



FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

Proceeding Number NSD 527 of 2024
Fortescue Limited ACN 002 594 872 & Ors
Applicants
Element Zero Pty Limited ACN 664 342 081 & Ors
Respondents

Third respondent's submissions in answer to interlocutory application dated 20 November 2024

A. Introduction

1. These are the Third Respondent's (Dr Winther-Jensen's) written submissions in answer to the discovery application made against him and the other respondents (**Interlocutory Application**) by the applicants (**Fortescue**). Fortescue seeks orders pursuant to rr 20.15 to 20.17 of the *Federal Court Rules 2011* (Cth) that the respondents give non-standard discovery of documents that fall within 15 categories that are identified in Schedule 1 to the Interlocutory Application.
2. Dr Winther-Jensen relies on the affidavit of Michael Geoffrey **Hales** affirmed 27 November 2024.
3. Dr Winther-Jensen's position is in many respects the same as that of the other respondents. The categories of discovery he respectfully submits the Court should order on this application are set out in Annexure A hereto. The marked up changes are against the orders sought by Fortescue.
4. In relation to the law on discovery applications, Dr Winther-Jensen repeats paragraphs 6 and 7 of his submissions in chief on his discovery application.

B. The categories sought by Fortescue

5. In relation to **category 1** (Hales [10]-[16]), Dr Winther-Jensen gratefully adopts the submissions of the other respondents in their submissions (**EZS**) at [4]-[15], including the proposed amendments to this category at EZS [14]. A *prima facie* case in relation to pleaded allegations does not permit a party to fish for discovery in support of potential new, unpleaded allegations (cf Fortescue's submissions (**FS**) at [4]).
6. Dr Winther-Jensen submits that one more change is necessary in order to make the category appropriate against him. Category 1 encompasses 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 particular subject-matter.

However, that includes a period before Dr Winther-Jensen started work at Fortescue. He did not take up employment there until 15 February 2021. Dr Winther-Jensen understands that Fortescue wants to find out if he has in his hands documents showing work done in the earlier period (FS [13]). However, the category should still not cover documents showing work done by Dr Winther-Jensen himself before he started at Fortescue. Dr Winther-Jensen has had many years of experience in electrochemistry. He may have in his possession documents showing work on similar subject-matter during that earlier period, but they would have no relevance to the proceeding. Fortescue does not say otherwise at FS [13].

7. Thus, Dr Winther-Jensen respectfully submits that category 1 should carve out documents showing his own work before he took up employment at Fortescue, as proposed in Annexure A.
8. Dr Winther-Jensen does not resist giving discovery in **category 2** (Hales [17]-[18]), except that the date issue arises again. Dr Winther-Jensen respectfully submits that category 2 should not cover documents showing work done by him before he began his employment at Fortescue. He proposes the amended form of category 2 shown in Annexure A.
9. In relation to **category 2A** (Hales [19]-[22]), Dr Winther-Jensen consents to give discovery in sub-category (g). Sub-categories (a) to (f) do not relate to Dr Winther-Jensen. Although sub-categories (e) and (f) concern a specific folder and two devices (see FS [19]), those are connected only with Dr Kolodziejczyk. Dr Winther-Jensen would not know how to search his own records for any documents that might be in that folder or on those devices. Dr Winther-Jensen now understands Fortescue to be saying, at FS [19], that he would not be required to search for documents in sub-categories 2A(a)-(f). On that basis, Dr Winther-Jensen agrees to give discovery in relation to **category 2A**.
10. Dr Winther-Jensen agrees to give discovery in relation to **categories 3 to 5**, on the basis that they do not require him to conduct, or have conducted, forensic work or investigation (which is what Fortescue appears to be saying in FS [21]-[22]).
11. In relation to **category 7** (Hales [28]-[30]), Dr Winther-Jensen gratefully adopts the submissions of the other respondents at EZS [24]-[26]. This category includes, for example, documents *referring to* documents created *indirectly using* the documents that are actually particularised in the pleading. That is outside the pleaded case and is fishing. Further, category 7 is oppressive. It would be impossible to craft searches to find such documents. Dr Winther-Jensen would be required to assess whether every document in his possession was “indirectly created” from a First Specified Document: Hales [29].

