales 4 [55] and see Hales 6 [8].
[26] Affidavit of Paul Dewar made 19 August 2025 (**Dewar 10**).
[27] Hales 4 [33].
[28] Hales 4 [56]-[57] and see Hales 6 [9].
[29] Hales 6 [11]-[12].

27. For the reasons given above, Dr Winther-Jensen respectfully submits that the relief Fortescue seeks should be refused.

Frances St John, 23 September 2025