12. For the same reason, in relation to **category 8** (Hales [28]-[30]), Dr Winther-Jensen gratefully adopts the submissions of the other respondents at EZS [27]-[28], and submits that the redrafted version of this category at EZS [27] is appropriate.
13. In relation to **category 9** (Hales [31]-[35]), Dr Winther-Jensen gratefully adopts the submissions of the other respondents at EZS [29]-[30]. The category is oppressive because the paragraphs to which is refers are so broad. It is not clear how Dr Winther-Jensen would search for documents of such a broad description. It would require him to review a significant number of documents.
14. By adding this category to the other, more specific categories seeking documents relating to the same allegations, Fortescue essentially seeks standard discovery in addition to non-standard discovery. That is an unfair obligation to put on the respondents. Fortescue has made its attempt to enunciate every document it considers might be relevant to the case, in the more specific categories. By this category, it seeks to have the respondents repeat that exercise, by determining for themselves which documents they consider might be relevant to the case. Thus, Fortescue seeks to have the benefit of its own assessment of what might be relevant, and also the benefit of an onus on the respondents to determine what is relevant, under threat of an allegation of non-compliance if they miss something. Dr Winther-Jensen submits this is double discovery. It is oppressive and unfair.
15. In relation to **category 10** (Hales [36]-[38]), Dr Winther-Jensen gratefully adopts the submissions of the other respondents at EZS [31]. Additionally, the date issue arises again: category 10 encompasses documents recording or evidencing consideration by Dr Winther-Jensen of his present or future involvement in an enterprise for electrochemical reduction of iron. Any such consideration Dr Winther-Jensen may have done before he took up his job at Fortescue is not relevant. Thus, even if discovery is ordered in category 10, in Dr Winther-Jensen's case it should be limited to the period from 15 February 2021 to 31 July 2022.
16. In relation to **category 11** (Hales [24]-[27]), Dr Winther-Jensen does not resist sub-category (e). Otherwise, Dr Winther-Jensen gratefully adopts the submissions of the other respondents at EZS [32]-[34]. The submission at EZS [35] is not for Dr Winther-Jensen to make, given that he is no longer an active participant in the first respondent's business.
17. In relation to **category 13** (Hales [39]-[44]), Dr Winther-Jensen gratefully adopts the submissions of the other respondents at EZS [36]. He would not resist discovery in this category if it were amended to exclude drafts, and if it were limited to documents created since 15 February 2021 (which is the date on which he started working for Fortescue). The reason for the date limitation is that Dr Winther-Jensen has been working in electrochemistry for many years, and over that period he has authored 32 patent applications: Hales [42] If no date limitation is imposed, Dr Winther-

Jensen would need to consider each of those applications, even those that predate his employment at Fortescue, in case any of them included “*any aspect of an electrochemical reduction process involving Ionic Liquid, leaching and/or any aspect of a pilot or trial plant for the electrochemical reduction of ore*”. That would be wasted work in relation to patent applications made before he started working for Fortescue. Those can have no bearing on the proceeding.

18. In relation to **category 14**, Dr Winther-Jensen gratefully adopts the submissions of the other respondents at EZS [37].

C. Conclusion

19. For the reasons set out above, the orders sought in the Interlocutory Application should be refused, except as set out in Annexure A, with costs.

Date: 3 February 2025

Frances St John
Tenth Floor Selborne/Wentworth Chambers
02 8915 2313
stjohn@tenthfloor.org

ANNEXURE A
Applicants' Categories of Documents
to be Discovered by the Respondents

Definitions

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

No.	Name	Ref
1	Green Iron Update (02.08.2021).pdf	see FASOC [19(i)(1)]
2	35557986AU- Specification as filed (35557986).pdf	see FASOC [19(i)(2)], see FASOC [20(i)(4)]
3	35557986AU - Drawings as filed (35557986).pdf	see FASOC [19(i)(2)], see FASOC [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 FASOC [19(i)(3)]
5	Bumblebee PID markups 26_10_21.pdf	see FASOC [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 FASOC [19(H)], see FASOC [20(iv)]
7	The internal Fortescue procedures and specifications listed in paragraph 103 of the affidavit of Mr Wayne McFaulx affirmed on 1 May 2024	see FASOC [19(iii)], see FASOC [20(v)]
8	211029_Iron ore leaching_Report_ASH RI.docx	see FASOC [20(i)(1)]
9	211014 FFI Green Steel Ore Leach ASH XRF results.csv	see FASOC [20(i)(2)]

No.	Name	Ref
10	211014 FFI Green Steel_Ore Leach_ASH_ICP results. csv	see FASOC [20(i)(3)]
11	Technical Evaluation.xlsx	see FASOC [20(i)(5)]
12	Email from David White sent on 4 November 2024 with Subject "Technical Evaluation of Green Iron process"	see FASOC [20(i)(5)]
13	Green Iron Update (01.11.2021).pdf	see FASOC [20(i)(6)]

- d. **"Fortescue"** has the meaning given to that term in paragraph 4 of the Further Amended Statement of Claim filed 24 October 2024 (**FASOC**).
- 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, molten carbonate-based electrolytes, "hydroxide alkali melt or eutectic melt" (referred to in paragraph 29(a)(i) of the EZ Parties' defence) and/or "molten hydroxide eutectic" (referred to in paragraph 29(c) of Dr Winther-Jensen's defence).
- f. **"Second Specified Documents"** means any:
- ~~modified forms of First Specified Documents, including previous or subsequent drafts;~~
 - ~~documents created directly or indirectly using the First Specified Documents.~~

Categories

Ionic Liquid documents

- 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, and/or The Third Respondent at any time during the period from 15 February 2021 to 12 November 2021, in relation to:

- a. Ionic Liquid R&D as defined in paragraph 12 of the FASOC;
- b. an electrochemical reduction process involving electrolytes that may be described as ionic liquid, molten salts, eutectics, molten hydroxide-based electrolytes, molten carbonate-based electrolytes, "hydroxide alkali melt or eutectic melt" (referred to in paragraph 29(a)(i) of the EZ Parties' defence) and/or "molten hydroxide eutectic" (referred to in paragraph 29(c) of Dr Winther-Jensen's defence).

an electrochemical reduction process involving Ionic Liquid. **[Note: the Respondents agree to this category if the words after "in relation to" were replaced with "Ionic Liquid R&D as defined in paragraph 12 of the FASOC".]**

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, and/or The Third Respondent at any time during the period from 15 February 2021 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 AI B-5 p 52, or AI B-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 AI B-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;
"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 AI B-17;
- (v) the work concerning "water, ionic liquids, and molten carbonate", being the work referred to in Bhatt AI B-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.

2A. All documents, and all documents recording or evidencing information, copied, taken or otherwise obtained by the Second Respondent or the Third Respondent from Fortescue (including Fortescue's network, systems or devices) in the period from September 2021 to November 2021, including:

- (a) the documents copied by the Second Respondent while working from home in October and November 2021;
- (b) the documents taken by the Second Respondent "to finish off [his] work for Fortescue", referred to in paragraph 50 of the Second Respondent's affidavit sworn on 19 June 2024;
- (c) the documents "saved on the local drives of [the Second Respondent's] Fortescue laptop", referred to in paragraph 50 of the Second Respondent's affidavit sworn on 19 June 2024;
- (d) "the files on the local drives" deleted from the Second Respondent's Fortescue laptop, referred to in paragraph 51 of the Second Respondent's affidavit sworn on 19 June 2024;
- (e) the documents in the TempSD folder, referred to in paragraph 52 of the Second Respondent's affidavit sworn on 19 June 2024;

- (f) the documents on the Toshiba USB device (serial 07080A078F1B6304) and on the Kingston USB device (serial 900042ACAE668708); and
 - (g) the documents sent by the Third Respondent from his Fortescue email address "bjorn.wintherjensen@fmgl.com.au" to his personal email address "bjornwj@gmail.com".
3. All documents recording or evidencing the location and storage of any of the documents referred to in category 1, 2 and 2A 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, 2 and 2A 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, 2 and 2A above.

Specified Documents

6. All documents constituting or referring to the First Specified Documents. ***[Note: Category agreed between the parties.]***
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. ***[Note: the Respondents agree to this category if the words "and/or Second" were deleted, thereby removing the "Second Specified Documents" from its scope.]***
9. ~~All documents directly relevant to any of the matters pleaded or particularised in paragraph 31, 33 and/or 78 of the FASOC.~~

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.~~

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, and/or the Third Respondent as at any time during the period 15 February 2021 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 or trial plant/s, including the "Element Zero Trial Plant" (referred to in paragraph 30 of the EZ Parties' defence);~~
- (b) ~~pipng and instrumentation documents for the First Respondent's pilot or trial plant/s, including the Element Zero Trial 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;
- (f) ~~documents recording the research and development of:~~
 - i. ~~the "Element Zero Process" referred to in paragraph 29 of the EZ Parties' defence; or~~
 - ii. ~~the "Element Zero process" referred to in paragraphs 29(b)-(c) of Dr Winther-Jensen's defence;~~during the period from January 2022 to February 2024.

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

plant/s, including the Element Zero Trial Plant. **[Note: Category agreed between the parties.]**

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 (created since 15 February 2021), and/or Fourth Respondents are named as an inventor concerning any aspect of an electrochemical reduction process involving Ionic Liquid, leaching and/or any aspect of a pilot or trial plant for the electrochemical reduction of ore (including the Element Zero Trial Plant), including drafts thereof, and including but not limited to: **[Note: the Respondents agree to this category if the words "including drafts thereof," were deleted.]**
- (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 electrochemical reduction process involving Ionic Liquid;
 - (f) any patent application concerning leaching;
 - (g) any patent application that relates to the features of a pilot or trial plant (including the Element Zero Trial 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, 2A, 6 and/or 7 above for or in preparing or inventing any of the patents or patent applications referred to in category 13 above. **[Note: the**

Respondents agree to this category to the extent it refers to category 1 (as amended per the note to that category) and category 6 only.

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